THE CONTINENTAL SHELF: RESOURCES (EXCLUDING OIL AND GAS) AND LEGAL STATUS

VOLUME II

Seyed Hossein Sadat Marashi

Degree of Ph.D.
University of Edinburgh
1982

TABLE OF CONTENTS

VOLUME II PART THREE

DISPUTES RELATING TO THE EXPLOITATION OF THE LIVING RESOURCES OF THE CONTINENTAL SHELF..... 356

CHAPTER VII: LEGAL STATUS OF UNILATERAL DECLARATIONS IN INTERNATIONAL LAW..... 358

Introduction..... 358

A. Definition of Unilateral Declaration.... 360

B. Unilateral Declarations Contrary to the Existing International Law..... 364

C. Disputes Concerning Unilateral Declarations Asserting Rights over the Continental Shelf and its Resources..... 371

i. Unilateral Declarations Asserting Rights over the Continental Shelf and its Mineral Resources..... 371

ii. Unilateral Declarations Asserting Rights over the Continental Shelf and Including both its Living and Non-living Resources..... 373

Conclusion..... 376

CHAPTER VIII: THE DISPUTES..... 377

Introduction..... 377

A. Disputes Concerning Unilateral Declarations..... 378

i. Disputes Between the United States and Some Latin American Countries.... 378

ii. The Onassis Incident..... 381

iii. Dispute Between Japan and Australia.. 386

1. Background to the Pearl Fisheries Act 1952..... 388

2. Japanese Engagement in Pearl Fisheries off the Australian Coasts... 390

3. Pearl Fisheries Act 1952-1953 and the View of the ILC on Sedentary Species..... 392

iv. Dispute Between Japan and the Republic of Korea..... 397

1. The Republic of Korea Presidential Proclamation of 1952..... 400

2. Japan Protest of 1952 and the Korean Reply..... 403

3. Japanese-Korean Negotiations: 1952-1964..... 406

4. Agreement Between Japan and Republic of Korea: 1965..... 410

B. Disputes Concerning the Definition of Natural Resources in the 1958 Geneva Convention on the Continental Shelf..... 414

i. Legal Definition of Sedentary Species Before 1958..... 417

ii. Legal Definition of Sedentary Species in Article 2(4)..... 422

iii. The Disputes..... 425

1. The 1962 Dispute Between France and Brazil..... 425

2. Dispute Between Japan and the United States..... 433

3. The United States Regulations Regarding Lobster..... 441

Conclusion..... 450

PART FOUR

CURRENT DEVELOPMENTS IN THE LEGAL REGIME FOR EXPLOITATION OF THE NATURAL RESOURCES OF THE CONTINENTAL SHELF..... 452

CHAPTER IX: DEVELOPMENT OF THE LAW OF THE SEA BETWEEN 1958 AND 1973..... 454

A. General Move Towards 12 Miles Territorial Sea..... 454

B. The Seabed Committee..... 464

C. The 1969 Continental Shelf Cases..... 472

D. Other Developments in the Law of the Sea.. 482

i. Latin American States..... 482

1. Montevideo Declaration: 1970..... 483

2. Lima Declaration: 1970..... 485

3. Santo Domingo Declaration: 1972..... 487

ii. Organization of African Unity (OAU) and the Law of the Sea..... 491

iii. The Group of 77..... 495

E. Preparatory Work of the Seabed Committee.. 497

i. The Work of the Committee in 1971..... 498

ii. The Work of the Committee in 1972..... 502

iii. The Work of the Committee in 1973..... 505

a. Proposals Relating to the Territorial Sea and the EEZ..... 506
b. Proposals Relating to the Continental Shelf..... 508

CHAPTER X: THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA..... 514

Introduction..... 514

A. The Conference..... 515

1. UNCLOS III, First Session: 1973..... 516
2. UNCLOS III, Second Session: 1974..... 518
i. The Territorial Sea..... 519
ii. The Continental Shelf..... 520
iii. The Economic Zone..... 524
3. UNCLOS III, Third Session: 1975..... 537
i. The Territorial Sea..... 540
ii. The Economic Zone..... 541
iii. The Continental Shelf..... 545
4. UNCLOS III, Fourth Session: 1976..... 547
5. UNCLOS III, Fifth Session: 1976..... 550
6. UNCLOS III, Sixth Session: 1977..... 554
i. The Territorial Sea..... 556
ii. The Exclusive Economic Zone..... 557
iii. The Continental Shelf..... 559
7. UNCLOS III, Seventh Session: 1978..... 561
i. Negotiating Group 4..... 562
ii. Negotiating Group 5..... 564
iii. Negotiating Group 6..... 570
8. UNCLOS III, Eighth Session: 1979..... 573
i. Rights of Access to the Living Resources of the EEZ by the LLGDS..... 574
ii. The Question of Settlement of the Disputes Relating to the Exercise of Sovereign Rights in the EEZ..... 576
iii. Outer Limit of the Continental Shelf and the Question of Payments..... 578
9.UNCLOS III, Ninth Session: 1980..... 581
i. Submarine Ridges..... 581
ii. The Problem of Sri Lanka..... 582
iii. Commission on the Limits of the Continental Shelf..... 583

iv. Delimitation Between Opposite and Adjacent States..... 584
10. UNCLOS III, Tenth Session: 1981..... 589
B. State Practice Since 1973..... 590
i. The Territorial Sea..... 590
ii. The Exclusive Economic Zone..... 592
iii. The Continental Shelf..... 599
Conclusion..... 601
General Conclusion..... 603
Select Bibliography..... 611

PART THREE

DISPUTES RELATING TO THE EXPLOITATION OF THE LIVING RESOURCES OF THE CONTINENTAL SHELF

Introduction

Between 1945 and 1958 many coastal States asserted their rights over the continental shelf and its natural resources by unilateral declarations.[1] These claims did not establish a uniform pattern and differed in extent and nature according to the interests of individual declarants who fell into two groups:[2]

(a). Those which associated their rights over the continental shelf with the exploitation of its mineral resources and insisted that claims over the continental shelf must not affect the legal status of its superjacent waters as high seas.

(b). Those which included both living and the non-living resources of the seabed, subsoil and the superjacent waters of the continental shelf in their claims.

The first type of dispute thus began and developed as a result of the coastal States' claims over the continental shelf as asserted in their unilateral declarations and was closely related to the principle of the freedom of the high seas.

The second type of dispute was created by the legal

---

1. See above pp. 86-116.
2. Ibid.

definition of natural resources adopted in Article 2(4) of the Convention on the Continental Shelf at the Geneva Conference in 1958.[3] While safeguarding the freedom of fishing on the high seas beyond the limit of the territorial sea this Convention included sedentary species in the definition of the natural resources of the continental shelf. As decided in Chapter V, the criterion employed in Article 2(4) to distinguish those species which came within the category of 'sedentary species' was that of locomotion. If at the harvestable stage a species is immobile or is in constant physical contact with the seabed or subsoil it would be regarded as sedentary. In the absence of a generally accepted definition of sedentary species, interpretations of the definition adopted in Article 2(4) differed, and continued to differ, widely. In their disputes over sedentary species States have not argued about the validity of the inclusion of sedentary species within the continental shelf regime, but are concerned with the interpretation of the definition. These States are divided into two groups: first, those who accept the legal definition of the sedentary species and try to interpret it in its strictest sense; and second, States who argue that the criterion for shelf-related species should not be their locomotion but their biological dependence on the continental shelf.

In this part the legal status of unilateral declarations in international law and disputes relating to the exploitation of the natural resources of the continental shelf will be discussed.

---

3. See above pp. 119-194.

CHAPTER VII

Legal Status of Unilateral Declarations in International Law

Introduction

The doctrine of the continental shelf was initiated by the United States and developed from 1945 to 1958 through unilateral declarations.[4] These claims, which by 1958 already constituted an extensive body of practice among States, differed greatly in the principles on which they were founded. The difference which became the basis of some disputes was related to the legal status of the living resources of the superjacent waters of the continental shelf as well as that of its sedentary species. The freedom of fishing beyond the limit of the territorial sea was one of the cornerstones of the freedom of the high seas and, therefore, the inclusion of living resources of the superjacent waters within the regime of the continental shelf by some coastal States was considered as contrary to the principle of the freedom of the high seas and thus a violation of customary international law.

Between 1951 and 1956 the International Law Commission, while examining various aspects of the Law of the Sea, defended the principle of the freedom of the high seas and repeatedly stated in its draft articles that the legal status of the superjacent waters of the continental shelf beyond the territorial sea remained as high seas.[5]

---

4. See above pp. 86-116.
5. See above pp. 119-174.

In 1958 the Convention on the Continental Shelf supported the Commission's view and in Article 3 referred to the superjacent waters of the continental shelf beyond the limit of the territorial sea as high seas. Furthermore, Article 5(1) stated that:

> "The exploration of the continental shelf and the exploitation of its natural resources must not result in any unjustifiable interference with navigation, fishing or the conservation of the living resources of the sea....".[6]

In 1958 the Convention on the Continental Shelf was adopted by 57 votes to 3 with 8 abstentions, but none of the coastal States which had included living resources of the superjacent waters of the continental shelf within their claims has ratified the Convention.[7] Chile, Peru, Argentina, El Salvador, Ecuador and Costa Rica are among those which have not ratified the Convention.[8] However, from 1945 to 1958 and throughout the following decade there was a series of disputes and disagreements among States regarding the legality of some of their claims under customary international law.

In this Chapter the basis of some of the disputes, i.e. the legal validity of the unilateral declarations asserting rights over the continental shelf and its natural resources will be examined.

---

6. Article 5(1) of the 1958 Geneva Convention on the Continental Shelf.

7. See New Directions in the Law of the Sea, Op. Cit., in note 19 (p. 12), Vol. I, at p. 101. By mid 1971 only 47 States had ratified or acceeded to the 1958 Geneva Convention on the Continental Shelf, see 10 ILM (1971) at pp. 1286-1287.

8. Some Latin American States insisted that there existed

A- Definition of Unilateral Declaration

The declaration, as one of the many forms of international transactions is, in practice, used in three different ways.[9] These have been defined by Oppenheim in the following terms:

> "It is, first, sometimes used as the title of a body of stipulations of a treaty according to which the parties engage themselves to pursue in future a certain line of conduct. The Declaration of Paris 1856 and the Declaration of St. Petersburg 1868 are instances of this. Declarations of this kind differ in no respect from treaties. One speaks, secondly, of declarations when States communicate to other States or urbi et orbi an explanation and justification ofaline of conduct pursued by them in the past, or an explanation of views and intentions concerning certain matters. Declarations of this kind may be very important but they hardly comprise transactions out of which rights and duties of other States follow. But there is a third kind of declaration out of which rights and duties do follow for other States and it is this kind which comprises a specific international transaction, although the different declarations belonging to this group are by no means of a uniform character".[10]

Unilateral declarations of the second kind can be referred to as declarations of intention specifying the future conduct of the declarant State. These unilateral declarations have been referred to by Sir Gerald Fitzmaurice as "declarations that are unilateral in form but not in substance".[11] Examples of this kind of unilateral declaration

---

a biological and geographical unity between the seabed and its superjacent waters, see Auguste, Op. Cit., in note 17 (p. 11), at pp. 215-240.

9. Oppenheim, Op. Cit., in note 5 (p. 22), at p. 513.

10. Ibid., at pp. 513-514; see also O'Connell, Op. Cit., in note 8 (p. 23), at pp. 198-201.

11. Sir Gerald Fitzmaurice, "The Law and Procedure of the

are the 1957 Egyptian Declaration regarding the Suez Canal and the declaration made by Norway's Minister for Foreign Affairs to the Danish authorities regarding the former's sovereignty over Eastern Greenland.[12]

It appears from the language of both Oppenheim and Sir Gerald Fitzmaurice that declarations of this nature are binding when they are made in the context of negotiations.[13] In fact, this was also the opinion of the PCIJ in the Eastern Greenland Case.[14] In 1974 the ICJ in the Nuclear Test Cases dismissed the view that the binding force of unilateral declarations of intention was subject to pre-existing negotiations. The Court observed that:

> "It is well recognised that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal

---

International Court of Justice 1951-1954 : Treaty Interpretation and other Treaty Points", 33 BYIL (1958), at pp. 231-232.

12. The Egyptian Declaration was registered with the United Nations Secretariat, see 265 UNTS, at p. 299. As to the Eastern Greenland Case see Legal Status of Eastern Greenland (1933) PCIJ Ser. A/B no. 53; see also William W. Bishop Jr., International Law Cases and Materials, Second edition, 1962, at pp. 107-109.

13. Professor Rubin also stated that "ostensibly 'unilateral' declarations have been considered binding when made in the context of a larger negotiating situation", Alfred P. Rubin, "The International Legal Effects of Unilateral Declarations", 71 AJIL (1977) pp. 1-59, at p. 4.

14. Legal Status of Eastern Greenland, Loc. Cit., in note 12 (p. 361); see also O'Connell, Op. Cit., in note 8 (p. 23), at pp. 202-203.

> undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a quid pro quo nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made".[15]

Unilateral declarations of the third kind "out of which", according to Oppenheim, "rights and duties of other States follow", are referred to by Sir Gerald Fitzmaurice as "declarations which are unilateral both in form and in substance".[16] In other words they are not negotiated documents but are, as far as the declarant States are concerned, binding upon other States. The international legal effects of this kind of declaration depend on their terms and can be evaluated, therefore, by close scrutiny of the very terms of those declarations.[17] Although they are not negotiated documents

---

15. The Nuclear Tests Cases (Australia v. France; New Zealand v. France), ICJ Reports, 1974, pp. 253-455 and 457-528, at p. 267 and 472-473 respectively.

16. Fitzmaurice, Loc. Cit., in note 11 (pp. 360-361), at pp. 231-232; Rubin, Loc. Cit., in note 13 (p. 361), at p. 5.

17. Professor O'Connell has summarized the views of international jurists on the legal effects of the unilateral declarations as follows:
"One view is that they are binding as soon as made and irrespective of the conduct of any other State. A second is that they are binding if communicated to another State. Yet a third is to deny any effect to a declaration unless accepted though acceptance may be by conduct. It may be that these contractual analogies from private law over-simplify the issue internationally where the governing principle is good faith. It

the legality of such declarations needs to be confirmed and accepted by other States which may be affected by them. It was in this context that in 1950 legal experts of the United Nations Secretariat stated in a Memorandum on the Regime of the High Seas that:

> "The value of these unilateral acts is one of the least studied questions in the technical field of international law. By comparison with the extraordinary rich literature on bi- and multilateral legal acts one is struck by the poverty both as to number and length of works on unilateral legal acts".[18]

In order to clarify the legal status of this kind of unilateral declaration in international law it is appropriate to divide such declarations into the following two groups:

(i) Unilateral declarations whose terms are contrary to the existing rules and customs of international law.

(ii) Unilateral declarations whose terms are neither contrary to nor in conformity with the existing rules and customs of international law; that is, they assert a new principle or principles based on social, economic and technical developments which had not previously necessitated some form of international practice.

It will be submitted that in either case the legal validity and effects of unilateral declarations in international law depend entirely on the consent of another State

---

follows that the factor that gives legal significance to a unilateral declaration in international law is the regime of tolerance built upon it", Op. Cit., in note 8 (p. 23), at pp. 200-201.

18. UN Secretariat Memorandum on the Regime of the High Seas, Doc. A/CN.4/32, July 1950, at p. 89.

or States. The difference between the two groups in international law can be illustrated by the claims made over the continental shelf and its natural resources by coastal States between 1945 and 1958.

B- Unilateral Declarations Contrary to the Existing International Law

Unilateral declarations which are intended to impose new rights and duties upon another State or States when and where such rights and duties are generally governed by a generally accepted rule or custom can be referred to as unilateral declarations contrary to the existing international law.[19] Although unilateral declarations are not negotiated

---

19. Under the heading of "Universal International Law" Professor Lauterpacht stated that:
"...certain principles of customary international law- such as those relating to immunities of diplomatic representatives or the freedom of the high seas or the obligation to spare life of prisoners of war who surrender at discretion- have secured such wide and unchallenged acceptance that their universal validity must be assumed", International Law, Collected Papers, Vol. I, General Work, 1970, pp. 113-117, at p. 115. Kunz stated that: "the principle of the freedom of the high seas is today a fully valid fundamental rule juris congentis", Loc. Cit., in note 36 (p. 78), at p. 828. But the principle of the freedom of the high seas cannot be considered as jus cogens since, according to Professor Schwarzenberger, "...a State may give up or restrict its rights to fish in certain parts of the high seas. Similarly, the notions of historic waters and bays and the reliance placed by the World Court in the Fisheries Case (1951) on acquiescence and tolerance as roots of title to portions of what, otherwise, would be the high seas, indicate that, in this respect, the rules governing the principle of the freedom of the high seas are not jus cogens which as such is unalterable, but are as much jus positivum as any other rules of international law", International Law, Vol. I, International Law as Applied by International Courts and Tribunals, 3rd edition (1957), at p. 352. For further discussion on the application of

documents their subsequent effects depend entirely on whether they are accepted or rejected by the State or States which are affected by their terms. They are, however, an important instrument, used from time to time to further the development of customary international law. This function of the unilateral declarations and their relations to customary international law were described by Professor McDougal in the following terms:

> "From the perspective of realistic prescription the international law of the sea is not a mere static body of rules but is rather a whole decision-making process, a public order which includes a structure of authorised decision-makers as well as a body of highly flexible, inherited prescriptions. It is, in other words, a process of continuous interaction, of continuous demand and response in which the decision-makers of particular nation States unilaterally put forward claims of the most diverse and conflicting character to the use of the world's seas, and in which other decision-makers, external to the demanding State and including both national and international officials, weigh and appraise these competing claims in terms of the interests of the world community and of the rival claimants, and ultimately accept or reject them".[20]

The process by which a particular claim or claims can constitute reforms or create new customs depends on how interested or affected States react to them. This process was described by the Supreme Court of the United States in the Scotia Case concerning a collision in the high seas between a British and an American Vessel. Mr. Justice Strong

---

jus cogens see Schwarzenberger, "The Problem of International Public Policy", 18 Current Legal Problems (1965) pp. 191-214; Egon Schwelb, "Some Aspects of International Jus Cogens as Formulated by the International Law Commission", 61 AJIL (1967) pp. 946-975; Alfred Verdross, "Jus Dispositivum and Jus Cogens in International Law", 60 AJIL (1966) pp. 55-63.

20. M.S. McDougal, "The Hydrogen Bomb Tests and International

delivered the opinion of the Court which read in part as follows:

> "Undoubtedly, no single nation can change the law of the sea. That law is of universal obligation, and no statute of one or two nations can create obligations for the world. Like all the laws of nations, it rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct... Many of the usages which prevail, and which have the force of law, doubtless originated in the positive prescriptions of some single State, which were at first of limited effect, but which when generally accepted became of universal obligation".[21]

In the Anglo Norwegian Fisheries Case,[22] Sir Eric Beckett challenged, in the Oral Proceedings, the Norwegian contention on the recent developments of the Law of the Sea and stated:

> "Norway there relies particularly on two recent developments:
> (1) new claims to jurisdiction over the resources of the continental shelf, and
> (2) new claims to extended maritime limits, many of them taking the form of claims to the waters over the shelf.
> The first development is completely irrelevant, as these claims are claims to what is under the water and not to the water itself. The second new tendency amounts at most to the making of new claims, and what is in issue in this Court is the obligation of a State to respect a new claim. I have already made the point that a claim - especially a mere paper claim - is only one half of the picture - the other half is equally essential - namely the reaction of other States to the claim or more particularly to its enforcement. These new claims are at present

---

Law of the Sea", 49 AJIL (1955) pp. 356-362, at pp. 356-357; see also Vattel's views on treaties and prescription, Op. Cit., in note 36 (p. 33), at pp. 106-107.

21. The Scotia, 14 Wallace (1872), at p. 170; T.B. Evans, Leading Cases on International Law, 2nd edition, 1922, at pp. 5-6.

22. Anglo-Norwegian Fisheries Case (U.K. v. Norway), ICJ,

> mere paper claims and have been met already by protests. There has been no enforcement at all".[23]

In the same Case Judge Reed, in his dissenting opinion, stated:

> "Customary international law is the generalization of the practice of States. This cannot be established by citing cases where coastal States have made extensive claims, but have not maintained their claims by the actual assertion of sovereignty over trespassing foreign ships. Such claims may be important as starting points which, if not challenged, may ripen into historic title in the course of time".[24]

The Court also made the following statement regarding the unilateral acts:

> "The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law".[25]

Sir Gerald Fitzmaurice, while examining the implications of the decision of the ICJ in the Fisheries Case, made the following observation:

> "It is clear that Norway attempted to invoke the consensual basis of international law as a ground for the non-application of a given rule to a State refusing to accept it. The general consent of States may be a source of rules of international law, and such consent

---

Reports, 1951.

23. ICJ, Pleadings, Oral Arguments, Documents, Vol. IV, at p. 55.

24. ICJ, Judgment, at p. 191.

25. Ibid., at p. 132.

> may be necessary before a rule can be said to be accepted as such. But this is not to say that States subject to international law can 'contract out' of its rules, so to speak, by purporting to revoke their consent. Consent can indeed be witheld, but this can only be in the formative period, when general consent is still necessary to the validity of the rule. This is why dissent must be expressed at that stage in order to confer exemption; otherwise it is too late".[26]

The legal status of unilateral declarations at the time of issuance is nothing more than a 'proposal'. As long as it remains a mere proposal it bears no legal significance in international law. This point has been discussed by Professor MacGibbon in the following terms:

> "The argument, frequently repeated in the written and oral pleadings of the United Kingdom in the Fisheries Case, that it is not by making decrees that a State infringes international law, but by enforcing her decrees against foreigners, appears to suggest that what is important from the point of view of determining what is the actual practice of States, and hence what is a relevant occasion for protest, is the action taken to enforce unilateral legislative claims rather than the promulgation of the decree itself".[27]

This is also the view of Professor Lauterpacht who stated:

> "...there may have taken place a legislative or administrative act in the nature of a proclamation of intention and assertion of a right, and yet, unless an actual attempt has been made to apply the law or decree in question and until an injury has actually occurred,

---

26. Sir Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice 1951-1954: General Principles and Sources of Law", 30 BYIL (1953), at p. 26; see also Lotus Case, PCIJ (1927), Series A No./10 at p. 18.

27. I.C. MacGibbon, "Some Observations on the Part of Protest in International Law", 30 BYIL (1953) pp. 293-319, at pp. 304-305.

> it is probable that no judicial remedy will lie".[28]

Again, while referring to the United States' Anti-Smuggling Act of 1935 which contained provisions regarding the foreign ships within a "customs enforcement area" which extended to some sixty-two miles from the coast he stated that:

> "It appears that no protests have been made against the adoption of the Act - a circumstance which is not itself decisive seeing that, for the purpose of safeguarding rights, a protest is essential at the time of the application of the enactment as distinguished from its adoption".[29]

Although unilateral declarations may be protested against before they are enforced, the absence of protests between the time of promulgation and enforcement cannot be interpreted as acquiescence.[30] Thus, the sole criterion for the validity or nullity of a claim is enforcement followed by either acquiescence or protest. Whether the claim is contrary to the existing rule of customary international law or is a new claim makes no difference at all. This view has been expressed by Sir Gerald Fitzmaurice in the following terms:

> "Where a general rule of customary international law is built up by the common practice of States

---

28. H. Lauterpacht, Loc. Cit., in note 19 (p. 27), at p.396; he also refers to the statement made by Mr. Beckett in the Third Committee of the Hague Conference of 1930 for the codification of international law: "It is not the enactment of the law which produces the breach of an international obligation, but its application and until the Court has applied the law, it cannot definitely be said if there has been a breach of international law", ibid, at p. 406 (footnote 1).

29. Ibid.

30. MacGibbon, Loc. Cit., in note 27 (p. 368), at pp. 299-306.

> although it may be a little unnecessary to have recourse to the notion of agreement (and a little difficult to detect it in what is often the uncoordinated, independent, if similar, action of States), it is probably true to say that consent is latent in the mutual tolerations that allow the practice to build up at all; and actually patent in the eventual acceptance (even if tacit) of the practice, as constituting a binding rule of law. It makes no substantial difference whether the new rule emerges in regard to (in effect) a new topic on which international law has hitherto been silent, or as a change in existing law".[31]

On the basis of the above authorities it can be concluded that unilateral declarations out of which the rights and duties of other States are to follow do not have any legal significance in international law at the time of their promulgation. It is only when they are enforced that the question of their legality will be encountered by affected or interested States and must be decided by either acquiescence or protest.

Between 1945 and 1958 there were a series of unilateral declarations asserting rights over the continental shelf and its natural resources. The legal status of these unilateral declarations in international law will be discussed in the following section.

---

31. Sir Gerald Fitzmaurice, Loc. Cit., in note 26 (p. 368), at p. 68.

C- Disputes Concerning Unilateral Declarations Asserting Rights Over the Continental Shelf and its Resources

Unilateral declarations asserting rights over the continental shelf and its resources fall into two groups as follows:

i. Unilateral Declarations Asserting Rights Over the Continental Shelf and its Mineral Resources

Claims over the submarine areas and their mineral resources specifically referred to the general concept of the freedom of the high seas and maintained that the rights of other States in the high seas beyond the limit of the territorial sea would not be affected.[32] No protest was recorded against any of these claims.[33]

The legal status of such claims was discussed by many prominent jurists. As early as 1946, Vallat observed that:

> "...general recognition and acceptance by States may perfect the rights claimed by the United States and establish new rules based on the doctrine of the continental shelf".[34]

Professor Lauterpacht in 1950 stated that:

> "...the question of the nature of the right over the adjacent submarine areas is to a large extent an academic question inasmuch as it has been resolved by practically unanimous practice of the coastal States concerned - a practice which has not been followed by protests by other interested States or by States in general".[35]

---

32. See above pp. 86-116.

33. See Sluka, Op. Cit., in note 106 (p. 60), at pp. 26-27.

34. F.A. Vallat, "The Continental Shelf", 23 BYIL (1946) pp. 333-338, at p. 337.

35. H. Lauterpacht, Loc. Cit., in note 19 (p. 27), at pp. 392-393.

In 1956 Kunz examined the doctrine of the continental shelf in order to ascertain whether it constituted a norm in international law and stated:

> "In this writer's opinion, a new norm of international law has not yet come into existence, although we are witnessing the formation of such a new norm".[36]

He further commented that:

> "Lauterpacht, François and Phleger agree that it is necessary to strike a just balance between the legitimate interests of the coastal State, viewed in the light of reasonableness and fairness, and the requirements of the international community at large; the doctrine must be compatible with the norm of the freedom of the high seas".[37]

In the absence of any protest directed against the unilateral declarations asserting rights over the submarine areas and their mineral resources by any States, including States which traditionally defended the freedom of the high seas, it can be deduced either that such claims were not considered infringements of customary international law or that, even if they were, the international community, by consent, felt that the new practice was necessary on the grounds of the interests of the international community as a whole. The importance of making a protest against what is considered to be an infringement of the rules of customary international law was discussed by Professor MacGibbon who stated that:

> "...in addition to providing evidence of what

---

36. Kunz, Loc. Cit., in note 36 (p. 78), at pp. 829-830.
37. Ibid, at p. 830.

> States consider to be the law, protests are apt to influence the development of customary rules of international law either as showing the extent of the generality of the custom in question or by assisting in the appreciation of the existence of the opinio juris sive necessitatis in respect of any particular practice".[38]

ii. Unilateral Declarations Asserting Rights Over the Continental Shelf and Including both its Living and Non-Living Resources

Claims of this nature were made by Argentina, Peru, Chile, Costa Rica, Ecuador and other States.[39] The inclusion of living resources of the high seas beyond the limit of the territorial sea in those claims was promptly challenged through diplomatic protests by some States. Among those States which strongly protested against the inclusion of living resources of the high seas within the shelf regime were Japan, the United States, France and the United Kingdom.[40] As stated earlier, there is nothing to prevent States from issuing unilateral declarations which are contrary to the existing international law but the international legal effect of such claims depends entirely on the reaction of other States. The number of States which protested against claims asserting rights over the living resources of the continental shelf were few but it is important that they were the States most affected by those claims.[41] Furthermore, protesting

---

38. I.C. MacGibbon, Loc. Cit., in note 27 (p. 368), at p. 293.

39. Mouton, Op. Cit., in note 3 (p. 65), at pp. 73-89; Sluka, Op. Cit., in note 106 (p. 60), at p. 44; Auguste, Op. Cit., in note 17 (p. 11), at pp. 105-139.

40. Mouton, Op. Cit., in note 3 (p. 65), at pp. 89-96; Kunz, Loc. Cit., in note 36 (p. 78), at p. 836;

States were those which traditionally advocated the freedom of the high seas beyond the limit of the territorial sea. The importance of protests directed against such claims has been discussed by Professor MacGibbon who stated:

> "In so far as the Latin-American claims have approximated to the United States' type of claim, no protest has been directed against them; and it may be argued that the features common to both types of claim, having met acquiescence and indeed imitation on the part of other States, are on the way to becoming, if they are not already, part of customary international law. In so far as the further claims to sovereignty over the superjacent waters have met with persistent protests from other States, that feature of the claims is thereby prevented from becoming part of customary international law".[41]

It is clearly understood that claims to sovereignty over the living resources of the superjacent waters of the continental shelf did not constitute any historic or customary rights for the declarant States against the States which had protested against such claims. The question arises whether such historic or customary rights can be established against States which did not protest against such claims. Could their silence be interpreted as acquiescence? The answer is in the negative. There are examples in international law when a practice which is contrary to a general rule of customary international law has constituted an historic or customary right such as the practice of the

---

Whiteman, Op. Cit., in note 25 (p. 73), at pp. 793-804.

41. I.C. MacGibbon, "Customary International Law and Acquiescence", 33 BYIL (1957) pp. 115-145, at p. 119. It must be noted that the claims made by some Latin American States assert sovereignty over the continental shelf up to 200 nautical miles which did not approximate to the United States' claim.

Scandinavian countries of the 4 mile territorial sea, but general consent for the formation of such rights is absolutely necessary. Sir Gerald Fitzmaurice referred to this class of customary rights in the following terms:

> "...where a special right different from, and in principle contrary to, the ordinary rule of law acceptable, is built up by a particular State or States through a process of prescription, leading to the emergence of a usage or customary or historic right in favour of such State or States... the element of consent, that is to say, acquiescence with full knowledge on the part of other States is not only present, but necessary to the formation of the right".[42]

The practice of the Latin American States and other States which included living resources of the high seas within their claims over the continental shelf did not constitute a general rule of customary international law. Nor did it, in the light of the protests, constitute, using the language of Sir Gerald Fitzmaurice "a usage or customary or historic rights". The assertion of sovereignty over the living resources of the high seas and the enforcement of such claims gave rise to a number of disputes between 1945 and 1958. None of the disputes was submitted to any international tribunal although the International Law Commission, which was preparing draft articles on the Law of the Sea, scrupulously advocated the freedom of the high seas beyond the limit of the territorial sea throughout its various sessions.[43]

---

42. Sir Gerald Fitzmaurice, Loc. Cit., in note 26 (p. 368), at pp. 68-69; Professor MacGibbon, Loc. Cit., in note 41 (p. 374), at pp. 122-123.

43. See above pp. 122-175.

Conclusion

Unilateral declarations out of which rights and duties of other States are to follow can be divided into two groups. First, those whose terms are contrary to the existing rules and customs of international law. Secondly, those whose terms are neither contrary to nor in conformity with the existing rules and customs of international law. In either case the legal validity and effects of such declarations in international law depend entirely on the consent of another State or States.

In 1974, the ICJ, in the Fisheies Jurisdiction Cases, referred to the unilateral extension of its fisheries jurisdiction to 50 miles by Iceland and stated inter alia:

> "Iceland's unilateral action thus constitutes an infringement of the principle enshrined in Article 2 of the 1958 Geneva Convention on the High Seas which requires that all States, including coastal States, in exercising their freedom of fishing, pay reasonable regard to the interests of other States..... Accordingly, the Court is bound to conclude that the Iceland's Regulations of 14 July 1972 establishing a zone of exclusive fisheries jurisdiction extending to 50 nautical miles from baselines around the coast of Iceland, are not opposable to the United Kingdom, and the latter is under no obligation to accept the unilateral termination by Iceland of United Kingdom fishery rights in the Area". 44

---

44. Fisheries Jurisdiction Case (United Kingdom v. Iceland), Judgment of July 25, 1974, ICJ. Report, 1974, pp. 1-174, at p. 29, para. 67. Fisheries Jurisdiction Case (Federal Republic of Germany v. Iceland), Judgment of July 25, 1974, ICJ. Report, 1974, pp. 174-251, at p. 198, para. 59.

CHAPTER VIII

The Disputes

Introduction

The legal concept of the continental shelf, as described in Part One, was initiated by the United States in 1945. The development of the shelf doctrine, between 1945 and 1958, was based on an overwhelming support it received from other coastal States. While the support for the right of the coastal States over the continental shelf and its resources was unequivocal, the actual claims regarding the continental shelf were extremely diverse. This diversity which was related to the definition of the shelf, its outer limit, its natural resources and the extent of the coastal States' rights over the continental shelf led to a few disputes. Those disputes were based on the legality of some of the claims which were regarded to have violated some of the existing rules of customary international law.

In 1958, the Convention on the Continental Shelf, in Article 2 (4), recognized, inter alia, the sovereign rights of the coastal States over the exploitation of the living organisms belonging to sedentary species within the continental shelf. The definition of sedentary species as adopted in that Convention, was open to various interpretations. Those interpretations of the meaning of sedentary species also led to a few disputes.

In this Chapter the disputes caused by the unilateral claims and those regarding the interpretation of the definition of sedentary species will be examined.

A- Disputes Concerning Unilateral Declarations

i. Dispute Between the United States and Some Latin American Countries

Between 1948 and 1951 the United States Government sent notes of protest to the Governments of Chile, Peru, El Salvador and Ecuador.[1] In all those notes the United States Government indicated that the inclusion of living resources of the high seas beyond the limit of the territorial sea within the regime of the continental shelf was contrary to existing customary international law. In its note to Chile the United States objected particularly to the following points:

> "(1) The Chilean Declaration confirms and proclaims the national sovereignty of Chile over the continental shelf and over the seas adjacent to the coast of Chile outside the generally accepted limits of territorial waters and (2) the declaration fails, with respect to fishing, to accord appropriate and adequate recognition to the rights and interests of the United States in the high seas off the coast of Chile".[2]

Notwithstanding these protests on the 18th of August 1952 Chile, Ecuador and Peru signed an agreement at Santiago de Chile.[3] This agreement, which produced the "Maritime Zone Declaration", was intended to coordinate the policies of these three countries regarding the living resources within the 200 miles which they had already claimed.

---

1. Mouton, Op. Cit., in note 3 (p. 65), at pp. 89-96; see also "Replies from the Governments to Questionnaires of the International Law Commission", A/CN.4/19, 23 March, 1950, at pp. 113-116.

2. Mouton, Op. Cit., in note 3 (p. 65), at pp. 89-96; Whiteman, Op. Cit., in note 25 (p. 73), at pp. 793-804.

3. UNLS, Laws and Regulations on the Regime of the Territorial Sea, 1957, at pp. 723-729; see also above at pp. 107-111.

Shortly after this agreement two American ships of the San Diego tuna fleet were arrested within its maritime zone by Ecuador.[4] In October of the same year (1952) six fishing boats owned by a joint United States-Ecuador company were seized by Ecuador within the 200 mile zone and were fined ₡500,000.[5] In 1953 "Sun Streak", another United States' fishing boat, was arrested by Ecuador and fined ₡12,000 which was paid by the United States Embassy.[6]

Within this period other Latin American States were also enforcing their claims over the living resources of the continental shelf. Colombia arrested four Californian fishing boats and after being charged with illegal fishing within Colombian waters they were fined and released.[7] In the same year, Panama which by Decree No. 449 of December 1946 had extended its jurisdiction to the living resources of the continental shelf,[8] arrested the American ship "Star Crest" on the charge of illegal fishing and fined it ₡3,000.[9] In all the above incidents the United States protested and maintained her position, denouncing the illegality of such claims. In 1954 the United States Congress enacted the "Fishermen Protective Act" which provided that

---

4. New York Times, 25 August, 1952, Col. 4, p. 2.

5. New York Times, 22 October, 1952, Col. 3, p. 18 and New York Times, 25 October, 1952, Col. 6, p. 34.

6. New York Times, 8 September, 1954, Col. 6, p. 3 and New York Times, 22 September, 1954, Col. 5, p. 10.

7. Colombia had not claimed any rights as regards the continental shelf nor had she extended her jurisdiction as regards the territorial sea, see Auguste, Op. Cit., in note 17 (p. 11), at pp. 114 and 172.

8. UNLS, Laws and Regulations on the Regime of the High Seas, Vol. I, at p. 16. Article 3 of Decree No. 449

any fine levied on American fishermen in the area which the United States Government regarded as high seas, would be reimbursed by the United States Government.[10] The implication of the Fishermen Protective Act was, according to Knight, that:

> "...the United States, by offering an economic subsidy, encourages tuna vessels to continue to fish in the claimed waters off Ecuador and Peru, thus maintaining a presence there which challenges the validity of the claimed zone".[11]

The practice of the Latin American States continued in 1954 and 1955 when, in two different incidents, 8 American fishing vessels were seized by the Peruvians on the grounds of illegal fishing within the maritime zone. In both incidents fines were imposed and paid.[12] Ecuador also seized two American fishing vessels "Arctic Maid" and "Santa Anna" on the same grounds; they were fined and the fines were paid.[13]

The United States Government as well as protesting against these illegal acts proposed that the dispute should be submitted to the International Court of Justice, but the declarants of the "maritime zone" did not accept this proposition.[14] Further attempts by the United States to

---

stated: "For the purposes of fisheries in general, national jurisdiction over the territorial waters of the Republic extends to all the space above the sea bed of the submarine continental shelf. For this reason the product of any fishing within the limits indicated is considered a national product, and is therefore subject to the provisions of the present decree", ibid.

9. New York Times, 15 June, 1953, Col. 4, p. 43.
10. 22 USC 1971-1979 (originally 68 State. 883).
11. H.G. Knight, Managing the Seas Living Resources, 1977, at p. 51.
12. Auguste, Op. Cit., in note 17 (p. 11), at p. 158.
13. Ibid; Kunz, Loc. Cit., in note 36 (p. 78), at pp. 836-837.

settle the dispute also failed and the position of the C.E.P. countries remained intact.[15]

ii. The Onassis Incident

Part (d) of the Declaration of the Maritime Zone by the E.C.P. countries specifically referred to whaling in the South Pacific.[16] In the Preamble to the "Regulations Governing Whaling in the Waters of the South Pacific" it was stated inter alia that:

> "It is the duty of each Government to ensure the conservation and protection of the stock of whales existing in the area of the South Pacific;
> It is necessary to regulate the hunting of the said whales so as to prevent such intensive operations as might lead to the temporary or permanent extinction of that animal species, with consequent injury to the economies of the countries of the South Pacific".[17]

The Regulations adopted by the C.E.P. countries were embodied in 24 Articles. The following Articles made the intentions of the C.E.P. countries as to complete sovereignty over the whaling activities within the maritime zone quite clear:

> "Article I. Whaling in the South Pacific, and more particularly in the maritime zones under the sovereignty or jurisdiction of the signatory States, whether carried on by land-based industries or by floating factories, shall be subject to the rules prescribed by the Conference, whose standing Committee shall study and, in agreement with the Governments of States aforesaid, decide upon any amendment which may be advisable for the purpose of the expansion or improvement of the industries...

---

14. Ibid., at p. 838.
15. Ibid.
16. UNLS, Laws and Regulations on the Regime of the Territorial Sea, 1957, at pp. 721-729.
17. Ibid., at p. 727.

> Article 2. The authorities of the several States shall be responsible for the control of whaling, whether carried on by floating factories or from land stations, and for the enforcement of the provisions of these Regulations.
>
> Article 3. For the purposes of the previous article, every whaling undertaking now existing or to be organized in future must be entered in the special register kept by the Standing Committee; every such undertaking shall file a declaration specifying the number and position of its land stations, the number and category of the whaling units at its disposal, or the number and characteristics of the ships or vessels constituting the floating factory".[18]

On 4 August, 1954, a whaling fleet owned by Mr. A.S. Onassis flying the Panamanian flag left the Port of Keil in West Germany "with the declared intention of hunting whales off the West Coast of South America".[19] Later in November, five of the vessels including the factory ship "Olympic Challenger" were captured by Peruvian authorities, two within the maritime zone and the rest, including the factory ship, outside the zone in the exercise of the right of "hot pursuit".[20] The ships were taken to the Peruvian Port of Paita and charged with violation of the maritime zone. Strong protests against the arrests were made by the United States, the United Kingdom and Panama.[21]

According to Garcia Sayon:

"The Ambassador of Great Britain delivered to

---

18. Ibid.

19. Auguste, Op. Cit., in note 17 (p. 11), at p. 157.

20. Kunz, Loc. Cit., in note 36 (p. 78), at p. 837.

21. The ships were fully insured in the United Kingdom and the United States, Kunz, Loc. Cit., in note 36 (p. 78), at p. 838.

> the Peruvian Foreign Office a note (a) expressing the anxiety of the British Government at the possible effect that the detention of Onassis' ship might have on British interests, especially those of the British firm which had insured the ships; (b) stating that the British Government reserved the right to claim compensation for damage done to those British interests particularly those of the insurers; and (c) stating that the attitude of the British Government towards the right of sovereignty and jurisdiction over the maritime zone of 200 miles claimed by the Peruvian Government remained that indicated in a note of 31 August, 1954".[22]

In reply to this protest the Peruvian Government stated that the measures taken to defend the maritime zone were "acts of sovereignty in regard to which the Peruvian Government could accept neither objections nor claims".[23]

The Port authority of Paita charged the masters of the five vessels with unlawful whaling within the Peruvian maritime zone and fined them £ 3,000,000 which was paid in Peruvian currency.[24]

The following are extracts from the judgment given by the Port Officer of Paita:

> "2....none of the masters were able to exhibit the documents required to be carried by the port authorities' Regulations and the ordinary law; such as the ship's log, engine room log or charts, nor the whaling register or whaling schedule. This fact constitutes the strongest evidence of the unlawfulness of the operations which they were carrying out...
> 3. It has been proved that the position of

---

22. Enrique Garcia Sayon, Notes on the Maritime Sovereignty of Peru, 1958, at p. 52; Auguste, Op. Cit., in note 17 (p. 11), at pp. 157-158.

23. Garcia Sayon, Op. Cit, in note 22 (p. 383), at p. 52.

24. Ibid; Auguste, Op. Cit., in note 17 (p. 11), at p. 158.

> all whalers, that is practically the whole whaling fleet, was ascertained by the ships of the Peruvian Navy, which detected and sighted them in a position exactly 110 miles from the Peruvian coast. The ships "Olympic Victor" and "Olympic Lightning" were captured at a distance of exactly 126 miles from the Peruvian coast, and the ships "Olympic Fighter" "Olympic Conqueror" and "Olympic Challenger" were captured later when they took flight.
> ....
> 5. It has also been proved that the arrested ships and those which made off had operated within Peruvian territorial waters and had taken between 2500 and 3000 whales. This was admitted in the depositions put in evidence... The "Olympic Challenger" was the ship which directed the catchers and gave them their bearings, and received and processed the catch taken within the 200 mile limit: about 6800 tons of whale oil was found in her tanks".[25]

Apart from the protests mentioned above no further action was taken by the protesting States. According to Kunz:

> "The Onassis incident is thus a new, successful application of sanctions for the violation of a national law which is clearly in contradiction with international law. The United States and the United Kingdom protested to Peru, concerning this incident, so did Panama, which furnished information to the Organisation of American States. But little else was done; no action was brought, no discussion was held in the United Nations".[26]

The implications of the enforcement of these unilateral declarations which are contrary to the existing international law were examined by Auguste who stated:

> "These displays of jurisdiction and arrest are to a large extent legal in so far as they are based on municipal law. But in international law, the unilateral declarations, in the absence of treaties, conventions or customary

---

25. Auguste, Op. Cit., in note 17 (p. 11), at pp. 405-406.

26. Kunz, Loc. Cit., in note 36 (p. 78), at pp. 837-838.

> international law, are not binding on third parties or States, unless these States accept the jurisdiction by virtue of acquiescence, diplomatic correspondence or treaty. However, whether or not these are done within the legal order, this does not affect the point that they have been carried out. To a large extent the validity of any legislation (unilateral) depends on the ability of the State concerned to enforce it. In the absence of such enforcement the whole case would be considerably weakened. However, the fact that these acts of arrest have taken place, seems to indicate that these States are enforcing their legislation without discrimination and thus creating a situation which has to be accepted as a movement towards the development of a new legal order. Acts in their inception illegal, can with time, acquiescence and a gradual weakening of protests, come to be accepted as valid".[27]

It will be shown in the next Chapter that the claims over the living resources of the superjacent waters of the continental shelf which were initiated by some Latin American States have been accepted and followed by many other States.[28] The notion of "maritime zone" advocated by the C.E.P. countries has been adopted as a 200 miles of Exclusive Economic Zone or Fishery Zone; the EEZ or FZ has been claimed by unilateral declarations by almost 100 coastal States and has become an important part of the Texts under discussion by the UNCLOS III since 1975.[29]

---

27. Auguste, Op. Cit., in note 17 (p. 11), at pp. 159-160.

28. See below Chapter IX "Development of the Law of the Sea Between 1958 and 1973" (D) (i) Latin American States.

29. See below Chapter X "The Third United Nations Conference on the Law of the Sea". As to State practice see ibid (B).

iii. Dispute Between Japan and Australia

In 1952 the Pearl Fisheries Act was enacted by Australia.[30] The Act provided that the regulation of pearl, beche-de-mer, trochus and green snail beyond the limit of the territorial waters, subject to a proclamation by the Governor-General, would be conducted by the Australian authorities.

In 1953, the Governor-General issued two Proclamations regarding the continental shelf of Australia and the continental shelf of the Territory of New Guinea.[31] These Proclamations referred to the sovereign rights of Australia over the "natural resources" of the seabed and subsoil of the continental shelf. Later, on 25th September 1953, another Proclamation was issued which brought into operation the Pearl Fisheries Act of 1952 and was incorporated within the Proclamation of 1953 on the Continental Shelf.[32] It is to be noted that the species which were enumerated in the Pearl Fisheries Act 1952 had not been claimed as the resources of the seabed and subsoil of the continental shelf. They had been claimed as being within the 'Australian' or 'Proclaimed' waters although these waters were defined in the amended Pearl Fisheries Act 1953 as "being waters which are above the continental shelf".[33] The

---

30. No. 8 of 1952, Commonwealth Acts 1952, Vol. 1, at p. 32; 1 Sydney Law Review (1953) pp. 96-104.

31. Commonwealth of Australia Gazette, 1953, no. 56, at p. 2563.

32. Act no. 38, 1953 s. 3 (a).

33. The Proclamation of 25 September, 1953 was issued after the ILC had decided to include sedentary species within the meaning of 'natural resources' of the continental shelf. See above Chapter IV (B).

Proclamation of 25 September 1953 can be regarded as the first unilateral claim which brought the regulation of sedentary fisheries within the concept of coastal States' sovereign rights over the continental shelf. This Proclamation was strongly opposed by Japan whose nationals had been regularly involved in pearl fishing off the Australian coasts since 1930.[34] According to Professor Oda the protest of October 1953 emphasised the Japanese view and stated inter alia:

> "The Japanese Government, adhering to its traditional enforcement of the principle of freedom of the seas, reminded the Australian Government that extra-territorial domestic jurisdiction was applicable only to the nationals and the vessels of the State which enacted such legislation and that any proposed action by the Australian Government vis-a-vis foreign nationals under its unilateral claims was in contradiction to established principles of international law and usage".[35]

The Australian Government replied on 30 October that it did not share the Japanese Government's views on the question of sedentary fisheries and considered such resources as the natural resources of the continental shelf.[36] In 1954 a Provisional Regime to regulate the Japanese pearlers was established and the two Governments agreed to submit the dispute to the International Court of Justice.[37]

---

34. S. Oda, International Control of Sea Resources, 1963, at p. 30.

35. Ibid, at p. 35.

36. Ibid.

37. 16 United Nations Bulletin (1954) at p. 150.

1. Background to the Pearl Fisheries Act 1952

Throughout the previous century there had been a stream of legislation regulating the pearl and beche-de-mer fisheries off the Australian coasts.[38] These were colonial laws which operated only within the three mile limit of Australian territorial waters. In 1881 the "Pearl Shell and Beche-de-Mer Fisheries Act" was passed by the Colonial Legislature of Queensland.[39] Section 3 of the Act required licensing of all boats engaged in fishing "within the colony of Queensland or within one league to seaward from any part thereof, unless such ship or boat is duly licensed or hereinafter provided".[40]

In 1885 the Imperial Parliament empowered the Federal Council of Australia to legislate for "Fisheries in Australian waters beyond territorial limits".[41] In 1886 Western Australia regulated the pearl fisheries both within and beyond territorial waters. Section 2 required that all vessels engaged in pearl fisheries must obtain licences and Section 8 imposed an export duty on pearl shell.[42] Whether the regulations applied to foreign pearlers who exploited this resource beyond territorial waters was not clear until, in

---

38. The Queensland Statutes, Vol. 1, 1911, at pp. 767-790; Auguste, Op. Cit., in note 17 (p. 11), at pp. 50-53; O'Connell, International Law in Australia, 1965, at pp. 280-281.

39. The Queensland Statutes, in note 38 (p. 388), at p. 778.

40. Ibid.

41. 48 and 49 Vic, C. 60, s. 15 (c), United Kingdom Law Reports Statutes 21, at pp. 324-328.

42. O'Connell, Op. Cit., in note 38 (p. 338) at pp. 277-278.

August 1888, the Law Officers of the Crown clarified the application of the Act in the following terms:

> "The Course taken by the Colonial government in levying customs and export duties under the Act can be legally upheld, both as regards ships which fish entirely within three miles of the shore, and as regards ships which fish partly within and partly beyond the three mile limit. In our opinion the provisions of the Act cannot be properly enforced against the vessels mentioned unless such vessels have taken a licence, or have in fact been used or employed by persons engaged in a pearl shell fishery within the three mile limit".[43]

Shortly thereafter the Governor was instructed that:

> "...this Act, like any other Colonial Law cannot be applied more than three miles from the Coast, and if it is necessary to regulate the pearl shell fishery as carried on beyond that limit, it will be necessary to have recourse to the Federal Council".[44]

Although the Federal Council of Australia passed two extra-territorial Acts in 1888 and 1889 regarding the pearl shell and beche-de-mer of Western Australia and Queensland,[45] beyond the three mile limit these Acts were to be applicable only to "British ships and boats attached to British ships".[46]

The above Acts were in operation until they were repealed by the Commonwealth Pearl Fisheries Act of 1952.[47]

---

43. C.O. Law Officers' Opinions, Vol. IV, no. 127.

44. Papers of the Legislative Council of Western Australia (1888), 2nd Session, no. 26; see O'Connell, Op. Cit., in note 38 (p. 388), at pp. 277-278.

45. The Queensland Pearl Shell and Beche-de-Mer Fisheries (Extra-Territorial) Act, no. 1 of 1888, s.2 and The Western Australia Pearl Shell and Beche-de-Mer Fisheries (Extra-Territorial) Act, no. 1, 1889, s. 19.

46. O'Connell, "Sedentary Fisheries and the Australian Continental Shelf", 49 AJIL (1955) pp. 185-209, at p. 187.

47. Ibid, at p. 186.

According to Professor O'Connell:

> "...during this period of sixty years, conservation and licensing legislation of Queensland and Western Australia operated in respect of both British and Foreign vessels within territorial waters and the system instituted by the Federal Council operated outside in respect of British vessels only".[48]

2. Japanese Engagement in Pearl Fisheries off the Australian Coasts

Pearl fisheries off the coast of Australia had been exploited by Malay and Indonesian divers from time immemorial.[49] In the middle of the last century an extensive exploitation of pearl fisheries off the Western Coast of Australia was begun by pearlers from Singapore.[50] The Pearl Fisheries Act of 1886 by Western Australia aimed at controlling these pearlers of Singapore.[51] Later, since most pearlers with the exception of Indonesians, were from British Colonies, the Federal Council Acts of 1888 and 1889 succeeded in regulating the pearl fisheries beyond the three mile limit. Towards the end of the last century the Japanese pearlers were employed by Australians but by 1930 they had set up their own pearl shell industry and begun to exploit this resource for themselves.[52] Soon they dominated the exploitation of pearl shell to an extent which created serious

---

48. Ibid, at p. 187.
49. The Australian Geographer, Vol. 6 (1952) at p. 13; Fisheries Newsletter, Vol. 9, no. 3 (1950) at pp. 18-20.
50. O'Connell, Op. Cit., in note 38 (p. 388), at p. 277.
51. Ibid.
52. Oda, Op. Cit., in note 34 (p. 387), at p. 33; O'Connell, Loc. Cit., in note 46 (p. 389), at p. 187.

concern regarding its conservation. Before the Japanese engagement in pearl fisheries the Australian Government was under pressure to take further measures towards the regulation of this resource but that situation had changed according to Professor O'Connell since:

> "...that pressure resulted from the activities in the years before the Second World War of Japanese pearlers who took one and a half times as much pearl shell in one year as the amount estimated to be a maximum seasonal harvest, and whose activities in consequence occasioned serious anxiety for the future of the Australian pearling industry".[53]

After the Second World War the Japanese pearlers intended to continue their exploitation of pearl shell off the coast of Australia but under Article 9 of the Peace Treaty Japan was obliged to enter into negotiations with the Allied Powers to reach agreements for the regulation and conservation of marine resources.[54] Article 9 of the Peace Treaty stated that:

> "Japan will enter promptly into negotiations with the Allied Powers so-desiring for the conclusion of bi-lateral and multilateral agreements providing for the regulation of fishing and the conservation and development of fisheries on the high seas".[55]

Prior to the signing of the Peace Treaty there was an exchange of notes between Japan and Australia regarding the pearl fisheries. According to Professor Oda:

---

53. O'Connell, Loc. Cit., in note 46 (p. 389), at p. 187.

54. The Peace Treaty, United Nations Treaty Series, Vol. 136, at p. 45.

55. Ibid, Article 9, at p. 56.

> "The exchange of notes and letters between Australia and Japan in the month prior to the signing of the Japanese Peace Treaty clearly disclosed the different views of these two Governments toward pearl-shelling on the high seas contiguous to the Australian coast. The Australian Government insisted on its right to exclude Japanese fishermen from the area of the continental shelf. On the other hand, the Japanese Government based its claim to such pearl-shelling on the established principle of freedom of the seas".[56]

The Peace Treaty was signed on 8 September, 1951 but the two Governments did not enter into negotiation until early 1953. Meanwhile, the Japanese pearlers had resumed their exploitation; the Conference held at Canberra between the two Governments could not produce any agreement and after four months of extensive negotiations on 28 August, 1953 it was suspended.[57]

Professor O'Connell stated that:

> "...while negotiations between the Australian and Japanese Governments were still in progress, Japanese pearlers resumed their pre-war activities in the Arafura Sea, and during the 1953 season are reported to have taken 1,100 tons of pearl shell, while the Australian harvest was only 170 tons. This suggested that the Japanese were, as a matter of policy, asserting an interest in the pearling grounds adverse to any exclusive claim that Australia might make during negotiations".[58]

3. Pearl Fisheries Act 1952-1953 and the View of the ILC on Sedentary Species

It is important to bear in mind that in 1951 the

---

56. Oda, Op. Cit., in note 34 (p. 387), at p. 34.

57. Ibid.

58. O'Connell, Loc. Cit., in note 46 (p. 389), at pp. 187-188.

International Law Commission's views on the question of sedentary species corresponded with the Japanese views, but in 1953, as explained in Chapter IV, the Commission reversed its views and decided that the products of sedentary species were included in the definition of "natural resources" of the continental shelf and therefore were subject to coastal States' exclusive rights.

The Pearl Fisheries Act of 1952, pending a Proclamation by the Governor-General was amended in 1953,[59] and finally on September 25, 1953 the Pearl Fisheries Act (no. 2), was proclaimed.[60] The new amending Act made the following points:

a. The Act defined the Australian waters within which the Act would operate.[61] The Australian waters were defined as waters above the continental shelf.

b. The Act excluded foreign pearlers from exploiting pearl, beche-de-mer, trochus and green snail fisheries within the Australian waters.

c. The Act empowered the Governor-General to fix by proclamation the limit of the continental shelf and to take measures regarding the waters above it.[62]

It is to be emphasised that the Australian Government did not claim the sedentary fisheries on the grounds of

---

59. L.F.E. Goldie, "Australia's Continental Shelf: Legislations and Proclamations", 3 ICLQ (1954) pp. 535-575, at p. 540.

60. Act no. 38, 1953; Goldie, Loc. Cit., in note 59 (p. 393), at p. 540.

61. Ibid.

62. Ibid, at p. 541.

their being products of the seabed and subsoil of the continental shelf. On the contrary, it was the water covering the continental shelf which became subject to the Australian claim. Part 1 of the Fisheries Act, 1952-1953 states:

> "4. In this Act, unless the contrary intention appears, Australian waters means:
> (a) Australian waters beyond territorial limits;
> (b) The waters adjacent to a Territory and within territorial limits; and
> (c) The waters adjacent to a Territory, not being part of the Commonwealth, and beyond territorial limits;
> being waters that are above the continental shelf".[63]

The Act distinguished between 'Australian waters' and 'proclaimed waters'; the latter was defined as "...waters specified by Proclamation in force under Section Seven of this Act".[64]

Having defined the Australian waters, Part 3 of the Pearl Fisheries Act, 1952-1953 on "Regulation of Pearl Fisheries" states that:

> "8. The Governor-General may, by Proclamation, declare any Australian waters to be proclaimed waters for the purposes of this Act.
> 9. (1) The Minister may, by notice published in the Gazette:
> (a) Prohibit, either at all times or during a period specified in the notice, the taking from proclaimed waters or from an area of proclaimed waters, of pearl shell, trochus, beche-de-mer or green snail;
> (b) Prohibit the taking from proclaimed waters or from an area of proclaimed waters, of pearl shell, trochus, beche-de-mer or green snail not exceeding a size specified in the notice;
> (c) Prohibit the taking, from proclaimed

---

63. Act no. 38, 1953, s. 3(a); see the Text in UNLS Laws and Regulations on the Regime of the Territorial Sea, 1957, pp. 421-425.
64. Ibid, at p. 421.

> waters, of pearl shell, trochus, beche-de-mer, or green snail by a method or equipment specified in the notice;
>
> (d) Prohibit the taking, by any one pearling ship, during a period and in an area of proclaimed waters specified in the notice, of pearl shell, trochus, beche-de-mer or green snail in excess of a quantity so specified, and
>
> (e) Prohibit the removal of live pearl shell, trochus, beche-de-mer or green snail from proclaimed waters".[65]

It was stated earlier that the ILC had included the products of the sedentary species within the definition of 'natural resources' of the continental shelf and although the Australian claim was legitimate in its nature, the concept of 'Australian waters' or 'proclaimed waters' within which such species could be regulated was ambiguous and vague. Furthermore, the Act referred only to a few species and it is not clear whether other sedentary species were included or not. Referring to the Act and the Regulations, Goldie stated that:

> "All this legislation is designed to place the sedentary fisheries off the Northern Australian coasts under the control of this country, to prevent, by schemes of licensing and conservation, unbridled and reckless

---

65. Ibid, at p. 423. The Regulation in Paragraph 11 stated that an officer may:
(a) Board or enter upon a ship or boat in proclaimed waters or a a ship or boat which he has reason to believe has been used, or is intended to be used, for pearling in proclaimed waters and may search the boat for equipment used or capable of being used for pearling;
(b) Examine any equipment found in any place, being equipment which he has reason to believe has been used, or is intended to be used, for pearling in proclaimed waters;
(c) Seize, take, detain, remove and secure any ship, pearl shell, trochus, beche-de-mer or green snail which the officer has reason to believe has been taken or used, is being used or is intended to be used, in contravention of this Act". Ibid, at p. 424.

wastage in the exploitation of this resource".[66]

The Act and the Regulations came into force on 12 October, 1953.[67] On 25 May, 1954 the Governments agreed to sign a provisional Regime to Regulate Pearling by Japan.[68] It was also agreed that the provisional Regime would remain in force until the final decision of the International Court of Justice. From 1953 to 1962 the Japanese exploitation of pearl shell was regulated by Australian authorities and then in 1962 the exploitation was cancelled.[69]

On November 6, 1954, the Australian Government deposited a new declaration with the ICJ regarding its recognition of the Court's compulsory jurisdiction replacing its declaration of 21st August 1940.[70] It was stated in the new declaration that the Government of Australia did not recognise the Court's compulsory jurisdiction over matters related to the continental shelf of Australia, the Australian waters and the Australian Pearl Fisheries Acts.[71] Japan, on the other hand, had not deposited any declaration regarding her recognition of the Court's compulsory jurisdiction and thus the dispute, despite the early agreement, was not decided by the International Court of Justice.[72]

---

66. Goldie, Loc. Cit., in note 59 (p. 393), at p. 542.
67. Commonwealth of Australia Gazette, no. 5, September 25, 1953, at p. 2683.
68. Oda, Op. Cit., in note 34 (p. 387), at p. 35. Oda notes that: "...the total annual catch of pearl shell by Japanese vessels in these waters rapidly declined as follows: 942 tons (1953), 940 tons (1954), 740 tons (1955), 651 tons (1956), 702 tons (1960), 369 tons (1961). Ibid, at p. 53.
69. Ibid at p. 35.
70. See ICJ Yearbook (1953-1954), at pp. 213-214.
71. Ibid.
72. Ibid, at pp. 213-224.

iv. Dispute Between Japan and the Republic of Korea

Introduction

Between 1945 and April 28, 1952, the date when the Peace Treaty with Japan entered into force, Japanese fishing activities particularly in the Yellow Sea, East China Sea and Sea of Japan were regulated by the Allied Powers.[73]

On September 14, 1945 Japanese wooden ships with donkey engines were granted fishing within twelve miles off their own coasts.[74] On September 22, 1945 the fishing grounds were expanded to allow Japanese fishermen to operate along the coasts of Kokkaido, Sanriku and the west of Kyushu although the period within which they could fish was specified. Later that September a memorandum issued by the Commander in Chief of the United States Pacific Fleet granted a designated area in the Pacific to the Japanese fishermen.[75] This demarcation, which became known as the MacArthur Line, granted some 17 per cent of the water fished by the Japanese boats before the war.[76] Japanese fishing areas were expanded by the Allied Powers twice in 1946 and

---

73. Whiteman, Op. Cit., in note 25 (p. 73), at p. 1185; see also G. Weissberg, Recent Developments in the Law of the Sea and the Japanese-Korean Dispute, 1966, at pp. 6-7.

74. Weissberg, Op. Cit., in note 73 (p. 397), at p. 6.

75. Ibid; see also Whiteman, Op. Cit., in note 25 (p. 73), at p. 1185.

76. Within the designated area the following restrictions were imposed on the Japanese fishing vessels:
"(1) All vessels were subject to search by Allied craft at any time;
(2) Vessels were bound to obey all instructions or future regulations established for their control from any Allied source;

again in 1949.[77]

The gradual expansion of the Japanese fishing areas in the Pacific affected the Republic of Korea, another nation heavily dependent on fisheries in the same region. The Japanese fishing industry flourished once again and by 1952 resumed its pre-war status as the world's leading nation.[78] In 1952 the Japanese annual catch off the coasts of Korea amounted to 230,000 tonnes.[79]

It will be recalled that by this date various coastal States had issued unilateral declarations concerning the continental shelf, some of which had regarded the living resources of the superjacent waters of the continental shelf as appertaining to the coastal States.[80]

In 1952 the President of the Republic of Korea accordingly issued a proclamation purporting to extend national sovereignty to the continental shelf of Korea whatever its depth, and to its living and non-living resources and also to the seas adjacent to the coasts.[81] The area under sovereignty was designated in Paragraph 3 of the Presidential Proclamation and extended in some points to 200 miles from

---

(3) All craft over 100 gross tons were required before they left port for the first time to be listed via Japanese channels with the US Naval Authorities". Ibid.

77. According to Weissberg, "...by May, 1950, tuna fishing could reach as far as the Equator. Gradual expansions thus took palce, and the permissible zones eventually reached as far out into the Pacific on the east, passed through the East China Sea and the Sea of Japan and approached the north-west coast of Formosa on the west", Op. Cit., in note 73 (p. 397), at p. 7.

78. Ibid.

79. Whiteman, Op. Cit., in note 25 (p. 73), at p. 1188.

80. See above pp. 86-116.

the coast.[82]

The dispute between Japan and the Republic of Korea began with the pronouncement of this unilateral declaration and its subsequent enforcement which created a war-like situation between the two countries. They broke off diplomatic relations and made a series of unsuccessful attempts to overcome their differences. Although this dispute, which lasted over 13 years and was often very hostile, concentrated on whether the Korean Proclamation was in conformity with international law, it also reflected the mutually hostile attitudes of these two nations.[83]

---

81. See the Text in UNLS, Laws and Regulations on the Regime of the Territorial Sea, 1957, at pp. 30-31.

82. Oda, Op. Cit., in note 34 (p. 387), at p. 27; Weissberg, Op. Cit., in note 73 (p. 397), at p. 8.

83. Writing about the dispute in 1963 Professor Jong Sung Park of Chung-ang University stated that the conflict between Japan and Korea was "...deeply rooted in the history, economy and national prestige of both States. No system of international law can settle this dispute successfully at the present stage. There is little hope toward settlement unless such matters as historical hatred, economic, geograghical and political problems are solved beforehand. It is not easy to solve these problems overnight. Indeed, it requires time and pressure from a world-wide viewpoint", " An Analysis of the Korean-Japanese Fishery Dispute", 5 K.A. no. 2 (1963) at pp. 82-83.

1. The Republic of Korea Presidential Proclamation of 1952

On 18 January, 1952 President Syngman Rhee issued the Proclamation concerning the continental shelf of the Republic of Korea, referred to above.[84] Paragraphs 1 and 2 stated:

> "1. The Government of the Republic of Korea holds and exercises the national sovereignty over the shelf adjacent to the peninsular and insular coasts of national territory, no matter how deep it may be, protecting, preserving and utilizing, therefore, to the best advantage of national interests, all the natural resources, mineral and marine, that exist over the said shelf, on it and beneath it, now, or which may be discovered in the future.
>
> 2. The Government of the Republic of Korea holds and exercises the national sovereignty over the seas adjacent to the coasts of the peninsula and islands of the national territory, no matter what their depths may be, throughout the extension, as here below delineated, deemed necessary to reserve, protect, conserve and utilize the resources and natural wealth of all kinds that may be found on, in or under the said seas, placing under the Government supervision particularly the fishing and marine hunting industries in order to prevent this exhaustible type of resources and natural wealth from being exploited to the disadvantage of the inhabitants of Korea, or decreased or destroyed to the detriment of the country".[85]

The boundary line which became known as the "Rhee Line" or "Peaceline" appeared in Paragraph 3 and extended at some points to 200 miles from the coast.[86] The areas claimed by

---

84. UNLS, Laws and Regulations on the Regime of the Territorial Sea, 1957, at pp. 30-31.

85. Ibid.

86. It was stated in Paragraph 3 that:
"The Government of the Republic of Korea declares and maintains the lines of demarcation, as given below, which shall define and delineate the zone of control

this unilateral act were amongst the richest fishery grounds in the world.[87]

The Korean Presidential Proclamation can be divided into two parts. First, the claim of 'national sovereignty' over the continental shelf. In this respect the use of the

---

and protection of the national resources and wealth on, in or beneath the said seas placed under the jurisdiction and control of the Republic of Korea and which shall be liable to modification, in accordance with the circumstances arising from new discoveries, studies or interests that may come to light in future. The zone to be placed under the sovereignty and protection of the Republic of Korea shall consist of seas lying between the coasts of the peninsular and insular territories of the Republic of Korea...", ibid. For the demarcation lines see ibid, at p. 31.

87. In a Paper given by Mr. Moon Ki during the Proceedings of the Indo-Pacific Fisheries Council in 1949, the biological productivity of the high seas adjacent to the Korean Coasts was examined. It stated that: "Korea is a peninsula. It faces, in the east, a deep sea whose greatest depth is 3,712 metres and whose tidal range is only about one metre; in most of the eastern sea there follows a cold current. In the western sea the difference between ebb and flow is about 10 metres and the greatest depth is only 84 metres. Throughout the coastline, long sand beaches and deltas face the famous shallow sea of Wang Hai. In the southern coast, many islands form an archipelago which is most suitable for the growth of marine organisms. In the eastern sea, where the cold and warm currents meet, a single kind of plankton, which is the food for fish, grows richly; and such cold current fish as Alaska Pollock and such warm current fish as Pilchard are so richly produced as to permit one of the highest peaks of production in the world. In the north, the coastal sea where flatfish and sole have their gathering grounds, lends to the Ochkatsk Sea, which is one of three greatest fishing grounds in the world. In the south, the eastern China Sea, which is west of Cheju Island and into which the Yangtze River drains, contains precious trawl fishing grounds. It leads to Borneo and Sunda Straits which are the cradle regions for tropical fish and reaches the Antarctic Ocean which is home of Whaling". Moon Ki, "Korean Fisheries", Indo-Pacific Council Proceedings, 1st meeting, 24-31 March, 1949, Singapore, at p. 83.

word 'shelf' is only a reference to the submarine area since the claim is made to the "shelf adjacent to the peninsular coasts of the national territory, no matter how deep it may be". The criterion used in this claim over the submarine area is 'adjacency' which, as discussed in previous Chapters, is a vague expression and, therefore, subject to various interpretations.[88] As regards the natural resources, while it can be assumed that the phrase "all natural resources, mineral and marine" includes all sedentary species, the following part of the sentence which states: "...that exists over the said shelf, on it and beneath it" raises the question whether the use of the term 'over' would also include swimming fish, and if so, whether it is intended to include only bottom fish or all fish which swim 'over' the shelf concerned.

The second Paragraph of the Proclamation refers to the high seas adjacent to the territorial seas and claims 'national sovereignty' over all the resources and makes a specific reference to 'fishing and marine hunting'.[89] The delimitation of the area which appears in Paragraph 3 is, in fact, in relation to the second Paragraph and not the first. It can,therefore, be concluded that the first Paragraph of the Proclamation concerns the continental shelf while the second and third are related to the claim over the resources of the high seas. The dispute between Japan and Korea was the result of the latter claim.

---

88. See above Chapter I pp. 11-16 and Chapter IV pp. 190-192.
89. The Territorial Sea of the Republic of Korea was 3 miles

2. Japan's Protest of 1952 and Korean Reply

On 27 January, 1952 Japan officially protested against the Rhee Proclamation asserting national sovereignty over the high seas adjacent to the Republic of Korea's territorial waters.[90] According to Weissberg:

> "The note found the Korean position untenable and unacceptable, and once again stated that the Proclamation violated the principle of the freedom of the high seas".[91]

On 12 February, 1952, the Korean Government gave an official answer to the Japanese Government, refuting the charges against them. It stated:

> "Variegated analyses are being made as to our recent Proclamation of sovereignty over adjacent seas. However, there are well-established international precedents - such as, President Truman's Proclamation on coastal fishing and on natural resources on and beneath the shelf, and other Proclamations of the same character made by the Governments of Mexico, Argentina, Chile, Peru and Costa Rica. The protective seas as designated in the Proclamation bear radically different significance than the MacArthur line. While the MacArthur line limits the area within which the Japanese fishing boats are allowed to operate, Korea's protective seas have been established to set limitations on the Koreans as well as the Japanese, in order to prevent the exhaustible type of natural wealth in the said area from being exploited... Proclamation of protective seas does not mean extension of territorial waters into the high seas. The special character of parts of the high seas that, at the same time, constitute adjacent seas has been recognised by many international bodies including the United Nations Commission on International Law. We do not lack in precedents in the international community which recognizes the special status of adjacent seas. Those who still adhere to the 19th century

---

until 1978 when it was extended to 12 miles, see FAO's Committee on Fisheries, 12th session, Rome, 12-16 June, 1978, at p. 25.

90. Mouton, Op. Cit., in note 3 (p. 65), at pp. 319-320;

> concept of the freedom of the high seas, claiming absolute freedom of fishing on adjacent seas, must be considered as being unaware of of the evolution of international law".[92]

The Korean reply to the Japanese protest does not justify the nature of the claim on the following grounds: First, there was no analogy between the Korean Proclamation of 1952 and the United States' Proclamation of 1945 as regards both the continental shelf and fishery conservation. The United States' Proclamation on the continental shelf as well as indicating some geological bases for the claim did not include the fishing resources of the superjacent waters within the scope of the claim. The Proclamation on "Policy of the United States with Respect to Coastal Fisheries in Certain Areas of the High Seas" explicitly recognised the rights of other States on equal footing in the common fishery grounds. Referring to fishing activities in the high seas adjacent to the territorial seas of the United States the Proclamation stated that:

> "Where such activities have been or shall, thereafter be legitimately developed and maintained jointly by nationals of the United States and nationals of other States, explicitly bounded conservation zones may be established under agreements between the United States and such other States; and all fishing activities in such zones shall be subject to regulation and control as provided

---

Oda, Op. Cit., in note 34 (p. 387), at p. 27.

91. Weissberg, Op. Cit., in note 73 (p. 397), at p. 8; see also "The South Korea-Japanese Fishery Dispute", The World Today (1054), Vol. 10, at p. 50.

92. Mouton, Op. Cit., in note 3 (p. 65), at p. 320. On 9 February, 1952, President Rhee referred to his Proclamation in a statement and stated inter alia that: "...the main object in establishing a boundary line on the high seas is to maintain peace between Korea and

in such agreements".[93]

Second, the Proclamations by the Latin American Governments, cited in the Korean reply, were protested against by the countries which were affected by such claims and, therefore, those claims did not constitute a legal regime to be referred to as precedents accepted by the international community. It is also important to note that the Korean Proclamation laid a claim to areas which were equally parts of the high seas adjacent to Japan's territorial waters. To exclude Japanese fishermen from fishing in parts of the Sea of Japan and the East China Sea would mean preventing them from fishing in the high seas adjacent to their territorial waters.

Finally, the International Law Commission did not, at any time, consider the validity of the sovereignty of coastal States over the high seas adjacent to their territorial waters and the claim to that effect by the Republic of Korea was totally erroneous and unfounded.

Japan, and I believe Japan will naturally comply with this. During the past 40 years the seas adjacent to Korea have been ruled with exclusive predominance by Japan. Korea, however, wishes to forget completely all past ill feelings and coexist with Japan. In spite of our sincere efforts to enter into a relationship that will be mutually advantageous, the Japanese, who still cannot discard their greed, are crossing the MacArthur line and many fishing vessels are entering our adjacent waters and taking the resources of the sea. We cannot endure the situation as it now is. Unless this is prevented, there is a fear of conflict between the countries becoming unavoidable", Shigeo Sugiyama, "Postwar Japan and High Seas Fisheries", Japan Annual of International Affairs, 1961, at pp. 71-72; Weissberg, Op. Cit., in note 73 (p. 397) at p. 9.

93. Whiteman, Op. Cit., in note 25 (p. 73), at p. 955.

3. The Japanese-Korean Negotiations: 1952-1964

The Republic of Korea and Japan agreed to settle their dispute peacefully and from 15 February, 1952 a number of conferences were held. The Nippon Times reported on 19 March, 1952 that:

> "The Japanese negotiators have said that Japan is ready to enter a pact for conservation of fishing resources and have proposed that the agreement apply to the Japan Sea, the Yellow Sea and the East China Sea".[94]

While negotiations were in progress the conflict between North and South Korea led to the establishment of a "Sea Defence Zone" by the United Nations Forces in Korea on 27 September, 1952. The Defence Zone which was described by the UN naval ships' Commander, General Mark W. Clark, as "strictly a wartime measures" extended:

> "... from a point in the sea twelve miles offshore from the Russian frontier on the east coast of Korea to the islands along the south coast and from there along the west coast to a distance of 12 miles off the Manchurian border".[95]

This zone, within which the Japanese could not engage in fishing, was suspended on August 27, 1953, notwithstanding strong protests by the Government of the Republic of Korea.[96] The South Korean Government tried to persuade

---

94. Mouton, Op. Cit., in note 3 (p. 73), at p. 321; Weissberg, Op. Cit., in note 73 (p. 397), at pp. 9-10.

95. Weissberg, Op. Cit., in note 73 (p. 397), at pp. 9-10.

96. According to Weissberg, "Mark Clark's memoirs leave no doubt that the delimited waters were definitely barred to Japanese vessels", ibid, at p. 10; see also Burdick H. Brittin, International Law for Seagoing Officers, 2nd edition, 1962, at p. 89.

the UN that prevention of communist activities necessitated the blockade imposed in the 'Defence Zone' and warned that if it was not reinstated they would proceed unilaterally to implement the 'peace line'.[97]

As a result of these events the Conference between the two countries was suspended and on 12 December, 1954 the Korean Government promulgated 'Fishery Resources Conservation Law No. 298' which stated:

> "Article 1. The seas lying between the coasts of the peninsular and insular territories of Korea and line of demarcation made from the continuity of the lines mentioned hereunder are hereby defined as jurisdictional water for the conservation of the fishery resources (hereinafter referred to as the jurisdictional water).
> .....
> Article 2. Any person who desires to engage in fishing in the jurisdictional waters is required to obtain a permission from the Competent Minister.
>
> Article 3. Any person who violated the preceeding Article shall be punished by a penal servitude or an imprisonment not exceeding three years, or by a fine not exceeding five hundred thousand Hwan, and any fishing vessel, equipment, catch, and cultured and manufactured product which are owned or possessed by such person shall be confiscated.
>
> Article 4. In the search for the offences provided in the preceeding article, the officers and sailors aboard Naval vessels, and other officials determined by Presidential Decree may carry out the functions of the judicial police officers.
> In conducting the search provided in the preceeding paragraph, they may, if necessary, bring home any vessel which violated the provisions of this Law....".[98]

---

97. Weissberg, Op. Cit., in note 73 (p. 397), at p. 10.

98. UNLS, Laws and Regulations on the Regime of the Territorial Sea, 1957, at pp. 523-524.

It is obvious that although national sovereignty over the seas adjacent to the territorial waters had already been claimed in 1952 it had not been effectively enforced. On the other hand, the Fishery Resources Conservation Law of 1954 can be seen to have modified the previous claim. It did not exclude any foreign nationals from fishing within the 'peace line', but claimed the right to issue permission for fishing within the designated area.[99] But as the Fishery Law promulgation of 1954 applied to both Korean nationals and foreign nationals what Korea now claimed was an absolute right to regulate fisheries in the high seas adjacent to its territorial sea.

Japan maintained that such a claim was contrary to the principle of the freedom of the high seas and insisted that any regulation of fisheries in the high seas, beyond the three mile limit of the territorial sea, should be decided by the States whose nationals are involved in fishing in these areas. The enforcement of the Fishery Resources Conservation Law therefore caused a serious clash between Japan and Korea. A number of Japanese fishing vessels were captured and "hundreds of Japanese fishermen were arrested, detained and sentenced".[100]

---

99. The demarcation line was almost the same as demarcation line which had been provided in the Paragraph 3 of the Proclamation of 1952, UNLS, Laws and Regulations on the Regime of the Territorial Sea, 1957, at pp. 31 and 523.

100. Weissberg, Op. Cit., in note 73 (p. 397), at pp. 26-27.

On 15 April, 1958, after five years of conflict, the two countries agreed to resume their talks and the Committee on Fishing and Peaceline was convened on 10 October, 1958.[101] The Japanese representatives proposed the establishment of a prohibited area where neither Japan nor Korea would engage in fishing and that in other areas the number of fishing vessels of each State would be determined by two Governments.[102] These talks also failed and negotiations were once more suspended.[103] Although the two countries resumed negotiations in 1959 they could not reach any agreement.

Between 1959 and 1963 further talks were held, but neither of the two countries was prepared to make any concessions to settle the dispute. During this period the Korean authorities seized and sank a number of Japanese fishing boats and arrested many Japanese fishermen. According to Oda and Owada "between 1947 and 1962 Korea seized

---

101. Oda, Op. Cit., in note 34 (p. 387), at p. 27; Weissberg, Op. Cit., in note 73 (p. 397), at pp. 11-12.

102. Ibid, at p. 12. Referring to these proposals Weissberg notes that:
"During these meetings the Japanese submitted a fishery agreement which the Korean Foreign Ministry regarded as clearly implying a 'flat denial of our peace line basis' and neglecting 'current international practice and trends in this field'. Another draft which would have delimited certain prohibited waters and in other areas would have limited the number of ships permitted each side, was likewise rejected. This proposal was turned down on grounds that it was designed to regulate fishing only in regions close to Korea, including those 'normally' considered part of her territorial waters, in disregard of recent tendencies 'to respect the special interests and rights 'of coastal states to the adjacent seas'", ibid, at p. 12; Oda, Op. Cit., in note 34 (p. 387), at pp. 27-28.

103. Weissberg, Op. Cit., in note 73 (p. 397), at p. 12.

301 Japanese vessels and detained 3,658 fishermen".[104] Further negotiations took place between two countries in 1963 and 1964. A number of proposals were put forward but they were not accepted.[105]

4. Agreement Between Japan and Republic of Korea 1965

After 13 years of serious confrontations the Republic of Korea and Japan settled their dispute by signing two agreements on 22 June, 1965 in Tokyo.[106] The first, which was entitled "Japan-Korea Treaty on Basic Relations" aimed to restore their political and cultural relations the rift in which had been the main cause of their disputes.

Article 1 of the above Treaty provided that the two Governments would undertake to normalize their diplomatic and consular relations.[107] Article 2 stated that all

---

104. Ibid, at pp. 11 and 13. The United States in a note sent to the Korean Government protested the illegal seizure of the Japanese fishing vessels and detention of the Japanese fishermen, ibid, at p. 13.

105. For the detailed negotiations of 1963-1964 see ibid, at pp. 67-78. The position of Japan since the Proclamation of 1952 and throughout the negotiations was discussed by Professor Ohira who said:
"The great problem with which we are now concerned is the so-called Rhee line set up on January 18, 1952, that claims to exercise Korean sovereignty over fishing on the seas adjacent to the proper Korean territorial waters. The Rhee Proclamation extends the theory of the continental shelf even to a region of any depth where there may be no continental shelf at all, and attempts to monopolize the high seas to the extent of sixty miles or more from the coast line. Furthermore, the Proclamation makes a fusion of the two theories of the continental shelf and the fisheries conservation zones, and totally thwarts the operation of the Japanese fishing boats within the line. From the standpoint of international law, the Rhee Proclamation is utterly unacceptable dogma and an overt aggression in the human society", Zergo Ohira,

treaties and agreements which had been concluded before 1910 between the two Governments were considered null and void. Japan also recognised the Government of the Republic of Korea as the only lawful Government in Korea.[108]

The second agreement concerned the fishery dispute and was entitled "Agreement Between Japan and the Republic of Korea Concerning Fisheries". Article 1 of this agreement stated that:

> "1. The High Contracting Parties mutually recognise that each High Contracting Party has the right to establish a sea zone (hereinafter "fishery zone") extending not more than 12 nautical miles from its respective coastal baseline, over which it will have exclusive jurisdiction with respect to fisheries. However, in case either High Contracting Party uses the straight base line for the establishment of its fishery zone, the straight base line shall be determined through consultation with the other High Contracting Party.
>
> 2. The High Contracting Parties shall not present objections when one Party excludes the fishing vessels of the other Party from engaging in fishing operations in its Fishery Zone.
>
> 3. Areas where the fishery zones of the High Contracting Parties overlap shall be divided in two by straight baselines joining the ends of the overlapping areas with the midpoints of straight lines drawn across

---

"The Japanese Point of View Concerning Marginal Sea and Fisheries in the Pacific", Paper read before Regional Meeting of the American Society of International Law, University of Washington, Seattle, Institute of International Affairs, Bulletin No. 12, pt. 2, June, 1956, at p. 10.

106. "Japan-Korea Treaty on Basic Relations", Vol. 4 ILM (1965) pp. 924-927; "Agreement Between Japan and the Republic of Korea Concerning Fisheries", Loc. Cit, at pp. 1128-1133.

107. Article 1 of the Japan-Korea Treaty on Basic Relations.

108. Ibid, Article 3.

the areas at their widest points".[109]

The first article clearly indicates that Japan had made a concession and had deviated from its longstanding views on the rights of coastal States in the high seas. The agreement on a 12 nautical miles 'fishery zone' can be seen as the first deviation from Japan's advocacy of the freedom of the high seas beyond the 3 miles of territorial waters. Article 2 of the Agreement provides a 'joint control zone' beyond the 'fishery zone'. This latter area is not as large as the Rhee line, but is still well beyond the 12 nautical miles.[110] The only difference between the Rhee line and the 'joint control zone' is that the nature of the claim has changed from 'unilateral' to 'bilateral'. There is nothing in the Agreement or its Annex to suggest that this 'joint control zone' is part of the high seas and, therefore, open to the nationals of other States.[111]

The provisions of the Agreement and the concessions made by the two Governments are not the subject of this study. What is important from the international point of view is that the unilateral claim of the Republic of Korea over the high seas adjacent to its territorial waters was, eventually, after some modifications, accepted by Japan. The danger remained, however, that the freedom of the high seas might become the subject of bilateral and multilateral agreements eroding it.

---

109. Article 1 of the 'Agreement between Japan and the Republic of Korea concerning Fisheries", Vol. 4 ILM (1965), at p. 1128.

110. Ibid, Article 2.

111. Ibid, Articles 3-10.

The Agreement did not refer to the sedentary species and the bottom fish, i.e. the resources explicitly claimed by the Proclamation of 1952. It is reasonable to assume that the first paragraph of the Rhee Proclamation remained in force while the second paragraph on the high seas and the Fishery Resources Conservation Law of 1954 was modified to allow Japan to exploit these resources. Furthermore, as this was an agreement with Japan only, the rights of other States in the Rhee line or 'joint control zone' remained unchanged.

B- Disputes Concerning the Definition of Natural Resources in the 1958 Geneva Convention on the Continental Shelf

Introduction

During the 19th century and until the emergence of the continental shelf doctrine the freedom of fishing beyond the three mile limit of the territorial waters was a generally accepted principle of the freedom of the high seas.[112] The only exception to this well-established customary law was the exploitation of certain fisheries which later became known as 'sedentary'.[113] This exception was not a general rule of customary international law and applied only to certain species in certain areas.

In 1951, the International Law Commission excluded sedentary species from its draft articles relating to the continental shelf and regarded them as the resources of the high seas.[114] In 1953, the ILC decided that since sedentary species were permanently attached to the seabed, they could be regarded as the natural resources of the continental shelf provided, of course, that they came within its limits. In 1956, the ILC incorporated this view into article 68 of its final draft articles on the continental shelf.[115]

---

112. The only exceptions to the 3 mile territorial waters were the claims of the Scandinavian countries which had asserted 4 miles as their territorial waters as early as 1745, see Jessup, Op. Cit., in note 97 (p. 57), at pp. 31-41.

113. Oppenheim, Op. Cit., in note 5 (p. 22), at p. 333; Fulton, Op. Cit., in note 89 (p. 54), at pp. 696-697; Jessup, Op. Cit., in note 97 (p. 57), at pp. 13-16; Mouton, Op. Cit., in note 3 (p. 65), at p. 138.

114. See above pp. 140-175.

115. Ibid.

This Article (68) was further amended in the Fourth Committee by a proposal sponsored by the six powers,[116] Paragraph 4 of which defined the natural resources of the continental shelf in the following terms:

> "The natural resources referred to in these articles consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile or are unable to move except in constant physical contact with the seabed or subsoil, but crustacea and swimming species are not included in this definition".[117]

Later, during the Plenary Meetings of the Conference the words "...but crustacea and...." were deleted from the latter part of this paragraph and the rest became the Fourth Paragraph of Article 2 of the Convention on the Continental Shelf.[118]

Since the inclusion of the above definition in the Convention adopted at Geneva in 1958, there has been a series of disputes regarding the interpretation of the definition of sedentary species. The expression 'sedentary species' which has been used by various international jurists since the beginning of this century is intended to emphasise the legal character of certain species which had become the subject of special regime. But since the emergence of the continental shelf doctrine, the expression has been

---

116. See above pp. 185-194.
117. UN Doc. A/CONF. 13/42.
118. The deletion of the proviso "...but crustacea and..." was approved by a vote of 59 to 5 with 6 abstentions, 1958 Geneva Conference, 6 Official Records, at pp. 13-15, UN Doc. A/CONF. 13/38.

used as a model for further analogous extensions. More and more species have been considered as sedentary by mere analogy and the expression has expanded to cover a number of species which, until recently, could not conceivably have been considered as coming within the same category as pearl oysters or chanks. It must be emphasised that the definition of natural resources adopted in Article 2(4) of the Geneva Convention on the Continental Shelf, has appeared, without any change, in all the Texts which have so far been proposed by the UNCLOS III.[119] Thus the definition of sedentary species is still a problem which requires legal clarification and interpretation.

---

119. See above pp. 267-268 (notes 202-206).

i. Legal Definition of Sedentary Species Before 1958

Until the beginning of this century there was no reference either in municipal laws or in international law, to a class of fishery known as 'sedentary'.

In the 18th century Vattel stated:

> "Who can doubt that the pearl fisheries of Bahrain and Ceylon may lawfully become property?".[120]

In the 19th century Weaton took the view that:

> "The Ceylon and Persian Gulf pearl fisheries carried on by the United Kingdom are validated, no doubt, by long usage".[121]

In 1894, however, Hall referring to regulations of pearl fisheries in Ceylon stated that the claim to pearl fishery is one:

> "...to the products of certain submerged portions of land which have been treated from time immemorial by the successive rulers of the island as subject of property and jurisdiction".[122]

---

120. Vattel, Op. Cit., in note 36 (p. 33), at p. 107; see above pp. 45-46.

121. Weaton's Elements of International Law, first published in 1836, 6th edition, 1929, at p. 375.

122. W.H. Hall, Foreign Powers and Jurisdiction, 1894, at p. 243, note 1, cited by Oppenheim, Op. Cit., in note 5 (p. 22), at p. 333, note 1. The distinction between the sea and its bed had also been noted and emphasised by Grotius as early as 1604 when his Mare Liberum was published. He stated that: "...the sea can in no way become the private property of any one, because nature not only allows but enjoins its common use. Neither can the shore become the private property of any one. The following qualification, however, must be made. If any part of these things is by nature susceptible of occupation, it may become the property of the one who occupies it only so far as such occupation does not affect its common use. This qualification is deservedly

In 1904 Westlake considered that:

> "The case of the pearl fishery is peculiar, the pearl being obtained from the sea bottom by divers, so that it has a physical connection with the stable element of the locality which is wanting to the pursuit of fish swimming in the water. When carried on under State protection, as that of British ships in pursuance of treaties with certain chiefs of the Arabian mainland, it may be regarded as an occupation of the bed of the sea. In that character, the pearl fishery will be territorial even though the shallowness of the water may allow it to be practised beyond the limit which the State in question generally fixes for the littoral sea, as in the case of Ceylon it is practised beyond the three mile limit generally recognised by Great Britain".[123]

It is evident from the authorities cited above that the subjects of the claims beyond the territorial waters were limited to certain species namely oysters, peal oysters, coral, chanks, trochus, sponges, sea-cucumber and beche-de-mer. They were claimed on the basis of long usage or

---

recognised", Op. Cit., in note 32 (p. 32), at p. 30. In Duchess of Sunderland v. Watson (1868) 6 M. 99, Lord Neave referred to mussels and observed that: "They are almost partes soli, like seaweeds. The characteristics of the mussel are (1) it has so little power of motion that it may be regarded as immoveable and localised;(2) it is gregarious; (3) it is capable of cultivation and artificial propagation; (4) its chief habitation is in sand and mud banks, in estuaries or creeks near the shore. By these it is distinctly marked off not only from floating fish, but from lobster, which have great powers of motion, and other shellfish,like whelks, which do not congregate in sculps, but move about".

123. John Westlake, International Law, Part 1, Peace, 2nd edition, 1910, at pp. 190-191; Oppenheim, Op. Cit, in note 5 (p. 22), at p. 333. For further discussions on the application of occupation and prescription regarding certain sedentary species see above pp. 23-45. As to State practice before 1945 see above pp. 45-60.

occupation.[124] Furthermore, the above species were not claimed collectively by one State. National or local legislation referred specifically to the species by name wherever they were claimed outside the territorial waters.[125]

The expression 'sedentary species' or 'sedentary fisheries' as far as can be ascertained, was first used by Fulton in 1911. Under the heading of "The inadequacy of the three mile limit" he made the following statement:

> "The other class of fisheries referred to for sedentary animals connected with the bottom, such as oysters, pearl oysters and coral which are found in shallow water as a rule and usually near the coast, have always been considered on a different footing from fisheries for floating fish. They may be very valuable, are generally restricted in extent, and are admittedly capable of being exhausted or destroyed; and they are looked upon rather as belonging to the soil or bed of the sea than to the sea itself. This is recognised in municipal law and international law also recognises in certain cases a claim to such fisheries when they extend along the soil under the sea beyond

---

124. See above pp. 23-45.

125. According to Smith:
"It now seems to be well established by practice that particular States may acquire by usage and undisturbed possession an exclusive title to the small portions of the seabed in which these products are to be found. Examples are fairly numerous and widely scattered. British legislation has been enacted to regulate oyster beds in St. George's Channel over twenty miles from the nearest coast, and also the pearl fisheries in the Gulf of Mannar between India and Ceylon. This country has also formally admitted the right of Tunisian Government to the exclusive control of the sponge fisheries off the Tunisian coast, although these lie well outside territorial limits. Other claims of the same kind which seem to be admitted are made by Republic of Mexico and Colombia, and probably other States", The Law and Custom of the Sea, 3rd edition, 1959, at p. 81; see also above pp. 45-60.

the ordinary territorial limit".[126]

The description of species referred to by Fulton as sedentary species can be analysed as follows: First, all the species referred to as sedentary were animals. Thus, benthic plants, such as seaweeds did not come within the description. Secondly, they were referred to as valuable and restricted in extent. This was a direct reference to pearl, coral and chank fisheries and not to whatever species could be found on the seabed outside territorial waters. And finally, as well as municipal laws, international law, according to Fulton, had also recognised the special character of these species. In the absence of any evidence to the contrary it can be assumed that the right of coastal States over sedentary fisheries beyond their territorial waters was based in their claims to certain specified species on the one hand and the recognition of such claims by international law on the other.[127]

Having described the legal character of sedentary fisheries, Fulton immediately states that "cases in point are...." and then refers to pearl fisheries of Ceylon, pearl fisheries of Western Australia and Queensland, pearl fisheries of Mexico and Colombia, oyster beds of Granville in the English Channel, and coral beds in the Mediterranean off the coasts of Algeria, Sardinia and Sicily which are regulated by Italians and French.[128]

---

126. Fulton, Op. Cit., in note 89 (p. 54), at pp. 696-697.

127. Ibid, at p. 697.

128. Ibid; see also L.C. Green, "The Continental Shelf", Vol. 4 Current Legal Problems (1951) at pp. 64-71.

Both the description of sedentary fisheries and the cases referred to by Fulton clearly indicate that the expression "sedentary fisheries" was used to refer to certain species which had already been recognised by international law on the ground of long usage or occupation.[129] From 1911 to 1958 the expression was used invariably by almost all international jurists in the same context as it was used by Fulton.[130] As discussed earlier, the ILC also interpreted the expression "sedentary species" as applying to those specified species which had been recognised, as an exception to the freedom of fishing beyond territorial waters, by international law.[131]

The first national legislation using the expression "sedentary fisheries" was enacted in 1939 by Libya.[132] Article 9 of the 'Ordinance concerning Fishing in Libya' provided a "restricted fishing zone" which extended to 6 miles from the shore. Article 16 stated that foreigners could not engage in catching of "sedentary fisheries of any kind" throughout the year.[133]

---

129. H. Lauterpacht, Loc. Cit., in note 19 (p. 27), at pp. 376-433; Mouton, Op. Cit., in note 3 (p. 65) at pp. 138-161.

130. See for instance, Sir Cecil Hurst, Loc. Cit., in note 15 (p. 39), at pp. 34-43; Oda, Op. Cit., in note 34 (p. 387), at pp. 181-186; Mouton, Op. Cit., in note 3 (p. 65), at pp. 138-161 and Lauterpacht, Loc. Cit., in note 19 (p. 27), at pp. 376-433.

131. See above pp. 140-175.

132. Libya was an Italian colony from 1912 to 1945 but fell under British and French administration after the Second World War. It became an independent State in 1951, Collins English Dictionary, 1979, at p. 848.

133. See the Text in UNLS, Laws and Regulations on the Regime of the Territorial Sea, 1957, at pp. 526-527.

ii. Legal Definition of Sedentary Species in Article 2 (4) of the Convention on the Continental Shelf

Article 2 (4) of the 1958 Geneva Convention on the Continental Shelf defined the sedentary species as:

> "...organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil".[134]

This definition bears no resemblance to the concept of the sedentary species as it existed before 1958. Firstly, species are referred to as 'organisms' which means both animals and vegetables. Thus the definition has been expanded to include all the benthic plants. Secondly, the sedentary species covered by existing law were, as discussed earlier, all sessile animals belonging to the mollusc family. The new definition included all other species which are in constant physical contact with the seabed or subsoil; a definition which thus includes not only most species of mollusc, but also various species of crustacea.[135] Thirdly, the inclusion of the condition that the species be at 'harvestable stage' signified that only at certain stages could they be regarded as natural resources.[136] Finally, the area over which coastal States exercise jurisdiction over the sedentary species has expanded to where the exploitation is technically possible. Before 1958 the exclusive

---

134. UN Doc. A/CONF. 13/38.

135. See above pp. 230-270.

136. Ibid. The problem of applying the criterion of exploitation of certain species of crustacea at 'harvestable stage' is very acute. Some species can be caught within the limit of the territorial sea while immature and raised by artificial means; these species, at harvestable stage would be resources of the high seas. See above pp. 230-270.

rights of a few coastal States over certain sedentary fisheries were more limited and extended only to a few miles beyond the three mile limit of their respective territorial waters. Furthermore, the exclusive right of coastal States over certain sedentary species was based on occupation or prescription. If a coastal State had not been engaged in exploitation of sedentary fisheries for a period, during which occupation or prescription could be established, it would not, under international law, have been able to claim exclusive rights regarding sedentary species. The Convention on the Continental Shelf renders this requirement invalid since under Article 2 (4) coastal States exercise their sovereign rights over the continental shelf and its natural resources; the rights which "do not depend on occupation, effective or notional or any express proclamation".[137]

It is, therefore, reasonable to conclude that the legal definition of sedentary species in Article 2 (4) is a new legal definition which has nothing in common with the legal concept of sedentary fisheries before 1958. The new definition soon gave rise to disputes related to its interpretation. The disputes regarding the interpretation of Article 2 (4) were directly concerned with species belonging to crustacea and related specifically to the extent of their mobility; a criterion which was adopted by the Conference although neither from the legal nor from the biological point of view can it at once settle the problem of

---

137. UN Doc. A/CONF. 13/38.

inclusion or exclusion of certain species from the definition of natural resources of the continental shelf.[138]

---

138. See above pp. 195-270.

iii. The Disputes

1. The 1962 Dispute Between France and Brazil

The dispute between France and Brazil over lobster began in 1962 and was the first to underline the difficulties concerning the application of the legal definition of sedentary species in Article 2 (4) of the 1958 Geneva Convention on the Continental Shelf. The dispute started when Breton fishermen who traditionally exploited lobsters off the Atlantic coast of North Africa faced a substantial decrease in the population of this species and moved further west to the north coast of Brazil to an area outside the three mile limit of the territorial sea, but within the Brazilian continental shelf. The presence of Breton fishermen who were highly experienced and well equipped caused a certain amount of apprehension among the local fishermen who therefore sought their Government's protection. The Brazilian Government intervened and on 2 January, 1962 a French vessel, the 'Cassiopee' was arrested. The arrest took place outside territorial waters and a few more similar arrests took place in the same year.[139]

On January 30, 1963, the Brazilian authorities arrested three French ships which were engaged in lobster fishing. On 12 February, 1963 it was made clear by the Brazilian authorities that the Government of Brazil regarded lobster

---

139. L.F.E. Goldie, in The Law of the Sea, edited by Lewis M. Alexander, 1967, at p. 286.

as one of the natural resources of the continental shelf.[140] The French Government insisted that neither lobster nor any other species of crustacea could be regarded as the natural resources of the continental shelf and, therefore, the Breton lobstermen remained in the area.[141] A few days later the French fishing vessels were given "a forty eight hour ultimatum by Brazil to withdraw from an area extending one hundred kilometres from the Brazilian shore".[142] On 21 February, 1963 the French Government, in reaction to the Brazilian ultimatum, sent a French warship 'Tartu' to Brazilian waters in order "to protect French nationals and ensure freedom of the seas".[143] This reaction by France, according to Journal do Brazil amounted to naval mobilization in Brazil.[144] The 'Tartu' was reported to have been re-directed before reaching its destination,[145] but on 9 March, 1963 a small cruiser 'Paul Goffney' was sent to protect the French lobstermen and subsequently all French fishing vessels were escorted to Brest.[146] The two countries recalled their

---

140. I. Azzam, "The Dispute between France and Brazil over Lobster Fishing in the Atlantic", 18 ICLQ (1964) pp. 1453-1459, at p. 1453; Goldie, Loc. Cit., in note 139 (p. 425), at p. 287.

141. Goldie, Loc. Cit., in note 139 (p. 425), at p. 287.

142. Azzam, Loc. Cit., in note 140 (p. 426), at pp. 1453-1454.

143. Ibid; see also Whiteman, Op. Cit., in note 25 (p. 73), at p. 864.

144. Jornal do Brazil, March 28, 1963.

145. Whiteman, Op. Cit., in note 25 (p. 73), at p. 864.

146. Azzam, Loc. Cit., in note 140 (p. 426), at p. 1454.

ambassadors and broke off diplomatic relations.[147]

The interpretation of the definition of sedentary species in Article 2 (4) was at the centre of the disagreement between the two countries, although neither France nor Brazil had, at the time of their dispute, ratified the Convention on the Continental Shelf.[148] Furthermore, the Convention itself had not, at that date, received enough ratifications to enter into force.[149]

Professor Rousseau has given two reasons in support of the French Government's claim that lobster was a resource of the high seas and not of the continental shelf. First, he considered that the rejection of the proviso "but crustacea and swimming species are not included in this definition" in the Plenary Meetings of UNCLOS I was a self-evident principle; it was rejected because the definition required, he said, "no further clarification".[150] Secondly, he considered that the species in dispute are capable of swimming and, therefore, are a high seas resource over which coastal States could not claim sovereign rights.[151]

The first argument, however, cannot be sustained since many species of crustacea are sedentary and cannot move except in constant physical contact with the seabed or the

---

147. Azzam, Loc. Cit., in note 140 (p. 426), at p. 1454.

148. See New Directions in the Law of the Sea, Op. Cit., in note 19 (p. 12), at p. 101, note 1.

149. The Convention entered into force on 10 June, 1964, ibid.

150. C. Rousseau, "Chroniques des Faits Internationaux", 67 Revue Général de Droit International Public (1963), at pp. 133-136.

151. Ibid.

subsoil.[152] To assume that all these species were excluded merely because they belong to the crustacean family would seem to be erroneous. It appears that the delegates at the 1958 Geneva Conference decided that the Proviso was rather a handicap and without it the definition itself would fulfil the necessary requirements for the determination of the legal status of various species. Professor Bailey of Australia, who was one of the sponsors of the definition of sedentary species stated in 1960 that:

> "It is the earnest hope of its draftsmen that it will be found, in practice, to exclude the shrimp and sole from the natural resources of the continental shelf".[153]

This view has been challenged by Goldie who considered that:

> "... Sir Kenneth Bailey's exclusion of the shrimp and the sole (i.e. crustaceans and demersal fish) would appear to rest upon a negative implication to be derived from the words which the Conference permitted to remain in Paragraph (4). Apart from the questioning the propriety of detecting a negative implication after the Plenary Session had deleted the express negative proviso, one should, I think, point out that negative implications have traditionally been, in the context of interpreting federal constitutions no less than that of treaties, uncertain guides. Indeed, in the subsequent history of Paragraph (4) its negative implication has fared little better than most others".[154]

Brazil did not agree with the French interpretation of Article 2 (4) and maintained that the rejection of the

---

152. It has been explained (see Chapter V) that all the species belonging to Anomura Reptantia, such as the hermit crab, mole crab and shore crab are essentially sedentary according to Article 2 (4).

153. See 1 Adelaide Law Review (1960) at pp. 1 and 11.

154. Goldie, Loc. Cit., in note 139 (p. 425), at p. 286.

Proviso in the Plenary Session was an indication that crustaceans were included in that definition. According to Azzam:

> "Brazil contends that inclusion of crustacea within the continental shelf is self-evident and requires nomention, a position which is concurred in by other Latin American countries desiring to curtail foreign development of their fisheries and who have adopted broad interpretations of their rights over the continental shelf".[155]

It must be mentioned here that Brazil, unlike Chile, Ecuador and Peru had not claimed sovereignty over all the natural resources of the continental shelf and its approach to the exploitation of natural resources of the continental shelf had been more in line with United States policy, although the possibility of a change of policy regarding the living resources of the superjacent waters of the continental shelf had not been completely ruled out. Article 1 of the Decree no. 28,840 of 8 November, 1950 stated that:

> "It is formally proclaimed that that part of of the continental shelf which adjoins (corrispondente) the continental and insular territory of Brazil is integrated into the territory, under the exclusive jurisdiction and dominion of the Federal Union"[156]

Article 2 referred to the resources and stated:

> "The utilization and exploration of products of natural resources of that part of national territory shall be subject in all cases to Federal authorities or concession".[157]

And Article 3 stated:

---

155. Azzam, Loc. Cit., in note 140 (p. 426), at p. 1457

156. See the Text in UNLS, Laws and Regulations on the Regime of the High Seas, Vol. 1, 1951, at pp. 299-300.

157. Ibid, at p. 300.

> "The rules governing navigation in the waters covering the aforesaid continental shelf shall continue in force without prejudice to any further rules which may be made, especially as regards fishing in that area".[158]

The problem of the interpretation of Article 2 (4) could have been decided by the International Court of Justice under the provisions of the Optional Protocol regarding the Compulsory Settlement of Disputes, had these two Governments signed and ratified the Convention on the Continental Shelf and its Protocol. However France, although she had accepted the principle regarding Compulsory Settlement, had not signed the Protocol and Brazil had not accepted it at all.[159]

During the dispute France made proposals for a modus vivendi and for arbitration to settle the differences, but Brazil did not accept either of these proposals.[160]

On 10 December, 1964, however, the two Governments finally reached an agreement based on a political compromise. The basis of the agreement was that the Breton lobstermen would be allowed to catch lobster in the prohibited zone with no more than twenty-six vessels and for five years only. In return:

> "...they were obliged to give tribute in lobsters and fish to the private Brazilian

---

158. Ibid.

159. See statement of Professor Gras at the 13th Plenary Meeting, Geneva Conference, Official Records, Vol. II, UN Doc. A/CONF. 13/38, at p. 31. As to the"Optional Protocol of Signature Concerning the Compulsory Settlement of Dispute", see 52 AJIL (1958) at pp. 826-864.

160. Azzam, Loc. Cit., in note 140 (p. 426), at p. 1459.

group for the privilege".[161]

Goldie, discussing the implications of the above agreement and replying to Professor Rousseau's arguments stated:

> "Professor Rousseau considers that the agreements being 'purement professionel et corporatif' leaves unsolved 'la problème juridique ...entre les deux gouvernements'. But does it? May not the ad hoc solution create difficulties - should France refuse to acknowledge that the disputed crustaceans are indeed to be viewed as resources of Brazil's continental shelf? May not the Breton lobstermen have, by the undertaking to deliver a percentage of their catch off the Brazilian continental shelf, placed themselves in an unfavorable position, namely one analogous to 'contractual licensees' in the common law? And may not France, by not intervening to prevent this resolution of the immediate problem, be viewed as having tacitly acquiesced in the Brazilian claim?".[162]

Although the agreement between France and Brazil solved the problem of Breton lobstermen and the Brazilian local fishermen, it cannot be considered to represent a solution to the problem of the definition of sedentary species in Article 2 (4). France ratified the Convention on the Continental Shelf on June 14, 1965 and in doing so it simultaneously declared that:

> "The Government of the Republic of France interprets the expression 'living organisms belonging to the sedentary species' as excluding the crustaceans, with the exception of the species of crabs called barnacles".[163]

---

161. Goldie, Loc. Cit., in note 139 (p. 425), at p. 287.

162. Ibid. On 25 March, 1970 the Brazilian Government extended its territorial sea to 200 nautical miles. See "Decree-Law Extending Territorial Sea to 200 Miles", in 10 ILM (1971) pp. 1224-1226.

163. Rene Jean Dupuy, "Regime for the Seabed: Living Resources of Seabed and their Protection", in Pacem in Maribus, Vol. II, 1971, at pp. 166-167.

The dispute over the lobster was only one indication of the problem concerning the interpretation of the definition of sedentary species in Article 2 (4). The definitional problem is not, however, one relating to lobster alone since there are hundreds of different species of crustacea and molluscs which are neither sedentary nor swimming species. They cannot be regarded as swimming species because they do not swim and when they do it is only a defence mechanism employed by these species in time of danger.[164]

Bilateral agreements may provide a solution between the States concerned, but they do not provide a permanent solution to the problem. The danger is that various species may become the subject of various legal regimes; lobster, for instance, can be regarded as natural resources of the continental shelf of Brazil while the same species may be natural resources of the high seas in other places. Since the same definition of sedentary species has appeared continuously in the Texts which have been presented by the UNCLOS III it is important to settle the contradictory views concerning the interpretation of the definition of the sedentary species.[165]

---

164. See above pp. 230-270

165. See above pp. 267-268 (notes 202-206).

2. Dispute Between Japan and the United States

On May 20, 1964 the United States Congress passed an Act entitled "Law Prohibiting Foreign Vessels from Fishing in Territorial Waters and on Continental Shelf".[166] The Act which became known as the Bartlett Act made it unlawful for foreign vessels to engage in fishing within the territorial waters of the United States. It further made it unlawful for any foreign vessel to engage in fishing "within any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters or to engage in the taking of any continental shelf fishery resource which appertains to the United States except as provided in this Act or as expressly provided by an international agreement to which the United States is a party".[167] According to Section 2 of the above Act any person violating the Act would face a maximum penalty of one year imprisonment or a fine of up to $10,000 or both. Furthermore, vessels involved "in any manner" in the violation of the Act would be subject to forfeiture.[168]

The Act did not specify what it meant by "waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters", bearing in mind that in 1966, two years after the enactment of the

---

166. Public Law 88-308, 88th Congress, c. 1988 May 20, 1964, 78 Stat. 194. See the Text in 3 ILM (1964) at pp. 642-644.

167. Ibid.

168. Ibid. Section 2 (a) and (b).

Bartlett Act, the United States Government adopted a 12-mile exclusive fishing zone.[169] The expression 'continental shelf fishery resource' was also new and ambiguous. Section 5 (a) of the Bartlett Act states:

> "As used in this Act, the term 'continental shelf fishery resource' includes living organisms belonging to sedentary species; that is to say, organisms which at the harvestable stage are either immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil of the continental shelf".

Although the definition of sedentary species in Section 5 (a) of the Bartlett Act is exactly the same as Article 2 (4) of the Geneva Convention on the Continental Shelf, the scope of the latter is more limited than the former since sedentary species are the only living organisms of the continental shelf over which coastal States can exercise their sovereign rights. The use of the term 'includes' while referring to 'continental shelf fishery resource' means that sedentary species are only one part of the continental shelf fishery resources.[170] This is

---

169. Exclusive Fishery Zone Act 1966, 16 USC ss 1091-1094 (originally enacted 14 October, 1966; Public Law 89-658).

170. Section 5 (b) of the Bartlett Act stated that: "The Secretary of the Interior in consultation with the Secretary of State is authorised to publish in the Federal Register a list of the species of living organisms covered by the provisions of subsection (a) of this Section". It was not until four years later that the first list was issued (33 Fed. Reg. 1614, 1968). The list included 16 species. There were two revisions regarding the list in 1971 which brought the number of species to 26 (Fed. Reg. 11923, 1971). Another revision in 1974 brought the number of species to the total of 31 species (Fed. Reg. 20381, 1974); see 13 ILM (1974) at pp. 89-93; see also above pp. 236-264.

further evident in Section 5 (c) which states:

> "As used in this Act, the term 'fisheries' means the taking, planting or cultivation of fish, mollusks, crustaceans, or other forms of marine animal or plant life by any vessel or vessels, and the term 'fish' includes mollusks, crustaceans, and all other forms of marine animal or plant life".

Moreover, under the Bartlett Act the rights claimed are the same as the rights exercised within the territorial waters; that is to say sovereignty, while coastal States can only exercise sovereign rights over the sedentary species under the Continental Shelf Convention.

As was pointed out earlier, Japan did not sign or ratify the 1958 Geneva Convention on the Continental Shelf and she always opposed the idea of appropriation by any coastal State of the living resources, including sedentary species, beyond the three mile limit of the territorial waters. Furthermore, Japanese fishermen had been involved in the exploitation of King and Tanner crabs in the Eastern Bering Sea outside the United States' territorial waters to the extent of having established a historic right over these species. This right was not denied by the United States although Japan during the course of negotiations with the United States did not rely on her long-established right, but maintained that King crabs were resources of the high seas.

On the same day as the enactment of the Bartlett Act the State Department issued a statement in which the views of the two Governments regarding the King crab were

indicated.[171] The Statement, however, pointed out that:

> "The United States Government has assured the Japanese Government that prior to implementing this legislation with respect to fishery resources of the continental shelf, the United States Government will consult with the Japanese Government and that in such consultations full consideration will be given to the views of the Japanese Government and to Japan's long-established King crab fishery".[172]

The statement indicated the different views taken by the two Governments regarding the exploitation of the continental shelf fishery; while Japan insisted that King crabs were high seas resources, the opposite view was taken by the United States Government.[173] Any decision to let Japanese

---

171. 50 Department of State Bulletin 1964, at p. 936; see the Text in 3 ILM (1964) at p. 645. The first part of the statement read as follows:
"The Governments of Japan and the United States have held a series of discussions in Washington on the effect of the US legislation s. 1988, which was signed by President Johnson today. The United States Government has explained to the Japanese Government that this legislation would not, of itself, constitute the assertion of any right to jurisdiction over the resources that does not already exist and that it is concerned primarily with providing meaningful protection to such rights as now exist or which might be acquired at some time in the future. The position of the Government of Japan is that it is not bound by the Convention on the Continental Shelf, to which Japan is not a party, and that, therefore, the rights of the Government of Japan will not be affected by the provisions of s. 1988 relating to fishery resources of the continental shelf...". Ibid.

172. Ibid.

173. On 5 February, 1965, the United States and the Union of Soviet Socialist Republics signed an agreement relating to the fishing of King crab on the continental shelf (US - USSR Agreement on Fishing for King Crab on the Continental Shelf), see the Text in 1965 UNTS Vol. 541, at p. 97; see also 4 ILM (1965) at pp. 359-361. Paragraph 1 of this agreement stated:
"The King crab is a natural resource of the continental shelf over which the coastal State has sovereign

fishermen exploit King crabs would be based on their "long-established King crab fishery in the eastern Bering Sea". The representatives of the two Governments met in Washington from 15 October to 24 November, 1964 and signed a two year agreement relating to the King crab fishery in the eastern Bering Sea.[174] The different views of the two Governments on the legal status of the exploitation of the King crab were clearly reflected in the note of agreement sent by the Japanese Ambassador to the United States' Secretary of State.[175]

The above agreement did not settle the more fundamental problem involved in the dispute; that is, the clarification of the legal status of the King crab. The concession made by the United States was based on the historic rights of the Japanese fishermen in the eastern Bering Sea and not on the basis of King crab being a resource of the high seas.

---

rights for the purpose of exploration and exploitation in accordance with the provisions of Article 2 of the Convention on the Continental Shelf", ibid.

174. Agreement of 25 November, 1964; UNTS, Vol. 533, at pp. 32-36.

175. The Agreement stated inter alia:
"1. The Government of Japan holds the view that King crabs are a high seas fishery resource, and that nationals and vessels of Japan are entitled to continue fishing for King crabs in the eastern Bering Sea.

2. The Government of the United States of America is of the view that King crab is a natural resource of the continental shelf over which the coastal State (in this case the United States of America) has exclusive jurisdiction, control and rights of exploitation.

3. However, the two Governments, having regard to the historical fact that nationals and vessels of Japan have over a long period of years exploited the King crab resource in the eastern Bering Sea, have

Moreover, it is clearly indicated in the agreement that Japanese fishermen were excluded from exploiting any other continental shelf fisheries in any part of the United States' continental shelf and that in the eastern Bering Sea only King crabs were subjects of the agreement.[176]

In 1968 the first list of the continental shelf fisheries of the United States was issued by the Department of the Interior; the list enumerated 16 species among which various species of King and Tanner crabs were included.[177] The agreements of 1968,[178] 1970,[179] and 1972[180] between Japan and the United States included the fisheries of tanner crabs as well as the king crabs in the eastern Bering Sea.

In all the above agreements the same reference was made to the different views of the two Governments on the legal status of these species; it was stated repeatedly that the admission of the Japanese fishermen to exploit these species was based on 'long-established practice' of the Japanese nationals and vessels in the eastern Bering

---

agreed, without prejudice to their respective positions as described above....". Ibid.

176. This agreement was renewed in 1966 for a further 2 years, UNTS, Vol. 680, at p. 382.

177. 33 Fed. Reg. 1614, 1968; see above pp. 236-264.

178. UNTS, Vol. 714, 1968, at p. 386.

179. UN St/Log/Ser. B/16/Add. 1, at p. 100.

180. See Shigeru Oda, The International Law of Ocean Development, Basic Documents, Vol. II, 1975, at p. 486.

Sea. The agreement of 1972 provided a designated zone within which the Japanese exploitation of the King crab and Tanner crab for the years 1973 and 1974 would amount to 27,000 and 600,000 respectively; outside the designated zone the Japanese fishermen were allowed to catch 430,000 King crabs and 8,000,000 Tanner crabs.[181]

The two Governments did not sign any agreement regarding the King and Tanner crab on the basis of their earlier agreements.[182] Between 1974 and 1976 the United States Government was studying the possibilities of the declaration of a 200-mile fishery and conservation zone. It must be noted that the notion of a 200 mile EEZ or FZ was embodied in the 1975 Informal Single Negotiating Text produced by UNCLOS III.[183] On 13 April, 1976 the Fishery Conservation and Management Act of 1976 was enacted by the United States' Congress; this Act unilaterally extended the United States fisheries jurisdiction to 200 miles.[184]

---

181. Ibid.

182. The United States, in fact, introduced tougher measures regarding the exploitation of the continental shelf fisheries by foreign nationals and, as will be discussed shortly, in 1975 two of the Japanese vessels were seized and fined for taking of lobsters and crabs. See below (3) "The United States Regulations Regarding Lobsters".

183. See H.G. Knight, Managing the Sea's Living Resources, 1977, at pp. 78-83.

184. Public Law 94-265, 94th Congress, HR. 200, 13 April, 1976; see the Text in 15 ILM (1976) at pp. 635-650.

The Japanese Government made an official protest to the above enactment.[185] On 10 February, 1977, the two Governments signed an agreement entitled "Agreement Concerning Fisheries off the Coasts of the United States".[186] This was an overall agreement regarding the fishing of both sedentary and non-sedentary species within the 200 mile fishery zone of the United States in both the Atlantic and the Pacific by Japanese vessels.[187] It was explicitly indicated in the agreement that all fishing activities by Japanese vessels within the United States' 200 mile fishery and conservation zone were subject to the United States

---

185. The Japanese protest read as follows:
"The Embassy of Japan presents its compliments to the Department of State and, under instructions of its home Government, has the honor to express the regrets of the Government of Japan over the recent enactment of the Fishery Conservation and Management Act of 1976, in consonance with the previously stated position of the Government of Japan that all nations should refrain from taking measures to establish unilaterally a two hundred nautical mile exclusive fishery zone prior to the conclusion of the Law of the Sea Conference. The Embassy further has the honor to state the position of the Government of Japan that the unilateral establishment of exclusive fishery management authority based on the above-mentioned Act cannot be deemed valid under international law and that the traditional interests of the Japanese fishing industry on the high seas should not be injured on account of the unilateral action of the Government of the United States". Knight, Op. Cit., in note 183 (p. 439), at p. 88. An official protest was also made by the Soviet Union regarding the Act; for further discussions see Knight, ibid, at pp. 88-89.

186. See the Text of the agreement in 16 ILM (1977) at pp. 287-294.

187. Ibid; see also Knight, Op. Cit., in note 183 (p. 439), at pp. 83-92.

regulations and requirements.[188] Unlike the previous agreements there was no mention of historic or any other right by the Japanese fishermen and vessels.

3. The United States Regulations Regarding Lobster

In 1960 the Department of State was requested by the Senate Foreign Relations Committee to clarify the definition of the term 'natural resources' in Article 2 (4) of the 1958 Geneva Convention on the Continental Shelf. The answer

---

188. Annex I of the above Agreement stated inter alia:

"1. The Government of Japan will submit an application to the Government of the United States for each fishing vessel of Japan that wishes to engage in fishing pursuant to this agreement. Such application shall be made on forms provided by the Government of the United States for that purpose.

2. Any such application shall specify:

(a) the name and official number or order identification of each vessel for which a permit is sought, together with the name and address of the owner and operator thereof;

(b) the tonnage, capacity, speed, processing equipment, type and quantity of fishing gear, and such other information relating to the fishing characteristics of the fishing vessel as may be requested;

(c) a specification of each fishery in which in which each such fishing vessel wishes to fish;

(d) the amount of fish or tonnage of catch by species contemplated for each such fishing vessel during the time such permit is in force;

(e) the ocean area in which, and the season or period during which such fishing would be concluded; and

(f) such other relevant information as may be requested.

3. The Government of the United States shall review each application, shall determine what conditions and restrictions related to management and conservation of fishery resources may be needed, and what fee will be required. The Government of the United States shall inform the Government of Japan of such determinations.

.....

was as follows:

> "The definition of 'natural resources' in the Continental Shelf Convention includes such species as shellfish which burrow into the sea bottom or are constantly in contact with the sea bottom during the part of their life history when they are of value commercially. Hence clams, oysters, abalone etc are included in the definition; whereas shrimp, lobsters and finny fish are not".[189]

In 1963 the position of the United States Government was, once more, clearly manifested in the following letter written by the Assistant Secretary of State to the State Department:

> "It was recently pointed out to the American Consulate-General in Nassau by the Colonial Secretary of the Bahamas that the boundaries of the colony are considered to include the area of the continental shelf which lies beneath the sea contiguous to the coasts of the Bahamas and that the Government of the Bahamas claims the right to enforce jurisdiction over this shelf. It is understood that this claim applies in particular to lobster and that the Bahamas enforces its laws that only Bahamians may take lobsters in waters around the Bahamas and to a depth of five fathoms. The United States recognises that the natural resources of the continental shelf appertain to the coastal State. This includes living resources if, at their harvestable stage, they are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed. Since lobsters can swim, the United States does not consider them resources of the

---

5. Upon acceptance of the conditions and restrictions by the Government of Japan and the payment of any fees, the Government of the United States shall approve the application and issue a permit for each fishing vessel of Japa,.....". For the full Text of the Agreement see 16 ILM (1977) at pp. 287-294.

189. Hearing before the Committee on Foreign Relations, United States, 86th Congress, 2nd Session, 20 January, 1960, at pp. 82-83; Whiteman, Op. Cit., in note 25 (p. 73), at p. 863.

> continental shelf.....
> Should any American fisherman be apprehended for fishing for lobsters or other species outside the territorial sea, every action practicable would, of course, be undertaken by the Department for the protection of their welfare".[190]

In 1964 the Bartlett Act, referred to above, provided for its application to the continental shelf fishery of the United States without specifying the organisms involved and it was not until 1968, as already stated, that the first list of 16 designated shelf species was published by the Department of the Interior.[191] Subsequent amendments in 1971 brought the total number of designated species to 26, all of which were sedentary according to Article 2 (4) of the 1958 Geneva Convention on the Continental Shelf.[192] A change in the United States' Government policy occurred, however, in 1973 with the enactment of the Offshore Shrimp Fisheries Act of 1973 which listed 31 species among which the American Lobster (homarus americanus) was included as one of the designated species of the continental shelf.[193] The Act, however, did not specify an exact date for the enforcement of the new policy.

On 5 September, 1974 new Guidelines for the enforcement of the United States policy regarding the continental shelf resources were announced by the Department of State.[194] On

---

190. Whiteman, Op. Cit., in note 25 (p. 73), at pp. 863-864.

191. See above pp. 236-264.

192. Ibid.

193. Public Law No. 92-242; 87 Stat 1061; see the Text in 13 ILM (1974) at pp. 89-93.

194. Guidelines for Enforcement of United States Rights to Continental Shelf Fishery Resources, Department

the same day the United States sent a Circular Note stating that the new Guidelines would be enforced as from 5 December, 1974 to the following major fishing nations : Canada, Czechoslovakia (in charge of Cuban interests), Denmark, the Federal Republic of Germany, The German Democratic Republic, Finland, France, Greece, Iceland, Italy, Japan, Republic of Korea, Mexico, Norway, Bulgaria, Poland, Portugal, Spain, Romania, the Soviet Union, the United Kingdom and Venezuela.[195] The Circular Note stated inter alia that:

> "Pursuant to the Convention of the Continental Shelf and international law, the United States exercises exclusive sovereign rights for the purposes of exploration and exploitation of the living resources of its continental shelf. These rights have been implemented by domestic legislation".[196]

It further stated that:

> "The United States was prepared to enter into negotiations with any Government for the purpose of establishing procedures designed to reduce and control the incidental catch of continental shelf fishery resources of the United States by fishermen using bottom gear (including bottom trawling gear)".[197]

Paragraph 1 of the new Guidelines stated that:

> "The taking of continental shelf fishery resources from the United States continental shelf will result in the arrest and seizure

---

of State Press Release No. 363 (12 September, 1974). See the Text in 13 ILM (1974) at pp. 1297-1298.

195. Department of State File No. P 74 0103-1509; see also A.W. Rovine, "Contemporary Practice of the US Relating to International Law", 69 AJIL (1975) at p. 150. In a note to Canada (11.9.74) it was stated that the new Guidelines would not be applied to Canada; Rovine, Loc. Cit., in note 195 (p. 444), at p. 150.

196. Ibid.

197. Ibid.

> of any vessel taking such resources, except as provided by the United States in bilateral agreements. For the purpose of determining whether such a taking has occurred, vessels may be boarded when engaging in either of the following acts:
>
> (a) Fishing above the continental shelf of the United States with gear which is designed specifically to catch shelf fishery resources; or
>
> (b) Fishing above the continental shelf of the United States with bottom gear which can be expected to result in the catch of continental shelf fishery resources except where the procedures used are designed to reduce and control such incidental catch pursuant to an agreement with the United States".

Paragraph 2 provided that any incidental catch of the continental shelf fishery resources should be avoided and instructed the immediate return of those species to the sea with minimum damage. Paragraph 5 stated that:

> "The effective date of these new procedures will be 5 December, 1974".[198]

In relation to the new Guidelines the Department of State stated that:

> "...the new measures are based on recognised legal rights of the United States as set out in the 1958 Geneva Convention on the Continental Shelf and do not constitute a new claim".[199]

It is clear that contrary to the above statement the new Guidelines were not in conformity with the 1958 Geneva Convention on the Continental Shelf on the following grounds: First, as was pointed out earlier, species belonging to macrura reptantia, such as lobsters and crayfish are not

---

198. Statement on Proposed US Legislation Extending Fisheries Jurisdiction, 13 ILM (1974) at pp. 1297-1298; see also Rovine, Loc. Cit., in note 195 (p. 444), at p. 149.

199. Department of State Press Release no. 363, Sept. 1974; Rovine, Loc. Cit., in note 195 (p. 444), at pp. 149-150.

sedentary and, although they do not display a great swimming ability they are not in constant physical contact with the seabed. This was the view of many Governments including France, Japan, the United Kingdom and even the United States.[200] Secondly, according to Article 5 (1) of the Convention on the Continental Shelf, the exploration of the continental shelf and the exploitation of its natural resources must not result in any unjustifiable interference with navigation, fishing or the conservation of the living resources of the sea and since lobster was, according to Article 2 (4) of that Convention, a high seas resource the exclusion of foreign fishermen from exploiting this species was a violation of the provisions of Article 5 (1). Thirdly, the new Guidelines did not impose conservation measures according to the provisions of Article 4 of the Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas which requires that any measures regarding the conservation of the high seas should be adopted by agreement and the measures taken must not be discriminatory.[201]

---

200. See above pp. 262-264 and pp. 425-432.

201. Convention on Fishing and Conservation of the Living Resources of the High Seas, UNTS, Vol. 599, at p. 311; 52 AJIL (1958) at p. 851. This Convention entered into force on 20 March, 1966. Article 4 (1) states: "If the nationals of two or more States are engaged in fishing the same stock or stocks of fish or other living marine resource in any area or areas of the high seas, these States shall, at the request of any of them, enter into negotiations with a view to prescribing by agreement for their nationals the necessary measures for the conservation of the living resources affected".

The announcement of the new Guidelines did not invoke any protest by other States although the legal status of the announcement as a rulemaking instrument was not clear.[202] It must be noted that these Guidelines were not promulgated in the form of Federal Regulations until 24 June, 1976.[203]

The new Guidelines became effective on 5 December, 1974 and on 31 January, 1975 an Italian vessel 'Tontini' was boarded by the United States Coast Guard some 81 miles south of Nantucket Island, Massachusetts. It was found that the ship had approximately 30 stone crabs, 4 loose lobsters and 44 pounds of assorted lobsters.[204] The vessel was formally seized and brought to New York Harbour for judicial proceedings. Later the vessel was charged with illegal catching of lobster and was fined $25,000.[205]

---

202. According to Fidell, "Although the Guidelines have been referred to as 'regulations' it is plain that they were not issued pursuant to the rulemaking provision of the Bartlett Act under which the Secretaries of the Treasury and Commerce may issue regulations. The Guidelines were never published in the Federal Register, a step that is required for regulations under the Administrative Procedures Act. The only dissemination of their contents came in correspondence between the Department of State and members of Congress that was published in hearings and committee reports, and in the diplomatic correspondence from the Secretary of State to the major fishing nations", Eugene R. Fidell, "The Case of the Incidental Lobster: United States Regulation of Foreign Harvesting of Continental Shelf Fishery Resources", 10 International Lawyer (1976) pp. 135-150, at p. 148.

203. 41 Fed. Reg., Vol. 41, number 123, 24 June, 1976, at pp. 26019-26020; 15 ILM (1976) at pp. 867-868.

204. New York Times, 3 February, 1975, p. 29, col. 1.

205. United States v. Stern Trawler Tontini Pesca Quarto. Civil No. 75-516 (Southern District of New York). Filed 5 Feb. 1975; see also Fishery News International, March 1975, at p. 17.

On 12 February, 1975 another Italian vessel 'Antonietta Madre' was boarded by the Coast Guard about 80 miles south-southeast of Nantucket and some 30 pounds of lobster were found in the vessel's hold.[206] The settlement for the forfeiture action amounted to $40,000[207] The owners of the 'Antonietta Madre' filed with the White House, the Coast Guard, the Departments of State, Justice, Transportation and Treasury a petition for remission of the $40,000.[208] They contended in the petition that the Italian Government had not notified them of the new Guidelines.[209] They further argued that lobster "is not and cannot be a creature of the continental shelf within the meaning of the Convention on the Continental Shelf, since lobster swim and can move with less than physical contact with the seabed or the subsoil of the continental shelf".[210]

On 12 June, 1975, a Bulgarian fishing vessel was seized some 150 miles southeast of Nantucket Island and was brought to Boston for judicial procedures. The vessel was charged

---

206. Boston Globe, 13 February, 1975, p. 16, col. 7, cited by Fidell, Loc. Cit., in note 202 (p. 447), at p. 146, note 51.

207. Affidavit of Samuel J. Wilson, United States v. Antonietta Madre, Civil No. 75-713, SDNY, Filed 14 Feb, 1975; see Fidell, Loc. Cit., in note 202 (p. 447) at pp. 146-147.

208. Petition of Societa Meridionale di Pesca to President of the United States et al, 15 April, 1975; see Fidell, Loc. Cit., in note 202 (p. 447), at pp. 147-149.

209. Petition, Loc. Cit., note 208, at p. 31; Fidell, Loc. Cit., in note 202 (p. 447), at p. 149.

210. Ibid.

with illegal retention of lobster and the forfeiture action was settled for $420,000.[211]

On 12 July, 1975 a Japanese stern trawler was seized approximately 90 miles northeast of Cape Henry, Virginia and since the vessel's hold contained 100 pounds of frozen lobster it was charged with illegal catching and retention of a designated shelf species.[212] The forfeiture action was settled for $105,000.[213]

Other instances of the enforcement of the new Guidelines included seizure and forfeiture of another Japanese vessel.[214] In none of the above cases was the vessel actually involved in the catching of shelf designated species; yet all were charged with the incidental catch and the retention of the species. It must be emphasised that no protest was made by any of those countries whose vessels were seized.[215] The other States' reluctance to protest against

---

211. United States v. Bulgaria F/V Argonaut, Civil No. 75-2345 (D. Mass, Filed 13 June, 1975); see Natural Fisherman, August 1975, at 2-A col. 5; Boston Globe, 14 June, 1975, p. 3 cols. 2-6.

212. New York Times, 14 July, 1975, p. 39, col. 8; Fidell, Loc. Cit., in note 202 (p. 447), at pp. 150-151.

213. United States v. Daishin Maru, Civil No. 75-350-N (E.D.Va. Filed 15 July, 1975); Fidell, Loc. Cit., in note 202 (p. 447), at pp. 150-151.

214. Ibid, at p. 151.

215. In separate agreements with the Soviet Union and Poland relating to fishing above the United States continental shelf these States accepted the new policy of the United States regarding the shelf-designated species. See Fidell, Loc. Cit., in note 202 (p. 447) at pp. 142-143.

the new policy adopted by the United States was, as will be seen in the next Chapter, based on the following grounds: First, by 1974 there were some 20 countries which had extended their jurisdiction over the living resources of the sea to 200 nautical miles.[216] Protests against such unilateral acts had not made any substantial impact.[217] Secondly, since the beginning of the UNCLOS III it had become clear that the majority of coastal States were seeking a 200 mile EEZ or FZ and, therefore, the United States policy in the light of both the practice and the development of the EEZ/FZ was not considered as an extravagant claim alien to international law.[218]

Conclusion

Although the freedoms of fishing and navigation beyond the three mile limit of the territorial sea had been accepted as customary rules of international law, some coastal States had, from time to time, insisted on the extension of that limit for fishing purposes.

The emergence of the shelf doctrine was seized as an opportunity by some coastal States to extend their rights over the fisheries beyond their territorial sea. While claiming the continental shelf, they frequently referred

---

216. See "Lists of Territorial Seas, Fishing Zones and Economic Zones", FAO's Committee on Fisheries, 12 Session, Rome 12-16 June, 1978, COFI/Inf. 9 Annex, at pp. 23-27.

217. See above pp. 378-441.

218. See below Chapter IX.

to the importance of fisheries and the inadequacies of the existing law on that subject.

The inclusion of the natural resources of the superjacent waters of the submarine areas within the shelf regime by some coastal States was, no doubt, contrary to the existing rules of customary international law. Rules of customary international law, no matter how inadequate or imperfect, cannot be changed by a few unilateral claims and their enforcements unless other interested or affected States accept such changes. It is not surprising that the claims made by some Latin American and one or two other coastal States to the living resources of the continental shelf did not, even after nearly twenty years, constitute a change in the existing rules of customary international law. It is important to note that in the light of subsequent developments in the Law of the Sea those claims made a great contribution to the concept of the EEZ .[219]

The problem regarding the interpretation of the definition of sedentary species has, so far, remained unsolved and since the same definition has also appeared in the 1980 Draft Convention on the Law of the Sea, further disputes may arise in that respect. It seems inevitable that this definition should either be deleted from the Text or a group of experts prepare an Appendix for the Draft Convention, enumerating the species which are within the scope of that definition.

---

219. See below pp. 454-497.

PART FOUR

CURRENT DEVELOPMENTS IN THE LEGAL REGIME FOR EXPLOITATION OF THE NATURAL RESOURCES OF THE CONTINENTAL SHELF

Introduction

In 1970 the General Assembly decided by Resolution 2750-C to convene a new Conference on the Law of the Sea. The General Assembly's decision followed a number of fundamental developments, both within the UN and at regional and sub-regional level, regarding various aspects of the Law of the Sea. These developments concerned inter alia the extent of the territorial sea, the exploitation of the natural resources of the seabed and subsoil beyond the limits of national jurisdiction, the definition of the continental shelf and finally the rights of the coastal States over the natural resources of the seas adjacent to their coasts but outside the territorial sea.

The task of preparing draft treaty articles for the Conference was vested in the UN Seabed Committee in 1970 and on the basis of the work of the Committee the Conference began its work in New York in 1973. The Third United Nations Conference on the Law of the Sea (UNCLOS III) produced its first draft text, the Informal Single Negotiating Test, in 1975 in four parts. Since then the Conference has produced several revisions of these texts; the latest being the Draft Convention on the Law of the Sea published in August 1980.

Whether this draft treaty will be accepted as it

stands or whether there will be further changes in its provisions is the question to be decided by the Conference. It is, however, appropriate to examine the legal status of the continental shelf and its natural resources according to the provisions of the Texts which have, so far, been produced by the UNCLOS III. This Part is divided into two Chapters dealing with the following topics:

Chapter IX Development of the Law of the Sea Between 1958 and 1973

Chapter X The Third United Nations Conference on the Law of the Sea

CHAPTER IX

DEVELOPMENT OF THE LAW OF THE SEA BETWEEN 1958 AND 1973

A- General Move Towards 12 Miles Territorial Sea

It has already been pointed out that until the beginning of this century the juridical nature of the territorial sea was ambiguous.[1] The concept of States' sovereignty over the marginal sea eventually found widespread support among States and though it failed to adopt a treaty the Hague Conference of 1930 can be regarded as having settled this problem.[2] In fact of 24 Governments who commented on draft article 1 of the proposal treaty regarding the juridical nature of the territorial sea all but France were in favour of States' sovereignty over the territorial sea. This sovereignty extended to the air space above the territorial sea as well as to its seabed and subsoil.[3] According to Professor O'Connell, many distinguished writers including Françpis, Gidel, Brierly, Vanselow, Sirven, Flori, Spiropoulos, Smith, Guggenheim and Rousseau also expressed views in support of coastal States' sovereignty over the territorial sea.[4] This sovereignty, however, was subject to the right of innocent passage and other international agreements.

---

1. See above, "Legal Status of Seawater", at pp. 297-308.
2. D.P. O'Connell,"The Juridical Nature of the Territorial Sea", 45 BYIL (1971) pp. 303-383, at pp. 348-354.
3. Ibid, at p. 349.
4. Ibid, at pp. 351-354.

The important features of this sovereignty were:

a- the exclusive right of coastal States to fisheries,

b- the right of coastal States to regulate matters regarding their security and peace, and

c- the inclusion of air space, seabed and subsoil of the territorial sea within that sovereignty.[5]

By 1930, the following States had claimed territorial sea in excess of three miles: Italy, Russia, Colombia, Norway, Sweden, Portugal, Spain, Argentina, and Uruguay. The position of France, Australia, Greece, and Turkey was not clear.[6]

During the Hague Conference it became evident that not all States were prepared to accept the three mile limit and all the arguments against the adoption of such a limit were originally related to fishery and the security of the coastal States.[7] It must, however, be pointed out that

---

5. McDougal and Burke note that:
"Toward the end of the nineteenth century various experts' groups began to consider the breadth question particularly as it related to fishing, and in 1894 and 1895 both the Institut de Droit International and the International Law Association adopted recommendations for a territorial sea of six miles. The Institut noted explicitly that three miles was the limit 'most generally adopted' but thought that 'it has been recognized as insufficient for the protection of coastwise fishing'". The Public Order of the Ocean, 1962, at p. 521.

6. Jessup, Op. Cit., in note 97 (p. 57), at pp. 10-66; Fulton, Op. Cit., in note 89 (p. 54), at pp. 650-692; H.A. Smith, The Law and Custom of the Sea, 3rd edition, 1959, at pp. 22-26.

7. See League of Nations Minutes of the Second Committee-Conference for the Codification of International Law, the Hague 1930 (Territorial Waters), C. 351 (b) M. 145 (b) 1930, Vol., at pp. 23, 150, 182-183, 211 and 221.

most States were in favour of three miles breadth of the territorial sea although among them some were in favour of three miles territorial sea plus a wider limit for fishery and security purposes.[8] States claiming a territorial sea in excess of three miles were few but in the end their opposition and arguments prevented the adoption of the three mile limit. Referring to the 1930 Hague Conference McDougal et al state that:

> "One result of the 1930 Conference was, however, to cast a degree of doubt upon the notion that States could not lawfully claim a territorial sea broader than three miles. While it is, or ought to be, clear that unanimity is not necessarily an indispensable characteristic of the consensus that is often termed a prerequisite of customary international law, the potential seriousness of the difference about the width of the territorial sea (including belligerent-neutral disputes during wartime) magnified the importance of the minority views on this point and contributed to a growing feeling that the degree of consensus on the three-mile rule was not sufficiently marked to warrant its definitive categorization as part of customary international law".[9]

Despite continuous insistence by the maritime powers (especially the United Kingdom, the United States and Japan) that the three mile limit was a general rule of customary international law the emergence of the continental shelf doctrine in 1945 was seized as an opportunity by many coastal States to question the validity of the three mile limit.

---

8. McDougal and Burke, Op. Cit., in note 5 (p. 455) at pp. 524-525; Colombos, Op. Cit., in note 102 (p. 59), at pp. 103-106.

9. McDougal and Burke, Op. Cit., in note 5 (p. 455) at p. 525; Smith, Op. Cit., in note 6 (p. 455), at p. 25.

Many coastal States regarded this limit as an out-dated rule supported by the maritime powers for the purpose of exploiting the fisheries off their coasts. There began a unique era in the field of international law, an era which can best be described as one of unilateral declaration. State after State unilaterally claimed the submarine areas contiguous to their coasts and in doing so many either directly extended their territorial sea or indirectly asserted rights over the fisheries of the superjacent waters of the continental shelf.[10] It was unique because maritime powers which had, on previous occasions, been able to impose their views when there was a claim by an individual State found themselves in rather new and complex circumstances.[11] By mid 1950's there were some thirty States claiming a territorial sea in excess of three miles and the number was rapidly increasing. On the other hand, as discussed in the previous Chapter, such claims were also successfully enforced.[12] Thus maritime powers had to content

---

10. See above pp. 86-116.

11. Previous attempts by Portugal and Spain to extend their territorial sea met with strong British protests and they could not successfully enforce their claims. But Russia which had claimed a 12 mile territorial sea since 1911 enforced it despite protests by Japan and the United Kingdom. See Jessup, Op. Cit., in note 97 (p. 57), at pp. 26-31 and 41-43.

12. See above Chapter VIII (A) "Disputes Concerning Unilateral Declarations" at pp. 378-385.

themselves with diplomatic protests.[13]

The International Law Commission in its 1956 report to the General Assembly made the following statement regarding the breadth of the territorial sea:

> "1. The Commission recognizes that international practice is not uniform as regards the delimitation of the territorial sea.
>
> 2. The Commission considers that international law does not permit an extension of the territorial sea beyond 12 miles".[14]

The Commission further stated that "...the extension by a State of its territorial sea to a breadth between three and twelve miles was not characterized by the Commission as a breach of international law.... such an extension would be valid for any other State which did not object to it...".[15]

In 1958 States' practice regarding the breadth of the territorial sea was as follows: 26 States were claiming territorial sea of less than 6 miles while 25 States were claiming territorial sea between 6 and 200 miles.[16] Thus in the light of States' practice the 1958 Geneva Conference on the Law of the Sea also failed to reach agreement on the question of the breadth of the territorial sea.[17] No limit

---

13. See above pp. 378-385.

14. Yearbook of the International Law Commission, 1956, Vol. II, at pp. 265-266.

15. Ibid, at p. 266.

16. UN. Doc. A/CONF. 19/14.

17. In fact prior to the 1958 Geneva Conference the comments made by some Governments regarding the Commission's 1956 draft articles on the Law of the Sea made it clear that coastal States were widely divided on the limit of the breadth of the territorial sea. See UN Official Records, Conference on the Law of the Sea, Vol. I Preparatory Documents, 1958, pp. 75-113.

was adopted although Article 24 (3) of the Convention on the Territorial Sea and the Contiguous Zone stated:

> "The contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured".

It is important to emphasise that according to Article 24 (1) (a) within the contiguous zone the coastal State could only exercise the rights necessary to "...prevent infringement of its customs, fiscal, immigration or sanitary regulation...". As can be seen the coastal State enjoys no exclusive or preferential rights regarding fishery in the contiguous zone.[18] It is clear, however, that in 1958 international law did not recognize any claim to the territorial sea in excess of twelve miles.

Article 6 of the 1958 Geneva Convention on Fishing and Conservation of Living Resources of the High Seas acknowledged the special interest of the coastal States in areas of the high seas adjacent to their coasts but did not grant any preferential rights to coastal States regarding the exploitation of fisheries in those areas.

The 1958 Geneva Conference, having failed to reach agreement on the breadth of the territorial sea, requested the General Assembly to convene a second conference on the Law of the Sea "for further consideration of questions left

---

18. See Sir Gerald Fitzmaurice, "Some Results of the Geneva Conference on the Law of the Sea, Part I, Territorial Sea and Contiguous Zone and Related Topics", 8 ICLQ (1959) pp. 73-121.

unsettled by the present Conference".[19] The General Assembly, by Resolution 1307 (XIII), decided to convene the second Conference in 1960 but limited its task to the questions of the breadth of the territorial sea and that of the fishery limit.[20]

The UNCLOS II met in Geneva from March 17 to April 29, 1960 and eventually ended without success. Many proposals were put forward but none could secure the two-thirds majority required by the Conference. The Joint Canadian/US proposal (L.11) which was based on a 6 mile territorial sea plus a 6 mile fishery zone failed by only one vote.[21] The failure to agree on a precise limit was based on two important factors: first, a wider territorial sea was opposed by the major maritime powers on the grounds that it was against the freedom of fishing in the high seas. They argued that a wider territorial sea would deprive their nationals of the right to fish in areas where they had habitually fished. This was exactly the reason why some States supported a wider territorial sea; for they wanted to prevent foreign fishermen from fishing in areas close to their coasts. Secondly, a wider territorial sea would limit the freedom of navigation, to a certain degree, particularly in the case of warships

---

19. UNCLOS I, Official Records, Vol. II Plenary Meetings, A/CONF. 13/38, at p. 145.

20. General Assembly, Official Records, Thirteenth Session, Supp. No. 18 (A/4090), at pp. 54-44.

21. For a detailed discussion of the UNCLOS II issues see D.W. Bowett, "The Second United Nations Conference on the Law of the Sea", 9 ICLQ (1960) pp. 415-435.

and submarine vessels. Thus the major maritime powers were strongly opposed to such a change. It is important to bear in mind that, according to US officials, a six miles territorial sea would include some 52 international straits while within a 12 mile limit some 116 international straits would be affected.[22]

In 1960 some 31 States were claiming territorial seas of less than 6 miles while 27 were claiming a territorial sea between 6 and 200 miles.[23] Between 1960 and 1972, however, some 30 coastal States claimed a 12 mile territorial sea.[24] By October 1972, 31 coastal States were claiming 3 or 4 miles, 12 States were claiming 6 miles, 1 State was claiming 10 miles and 63 States were claiming territorial seas between 12 and 200 miles.[25]

Although it is difficult to say that the 12 mile limit became a customary rule in that period it is safe to say

---

22. Bowett, Loc. Cit., in note 21 (p. 460), at pp. 416-417; see also R.P. Anand, "Freedom of Navigation Through Territorial Waters and International Straits", 14 IJIL (1974) pp. 169-189.

23. E.D. Brown, "Maritime Zone: A Survey of Claims", New Directions in the Law of the Sea, Vol. III (Collected Papers) edited by Robin Churchill, K.R. Simmonds and Jane Welch, 1973, pp. 157-192, at p. 161.

24. They were: Algeria (1963), Burma (1968), Canada (1970), Colombia (1972), Cyprus (1964), Costa Rica (1972), Djibouti (1971), Equatorial Guinea (1970), France (1970), Gambia (1969), Haiti (1972), Honduras (1965), India (1967), Jamaica (1971), Kampuchea (1969), Kenya (1969), Kuwait (1967), Malaysia (1969), Mauritius (1970), Mexico (1969), Nauru (1971), Oman (1972), Pakistan (1966), Sri Lanka (1971), Sudan (1970), Syria (1964), Thailand (1966), Trinidad and Tobago (1969), Yemen A.R (1967), and Yemen People's Democratic Republic (1970). See FAO's Committee on Fisheries, 12 Session, Rome, 12-16 June 1978, at pp. 23-27.

25. Brown, Loc. Cit., in note 23 (p. 461), at p. 161.

that, in the light of State practice, it was more of a general rule than that of the three mile limit. In 1970, the President of the United States made an announcement regarding the United States Ocean Policy.[26] The First Paragraph of the Announcement stated:

> "The nations of the world are now facing decisions of momentous importance to man's use of the oceans for decades ahead. At issue is whether the oceans will be used rationally and equitably and for the benefit of mankind or whether they will become an area of unrestrained exploitation and conflicting jurisdictional claims in which even the most advantaged States will be losers".[27]

The Announcement went on to state that:

> "It is equally important to assure unfettered and harmonious use of the oceans as an avenue of commerce and transportation, and as a source of food. For this reason the United States is currently engaged with other States in an effort to obtain a new treaty for these purposes. This treaty would establish a twelve-mile limit for the territorial sea and provide for free transit through international straits".[28]

It is obvious from the above Announcement that the United States was prepared to accept, on a treaty basis, a twelve mile territorial sea. The only reservation was the problem of free transit through international straits. This problem was frequently discussed in the Sea-bed Committe.[29]

---

26. Announcement by President Nixon on United States Ocean Policy, 23 May 1970, see the Text in 9 ILM (1970) at pp. 807-809.

27. Ibid, at p. 809.

28. Ibid.

29. See Anand, Loc. Cit., in note 22 (p. 461), pp. 180-189. Professor Brown notes that both Soviet Union and the United Kingdom support the freedom of passage: "The Soviet Union has expressed the view that 'it is necessary to preserve in (such straits) the freedom of passage which existed before the extension of the

The success of the move towards a twelve mile territorial sea was the result of various factors including:

(a) A substantial increase in the number of coastal States claiming a twelve mile territorial sea. Perhaps it should be mentioned that many newly independent States joined the 'twelve milers'.

(b) The exploitation of both the living and the non-living resources of the submarine areas and their superjacent waters became the focus of much scientific research. This, as discussed in Chapters V and VI, proved to be vital in deciding a logical approach to the question of fisheries. Thus by the beginning of the UNCLOS III the issues regarding the exclusive right to fishery went far beyond the 12 mile limit and the notion of a 200 mile exclusive economic zone was very much in evidence.[30]

(c) The move for the exploitation of the seabed and subsoil beyond the limits of national jurisdiction to be undertaken by the UN or under its supervision.[31] This would require the precice limits of the territorial sea, the contiguous zone, the fishery zone and the continental shelf to be settled.

(d) There was a change of attitude among some maritime powers regarding the freedom of fishing beyond the three mile limit. Thus the United States, as described in the

---

territorial sea' and the United Kingdom has stressed the serious defence implications of any system under which international Straits would be closed", Loc. Cit., in note 23 (p. 461), at p. 162.

30. See below (B) "The Seabed Committee" and (E) "Preparatory Work of the Seabed Committee".

31. Ibid.

previous Chapter, entered into negotiations with Japan in order to reduce the latter's activities in fishing in areas adjacent to the former's territorial sea.

B- The Seabed Committee

The 1958 Geneva Convention on the Continental Shelf did not set any precise limit to the sovereign rights of coastal States over submarine areas. Neither did the Convention on the High Seas specify the legal character of the seabed and subsoil of the high seas beyond the limits of national jurisdiction. The only explanation for this flaw is that the idea of the exploitation of the seabed and subsoil beyond 200 metres had not been envisaged during the 1950's.

By the mid Sixties, as a result of rapid technological progress, not only did the idea of the exploitation of the natural resources of the seabed and subsoil beyond the continental shelf became a reality but the fact that there existed millions of tonnes of various minerals ready to be extracted from the ocean floor raised the question of the legal status of the seabed and subsoil of the high seas beyond the continental shelf.[32] Another important factor related to the same question was that of the possible use of

---

32. See R. Young, "The Legal Regime of the Deep-sea Floor", 62 AJIL (1968) pp. 641-653; see also David B. Brooks, "Deep Sea Manganese Nodules: From Scientific Phenomenon to World Resource ", Proceedings of the Second Annual Conference of the Law of the Sea Institue, June 26-29, 1967, at pp. 32-41; Mero, Op. Cit., in note 55 (p. 291).

the ocean floor for military purposes.[33]

On March 7, 1966, the Economic and Social Council (ECOSOC) of the United Nations passed a resolution regarding the possible exploitation of the non-agricultural resources of the seabed and subsoil beyond the continental shelf for the benefit of the developing countries.[34] In July of that year President Johnson made a Statement regarding the exploitation of the resources of the seabed and subsoil beyond the continental shelf. It stated inter alia that:

> "Under no circumstances, we believe, must we ever allow the prospect of a rich harvest of mineral wealth to create a new form of colonial competition among the maritime nations. We must ensure that the deep seas and the ocean bottom are and remain, the legacy of all human beings".[35]

In 1967, a few weeks before the beginning of the General Assembly Session, Ambassador Pardo of Malta proposed an item to be included in the General Assembly's Agenda. The proposed item was entitled "Declaration and Treaty concerning the reservation exclusively for peaceful purposes of the Seabed and Ocean Floor underlying the seas beyond the limit of present national jurisdiction, and the use of

---

33. See Rene-Jean Dupuy, The Law of the Sea, 1974, pp. 105-112; J. Andrassy, "The Present Regime of the Military Uses of the Sea-Bed: Possible Regime to be Envisaged", Paper presented at Symposium on the International Regime of the Sea-Bed, Rome, 1969; E.D. Brown, "The Demilitarisation and Denuclearisation of Hydrospace", in Annals of International Studies, Vol. 4, 1973, edited by Lucius C. Caflisch, pp. 71-92.

34. Evan Luard, The Control of the Seabed, 1974, at p. 84.

35. Ibid.

their resources in the interests of mankind".[36]

The item was discussed before the First Committee and in a three hour speech Ambassador Pardo explained the importance of the item.[37] The item was accepted and later the General Assembly adopted Resolution 2340 (XXII) by which an Ad Hoc Committee, with 35 members, was established to study the item.[38] Two Working Groups were set up; one to study the technical and economic questions related to the exploitation of the seabed and subsoil beyond the limits of national jurisdiction and the second to study the legal questions related to the exploitation of the natural resources of the seabed and subsoil.[39] The Committee met three times in 1968 and succeeded in providing only a basic agreement on the subject. The agreement was based on the recognition of the existence of an area beyond the limits of national jurisdiction. Other important issues such as

---

36. For details regarding the Maltese Proposal see Luard, ibid, at pp. 83-90.

37. Ibid.

38. General Assembly Resolution 2340 (XXII); 7 ILM (1968) p. 174. Referring to the Ad Hoc Committee Luard notes that "The New Committee was ultimately established with 35 members, roughly 20 developing and the rest developed, including 5 Communist States. It did not, however, represent any Land-Locked developing Countries, a decision which caused justifiable complaints from Paraguay and Nepal", Luard, Op. Cit., in note 34 (p. 465), at p. 89. For the list of the 35 member States see R. Young, Loc. Cit., in note 32 (p. 464), at p. 652 (Footnote 32).

39. Luard, Op. Cit., in note 34 (p. 465), at p. 90. For the draft resolutions submitted to the Ad Hoc Committee by various States see 7 ILM (1968) at pp. 881-889. See Shigeru Oda, The Law of the Sea in our Time - II, The United Nations Seabed Committee, 1968-1973, 1977, at pp. 3-78.

the legal character of the area and the problem of who may regulate the exploitation of the resources of the area remained the centre of controversy.[40]

In December 1968, as the result of the report of the Ad Hoc Committee, the General Assembly adopted Resolution 2467 (XXIII) according to which the Permanent United Nations Committee on the Peaceful Uses of the Sea-Bed and Ocean Floor Beyond the Limits of National Jurisdiction was established. The Permanent Committee was increased to 42 States consisting of both the developed and the developing Countries.[41] The new Committee met bi-annually and the first important outcome of its meetings was evidenced in General Assembly Resolution 2574-D (XXXIV) in 1969.[42] This Resolution declared that pending the establishment of an international seabed regime:

> "(a) States and persons, physical or juridical, are bound to refrain from all activities or exploitation of the area of the sea-bed and ocean, and the subsoil thereof, beyond the limits of national jurisdiction;
> (b) No claim to any part of the area or its resources shall be recognized".[43]

On December 17, 1970, the General Assembly adopted Resolution 2749 (XXV) entitled "Declaration of Principles Governing the Sea-bed and the Ocean Floor, and the Subsoil thereof, Beyond the Limits of National Jurisdiction".[44]

---

40. Luard, Op. Cit., in note 34 (p. 465), at pp. 90-94; Dupuy, Op. Cit., in note 33 (p. 465), at pp. 112-116.

41. General Assembly Resolution 2467 (XXIII) (1968), see 8 ILM (1969) at p. 201.

42. General Assembly Resolution 2574-D (XXIV) (1969), see 9 ILM (1970) at p. 422.

43. Ibid.

44. General Assembly Resolution 2749 (XXV) (1970), see

This Resolution, which was adopted by a vote of 108 in favour, none against, with 14 abstentions, declared inter alia:

> "1. The Sea-bed and Ocean Floor, and the subsoil thereof beyond the limits of national jurisdiction (hereinafter referred to as the area) as well as the resources of the area, are the common heritage of mankind.
>
> 2. The area shall not be subject to appropriation by any means by States or person, natural or juridical, and no State shall claim or exercise sovereignty or sovereign rights over any part thereof.
>
> 3. No State or person, natural or juridical, shall claim, exercise or acquire rights with respect to the area or its resources incompatible with the international regime to be established and the Principles of this Declaration.
>
> 4. All activities regarding the exploration and exploitation of the resources of the area and other related activities shall be governed by the international regime to be established.
>
> 5. The area shall be open to use exclusively for peaceful purposes by all States whether coastal or land-locked, without discrimination, in accordance with the international regime to be established.....
>
> .....
>
> 13. Nothing herein shall affect:
> (a) The legal status of the waters superjacent to the area or that of the air space above those waters;".[45]

There are two important points in the above Declaration which require some elaboration:

First, it was generally agreed that there existed an area beyond the limits of national jurisdiction which could not be claimed or exploited by States or persons, whether natural or juridical. This was an acknowledgement that neither customary international law nor the 1958 Geneva

---

10 ILM (1971) at p. 220.

45. Ibid.

Conventions had prescribed a legal regime for the use of the seabed or the exploitation of its resources. Thus the Declaration of Principles was a safeguard to prevent States from asserting any rights beyond their present national jurisdiction with regard to the seabed. The problem of establishing a legal basis upon which the resources could be exploited remained unsolved. The Declaration left this question to be answered by the future international regime. It was, however, clear from the outset that the legal basis upon which the exploitation could be conducted was the centre of controversy. Developing countries were in favour of an international body, preferably the UN, to exploit the resources of the area. In other words they were in favour of internationalisation of the area for the benefit of the developing nations. Developed countries, on the other hand, argued that the exploitation should benefit mankind and maintained that the exploitation of the seabed and subsoil "would promote economic progress and material development".[46] They further argued that the exploitation of the resources of the ocean floor and its subsoil would require huge investment as well as high technology. Such involvement needed adequate incentives. They did not think that the UN had either the experience or the necessary means for such a task.[47] They felt that international machinery should be established to act as a governing body only and that revenue

---

46. Luard, Op. Cit., in note 34 (p. 465), at pp. 132-138.
47. R. Young, Loc. Cit., in note 32 (p. 464), at pp. 647-653.

sharing should be carried out on a voluntary basis. The Soviet Union and the Eastern European Countries were against any moves toward internationalisation which in their view would bring about supranationalism. Some Latin American States, which had claimed 200 nautical miles either as territorial sea or for fishing purposes, would only agree to a legal regime for the seabed and subsoil if the area were beyond the limits they had already claimed.

Secondly, it was made clear in the Declaration of Principles that the question of the seabed and subsoil beyond the limits of national jurisdiction did not affect the legal status of the superjacent waters of the area. In this respect both customary international law and the 1958 Geneva Conventions had been explicit in supporting the freedom of fishing beyond the territorial sea. However, despite the emphasis on the freedom of fishing the diversity of national claims would render it impossible to establish a regime for the seabed unless the limits of the national jurisdiction became unified and the new limit thus respected by all States.

Realising the relationship between the seabed regime and other important issues such as the territorial sea, fishing limits and the continental shelf, on the same day that the Declaration of Principle was passed the General Assembly passed Resolution 2750-C concerning a new Conference on the Law of the Sea.[48] The preamble of the Resolution

---

48. General Assembly Resolution 2750-C (XXV), see 10 ILM (1971) at pp. 226-230. Resolution 2750-A was concerned with the possible effects of the exploitation of the resources of the area on the world economy and

referred to the widespread support for a "Comprehensive Conference on the Law of the Sea" and went on to state that "the problems of the ocean space are closely interrelated and need to be considered as a whole". It referred to the "political and economic realities" and to the fact that the rapid technological development in the past decade necessitated a new approach to the law of the sea. It also acknowledged that "many of the present States Members of the United Nations did not take part in the previous United Nations Conferences on Law of the Sea".[49] Paragraph 2 of the Resolution stated that the General Assembly

> "Decides to convene in 1973, ..., a Conference on the Law of the Sea which would deal with the establishment of an equitable international regime - including an international machinery - for the area and the resources of the sea-bed and the ocean floor and the subsoil thereof beyond the limits of national jurisdiction, a precise definition of the area, and a broad range of related issues including those concerning the regime of the high seas, the continental shelf, the territorial sea (including the question of its breadth and the question of international straits) and contiguous zone, fishing and conservation of the living resources of the high seas (including the question of the preferential rights of coastal States), the preservation of the marine environment (including inter alia, the prevention of pollution) and scientific research".[50]

The general Assembly decided to enlarge the Sea-bed Committee from 42 to 86 members and instructed the Committee

---

Resolution 2750-B was concerned with the special interests of the developing countries and the land-locked countries. Ibid, at pp. 224-226.

49. Ibid.

50. Ibid.

to prepare draft treaty articles for the Conference.[51] The Committee held two Sessions in Geneva and one in New York in 1971 as a result of which three Sub-Committees were established to deal with various subjects allocated to them.[52] The work of the Sub-Committees which involved the question of the continental shelf and its natural resources will be discussed later.[53]

In 1969 another development took place which had a direct effect on the question of the continental shelf. This development was based on the decision of the International Court of Justice in the North Sea Continental Shelf Cases which will be discussed below.

C- The 1969 Continental Shelf Cases

As described in Chapter IV the definition of the continental shelf in the 1958 Geneva Convention was an arbitrary one which did not reflect the geological concept of the shelf, although the claims to the natural resources of the seabed and subsoil of the continental shelf were based on the contention that those areas were adjacent to the land territory and in some cases an extension of it.[54] The rights of the coastal States over the continental shelf

---

51. Ibid, Paragraphs 5 and 6. In 1971 the Sea-bed Committee was further extended to 91 members, see General Assembly Resolution 2881 (XXVI) (1971), Operative Paragraph 3.

52. UNGA, 26th Session, Report, 1971, at pp. 4-5.

53. See below pp. 497-514.

54. See above at pp. 86-116.

were therefore an extension of the sovereignty they enjoyed over their land territory. It was on the basis of this unity or relation between the land and the adjacent areas that Paragraph 2 of Article 2 of the Convention on the Continental Shelf, after referring to the sovereign rights of the coastal States in Paragraph 1, stated:

> "The rights referred to in Paragraph 1 of this Article are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities, or make a claim to the continental shelf, without the express consent of the coastal State".[55]

While it is understood that the coastal State is entitled to exercise sovereign rights over the natural resources of the continental shelf the Convention did not make it clear whether this entitlement applied to any portion of the submarine areas adjacent to the coast or indeed whether there existed a criterion constituting such an entitlement. In fact the Truman Proclamation had given several reasons for the United States claim to the continental shelf all of which had, individually as well as collectively, put forward some justifications regarding the basis of the claim.[56] It had stated that:

> "Whereas it is the view of the Government of the United States that the exercise of jurisdiction over the natural resources of the

---

55. Paragraph 3 of Article 2 also stated that:
"The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or any express proclamation".

56. For a full discussion on the United States Proclamation of 1945 see above pp. 72-86. See the Text of the Proclamation in UNLS, Laws and Regulations on the Regime of the High Seas, Vol. I, 1951, at pp. 38-39.

> subsoil and seabed of the continental shelf by the contiguous nation is reasonable and just,
> Since the effectiveness of the measures to utilise or conserve these resources would be contingent upon cooperation and protection from the shore,
> Since the continental shelf may be regarded as extension of the land mass of the contiguous nation and thus naturally appurtenant to it,
> Since these resources frequently form a seaward extension of a pool or deposit lying within the territory, and
> Since self-protection compels the coastal nation to keep a close watch over the activities off its shores which are of the nature necessary for the utilisation of these resources.....".[57]

Although it is clear that the above reasons do lead, to some extent, to the geological concept of the continental shelf the claim is not, however, based solely on the fact that these are, or should be, the extension of the land mass. Other criteria such as contiguity and proximity are also evident.[58]

In 1969 the ICJ in the North Sea Continental Shelf Cases referring to Article 2 of the 1958 Geneva Convention on the Continental Shelf made the following important statement:

> "....the most fundamental of all rules of law relating to the continental shelf, enshrined

---

57. Ibid.

58. Professor Jennings, referring to the reasons given in the Truman Proclamation, states that:
"All these reasons are aspects of a relationship of fact between the mainland and the resources of the submerged areas subjected therefore to the exclusive jurisdiction and control of the coastal State", "The Limits of Continental Shelf Jurisdiction: Some Possible Implications of the North Sea Case Judgment", 18 ICLQ (1969) pp. 819-832, at p. 822.

> in Article 2 of the 1958 Geneva Convention, though quite independent of it, - namely that the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist ipso facto and ab initio, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short, there is here an inherent right. In order to exercise it, no special legal process has to be gone through, nor have any special legal acts to be performed. Its existence can be declared (and many States have done this) but does not need to be constituted. Furthermore, the right does not depend on its being exercised. To echo the language of the Geneva Convention, it is 'exclusive' in the sense that if the coastal State does not choose to explore or exploit the areas of shelf appertaining to it, that is its own affair, but no one may do so without its express consent".[59]

The Court's interpretation of Article 2 and its reference to this Article as having enshrined "the most fundamental of all rules of law relating to the continental shelf" was a remarkable deviation from the definition of the shelf in Article 1 and against the background of the doctrine of the continental shelf. It was remarkable because, as will be shown later, this interpretation had a profound influence upon the formation of the shelf regime by the UNCLOS III. Its deviation can be explained by pointing out that neither the ILC nor the 1958 Geneva Conference

---

59. Judgment of February 20, 1969 (Fed. Republic of Germany/ Denmark; Fed. Republic of Germany/Netherlands), 1969, ICJ Reports, at p. 22, Paragraph 19. See the Judgment in New Directions in the Law of the Sea, Op. Cit., in in note 19 (p. 12), Vol. I, at pp. 134-186.

had found it possible to base the rights of the coastal State over the continental shelf on the principle of natural prolongation.[60] In fact the criterion employed by the Convention was that of adjacency. The Court referred to adjacency, proximity, near, close to its coasts, off its coasts, opposite, in front of, and contiguous and observed that these terms were ".... all of them terms of a somewhat imprecise character which although they convey a reasonably clear general idea, are capable of a considerable fluidity of meaning".[61] In other words the Court completely dismissed the rights of the coastal State over the adjacent submarine areas beyond the territorial sea unless those areas were the extension of the land territory. In another passage the Court was more explicit when it stated that:

> "More fundamental than the notion of proximity appears to be the principle - constantly relied upon by all parties - of the natural prolongation of the land territory or domaine, or land sovereignty of the coastal State, into and under the high seas, via the bed of its territorial sea which is under the full sovereignty of that State. There are various ways of formulating this principle, but the underlying idea, namely of an extension of something already possessed, is the same, and it is this idea of extension which is, in the Court's opinion, determinant. Submarine areas do not really appertain to the coastal State because - or not only because - they are near it. They are near it of course; but this would not suffice to confer title, any more than, according to a well-established

---

60. See UN. Doc. A/1858, 17 (1951); UN. Doc. A/2456, 12 (1953); UN.Doc. A/3159, 43 (1956). For detail analysis see above pp. 86-116 and pp. 119-194.

61. ICJ, Judgment, North Sea Continental Shelf Cases, Paragraph 41; New Directions in the Law of the Sea, Op. Cit., in note 19 (p. 12), Paragraph 41, at p. 162.

> principle of law recognized by both sides in present case, mere proximity confers per se title to land territory. What confers the ipso jure title which international law attributes to the coastal State in respect of its continental shelf, is the fact that the submarine areas concerned may be deemed to be actually part of the territory over which the coastal State already has domaine, - in the sense that although covered with water, they are a prolongation of that territory, an extension of it under the sea. From this it would follow that whenever a given submarine area does not constitute a natural - or the most natural - extension of the land territory of a coastal State, even though that area may be closer to it than it is to the territory of any other State, it cannot be regarded as appertaining to that State; - or at least it cannot be so regarded in the face of a competing claim by a State of whose land territory the submarine area concerned is to be regarded as a natural extension, even if it is less close to it".[62]

There is no doubt that the Court emphatically pronounced the natural prolongation as the sole criterion constituting the right over the continental shelf. The Court also considered the right to be inherent and therefore the notion of the continental shelf as an extension of the land territory under the sea water was assumed to be a geological fact from which the inherent right of the coastal State is derived.

While the validity of the Court's definition of the continental shelf cannot be challenged the application of its interpretation of Article 2 would, if applied, cause certain controversy among States and jurists. Perhaps the

---

62. ICJ, Judgment, at p. 31, Paragraph 43.

validity of the Court's interpretation of Article 2 would be the first to be questioned. Claims to the submarine areas made between 1945 and 1958 had not referred to the geological concept of the shelf as the only criterion constitutive of such rights. The ILC had dismissed the geological concept of the shelf as not applicable in international law, a view which was followed by the Geneva Convention. Thus in the light of both state practice and the provisions of the Convention the Court's interpretation was rather contrary to the legal development of the shelf doctrine.[63] Many coastal States had asserted rights over the continental shelf which was not the natural extension of the land mass and those claims had not been challenged.[64] It is true that the continental shelf is a geological concept but its legal development in international law between 1945 and 1958 had not been based on its geological definition.

The application of the natural prolongation criterion without further modifications in the rules promulgated in the Convention would raise many questions: First, what would the seaward limit of the natural prolongation be: the continental shelf; the continental slope or the continental margin? Secondly, what would be the legal status of the submarine areas which had been claimed but were not a natural prolongation? Would a relatively short period be considered as constituting a right on the basis of acquiescence? What about coastal States which had not claimed the submarine

---

63. See above pp. 119-194.

64. See above pp. 86-116.

areas?[65]

There is no doubt that the Court's interpretation of Article 2 of the Convention would have been the centre of many controversial arguments regarding the validity of numerous claims but the Court's interpretation was overshadowed by the General Assembly's decision in 1970 to convene a new Conference on the Law of the Sea. As will be described in the next Chapter the Court's interpretation of Article 2 has been incorporated in the Texts which have so far been provided by the UNCLOS III. At the same time a compromise has been reached to the effect that sovereign rights of the coastal States over the 200 nautical miles EEZ have been extended to the seabed and subsoil of the EEZ. Thus the coastal States whose adjacent submarine areas are not the extension of the land mass can still enjoy sovereign rights regarding the seabed and subsoil up to a distance of 200 nautical miles.

It is appropriate, however, to refer also to the ICJ's Judgment in the Aegean Sea Continental Shelf Case between Greece and Turkey in 1978.[66] In its Judgment the Court once again reaffirmed its concept of the continental shelf as the natural prolongation of the land territory and went as far as to pronounce that the continental shelf related to the coastal States' territorial status:

---

65. See Paragraph 3 of Article 2 of the Convention on the Continental Shelf which states:
"The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation".

66. Judgment of December 19, 1978 (Greece v. Turkey), 1978 ICJ. Reports, pp. 3-46.

> " The question for decision is whether the present dispute is one of 'relating to the territorial status of Greece', not whether the rights in dispute are legally to be considered as 'territorial' rights; and a dispute regarding entitlement to and delimitation of areas of continental shelf tends by its very nature to be one relating to territorial status. The reason is that legally a coastal State's rights over the continental shelf are both appurtenant to and directly derived from the State's sovereignty over the territory abutting on that continental shelf. This emerges clearly from the emphasis placed by the Court in the North Sea Continental Shelf Cases on 'natural prolongation' of the land as a criterion for determining the extent of coastal State's entitlement to continental shelf as against other States abutting on the same continental shelf".[67]

The Court further observed that:

> " .... it is solely by virtue of the coastal State's sovereignty over the land that rights of exploration and exploitation in the continental shelf can attach to it, ipso jure, under international law. In short, continental shelf rights are legally both an emanation from and an automatic adjunct of the territorial sovereignty of the coastal States. It follows that the territorial regime - the territorial status - of a coastal State comprises, ipso jure, the rights of exploration and exploitation over the continental shelf to which it is entitled under international law. A dispute regarding those rights would, therefore, appear to be one which may be said to 'relate' to the territorial status of the coastal State".[68]

The criterion of natural prolongation was examined by the Court of Arbitration in the Anglo-French Continental Shelf Case in 1977.[69] The Court observed that:

---

67. Ibid, at p. 36, Paragraph 86.

68. Ibid.

69. UK - France Continental Shelf Case (First Decision), 1977, 54 ILR (1979) pp. 6-138. See E.D. Brown,"The Anglo-French Continental Shelf Case", 33 the Year Book of World Affairs (1979) pp. 304-327; D.W. Bowett, "The Arbitration Between the United Kingdom and France

"The continental shelf of the Channel Islands of the mainlands of France and of the United Kingdom, in law, appertains to each of them as being the natural prolongation of its land territory under the sea. The physical continuity of the continental shelf of the English Channel means that geographically it may be said to be a natural prolongation of each one of the territories which abut upon it. The question for the Court to decide, however, is what areas of continental shelf are to be considered as legally the natural prolongation of the Channel Islands rather than of the mainland of France. In international law, as the United Kingdom emphasized in the Pleadings, the concept of the continental shelf is a juridical concept which connotes the natural prolongation under the sea not of a continent or geographical land mass but of the land territory of each State. And the very fact that in international law the continental shelf is a juridical concept means that its scope and the conditions for its application are not determined exclusively by the physical facts of geography but also by legal rules. Moreover, it is clear both from the insertion of the 'special circumstances' provision in Article 6 and from the emphasis on 'equitable principles' in customary law that the force of the cardinal principle of 'natural prolongation' is not absolute, but may be subject to qualification in particular situations".[70]

Concerning the Continental Shelf Boundary in the English Channel and South-Western Approaches", 49 BYIL (1978) pp. 1-30.

70. UK-France Continental Shelf Case (First Decision), in note 69 (p. 480), at p. 99. For further discussions on the ICJ in the North Sea Continental Shelf Cases, see W. Friedmann, "The North Sea Continental Shelf Cases - A Critique", 64 AJIL (1970) pp. 229-240; R.Y. Jennings, "The Limits of Continental Shelf Jurisdiction: Some Possible Implications of the North Sea Case Judgment", 18 ICLQ (1969) pp. 819-832; E.D. Brown, "The North Sea Continental Shelf Cases", 23 Current Legal Problems (1970) pp. 187-215; L.F.E. Goldie, "The International Court of Justice's 'Natural Prolongation' and the Continental Shelf Problem of Islands", Netherlands Yearbook of International Law (1973) pp. 237-261; E.D. Brown, " Rockall and the limits of national jurisdiction of the UK" Part 1, Vol. 2, No. 3, Marine Policy (1978) pp. 181-211.

D- Other Developments in the Law of the Sea Between 1958 and 1973

i. Latin American States

Before the Seabed Committee began its work to prepare a draft treaty articles for the UNCLOS III, no fewer than 11 Latin American States had claimed 200 miles of their adjacent submarine areas and their superjacent waters.[71] Although the juridical nature of the superjacent waters claimed varied from sovereignty to rights amounting to special jurisdiction such variation did not appear with regard to the seabed and subsoil. In short, they all claimed exclusive rights over the natural resources of the seabed and subsoil to a distance of 200 miles.[72]

The possibility of a new Conference on the Law of the Sea, which had become evident since the question of the seabed and subsoil beyond the limits of national jurisdiction had been raised in 1967, prompted these States to coordinate their policies on the Law of the Sea. Their main object was to achieve an agreement which would reflect the policy of the region, a policy which would be defended collectively instead of individually. These attempts, which produced three Declarations by some Latin American States, had a great influence on the development of the Law of the Sea

---

71. They were: Argentina, Brazil, Chile, Costa Rica, El Salvador, Honduras, Nicaragua, Panama, Peru and Uruguay, see F.V. Garcia Amador, "The Latin American Contribution to the Development of the Law of the Sea", 68 AJIL (1974) pp. 35-50.

72. Ibid, at pp. 38-48.

and therefore it is appropriate to examine the contents of each Declaration separately.[73]

1. Montevideo Declaration on the Law of the Sea, 1970

In March 1970, Uruguay invited other Latin American States which had claimed a 200 mile limit to meet in Montevideo in order to coordinate their positions. Costa Rica and Honduras did not attend the meeting. On May 8, 1970, the nine participant States adopted the Declaration of Montevideo on the Law of the Sea.[74] The Preamble of the Declaration stated inter alia that:

> ".....there exists a geographic, economic and social link between the sea, the land, and its inhabitants, Man, which confers on the coastal peoples legitimate priority in the utilization of the natural resources provided by their environment,
>
> Recognizing likewise that any norms governing the limits of the national sovereignty and jurisdiction over the sea, its soil and subsoil, and the conditions for the exploitation of their resources, must take account of the geographical realities of the coastal States and the special needs and economic and social responsibilities of developing States.....
> .....
> ....that a number of declarations, resolutions, many of them inter-American, and multinational declarations and agreements conducted between Latin American States, embody legal principles which justify the right of States to extend their sovereignty and jurisdiction to the extent necessary to conserve, develop and exploit the natural resources of the maritime area adjacent to their coast, its soil and subsoil,
>
> that in accordance with those legal principles the signatory States have, by reason of conditions peculiar to them, extended their sovereignty or

---

73. Ibid. See also Reynaldo Galindo Pohl, "Latin America's Influence and Role in the Third Conference on the Law of the Sea", 7 Ocean Development and International Law (1979) pp. 65-87.

74. Declaration of Montevideo on the Law of the Sea, adopted May 8, 1970, see the Text in 9 ILM (1970) pp. 1081-83.

> exclusive rights of jurisdiction over the maritime area adjacent to their coasts, its soil and subsoil to a distance of 200 nautical miles from the baseline of the territorial sea,.....".[75]

The emphasis on the geographical, economic, and social elements in the Preamble of Montevideo Declaration was not an innovation. This emphasis had been the fundamental basis of the claims made by the Latin American States. It had been used in the Declaration of the Maritime Zone in 1952 as well as in all other unilateral declarations which had asserted rights to 200 nautical miles.[76] It is, however, interesting to note that the 200 nautical mile limit referred to in the Montevideo Declaration was regarded as justified by these States "by reason of conditions peculiar to them" and not as a limit for all coastal States. Other coastal States, according to Paragraph 2 of the Declaration have the right "to establish the limits of their maritime sovereignty and jurisdiction in accordance with their geographical and geological characteristics and with the factor governing the existence of marine resources and the need for their national utilization".[77]

Another important point in the above Declaration was its reference to the continental shelf. Paragraph 4 referred to the coastal States as having the right "to explore, conserve and exploit the natural resources of their continental shelves to where the depth of the superjacent waters admits

---

75. Ibid, at p. 1081.

76. See above pp. 101-111.

77. Montevideo Declaration, 9 ILM (1970), at p. 1082.

of the exploitation of such resources".[78] The legal significance of this Paragraph is that although coastal States are entitled to establish a zone on the basis of geographical, economic and social factors, their rights over such a zone are quite independent of their rights to the continental shelf. In other words it was contended that coastal States have, on the basis of their geographical and socio-economic conditions, the right to establish a zone which comprises both the superjacent waters and the seabed and subsoil. In addition to this zone coastal States are entitled to exploit the natural resources of the continental shelf to where the depth of the superjacent waters admits of exploitation. The implication of Paragraph 4 was to make it clear that the claim over the 200 nautical miles adjacent sea and its seabed and subsoil must not be associated with the coastal States' rights over the continental shelf. It is important to point out that although the concept of an Exclusive Economic Zone has been attributed to Kenya's draft article during the Seabed Committee's preparatory work in 1972, the idea had been created and developed by the Latin American States.

Freedom of navigation and overflight was recognized in Paragraph 6 of the Declaration.[79]

2. Lima Declaration on the Law of the Sea, 1970

In August 1970, following the Montevideo Declaration,

---

78. Ibid, at p. 1082.

79. Ibid, at p. 1083.

most Latin American and some Caribbean States attended a meeting in Lima to coordinate, on a larger scale, their policies on the Law of the Sea.[80] On 8 August 1970 the "Declaration of the Latin American States on the Law of the Sea" was issued.[81]

The above Declaration did not differ in essentials from the previous one. Once again emphasis was put on geographical, economic and social elements in determining the extent of maritime sovereignty and although there was no mention of 200 nautical miles there was enough evidence to suggest that the position of those who had claimed 200 nautical miles was still the same.[82] The last Paragraph of the Preamble stated that ".... it is desirable to assemble and reaffirm the plurality of existing legal regimes on maritime sovereignty or jurisdiction in Latin American Countries".[83] This statement can only be regarded as a clear indication by the 14 signatory States that they would

---

80. States participating in the Meeting were: Argentina, Brazil, Chile, Ecuador, El Salvador, Nicaragua, Panama, Peru, Uruguay, Mexico, Colombia, Honduras, Guatemala, Dominican Republic, Bolivia, Paraguay, Trinidad and Tobago, Jamaica and Barbados. See the Text of the Declaration in 10 ILM (1971) pp. 207-214. Representatives of Canada, South Korea, Costa Rica, India, Ireland, United Arab Republic, Senegal, and Yugoslavia also attended the Meetings as observers, see Karin Hjertonssen, The New Law of the Sea, Influence of the Latin American States on Recent Development of the Law of the Sea, 1973, at p. 71.

81. The Lima Declaration was approved by 14 to 3 with one abstention. The 3 States voting against the Declaration were Bolivia and Paraguay (land-locked States) and Venezuela. Barbados and Jamaica were not present at the time of voting, New Directions in the Law of the Sea, Op. Cit., in note 19 (p. 12), Vol. I, at p. 237.

82. See Paragraphs 1,2 and 3 of the Preamble, 10 ILM (1971)

defend their claims collectively and regionally.

The Text of the Lima Declaration was sent to the Chairman of the Seabed Committee. The Common principles of the Law of the Sea set out in this Declaration referred inter alia to:

> "1. The inherent right of the coastal State to explore, conserve and exploit the natural resources of the sea adjacent to its coasts and the soil and subsoil thereof, likewise of the Continental Shelf and its subsoil, in order to promote the maximum development of its economy and to raise the level of living of its people;
>
> 2. The right of the coastal State to establish the limits of its maritime sovereignty or jurisdiction in accordance with reasonable criteria, having regard to its geographical, geological and biological characteristics, and the need to make rational use of its resources;
>
> 3. The right of the coastal State to take regulatory measures for the aforementioned purposes, applicable in the areas of its maritime sovereignty or jurisdiction, without prejudice to freedom of navigation and flight in transit of ships and aircraft, without distinction as to the flag;".[84]

3. The Declaration of Santo Domingo, 1972

In June 1972, 15 Caribbean States held a Conference in Santo Domingo in the Dominican Republic to decide upon their policies on the Law of the Sea.[85] Some of the participants had not only attended the meetings in Montevideo and Lima but had voted in favour of the resulting

---

pp. 1082-1083.

83. Ibid.

84. Ibid, New Directions in the Law of the Sea, Op. Cit., in note 19 (p. 12), Vol. I, at p. 239

85. They were: Barbados, Colombia, Costa Rica, the Dominican Republic, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Trinidad and Tobago, Venezuela, El Salvador and Guyana. Other Latin American States were invited as observers, see Hjertonssen, Op. Cit., in note 80 (p. 486), at p. 73.

Declarations.[86]

In contrast to the previous Declarations by the Latin American States the Santo Domingo Declaration, which was approved by 10 States with 5 abstentions,[87] provided more detailed and clearer policies on the various aspects of the Law of the Sea.

Under the heading of "Territorial Sea" the sovereignty of the coastal States over the territorial sea, its seabed and subsoil and over the air space above the territorial sea was recognized. The breadth of the territorial sea was to be 12 miles while the right of innocent passage according to international law was recognized.[88]

Under the heading of "Patrimonial Sea" the Santo Domingo Declaration stated that:

> "1. The coastal State has sovereign rights over the renewable and non renewable natural resources, which are found in the waters, in the seabed and in the subsoil of an area adjacent to the territorial sea called the Patrimonial Sea.
>
> 2. The coastal State has the duty to promote and the right to regulate the conduct of scientific research within the Patrimonial Sea, as well as the right to adopt necessary measures to prevent marine pollution and to ensure its sovereignty over the resources of the area.
>
> 3. The breadth of this zone should be the subject of an international agreement, preferably of a world wide scope. The whole of the area of both the territorial sea and the Patrimonial Sea, taking into account geographic circumstances, should not exceed a maximum of 200 nautical miles.
>
> .....

---

86. See above pp. 483-487.
87. See Hjertonssen, Op. Cit., in note 80 (p. 486), at p. 73.
88. See the Text of the Santo Domingo Declaration in New Directions in the Law of the Sea, Op. Cit., in note 19 (p. 12), Vol. I, at pp. 247-250.

> 5. In this zone ships and aircraft of all States, whether coastal or not, should enjoy the right of freedom of navigation with no restrictions other than those resulting from the exercise by the coastal State of its rights within the area. Subject only to these limitations, there will also be freedom of laying of submarine cables and pipelines".[89]

The 200 nautical mile Patrimonial Sea referred to in the above Declaration was an accomplished version of the previous unilateral and multilateral Declarations which had been made by the Latin American States. It recognized the sovereign rights of the coastal States over the natural resources of the water, the seabed and the subsoil of the Patrimonial Sea. It must be pointed out that while in Paragraph 1 the rights referred to are "sovereign rights" the following Paragraph referred to the coastal States' "sovereignty over the resources of the area". There was not any substantial difference between the rights of the coastal States over the Patrimonial Sea and those over the Maritime Zone or Maritime Sovereignty previously claimed by the Latin American States. The Santo Domingo Declaration referred to the right of the coastal States to regulate the conduct of scientific research and thus it was assumed that other States were not banned from scientific research within the Patrimonial Sea. Furthermore, within the Patrimonial

---

89. Ibid, at p. 247. For the concept of the Patrimonial Sea, see Garcia Amador, Loc. Cit., in note 71 (p. 482), at pp. 42-43; L.D.M. Nelson, "The Patrimonial Sea", 22 ICLQ (1973) pp. 668-686. For the Declaration of the Maritime Zone of 1952 see above pp. 107- 111.

Sea coastal States had the right to take necessary measures for the prevention of marine pollution.

The sovereign right of the coastal States over the seabed and subsoil of the Patrimonial Sea was independent of their rights over the continental shelf. This was made clear in the Declaration, for its provisions regarding the continental shelf referred to the sovereign rights of the coastal States over the natural resources of the continental shelf to "a depth of 200 metres or beyond that limit to where the depth of the superjacent waters admits the exploitation".[90] When the seabed and subsoil of the adjacent submarine area was covered by both regimes the Declaration regarded the area within 200 nautical miles to be under the Patrimonial Sea and beyond that under the continental shelf.[91] As to the outer limit of the continental shelf it was stated that the Latin American States participating in the Seabed Committee "should promote a study concerning the advisability and timing for the establishment of precise outer limits of the continental shelf taking into account the outer limits of the continental rise".[92]

The Santo Domingo Declaration, as stated earlier, was an accomplished version of the Latin American claims. Although the 12 miles territorial sea, within which the right

---

90. Santo Domingo Declaration, in New Directions in the Law of the Sea, Op. Cit., in note 19 (p. 12), at p. 248.

91. Paragraph 4 of the Declaration (under the heading of the Continental Shelf) stated that: "In that part of the continental shelf covered by the Patrimonial Sea the legal regime provided for this area shall apply. With respect to the part beyond the Patrimonial Sea, the regime established for the continental shelf by

of innocent passage could be exercised by all States, had not been mentioned in the previous Declarations by the Latin American States the Santo Domingo Declaration only reflected the general attitude of most coastal States. On the other hand, the intention behind the Latin American claims to 200 nautical miles was to secure their rights over the natural resources of the area claimed and this intention was well protected by the provisions regarding the Patrimonial Sea. Thus a 12 miles territorial sea, a 200 nautical miles Patrimonial Sea and an independent regime for the continental shelf were the basis of the Santo Domingo Declaration; the very basis of the subsequent negotiations in the UNCLOS III.

ii. Organization of African Unity (OAU) and the Law of the Sea

The Council of Ministers of the OAU met in Addis Ababa, Ethiopia in June 1971.[93] The Resolution on Fisheries passed by the Council referred to the importance of fishery resources in the seas adjacent to the coasts of the African States and proceeded to state that the Council inter alia:

> "1. Confirms the inalienable rights of the African Countries over the fishery resources of the Continental Shelf surrounding Africa, in accordance with the spirit and principle

---

International Law shall apply". Ibid, at p. 248.

92. Ibid.

93. Resolutions of the Council of Ministers of the Organization of African Unity of 1971, Resolution on Fisheries, see the Text in Shigeru Oda, The International Law of the Ocean Development, Basic Document, Vol. II, 1972, pp. 362-363.

> of the Charter of the United Nations and the Charter of the Organization of African Unity;
>
> 2. Urges the governments of the African Countries to take all necessary steps to proceed rapidly to extend their sovereignty over the natural resources of the high seas adjacent to their territorial waters up to the limits of their continental shelf;
>
> 3. Confirms that the exploitation of fishery resources in the fishing areas thus defined for each Country shall always be conducted in accordance with its national laws and regulations.....".[94]

It is clear that the main reason for adopting the above Resolution was to urge the African States to exercise sovereign rights over the living resources of the seas adjacent to their territorial waters. However, the fact that the seaward limit of the fishery rights was to correspond to the limit of the continental shelf can be regarded as a mistake since its application would create some controversial arguments. These arguments would be based on the interpretation of the continental shelf itself since it was not clear whether the continental shelf was considered in its customary concept as in the 1958 Geneva Convention or in its geological concept which had been so vigorously defended by the ICJ in the North Sea Continental Shelf Cases.[95] If it was the first the question of the outer limit of the continental shelf had not yet been settled. If it was the latter the whole object of the Resolution would seem meaningless in the case of some African States

---

94. Ibid, at p. 363.

95. See above pp. 472-481.

with a very narrow shelf such as Ethiopia, Zaire and Congo.[96]

In June 1972, the OAU held a Regional Seminar on the Law of the Sea in Yaounde, Cameroon.[97] The Seminar adopted a number of recommendations which included a 12 mile territorial sea and an unspecified limit beyond the territorial sea called the Economic Zone.[98] Referring to the Economic Zone the Recommendation stated:

> "(3) The African States have equally the right to establish beyond the Territorial Sea an Economic Zone over which they will have an exclusive jurisdiction for the purpose of control regulation and national exploitation of the living resources of the sea and their reservation for the primary benefit of their peoples and their respective economies, and for the purpose of the prevention and control of pollution".[99]

The Recommendation proceeded to recognize freedom of navigation and overflight as well as the freedom to lay submarine cables and pipelines within the Economic Zone. Although this Recommendation did not refer to the natural resources of the seabed and subsoil the subsequent Recommendations made it clear that the rights over the Economic Zone would also apply to the natural resources of the seabed and subsoil of the Zone. Part II of the Conclusions of the Yaounde Seminar stated that the participants: "Recommend to African States to extend their sovereignty over all the

---

96. Alexander & Hodgson, "The Role of the Geographically Disadvantaged States in the Law of the Sea", 13 San Diego Law Review (1976) pp. 558-582, at pp. 564-565.
97. Conclusions of the Regional Seminar on the Law of the Sea, see the Text in 13 ILM (1973) pp. 210-213.
98. Ibid, at p. 210.
99. Ibid, at p. 211.

resources of the high seas adjacent to their territorial sea within an economic zone to be established and which will include at least the continental shelf".[100]

It is interesting to note that the right over the economic zone "which will include at least the continental shelf" was to be that of sovereignty.

In Part III "On the Continental Shelf and Seabed" it was recommended inter alia that:

> "(1) The Economic Zone embodies all economic resources comprising both living and non-living resources such as oil, natural gas and other mineral resources".[101]

There were two important Recommendations in the Conclusions of the Yaounde Seminar in relation to the rights of African States over the Economic Zone which are significant. The first concerned the right of the land-locked States within the economic zone. It was stated that:

> "The exploitation of the living resources within the economic zone should be open to all African States both land-locked and near land-locked, provided that the enterprises of these States desiring to exploit these resources are effectively controlled by African capital and personnel".[102]

The second concerned the concept of historic rights. In this respect it was stated that "....all 'historic rights' acquired by certain neighbouring African States in a part of the sea which may fall within the exclusive jurisdiction of another State would be recognized and safeguarded".[103]

---

100. Ibid.

101. Ibid, at p. 213.

102. Ibid, at p. 210.

103. Ibid, at p. 211.

The Yaounde Recommendations on the Law of the Sea was the first document to refer to the concept of an Exclusive Economic Zone although its root can be traced to the Declarations made by the Latin American States beginning with the concept of the Maritime Zone in 1952. It differed substantially from the Latin American Declarations in that the rights of the land-locked or near land-locked States were explicitly recognized. Furthermore, it also respected the historic rights of the African States within the Exclusive Economic Zone.

iii. The Group of 77

The Group of 77 was originally formed during the United Nations Conference on Trade and Development (UNCTAD) in 1970.[104] The idea behind the formation of the Group was to pursue their common interests within the UNCTAD and initially consisted of the developing countries from Africa, Asia and Latin America.[105]

The Second Ministrial Meeting of the Group of 77 was held in Lima from October 28 to November 8, 1971 and adopted a Resolution on Marine Resources.[106]

The Preamble of the Resolution referred to the right of the developing countries to exploit their natural

---

104. See A.O. Adede, "The Group of 77 and the Establishment of the International Sea-bed Authority", 7 Ocean Development and International Law (1979) pp. 31-64.

105. Ibid, at p. 61, note 7. According to Adede, "They are now 105 Countries but the original name - Group of 77 - has been retained", ibid.

106. Resolution of the Ministerial Meeting of the Group of 77, Resolution on Marine Resources, see the Text in Oda, Op. Cit., in note 93 (p. 491), at pp. 364-366.

resources for the benefit of their peoples. The First Paragraph of the Resolution stated that the Group of 77 decides:

> "1. To affirm as a common aim of the Group of 77 recognition by the international community that coastal States have the right to protect and exploit the resources of the sea adjacent to their coasts and of the soil and subsoil thereof, within their limits of national jurisdiction, the establishment of which must take due account of the development and welfare of their peoples".[107]

Although the above Resolution was pronounced in general terms and did not specify the limit of the adjacent sea, two important points emerged from it: First, it referred to the seabed and subsoil of the adjacent sea and not to the continental shelf. Secondly, it marked the beginning of a new political development in the Law of the Sea.[108] The Group, as stated above, comprised the developing States from Africa, Asia and Latin America and therefore dissolved within itself the regional and sub-regional policies in favour of a common policy based on the defence of the interests of the developing countries on a global basis. The influence of the Group of 77 on the development of the Law of the Sea during the UNCLOS III will be discussed in the next Chapter.

---

107. Ibid, at p. 365.

108. Paragraph 5 of the Resolution stated that the Group of 77 decides:
"To maintain periodical consultations among the States members of the Group of 77 concerning the exploitation of the marine resources within and beyond the limits of national jurisdiction, in view of co-operating positions which may be of common interest to the developing Countries", ibid, at p. 366.

E- Preparatory Work of the Seabed Committee

As stated earlier, on December 17, 1970 the General Assembly passed Resolution 2750-C according to which a new Conference on the Law of the Sea was scheduled for 1973.[109] It was further decided in that Resolution that the Seabed Committee should be expanded by 44 new members and that the enlarged Seabed Committee should prepare draft treaty articles for the Conference.[110]

The Seabed Committee held its first session in March 1971 and after intensive negotiations and consultations established three Sub-Committees.[111] The subjects and functions allocated to each Sub-Committee were essentially those which had been mentioned in the General Assembly Resolution 2750-C. Sub-Committee I was given the task of preparing draft articles on the subject of the Seabed regime. Sub-Committee II was given the task to "prepare a comprehensive list of subjects and issues relating to the Law of the Sea".[112]

---

109. UNGA, Resolution 2750-C (XXV), 10 ILM (1971) pp. 226-230. States voting against this Resolution were: Bulgaria, Byelorussia, Czechoslovakia, Hungary, Ukraine and the USSR, see ibid, at p. 230.

110. The Seabed Committee was expanded to 86 members in December 1970, UNGA, 26th Session, Report, 1971, at p. 3, Paragraph 12, and to 91 in 1972, UNGA, 27th Session, Report, 1972, at p. 2, Paragraph 7.

111. The Seabed Committee held its first Session from 12 to 26 March 1971 in Geneva. For detail of the subjects and functions allocated to each Sub-Committee see UNGA Official Records, 26th Session, Report, 1971, at pp. 4-5. See also Oda, Op. Cit., in note 39 (p. 466), at pp. 153-183.

112. UNGA Official Records, 26th Session, Report, 1971, at p. 5, Paragraph 19.

The list was to include the regime of the territorial sea (its breadth and the question of international straits), the continental shelf, the high seas as well as other issues such as the contiguous zone, fishing and conservation of the living resources of the high seas and the preferential rights of the coastal States in those areas.[113] Sub-Committee III was to prepare draft treaty articles on the preservation of the marine environment and scientific research.

Although on the basis of the above allocations various questions related to the continental shelf were to be dealt with by Sub-Committee II, the question of the outer limit of the continental shelf was also discussed by Sub-Committee I.[114] The work of the Sub-Committees in relation to the continental shelf during 1971, 1972 and 1973 will be discussed separately as follows:

i. <u>The Work of the Seabed Committee in relation to the Continental Shelf in 1971</u>

Of the various proposals submitted to Sub-Committee I in relation to the seabed regime only three made direct reference to the outer limit of the continental shelf or national jurisdiction regarding submarine areas. These were proposals by the United States, Malta and a joint proposal by Afghanistan, Austria, Belgium, Hungary, Nepal, the

---

113. Ibid.

114. See above pp. 464-472.

Netherlands and Singapore.[115]

The United States Proposal stated inter alia:

> "... the international regime should apply to the broadest practicable area of the Sea-bed, and in particular should include benefits flowing from the development of hydrocarbon deposits of the continental slope and rise. A broad international area necessarily requires narrow limits of exclusive national jurisdiction over sea-bed resources. (we have proposed a distance of 12 miles or a depth of 200 meters, whichever is further from shore). Seaward of such limits there would be a fairly broad trusteeship or international zone of mixed coastal and international rights".[116]

The Maltese Proposal, entitled "Draft Ocean Space Treaty" contained 205 articles. According to this Draft Treaty ocean space was divided into two zones: National Ocean Space and International Ocean Space. Paragraph 2 of article 1 defined Ocean Space as follows:

> "Ocean Space comprises the surface of the sea, the water column and the sea-bed beyond national waters".[117]

Paragraph 3 of the same article stated that:

> "National Ocean Space means that part of Ocean Space which is under the jurisdiction of a coastal State".[118]

Article 36 described the limits of national jurisdiction

---

115. In addition to the member States of the Committee the meetings of the Sub-Committee I were attended by observers from Barbados, Burma, China, Cuba, Dominican Republic, Fiji, Finland, Israel, Malawi, Nicaragua, Portugal, Saudi Arabia and South Africa. Also attending the meetings were the representatives of FAO, IAEA, UNESCO and its Intergovernmental Oceanographic Commission, WMO, and UNCTAD, see UNGA Official Records, 26th Session, Report, at p. 16, Paragraph 50.
116. Ibid, at pp. 17-18, Paragraph 53.
117. Ibid, pp. 105-193, at p. 114.
118. Ibid.

as extending "to a belt of ocean space adjacent to the coast the breadth of which is 200 nautical miles".[119]

Article 47 stated that:

> "Subject to the provisions of these articles, vessels of all States, whether coastal or not, shall enjoy the right of innocent passage through national ocean space beyond 12 miles from the coast and of innocent passage in other parts of national ocean space".[120]

In cases where the submarine area extends beyond the 200 nautical mile national ocean space and the depth of the superjacent waters does not exceed 200 metres, the coastal States should be given equitable compensation.[121]

The Proposal submitted by Afghanistan, Austria, Belgium, Hungary, Nepal, the Netherlands and Singapore also concerned the submarine areas adjacent to the coast.[122] It was proposed that "The international area shall comprise all sea-bed and subsoil outside the area of the territorial sea (the maximum breadth of which is 12 miles from the base-line)

---

119. Ibid, at p. 131.

120. Paragraph 2 of article 34 stated: "In a belt of sea adjacent to the coast not exceeding twelve miles in breadth the right of overflight is limited to passage not prejudical to the peace, good order and security of the coastal State". The right of innocent passage within the 12 mile limit was recognized in article 47. Ibid, at pp. 129-135.

121. Ibid, at p. 131.

122. See the Text in UNGA Official Records, 26th Session, Report, 1971, at p. 194. Sponsors of this Proposal were land-locked or shelf-locked States, see Alexander and Hodgson, Loc. Cit., in note 96 (p. 493), at pp. 562-565. For further discussions on the work of the Sub-Committee I, see Oda, Op. Cit., in note 39 (p. 466), at pp. 155-174.

and beyond the submarine areas adjacent to the coasts of States. For the purpose of this article submarine areas are considered to be adjacent to the coast of particular State if

> -either their depth does not exceed 200 metres,
> -or they underlie a belt of sea the breadth of which is 40 miles from the base-line of the territorial sea.....".[123]

Other proposals submitted to Sub-Committee I did not refer to the outer limit of the national jurisdiction regarding the submarine areas.[124] They were mainly concerned with the organizational structure of the seabed authority and questions such as the interpretation of the common heritage of mankind and equitable sharing of the resources of the area.

The legal status of the continental shelf, as mentioned earlier, was one of the subjects which had been allocated to Sub-Committee II. This Sub-Committee held two Sessions in Geneva during 1971 and received a number of proposals from various States.[125] None of the proposals was in the form of a draft article but all were concerned with the list of subjects relating to the Law of the Sea. The lists invariably included the continental shelf, its

---

123. UNGA Official Records, 26th Session, Report, 1971, at p. 194.

124. See proposals by the United Kingdom, France, the United Republic of Tanzania, the Union of Soviet Socialist Republics, Poland, Canada, a joint proposal by Chile, Colombia, Ecuador, El Salvador, Guatemala, Guyana, Jamaica, Mexico, Panama, Peru, Trinidad and Tobago, and Venezuela, another joint proposal by Afghanistan, Belgium, Hungary, Nepal, the Netherlands, Austria and Singapore, ibid, at pp. 18-23.

125. Ibid, at pp. 30-37.

natural resources, its delimitation and its outer limit.[126]

ii. The Work of the Sea-bed Committee in Relation to the Continental Shelf in 1972

In 1972, Sub-Committee I held two Sessions. The first Session was held in New York from 29 February to 29 March and the second in Geneva from 19 July to 15 August. During its First Session in New York Sub-Committee I had adopted its Programme for 1972.[127] Two Items were to be discussed; the first Item concerned the "status, scope and basic provisions of the regime" according to the Declaration of Principles, and the second Item was related to "status, scope, functions and powers of the international machinery".[128] The result of the work accomplished by the Sub-Committee was a Text which illustrated the areas of agreements and disagreements regarding the first Item.[129] The Text, while referring to the limits of the area, stated:

> "The sea-bed and ocean floor, and the subsoil thereof beyond the limits of national jurisdiction, as defined pursuant to Article.... and hereinafter referred to as the 'area', are the common heritage of mankind".[130]

In 1972, the Sea-bed Committee received detailed proposals regarding various aspects of the Law of the Sea. These included the Text of the Declaration of Santo Domingo

---

126. UNGA Official Records, 27th Session, Report, at pp. 5-8.

127. Ibid, Paragraph 51.

128. Ibid.

129. Ibid, at pp. 81-108.

130. Ibid, at p. 85. See also Oda, Op. Cit., in note 39 (p. 466), at pp. 187-209.

and the Conclusions in the General Report of the African States Regional Seminar on the Law of the Sea.[131]

Sub-Committee II received many proposals on various subjects during 1972.[132] The only proposal affecting the submarine areas beyond the territorial sea was submitted by Kenya.[133] The Proposal was entitled "Draft articles on exclusive economic zone" and referred to a 12 mile territorial sea and a 200 mile exclusive economic zone.[134] Article IV of these draft articles stated:

> "The exercise of jurisdiction over the Zone shall encompass all the economic resources of the area, living and non-living, either on the water surface or within the water column, or on the soil of sub-soil of the sea-bed and ocean floor below".[135]

Article V stated inter alia that the coastal State

> "....may establish special regulations within its Economic Zone for:
> (a) Exclusive exploration and exploitation of non-renewable marine resources;
> (b) Exclusive or preferential exploitation of renewable resources;
> (c) Protection and conservation of the renewable resources;
> (d) Control, prevention and elimination of pollution of the marine environment;
> (e) Scientific research".[136]

Article III of the Proposal stated that "The establishment

---

131. UNGA Official Records, 27th Session, Report, at pp. 70-76.

132. Ibid. We may also refer to a request by Afghanistan, Austria, Belgium, Bolivia, Czechoslovakia, Hungary, Nepal, the Netherlands, Singapore, Zaire and Zambia in which they asked the Secretary-General to study the implications of the various proposals regarding the limit of the area. The limits suggested were as follows:
" (a) 200 metres isobath;
(b) 500 metres isobath;
(c) 40 nautical miles;
(d) 200 nautical miles;
(e) edge of continental margin". Ibid, at pp. 77-78.

of such a Zone shall be without prejudice to the exercise of freedom of navigation, freedom of overflight and freedom to lay submarine cables and pipelines as recognized in international law".[137] The EEZ concept was very much in the same spirit as the concepts of the Maritime Zone, Patrimonial Sea and Maritime Sovereignty which had been advocated by some Latin American States.[138]

The concept of the EEZ as proposed by Kenya was included in the list of subjects relating to the Law of the Sea and was submitted to Sub-Committee II by 55 members.[139] The list was approved by the Main Committee on August 18, 1972.[140] The list also included the regime of the continental shelf, its resources, its outer limit, its superjacent

---

133. Ibid, at pp. 180-182.

134. Ibid.

135. Ibid.

136. Ibid.

137. Ibid.

138. For the concept of the Exclusive Economic Zone see E.D. Brown, Loc. Cit., in note 23 (p. 461), at pp. 170-186; see also by the same author, "The exclusive economic zone: criteria and machinery for the resolution of international conflict between different users of the EEZ", 4 Marit. Pol. Mgmt (1977) at pp. 325-350. See above pp. 482-491.

139. The members consisted of developing countries of Africa, Asia and Latin America; see UNGA Official Records, 27th Session, Report, 1972, at pp. 142-146. The List as approved by the Committee received amendments from the following countries: Malta, the United States, Greece and Italy, Japan, the USSR, a joint amendment by Afghanistan, Austria, Belgium, Bolivia, Czechoslovakia, Hungary, Mali, Nepal and Zaire, Turkey, a joint amendment by France, the Netherlands, the United Kingdom, and finally a second amendment by Japan. UNGA Official Records, 27th Session, Report, 1972, at pp. 147-154.

140. Ibid, at p. 4, Paragraph 23.

waters and its natural resources.[141]

Other proposals were essentially concerned with the fishery and preferential rights of the coastal States in areas adjacent to their coasts. Although the latter point was emphasised in all those proposals there were some limitations attached to those rights. Furthermore, none of these proposals suggested any limit on the area within which the preferential rights were to be exercised.[142]

iii. The Work of the Sea-bed Committee in Relation to the Continental Shelf in 1973

In 1973, Sub-Committee II held two Sessions, in March and July, and received 50 proposals, working papers, draft articles and other documents regarding the list of the subjects relating to the Law of the Sea.[143] Unlike the previous Sessions, the documents submitted to the Sub-Committee were in the form of draft articles or proposals and were not simply a list of subjects.

There were a few draft articles on the continental shelf which will be dealt with later, but the most important results of an overall assessment of the documents submitted

---

141. Ibid, at p. 6.

142. See for example the following proposals: Declaration on Principles of Rational Exploitation of the Living Resources of the Sea and Ocean in the Conference of Ministers held at Moscow between 6-7 July 1972; the above Declaration was submitted to the Sub-Committee II as a proposal, UNGA Official Records, 27th Session, Report, 1972, at pp. 78-80. See also Draft article on fishing (basic provisions and explanatory note) submitted by the USSR, ibid, at pp. 158-161; Working Paper on Management of the Living Resources of the Sea, submitted by Canada, ibid, at pp. 164-174; revised draft fisheries article, submitted by the United States, ibid, at pp. 175-179; Working Paper

by various States reveals that (a) the concept of a 200 mile EEZ was gathering significant support among States and (b) the territorial sea of 12 miles, subject to the right of innocent passage, was very much the limit generally accepted by almost all States. Since the extent of rights and the limit of both the territorial sea and the EEZ are directly related to the regime of the continental shelf it is appropriate to look at some those proposals:

a. Proposals Relating to the Territorial Sea and the EEZ

The 12 mile limit for the territorial sea, subject to the right of innocent passage, was proposed by the USSR;[144] by Colombia, Mexico and Venezuela in a joint proposal,[145] Malta,[146] Argentina,[147] Pakistan,[148] and the Netherlands.[149] The proposal by Uruguay referred to a 200 mile territorial sea with the right of innocent passage recognized within the 12 mile limit but beyond that limit the freedom of navigation, the freedom of overflight and the freedom to lay submarine cables and pipelines were also acknowledged.[150] It is important to point out that there was not a single

---

submitted by Australia and New Zealand, ibid, at pp. 183-187; and finally proposals for a regime of fisheries of the high seas submitted by Japan, ibid, at pp. 188-196.

143. UNGA Official Records, 28th Session, Report, 1973, Vol. III, at pp. vi-viii.

144. Ibid, at p. 1.

145. Ibid, at pp. 19-22.

146. Ibid, at pp. 35-70.

147. Ibid, at pp. 78-81.

148. Ibid, at p. 106.

149. Ibid, at pp. 111-114.

150. Ibid, at pp. 23-28.

proposal suggesting a territorial sea of less than 12 miles. Two other proposals also advocated the sovereignty of the coastal States over a 200 mile territorial sea. These were a proposal by Brazil[151] and joint proposal by Ecuador, Panama and Peru.[152] The former did not mention the rights of other States within the territorial sea while the latter, after referring to the freedom of navigation (article 4), stated that:

> "Notwithstanding the provisions of article 4, the coastal State may lay down additional provisions for the passage of foreign vessels and aircraft within a limit close to its coast, for the purpose of safeguarding national peace, order and security".[153]

The following States proposed a 200 nautical mile Exclusive Economic Zone, Fishery Zone or Patrimonial Sea: Argentina,[154] Iceland,[155] a joint proposal by Colombia, Mexico and Venezuela,[156] Malta,[157] China,[158] a joint proposal by Australia and Norway,[159] a joint proposal by Algeria, Cameroon, Ivory Coast, Kenya, Liberia, Madagascar, Mauritius, Senegal, Sierra Leone, Somalia, Sudan, Tunisia and United Republic of Tanzania,[160] and Pakistan.[161] The proposals by the United States [162] and Japan [163] referred to the

---

151. Ibid, at p. 29.
152. Ibid, at pp. 30-35.
153. Ibid, at p. 30 (article 5).
154. Ibid, at pp. 87-89.
155. Ibid, at p. 23.
156. Ibid, at pp. 19-22.
157. Ibid, at pp. 35-70.
158. Ibid, at pp. 71-74.
159. Ibid, at pp. 77-78.
160. Ibid, at pp. 87-89.
161. Ibid, at p. 106.
162. Ibid, at pp. 75-77.
163. Ibid, at p. 111.

exclusive rights of the coastal States but a limit was not specified. In addition they did not mention the rights of coastal States over the living resources of the superjacent waters of the area. The proposal by the Netherlands suggested an intermediate zone beyond the 12 mile territorial sea, but the exact limit of this zone was not mentioned.[164] Moreover, coastal States were not given an exclusive right over the living resources of the superjacent waters of the zone. Finally, the draft articles on fisheries submitted by Canada, India, Kenya and Sri Lanka recognized the exclusive right of coastal States to their fisheries beyond the territorial sea. The limit of the exclusive fishery zone was not specified in the proposal.[165]

b. Proposals Relating to the Continental Shelf

During 1973 Sub-Committee II received 7 proposals regarding the regime of the continental shelf. These proposals were submitted by the following States:

1. Colombia, Mexico and Venezuela. Article 13 of the draft treaty articles submitted by these States defined the term continental shelf as:

> "The seabed and subsoil of the submarine areas adjacent to the coast, but outside the area of the territorial sea, to the outer limits of the continental rise bordering on the ocean basin or abyssal floor".[166]

---

164. Ibid, at pp. 111-114.

165. Ibid, at pp. 82-84.

166. Ibid, at p. 21.

The nature of the rights to be exercised by the coastal States over the continental shelf was describrd in article 14 which stated: "The coastal State exercises sovereign rights over the continental shelf for the purpose of exploring it and exploiting its natural resources". And article 15 stated that:

> "In that part of the continental shelf covered by the patrimonial sea, the legal regime for the latter shall apply. With respect to the part beyond the patrimonial sea, the regime established by international law for the continental shelf shall apply".[167]

It will be recalled that the above proposal had already been put forward by the Santo Domingo Declaration.[168]

2. The USSR

Paragraph 1 of the "rough draft of basic provisions on the question of the outer limit of the continental shelf" submitted by the USSR stated:

> "The outer limit of the continental shelf may be established by the coastal State within the 500-metre isobath".[169]

Paragraph 2 gave the coastal States rights over the continental shelf to a distance of 100 miles provided the depth does not exceed 500 metres. Paragraph 3 granted all coastal States the same rights over submarine areas which are not the continental shelf in a proper sense.[170]

3. Malta

The "Preliminary draft articles on the delimitation

---

167. Ibid.

168. See above pp. 487-491.

169. UNGA Official Records, 28th Session, Report, 1973, Vol. III, at p. 29.

170. Ibid.

of coastal State jurisdiction in Ocean Space and on the rights and obligations of coastal States in the area under their jurisdiction" was based on the Maltese "Draft Ocean Treaty" which had been submitted to the Sea-bed Committee in 1971.[171]

4. The Netherlands

A note attached to Article I of the "proposal concerning an intermediate zone" submitted by the Netherlands stated that:

> "The continental shelf is understood here as the sea-bed and subsoil adjacent to the coast, not exceeding the 200 metres isobath or underlying a belt of sea the breadth of which is 40 nautical miles....".[172]

5. Argentina

Article 15 of the "draft articles" submitted by Argentina stated that:

> "The sovereignty of a coastal State extends to its continental shelf. The continental shelf comprises the bed and subsoil of the submarine areas adjacent to the territory of the State but outside the area of the territorial sea, up to the outer lower edge of the continental margin which adjoins the abyssal plains or, when that edge is at a distance of less than 200 miles from the coast, up to that distance".[173]

The sovereignty over the continental shelf did not include sovereignty over its superjacent waters.[174] The natural

---

171. See above pp. 499-500.

172. UNGA Official Records, 28th Session, Report, 1973, Vol. III, pp. 111-114, at p. 112.

173. Ibid, pp. 78-81, at p. 80.

174. Ibid, article 16, at p. 80. A Working paper submited by Ecuador, Panama and Peru, also referred to the provisions to be considered where the continental shelf extends beyond 200 nautical miles, ibid, pp. 30-35, at p. 35.

resources of the continental shelf were defined in article 18 and were exactly the same as in Article 2 (4) of the 1958 Geneva Convention on the Continental Shelf.[175]

6. China

Paragraph 1 of Part 3 of the Working paper submitted by China stated that:

> "By virtue of the principle that the continental shelf is the natural prolongation of the continental territory, a coastal State may reasonably define, according to its specific geographical conditions, the limits of the continental shelf under its exclusive jurisdiction beyond its territorial sea or economic zone. The maximum limits of such continental shelf may be determined among States through consultations".[176]

Paragraph 2 defined the natural resources of the continental shelf as including "the mineral resources of the seabed and subsoil and the living resources of sedentary species".[177] Paragraph 3 referred to the waters above the continental shelf and stated:

> "The superjacent waters of the continental shelf beyond the territorial sea, the economic zone or the fishery zone are not subject to the jurisdiction of the coastal State".[178]

It is important to point out that since the preparatory work of the Seabed Committee began in 1971 the Chinese Working paper was the first document to have referred to the concept of 'natural prolongation'. Furthermore, it proposed that if the natural prolongation extended beyond the 200

---

175. Article 4 of the above draft articles had already given coastal States sovereign rights over the sea adjacent to the territorial sea to a distance of 200 nautical miles". Ibid, at p. 79, and pp. 80-81.

176. Ibid, at pp. 71-74, at p. 74.

177. Ibid.

178. Ibid. Note that the coastal States' exclusive jurisdiction over all the natural resources of the EEZ had

mile EEZ or FZ coastal States were entitled to the natural resources of their continental shelves the limit of which would be decided by the international community.

7. Australia and Norway

The Working paper submitted by the delegations of Australia and Norway also referred to the continental shelf and the concept of 'natural prolongation'.[179] Paragraph 1 (c) stated:

> "The coastal State has the right to determine the outer limit of the (economic zone - patrimonial sea) up to a maximum distance of 200 nautical miles from the applicable baselines for measuring the territorial sea. However, the coastal State has the right to retain, where the natural prolongation of its land mass extends beyond the (economic zone - patrimonial sea), the sovereign rights with respect to that area of the sea-bed and subsoil thereof which it had under international law before the entry into force of this convention: such rights do not extend beyond the outer edge of the continental margin".[180]

The three Sub-Committee were, as mentioned earlier, given the task of preparing draft treaty articles on the subjects which had been allocated to them. Sub-Committees I and III succeeded in providing the UNCLOS III with draft articles in the form of alternative articles showing the areas of agreements and disagreements.[181] Sub-Committee II did not achieve this goal. It is, however, important to

---

already been recognized, ibid, at p. 72, 2(1).

179. Ibid, at pp. 77-78.

180. Ibid, at p. 78.

181. See the Text in UNGA Official Records, 28th Session, Report, Vols. IV,V and VI; see also John R. Stevenson and Bernard H. Oxman, "The Preparations for the Law of the Sea Conference", 68 AJIL (1974) pp. 1-32.

bear in mind that Sub-Committee II, despite the importance of the subjects allocated to it and the political controversies surrounding these subjects, made very good progress. The points which emerged during its various Sessions in 1971, 1972 and 1973 can be summarized as follows:

1. Sovereignty of coastal States over the territorial sea, the breadth of which was generally agreed to be 12 miles. Within this limit the right of innocent passage was recognized.

2. Exclusive jurisdiction of the coastal States over a zone referred to as the Exclusive Economic Zone. The limit of this zone was generally accepted to be 200 nautical miles. While the freedom of navigation, freedom of overflight, freedom to lay submarine cables and pipelines and freedom of scientific research were recognized the exclusive right of the coastal States within this zone extended to the natural resources (both living and non-living) of the seabed and subsoil as well as its superjacent waters.

3. The sovereign rights of the coastal States over the exploitation of the natural resources of the continental shelf, which is the natural prolongation of the land territory, was to extend beyond the 200 nautical mile limit. The limit referred to in some proposals was the edge of the continental margin.

The above principles which emerged during the preparatory work of Sub-Committee II have, as will be shown in the next Chapter, appeared in the Texts which have, so far, been produced by the UNCLOS III.

CHAPTER X

THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA

Introduction

As described in the previous Chapter, the Third United Nations Conference on the Law of the Sea was convened by the General Assembly, to provide a comprehensive Treaty on the Law of the Sea. It took the UN Sea-bed Committee nearly three years to prepare a few draft treaty articles for the Conference. The subjects and the number of the items agreed to be submitted to the Conference were, in short, complex and ambitious.

This Chapter is devoted to the UNCLOS III and its progress and achievements. The First Session of the Conference was held in New York in 1973 and its Tenth Session ended in Geneva in August 1981.

The question of the exploitation of the natural resources of the continental shelf is closely related to the rights of the coastal States within the limits of national jurisdiction; these are the territorial sea and the EEZ. In this Chapter the development of the Law of the Sea, regarding the territorial sea, the EEZ and the continental shelf, through the UNCLOS III will be described. Since the Conference is still in progress it is appropriate to assess State practice regarding the development of the Law of the Sea in respect of those three issues.

A- The Conference

On 16 November 1973 the General Assembly, by Resolution 3067 (XXVIII), dissolved the Sea-bed Committee and on 3 December 1973 the First Meeting of the First Session of the UNCLOS III was held in New York.[1] The First Session of the Conference had been designed by the General Assembly to deal exclusively with the organizational structure of the Conference and its rules of procedure.[2] The First Session of the Conference was attended by delegates of 137 States.[3] Since then the Conference has held 10 Sessions and has produced a number of Informal Texts.[4] The 9th Session of the Conference which ended on 29 August 1980 produced a Text containing 320 Articles and 8 Annexes.[5]

In the following pages the process of the UNCLOS III towards providing a treaty for the Law of the Sea will be examined. While brief references will be made to the areas of disagreement which have prevented the Conference from

---

1. GA Resolution 3067 (XXVIII) (1973), 13 ILM (1974) pp. 227-229. The Resolution was passed by a vote of 117 in favour, none against and 10 abstentions, ibid.
2. Paragraph 2 of the Resolution stated that the General Assembly "decides to convene the First Session of the Third United Nations Conference on the Law of the Sea in New York from 3 to 14 December 1973 inclusive for the purpose of dealing with matters relating to the organization of the Conference, including the election of its officers, the adoption of the agenda and rules of procedure of the Conference.....". Ibid.
3. UNCLOS III Official Records, Vol. I, Summary Records of Meetings, UN, 1975, at pp. 17-20.
4. The Tenth Session of the Conference ended on 28 August, 1981. See UNIC , For the United Kingdom, Ireland and the Netherlands,"Resumed Tenth Session of Law of Sea Conference, Geneva, 3-28 August", BR/81/20 for use of Information Media - not an Official Record, 31 August, 1981; Vol. X S.R. No.1, International Report (Anniversary

achieving its goal special emphasis will be placed on the legal status of the continental shelf and its resources and its relation to other issues such as the EEZ.

1. UNCLOS III, First Session (New York): 1973

At the First Meeting of the First Session in New York the provisional agenda of the Conference was adopted. This provisional agenda included among other items the adoption of the rules of procedure, appointment of the Credentials Committee, election of Chairmen of the Main Committees and appointment of the members of the Drafting Committee.[6]

At its 6th Meeting the Conference decided that "No State shall as a right be represented on more than one Main Committee".[7] During the following Meeting the Conference elected Chairmen of the First, Second and Third Committees.[8] The three main Committees of the Conference were essentially to deal with the list of subjects which had previously been dealt with and approved by the Seabed Committee. At the same Meeting the Chairman of the Drafting Committee, its members and the members of the Credential Committee were also elected.[9] Thus the structural organization of the

---

Issue) 23 September 1981, at pp. 1-2.

5. See ICNT, Rev. 3, (A/CONF. 62/WP. 10/Rev. 3), 27 August 1980.

6. UNCLOS III, Official Records, First Session, Vol. I, at pp. 3-5.

7. Ibid, 6th Meeting, at p. 16, Para. 1.

8. Ibid, 7th Meeting, at pp. 17-20.

9. Many of the elected personalities had acted in the same capacities for the UN Seabed Committee. See John R. Stevenson and Bernard H. Oxman, "The Third United

Conference consisted of the following Committees:

i. The Main or General Committee;
ii. The First Committee;
iii. The Second Committee;
iv. The Third Committee;
v. The Drafting Committee;
vi. The Credential Committee.[10]

In addition to its informal consultations the Conference spent four meetings discussing the issue of the rules of procedure. The result was not successful. The Conference decided at the end of the First Session that informal consultations regarding the rules of procedure should continue and a final decision be taken by the Conference at the beginning of its Second Session in Caracas.[11]

Nations Conference on the Law of the Sea: The 1974 Caracas Session", 69 AJIL (1975) pp. 1-31, at p. 3.

10. Stevenson and Oxman noted that:
"The Conference inherited from the United Nations its regional groups; African, Asian, Eastern European, Latin American, Western European and others. It also inherited the so-called "Group of 77", principally the developing Countries of Africa, Asia, and Latin America, now numbering more than 100. Some subregional meetings also occured, for example among Arab States and among members of the European Economic Community.... Land-locked and other "Geographically disadvantaged" States consult with each other frequently...", ibid, at p. 5.

11. The draft rules of procedure had, according to the President of the Conference, "a bearing on the gentleman's agreement" which had been reached during the proceedings of the GA at its 2169th meeting on 16 Nov. 1973. It had been stated during the proceedings that "...the General Assembly expresses the view that the Conference should make every effort to reach agreement on substantive matters by way of consensus; that there should be no voting on such matters until all efforts at consensus have been exhausted; and further expresses the view that the Conference at its inaugural session will consider devising appropriate means to that end". The President at the Final Meeting of the First Session after referring to the above statement said:

2. UNCLOS III, Second Session (Caracas): 1974

On 20 June 1974 the Second Session of the UNCLOS III was officially opened in Caracas.[12] The Conference eventually adopted its rules of procedure on 27 June 1974.[13] Two important issues regarding the decision-making capacity and the way it should be carried out were incorporated in Rules 37 and 39. It was decided in Rule 37 that:

> "1. Before a matter of substance is put to the vote, a determination that all efforts at reaching general agreement have been exhausted shall be made by the majority specified in Paragraph 1 of rule 39".[14]

Paragraph 1 of Rule 39 stated that:

> "Decisions of the Conference on all matters of substance, including the adoption of the text of the Convention on the Law of the Sea as a whole, shall be taken by a two-thirds majority of the representatives present and voting, provided that such majority shall include at least a majority of the States participating in that session of the Conference".[15]

Paragraph 4 of the same Rule stated:

> "If the question arises whether a matter is one of procedure or of substance, the President shall rule on the question. An appeal against this ruling shall immediately be put to the vote and the President's ruling shall stand unless the appeal is approved by a majority of the representatives present and voting".[16]

"The Consultations had failed to devise appropriate means to that end. As there was not sufficient time to proceed with the consultations and as there was no prospect of their yielding fruitful results...". The President therefore invited all interested members to hold informal consultations from 25 February to 1 March 1974 in order to succeed in reaching agreement "not later than 27 June 1974", see UNCLOS III Official Records, 1975, Vol. I, Summary Records, 13th Meeting, at p. 30. Paragraphs 1 and 2; see also Daniel Vignes, "Will the Third Conference on the Law of the Sea Work According to the Consensus Rule", 69 AJIL (1975)pp. 119-29.

12. UNCLOS III, Official Records, 1975, Vol. I, at p. 30.
13. Ibid, at pp. 54-59; see the Rules in 13 ILM (1974)

On 21 June 1974 the Conference approved the allocation of the items to each Main Committee.[17] The items allocated to the Second Committee of the UNCLOS III included the following subjects: territorial sea, contiguous zone, straits used for international navigation, continental shelf, exclusive economic zone, high seas and land-locked Countries.[18] The work of the Second Committee regarding the rights and duties of the coastal States over the territorial sea, the continental shelf and the exclusive economic zone will bw discussed below:

i. The Territorial Sea

Of all the proposals submitted to the Conference only three States expressed preferences for a territorial sea in excess of 12 miles. The draft articles submitted by Spain referred to national jurisdiction or sovereignty of the coastal State over a 200 mile territorial sea.[19] Article 3 stated that:

> "The sovereignty of a Coastal State extends to straits forming part of the territorial sea, whether or not they are used for international navigation".[20]

Although Paragraph 2 of the same Article referred to this sovereignty as being subject to the rules of international

---

pp. 1199-1209.

14. Ibid.
15. Ibid.
16. Ibid.
17. Doc. A/CONF. 62/29, UNCLOS III Official Records, Vol. III, pp. 59-61.
18. Ibid, at p. 60.
19. Doc. A/CONF. 62/C.2/L.6, ibid, at p. 187.
20. Ibid, at p. 188.

law those rules were never specified in the Proposal itself.

The draft articles on the territorial sea submitted by Ecuador also referred to the sovereignty of the coastal State over a 200 nautical mile territorial sea.[21] There was no mention of the freedom of navigation or other rights traditionally enjoyed by other States in this draft articles.

Finally a draft article submitted by Nigeria referred to a 50 nautical mile territorial sea.[22]

ii. The Continental Shelf

The Second Committee spent five Meetings (16th-20th) in discussing various proposals regarding the regime of the continental shelf.[23] Delegates of nearly 60 States spoke on the subject. Two issues dominated the statements; first, States which expressed views as to a 200 nautical mile EEZ which would also cover the regime of the continental shelf and secondly, States which considered the regime of the continental shelf as an independent regime. According to the latter view the submarine areas forming a natural prolongation of the land territory and extending beyond the EEZ should be under the coastal States' sovereign rights.

Before examining some of the statements made during the proceedings of the Second Committee it is appropriate to refer to some of the proposals on the regime of the continental shelf which were submitted to the Conference

---

21. Doc. A/CONF. 62/C.2/L.10, ibid, at p. 189.
22. Doc. A/CONF. 62/C.2/L.12, ibid, at p. 190.
23. Ibid, Vol. II, at pp. 142-170.

or to the Second Committee.

Article 2 of a joint proposal submitted by Canada, Chile, Iceland, India, Indonesia, Mauritius, Mexico, New Zealand and Norway referred to a 12 mile territorial sea within which the coastal State exercised sovereignty over its seabed and subsoil as well as the air space above.[24] Article 12 established an economic zone of 200 nautical miles within which the coastal State exercises sovereign rights "for the purpose of exploring and exploiting the natural resources, whether renewable or non-renewable, of the sea-bed and subsoil and the superjacent waters".[25] The rights and duties of the coastal State within this zone would include "the preservation of marine environment and the conduct of scientific research".[26] Article 19(1) referred to the sovereign rights of the coastal State over the continental shelf. Paragraph 2 stated:

> "The continental shelf of a coastal State extends beyond its territorial sea to a distance of 200 miles from the applicable baselines and throughout the natural prolongation of its land territory where such natural prolongation extends beyond 200 miles".[27]

While the concept of 'natural prolongation' was used in defining the continental shelf its only significance was to guarantee the rights of States whose submarine areas extended beyond 200 miles; otherwise it served no purpose within the 200 mile EEZ.

---

24. Doc. A/CONF. 62/L. 4, see the text in UNCLOS III, Official Records, Vol. III, at pp. 81-83.
25. Ibid, Article 12.
26. Ibid.
27. Ibid, at p. 83.

A proposal by Greece referred to a national maritime zone within which there would be a 12 mile territorial sea (Article 8) and a 200 mile economic zone (Article 1).[28] Article 2 stated that:

> "The sovereignty of a coastal State extends beyond its continental or insular territory to its: (a) internal or archipelagic waters; (b) territorial sea; (c) continental shelf area of the economic zone".[29]

The Greek proposal neither defined the continental shelf nor recognized any rights beyond 200 miles. Another proposal by Greece employed the depth and distance criteria for determining the outer limit of the continental shelf.[30] This time the rights conferred on the coastal State were sovereign rights and were to be exercised "for the purpose of exploring it and exploiting its natural resources".[31] The continental shelf was referred to as "the seabed and subsoil of the submarine areas adjacent to the coast...".[32]

A proposal by Japan referred to the continental shelf as "the coastal sea-bed area".[33] The First Paragraph of the Japanese draft article stated that:

> "The coastal State exercises sovereign rights over the continental shelf (the coastal sea-bed area) for the purpose of exploring it and exploiting its mineral resources".[34]

The outer limit of the coastal sea-bed area was to be 200 nautical miles. As can be seen it is only mineral resources

---

28. Doc. A/CONF. 62/C.2/L. 22, ibid, at p. 200.
29. Ibid.
30. Doc. A/CONF. 62/C. 2/L. 25, ibid, at pp. 202-203.
31. Ibid, Article 4.
32. Ibid, Article 1.
33. Doc. A/CONF. 62/C.2/L. 31 Rev. 1, ibid, at p. 211.
34. Ibid.

which have been included. There is no reference to the natural prolongation or any recognition of any rights beyond the 200 nautical miles.[35]

The United States "draft articles for a chapter on the economic zone and the continental shelf" contained 29 articles.[36] Article 1 referred to the coastal State's jurisdiction or sovereign rights over the renewable and non-renewable natural resources within the economic zone.[37] The outer limit of the economic zone was to be 200 nautical miles.[38] Within the economic zone a distinction was made between renewable and non-renewable resources. The coastal State had to make sure that the total allowable exploitation of the renewable resources was achieved. If a coastal State could not utilize the resources it should make the surplus available to other States. The preferential right of the developing land-locked and other geographically disadvantaged States within the region to the surplus of the renewable resources was recognized.[39] Paragraph 1 of Article 22 recognized the sovereign rights of the coastal State over the continental shelf. The sovereign rights were to be exercised for the purpose of exploring the continental shelf and exploiting its natural resources.[40] Paragraph 2 defined

---

35. Ibid, paragraphs 1 and 2.
36. Doc. A/CONF. 62/C. 2/L. 47, ibid, at pp. 222-225.
37. Ibid, at p. 222, Article 1.
38. Ibid, Article 2.
39. Ibid, at p. 223, Article 13. Article 15 recognized the right of the nationals of the land-locked States to fish within the EEZ of the neighbouring States, ibid.
40. Ibid, at p. 224.

the continental shelf as:

> ....the seabed and subsoil of the submarine areas adjacent to and beyond the territorial sea to the limit of economic zone, or beyond that limit throughout the submerged natural prolongation of the land territory of the coastal State to the outer limit of its continental margin....".[41]

The definition of the natural resources which was incorporated in Article 24 was exactly the same as the definition of natural resources in Article 2 (4) of the Geneva Convention on the Continental Shelf.[42] Article 25 stated that the rights of the coastal State over the continental shelf should not affect the legal status of the superjacent waters or the airspace above the continental shelf.[43] It is clear, however, that the reference to the legal status of the superjacent waters of the continental shelf was in relation to the continental shelf beyond 200 miles since the legal status of the waters within that limit was governed by the provisions regarding the economic zone.

iii. The Economic Zone

The concept of a 200 nautical mile zone within which the coastal State exercises sovereign rights over the living and non-living resources of its seabed, subsoil and the superjacent waters was, as discussed earlier, created by the Latin American Countries.[44] The concept gained considerable support during the preparatory work of the

---

41. Ibid.
42. Ibid, at p. 225.
43. See above pp. 185-190.
44. See above pp. 482-491.

Sea-bed Committee.[45] During the Caracas Session the following States also expressed their support for the zone, which was now widely referred to as the Exclusive Economic Zone: Canada, Chile, Iceland, India, Indonesia, Mauritius, Mexico, New Zealand, Norway,[46] Guyana,[47] Nicaragua,[48] Nigeria,[49] Greece,[50] Bulgaria, Byelorussian SR, German Democratic Republic, Poland, Ukraine SSR and USSR,[51] USA,[52] Bolivia, Paraguay,[53] Gambia, Ghana, Ivory Coast, Kenya, Lesotho, Liberia, Libyan Arab Republic, Madagascar, Mali, Mauritania, Morocco, Senegal, Sierra Leone, Tunisia, United Republic of Cameroon, United Republic of Tanzania and Zaire.[54]

A document submitted by 22 land-locked and geographically disadvantaged States (LLGDS) to the Second Committee contained some important provisions which can be outlined as follows.[55] First, the right of the coastal State to

---

45. See above pp. 497-513.
46. Doc. A/CONF. 62/L. 4; UNCLOS III Official Records, Second Session, Documents, Vol. III, at pp. 81-83.
47. Doc. A/CONF. 62/C. 2/L. 5, ibid, at p. 187.
48. Doc. A/CONF. 62/C. 2/L. 17, ibid, at p. 195.
49. Doc. A/CONF. 62/C. 2/L. 21/Rev. I, ibid, at pp. 199-200.
50. Doc. A/CONF. 62/C. 2/L. 22, ibid, at pp. 200-201.
51. Doc. A/CONF. 62/C. 2/L. 38, ibid, at pp. 214-216.
52. Doc. A/CONF. 62/C. 2/L. 47, ibid, at pp. 222-225.
53. Doc. A/CONF. 62/C. 2/L. 65, ibid, at p. 234.
54. Doc. A/CONF. 62/C. 2/L. 82, ibid, at pp. 240-241.
55. Doc. A/CONF. 62/C. 2/L. 39, ibid, at pp. 216-217. The sponsors of this document were: Afghanistan, Austria, Belgium, Bhutan, Bolivia, Botswana, Finland, Iraq, Laos, Lesotho, Luxembourg, Mali, Nepal, Netherlands, Paraguay, Singapore, Switzerland, Sweden, Uganda, Upper Volta, and Zambia. Ibid.

establish a zone beyond the territorial sea was recognized in Article 1. Coastal States were entitled to both living and non-living resources of the zone but the limit of the zone so described was not defined. Secondly, Article 2 stated:

> "Land-locked and other geographically disadvantaged States shall have the right to participate in the exploration and exploitation of the living resources of the .... zone of neighbouring coastal States on an equal and non-discriminatory basis.....".[56]

Thirdly, Article 3 stated that the same right would also apply to the non-living resources of the .... zone.[57]

There are two problems regarding the above proposal. First, coastal States would never agree to allow other States to exploit the living resources of the zone on an equal basis. This would defeat the whole object of the concept of an exclusive economic zone. Secondly, the exploitation of the non-living resources of the zone was totally unrealistic. It would involve the re-examination of the shelf doctrine and the rights already exercised or claimed by many coastal States over the adjacent submarine areas.

Nearly 60 delegates commented on the regime of the continental shelf during the Second Committee's debate on the subject.[58] With the exception of the delegate from Bahrain, who supported the 1958 Geneva Convention on the

---

56. Ibid, at p. 216.

57. Ibid.

58. UNCLOS III Official Records, Second Session, Caracas, Report, Vol. II, pp. 142-171.

continental shelf, other statements by various delegates can be divided into three groups:

(a) States in favour of 200 miles for all purposes

According to this group the coastal State exercises sovereign rights over the living and non-living resources of the seabed, subsoil and superjacent waters of the adjacent submarine areas up to a distance of 200 nautical miles. States supporting this view included Australia, Zaire, Lebanon, Singapore, Nepal, Greece, Switzerland, Gambia, Ghana, Mali, Italy and Malta.[59] According to this group the 200 nautical mile EEZ should also cover the regime of the continental shelf. There was no mention of the concept of 'natural prolongation' in their statements.

(b) States in favour of 200 miles plus natural prolongation

According to this group a coastal State should exercise sovereign rights over the living and non-living resources of the sea adjacent to its coast to a distance of 200 nautical miles. Beyond 200 nautical miles the coastal State whose submarine areas are the natural prolongation of its land territory can exercise sovereign rights over the natural resources of the continental shelf. The limit frequently referred to by the supporters of this view was the outer limit of the continental margin. According to this group the continental shelf was an independent concept;

---

59. Ibid, at pp. 142-143, 146, 148-149, 150, 151-152, 152-153, 157, 160, 165, 166-167, and 168-169 respectively.

they referred to the Judgment of the ICJ in the North Sea Continental Shelf Cases and the inherent right of the coastal State over its continental shelf.[60] States supporting this view included: Nicaragua,[61] Portugal,[62] Australia,[63] Republic of Korea,[64] Spain,[65] Canada, Chile, Iceland, India, Indonesia, Mauritius, Mexico, New Zealand and Norway,[66] El Salvador,[67] Argentina,[68] Venezuela,[69] Uruguay,[70] Pakistan,[71] Trinidad and Tobago,[72] Burma,[73] Ecuador,[74] Democratic Republic of Korea,[75] Republic of Viet Nam,[76] and Cuba.[77]

(c) States in favour of revenue sharing beyond 200 miles

According to this group the rights of coastal States over the natural resources of the continental shelf beyond 200 nautical miles is recognized, but they argued that for the sake of clarity and for the benefit of the international community, the exploitation of the continental shelf beyond 200 nautical miles should be conducted either by the

---

60. See above pp. 472-481.
61. Doc. A/CONF. 62/C. 2/L. 17, UNCLOS III, Official Records, Vol. III, at p. 195.
62. UNCLOS III, Official Records, Vol. II, at pp. 145-146.
63. Ibid, at pp. 146-147.
64. Ibid, at p. 148.
65. Ibid,
66. Doc. A/CONF. 62/L. 4, UNCLOS III, Official Records, Vol. III, at pp. 81-83.
67. UNCLOS III, Official Records, Vol. II, at pp. 149-150.
68. Ibid, at pp. 150-151.
69. Ibid, at pp. 151-152.
70. Ibid, at p. 153.
71. Ibid, at p. 154.
72. Ibid, at pp. 154-155.
73. Ibid, at p. 155.
74. Ibid, at p. 158.
75. Ibid, at p. 162.
76. Ibid.
77. Ibid, at p. 164.

Seabed Authority in which case adequate compensation would be made to the coastal State or by the coastal State on the understanding that it would share the revenue with Seabed Authority. States supporting this view included Uganda,[78] Trinidad and Tobago,[79] Tunisia,[80] Denmark,[81] Mauritius,[82] Italy,[83] and Jamaica.[84]

The Second Committee spent 8 meetings on the subject of the EEZ.[85] An overwhelming majority of the 95 delegates making comments supported the 200 nautical mile EEZ although there were some conditions attached to the extent of the sovereign rights to be exercised by the coastal State within the EEZ. The attitudes of the States present in the Second Committee can be divided into three groups:

(a) Land-locked and geographically disadvantaged States

States belonging to this group were prepared to agree to an economic zone on condition that the establishment of such a zone did not prejudice their equal rights to exploit the natural resources of the EEZ. They argued that the area in question was part of the high seas and therefore any appropriation of the high seas by coastal States would

---

78. Ibid, at p. 151.
79. Ibid, at pp. 154-155.
80. Ibid, at p. 163.
81. Ibid, at p. 162.
82. Ibid, at p. 163.
83. Ibid, at p. 167.
84. Ibid, at p. 168. Note that some of the States supporting this view were also supporters of the 200 nautical mile zone for all purposes, see above at p. 527.
85. Ibid, at pp. 170-226.

be prejudicial to their rights unless they enjoyed equal rights in respect of the exploitation of the natural resources of the area appropriated by the coastal States.[86]

(b) Developing Countries and States with special interests in fishing

States belonging to this group supported the 200 nautical mile EEZ but pointed out that the maximum utilization of the living resources within the zone should be achieved; if coastal States could not exploit the maximum allowable catch they should permit others to exploit the surplus.[87]

(c) Developing coastal States

This group included almost all the developing coastal States; they were in favour of a 200 nautical mile exclusive economic zone. Exclusivity of the sovereign rights of the coastal States within the EEZ was an integral part of the concept and although they did not dismiss the idea of accommodating the land-locked and geographically disadvantaged States within their EEZ they would not commit

---

86. See the statements by delegates from Switzerland, ibid, at pp. 180-181; Uganda, ibid, at p. 198; Nepal, ibid, at p. 205; Belgium, ibid, at p. 206; Japan, ibid, at pp. 216-217; Austria, ibid, at p. 223; Mali, ibid, at p. 226 and Finland, ibid, at p. 181.

87. See the statements by delegates from France, ibid, at pp. 184-186; New Zealand, ibid, at pp. 170-171; USA, ibid, ibid, at pp. 190-191; Federal Republic of Germany, ibid, at pp. 191-192; United Kingdom, ibid, at pp. 200-202; Ukraine SSR, ibid, at p. 201; Poland, ibid, at p. 202; Australia, ibid, at pp. 204-205; Byelorussia SSR, ibid, at p. 205; Spain, ibid, at p. 216; USSR, ibid, at p. 221 and Canada, ibid, at pp. 224-225.

themselves to receiving the nationals of other States within their EEZ on an equal footings.[88]

At the final Meeting of the Second Committee, the Chairman made a statement regarding the progress of the Committee.[89] He stated inter alia that:

> "So far each State has put forward in general terms the position which would satisfy its own range of interests in the seas and oceans. Once these positions are established, we have before us the opportunity of negotiation based on an objective and realistic evaluation of the relative strength of the different opinions.
>
> It is not my intention in this statement to present a complete picture of the situation as I see it personally. But I can offer some general evaluations and comments.
>
> The idea of a territorial sea of 12 miles and an exclusive economic zone beyond the territorial sea up to a total maximum distance of 200 miles is, at least at this time, the keystone of the compromise solution favoured by the majority of the States participating in the Conference, as is apparent from the general debate in the plenary meetings and the discussions held in our Committee.
>
> Acceptance of this idea is, of course, dependent on the satisfactory solution of other issues, especially the issue of passage through straits used for international navigation, the outermost limit of the continental shelf and the actual retention of this concept and, last but not the least, the aspiration of the land-locked countries and of other countries which, for one reason or another, consider themselves geographically disadvantaged".[90]

On the basis of the proposals submitted to the Sea-bed Committee and the Conference and in connection with

---

88. See for example the statements made by the delegates from Peru, ibid, at pp. 193-194 and Pakistan, ibid, at p. 195.

89. Doc. A/CONF. 62/C. 2/L. 86, UNCLOS III, Official Records, Vol. III, pp. 242-243.

90. Ibid, at p. 243.

observations made by various delegates during the Second Committee's Meetings the Committee prepared 13 informal working papers. These working papers were revised twice by the officers of the Committee. It was decided by the Committee at its Final Meeting that all those working papers should be consolidated into a single informal document.[91] The document, which was entitled "Working Paper of the Second Committee: main trends", incorporated 243 provisions.[92] Each provision, when necessary, provided several formulae showing the areas of disagreement. It was stated in the Introduction to the Document that:

> "The sole purpose of this working paper is to reflect in generally acceptable formulations the main trends which have emerged from the proposals submitted either to the Committee of Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction or to the Third United Nations Conference on the Law of the Sea.
>
> The inclusion of these formulations does not imply any opinion on the degree of support they have commanded either in the preparatory stage or in the Proceedings of the Caracas Session of the Conference.....".[93]

Part IV of the working paper dealt with the question of the continental shelf. Provision 68 contained four Formulae of the definition of the continental shelf.[94] Formula A defined the continental Shelf as the "sea-bed

---

91. Doc. A/CONF. 62/C. 2/L. 86/Corr. 1, ibid, at p. 106.
92. ibid, at pp. 107-142.
93. Ibid, at p. 107.
94. Ibid, at pp. 117-118.

and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea".[95] According to this Formula the continental shelf would extend "to the outer limits of the continental rise bordering on the ocean basin or abyssal floor".[96] Formula B referred to the continental shelf as extending to 200 miles and beyond that throughout the natural prolongation.[97] No limit was mentioned in that Formula. Formula C was the same as Formula B but stated that the outer limit of the continental margin was the limit of the continental shelf.[98] Formula D was the same as Formula A except that the limit of the continental shelf was the "outer lower edge of the continental margin".[99]

As regards the nature of the coastal States' rights over the continental shelf one formula referred to the sovereign rights for the purpose of exploring the shelf and exploiting its natural resources while the second referred to the sovereignty of the coastal State over the continental shelf.[100]

Provision 80 provided two Formulae both of which referred to the contributions to be made by the coastal States to the International Authority in respect of the exploitation of the non-living resources of the continental shelf. The interesting point was that the limit of 200

---

95. Ibid.
96. Ibid.
97. Ibid.
98. Ibid. For other limits suggested for the outer limit of the continental shelf see also Provision 81, ibid, at p. 119.
99. Ibid, at p. 118, Provision 69.
100. Ibid.

metres depth or 40 miles distance were stated as limits within which the coastal States were required to make such contributions.[101] And finally the natural resources of the continental shelf were defined in Provision 85 which was exactly the same as the definition adopted by the 1958 Geneva Convention on the Continental Shelf.[102]

Part V of the Working Paper dealt with the EEZ.[103] The First Formula of Provision 90 referred to the sovereign rights of the coastal State over the renewable and non-renewable resources of the Patrimonial Sea.[104] Paragraph two of this Formula stated that: "The coastal State has the right to adopt the necessary measures to ensure its sovereignty over the resources and prevent marine pollution of its Patrimonial Sea".[105] The second Formula referred to the sovereignty of the coastal State over the living and non-living resources of the EEZ. It further referred to the: "sovereign rights for the purpose of regulation, control, exploration, exploitation, preservation of all living and non-living resources therein".[106] This Formula recognized the legitimate right of the LLGDS within the EEZ.[107] The third Formila referred to the exclusive right

---

101. Ibid, at p. 119.
102. Ibid, at p. 120.
103. Ibid, at pp. 120-122.
104. Ibid, at p. 120, Formula A.
105. Ibid.
106. Ibid. The coastal State also had sovereign rights over the prevention of marine pollution and the conduct of scientific research, ibid.
107. Ibid.

of the coastal State over renewable resources while the sovereign rights of the coastal State over non-renewable resources were recognized in connection with the continental shelf.[108] The fourth Formula referred to the sovereign rights of the coastal State "for the purpose of exploring and exploiting the natural resources, whether renewable or non-renewable, of the seabed and subsoil and the superjacent waters".[109]

Provision 94 included four Formulae regarding the rights of the LLGDS. The first three referred to the rights of the LLGDS to exploit the renewable resources within the EEZ of neighbouring States. They referred to bilateral or regional agreements among the States concerned.[110] The last Formula referred to the equal rights of the LLGDS within the EEZ; the equal rights referred to would also extend to the non-renewable resources of the EEZ.[111]

Other important provisions concerning the EEZ referred to the rights of other States to fish within the EEZ when the coastal States cannot exploit the maximum allowable catch.[112] As to the limit of the EEZ, Provision 29 provided two formulae. The first referred to the Patrimonial Sea, the limit of which should not exceed 200 nautical

---

108. Ibid, at p. 121.

109. Ibid. Formula E also recognized "the jurisdiction and the sovereign right and the exclusive rights... for the purpose of exploring and exploiting the natural resources, whether renewable or non-renewable, of the sea-bed and subsoil and the superjacent waters", of the coastal States within the EEZ. Ibid, at p. 121.

110. Ibid.

111. Ibid, at pp. 121-122.

112. Ibid, at pp. 122-123, Provisions 100-107.

miles.[113] The second Formula referred to the EEZ, the limit of which should not exceed 200 nautical miles.[114]

Considering the nature of the issues before the Second Committee and the political and economic implications of the various items the progress made by the Second Committee, mainly through informal consultations, can be judged a success. Although there were many problems which could upset progress there appeared to be a great willingness on the part of various States with different interests to compromise Perhaps the most important feature of the UNCLOS III which emerged from the start was the idea that a single treaty regarding all aspects of the Law of the Sea should be adopted. In other words, the expression "package deal" used frequently throughout the various Sessions of the Conference indicated that States had to accept a single treaty or reject it. States could not accept part or parts of it which suited them without accepting part or parts which were not to their liking.

It is fair to say that the major issues such as the breadth of the territorial sea, the right of transit through international straits, the 200 nautical mile exclusive economic zone, the rights of the coastal States over the continental shelf beyond 200 miles and the rights of the LLGDS were generally acknowledged and recognized by a substantial majority of the States participating in the

---

113. Ibid, at p. 122.
114. Ibid.

Conference. Other issues such as the extent of the coastal States' rights over the EEZ, the extent of the rights to be enjoyed by the LLGDS, and the extent of the rights of the coastal States over the continental shelf beyond the 200 nautical miles and the question of the outer limit of the continental shelf were left for further consultations. All in all the Caracas Session provided the basis which was the backbone of subsequent negotiations.[115]

3. UNCLOS III, Third Session (Geneva): 1975

The Third Session of the UNCLOS III was held in Geneva from March 17 to May 9, 1975. At the opening Session the President of the Conference stated that:

> "....at the end of the second session the Conference had agreed that the stage of general debate and general statements had been concluded and that from the outset the current session should be devoted to

---

115. For further analysis of the Caracas Session see, Stevenson and Oxman, Loc. Cit., in note 9 (pp. 516-517, pp. 1-30; Edward Miles, "An Interpretation of the Caracas Proceedings", in Law of the Sea, Caracas and Beyond, edited by Christy, Clingam, Gamble, Knight and Miles, 1975, pp. 39-94; Ann L. Hollic, "The Third UN Conference on the Law of the Sea: Caracas Review", in The Law of the Sea: U.S. Interests and Alternatives, edited by Ryan C. Amacher and Richard James Sweeney, 1976, pp. 123-132. For the progress of the First Committee (the Seabed Regime) see A.O. Adede, "The System for Exploitation of the 'Common Heritage of Mankind' At the Caracas Session", 69 AJIL (1975), pp. 31-49; Thomas M. Frank and Evan R. Chester, "An International Regime for the Sea-Bed Beyond National Jurisdiction", 13 Osgoode Hall Law Journal (1975), pp. 579-601.

> negotiations on issues of substance. It was therefore desirable that the Main Committees should immediately initiate the process of negotiation, avoiding general debate and allowing ample time for consultations and negotiations".[116]

The Second Committee held two formal Meetings during the Third Session.[117] The first concerned the organization of work of the Committee and it was decided to review the documents which had been produced at Caracas. Thus:"The basic text would be the Working Paper on main trends in documents produced by the Second Committee in informal meetings at Caracas".[118] It was also decided that the main work of the Second Committee would be based on informal consultations especially with a view to reaching a compromise on issues on which States held different views.

The second formal meeting discussed a proposal submitted by the delegation of Ecuador which referred to the sovereignty of the coastal States over a 200 mile territorial sea. Although a few States supported the proposal it was pointed out that the sovereignty of the coastal States over a 200 mile territorial sea had already been incorporated in the Working Paper on main trends prepared by the Committee at the end of its Second Session.[119]

At the 55th Plenary Meeting of the Conference it was

---

116. UNCLOS III, Official Records, Vol. IV, Third Session, Geneva, 17 March 9 May, 1975, at p. 4 Para. 19.

117. Ibid, at pp. 73-80.

118. Ibid, at p. 73, Para. 8.

119. For the Ecuador Proposal see A/CONF. 62/C. 2/L. 88, for the discussion on this proposal see UNCLOS III, Official Records, Vol. IV, at pp. 75-80.

decided that each Chairman of the three Main Committees would "prepare a single negotiating text covering the subjects entrusted to his Committee".[120] The President of the Conference remarked that:

> "...the single text should take account of all the formal and informal discussions held so far, would be informal in character and would not prejudice the position of any delegation..... it should, therefore, be quite clear that the single negotiating text will serve as a procedural device and only provide a basis for negotiations".[121]

The informal consultations that took place among the members of the Second Committee were mainly based on the activities of the "Evensen Group".[122] and the "Group of 77".[123] The LLGDS also formed a group and were involved in active consultations.[124]

On 7 May 1975 the Chairmen of the First, Second and Third Committees submitted informal single negotiating texts based on the results of the informal consultations to the Conference.[125] Referring to the texts Stevenson and Oxman

---

120. Ibid, at p. 137.

121. For the views expressed in the Plenary Meeting see ibid, at pp. 19-26.

122. According to Miles, "One of the most important of these (Groups) was the Evensen Group, Chaired by the Leader of the Norwegian delegation and containing representatives of between 30 to 50 Countries but heavily reflective of coastal-states' interests", Edward Miles, "An Interpretation of the Geneva Proceedings, Part II", 3 ODIL (1975-1976) pp. 303-340, at p. 304; see also Stevenson and Oxman, "The Third United Nations Conference on the Law of the Sea: The Geneva Session", 69 AJIL (1975) pp. 763-797, at p. 764.

123. Miles, Loc. Cit., in note 122 (p. 539), at p. 304; Stevenson and Oxman, Loc. Cit., in not 122 (p. 539), at p. 764.

124. Miles, Loc. Cit., in note 122 (p. 539), at p. 304.

noted that:

> "...in some important respects they do reflect a basis for agreement that emerged in informal negotiations. This is particularly true of the Committee II text, which took account of the texts on the economic zone that emerged from the daily meetings of the Informal Group of Juridical Experts from 40 nations from all regionos (Chaired by Minister Jens Evensen of Norway and Known as the 'Evensen Group') and Complementary work of the Group of 77 (now composed of over 100 developing Countries); texts worked out by informal groups set up by the Chairman of Committee II on a wealth of detailed provisions regarding the territorial sea and the high seas; a text on straits prepared by an informal group of moderate nations from all regions chaired by Fiji and the United Kingdom; and other negotiations".[126]

The single negotiating text presented by the Chairman of the Second Committee contained 137 Articles and an Annexe enumerating 16 highly migratory species.[127] It is appropriate to outline the main points regarding the territorial sea, the EEZ and the continental shelf.

i. The Territorial Sea

Article 1 of the Informal Single Negotiating Text (ISNT) recognized the sovereignty of the coastal and archipelagic States over the territorial sea.[128] This sovereignty, which extended to the air space above the territorial sea and to its seabed and subsoil, was subject to the provisions provided in the ISNT and other rules of international law.[129] Article 2 stated that the outer limit of

---

125. Doc. A/CONF. 62/WP. 8, Parts I,II and III, UNCLOS III, Official Records, Vol. IV, pp. 137-181.
126. Stevenson and Oxman, Loc, Cit., in note 122 (p. 539), at p. 764.
127. UNCLOS III, Official Records, Vol. IV, pp. 152-171.
128. Ibid, at p. 153. 129. Ibid, Art. 1, Para. 2.

the territorial sea should not exceed 12 nautical miles.[130] Article 4 referred to the low-water line as the normal baseline for measuring the breadth of the territorial sea.[131] Article 6 recognized the employment of the straight baselines in localities where the application of the normal method is impossible.[132]

Articles 14 to 23 dealt exclusively with the right of innocent passage in the territorial sea.[133] In addition to a 12 mile territorial sea, Article 33 established a contiguous zone of 24 nautical miles.[134]

ii. The Exclusive Economic Zone

Three important objections had been voiced by States regarding the EEZ. The developed States, especially the United States, the Soviet Union, and Western European Countries were particularly worried about the freedom of navigation, the laying of submarine cables and the freedom of overflight over such a zone. Their second worry was the maximum utilization of the living resources of the EEZ. The third objection came from the LLGDS. The ISNT in dealing with innocent passage through the territorial sea settled the navigation problem.[135] It further provided extensive security regarding the use of international

---

130. Ibid.
131. Ibid.
132. Ibid, at pp. 153-154.
133. Ibid, at pp. 153-157.
134. Ibid, at p. 157.
135. Ibid, at pp. 154-157.

straits.[136] In describing the legal character of the EEZ according to the provisions of ISNT it will be shown whether the above objections have been met positively and the worries of the States concerned have been removed.

Article 45 of the ISNT stated:

> " 1. In an area beyond and adjacent to its territorial sea, described as the exclusive economic zone, the coastal State has:
>
> (a) Sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether renewable or non-renewable, of the sea-bed and subsoil and the superjacent waters;
>
> (b)Exclusive rights and jurisdiction with regard to the establishment and use of artificial islands, installations and structures;
>
> (c) Exclusive jurisdiction with regard to:
> (i) Other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds; and
>
> (ii) Scientific research;
>
> (d) Jurisdiction with regard to the preservation of the marine environment, including pollution control and abatement;
>
> (e) Other rights and duties provided for in the present Convention".[137]

Article 46 dealt with the limit of the EEZ and as expected it was 200 nautical miles.[138] Article 47 (1)

---

136. Ibid, at pp. 157-159, Articles 34-44.

137. Ibid, at p. 159. Although the exclusive jurisdiction of the coastal States over scientific research was recognized (Art. 45 (c) (ii), Article 49 stated: "The consent of the coastal State shall be obtained in respect of any research concerning the exclusive economic zone and undertaken there. Nevertheless, the coastal State shall not normally withhold its consent if the request is submitted by a qualified institution with a view to purely scientific research, subject to the proviso that the coastal State shall have the right, if it so desires, to participate or to be

stated that:

> "All States, whether coastal or land-locked, shall, subject to the relevant provisions of the present Convention, enjoy in the exclusive economic zone the freedom of navigation and overflight and of the laying of submarine cables and pipelines and other internationally lawful uses of the sea related to navigation and communication".[139]

Article 50 referred to the rights and duties of the coastal States regarding the exploitation, regulation and management of the living resources of the EEZ and Article 51 made sure that the maximum utilization of the living resources of the EEZ would be achieved.[140] Paragraph 2 of Article 51 stated:

> "The coastal State shall determine its capacity to harvest the living resources of the exclusive economic zone. When the coastal State does not have the capacity to harvest the entire allowable catch, through agreements or other arrangements, ..., give other States access to the surplus of the allowable catch".[141]

States to be given priority in allocation of the surplus were the LLGDS and States whose nationals had habitually fished in those areas or had made "substantial efforts in research and identification of stock".[142] It must be pointed out that according to Article 56 the provisions of Articles regarding the living resources of the EEZ did not apply to sedentary species.[143]

---

represented in the research, and that the results shall be published after consultation with the coastal State concerned", ibid, at p. 160.

138. Ibid.
139. Ibid.
140. Ibid.
141. Ibid.
142. Ibid, Para. 3
143. Ibid, at p. 162.

Article 57 dealt with the rights of the land-locked States within the EEZ of the coastal States. Paragraph 1 stated:

> "Land-locked States shall have the right to participate in the exploitation of the living resources of the exclusive economic zone of adjoining coastal State on an equitable basis, taking into account the relevant economic and geographic circumstances of all the States concerned. The terms and conditions of such participation shall be determined by all the States concerned through bilateral, sub-regional or regional agreements. Developed land-locked States shall, however, be entitled to exercise their rights only within the exclusive economic zone of neighbouring developed coastal States".[144]

The participation of the land-locked States on an equitable basis was far short of the equal footing which had been sought by the land-locked States since the Caracas Session. All they got was a preferential right over the surplus of the total allowable catch.[145]

It is perhaps important to question the meaning of the coastal State's capacity to exploit the maximum allowable catch. Would that mean the actual capacity without the help of a third party or the capacity using all available means? If the latter be the case, the whole object of the availability of the surplus to the developing land-locked States is defeated. However, to reveal that

---

144. Ibid.

145. Ibid. Paragraph 2 of Article 57 stated: "The provisions of this article are without prejudice to the provisions of article 50 and 51". Ibid.

the right of the land-locked States to access on an equitable basis is not really a secure and safe one it is appropriate to look at the provisions of Article 60. It was stated in Paragraph 1 that:

> "The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the provisions of this Convention".[146]

The sovereign rights of the coastal State regarding the exploration and the exploitation of the non-renewable resources of the seabed, subsoil and the superjacent waters of the EEZ were not subject to similar limitations.

iii. The Continental Shelf

Article 62 of the ISNT defined the continental shelf in the following terms:

> "The continental shelf of a coastal State comprises the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance".[147]

Article 63 made it clear that the sovereign rights referred to in Article 62 were to be exercised for the purpose of exploring the continental shelf and exploiting

---

146. Ibid. Article 59 stated that the rights granted to nationals of other States within the economic zone are not transferable unless by the consent of the coastal State. Ibid.

147. Ibid.

its natural resources.[148] Paragraph 4 of Article 63 defined the natural resources as minerals and other non-living resources of the seabed and subsoil as well as organisms belonging to sedentary species; the very definition which had been adopted by the 1958 Geneva Convention on the Continental Shelf.

It was pointed out earlier that during the Caracas Session some States suggested that coastal States should make some contribution to the international community in respect of the benefit they would derive from the exploitation of the mineral resources of the continental shelf beyond 200 nautical miles. This idea seems to have been strongly supported by many States during the informal consultations to the extent that it was incorporated in Article 69.[149] The rate of such contribution was left to be decided by the International Authority to which such payments were also to be made.[150]

---

148. Ibid, at pp. 162-163.

149. Ibid, at p. 163.

150. Ibid, Article 69, Paragraphs 3 and 4. For detailed analysis of the Geneva Session and the ISNT see, Stevenson and Oxman, Loc. Cit., in note 122 (p. 539), pp. 763-797; Edward Miles, "An Interpretation of the Geneva Proceedings - Part I" 3 ODIL (1975-1976) pp. 187-224; Miles, Loc. Cit., in note 122 (p. 539), pp. 303-340; Robert D. Hodgson and Robert W. Smith, "The Informal Single Negotiating Text (Committee II): A Geographical Perspective", 3 ODIL (1975-1976) pp. 225-259. In addition to the three texts prepared by the Chairmen of the three Main Committees on 21 July 1975 a single negotiating text on the settlement of dispute was prepared by the President of the Conference, see Doc. A/CONF. 62/WP. 9, UNCLOS III, Official Records, Vol. V, 1976, pp. 111-122.

4. UNCLOS III, Fourth Session (New York): 1976

The Fourth Session of the UNCLOS III was held in New York from 15 March to 7 May 1976.[151] The ISNTs provided by the Chairmen of the three Main Committees and distributed at the last day of the Geneva Session had not been subject to official assessments by the delegates during that Session. The Fourth Session was therefore destined to examine the ISNTs.

During the Fourth Session there were 14 Plenary Meetings the work of which was mainly devoted to the question of settlement of disputes and peaceful uses of the ocean: Zones of Peace and Security.[152] The General Committee held 7 Meetings and dealt with the organization of work.[153] The First and Second Committees each held one official Meeting while the Third Committee held two.[154]

At the first General Meeting in New York it was decided that informal negotiations should continue and that the Chairmen of the three Main Committees, on the basis of article by article analysis of the ISNT during the informal negotiations, should revise the Texts when necessary.[155]

On 6 May 1976, on the basis of these extensive

---

151. UNCLOS III, Official Records, Fourth Session, Summary Records, Vol. V.
152. Ibid, at pp. 3-76.
153. Ibid, at pp. 97-105.
154. Ibid.
155. Ibid, at pp. 77-80.

informal consultations, the Revised Single Negotiating Texts (RSNT) were submitted by each Chairman.[156] The RSNT on Dispute Settlement was prepared by the President of the Conference on 23rd November 1976.[157]

In his introductory note to the RSNT/Part II the Chairman of the Second Committee noted that more than 120 States of the 149 delegations participating the Fourth Session were represented during the negotiations. He referred to "53 informal meetings during which more than 3700 interventions were made".[158]

The issues dividing the delegates during the informal negotiations were:

(i) The rights of land-locked States within the EEZ of other States;

(ii) Clarification of the precise limit of the continental shelf; and

(iii) The legal status of the EEZ.[159]

Referring to the first issue the Chairman stated that:

> "On the question of the land-locked States and certain developing coastal States in the exploitation of the resources of the exclusive economic zone, I made no major changes. Despite the fact that a great amount of effort was devoted in the special interest group and in formal and informal groups dealing with the issue, I was offered no clear guidance on possible changes. No single proposal commanded

---

156. Doc. A/CONF. 62/WP. 9/Rev. 1/Parts I, II, III and IV, ibid, at pp. 125-201.
157. See the Text in UNCLOS III, Official Records, Vol. VI, at pp. 144-155.
158. UNCLOS III, Official Records, Vol. V, at p. 153, para. 4.
159. Ibid, Paras. 11-19.

> significant support. I consider that any major change in the relevant provisions could jeopardize any further negotiations which might take place".[160]

Referring to the second issue the Chairman pointed out inter alia that:

> "...since the proposals on such a precise limit were of a very technical nature and were in fact presented to the Committee in detail for the first time, I did not consider it appropriate to include such a definition at this stage. At the next session, a group of experts could perhaps be convened to give more exposure to this question".[161]

Regarding the third issue, most developed and maritime powers wanted to include provisions covering the EEZ under the general title of the high seas while the developing coastal States regarded the EEZ as an independent legal concept.[162] The Chairman considered the EEZ as neither the high seas nor the territorial sea. "It is", noted the Chairman "a zone sui generis".[163] He then stated:

> "As has often been pointed out, the matter should be addressed in terms of the 'residual rights'. In simple terms, the rights as to resources belong to the coastal State and, in so far as such rights are not infringed, all other States enjoy the freedoms of navigation and communication".[164]

The RSNT, Part II, can be described as a refined and clearer version of the ISNT. In fact no changes regarding

---

160. Ibid, Para. 11.
161. Ibid, Para. 13.
162. Ibid, Para. 17.
163. Ibid, Para. 18.
164. Ibid.

the issues discussed in relation to the ISNT occurred. According to Oxman:

> "Significant changes were made in the Committee I text on the deep seabed and in the Committee III text on scientific research and protection of the marine environment. The Committee II text, which commanded very broad support in general, was refined in some respects".[165]

During the Fourth Session many delegates expressed views as to the satisfactory progress which had been made by the Conference. It seemed that, on the basis of the negotiations, there was every opportunity of achieving, subject to further negotiations and some changes in the RSNT, a long awaited comprehensive treaty on the Law of the Sea. Optimism had increased because there appeared to be some willingness on the part of most, if not all, delegates to compromise on issues which once had seemed impossible. It was on the basis of this spirit that the Conference decided to hold its Fifth Session in New York during August-September of the same year.

5. UNCLOS III, Fifth Session (New York): 1976

The Fifth Session of the UNCLOS III was held in New York from 2 August to 17 September 1976.[166] The Second

---

165. Bernard H. Oxman, "The Third United Nations Conference on the Law of the Sea", 71 AJIL (1977) pp. 247-269, at p. 248. On the legal status of the EEZ see ibid, at pp. 259-268; Surya P. Sharma, "Ocean Law on the Eve of New York Session (August-September 1976)", 16 IJIL (1976) pp. 105-121; David L. Ganz, "The United Nations and the Law of the Sea", 26 ICLQ (1977) pp. 1-54.
166. UNCLOS III, Official Records, Fifth Session, Vol. VI.

Committee did not hold any official meetings during this Session but informal negotiations and consultations among various working groups were held throughout the Session.[167]

On 16 September 1976 the results of the Second Committee's activities were incorporated in the report of the Chairman of the Second Committee.[168] According to this document the Committee, "after lengthy consideration of the various possibilities", decided to deal, in the first three weeks, with the following questions which were described as "priority questions in view of the interest which they held for a large number of delegations":

> "(i) The legal status of the exclusive economic zone. Rights and duties of the coastal State and other States in the exclusive economic zone.
>
> (ii) Rights of access of land-locked States to and from the sea and freedom of transit.
>
> (iii) Payments and contributions in respect of the exploitation of the continental shelf beyond 200 miles.
>
> (iv) Definition of the outer edge of the continental shelf".[169]

On 20 August, the Committee decided to add the following two questions to the above list:

> "(v) Straits used for international navigation; and
>
> (vi) Delimitation of the territorial sea, exclusive economic zone and the continental shelf between adjacent or opposite States".[170]

---

167. During the Fifth Session there were 6 Plenary Meetings and 8 General Meetings, ibid, at pp. 3-53. The First Committee held 13 Meetings and the Third Committee held 6 Meetings, ibid, at pp. 53-116.
168. Ibid, at pp. 135-139.
169. Ibid, at p. 136, Paras. 10-11.
170. Ibid, Para. 12.

The Committee established Five Negotiating Groups to deal with the above questions.[171] In addition to the Five Negotiating Groups, the Committee decided to set up a number of smaller consultative groups "with a view to facilitating the negotiating process".[172]

Negotiating Group 1 which was assigned to deal with the first question divided the question into two sub-items; first, the legal status of the EEZ and secondly, the rights and duties of States regarding the living resources of the EEZ.[173] Changes regarding the Articles on highly migratory species (Art. 53, RSNT) and Catadromous species (Art. 56, RSNT) were discussed. No final agreement was reached on the first point and on the second point the change was negligible.[174] Negotiating Group I set up a smaller group to deal with the legal status of the EEZ which held 7 meetings.[175] Referring to the outcome of the negotiations on this point the Chairman stated in his report:

> "Unfortunately, I cannot say that the meetings of that group achieved practical results. I should like to state, however, that the group was very close to reaching a generally acceptable solution".[176]

He then pointed out that:

---

171. Questions (iii) and (iv) were dealt with by the Negotiating Froup 3, ibid, Para. 13.

172. Ibid, Paras. 15 and 16.

173. Ibid, at p. 137, Para. 19.

174. Paragraph 2 of Article 56 of the RSNT, Part II read: "Harvesting of catadromous species shall be conducted only in waters in respect of which the coastal State mentioned in Paragraph 1 exercises sovereign rights over the living resources and...". The new agreed proposal read: "Harvesting of catadromous species shall be conducted only in waters landwards of the outer limits of the exclusive economic zone". Ibid,

> "...it should be noted that the discussion within the consultative group in fact centered on articles 44 and 46 with a view to reformulating them in order to avoid assimilating the exclusive economic zone in any way to the territorial sea or the high seas. For that purpose, formulas were presented which were favourably received as a basis for the final settlement of that difference views".[177]

Negotiating Group 2 which had been set up to deal with the "rights of access of land-locked States to and from the sea and freedom of transit" held six informal meetings.[178] On the basis of the proceedings of this group the Chairman said that "I personally feel,....., that the text of Chapter vi represents a good compromise solution and could, with minor changes, have been the basis for a formal agreement at the present session".[179]

Negotiating Group 3 dealt with the payments and contributions regarding the exploitation of the resources of the continental shelf beyond the 200 miles and the definition of the outer edge of the continental margin.[180] On the first point some useful suggestions were made, the most important of which was whether the developing coastal States should be exempted from such payments.[181] No practical solution was found to the problem of the definition of the outer limit of the continental shelf.[182] At

---

at p. 137, (Doc. A/CONF. 62/L. 17).
175. Ibid, Para. 23.
176. Ibid, Para. 25.
177. Ibid, Para. 27.
178. Ibid, Paras. 28-31.
179. Ibid, Para. 32.
180. Ibid, Paras. 33-37.
181. Ibid, Para. 36.
182. Ibid, Para. 37.

the final meeting of this group some delegates adhered to their original position of denouncing rights beyond 200 miles. It was pointed out by some delegates representing States with broad continental shelves, however, that this right was one condition for their acceptence of the "package deal".[183]

The other two Negotiating Groups did not provide any solutions to the problems raised by some delegates but it appeared that with some minor changes the text was generally regarded as acceptable.[184]

6. UNCLOS III, Sixth Session (New York): 1977

The Sixth Session of the UNCLOS III was held in New York from May 23 to July 15, 1977.[185] It must be pointed out that the main crisis facing the UNCLOS III was the question of the legal regime for the seabed beyond the limits of national jurisdiction. Other problems such as the legal status of the EEZ, the rights of LLGDS within the EEZ of the coastal States, the precise definition of the outer limit of the continental shelf, the contribution of the coastal States in respect of the exploitation of the continental shelf beyond 200 miles and the problems regarding scientific research seemed, at the end of the Fifth Session, to be minor in the sense that, with a few

---

183. Ibid, Para. 38.

184. Ibid, at pp. 138-139, Paras. 40-48.

185. Doc. A/CONF. 62/WP. 10 and Add. 1; see the text in 16 ILM (1977) pp. 1099-1236.

amendments or the inclusion of a few provisions, a compromise would be achieved.

The Sixth Session of the Conference followed the same policy as it had adopted during its Fifth Session i.e. informal negotiations within the working groups. On the basis of the informal negotiations carried out during this Session the Chairmen of the three Main Committees with the President of the Conference prepared a text which differed from the previous texts both in form and in substance.

The new text, entitled Informal Composite Negotiating Text (ICNT), was produced as one unit containing 303 Articles with Seven Annexes.[186] In his explanatory memorandum on the ICNT the President referring to the decision taken by the Conference on June 29, 1977, at its 78th Plenary meeting stated that:

> "....the Conference decided that the President should undertake, jointly with the Chairmen of the three Main Committees, the preparation of an informal composite negotiating text which would bring together issues covered by Parts I, II, III and IV of the revised single negotiating text".[187]

It was, however, understood that while the President could make suggestions about any part of the ICNT, the three Chairmen had absolute freedom to amend the provisions of the RSNT or to introduce new provisions on the basis of the results reached within their Committees and thus the parts

---

186. The Rapporteur-General of the Conference and the Chairman of the Drafting Committee were also associated with the preparation of the ICNT, ibid, at p. 1099.
187. Ibid.

provided by each Chairman would be his own responsibility.[188] The President also remarked that the Text (ICNT) was an informal document which would serve as a basis for further negotiations and therefore it did not have the same legal character as the document presented by the International Law Commission to the UNCLOS I in 1958.[189]

The changes regarding the major issues mainly affected the work of the First Committee.[190] Changes regarding the work of the Second Committee were as follows:

i. The Territorial Sea

The provisions of the ICNT dealing with the territorial sea were exactly the same as those in the RSNT except for two minor changes both of which concerned foreign ships exercising the right of innocent passage. The Press Release published on the same day as the ICNT referred to the above tow changes as follows:

> "The first of these, article 21 in the subsection on rules applicable to all ships, concerns the laws and regulations of the coastal State relating to innocent passage. The altered text specifies that these laws and regulations shall not apply to or affect the design, construction, manning or equipment of foreign ships 'unless they are giving effect to generally accepted rules or standards'. In the list of subjects on which the coastal

---

188. Ibid.

189. Ibid, at p. 1100.

190. See UN Press Release, Office of Public Information, Press Section, UN, New York, 29 July 1977, pp. 1-29, at p. 1; see also P.W. Birnie, "Slow Progress Report on the Law of the Sea", Contemporary Review, Nov. 1977, pp. 231-237; Oxman, "The Third United Nations Conference on the Law of the Sea: the 1977 New York Sessions", 72 AJIL (1978) at p. 72.

> State may make laws and regulations on innocent passage, "reduction and control" of pollution is added.
>
> The second alteration affecting article 27, is in the subsection on rules applicable to merchant ships and government ships operated for commercial purposes. Dealing with criminal jurisdiction of the coastal State on board a foreign ship, it provides for two exceptions to the previously stated rule forbidding the coastal State from arresting persons or conducting investigations on board such a ship in connexion with a crime committed before the ship entered the territorial sea, when the ship is coming from a foreign port and only passing through a State's territorial sea without entering internal waters. The exceptions, both of them new, relate to the coastal State's rights under the convention to protect and preserve the marine environment, and its rights when its laws and regulations concerning the continental shelf are violated".[191]

ii. The Exclusive Economic Zone

One of the controversial arguments concerning the EEZ was the question of its legal status. Article 44 of the RSNT had not defined the EEZ so a new article was introduced in the ICNT. Thus Article 55 entitled "specific legal regime of the exclusive economic zone" stated:[192]

> "The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdictions

---

191. UN Press Release, Op. Cit., in note 190 (p. 556), at p. 6. A new article (Art. 40) was introduced in the ICNT entitled "Research and survey activities" regarding Straits Used for International Navigation stated: "During their passage through straits, foreign ships, including marine research and hydrographic survey ships, may not carry out any research or survey activities without the prior authorization of the States bordering straits". Ibid, at p. 7.

192. Ibid, at p. 8.

> of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of the present Convention".[193]

The significance of this article compared with the previous provisions in the ISNT and RSNT is that the rights and jurisdictions of the coastal States and the rights and freedoms of other States within the EEZ are now equally subject to the provisions of the ICNT. Thus its legal status is linked neither with the territorial sea nor with the high seas. Other provisions of Article 44 of the RSNT referring to the rights and jurisdictions of the coastal States within the EEZ have been rearranged in Article 56 of the ICNT.

Paragraph 1 of Article 46 of the RSNT referring to the rights of other States within the EEZ had stated that they enjoyed "...the freedoms of navigation and overflight and the laying of submarine cables and pipelines and other internationally lawful uses of the sea related to navigation and communication". Paragraph 1 of Article 58 of the ICNT dealing with the same subject made a minor change in the latter part of the above Paragraph by stating "...lawful uses of the sea related to these freedoms such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with other provisions of the present Convention".[194]

---

193. Art. 55 ICNT, see the text in 16 ILM (1977) pp. 1099-1236, at p. 1135.

194. Ibid.

Article 49 of the RSNT referring to the consent of the coastal State in "respect of any research concerning the exclusive economic zone" was deleted since this subject was dealt with in Part XIII of the ICNT.[195]

Finally Article 71 of the ICNT introduced a new provision regarding the rights of land-locked and certain developing States within the EEZ of the neighbouring coastal States which were incorporated in Articles 69 and 70 of the ICNT. It stated:

> "The provisions of articles 69 and 70 shall not apply in the case of a coastal State whose economy is overwhelmingly dependent on the exploitation of the living resources of its exclusive economic zone".[196]

iii. The Continental Shelf

The ICNT contained two changes regarding the regime of the continental shelf. The first was the deletion of Article 73 of the RSNT which required the consent of the coastal State in respect of any research concerning the continental shelf. It must be pointed out that one of the long-standing provisions regarding the continental shelf was a provision which first appeared in Paragraph 2 of Article 2 of the 1958 Geneva Convention on the Continental Shelf.[197] Referring to the sovereign rights of the coastal State in respect of the exploration and exploitation of the continental shelf and its natural resources it had

---

195. See UN Press Release, Op. Cit., in note 190 (p. 556), at p. 8.
196. 16 ILM (1977), at p. 1140.
197. See above at p. 188.

stated that those rights "..are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities,....., without the express consent of the coastal State".[198] This Paragraph also appeared in the ISNT, RSNT and ICNT and since exploration also covers any scientific activities the deletion of Article 73 of the RSNT would not make any difference at all. It seems, however, that when the conduct of any scientific research is not connected with the exploration of the continental shelf and the exploitation of its natural resources the sovereign rights of the coastal State do not affect the rights of other States in conducting such research. This is exactly how the matter was dealt with in Article 247 (4) of the ICNT.[199]

The second change was introduced in Article 82 of the ICNT which specified the exact rate for the payments regarding the exploitation of the continental shelf beyond the 200 mile limit.[200] Paragraph 2 stated that the payment would begin "after the first five years of production at a given site, at 1 per cent annually thereafter until the tenth year, after which it would stay at 5 per cent".[201]

---

198. See Article 2(4) of the 1958 Geneva Convention on the Continental Shelf; Article 63(2) of the ISNT; Article 65(2) of the RSNT and Article 77(2) of the ICNT.
199. See Part XIII of the ICNT in 16 ILM (1977), at pp. 1189-1195. Article 247(4) gives the coastal State the right to withold its consent if the project "is of direct significance for the exploitation of natural resources, whether living or non-living...". Ibid, at p. 1191.
200. Ibid, at p. 1143; UN Press Release, Op. Cit., in note 190 (p. 556), at p. 9.

Paragraph 3 included a new provision which stated:

> "A developing Country which is a net importer of a mineral resources produced from its continental shelf is exempt from making such payments or contributions in respect of that mineral resources".[202]

7. UNCLOS III, Seventh Session (Geneva and New York): 1978

The Seventh Session of the UNCLOS III was held in Geneva from March 28 to May 19, 1978 and resumed in New York from August 21 to September 15, 1978.[203]

On April 13 the Conference decided to establish 7 negotiating groups to deal with "certain hard core issues".[204] The Conference also decided that on the basis of the results reached by the negotiating groups the three Chairmen of the Main Committees and the President should revise the ICNT. It was, however, stated that:

> "Any modifications or revisions to be made in the Informal Composite Negotiating Text should emerge from the negotiations themselves and should not be introduced on the initiative of any single person....".[205]

It was further decided that:

> "The revision of the Informal Composite Negotiating Text should be the collective responsibility of the President and the Chairmen of the main Committees acting together as a team headed by the President".[206]

At its 90th meeting the Conference decided that

---

201. 16 ILM (1977), at p. 1143. 202. Ibid.
203. Bernard H. Oxman, "The Third United Nations Conference on the Law of the Sea: The Seventh Session (1978)", 73 AJIL (1979) pp. 1-41.
204. UN Doc. A/CONF. 62/62, April 13, 1978, Para. 5.
205. Ibid, Para. 10. See also "Explanatory Memorandum by the President of the Conference" on the A/CONF. 62/WP. 10/Rev. I (ICNT. Rev. I), 18 ILM (1979) pp. 699-701, at p. 699. 206. Ibid.

negotiations should be concentrated on the outstanding problems, referred to as "hard core issues", and listed seven issues.[207] The first three concerned the 'area' while questions 4, 5 and 6 either directly or indirectly affected the EEZ or the continental shelf. They were:

> "(4) Right of access of land-locked States and certain developing coastal States in a subregion or region to the living resources of the exclusive economic zone,
>
> Right of access of land-locked and geographically disadvantaged States to the living resources of the economic zone.
>
> (5) The question of the settlement of disputes relating to the exercise of the sovereign rights of coastal States in the exclusive economic zone.
>
> (6) Definition of the outer limits of the continental shelf and the question of Payments and Contributions with respect to the exploitation of the continental shelf beyond 200 miles.
>
> Definition of the outer limits of the continental shelf and the question of revenue sharing".[208]

Seven Negotiating Groups were set up to deal with each issue The progress made by Negotiating Groups 4, 5 and 6, together with the changes which emerged in the ICNT will be discussed below.

i. Negotiating Group 4

It will be recalled that Articles 57 and 58 of the ISNT dealt with the rights of the land-locked and certain developing coastal States within the EEZ of adjoining or neighbouring States.[209] These Articles appeared, without

---

207. Ibid; see also Doc. A/CONF. 62/62, April 13, 1978, Para. 5.
208. Ibid; 18 ILM (1979), at p. 699.
209. See above pp. 541-545.

any change, as Articles 58 and 59 of the RSNT and again as Articles 69 and 70 of the ICNT. Article 69 stated that land-locked States had the right to participate, on an equitable basis, in the exploitation of the living resources of the EEZ of adjoining or neighbouring States. The same provision was also applied to certain developing coastal States in Article 70 of the ICNT. This right was, however, subject to the provisions of Article 61 and 62 of the ICNT. The latter Articles gave the coastal States the right to determine both the total allowable catch of the living resources within the EEZ and its own capacity to harvest them. It was, therefore, only the surplus to which the provisions of Articles 69 and 70 of the ICNT were applicable.[210]

The extensive negotiations in NG 4 provided three fundamental changes in Articles 69 and 70 of the ICNT. The first concerned the rights of land-locked States within the EEZ when there is an increase in the capacity of the coastal State to harvest the total allowable catch of the living resources. The second was a definition of States previously referred to as "certain developing coastal States". The third concerned the rights of developed land-locked and coastal States with special geographical characteristics.[211] The changes were, as will be shown later,

---

210. See above pp. 544-545.

211. For the "Compromise Suggestions by the Chairman of NG. 4 see, UNCLOS III, Official Records, Seventh Session, Vol. X, at pp. 93-95. See also "Explanatory Memorandum on the Proposals (NG4/9/Rev.2) by the

incorporated in the ICNT. Rev. 1.[212]

ii. Negotiating Group 5

Part IV of the ISNT presented by the President of the Conference in 1976 dealt with the question of the settlement of disputes.[213] Article 18 (1) stated:

> "1. Nothing in the present Convention shall empower any Contracting Party to submit to the dispute settlement procedures provided for in the present Convention any dispute in relation to the exercise of sovereign rights, exclusive rights or exclusive jurisdiction of a coastal State, except in the following cases".[214]

The exceptions were specifically mentioned in Article 18 (a), (b) and (c). Paragraph (a) referred to the coastal State's violation of its obligations by interfering with the freedoms of navigation and overflight, the laying of submarine cables and pipelines or "by failing to give due regard to any substantive rights specifically established by the present Convention in favour of other States".[215] Paragraph (b) referred to such violations by other States while exercising their rights.[216] Paragraph (c) referred to the coastal State's violation of its obligations to comply with or apply the international standards or criteria established by the present Convention in relation to the preservation of the marine environment.[217]

Article 17 of the RSNT (Part IV) made two changes

Chairman of Negotiating Group 4", ibid, at pp. 88-92.
212. See below, UNCLOS III, Eighth Session, pp. 573-581.
213. Doc. A/CONF. 62/WP. 9/Rev. 1, 6 May 1976, UNCLOS III, Official Records, Vol, V, pp. 185-201.
214. Ibid, at p. 190. 215. Ibid, Para. (a).
216. Ibid, Para. (b). 217. Ibid, Para. (c).

to the previous Text; the first was the deletion of the latter part of Paragraph (a) which read "or by failing to give due regard.....". This sentence was replaced by "and other internationally lawful uses of the sea related to navigation or communication".[218] The second change appeared in Paragraph (c) which stated:

> "When it is claimed that a coastal State has acted in contravention of specified international standards or criteria for the preservation of the marine environment or for the conduct of marine scientific research, which are applicable to the coastal State and which have been established by the present Convention or by a competent international authority acting in accordance with the present Convention...".[219]

In addition to the above changes a new paragraph was also added to Article 17. The new Paragraph (d) stated:

> "When it is claimed that a coastal State has manifestly failed to comply with specified conditions establsihed by the present Convention relating to the exercise of its rights or performance of its duties in respect of living resources, provided that in no case shall the sovereign rights of the coastal State be called in question".[220]

The adoption of Paragraph (d) was a gesture to satisfy the LLGDS as well as distant water fishing States in respect of their rights to the surplus of the total allowable catch within the EEZ. The implication of Article 17 of the RSNT (Part IV) was that although coastal States exercised sovereign rights for the purpose of exploring

---

218. Doc. A/CONF. 62/WP. 9/Rev.2, 23 November 1976, UNCLOS III, Official Records, Vol. VI, pp. 144-155, at p. 147, Para. (a).

219. Ibid, Para. (c). The change concerned the question of marine scientific research which had not been included in the previous Article.

220. Ibid, at p. 148, para. (d).

the EEZ and exploiting its natural resources the right to determine its total allowable catch or its capacity to exploit the living resources of the EEZ was not "exclusive".[221] Thus if a coastal State manifestly failed to comply with its duties to determine the total allowable catch, for example, or its capacity to harvest within the EEZ the matter could be decided by compulsory settlement of disputes.[222]

Article 296 of the ICNT dealt with the same question.[223] The original Article 17 of the RSNT was restructured and expanded. Paragraph 1 referred to the compulsory settlement of disputes relating to the exercise of sovereign rights by the coastal State. The provisions of Article 296 would apply if three conditions stated in Paragraph 1 were complied with. These were when "the party which has submitted the dispute has established prima facie that the claim is well founded".[224] The second condition was that the court or tribunal would not entertain "any application which in its opinion constitutes an abuse of legal process or is frivolous or vexatious".[225] The third condition was that upon receipt of an application the court or tribunal should immediately notify the other party to the dispute and "such party shall be entitled, if it so desires, to

---

221. See articles 50, 51, 58 and 59 of the RSNT. Doc. A/CONF. 62/Rev. 1/Part II.
222. See A.O. Adede, "Law of the Sea: The Scope of the Third-Party Compulsory Procedures for Settlement of Disputes", 71 AJIL (1977) pp. 305-311.
223. Doc. A/CONF. 62/WP. 10 and Add. 1.
224. Ibid, Article 296, Para. 1 (a).
225. Ibid, Article 296, Para. 1 (b).

present objections to the entertainment of the application".[226] If the above conditions were fulfilled the court or tribunal, according to Paragraph 2, could deal with three cases. These were essentially the same cases which had been enumerated in Article 18 of the ISNT with one additional change with regard to Paragraph (a) as it appeared in Article 17 of the RSNT.[227] In addition to the above cases, Paragraph 4 widened the scope of the compulsary settlement of disputes by stating that:

> "No dispute relating to the interpretation or application of the provisions of the present Convention with regard to the living resources of the sea shall be brought before such court or tribunal unless the conditions specified in Paragraph 1 have been fulfilled; provided that:
>
> (a) when it is alleged that there has been a failure to discharge obligations arising under articles 61, 62, 69 and 70, in no case shall the exercise of a discretion in accordance with articles 61 and 62 be called in question; and
>
> (b) the court or tribunal shall not substitute its discretion for that of the coastal State; and
>
> (c) in no case shall the sovereign rights of a coastal State be called in question".[228]

Although it is clear that the sole purpose of Article 296, especially Paragraph 3, was to protect the rights of other States to exploit the living resources of the EEZ, which were or should have been declared a surplus and

---

226. Ibid, Article 296, Para. 1 (c).

227. Ibid, Article 296, Para. 2 (a) (b) and (c).

228. Ibid, Article 296, Para. 4 (a) (b) and (c). See Shabtai Rosenne, "Settlement of Fishery Disputes in the Exclusive Economic Zone", 73 AJIL (1979) pp. 89-104.

thus to secure the rights of other States, the provisions incorporated in the article failed to make direct reference to this key issue. Referring to Article 296 of the ICNT Rosenne stated that since it was "....drafted in a complicated way, it has to be evaluated in political terms, not as a definitive and carefully negotiated and formulated statement of legal obligation".[229]

Unlike the previous negotiations which involved various aspects of the settlement of disputes, Negotiating Group 5 was presented with the specific task of dealing with "The question of the settlement of disputes relating to the exercise of the sovereign rights of coastal States in the exclusive economic zone".[230]

The extensive negotiations within Negotiating Group 5 resulted in the reshuffling of Article 296 as well as the introduction of new provisions. In his report to the Plenary, the Chairman of the NG 5 stated inter alia that:

> "The constructive negotiating spirit within the small group made possible a compromise formula involving the use of a compulsory conciliation procedure. When it was presented to the main Negotiating Group (document NG 5/15), although reservations were expressed, the final formula received widespread and substantial support amounting to a 'conditional consensus': that is, a consensus conditional upon an over-all package deal. In any event, consensus should be achieved on this issue as part of the package".[231]

---

229. Loc. Cit., in note 228 (p. 567), at pp. 90-91.

230. See above at p. 562 (5).

231. See "Results of the Work of the Negotiating Group on Item (5) of Document A/CONF. 62/62" "Report to the Plenary by the Chairman....", UNCLOS III, Official Records, Seventh Session, Vol. X, pp. 117-119, at p. 117.

Paragraph 1 of Article 296, as proposed by the NG 5 stated:

> "Notwithstanding the provisions of Article 286, disputes relating to the interpretation or application of the present Convention with regard to the exercise by a coastal State of its sovereign rights or jurisdiction provided for in the present Convention, shall be subject to the procedures specified in Section 2 of this Part in the following cases".[232]

The three cases mentioned in sub-paragraphs (a), (b) and (c) were the same as those which had appeared in sub-paragraphs (a), (b) and (c) of Paragraph 2 of Article 296 of ICNT. Paragraph 2 of the proposed article incorporated Paragraph 4 of Article 296 of ICNT. Paragraph 3 introduced new provisions which had not appeared in the ICNT. This Paragraph was the result of extensive negotiations within the NG 5 and dealt directly with the question assigned to it.[233] Referring to the provisions of Article 296, as proposed by the NG 5, Rosenne noted that:

> "One may reach a general conclusion that for the settlement of fisheries disputes in the exclusive economic zone, the text that has emerged from Negotiating Group 5 is about as far as this Conference will be able to go, subject only to routine scrutiny by the Drafting Committee, of course, to further substansive consideration of those aspects not fully exhausted in the existing mandate of the Group...".[234]

---

232. Ibid, at p. 120. Referring to Paragraph 1, the Chairman of the NG 5 stated in his report that: "With regard to the restructing of article 296 of the ICNT, it was agreed by a small group that the provisions regarding the application of compulsory adjudication procedures should appear first, to be followed by the compromise text, NG 5/15, dealing with compulsory recourse to conciliation. These provisions now appear as paragraphs 1, 2 and 3....". Ibid, at p. 118.

233. Ibid, pp. 117-123. For further discussions on the proposed changes which were incorporated in the ICNT. Rev. 1, see below pp. 576-577.

iii. Negotiating Group 6

The question before Negotiating Group 6 was to define the outer limits of the continental margin and the question of payments or revenue sharing in respect of the exploitation of its mineral resources beyond 200 miles. It will be recalled that Article 76 of the ICNT had simply referred to the outer edge of the continental margin as the outer limit of the continental shelf.

The Group had before it two proposals; one submitted by the Irish delegate and one by the Soviet delegate. The latter proposal was submitted in order to minimize the complications regarding the Irish Formula. The provisions contained in the Irish Formula included, inter alia, the following:

> "2. The continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the seabed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor nor the subsoil thereof.
>
> 3. For the purpose of this Convention, the coastal State shall establish the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by either:
>
> (a) A line delineated in accordance with paragraph 4 by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1% of the shortest distance from such point to the foot of the continental slope; or
>
> (b) A line delineated in accordance with paragraph 4 by reference to fixed points not more than 60 nautical miles from the foot of of the continental slope.
>
> In the absence of evidence to the contrary, the foot of the continental slope shall be

234. Loc. Cit., in note 228 (p. 567), at p. 103.

determined as the point of maximum change in the gradient at its base".[235]

The proposal by the delegate of the Soviet Union stated:

"(1) Where the continental margin does not extend beyond the confines of the 200-mile economic zone, the edge of the continental shelf will lie along the outer limit of the economic zone.

(2) In cases where the edge of the continental margin extends less than 100 miles beyond the outer limit of the 200-mile economic zone, the continental shelf of the coastal State will be determined on the basis of scientifically-sound geological and geomorphological data. If such data are not available, the outer edge of the continental shelf will be determined in accordance with paragraph 3 (b) of the Irish Formula ("not more than 60 nautical miles from the foot of the continental slope"), on the understanding, however, that the edge of the continental shelf shall not under any circumstances be fixed at more than 100 miles beyond the outer limit of the 200-mile economic zone.

(3) Where the continental margin extends beyond the 100-mile strip adjacent to the 200-mile economic zone, the edge of the continental shelf will be fixed at a distance of 100-mile from the outer limit of the economic zone.

Consequently, according to the suggested Formula the 100-mile extension of the continental shelf beyond the outer limit of the 200-mile economic zone represents a maximum limit beyond which no State exercises its sovereign rights over the continental shelf".[236]

Referring to the above proposals Oxman noted that:

"...the arguments made by proponents of the Soviet formula (and against the Irish formula) are that it is easier to apply, provides more certainty as to the ultimate result, reduces the possibility of dispute, obviates the need

---

235. Oxman, Loc. Cit., in note 203 (p. 561), at p. 19, note 59.

236. Ibid, at p. 20, note 61.

> for an international commission to review the claims of coastal states, and involves less encroachment on the international area. These arguments appear to be directed to the proposal for a maximum distance limit (e.g. 300 miles) and not to the problem of ascertaining the limit of the continental margin within that maximum limit.
>
> The arguments made against the Soviet proposal (and in favor of the Irish formula) are that it ignores the geological basis of the continental shelf doctrine, eliminates existing rights of the coastal state over the entire 'natural prolongation' of its land territory under the sea, fails to take into account the economic and environmental interests of the coastal state in hydrocarbon production off its coast, and might unnecessarily complicate the division of common fluid resource deposit".[237]

Negotiating Group 6 did not complete its work during the Seventh Session and by the end of that Session no agreement was reached. In his report to the Plenary, the Chairman of the NG 6 (who was also the Chairman of the Second Committee) stated inter alia:

> "...This Group held seven informal meetings during the resumed seventh session. The work was very similar in character to that carried out in Geneva; that is to say, although the discussion was positive, it was not possible to reach a general agreement. As in Geneva, statements focused on the question of the outer limit, and some delegations defined their position for the first time on this matter. The suggestions which we discussed in this Group were: the Irish formula, document NG 6/1; the Soviet proposal, document C. 2/ Informal Meeting/14; and the proposal of the Arab Group, document NG 6/2, which advocates a maximum limit of 200 miles. In the last stage of the work, one delegation made an informal suggestion, which consisted of accepting the so-called Irish formula and amending article 82 of the ICNT concerning payments and contributions with respect to the exploitation of the shelf beyond 200 miles.....".[238]

---

237. Ibid, at pp. 20-21.

238. UNCLOS III, Official Records, Seventh Session, Vol. X, pp. 164-165, at p. 164, Para. 6.

8. UNCLOS III, Eighth Session (Geneva and New York): 1979

The Eighth Session of the UNCLOS III was held in Geneva from March 19 to April 27, 1979 and resumed in New York from July 16 to August 24, 1979.[239]

As described earlier, Negotiating Group 6 had not completed its work during the Seventh Session, thus it continued its work during the Eighth Session. At Geneva the NG 6 held six informal meetings.[240] On 26 April, 1979, the results of the negotiations within the NG 6 were incorporated in "Compromise suggestions by the Chairman of negotiating group 6".[241] This text combined the Irish and the Soviet formulae. The outer limit of the continental shelf, according to this text, would not, in any case, exceed either 350 miles from the baseline from which the breadth of the territorial sea is measured or 100 miles from the 2,500 metre isobath.[242] According to the Chairman of the Second Commitee:

> "...I have held intensive consultations over the last few days with a number of delegations which have been most active in the group's discussions. The results of these efforts to achieve what may be a decisive break-through resolving Second Committee issues, and perhaps issues of the Conference itself, are set out in document A/CONF. 62/L. 37. I know that there are delegations which will have reservations or objections to my suggestions, but I

---

239. UNCLOS III, Official Records, Eighth Session, Vols. XI and XII.

240. Ibid, Vol. XI, at p. 67, Para. 79. There were no changes regarding the results achieved by Negotiating Groups 4 and 5 during the Seventh Session, see ibid, pp. 8-10, Paras. 1-14, pp. 57-59 and pp. 64-67.

241. Doc. A/CONF. 62/L. 37, ibid, at pp. 100-101.

242. Ibid. See also Oxman,"The Third United Nations Conference on the Law of the Sea", 74 AJIL (1980) pp. 1-47, at pp. 19-21.

> hope they understand that the negotiations are open-ended and that they will have an opportunity to put forward their own views in our future negotiations. The suggestions I am making for inclusion in any revision of the composite negotiating text are self-explanatory. I am convinced that they will improve the prospect of a consensus.....".[243]

The results of the first part of the Eighth Session of the UNCLOS III were incorporated in the revision of the ICNT (ICNT. Rev. 1) which was issued on April 28, 1979.[244] It is, therefore, appropriate to look at the new provisions regarding the issues dealt with by Negotiating Groups 4, 5 and 6.

i. Rights of Access to the Living Resources of the EEZ by the LLGDS

The extensive negotiations by the NG 4 provided three fundamental changes in Articles 69 and 70.[245] The changes as they appeared in the ICNT. Rev. 1 were as follows:

Article 69 of the ICNT. Rev. 1 dealt in more detail with the rights of the land-locked States.[246] Paragraph 3 stated:

> "When the harvesting capacity of a coastal State approaches a point which would enable it to harvest the entire allowable catch of the living resources in its exclusive economic zone, the coastal State and other States concerned shall operate in the establishment of equitable arrangements on bilateral, subregional or regional bases to allow for participation of developing land-locked States of the same subregion or region in the exploitation of the living resources of the exclusive economic zone of coastal States of the subregion or region,

---

243. UNCLOS III, Official Records, Eighth Session, Vol. XI, at pp. 101-102.
244. UN Doc. A/CONF. 62/WP. 10/Rev. 1 of April 28, 1979, see the Text in 18 ILM (1979) pp. 686-816.
245. See above at p. 563.
246. 18 ILM (1979) pp. 686-816, at pp. 720-722.

> as may be appropriate in the circumstances and on terms satisfactory to all parties. In the implementation of this provision the factors mentioned in paragraph 2 shall also be taken into account".[247]

Paragraph 2 of Article 70 of the ICNT. Rev. 1 defined the "States with special geographical circumstances" as:

> "Coastal States, including States bordering enclosed or semi-enclosed seas, whose geographical situation makes them dependent upon the exploitation of the living resources of the exclusive economic zone of other States in the subregion or region, for adequate supplies of fish for nutritional purposes of their populations or parts thereof, and coastal States which can claim no exclusive economic zones of their own".[248]

Other provisions of Article 70 regarding these States were exactly the same as those regarding the land-locked States.

Paragraph 4 of Article 69 and paragraph 5 of Article 70 of the ICNT. Rev. 1 stated that developed land-locked States or developed States with special geographical characteristics are entitled to the same rights only within the EEZ of developed coastal States in the same region or subregion. The latter part of the paragraph, however, gave priority to developed land-locked States or States with special geographical characteristics whose nationals have habitually fished in the zone and are dependent on

---

247. Ibid, at p. 721. Paragraph 2 of Article 69 stated: "The terms and modalities of such participation shall be established by the States concerned through bilateral, subregional or regional agreements taking into account inter alia:
(a) the need to avoid effects detrimental to fishing communities or fishing industries of the coastal State;
.....
(d) the nutritional needs of the populations of the respective States". Ibid, at pp. 720-721.

248. Ibid, at p. 721.

fishing in these areas.[249]

ii. The Question of Settlement of the Disputes Relating to the Exercise of Sovereign Rights of the Coastal States within the EEZ

As discussed earlier the extensive negotiations within the NG 5 resulted in the reshuffling of Article 296 as well as the incorporation of new provisions. The reshuffling of Article 296 has already been discussed.[250] Paragraph 3 of Article 296 introduced new provisions which had not appeared in the ICNT. It stated inter alia that:

> "3. (a) Unless otherwise agreed or decided by the parties concerned, disputes relating to the interpretations or application of the provisions of this Convention with regard to fisheries shall be settled in accordance with this section, except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary power for determining the allowable catch, its harvesting capacity, the allocation of surplus to other States and the terms and conditions established in its conservation and management.
>
> (b) Where no settlement has been reached by recourse to the provisions of section 1, a dispute shall, notwithstanding article 284, paragraph 3, be submitted to the conciliation procedure provided in Annex IV, at the request of any party to the dispute, when it is alleged that:
>
> (i) a coastal State has manifestly failed to comply with its obligations to ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not seriously endangered;
>
> (ii) a coastal State has arbitrary refused to determine, upon the request of another State, the allowable catch and its capacity to harvest the living resources with respect to stocks which

249. Ibid.

250. See above pp. 568-569.

that other State is interested in fishing;

(iii) a coastal State has arbitrarily refused to allocate to any State, under the provisions of articles 68, 69 and 70 and under the terms and conditions established by the coastal State consistent with this Convention, the whole or part of the surplus it has declared to exist.

(c) In any case the conciliation commission shall not substitute its discretion for that of the coastal State.

(d) The report of the conciliation commission shall be communicated to the appropriate global, regional or sub-regional intergovernmental organizations".[251]

It is clear from the provisions of paragraph 3 (a) that the coastal State is under no obligation to accept the submission to settlement of any dispute regarding its sovereign rights over the living resources of the EEZ. Paragraph 3 (b) states that at the request of any party certain disputes shall be submitted to the conciliation commission. While the commission's discretion shall not, according to paragraph 3 (c), substitute that of the coastal State's, a strong pressure has been placed on the coastal State in paragraph 3 (d). According to this sub-paragraph, the commission shall send its report to appropriate global, regional and subregional intergovernmental organizations. It appears that some pressure through such organizations is expected and that this is considered to be the best practical mean in persuading a defiant coastal State to comply with its duties under the Convention.

---

251. Ibid, at pp. 782-783. Article 7 (2) of Annex IV dealing with the conciliation commission states that: "The report of the commission, including any conclusions or recommendations, shall not be binding upon the parties". Ibid, at p. 804.

iii. Outer Limit of the Continental Shelf and the Question of Payments

Article 76 of the ICNT. Rev. 1 stated:

> "The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance".

The most important problem regarding the above definition appears when it is read in relation to the seabed and subsoil of the EEZ. If, for example, two opposite States share the same submarine area which is within the EEZ of one State but is the natural prolongation of the land territory of the other, how should the submarine area be divided between them? Article 56 (3) of the ICNT. Rev. 1, after describing the rights, jurisdiction and duties of the coastal States in the EEZ (paras. 1 and 2) states that:

> "The rights set out in this article with respect to the sea-bed and subsoil shall be exercised in accordance with Part VI".

The use of the term 'in accordance with' adds further complication to the question of the delimitation since there is no provision in Part VI which deals with the above problem. The term seems to refer only to the provisions regarding the exploration of the seabed and subsoil and the exploitation of its natural resources. It must, however, be noted that the right of the coastal State over the continental shelf is, according to the ICJ in the

North Sea Continental Shelf Cases, an inherent right. Whether a coastal State, in a delimitation dispute, can be denied of its inherent right in favour of another State's right over the EEZ is doubtful.

Paragraphs 4 and 5 of the ICNT. Rev. 1 stated:

" 4. (a) For the purposes of this Convention, the coastal State shall establish the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by either:

(i) A line delineated in accordance with paragraph 6 by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope; or

(ii) A line delineated in accordance with paragraph 6 by reference to fixed points not more than 60 nautical miles from the foot of the continental slope.

(b) In the absence of evidence to the contrary, the foot of the continental slope shall be determined as the point of maximum change in the gradient at its base.

5. The fixed points comprising the line of the outer limits of the continental shelf on the seabed, drawn in accordance with paragraph 4 (a) (i) and (ii), either shall not exceed 350 miles from the baselines from which the breadth of the territorial sea is measured or shall not exceed 100 nautical miles from the 2,500 metres isobath, which is a line connecting the depth of 2,500 metres".252

Article 77 of the ICNT. Rev. 1 is an exact reproduction of Article 2 of the 1958 Geneva Convention on the Continental Shelf. The provisions of Article 82 regarding payments and contributions in respect of the exploitation of the mineral resources of the continental shelf beyond 200 nautical miles are the same as the provisions of

252. Ibid, at pp. 723-724. Article 76 contained two footnotes; the first referred to the underwater oceanic ridges and the second on the special problem of Sri Lanka, ibid, at p. 723

Article 82 of the ICNT.[253]

The resumed Eighth Session of the UNCLOS III was held in New York from July 19 to August 24, 1979.[254] Negotiating Group 6 continued with its work on the definition of the outer limit of the continental shelf and the question of payments.[255] It held five meetings and over 70 statements were made by various delegations.[256] At the request of a number of delegations the NG 6 established "the so-called group of 38" the establishment of which was, according to the Chairman of NG 6, " in response to the request by several delegations for questions referred to negotiating group 6 to be considered by a smaller group with a view to facilitating the solution of those questions".[257]

The group of 38 held five meetings and dealt with the following questions: the outer limit of the continental shelf; payments and contributions; submarine oceanic ridges; the commission on limits; and the problem of Sri Lanka.[258] The results of the progress made by this group during the resumed Eighth Session was summarized in the Report of the Chairman of the Second Committee as follows:

> "Concerning these items, delegations presented various informal suggestions which helped to determine more precisely the various positions and the possible solutions. I hope that the deliberations and extensive consultations held during this stage have prepared the ground for finding satisfactory solutions on these items

---

253. Ibid, at p. 725.

254. UNCLOS III, Official Records, Resumed Eighth Session, Vol. XII.

255. Ibid, at pp. 106-107.

256. Ibid.

257. Ibid.

258. Ibid.

at the next session".[259]

Negotiating Groups 4 and 5 did not hold any meetings during the resumed Eighth Session.[260]

9. UNCLOS III, Ninth Session (New York and Geneva): 1980

The Ninth Session of the UNCLOS III was held in New York from March 27 to April 4, 1980 and resumed in Geneva from July 28 to August 29, 1980.[261]

The first part of the Ninth Session produced a second revision of the ICNT (ICNT. Rev. 2).[262] The second part of the Session produced a third revision of the ICNT (ICNT. Rev. 3) and this time the Text was issued as the Draft Convention on the Law of the Sea (Informal Text).[263]

During the first part of the Ninth Session the Second Committee held six informal meetings.[264] Negotiating Group 6 continued its work on the various questions relating to the continental shelf. The results of the negotiations carried out by the NG 6 can be summarized as follows:

i. Submarine Ridges

It will be recalled that Article 76 (3) of the ICNT. Rev. 1 defined the continental margin as "the submerged prolongation of the land mass of the coastal States" which would consist of "the sea-bed and subsoil of the shelf,

---

259. Ibid, at p. 92, Para. 9.

260. Ibid, Para. 2.

261. UNCLOS III, Official Records, Ninth Session, New York, Vol. XIII. See also Bernard H. Oxman, "The Third United Nations Conference on the Law of the Sea: The Ninth Session 1980", 75 AJIL (1981) pp. 211-256.

262. UN Doc. A/CONF. 62/WP. 10/Rev. 2 (1980).

263. UN Doc. A/CONF. 62/WP. 10/Rev. 3, 27 August 1980.

the slope and the rise". The last sentence of this Paragraph stated that:

> "It does not include the deep ocean floor or the subsoil thereof".[265]

A foot-note on this Paragraph stated that:

> "General understanding has been reached to the effect that on the question of underwater oceanic ridges there will be additional discussion and a mutually acceptable formulation to be included in Article 76 will be drawn up".[266]

As a result of extensive consultations an amendment was made to the last sentence of Article 76 (3) which read as follows:

> "It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof".[267]

In addition to this change a new Paragraph 5 (bis) was introduced which read:

> "Notwithstanding the provisions of paragraph 5, on submarine ridges the outer limit of the continental shelf shall not exceed 350 miles from the baselines from which the breadth of the territorial sea is measured. This paragraph does not apply to submarine elevations that are natural components of the continental margin, such as its plateaux, rises, caps, banks and spurs".[268]

ii. <u>The Problem of Sri Lanka</u>

A foot-note to Paragraph 4 of Article 76 of the ICNT. Rev. 1 stated that:

> "The suggestion of the delegation of Sri Lanka for an additional method of delimitation

---

264. UNCLOS III, Official Records, Ninth Session, Vol. XIII, at p. 82, Para. 2.

265. See above at p. 579.

266. 18 ILM (1979), at p. 723.

267. UNCLOS III, Official Records, Ninth Session, Vol. XIII, at p. 82, Para. 6(a).

268. Ibid.

> applicable to its geological and geomorphological conditions received widespread sympathy. However, the matter has been left for negotiation at the forthcoming session of the Conference".[269]

Extensive negotiations on this point provided an agreement which would provide an exceptional method for delimitation of its continental shelf by Sri Lanka. Referring to this agreement the Chairman of the Second Committee stated that:

> "There is widespread understanding that such an exception would be accommodated and that provision for it would be made by way of a statement of understanding of the President of the Conference to be incorporated in an annex to the final act of the Conference as part of an over-all settlement....".[270]

iii. Commission on the Limits of the Continental Shelf

The idea of a commission to examine the precision of the continental shelf boundaries first appeared in Paragraph 5 of the Irish Formula.[271] Canada had submitted a proposal on the structure and functions of such a commission in 1978.[272]

As a result of extensive negotiations on this question it was agreed that a new annex relating to a commission on limits of the continental shelf would be included in the Text.[273]

On the question of payments and contributions (Article 82 of the ICNT. Rev. 1) the Chairman of the Second Committee noted inter alia that: "No new informal suggestions concerning this point was put forward in the group.....".[274]

---

269. 18 ILM (1979), at p. 723.
270. UNCLOS III, Official Records, Ninth Session, Vol. XIII, at p. 83 (d).
271. Oxman, Loc. Cit., in note 203 (p. 561), at pp. 20-21.
272. Ibid.
273. UNCLOS III, Official Records, Vol. XIII, at pp. 82-83
274. Ibid, at p. 83.

iv. Delimitation Between Opposite and Adjacent States

The delimitation of the EEZ and the continental shelf between opposite and adjacent States had been recognized as one of the hard core issues.[275] The task of providing a solution to this problem had been vested in the NG 7.[276]

The results of extensive negotiations by the NG 7 appeared at the end of the first part of the Ninth Session in a suggestion by the Chairman of that group. Paragraph 1 of Article 74 of the ICNT. Rev. 1 stated that:

> "The delimitation of the exclusive economic zone between adjacent or opposite States shall be effected by agreement in accordance with equitable principles, employing, where appropriate, the median or equidistance line, and taking account of all the relevant circumstances".[277]

The suggested text read as follows:

> "The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement in conformity with international law. Such an agreement shall be in accordance with equitable principles, employing the median or equidistance line, where appropriate, and taking account of all circumstances prevailing in the area concerned".[278]

The difference between the provisions of the ICNT. Rev. 1 and the suggested text was that in the former "equitable principles" was the basis of an agreement while in the suggested text the basis of an agreement was "international law".[279] The suggested text was not incorporated in the

---

275. 18 ILM (1979), at p. 700.

276. See Oxman, Loc. Cit., in note 203 (p. 561), at pp. 22-24.

277. Paragraph 1 of Article 83 of the ICNT. Rev. 1 (delimitation of the continental shelf between adjacent and opposite States) is exactly the same. 18 ILM (1979), at pp. 722-723 and at p. 725.

278. UNCLOS III, Official Records, Vol. XIII, at p. 77. The same paragraph was also suggested for the continental shelf, ibid, at p. 78.

ICNT. Rev. 2 but appeared in the Draft Convention on the Law of the Sea (Informal Text).[280]

Article 76 of the Draft Convention (Informal Text) included the two changes proposed by the NG 6.[281] Apart from these two changes the Article is exactly the same as Article 76 of the ICNT. Rev. 1.

At the end of the Ninth Session four issues were identified as among the outstanding problems requiring further negotiations. They were:

a. The rules concerning the delimitation of overlapping boundaries for the EEZ and the Continental shelf.

b. Participation in the Convention by (i) regional inter-governmental organizations (ii) non-independent territories and, (iii) national liberation movements.

c. Arrangements for a preparatory Commission which would deal with the groundwork for the International Sea-Bed Authority.

d. Protection of investments that might be made for the exploitation of the Sea-Bed before the Convention became Law.[282]

---

279. See Oxman, Loc. Cit., in note 261 (p. 581), at pp. 231-232.

280. Ibid. See Articles 74 and 83 of the Draft Convention (Informal Text) A/CONF. 62/WP. 10/Rev. 3, at pp. 30 and 34 respectively.

281. Ibid, at pp. 31-32.

282. See UN Press Release, Department of Public Information, Press Section, United Nations, New York, 16 April 1981, at pp. 1-2.

10. UNCLOS III, Tenth Session (New York and Geneva): 1981

The Tenth Session of the UNCLOS III was held in New York from March 9 to April 24, 1981 and resumed in Geneva from 3 to 28 August, 1981.[283]

It is important to note here that the most controversial issues preventing the completion of a treaty on the Law of the Sea were those related to the exploitation of the deep seabed. In fact in 1980, the promulgations of Acts regarding the exploitation of the mineral resources of the deep seabed by the United States and Federal Republic of Germany,[284] were interpreted by various delegations to the Conference as threats endangering the progress of the negotiations.[285]

On March 2, 1981, shortly before the Tenth Session started its work, the United States' State Department issued the following statement:

> "After consultations with other interested Departments and Agencies of the United States Government, the Secretary of State has

---

283. See, "Third United Nations Conference on the Law of the Sea: First Part of Tenth Session, New York, 9 March-24 April", United Nations, Information Centre, For the United Kingdom, Ireland and the Netherlands, For Use of Information Media - Not An Official Record, BR/81/8 (hereinafter referred to as UNIC, BR/81/8, 20 May 1981, and "Resumed Tenth Session of Law of the Sea Conference, Geneva, 3-28 August", UNIC, BR/81/20, 31 August 1981. See also United States Delegation Report, Tenth Session of the Third United Nations Conference on the Law of the Sea, March 9- April 24 1981, New York.

284. For the United States' "Deep Seabed Hard Mineral Resources Act 1980" see 19 ILM (1980) pp. 1003-1020, for the Federal Republic of Germany's "Act on Interim Regulation of Deep Sea-bed Mining, August 16 1980" see ibid, at pp. 1330-1339.

> instructed our representative to the UN Law of the Sea Conference to seek to ensure that the negotiations do not end at the present session of the Conference, pending a policy review by the United States Government. The interested Departments and Agencies have begun studies of the serious problems raised by the Draft Convention, and these will be the subject of a thorough review which will determine our position toward the negotiations".[286]

The United States' Delegation attended the Conference but did not participate in the negotiations.

During the first part of the Tenth Session the Second Committee did not have any agenda which enabled various delegations to express their views on any questions related to the work of the Second Committee. The comments made by various delegations were focused on the following subjects:

a. Warship passage in the territorial sea (Article 21).
b. Warship activities within the 200 mile EEZ (Article 58).
c. Military installations (Article 60. 1).
d. Duty to remove installations (Article 60. 3).
e. Straddling fish stocks (Article 63).[287]

Referring to the results of the suggestions made during the four informal meetings the Chairman stated that:

> "...the following conclusions may be drawn from these discussions:
>
> (a) There is a virtual consensus on the fact that it is not desirable or practical to reopen discussion on the basic Second Committee issues, which, while they do not in all cases represent a consensus, are the formulae that come closest to commanding general agreement and that have been arrived at through long and arduous negotiations.
>
> (b) It is possible to introduce, at such time as the Conference may decide, minor changes designed to supplement, clarify or improve the

---

285. See Oxman, Loc. Cit., in note 261 (p. 581), at p. 212.

286. Ibid, at p. 211. For the reaction to the United States policy review see, US Delegation Report, Loc. Cit., in note 283 (p. 586), at pp. 1-3.

287. Ibid, at pp. 6-8, see also UNIC,BR/81/8, Loc. Cit., in note 283 (p. 586), at pp. 9-12.

> draft Convention, always provided, of course, that they command necessary support and will help to facilitate acceptance of the text by the largest possible number of delegations.
>
> (c) Although some of the draft articles, as now worded, present difficulties of various kinds for some delegations, the draft as a whole is acceptable to the great majority of delegations. There are actually, in the view of a significant number of delegations, very few questions that require further discussion and negotiation".[288]

As stated earlier, the problem of delimitation between opposite and adjacent States was one of the outstanding issues.[289] During the first part of the Tenth Session further negotiations were carried out by two interested groups which were headed by Spain and Ireland.[290] No final agreement was reached although the Spanish Delegation expressed that: "there was a firm basis to believe that we will reach an understanding".[291]

The second part of the Tenth Session brought a solution to the problem of delimitation of maritime boundaries. The President of the Conference, Mr. Koh, submitted the following text to replace Articles 74 (1) and 83 (1) of the Draft Convention. It read as follows:

> "The delimitation of the exclusive economic zone [continental shelf] between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as

---

288. UN Doc. A/CONF. 62/L. 69, 15 April, 1981, at p. 2.

289. See above pp. 584-585.

290. Ireland was heading the group which favoured "equitable principles" as the basis of agreement while Spain represented States which were in favour of the text(Articles 74. 1 and 83. 1), see UNIC BR/81/8, Loc. Cit., in note 283 (p. 586), at p. 12.

291. Ibid.

> referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution".[292]

This text seems to have satisfied the two groups in opposition and is expected to appear in a new revision of the Draft Convention on the Law of the Sea.[293]

The results of the negotiations completed during the Tenth Session are expected to appear in an "official" Text of the Draft Convention on the Law of the Sea.[294] The next Session of the Conference, "Final Decision-Making Session", is scheduled to be held in New York from 8 March to 30 April, 1982.[295] It has also been decided that in September a Session will be held in Caracas for signing of the Convention.[296]

On 27 August, 1981, at a Press Conference, President Koh stated that: "delegations intended to bring the LOS Conference to a successful conclusion next spring 'with or without the US'".[297]

---

292. UNIC, BR/81/20, Loc. Cit., in note 283 (p. 586), at p. 14.
293. Ibid.
294. Ibid, at p. 1.
295. Ibid.
296. Ibid.
297. See "Resumed Tenth Session of the Law of the Sea Treaty Conference-Geneva", X, No. 1 International Report (Anniversary Issue) S.C. 23 Sep. 1981, at p. 1.

B- State Practice Since 1973

The 10th Session of the UNCLOS III ended in August, 1981.[298] Whether the Conference will eventually succeed in providing a comprehensive Treaty on the Law of the Sea, which would be acceptable to all States, is a question whose answer no one ventures to predict. The fact remains, however, that since 1973 the Law of the Sea has, through State practice, developed to the extent that should the Conference fail, certain issues can be seen to have emerged as part of customary international law.

The legal status of the exploitation of the natural resources within the limits of national jurisdiction is related to the regimes of the territorial sea, the EEZ and the continental shelf and therefore it is appropriate to examine State practice regarding the exploitation of the natural resources within the limits of national jurisdiction.

i. The Territorial Sea

According to the FAO'o latest estimation, of nearly 140 coastal States, some 80 have claimed 12 miles territorial sea, 22 have claimed territorial seas between 12 and 200 miles and the rest (some 30 States) have claimed territorial seas between 3 and 12 miles.[299]

The above estimates, while indicating a substantial support for a 12 mile territorial sea, cannot be viewed

---

298. See above pp. 586-589.

299. Gerald Moore, Legislation on Coastal State Requirements for Foreign Fishing, FAO, Rome, 1981, at pp. 328-335.

as an absolute reflection of State practice regarding the breadth of the territorial sea. States which traditionally supported a 3 mile territorial sea no longer adhere to that limit and since 1973 at least they have not protested against the 12 mile territorial sea claimed by a number of States.[300] No proposal regarding a 3 mile territorial sea has been submitted to the UNCLOS III while at the same time no voice has been raised against the adoption of the 12 mile territorial sea. The sovereignty of the coastal State over a 12 miles territorial sea which appeared in the ISNT in 1975 has since been incorporated in the subsequent Texts which have so far been the basis for negotiations. It seems, however, that the absence of protests regarding the new claims to 12 miles territorial sea since 1973 on the one hand, and the absence of renewed protests regarding the previous claims to 12 mile territorial sea limit on the other, indicate that 12 mile territorial sea is now regarded as a customary rule of international law. Furthermore, this limit has been been explicitly accepted, subject to the right of innocent passage, by most maritime powers.

---

300. States claiming 12 mile territorial sea since 1973 include: Bangladesh (1974), Barbados (1977), Cape Verde (1978), Comoro Islands (1976), Cuba (1977), Fiji (1976), Grenada (1978), Guinea Bissau (1978), Guyana (1977), Iceland (1979), Italy (1974), Ivory Coast (1977), Japan (1977), Republic of Korea (1978), Monaco (1973), Morocco (1973), Mozambique (1976), New Zealand (1977), Oman (1977), Papua New Guinea (1978), Poland (1977), Portugal (1977), Sao Tome (1978), Seychelles (1977), Solomon Islands (1978), South Africa (1978), Spain (1977), Suriname (1978), Tunisia (1973), Viet Nam (1977), Western Samoa (1977), Yugoslavia (1979) and Zaire (1974). See Moore, Op. Cit., in note 299 (p. 590), at pp. 328-335.

It must be pointed out that since 1973 only 12 States have claimed territorial seas in excess of 12 miles.[301] Most Latin American States whose claims to maritime sovereignty in the 1950's were interpreted as claims to territorial sea are now satisfied with the provisions regarding the EEZ and therefore their claims cannot be regarded as claims to the territorial sea.[302] It is, therefore, safe to suggest that State practice indicates a general acceptence of a 12 mile limit for the breadth of the territorial sea.

ii. The Exclusive Economic Zone

The concept of an exclusive economic zone can, as noted earlier, be traced to the claims made by some Latin American States to a 200 mile maritime sovereignty.[303] Between the early 1950's and the early 1970's those claims were the subject of strong protests and despite their successful enforcement were not followed by other States. The concept of 200 mile maritime sovereignty did not, during these 20 years, develop outside Latin America and therefore did not constitute a pattern for State practice in international law.

Between 1970 and 1973 the concept of a 200 mile zone, within which the coastal State exercises sovereign rights

---

301. They were: Albania, 15 miles (1976), Angola, 20 miles (1976), Benin, 200 miles (1976), Cameroon, 50 miles (1974), People's Republic of Congo, 200 miles (1977), Ghana, 200 miles (1977), Liberia, 200 miles (1976), Madagascar, 50 miles (1973), Mauritania, 70 miles (1978), Senegal, 150 miles (1976), Tanzania, 50 miles (1973) and Togo, 30 miles (1977). Ibid.

302. See above pp. 487-491.

303. See above pp. 482-495.

over its natural resources, received substantial support from most of the developing countries. The concept became known as the Exclusive Economic Zone.[304]

Although the EEZ became one of the major issues during the preparatory work of the Seabed Committee in that period it was not yet considered a customary rule of international law. This is clearly the view expressed by the ICJ in the Fisheries Jurisdiction Case (United Kingdom v. Iceland) in 1974.[305] The dispute between the United Kingdom and Iceland was based on the latter's Regulations of 14 July, 1972 by which she claimed a 50 mile exclusive fishing zone. The Court did not refer to the concept of the EEZ but discussed the preferential rights of the coastal States over the fisheries in waters adjacent to their territorial seas. It observed that:

> "In recent years the question of extending the coastal State's fisheries jurisdiction has come increasingly to the forefront. The Court is aware of present endeavours, pursued under the auspices of the United Nations, to achieve in a third Conference on the Law of the Sea the further codification and progressive development of this branch of the law, as it is of various proposals and preparatory documents produced in this framework, which must be regarded as manifestations of the views and opinions of individual States and as vehicles of their aspirations, rather than as expressing principles of existing law. The very fact of convening the third Conference on the Law of the Sea evidences a manifest desire on the part of all States to proceed to the codification of that law on a universal basis, including the question of fisheries and conservation of the living resources of the sea. Such a general desire is understandable since the rules of

---

304. See above pp. 497-513.

305. Fisheries Jurisdiction Case (United Kingdom v. Iceland), Judgment of July 25, 1974, ICJ. Report, 1974, pp. 1-174.

> international maritime law have been the product of mutual accommodation, reasonableness and co-operation. So it was in the past, and so it necessarily is today. In the circumstances, the Court, as a court of law, cannot render Judgment sub specie legi ferendae, or anticipate the law before the legislator has laid it down".[306]

And again the Court noted that:

> "State practice on the subject of fisheries reveals an increasing and widespread acceptance of the concept of preferential rights for coastal States, particularly in favour of countries or territories in a situation of special dependence on coastal fisheries".[307]

There are two important points in the above statements regarding the development of the Law of the Sea in relation to State practice. First, the Court was well aware of the development of the Law of the Sea in relation to fisheries in areas adjacent to the coast but outside the territorial sea. It did not refer to the concept of the EEZ or the FZ which had been the most important issue in relation to fisheries during the preparatory work of the UNCLOS III. The Court chose the term preferential rights in order to avoid any subsequent effects which it might have had on the negotiations. Secondly, the Court avoided basing its Judgment on the growing support for an exclusive economic zone. It observed that while the concept of preferential rights was widely evidenced in State practice, no customary rule had yet developed to justify the exclusive claims over the fisheries

---

306. Ibid, at pp. 23-24, para. 53.

307. Ibid, at p. 26, para. 58.

beyond the territorial sea. The customary rule, however, as the Court acknowledged, had developed but only to a limited extent. Referring to this point the Court noted that:

> "The concept of preferential rights is not compatible with the exclusion of all fishing activities of other States. A coastal State entitled to preferential rights is not free, unilaterally and according to its own uncontrolled discretion, to determine the extent of those rights. The characterization of the coastal State's rights as preferential implies a certain priority, but cannot imply the extinction of the concurrent rights of other States.....".308

Referring to the unilateral extension to 50 miles by Iceland the Court stated that:

> "The provisions of the Icelandic Regulations of 14 July 1972 and the manner of their implementation disregard the fishing rights of the Applicant. Iceland's unilateral action thus constitutes an infringement of the principle enshrined in Article 2 of the 1958 Geneva Convention on the High Seas which requires that all States, including coastal States, in exercising their freedom of fishing, pay reasonable regard to the interests of other States..... The Applicant is therefore justified in asking the Court to give all necessary protection to its own rights, while at the same time agreeing to recognize Iceland's preferential position. Accordingly, the Court is bound to conclude that the Iceland's Regulations of 14 July 1972 establishing a zone of exclusive fisheries jurisdiction extending to 50 nautical miles from baselines around the coast of Iceland, are not opposeable to the United Kingdom, and the latter is under no obligation to accept the unilateral termination by Iceland of United Kingdom fishery rights in the area".309

---

308. Ibid, at pp. 27-28, para. 62.

309. Ibid, at p. 29, para. 67. For further discussion on the Case see R.R. Churchill, "The Fisheries Jurisdiction Cases: The Contribution of the International Court of Justice to the Debate on Coastal States' Fisheries Rights", 24 ICLQ (1975) pp. 82-106.

It is clear that the Court did not consider the claims by some coastal States to exclusive rights beyond the territorial sea or the discussions regarding the concept of the EEZ during the preparatory work of the Seabed Committee as having established a customary rule of international law.

The concept of a preferential right enjoyed by the coastal State within an area adjacent to but outside the territorial sea developed in two directions; the EEZ and the FZ. Western European and Developed States were in favour of a fishery zone while others, mainly developing States, were in favour of an economic zone within which the coastal State could exercise rights inter alia with regard to all its resources, whether renewable or non-renewable, of the seabed, subsoil and the superjacent waters. The latter group, while conceding some exceptions regarding their exclusive rights within the EEZ, succeeded in imposing their views and thus, as discussed in the previous section, the notion of a 200 nautical mile EEZ was eventually incorporated in the Texts which have been the basis for negotiations so far. The provisions regarding the EEZ have been subject to some changes but it has received substantial support both within the UNCLOS III and outside it.[310]

---

310. See above pp. 524-527. Since 1973, regulations on foreign fishing within an extended zone have been promulgated by many States. Examples are: Canada (1976 and 1977), European Communities (1980), The Gambia (1977 and 1978), Japan (1977), Mexico (1976), New Zealand (1977 and 1978), Norway (1977), Portugal (1979), Senegal (1976), Seychelles (1979), Sri Lanka (1979), United Kingdom (1976) and United States of America (1976, 1977 and 1978). For full details of these Acts see Moore, Op. Cit., in note 299 (p. 590), at pp. 53-277.

According to the FAO's latest estimates:

> "As of April 1980, out of some 136 coastal states, almost three quarters (99 states) claim fisheries jurisdiction beyond 12 miles and almost two thirds (84 states) claim limits of 200 miles. In a number of other countries '200-mile' legislation is pending before legislative bodies or awaiting entry into force".[311]

Another important development regarding the EEZ/FZ is the influence of the provisions of the UNCLOS III Texts on bilateral agreements regarding fishing within the extended jurisdictional zones since 1975. Direct and implied references are made in a number of agreements accommodating the provisions contained in the Texts.[312] Agreements between various States indicate that the concept of the EEZ and especially the question of fisheries within the EEZ is broadly accepted by almost all coastal States.[313] According to Carroz and Savini:

> "On the whole, bilateral agreements provide significant evidence that coastal States are in effect already implementing most of the provisions on fisheries which are to be found in the Negotiating Text before the Conference on the Law of the Sea. Contracting parties, however, do not indicate that they accept the new fishery regime in its entirety or that they will subscribe to it in the future. Indeed, coastal states granting access to living resources in extended zones of jurisdiction seem to be careful to avoid quoting or referring specifically to provisions of the

---

311. Ibid, at p. 3.

312. For detailed discussions on bilateral agreements regarding fishing within the EEZ/FZ see J.E. Carroz and M.J. Savini, "Law of Fisheries Emerging from Bilateral Agreements", Marine Policy, April 1979, pp. 79-98.

313. Ibid, at p. 97.

Negotiating Text which limit or restrict national sovereignty".314

Although it is admitted that both the support and the practice regarding the rights of the coastal States within a zone adjacent to but outside the territorial sea have substantially increased since 1973 the fundamental question, in the absence of a Treaty, is whether such support and practice have resulted in the concept becoming part of customary international law.

The answer is that it is only safe to suggest that while the preferential rights of the coastal States within a zone, the limit of which is generally agreed to be 200 nautical miles, have become part of customary international law the scope and content of these rights remains a major problem. The very concept of these rights is divided in the unilateral acts. Claims to the EEZ cannot be interpreted as being equivalent to claims to a Fishery or Exclusive Fishery Zone. The former extends to the living and non-living resources of the seabed, subsoil and the superjacent waters while the latter is limited to living resources of the superjacent waters. It is, therefore, very probable that the validity of the EEZ as (having become part of) customary international law will be challenged by some States. In this respect they have a valid point which may receive recognition by any international tribunals before which such point is rased.

---

314. Ibid.

iii. The Continental Shelf

State practice regarding the legal status of the continental shelf is diverse and ambiguous. While there is a general belief as to the inherent right of the coastal States over the continental shelf the definition of the continental shelf, its limit and the extent of the coastal States' rights over the continental shelf remain, in the absence of a Treaty, extremely controversial.

In recent years, there have been a few claims to the continental shelf but these claims are as diverse as the claims made by many States before 1973. Examples are the United States' "Fishery Conservation and Management Act 1976 as amended in 1978" [315] and Papua New Guinea's "Continental Shelf 'Living Resources' National Seas Act 1977".[316] The continental shelf, in both Acts, has been defined as the seabed and subsoil of the submarine areas adjacent to the coast to a depth of 200 metres or beyond that limit to where the depth of the superjacent waters admits the exploitation of the natural resources.[317] Guyana[318] and The Cook Islands[319] on the other hand, have promulgated Acts which defines the continental shelf as the

---

315. See the Text in Moore, Op. Cit., in note 299 (p. 590), at pp. 244-277.

316. Nordquist, Lay and Simmonds, New Directions in the Law of the Sea, 1980, Vol. VII, at pp. 206-214.

317. See Nordquist et al, Op. Cit., in note 316 (p. 599), at p. 207 and Moore, Op. Cit., in note 299 (p. 590), at p. 246.

318. For Guyana's Act see Moore, Op. Cit., in note 299 (p. 590), at pp. 23-35.

319. Nordquist et al, Op. Cit., in note 316 (p. 599), at p. 205.

natural prolongation of the land territory under the sea-water to a distance of 200 nautical miles or to the outer edge of the continental margin.[320]

Although the concept of 'natural prolongation' as the basis of defining the continental shelf has been accepted by almost all States during the UNCLOS III, such acceptance can only be evaluated in the light of compromises reached during the negotiations on other important issues. For instance, States whose submarine areas are not the natural prolongation of their land territories have accepted this definition because they gained equal rights over their adjacent submarine areas as the result of the inclusion of the provisions concerning the EEZ. Should the Conference fail, not only will the rights of the coastal States over the seabed and subsoil of the EEZ be questioned but the concept of the continental shelf as the natural prolongation will be equally attacked.[321] Even if the concept of 'natural prolongation' is accepted in international law, the outer limit of the continental shelf will still remain unsettled. The natural prolongation may not be considered to extend beyond the shelf itself.

National claims regarding the continental shelf indicate that while 37 States have adhered to the provisions of the 1958 Geneva Convention on the Continental Shelf,[322] a large number of States have not made any direct claims

---

320. Moore, Op. Cit., in note 299 (p. 589), at pp. 25-26; Nordquist et al, Op. Cit., in note 316 (p. 599), at p. 205.

321. See above pp. 472-481.

322. Churchill, Nordquist and Lay, New Directions in the

over the continental shelf or if they have their claims are extremely vague.[323] In between some States have adopted depth limits of 200 or 300 metres while others have adopted either a distance criterion or distance and the outer edge of the continental margin.[324] Thus it is apparent that the criticisms addressed to the provisions of the 1958 Convention on the Continental Shelf and to the claims themselves will, re-emerge.[325]

State practice since 1973 does not indicate any clarification regarding the ambiguities which have surrounded the legal status of the continental shelf since its initiation by the United States in 1945.

Conclusion

In 1970, the decision by the General Assembly to convene a new Conference on the Law of the Sea, was an acknowledgment of a widespread belief that the 1958 Genva Conference had failed to establish generally accepted rules on this branch of international law.[326] Between 1970 and 1973 the UN Seabed Committee was in charge of preparing draft articles for the UNCLOS III.[327] It was during the work of the UN Seabed Committee that the limits of national jurisdiction were generally agreed to be: a 12 mile

---

Law of the Sea, 1977, Vol. VI, at pp. 883.

323. Ibid, at p. 884.

324. Ibid.

325. See above pp. 190-194.

326. See above pp. 452-472.

327. See above pp. 497-513.

territorial sea, a 200 nautical mile Exclusive Economic Zone and 200 nautical miles or the edge of the continental margine as the outer limit of the continental shelf.[328]

The UNCLOS III held its first Session in New York in 1973 and established six Committees. On 21 June 1974, at the start of the Second Session, the Conference approved the allocation of the items to each main Committee. The Second Committee was to deal with the items which included the territorial sea, the contiguous zone, the continental shelf and the EEZ.

The Second Committee, after intensive negotiations during the various Sessions of the Conference, has succeeded in providing provisions which can be regarded as acceptable to all States. While the general pattern of the limits of national jurisdiction in the 1980 Draft Convention is the same as the results which were reached by the UN Sea-bed Committee, new provisions have been incorporated in order to ensure the clarity and the precision of the rights and duties of States within those limits. During this period of intense negotiations certain issues such as the limit of the territorial sea and the limit and the rights of States within the EEZ have also developed outside the UNCLOS III. Unlike these two issues, the progress made by the Conference on the continental shelf has had very little impact on State practice. Should the Conference fail, the questions regading the definition of the shelf, the definition of its resources, the rights of the coastal States over the continental shelf and the outer limit of the continental shelf remain unsettled.

GENERAL CONCLUSION

Before the emergence of the continental shelf doctrine the legal status of the submarine areas beyond the three mile limit of the territorial sea differed in relation to the subsoil and the seabed. The subsoil of the submarine areas did not, at any time, present any difficulty in determining its legal status for purposes of exploitation. Coastal States could, according to customary international law, exploit the resources of the subsoil. This admission of exploitation by customary international law was based on two factors. First, there was an element of constant and uninterrupted occupation regarding the subsoil the exploitation of which was always conducted by means of tunnelling from the shore. Secondly, this method of exploitation of the resources of the subsoil did not interfere with the rights of other States in respect of their freedoms of navigation and fishing which had long been established as fundamental rules of customary international law.

The exploitation of the resources of the seabed of such submarine areas was limited to a few species of so-called sedentary animals. International law recognized the rights of a few States over a few sedentary species beyond their territorial seas on the ground of immemorial possession. Those rights were exclusive in so far as those few species were concerned and could not be extended to other resources, nor could they be interpreted as extending to the seabed

itself. In relation to the latter they were non-exclusive. The rights of a few coastal States over a few well-known sedentary species were, however, considered as exceptions to the generally accepted rules of customary international law.

The doctrine of the continental shelf, as formulated in the United States Proclamation of 1945, favoured coastal State rights over the natural resources of the seabed and subsoil of the continental shelf although neither the resources nor the limit of the continental shelf was specified in that Proclamation. Subsequent claims to the continental shelf were equally or even more ambiguously framed. Although the concept of coastal State rights over the exploitation of the natural resources of the continental shelf was accepted by almost all States the ambiguities surrounding its definition, its natural resources and its limit remained unsettled.

The 1958 Geneva Convention on the Continental Shelf did very little to remove those ambiguities. While the outer limit of the continental shelf was, in effect, extended to the point at which the depth of the superjacent waters admits of the exploitation of the natural resources, the definition of sedentary species as defined in that Convention did not relate either to customary international law or biological factors relating to such species.

In 1969 the ICJ in the North Sea Continental Shelf Cases referred to the continental shelf as the natural prolongation of the land territory under the sea water.

This definition, although corresponding to the geological definition of the shelf, was contrary to the legal concept of the continental shelf as it had developed since 1945.

In 1967 the question of exploitation of the seabed and subsoil of the high seas, beyond the limits of national jurisdiction, was raised by Malta in the General Assembly, following which in 1970, the General Assembly adopted a Declaration of Principles stating that the natural resources of the seabed and subsoil, beyond the limits of national jurisdiction, were the common heritage of mankind, but the fact that many different claims regarding the limits of national jurisdiction existed inhibited adoption of a reasonable and just approach to the exploitation of that area. These and other controversial issues such as the extent of the territorial sea, the question of international straits, the preferential rights of the coastal States over fishing beyond their territorial seas and the questions regarding the protection of the marine environment resulted in a general agreement among member States of the UN that a new treaty on the Law of the Sea was needed.

A Third United Nations Conference on the Law of the Sea was convened with the task of preparing a comprehensive treaty on the Law of the Sea. It began its work in 1973 and since then the Conference has held Ten Sessions. Extensive negotiations during this period have resulted in a Draft Treaty which will probably be subject to further amendments at the next Session due to be held in Spring 1982. If the Conference fails, the questions regarding

the definition of the continental shelf, the definition of its natural resources, the outer limit of the continental shelf and the extent of the coastal States' rights over the continental shelf will remain as ambiguous as they have been since 1945. On the other hand if the Conference succeeds and the Draft Treaty is, in its present form, adopted there will still remain a number of fundamental problems regarding the legal status of the continental shelf. These are briefly examined below.

1. The Definition of the Continental Shelf

Paragraph 1 of Article 76 of the Draft Treaty (A/CONF. 62/L. 78, 28 August 1981) defines the continental shelf of a coastal State as "the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory" the outer limit of which is either "the outer edge of the continental margin" or "to a distance of 200 nautical miles..... where the outer edge of the continental margin does not extend up to that distance". The reference to 200 nautical miles in the latter part of the Paragraph is contrary to the development of customary law regarding the continental shelf since it can be interpreted either as extending the "inherent right" of the coastal State over the submarine areas beyond its natural prolongation (which defeats the whole object of that concept) or as reducing the "inherent right" of the coastal State over the 200 miles (which it may already have under customary law as interpreted by the ICJ) to the status of the seabed and subsoil of the EEZ merely. It is particularly important to point out

that Article 77 of the Draft Treaty is a reproduction of Article 2 of the 1958 Geneva Convention on the Continental Shelf which according to the ICJ had enshrined "the most fundamental rules of law relating to the continental shelf". The Court observed that the coastal State's right over the continental shelf which is the natural prolongation of its land territory was "an inherent right". This view which was expressed in the North Sea Continental Shelf Cases in 1969 was again confirmed by the Court in the Aegean Sea Continental Shelf Case in 1978. Thus there is a fundamental difference between the legal character of the seabed and subsoil of the continental shelf and that of the EEZ. This difference has been further ignored by Article 56(3) of the Draft Treaty which states that the rights of the coastal State over the seabed and subsoil of the EEZ "shall be exercised in accordance with Part VI". The rights are not subject to the provisions of Part VI regarding the continental shelf but are to be exercised in accordance with that Part. In other words, there does not seem to exist any difference in the Draft Treaty between the rights of the coastal State over the continental shelf and those in respect of the seabed and subsoil of the EEZ. This can, in certain cases regarding the delimitation between the opposite States, lead to serious conflicts.

2. The definition of the Natural Reources of the Continental Shelf

There are two important problems regarding the definition of the natural resources of the continental

shelf as it stands in the Draft Treaty. First, seawater covering the continental shelf, is used and thus treated as a resource. It makes sense to acknowledge this fact and to include the water among the resources of the continental shelf. On the other hand, since water is not stationary, it should be regarded as a shared natural resource in order to secure an effective environmental policy regarding its exploitation which is necessary to protect adverse effects on living resources and on the marine environment as a whole. The second problem is the retention of the definition of sedentary species in Article 77(4) in the Draft Treaty. This definition, in its present form, was incorporated in the shelf regime in 1958 in order to secure the freedom of fishing for all other species within that regime. Now that all coastal States are given sovereign rights over all living resources of the EEZ within 200 nautical miles this Paragraph does not serve any useful purpose. The problem regarding sedentary species has been further complicated by Article 68 of the Draft Treaty which has excluded sedentary species from the provisions applicable to the rights of the coastal States within the EEZ. It states that:

> "This Part does not apply to sedentary species as defined in article 77, paragraph 4".

Article 56(3) of the Draft Convention states that:

> "The rights set out in this article with respect to the sea-bed and subsoil shall be exercised in accordance with Part VI".

It can only be concluded that sedentary species are regarded as resources of the seabed and subsoil within the 200 nautical

miles regardless of the geological structure of the submarine area. If sedentary species are legally treated like other living resources within the 200 nautical miles the surplus will be available to other States. As the provisions of the Draft Treaty stand there is no obligation in this respect. If the definition of sedentary species is retained it is at least highly desirable to avoid conflicts regarding its interpretation by adding an Annex to the Draft Treaty in which these resources are clearly defined. It may even yet not be too late to remedy this deficiency. If, as is at present being contemplated, the UNCLOS establishes an Interim Commission to deal with matters requiring further definition or action pending the entry into force of the Convention, such a Commission could be entrusted with this task. The list of Highly Migratory Species in Annex I to the Convention provides a precedent for such a list.

3. The Delimitation Between Opposite States

The most important problem concerning the legal status of the continental shelf is its delimitation under the provisions of the Draft Treaty. This follows the ambiguity surrounding the legal status of the submarine areas beyond the territorial sea. It was pointed out earlier that although the right of the coastal State over the continental shelf is an "inherent right" this does not appear to have been expressly referred to in the Draft Treaty. The problem concerns mainly the delimitation of the submarine area which is the continental shelf of one State but is also within the 200 nautical miles of the EEZ of another

State. Can the former State exclude the latter from exploiting the submarine areas on the ground of its being the natural prolongation of its land territory? If the answer is yes this should have been made absolutely clear in the Draft Convention and if the answer is in the negative the definition of the continental shelf in Article 76 should have been revised and Article 77 should have been deleted.

The provisions of the Draft Treaty, as they stand, do not provide any satisfactory solutions regarding the regime of the continental shelf. The legal status of the continental shelf and its resources remain as ambiguous as it has been since 1945.

SELECTIVE BIBLIOGRAPHY

Adede, A.O., "Settlement of Disputes Arising Under the Law of the Sea Convention", 69 AJIL (1975), pp. 798-818.

Adede, A.O., "The Group of 77 and the Establishment of the International Sea-bed Authority", 7 ODIL (1979), pp. 31-64.

Alexander, Lewis M., Law of the Sea, Offshore Bounderies and Zones (ed), The Ohio University Press, 1967.

Alexander, Lewis M., "Alternative Regimes for the continental shelf", 2 Pacem in Maribus (1971), pp.31-43.

Alexander, Lewis M., "The Role of the Geographically Disadvantaged States in the Law of the Sea", 13 San Diego Law Review (1976), pp. 558-582.

Amador, F.V.G., "The Latin American Contribution to the Development of the Law of the Sea", 68 AJIL (1974), pp. 35-50.

Alverson, D.L., "Management of the Ocean's Living Resources: An Essay Review", 3 ODIL (1975), pp. 99-125.

Andrassy, J, "The Implications of the North Sea Cases", 2 Pacem in Maribus (1970), pp. 44-49.

Auguste, Barry B.L., The Continental Shelf; The Practice and Policy of Latin American States, with Special Reference to Chile, Ecuador and Peru, Paris, 1960.

Azzam, I., "The Dispute Between France and Brazil over Lobster Fishing in the Atlantic", 13 ICLQ (1964), pp. 1453-1459.

Bader, R.G. and Ragotzkie, A., "Nonrenewable Resources", in The Water's Edge (edited by Ketchum et al), The Massachuset Institute of Technology, 1972.

Banse, Karl., "Global Distribution of Organic Production in the Ocean", in Ocean Resources and Public Policy (edited by English), 1973, pp. 38-48.

Barnes, Robert D., Invertebrate Zoology, Third edition, London, 1974.

Barret, John., Life on the Sea Shore, London, 1974.

Bellamy, David., Life Giving Sea, London, 1975.

Blum, Yehuda Z., Historic Title in International Law, The Hague, 1965.

Boggs, S.W., "Delimitation of Seaward Areas Under National Jurisdiction", 45 AJIL (1951), pp. 240-266.

Boney, A.D., Phytoplankton, London, 1975.

Borgese, Elisabeth Mann and Ginsburg, Norton., Ocean Yearbook 1 (ed), The University of Chicago Press, Chicago, 1978.

Bouchez, Leo J., "The Outer Boundary of National Jurisdiction", 2 Pacem in Maribus (1970), pp. 50-67.

Bowett, D.W., "The Arbitration Between the United Kingdom and France Concerning the Continental Shelf Boundary in the English Channel and South-Western Approaches", 49 BYIL (1978), pp. 1-30.

Bowett, D.W., "The Second United Nations Conference on the Law of the Sea", 9 ICLQ (1960), pp. 415-435.

Brook, A.J., The Living Plant, Edinburgh University Press, 1964.

Brown, E.D., The Legal Regime of Hydrospace, Stevens, London, 1971.

Brown, E.D., "Maritime Zones: A Survey of Claims", in New Directions on the Law of the Sea, edited by Churchil et al Vol. III, London, 1973, pp. 157-192.

Brown, E.D., "The North Sea Continental Shelf Cases", 23 Current Legal Problems (1970), pp. 187-215.

Brown, E.D., "The exclusive economic Zone; Criteria and Machinery for the resolution of international conflict between different Users of the EEZ", 4 Mari. Pol. Mgmt (1977), pp. 325-350.

Brown, E.D., "The Anglo-French Continental Shelf Case", 33 Yearbook of World Affairs (1979), pp. 304-327.

Brown, E.D., "Rockall and the limits of national jurisdiction of the UK, Part 1", 2 Marine Policy (1978), pp. 181-211.

Campbell, A.C., The Seashore and Shallow Seas of Britain and Europe, London, 1976.

Carroz, J.E. and Savini, M.J., "The New International Law of Fisheries Emerging from Bilateral Agreements", 2 Marine Policy (1975), pp. 79-98.

Carroz, J.E. and Savini, M.J., "Law of Fisheries Emerging from Bilateral Agreements", 3 Marine Policy (1979), pp. 79-98.

Charlier, R.H., "Other Ocean Resources", in Ocean Yearbook 1 (see under Borgese), pp. 160-210.

Clapham Jr, W.B., Natural Ecosystem, London, 1973.

Clayton, Joan M., The Living Seashore, London, 1974.

Cloud, Preston., "Mineral Resources from the Sea", in Resources and Man, Committee on Resources and Man, National Academy of Science - National Research Council, San Francisco, 1969, pp. 135-155.

Colombos, C.John, The International Law of the Sea 6th revised edition, London, 1972.

Cushing, D.H., Marine Ecology and Fisheries, Cam. Univ. Press, Great Britain, 1975.

Cushing, D.H. and Walsh, J.J., The Ecology of the Seas, Blackwell, Oxford, 1976.

Davis, C.C., "The Effects of Pollutants on the Reproduction of Marine Organisms", in Marine Pollution and Sea Life, edited by Ruivo, FAO, Rome, 1972, pp. 305-311.

Dupuy, Rene J., "Regimes for the Seabed: Living Reources of the Seabed and their Production", 2 Pacem in Maribus (1971), pp. 163-175.

Dupuy, Rene J., The Law of the Sea, Oceana, NY, 1974.

English, T.S., Ocean Resources and Public Policy (ed), University of Washington Press, 1973.

Emery, K.O., "The Continental Shelves", in Ocean Science, Published by Scientific American, 1977, pp. 33-45.

Fell, Barry., Introduction to Marine Biology, NY, 1975.

Fenn Jr, P.T., "Origins of the Theory of Territorial Waters", 26 AJIL (1926), pp. 465-482.

Fidell, E.R., "The Case of the Incidental Lobster: United States Regulation of Foreign Harvesting of Continental Shelf Fishery", 10 International Lawyer (1976),pp. 135-154.

Fitzmaurice, G.G., "The Law and Procedure of the International Court of Justice, 1951-1954: General Principles and Sources of Law", 30 BYIL (1953), pp. 1-70.

Fitzmaurice, G.G., "The Law and Procedure of the International Court of Justice, 1951-1954: Points of Substantive Law, Part II", 32 BYIL (1955-1956), pp. 20-96.

Fitzmaurice, G.G., "The Law and Procedure of the International Court of Justice, 1951-1954:Treaty Interpretation and other Treaty Points", 33 BYIL (1958), p. 203.

Fitzmaurice, G.G.,"Some Results of the Geneva Conference on the Law of the Sea, Part I, The Territorial Sea and Contiguous Zone and Related Topics", 8 ICLQ (1959), pp. 73-121.

Franklin, Karl M., "The 1958 Geneva Convention of the Continental Shelf", International Law Studies, US Naval War College 1959-1960, Washington, 1961, pp. 8-63.

Friedmann, W., "The North Sea Continental Shelf Cases - A Critique", 64 AJIL (1970), pp. 229-240.

Fulton, Thomas W., Sovereignty of the Sea, Edinburgh, 1911.

Ganz, David L., "The United Nations and the Law of the Sea", 26 ICLQ (1977), pp. 1-54.

Gilpin, W.C, and Heasman., "Recovery of Magnesium Compounds from Sea Water", in Chemistry and Industry, 16 July, 1977, pp. 567-572.

Goldie, F.E., "Australia's Continental Shelf: Legislations Proclamations", 3 ICLQ (1954), pp. 535-575.

Goldie, F.E., "Sedentary Fisheries and Article 2(4) of the Continental Shelf - A Plea for a Separate Regime", 63 AJIL (1969), pp. 86-97.

Green, L.C., "The Continental Shelf", 4 Current Legal Problems (1951), pp. 54-80.

Grisel, Etienne., "The Lateral Boundaries of the Continental Shelf and the Judgment of the I.C.J. in the North Sea Continental Shelf Cases", 64 AJIL (1970), pp. 562-593.

Grotius, Hugo., The Freedom of the Seas, Translated by Ralph Von Deman Magoffin, Oxford, 1916.

Grotius, Hugo., De Jure Praede Commentarius, Translated by G.L. Williams, Oxford, 1950.

Hackworth, G.H., Digest of International Law, Vol. II, 1941.

Hanson, J.A., Open Sea Mariculture (ed), Pennsylvania, 1974.

Hall, W.E., International Law, 8th edition, Oxford, 1924.

Halstead, W.B., "Toxicity of Marine Organisms Caused by Pollutant", in Marine Pollution and Sea Life, edited by Ruivo, 1972, pp. 584-594.

Hardy, A., The Open Sea. Part I - The World of Plankton, Collins, London, 1956.

Herrkind, W, and Kancitukm, P., "Mass Migration of Spiny Lobster 'Panulirus argus' ", in Animal Migration, Navigation and Homing, edited by Schmidt-Koenig, K and Keeton, W.T., 1977, pp. 430-438.

Hjertonessen, Karin., The Law of the Sea, Influence of the Latin American States on Recent Development on the Law of the Sea, Leiden, 1973.

Hollic, A., "The Origins of 200 Mile Offshore Zones", 71 AJIL (1977), pp. 494-499.

Holt, S.J., "The Food Reosurces of the Oceans", in Ocean Science, 1977, pp. 210-222.

Hurst, C.J.B.,"Whose is the Bed of the Sea?", 4 BYIL (1923-1924), pp. 34-43.

Idyll, C.P., The Sea Against Hunger,NY, 1978.

Iverson, E.S., Farming the Edge of the Sea, Fishing News Books Ltd, England, 1976.

Jain, H.M., "Continental Shelf - Some Geological Aspects", 12 IJIL (1972), pp. 564-580.

Jennings, R.Y.,The Acquisition of Territory in International Law, Manchester University Press, 1966.

Jennings, R.Y., "The Limits of Continental Shelf Jurisdiction: Some Possible Implication of the North Sea Cases", 18 ICLQ (1969), pp. 819-832.

Jessup, Philip C., The Law of Territorial Waters and Maritime Jurisdiction, NY, 1927.

Johannes, R.E., "Coral Reefs and Pollution", in Marine Pollution and Sea Life, edited by Ruivo, 1972, pp. 364-375.

Jolley, R.L , Gorchev, H and Hamilton Jr, D.H., Water Chlorination, Environmental Impact and Health Effect, Vol. 2, Michigan, 1978.

Johnston Douglas M., The International Law of Fisheries, Yale University Press, New Haven, 1965.

Johnson, D.H.N., "Acquisitive Prescription in International Law", 27 BYIL (1950), pp. 332-354.

Keen, N.J., "Recovery of Uranium from Sea Water", in Chemistry and Industry, 16 July, 1977, pp. 579-582.

Ketcham, B.H., The Water's Edge, Critical Problems of the Coastal Zone, (ed), Massachusetts Institute of Technology, 1972.

Knight, G.H., Managing the Sea's Living Resources, Massachusetts and Toronto, 1977.

Kunz, Joseph L., "Continental Shelf and International Law: Confusion and Abuse", 50 AJIL (1956), pp. 828-853.

Langford, T., "Biological Problems with the Use of Sea Water for Cooling", in Chemistry and Industry, 16 July, 1977, pp. 612-616.

Lauterpacht, H., "Sovereignty over Submarine Areas", 27 BYIL (1950), pp. 376-433.

Lauterpacht, H., "Codification and Development of International Law", 49 AJIL (1955), pp. 16-43.

Lay, H, Churchill, R, and Nordquist, M., New Directions in the Law of the Sea, Documents Vols. I and II, Oceana Publication, 1973.

Leopold, L.B., Water - A Primer, San Francisco, 1974.

Loftas, Tony., The Last Resource, Man's Exploitation of the Oceans, Pelican Books, Great Britain, 1972.

Lorenzen, C.J., "Primary Production in the Sea", in The Ecology of the Seas (see Cushing), pp. 173-186.

Luard, Evan., The Control of the Seabed, London, 1974.

MacGibbon, I.C., "Some Observations on the Part of Protest in International Law", 30 BYIL (1953), pp. 293-319.

MacGibbon, I.C., "Customary International Law and Acquiescence", 33 BYIL (1957), pp. 115-145.

Mann, Kenneth H., "Production on the Bottom of the Sea", in The Ecology of the Seas (see Cushing), pp. 225-251.

Marsden, R.G., The Law of Collision at Sea, British Shipping Laws Series, Vol. 4, 11th edition, edited by K.C. McGuffie, London, 1961.

Marston, Geoffrey, "The Evolution of the Concept of Sovereignty over the Bed and Subsoil of the Territorial Sea", 48 BYIL (1976-1977), pp. 321-332.

Marston, Geffrey., The Marginal Seabed: United Kingdom Legal Practice, Oxford University Press, 1981.

Mason, C.M., The Effective Management of Resources (ed), London, 1979.

McIlwain, C.H., "A Fragment on Sovereignty", 48 Political Science Quarterly (1933), pp. 94-107.

McDougal, M.S and Burke,W.T., The Public Order of the Oceans, Yale University Press, New Haven, 1962.

McDougal, M.S., "The Hydrogen Bomb Tests and International Law of the Sea", 49 AJIL (1955), pp. 356-362.

McNair, A.D., International Law Opinions, Vol. I Peace, Cambridge, 1956.

Meadows, P.S. and Campbell, J.I., Marine Science, Glasgo and London, 1978.

Menard, H.W., Geology, Resources and Society, San Francisco, 1974.

Menard, H.W., "The Deep-Ocean Floor", in Ocean Science, Published by Scientific American, 1977, pp. 55-65.

Mero, John L., The Mineral Resources of the Sea, NY, 1964.

Mill, H.R., The Realm of Nature, An Outline of Physiography, London, 1892.

Milne, P.H., Fish and Shellfish Farming in Coastal Waters, Fishing News Book Ltd, England, 1972.

Miron, George, "The Outer Continental Shelf - Managing or Mismanaging its Resources", 2 Journal of Maritime Law and Commerce (1971), pp. 267-288.

Nash, C.E., "Crop Selection Issues", in Open Sea Mariculture (see under Hanson), 1974, pp. 183-210.

Naylor, E., "Effects of Heated Effluents Upon Marine and Estuarine Organisms", 3 Advanced Marne Biology (1965), pp. 63-103.

Nelson, L.D.M., "The Patrimonial Sea", 22 ICLQ (1973), pp. 668-686.

Nichols, D, Cook, J and Whiteley, D., The Oxford Book of Invertebrates, Oxford University Press, 1971.

Novak, W.S., The Marketing of Shellfish, Fishing News Bool Ltd, England, 1970.

O'Connell, D.P., "Sedentary Fisheries and the Australian Continental Shelf", 49 AJIL (1955), pp. 185-209.

O'Connell, D.P, and Riordan, Ann, Opinion on Imperial Constitutional Law, Sydney, 1971.

O'Connell, D.P., "The Juridical Nature of the Territorial Sea", 45 BYIL (1971), pp. 303-383.

Oda, S., International Control of Sea Resources, Leyden, 1963.

Oda, S., The International Law of the Ocean Development, Basic Documents, Vol. II, Leyden, 1975.

Oda, S., The Law of the Sea in Our Time - II, The United Nations Seabed Committee, 1968-1973, Leyden, 1977.

Oppenheim, L., International Law, A Treatise, Vol. 1, Peace, London, 1905.

Oxman, Bernard H., "The Third United Nations Conference on the Law of the Sea", 71 AJIL (1977), pp. 247-269.

Oxman, Bernard H., "The Third United Nations Conference on the Law of the Sea: The Seventh Session (1978)", 73 AJIL (1979), pp. 1-41.

Oxman, Bernard H., "The Third United Nations Conference on the Law of the Sea", 74 AJIL (1980), pp. 1-47.

Oxman, Bernard H., "The Third United Nations Conference on the Law of the Sea: The Ninth Session 1980)", 75 AJIL (1981), pp. 211-256.

Pardo, Arvid., "The Evolving Law of the Sea: A Critique of the Informal Composite Negotiating Text (1977)", in Ocean Yearbook 1 (see under Borgese), 1978, pp. 9-37.

Pereira, H.C., Land Use and Water Resources, Cambridge University Press, 1973.

Perkins, E.S., The Biology of Estuaries and Coastal Waters, Academic Press, London, 1974.

Portman, J.E., "Possible Dangers of Marine Pollution as a Result of Mining Operations for Metal Ore", in Marine Pollution and Sea Life (see under Ruivo), 1972, pp. 343-347.

Phillips, J.C., "The Exclusive Economic Zone as a Concept in International Law", 26 ICLQ (1977), pp. 585-618.

Pohl, R.G., "Latin America's Influence and Role in the Third Conference on the Law of the Sea", 7 ODIL (1979), pp. 65-87.

Reeve, M.R and Casper, E., "Acute Effects of Heated Effluents on the Copepod", in Marine Pollution and Sea Life (see under Ruivo), 1972, pp. 250-252.

Rona, Peter A., "Plate Tectonic and Mineral Resources", in Ocean Science, Published by Scientific American, 1977, pp. 286-295.

Rosenne, Shabtai., "Settlement of Fishery Disputes in the Exclusive Economic Zone", 73 AJIL (1979), pp. 89-104.

Rubin, Alfred P., "The International Legal Effects of Unilateral Declarations", 71 AJIL (1977), pp. 1-59.

Russell-Hunter, W.D., Aquatic Productivity, London, 1970.

Russell-Hunter, W.D., A Biology of Lower Invertebrates, London, 1968.

Russell-Hunter, W.D., A Biology of Higher Invertebrates, London, 1969.

Ruivo, Marrino., Marine Pollution and Sea Life (ed), FAO, Rome, 1972.

Ryther, J.H., "Photosynthesis and Fish Production in the Sea", 166 Science (1969), pp. 72-76.

Sayan, E.G., Notes on the Maritime Sovereignty of Peru, Geneva, 1958.

Schøwarzenberger, Georg., "The Problem of International Public Policy", 18 Current Legal Problem (1965), pp. 191-214.

Schwelb, Egon., "Some Aspects of International Jus Cogens as Formulated by the International Law Commission", 61 AJIL (1967), pp. 946-975.

Selak, C.B., "Recent Developments in the High Seas Fisheries Jurisdiction under the Presidential Proclamation of 1945", 44 AJIL (1950), pp. 670-681.

Sibthorp, M.M., The North Sea: Challenge and Opportunity, London, 1975.

Skinner, Brian., Earth Resources, New Jersey, 1976.

Skinner, Brian and Turekian, Karl., Man and the Ocean, New Jersey, 1973.

Smith, H.A., The Law and Custom of the Sea, 3rd edition, London, 1959.

Smith, Keith., Water in Britain, Great Britain, 1972.

Smith, S.V. and Oceanic Foundation Staff., "Chemical Oceanography", in Open Sea Mariculture (see unser Hanson), 1974, pp. 106-120.

Steele, John H., The Structure of Marine Ecosystems, Massachusetts, 1976.

Stevenson, John R. and Oxman, Bernard H., "The Third United Nations Conference on the Law of the Sea: The 1974 Caracas Session", 69 AJIL (1975), pp. 1-30.

Stevenson, John R. and Oxman, Bernard H., "The Third United Nations Conference on the Law of the Sea: The Geneva Session", 69 AJIL (1975), pp. 763-797.

Stowe, Keith S., Ocean Science, New York, 1979.

Stroup, E.D. and Smith, S.V., "Physical Oceanography and Geology", in Open Sea Mariculture (see under Hanson), 1974, pp. 61-105.

Tait, R.V., Elements of Marine Ecology, 3rd Impression, Great Britain, 1977.

Thurston, Edgar., Notes on the Pearl and Chank Fisheries and Marine Fauna of the Gulf of Mannar, Madras, 1890.

Tranter, D.J., "Herbivor Production", in The Ecology of the Seas (see under Cushing),1976, pp. 186-225.

Turekian, Karl., Oceans, 2nd edition, New Jersey, 1976.

Umbgrove, J.H.F., "Origin of the Continental Shelves", 30 Bulletin of American Association of Petroleum Geologists, 1946, pp. 249-253.

Umbgrove, J.H.F., The Pulse of the Earth, 2nd edition, 1947.

Vallat, F.A., "The Continental Shelf", 23 BYIL (1946), pp. 333-338.

Vattel, E.D., The Law of Nations or the Principles of Natural Law, Applied to the Conduct and to the Affairs of Nations and of Sovereigns, 1758, Translated by Charles G. Fenwick, 1916.

Warren, Kenneth., Mineral Resources, Great Britain, 1973.

Weisberg, J. and Parish, H., Introductory Oceanography, 1974.

Weissberg, Gunter, Recent Developments in the Law of the Sea and the Japanese-Korean Dispute, The Hague, 1966.

Wenk Jr, E., The Politics of the Ocean, 1972.

Westlake, John., International Law, Part I, Peace, 2nd edition, 1910.

Whiteman, Marjorie M., Digest of International Law, Vol. 4, 1965.

Wyatt, T., "Plants and Animals of the Sea", in The Ecology of the Seas (see under Cushing), 1976, pp. 59-81.

Yonge, C.M., Oysters, London, 1960.

Yonge, C.M., The Sea Shore, 10th Impression, London, 1975.

Young, Richard., "Recent Developments with Respect to the Continental Shelf", 42 AJIL (1948), pp. 849-857.

Young, Richard., "The Legal Status of Submarine Areas Beneath the High Seas", 45 AJIL (1951), pp. 225-249.

Young, Richard., "The International Law Commission and the Continental Shelf", 46 AJIL (1952), pp. 123-128.

Young, Richard., "Sedentary Species and the Convention on the Continental Shelf", 55 AJIL (1961), pp. 359-373.

United Nations Documents:

Yearbooks of the International Law Commission, Summary Records, 2nd to 8th Sessions (1950-1956).

United Nations Conference on the Law of the Sea, Official Records, Vols. I-VI, Geneva, 1958.

United Nations Legislative Series, Laws and Regulations on the Regime of the High Seas, Vols. I and II, 1951.

United Nations Legislative Series, Laws and Regulations on the Regime of the Territorial Sea, 1957.

United Nations General Assembly, Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, 26th Session, New York, 1971.

United Nations General Assembly, Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, 27th Session, New York, 1972.

United Nations General Assembly, Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, 28th Session, Vols. I-V, New York, 1973.

Third United Nations Conference on the Law of the Sea, Official Records, Vols. I-XIII.

United Nations Press Release, Office of Public Information, Press Section, UN, NY, Sea/277, 20 July, 1977.

Round-up of Eighth Session, UN Information Center, BR/79/33, 6 September, 1979.

Informal Composite Negotiating Text, 1979, A/CONF. 62/WP. 10/Rev.1.

Draft Convention on the Law of the Sea, 1980, A/CONF. 62/WP. 10/Rev.3.

Draft Convention on the Law of the Sea, 1981, A/CONF. 62/L.78.

Third United Nations Conference on the Law of the Sea: First Part of Tenth Session, New York, 9 March-24 April, UNIC, BR/81/8, 20 May 1981.

Resumed Tenth Session of the Law of the Sea Conference, Geneva, 3-28 August 1981, UNIC, BR/81/20, 31 August 1981.

FAO's Committee on Fisheries, Eleventh Session, Rome, 19-26 April, 1977, COFI/77/5, 1977.

FAO's Committee on Fisheries, Twelfth Session, 12-16 June 1978, COFI/78/7, March 1978.

FAO's Legislation on Coastal Requirements for Foreign Fishing (by Gerald Moore), FAO, Rome, 1981.

FAO's Yearbooks of Fishery Statistics, Catches and Landings, (1960-1977), Vols. 20-44, FAO, Rome, 1978.