INTERNATIONAL FOUNDATION FOR THE LAW OF THE SEA

ACADEMY OF INTERNATIONAL LAW OF THE SEA AND MARITIME LAW – 27JULY 2015

THOMAS A. MENSAH

HANDOUT

DEVELOPMENT OF THE UNCLOS REGIME

The original rationale of the Law of the Sea

"The history of the law of the sea has been dominated by a central and persistent theme: the competition between the exercise of governmental authority over the sea and the idea of the freedom of the sea."

O'Connell, the Law of the Sea, Second Edition, page 1

"Two principles have governed the law of the sea since the early times when sailors and fishermen ventured into the sea: the right of the coastal state to control a narrow strip along the coast, and the freedom of navigation and fishing in the high seas beyond that area. Some states made attempts to appropriate certain areas of the sea. Venice (and later Rome) claimed dominion over the Mediterranean; and Great Britain claimed suzerainty over the North Sea, while Spain and Portugal, with the blessing of the Pope, attempted to assert dominion over the seas adjoining America, Africa and southern Asia"

Louis Sohn & Kristen Gustafson: The Law of the Sea in a Nutshell, West Publishing Co. , 1984), p. xvii

"The competition between shared and exclusive uses of the oceans has been the mainspring for the evolution of the law of the sea. For the last several hundred years, a dichotomy has been manifested between the freedom of the sea and the sovereignty of the coastal state"

Reports of the United States Delegation to the Third United Nations Conference on the Law of the Sea, Myron H. Nordquist & Choon-Ho Park (eds.) The Law of the Sea Institute Occasional Papers (No.33) 1983, p. 2

The Middle Ages to the Nineteenth century

Attempts by some States to claim dominion (sovereignty) over particular areas of the seas

Among both the Greek states, and in Romans times, it was generally accepted that a powerful state or king could have "command of the sea" or could be accepted as "lord of the sea"). Such claims were often made.

(Athens claimed such a right; and was prepared to go to war against other Greek States (Macedonia and Sparta) to advance its claims. Similar claims were also made by some Roman emperors and generals from time to time. For instance Venice made claims to sovereignty over the whole of the Adriatic in medieval times.

Claims were also made by Denmark, Sweden (and later Poland) for control over large parts of the Baltic. These claims led to many disputes and several wars some of which were settled by peace treaties. Until well into the 20th century, Denmark continued to levy a toll on ships passing through the Sound.

In 1609 James I of England (and James VI of Scotland) claimed sovereignty over areas that he designated as “English Seas”.

By a Papal Bull, Pope Alexander VI sought to divide the Atlantic Ocean and the seas of the New World between Spain and Portugal; and both these countries subsequently tried to prohibit trade by other countries in the respective areas allocated to them.

To counter the pretensions of the Portuguese in the East Indies, as well as the attempts of the English to exclude Dutch fishermen from operating in areas claimed by the King of England, Hugo Grotius, the Dutch legal scholar, propounded his principle of the *mare liberum* (the free seas).

Grotius and the beginning of the modern Law of the Sea

In his treatise (*On the Law of War and Peace*), published in 1625, Hugo Grotius (de Groot) included a chapter devoted to the “mare liberum” (the freedom of the sea). Grotius argued that the oceans were indivisible and were so vast that States could not effectively occupy them. He also contended that the resources of the high seas were inexhaustible and, therefore, were open to utilization by all States on equal terms.

The thesis of Grotius was at the time resisted by some, including the English who claimed exclusive fishing and trade rights over large expanses of the ocean. The legal basis of the English position was developed by an English legal scholar, John Selden. Selden argued that the English had the right to exclusive fishing and trade rights in certain specified enclosed areas that bordered the land areas of England. According to this theory, certain areas of the sea which he described as closed seas (mare clausum), in the sense that they were for the exclusive use of the specific States which were close to those seas.

The argument between *mare liberum (freedom of the seas)* and *mare clausum (controlled seas),* as characterised by the dispute between Hugo Grotius and John Selden in the 1600’s, was referred to as the “battle of the books”. In the main Grotius advocated a concept of the freedom of the seas (based on the right of unimpeded navigation between countries in the interest of commerce), while Selden, promoting the English position, argued

in favour of a principle of “closed seas” (i.e. the right of a State to exercise jurisdiction or control over certain areas of the sea). The liberal principles advocated by Grotius were in line with the prevailing thinking at the time, and they gradually came to be accepted as the cornerstone of the international law of the seas for several hundred years.

In due course, these principles were articulated by several international arbitral tribunals in disputes between the leading maritime States. They were subsequently incorporated in four international agreements (treaties) on the law of the sea which became the foundation of the modern international law of the sea.

Decisions of international arbitral tribunals

Prior to the adoption of the conventions, the principles were applied by several international tribunals in a number of disputes between States. Among these are the following decisions:

The Costa Rica Packet arbitration

This arbitral tribunal was the first to spell out the distinction between jurisdiction of States on the high seas and the jurisdiction to be accorded to a State in an area near its coast (“within the range of the cannon”) from its coast. According to the arbitral tribunal, while all States had the right of unimpeded access to the high seas, this right did not extend to areas close to a particular State. According to this theory, a State had the right to exclude foreign ships from areas “within canon range” of its coast.

The Behring Sea Fur Seal Arbitration

In this case, the arbitral tribunal stated that the right to control activities of foreign ships was restricted to an area of the sea extending no more than three miles from the coastline of the State**.** Specifically, the tribunal declared that a State (the United Stated) did not have “any right of protection or property in the fur seals frequenting the island of the US in Behring Sea when such seals are found outside the ordinary three-mile limit (of the maritime jurisdiction of the US)”

The *Cape Horn Pigeon, Kate and Anna, James Hamilton Lewis* and *C. H. White*

These cases were between the United States and Russia. The Arbitral tribunal held that Russia acted illegally when it seized American fishing vessels while they were outside Russian territorial waters i.e. more than three miles from the Russian coast.

LE LOUIS
(2 Dobson 210, 165 Eng. Reports. 1464 (1817)
In this case, a French vessel was arrested for having allegedly resisted by force the demand of an English cutter “the Queen Charlotte” to search it for

evidence of slave trading. One of the questions at issue was whether the British cutter had a right of search on the high seas in time of peace. The Court declared:

“Two principles of public law are generally recognized as fundamental. One is the perfect equality and entire independence of all distinct states. The second is that, all nations being equal, all have an equal right to the uninterrupted use of the un-appropriated parts of the ocean for their navigation. In places where no local authority exists, where the subjects of all states meet upon a footing of entire equality and independence, no one state, or any of its subjects, has a right to assume or exercise authority over the subjects of another”

In *The Marianna Flora* (Wheat. (24 U.S.) 1 (1826).

In this case, the Supreme Court of the United States declared:

“Upon the ocean…. in time of peace all possess an entire equality. It is the common highway of all, appropriated to the use of all; and no one can vindicate to himself a superior and exclusive prerogative there. Every ship sails there with the unquestionable right of pursuing her own lawful business, without interruption, but whatever may be that business, she is bound pursue it in such a manner as not to violate the rights of others…”
The Court continued:
“It has been argued that no ship has a right to approach another at sea; and that every ship has a right to draw round her a line of jurisdiction, within which no other is at liberty to intrude. In short, that she may appropriate so much of the ocean as she may deem necessary for her protection, and prevent any nearer approach. This doctrine appears to us novel, and is not supported by any authority. It goes to establish upon the ocean a territorial jurisdiction, like that which is claimed by all nations, within cannon-shot of their shores, in virtue of their general sovereignty. But the latter right is founded upon the principle of sovereign and permanent right of appropriation, and has never been successfully asserted beyond it. Every vessel, undoubtedly, has a right to the use of so much of the ocean as she occupies, and as is essential to her own movements. Beyond this, no exclusive right has ever yet been recognized, and we see no reason for admitting its existence”.

The early 20th Century:

The stability attained in the law of the sea in the second half of the 19th century led to suggestions that the law was ripe for codification.

The ***Institut de droit international*** made efforts to achieve this in the 1880s and 1890s. Its objective was to establish the geographical areas which constituted the territorial sea of a State. As far as the extent of the territorial sea was concerned, the Institute as faced with the difficulty that the increasing range of the cannon was invalidating the criterion that had previously considered as the justification of the "three-mile" limit. For this and other reasons, it was not possible to resolve the issue as to the maximum breadth of the territorial sea at The Hague Peace Conferences that were convened in 1907 and 1909.

THE LEAGUE OF NATIONS (1920 – 1945)

The establishment of the League of Nations led to further attempts to codify the law of the sea in the 1920's. Among others, attempts were made by the **Institut de droit international**, the International Law Association, the German Society of International Law, the Japanese Society of International Law and the American Institute for International Law. In addition a number of private codifications were attempted, including one by the Harvard Law School.

In 1930 The Hague Codification Conference was convened by the Assembly of the League of Nations to codify, among others, the law relating to territorial waters. The conference was preceded by a Preparatory Committee that was set up to draft articles for submission to the conference.

The 1930 conference was not successful. One reason was that very few States were prepared to accept a three-mile territorial sea, especially if this was also to be the limit within which a State would have the right to control over fisheries. Many countries were concerned about the dangers of over-fishing and the general view was that the only form of regulation that would be effective for conservation was to give to the coastal state the power and right to control and regulate fisheries in waters well beyond three miles from their coasts. This led to the clamour by many States to increase their territorial sea beyond three miles.

The League of Nations had intended to study the matter further, and reconvene a conference to codify the law - when sufficient consensus had been attained. Unfortunately, developments in the global situation prevented this. In fact these developments eventually led to the Second World War and the demise of the League itself.

THE UNITED NATIONS

The failure of the 1930 Conference encouraged many states to make unilateral declarations extending their territorial sea beyond three miles. This

was mainly to give them the power to regulate fisheries, particularly foreign fishing operations. In response the General Assembly of the newly established United Nations concluded that it was necessary for it to intervene and develop a law that would apply to all States.

Article 13 of the UN Charter provided, inter alia, that the General Assembly had the power to initiate studies and make recommendations for the "progressive development of international law and its codification". To discharge this mandate, the Assembly established the International Law Commission (ILC) in 1947. The ILC decided that the issues of regime of the high seas and the extent of the territorial sea were ripe for codification, and it prepared a report, with draft articles and commentaries, which it submitted to the General Assembly in 1956. In February 1957 the Assembly decided to convene an international conference of plenipotentiaries to "examine the law of the sea …and embody the results of its work in one or more international conventions…"

The First United Nations Conference on the Law of the Sea, 1958

This, the first United Nations Conference on the Law of the Sea was held in Geneva from 24 February to 27 April 1958. It was attended by 86 States. The conference adopted **four** conventions, namely, the Convention on the Territorial Sea and the Contiguous Zone; the Convention on the High Seas; the Convention on Fishing and the Conservation of the Living Resources of the High Seas; and the Convention on the Continental Shelf. In addition to these four conventions, the conference adopted an Optional Protocol of Signature concerning the Compulsory Settlement of Disputes.

All four convention eventually entered into force;

a. The Convention on the High Seas entered into force on 30 September 1962
b. The Convention on the Continental Shelf entered into force on 10 June 1964
c. The Convention on the Territorial Sea and Contiguous Zone entered into force on 10 September 1965; and
d. The Convention on Fishing and Conservation of the Living Resources of the High Seas entered into force on 20 March 1966

But the 1958 conference could not reach agreement on two important issues, namely, the breadth of the territorial sea and the extent of the fisheries jurisdiction of states. By resolution 1307(XIII) of 10 December 1958, the General Assembly decided to convene a second conference on the Law of the Sea to settle these two outstanding issues.

The Second United Nations Conference on the Law of the Sea. 1960

The second conference was held in Geneva from 16 March to 26 April 1960; but, once again, this conference could not reach agreement either on the uniform breadth of the territorial sea or on the limits of the fisheries jurisdiction of coastal states.

The failure of the 1958 and 1960 conferences meant that four principal troublesome questions of the law of the sea remained to be resolved. These were:
(a) the outer limit of the territorial sea,
(b) the extent to the fisheries jurisdiction of individual states;
(c) the limits of the continental shelf and
(d) the delimitation of the boundaries between adjacent and opposite coastal states.
These problems became more acute as advances in technology made it more possible to extend petroleum operations and other maritime operations further offshore and to facilitate distant water fishing on an increasing scale. In addition the increasing power of and influence of the new developing countries seriously undermined the consensus on which the previous law of the sea (and especially the Conventions of 1958) had been based. It thus became more clear that another effort was urgently needed to review and develop a new law of the sea that was generally accepted.

Sea bed Committee (the Ad Hoc Committee to Study the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction, 1968

In November 1967 the Ambassador of Malta to the United Nations, Ambassador Arvid Pardo, made a statement in the General Assembly on the importance of the oceans to the future of mankind and on the need to modernise the legal regime for ocean space. Specifically, he proposed a resolution that would make it illegal for any state to appropriate any part of the seabed beyond the limits of national jurisdiction. The resolution would also establish an interim international agency to control all seabed activities in the area beyond national jurisdiction. He proposed that the financial benefits from the resources of the seabed should be used for the benefit of all humankind, with particular reference to the needs of the poorer countries of the world.

These ideas found considerable support in the General Assembly and the Assembly established an *ad hoc* Committee of 35 members to study the question of future activities in the seabed “beyond national jurisdiction”, and to recommend the means to promote cooperation in the use of the resources of the area.

Committee on the Peaceful Uses of the Sea-Bed and Ocean Floor beyond the Limits of National Jurisdiction,1969 – 1973

In December 1968 the General Assembly adopted a resolution to create a standing Committee of 42 Members “on the peaceful uses of the seabed and ocean floor beyond the limits of national jurisdiction” (the Seabed Committee).

The mandate of the Seabed Committee was maintained and strengthened by subsequent resolutions of the General Assembly. In 1969 the General

Assembly requested the Secretary General to ascertain the views of member States on the desirability of convening a conference on the law of the sea.

In the preamble of the resolution, the Assembly noted that “the problems relating to the high seas, the territorial waters, contiguous zones, the continental shelf, the superadjacent waters and the seabed and ocean floor beyond the limits of national jurisdiction are closely linked together.”

The Committee was requested to expedite the preparation of draft principles governing the deep seabed and submit a draft declaration in 1970.

(In the meantime the resolution called for a moratorium on deep seabed exploration and exploitation activities, pending the establishment of an international regime. This part of the resolution opened up a very deep and serious disagreement between the industrialized countries and the developing countries).

In 1970 the Committee reported and the GA adopted a Declaration of Principles Governing the Seabed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction. In the Declaration, the General Assembly declared the deep seabed area and its resources to be the “common heritage of mankind”. The area was not to be appropriated, and no rights were to be acquired “with respect to the area or its resources incompatible with the international regime to be established and the principles of this Declaration” (Resolution 2749)

By another resolution (resolution 2750) the General Assembly noted that the responses from States indicated widespread support for holding a comprehensive conference on the law of the sea. The Assembly also observed that the problems of the ocean space were closely inter-related and that technological advances had accentuated the need for early and progressive development of the law of the seas. Accordingly, the General Assembly decided 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 seabed 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 regimes 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”

The Third United Nations Conference on the Law of the Sea, 1973-1982.

The first official session of the Third UN Conference on the Law of the Sea was held in New York. It elected Ambassador Hamilton Shirley Amerasinghe

of Sri Lanka as its President. (Ambassador Amerasinghe died suddenly in 1981 and he was succeeded by Ambassador Tommy Koh of Singapore). The conference also established three Committees and a Drafting Committee and elected the Chairmen for these committees.

The second session of the conference was held in Caracas, Venezuela for a period of ten weeks commencing from 20 June 1974.

Sessions of the conference were held in subsequent years - with one session each year in New York and a second session in Geneva.

At the eleventh session in 1982 (8 March – 30 April), the conference adopted the convention and four related resolutions with 130 in favour, 4 votes against, and 17 abstentions.

A number of countries, including Chile, Peru, Turkey Venezuela and Israel, indicated that they had problems with certain provisions or parts of the Convention as it was and, accordingly, they could not become parties to it.

A signing session of the Conference was held in Montego Bay in December 1982 at which time the Convention was signed by 119 delegations. These delegations, plus 23 others and 8 observers also signed the Final Act of the Conference.

The Unites States, with the support of a large number of industrialized states, expressed deep misgivings about Par Xi of the Convention relating to the regime to govern the Area of the seabed beyond national jurisdiction and the resources of the Area. In particular, they felt that the provisions would deter the development of seabed mineral operations, that they would prevent access to these resources by states and corporations that had the requisite expertise. They also objected to the structure of the regime which, they felt, did not give enough voice to the countries with the technical know-how and financial resources to make the regime work. Finally, they objected to provisions that required the transfer of technology and contended that these provisions would not give adequate protection to intellectual property rights.

In the end both the developing countries and the industrial states concluded that it was in their common interests to have a convention that would attract wide participation. Through consultations initiated by the Secretary General of the United Nations, the States managed to agree on changes to Part XI of the Convention. The changes were incorporated in an “Agreement on the Implementation of Part XI of the Convention” which was approved by the General Assembly in July 1994. The 1982 Convention, as modified by the Agreement of 1994, entered into force in November 1994. However, the United States has not been able to ratify the Convention and it remains a non-Party to it.

Preparatory Reading:

D. P. O'Connel, *The International Law of the Sea,* I. A. Shearer (ed.), Volume I, Chapter 1, pp.1-28

H. Shirley Amerasinghe, The Third United Nations Conference on the Law of the Sea*,* reproduced in *United Nations Convention on the Law of the Sea: A Commentary,* Centre for Ocean Law and Policy, University of Virginia, 1985, Vol. 1, pp.1-10

Tommy T. B. Koh: Introduction to the Convention on the Law of the Sea - A Constitution for the Oceans, id. pp.11 – 16

Bernado Zuleta: Introduction to the Law of the Sea, id. pp. 17 - 28.