LAND-LOCKED STATES IN THE INTERNATIONAL LAW OF THE SEA

by

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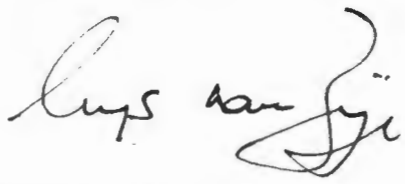
DECLARATION

I declare that the thesis for the degree of Doctor of Laws at the University of Bophuthatswana hereby submitted, has not previously been submitted by me for a degree at this or any other university, that it is my own work in design and execution and that all material contained herein has been duly acknowledged.



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1 DECEMBER 1991

It may seem strange, in this last third of the twentieth century, when Man is reaching out to the stars and is close to harnessing the might of thermonuclear energy for his own use, to be concerned with such an old-fashioned matter as whether a merchant in the interior of a continent may be given assurances that his goods enroute to or from a merchant in another state will not be interfered with or unduly taxed merely because they must cross a line which governments have drawn between their respective territories.

Glassner

SUMMARY

The aim of this thesis is to evaluate the place in and the role played by land-locked states in the international law of the sea. To that end, it is necessary to examine public international law in general, and the law of the sea in particular. Treaties and customary international law are both instrumental in shaping the law of the sea, with the result that the 1982 **Law of the Sea Convention** - which is both codificatory and innovative in character - is of particular importance in giving new directions to the traditional law of the sea whilst retaining that which is accepted as customary international law. In addition, the emerging newly independent states for the first time played an important role in international treaty law, and their influence is assessed as to the impact they had on the negotiations towards the emerging law of the sea.

In evaluating land-locked states in the international law of the sea, two basic concepts are dealt with. In the first place, the law of the sea as part of public international law is examined as it evolved over many centuries to where it is today. Secondly, land-locked states are dealt with in terms of their particular problems (access to the sea, transit over the territory of neighbouring states, and sharing in the resources of the sea), but also in terms of the 'new' international law that makes allowances for disadvantaged states.

The three post-World War Two conferences on the law of the sea are discussed, with particular emphasis on the third which (with its protracted negotiations) after nine years led to a convention that is, after another nine years, not yet in force. This creates its own set of problems, and these are discussed in terms of the status of the law of the sea today.

The role of the developing states at the negotiations on the law of the sea, as well as their influence on the final treaty, are discussed with particular reference to land-locked

states in the first place, and secondly the emergence of the concept of the 'common heritage of mankind' as a general principle of international law.

The problems facing land-locked states and the provisions pertaining to land-locked states are examined on two levels: firstly, on the level of geographical, economic and psychological disadvantages for these states, and secondly in terms of the provisions of the convention itself. The Southern African land-locked states are then discussed in order not only to find some common ground as far as they are concerned, but also in terms of possible solutions to their problems.

Any present-day evaluation of land-locked states in the international law of the sea will inevitably have to consider the viability of the 1982 convention. This is done with reference to the present status of the convention, as well as the impact of the convention on future international treaty-making. The evaluation attempts to emphasise the non-static nature of the law of the sea in particular, and international law in general. In addition, the importance of regional cooperation in the future is stressed as one of the major factors that may alleviate some of the problems facing land-locked states, even in the absence of a ratified treaty.

ACKNOWLEDGEMENTS

I wish to gratefully acknowledge the assistance and advice of my promoters, Professors Marinus Wiechers and George Devenish, as well as the assistance of the University of Bophuthatswana.

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ABBREVIATIONS

ABA	American Bar Association
ACP	African, Caribbean, Pacific
ANC	African National Congress
CFM	Mozambican Railways
CSCE	Conference on Security and Cooperation in Europe
ECAFE	United Nations Economic Commission for Asia and the Far East
ECOSOC	Economic and Social Council
ECOTEC	United Nations Economical and Technical Committee
EEC	European Economic Community
FAO	Food and Agriculture Organization
GA	General Assembly
GATT	General Agreement on Tariffs and Trade
GDS	Geographically Disadvantaged State(s)
ICAO	International Civil Aviation Organisation

ICJ	International Court of Justice
ICNT	Informal Composite Negotiating Text
ILA	International Law Association
ILC	International Law Commission
ILO	International Labour Organization
IMCO	Inter-Governmental Maritime Consultative Organization
IOC	Inter-Governmental Oceanographic Commission
ISNT	Informal Single Negotiating Text
ITLOS	International Tribunal for the Law of the Sea
LLGDS	Land-Locked and Geographically Disadvantaged States
LLS	Land-Locked States
LOSC	1982 United Nations Law of the Sea Convention
MIT	Massachusetts Institute of Technology
NEAFC	North East Atlantic Fisheries Commission
NIEO	New International Economic Order
NRZ	National Railways of Zimbabwe

OAU	Organization of African Unity
PCIJ	Permanent Court of International Justice
PREPCOM	Preparatory Commission
RSNT	Revised Single Negotiating Text
SACU	Southern African Customs Union
SADCC	Southern African Development Coordination Conference
SATCC	Southern African Transport and Communications Commission
SIPRI	Stockholm International Peace Research Institute
UDI	Rhodesian Unilateral Declaration of Independence
UN	United Nations
UNCLOS III	Third United Nations Conference on the Law of the Sea
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development

PREFACE

The purpose of this thesis is to examine the present status of the international law of the sea in view of the fact that the 1982 **Convention on the Law of the Sea** is not in force yet. In particular, land-locked states and their position in the law of the sea is discussed, not only to highlight the problems pertaining to these states, but also in an attempt to offer some solutions to their problems.

The approached followed in this study is - because of the nature of the subject matter - multifarious and diverse. The international law of the sea is examined on historical, descriptive, analytical and comparative levels. Land-locked states are dealt with in a descriptive and factual manner. The primary sources used can be divided into two main categories: treaties on an international as well as a municipal level, and debates during the negotiations at the conferences on the law of the sea. Secondary sources used can be divided into three categories: the 'classics' (used mainly for historical purposes), descriptive (of particular assistance in setting out the factual position of the law of the sea) and comparative (used for evaluating the present status of international law, operational norms, and possible future trends).

The thesis is introduced by a theoretical framework in which public international law - and the place of the law of the sea within that framework - is discussed. Firstly, the historical development is traced from the early 16th century and the writings of Grotius and others. Secondly, the sources of international law - treaties, custom, general principles of law, judicial decisions and opinions, and academic writings - are discussed. In the third place, present trends in international law are examined. Finally, the law of the sea in general, and land-locked states in particular, are referred to.

Chapter two deals with a brief survey of the history of the law of the sea, with the emphasis on 'modern' international law, that is from the 16th century onwards. The classic debate of *mare liberum* v *mare clausum* is discussed, as well as the emergence of accepted principles of customary international law like freedom of fishing and of navi-

gation. Attempts at codification are examined, in particular the 1958 and 1960 conferences on the law of the sea.

Chapter three deals solely with the 1982 conference on the law of the sea. A fairly detailed overview is offered of the events leading up to the eventual start of the conference. The different sessions are discussed session by session for various reasons. In the first place, it can by itself offer an insight into the difficulties of the consensus procedure followed and the mechanisms of the working committees within the negotiations. Secondly, the different negotiating texts used at the different sessions indicate the major trends that emerged during the negotiations. The final act, signatories and ratification are discussed in terms not only of the conclusion of the protracted negotiations, but also in terms of the present status of the convention.

Chapter four examines two issues. In the first place, the contribution of land-locked states to the convention is discussed. It is pointed out that it is a difficult task separating the role of land-locked states in this regard from the other actors at the negotiations because of cross-cutting and overlapping interests on different issues. In the second place, the emergence of the concept of the 'common heritage of mankind' is discussed, and an attempt is made to show up the imprecisions of or misunderstandings surrounding the concept as a legal principle.

Chapter five elaborates on the particular problems facing land-locked states, namely transit rights, economic rights, access to the living and non-living resources of the sea, enforcement of the convention, and settlement of disputes under the convention. The question of whether land-locked states are entitled to 'special privileges' because of their geographically disadvantaged position is also discussed.

Chapter six evaluates the land-locked states of Southern Africa with their particular problems. The geographical factors such as long distances to the sea and relatively weak infrastructure are examined in particular. Some pointers to the future are offered in terms of regional cooperation to establish a network of transit systems in the future.

In chapter seven the viability of the 1982 convention is discussed, as well as the impact of the convention (and the way of negotiation at the preceding conference) on the future of international law in general, and international treaty-making in particular. In conclusion, some suggestions are offered concerning regional cooperation. It is suggested that international treaties of binding force have much to offer the parties to such treaties, but that self-interest of states plays an important role for such states in deciding whether or not to be a party to, or abide by, such treaties and their provisions. It is furthermore suggested that security and regional interests will ultimately play more of a deciding factor in such matters. Land-locked states in particular can benefit greatly from formal and informal interaction with their neighbours in achieving their goals.

CHAPTER ONE: LAND-LOCKED STATES IN THE CONTEMPORARY INTERNATIONAL LAW OF THE SEA

1.1 INTRODUCTION AND STATEMENT OF THE PROBLEM

Land-locked states are defined simply as states which do not have a seacoast[1]. The mere fact of being land-locked brings about special problems for those states - economic, social and political. About a fifth of all states in the world are land-locked, almost half of them in Africa[2]. Many land-locked states are among the states identified as the least developed of all developing states[3], due in large part to their being geographically disadvantaged[4]. Not only are they isolated from the main arteries of international communications, trade and commerce, but their geographical location also implies dependence on transit states[5].

This study will attempt to shed some light on the particular problems facing land-locked states, and to offer some possible solutions for the future. To that end, the history of the law of the sea, the emergence of the principle of the 'common heritage of mankind', the role of the land-locked states in the deliberations of the **Third United Nations Conference on the Law of the Sea** (**UNCLOS III**), the status of the 1982 **LOSC**, and America's rejection of the convention will have to be examined.

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1 Article 124(1)(a) of the 1982 **United Nations Convention of the Law of the Sea (LOSC)**

2 Sinjela A M *Land-Locked States and the UNCLOS Regime New* York: Oceana Publications, Inc. 1983 1. See 5.1 *infra* for a list of those states

3 Rembe N S *Africa and the International Law of the Sea* Alphen aan den Rijn: Sijthoff & Noordhoff 1980 74

4 Some coastal states may also be classified as geographically disadvantaged, however - see 1.3.2 *infra*

5 A transit state is defined as 'a State, with or without a sea-coast, situated between a land-locked State and the sea, through whose territory traffic in transit passes' - Article 124(1)(b) of the 1982 **LOSC**

Throughout history man has used and been involved with the sea. It is only comparatively recently, however, that maritime issues have been widely publicised[6]. Less publicised - but still an important part of the maritime dimension - are bilateral and multilateral issues such as the establishment of rules and standards for controlling pollution, access to the sea for land-locked states, vessel designs, and the routing of ships in congested or vulnerable sea areas. While many of those issues are handled at a technical level they can from time to time become highly politicised when linked with other policy areas[7].

That is not to say that the law of the sea is a new phenomenon. Centuries before the birth of Christ there had already been disputes concerning the seas[8]. However, the emphasis on particular problem areas has changed greatly. Whereas issues such as piracy, the levying of tolls on passing vessels, the salute to warships at sea, and the debate between the freedoms of the seas and jurisdiction over certain areas of the seas[9] had been major areas of concern in earlier centuries, only the latter still remains an issue at present.

Four general reasons may be offered for the increased importance of maritime issues in international relations since the early 1960s. In the first place, the growing number of fisheries disputes from the late 1950s onwards[10] reflected greater world fishing operations than ever before, with the corresponding dissatisfaction of coastal states with

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6 Through a variety of events such as maritime boundary disputes, fisheries conflicts, major oil tanker accidents and pollution in general (for example the aftermath of the 1991 Gulf War)

7 Barston R P and Birnie P W 'Introduction' in *The Maritime Dimension* edited by Barston R P and Birnie P London: George Allen & Unwin 1980 1

8 See 2.1 *infra*

9 See 2.2 *infra*

10 See 2.6.3 *infra*

the ineffectiveness of international fisheries organisations at establishing acceptable catch limits and conservation regulations[11]. In response to those and other pressures celand became the first of the Scandinavian states to challenge the traditional fisheries limits[12] by declaring a 50-mile limit in July 1971, which was implemented in September 1972 and subsequently extended to 200 miles[13]. The Icelandic action[14] served as a catalyst on the law of the sea debate over maritime limits[15]. For the UK the loss of access to the Icelandic waters meant that fisheries questions would remain high on the agenda of British foreign policy[16].

A second reason lies in the impact of marine technology on scientific research and exploration. In the offshore context, technological advances during the early 1960s made possible the exploration and exploitation of gas, oil and other resources in commercial quantities, considerably beyond previously known limits. The prospect of rich offshore resources forced states to show a growing interest in and stake competing claims to areas of the ocean which previously might have been the subject of little economic or scientific interest[17].

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11 By the mid-1960s world fish production had more than doubled to 67 million metric tons, of which an ever-growing percentage was used for animal protein and industrial requirements. Increased cathces were made possible by rapid advances in marine acoustic technology, net design, and the replacement of ageing vessels. Furthermore, the development of large mobile factory fleets, particularly by the USSR and Japan, operating at considerable distances from home bases and able to stay away for several months, exacerbated the problem of overfishing and made international regulation more difficult. In addition, a number of states bordering on the North Sea began to switch their fishing operations to the distant water ground off Iceland and the Barents Sea as the North Sea became less profitable - see Barston and Birnie 7 1

12 See 2.6.2.5 *infra*

13 That led to the *Anglo Icelandic Fisheries Dispute* (the third of the 'Anglo-Iceland Cod Wars' after 1945) with serious implications for the management of fisheries in the North Atlantic - see Barston and Birnie 7 2

14 Along with that of Canada, which the previous year had established a 100-mile Arctic waters pollution zone

15 By that action Iceland had joined the minority group of mostly Latin American states claiming 200-mile limits - a decision the European states in particular could not ignore

16 And for the **European Economic Community** (EEC) a subject of controversy - see Barston and Birnie 7 2

17 As a result an additional range of boundary disputes - in such areas as the Aegean, the South China Sea and off the Falkland Islands - was added to international relations during a period of political and legal uncertainty

In the third place, marine environmental issues came to receive considerable attention. After the 1960 **Geneva Conference on the Law of the Sea** the number of international environmental conventions steadily grew to cover such aspects as land-based sources of pollution[18], dumping[19] and pollution from ships[20]. However, the gap between the purposes of such conventions and international practice remains wide[21], with the resultant problems of poorly enforced conventions and the technical difficulties of dealing with large oil spills, as well as human error[22].

In the fourth place, there was the increased military uses of the oceans. For the major naval powers, the development of submarine launched ballistic missiles meant an enhanced interest in strategic sea routes, long-range operations and the acquisition of naval intelligence[23]. Conventional naval power has since the 1970s become more important as a means of establishing claims to and monitoring maritime boundaries, as well as in minor power conflict. However, the rapid changes in international relations and the concomitant arms reduction in the course of 1991 may well diminish the influence of that as a real factor.

The sea abounds with resources ranging from marine life to minerals and hydrocarbons. There is enough wealth in and underneath the sea to provide for all of mankind. What

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18 The 1974 **Paris Convention for the Prevention of Marine Pollution from Land-based Sources** - see Harris D J Cases and Materials on International Law 3rd ed London: Sweet & Maxwell 1983 341

19 1972 **Oslo Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft** and the 1972 **London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter at Sea** - see Harris 18 340 .

20 See 1.2.3.2.2.2 *infra* and the work of the 1954 and 1973 **Inter-Governmental Maritime Consultative Organisation (IMCO)**

21 As illustrated by continuing large-scale pollution from vessels. A succession of tanker accidents after the *Torrey Canyon*, blow-out incidents such as *Ekofisk* in the North Sea and *Ixtoc* in the Gulf of Mexico, and deliberate pollution such as caused by Iraq in the 1991 Gulf War has served to dramatise the environmental issues at stake

22 Barston and Birnie 7 2/3

23 At **UNCLOS III** those factors have been at least one of the main sets of considerations shaping the approach of the major naval powers to questions such as access through straits for civil and military vessels and the freedom to conduct marine scientific research

is needed, however, is an organised system for exploring and exploiting it and equitably sharing in its benefits. Besides material wealth, the seas also perform other important functions for mankind: not only are they the 'highways of the world' linking continents together, but they also provide opportunities for scientific research[24].

Traditionally, maritime issues have been handled by states and private interests on an *ad hoc* basis through bilateral international agreements on specialised areas[25]. After the Second World War three - at times conflicting - management trends emerged: the continued extension of national jurisdiction beyond the three-mile limit[26], the emergence of regional institutions, and the work of the **United Nations (UN)**[27]. Regional cooperation has taken place in the fisheries and pollution sector[28] as states recognised and accepted the need for international regulation. However, regional intergovernmental fisheries organisations have achieved only modest results[29]. In addition, scientific advice had been institutionally located outside the commissions[30]. Other problems, such as different national legal systems and resource requirements, have also limited progress in fisheries management as well as in other sectors such as the control of marine pollution.

A further constraint on regional cooperation had been the post-Second World War East-West political division. However, with the easing of German problems in the early 1970s and the US-USSR *detente* at the time, a number of East-West agreements were

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24 Sinjela 2 6

25 See 2.5.4 *infra*

26 Either unilaterally or by international agreement

27 Through its agencies like the **Food and Agricultural Organization (FAO)**, **IMCO** and the **United Nations Educational, Scientific and Cultural Organization (UNESCO)**, periodic conferences and codification of legal practice

28 Through for example the **North East Atlantic Fisheries Commission (NEAFC)**, the **European Fisheries Convention** and environmental conventions such as those of Barcelona and Paris - see 2.5.4 *infra*

29 Mainly because individual member states have been unwilling to transfer sufficient political power to the commissions

30 As in the case of **NEAFC**

made possible[31]. Today the situation is even more fluid, and it is submitted that regional cooperation on law of the sea issues will feature strongly in future[32].

Within the UN framework the approach to managing international maritime questions has similarly been on an *ad hoc* basis[33]. The overall lack of coordination resulted in a duplication of effort and limited strategic planning. The Maltese proposal[34] was the first real step towards organising the oceans[35].

The discussions and negotiations at **UNCLOS III** have revealed widely differing conceptions of the form of maritime control for coastal jurisdiction in the exclusive economic zone, the outer limit of the continental shelf, and the high seas, as well as the rights of land-locked and geographically disadvantaged states. However, the biggest problem was the issue of the seabed regime beyond the outer limit of national jurisdiction. For many states the seabed resources beyond the economic zone were regarded as the 'common heritage of mankind'. The concept eventually became incorporated in the wider demands of the developing states - intensified by the energy crisis of the early 1970s - for a **New International Economic Order (NIEO)** put forward at the sixth and seventh special sessions of the General Assembly[36]. Others - such as the US - accepted the general concept that the international community - and in particular the poorer members - should benefit from the resources of the deep seabed area, but argued nevertheless that that should not be at the cost of unduly restricting access to seabed resources.

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31 For example, after the recognition of the German Democratic Republic the Baltic riparian states met in Gdansk in June 1973 to conclude the **Gdansk Convention** on fishing and conservation in the Gulf of Finland, Botnia and the Baltic

32 See 7.2 *infra*

33 For example, the **International Oceanographic Commission (IOC)** located within **UNESCO**, and fisheries handled by the **FAO. IMCO** was not operative until 1958

34 See 3.2 *infra*

35 See Barston and Birnie 7 4/5

36 See 4.3 *infra*, Barston and Birnie 7 5/6, Erasmus M G *The New International Economic Order and International Organizations* Frankfurt/Main: Haag und Herchen 1979 51

The conflict over the seabed issue - in particular the issue areas of the international economy such as trade, commodity price, and technology transfer - became increasingly more emotive and less easy to isolate and deal with in a self-contained manner. Thus the conflict served to highlight the gap between the advanced industrialised states and the developing states. In addition, delay in reaching a generally accepted outcome on the seabed issue posed for **UNCLOS III** the problem that one issue area might be used to reopen the previously negotiated package deal on other regimes[37].

A number of aspects of the major regime proposals discussed at **UNCLOS III** have been assimilated into state practice, with some national variations. The continued absence, however, of an overall regime for the sea which has wide acceptance means that maritime issues such as coastal state powers and the extent of the territorial sea may continue to be important sources of conflict and instability in the international system[38].

Apart from the aspect of legal uncertainty, a number of contemporary developments in three main areas - security, threats to the marine environment, and the search for new resources - will also make it likely that maritime issues remain significant sources of international tension. As already noted, the increased use of the sea for a variety of foreign policy and security purposes will place an enhanced requirement on maritime derived intelligence, marine scientific research, and the capability to deploy in order to deter, weaken or defeat other actors. Thus issues connected with access (for example, through territorial seas and straits), seabed installations, acoustic detection and the acquisition of maritime territory may come to feature frequently in interstate disputes. In the second area - the marine environment - the growth of a network of heavily used main and feeder tank routes to supply the oil requirements of the major industrialised states and other users has made a number of traditional strategic routes (such as the Malacca Straits and the English Channel, as well as several new areas such as those in the Caribbean) vulnerable to shipping accidents and pollution. Also in the field of

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[37] Barston and Birnie 7 6

[38] *Ibid*

shipping, the trend of dumping industrial waste at sea and transporting waste by-products (such as spent nuclear fuel) to receiving states for reprocessing, has become a source of controversy as transnational environmental groups and bordering coastal states seek to limit the practice. Finally there are those problems which are likely to stem from what might be called the quest for maritime territory, as states show renewed interest in establishing claims to possible resources. Recent technological advances in - for example - offshore installation design, artificial islands, ocean data acquisition systems, and sensing of the earth's resources by satellite - are beginning to extend significantly the range of civil and military exploration and inquiry. Those developments, along with those referred to above, will no doubt generate new, and at times critical, issue areas for the maritime dimension of international relations as the sea is explored and used within and beyond the limits of technology[39].

All of the above serve to indicate the problems relating to the sea in general. The issues surrounding land-locked states form but a relatively small part of the law of the sea when seen in perspective, but a very important part nonetheless for the states so affected by their geographical location (something which they have no control over).

Land-locked states face particular problems in terms of guaranteed access to the sea through or over transit states, to the living resources of the sea, and to the mineral resources of the sea. Furthermore, there are problems pertaining to the rights of free transit, the right to fly a flag, rights of navigation, the regime to be applied in ports, and the preservation of existing agreements. In addition, there are the economic problems facing land-locked states by virtue of the fact that they are land-locked. Those are the real issues which are the main concern of this study[40].

The three issues of access to the sea, to the living resources of the sea, and to the mineral resources of the sea are closely interlinked, because paramount to the participation of land-locked states in the exploration and exploitation of the ocean's

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[39] Barston and Birnie 7 6/7

[40] See 1.3 *infra*

resources is their 'right' of access to and from the sea. The historic position for land-locked states had been that the right of transit to and from the sea is a fundamental right of sovereign states, and not a conditional privilege. The issue of whether access to the sea for land-locked states is a 'right' or merely a privilege was finally settled by the 1958 **Geneva Convention on the High Seas** in favour of a right. However, that right was qualified by the provision that an agreement should be reached with transit states before the right of access is recognised. Furthermore, the right of access was also conditioned by the requirement that a land-locked state grant its transit state(s) a reciprocal right of transit. (If the transit state had no need of access through the land-locked state the issue was unresolved whether such a state therefore could withhold the right of transit from the land-locked state in question.) On the question of access there was little change from 1958 to the 1982 **LOSC**, with the result that on that issue land-locked states are in effect no better off than in 1921 with the **Barcelona Conventions**[41].

As far as the economic problems of land-locked states are concerned, it was pointed out before that developing land-locked states in particular had been identified as some of the poorest states in the world. There are various reasons for that, *inter alia* that because of their geographical disadvantage relative to coastal states they face additional tariffs and duties on the transit of goods. They also face high transport costs to have their goods delivered to and from the sea. Furthermore, they do not have ready access to the living resources of the sea, which they can well do with to supplement their food stocks.

Still on economic issues, it is debatable whether many land-locked states possess the financial abilities to avail themselves of the opportunities of deep seabed mining. However, the acceptance of the concept of the 'common heritage of mankind' as a general principle together with the provisions of the 1982 **LOSC** on that issue should guarantee that right[42].

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[41] For a full discussion of the above issues, see 2.5.4, 2.6.2.6.2 and 3.4 *infra*

[42] See 4.3 *infra*

There are also psycholgical problems facing land-locked states in the sense that they know that they are dependent on transit states for access through their territory. Land-locked states are thus aware that they have to ensure good relationships with the governments of transit states in order to assure access and reasonable tariffs and duties. In addition, they also know that, in the absence of any treaty to the contrary, such 'rights' can easily be denied them at short notice. It is also not merely the taking away of such 'rights': in many cases the transit state could cause problems for a land-locked state by merely delaying traffic at border posts or levying unreasonable duties. These are hard realities that land-locked states have to face (as Botswana and Lesotho can bear out, as will be discussed later).

This study will also examine the 1982 **LOSC** on several levels. In the first place, the convention is not in force yet (and there is even doubt whether it will ever enter into force). That poses questions as to the legal status of the **LOSC**. Secondly, there is the issue of customary international law, and the question of whether certain provisions of the **LOSC** have attained customary law status or not. Finally, there is the question as to the future of the law of the sea in general, but in particular also as it affects land-locked states. The alternatives to the **LOSC** will be discussed, with special reference to Southern African land-locked states. To that end, regionalism in present-day international law will have to examined.

In stating the problem it should thus be clear that the problems of land-locked states cannot be seen in isolation from the wider issues concerning the law of the sea. It is therefore necessary in this study to not only concentrate on land-locked states, but also on issues such as customary international law, treaty law (in particular the present status but also the future of the 1982 **LOSC**), and decisions of the **ICJ**. In addition, it is necessary to take a close look at the concept of the 'common heritage of mankind'. It should be quite clear that **UNCLOS III** faced a completely different set of actors than those participating at the 1958 and 1960 **Geneva Conferences on the Law of the Sea.** The developing states had come to stay, and would play an important role in the eventual outcome of the 1982 **LOSC**. Finally, the fact that the 1982 **LOSC** is not in

force yet poses its own set of questions, and alternative courses of action regarding the treaty will have to be examined.

1.2 PUBLIC INTERNATIONAL LAW

1.2.1 INTRODUCTION

> In the long march of mankind from the cave to the computer a central role has always been played by the idea of law - the idea that order is necessary and chaos inimical to a just and stable existence. Every society whether it be large or small, powerful or weak, has created for itself a framework of principles within which to develop[43].

Law consists of a series of rules regulating behaviour within a society. Similarly, public international law is the system of law which governs relations between states[44].

The rules of international law should be distinguished from so-called international comity[45], as well as international morality[46].

During the 17th and 18th centuries the law of nations (as it was known) was an aspect of philosophy, which located general principles of conduct in man's nature and identified them as 'general principles of law'[47]. The 'fathers' of modern international

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43 Shaw M N *International Law* 2nd ed Cambridge: Grotius Publications Limited 1986 1

44 Akehurst M *A Modern Introduction to International Law* 2nd ed London: George Allen and Unwin Ltd 1971 9. For the purposes of this study it is unnecessary to dwell on the age-old question 'Is international law really law?' - on that see Akehurst *op cit* 9-22, Carty A *The decay of international law?* Manchester: Manchester University Press 1986 1, Hosten W J, Edwards A B, Nathan C and Bosman F *Introduction to South African Law and Legal Theory* Durban: Butterworth 1983 828-830, Shaw 43 4. Instead, it will be assumed that international law is indeed law

45 Practices such as saluting the flags of foreign warships at sea, which are adhered to because of courtesy and are not regarded as legally binding - see Brownlie I *Principles of Public International Law* 4th ed Oxford: Clarendon Press 1990 29, Hosten *et al* 44 831, Shaw 43 4

46 See Akehurst 44 1, Shaw 43 4

47 O'Connell D P *International Law for Students* London: Stevens & Sons 1971 3

law[48] devised systems of law on the basis of concepts that are universal because they were essential for the achievement of justice. 'The result was an intellectual construction, quite specific in its details but consisting in logical applications of these concepts to actual situations, such as diplomatic immunity, performance of treaties, freedom of the seas and acquisition and loss of territory'[49].

In the 18th century Vattel was instrumental in advocating that law was a matter of the exercise of the sovereign will, whereby states freely consent to specific rules. However, the philosophical basis for that general will 'vanished in the nineteenth century, whereupon there was no support for a system of international law other than the supposition of unanimous agreement'[50].

That brought about the reliance upon state practice as the basis of international law. However, contemporary international law - confronted with the problems of contradictory and divergent policies of states respecting international law - tends to return once more to the 17th century view of positive law as the embodiment of general principles of justice[51].

> It must not be thought, however, that the practices of States are becoming irrelevant: international law must be an effective adjunct of diplomacy; and, even if its ultimate principles reside in the purely intellectual sphere, the rules whereby those principles are translated into the realm of behaviour must constantly be verified against diplomatic reality. The content of international law is thus highly fluid, and theory and practice, the intellectual and the pragmatic, constantly interweave. This makes the subject more challenging than most branches of law, and it implies that the international lawyer should have a developed sense of political reality as well as a philosophical conviction. It also

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48 Grotius, Pufendorf and Suarez - see O'Connell 47 3

49 O'Connell 47 3

50 O'Connell 47 3. See also Shaw 43 10 for the doctrine of consensus

51 Carty 44 1, O'Connell 47 4

follows that the rules of international law are technically complex and require skill in their elaboration[52].

Juristic logic and state practice are, however, insufficient to promote rules of law which are adequate to deal with the problems of modern international society. The emphasis is currently shifting towards multilateral treaty-making. The 1982 **LOSC** is a prime example in that regard.

1.2.2 THE HISTORICAL DEVELOPMENT OF PUBLIC INTERNATIONAL LAW

Even though it is generally agreed[53] that the modern international system originated in the 16th century, certain of the basic concepts of international law date back to the earliest days of civilisation. For example, one of the earliest known treaties concerned the establishment of a boundary between Lagash and Umma at around 2100 BC[54]. A treaty was also concluded between Ramses II of Egypt and the King of the Hittites for the establishment of eternal peace and brotherhood[55]. Since that time many agreements between the rival Middle Eastern powers were concluded[56].

In ancient Israel there was a universal ethical stance concerning warfare and a demand for justice and a fair system of law founded upon strict morality[57].

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52 O'Connell 47 4

53 See Akehurst 44 23, Hosten *et al* 44 832, Shaw 43 21

54 Shaw 43 13

55 *Ibid*

56 Akehurst 44 23, Shaw 43 13/14

57 Shaw 43 13

Even before the birth of Christ, the civilisations in the Far East, India and China developed rules displaying morality, generosity and harmony in relations between the different parts. However, the predominant approach of ancient civilisations was geographically and culturally restricted, and the most important parallel to modern international law was the existence of certain ideals (such as the sanctity of treaties), which continues to the present[58].

The era of classical Greece brought about their system of city-states and colonies[59]. Numerous treaties linked the city-states together in a network of commercial and political associations. However, those of different origin 'were barbarians not deemed worthy of association'[60].

The Romans had a great respect for organisation and the law. They distinguished between *ius civile*[61] and *ius gentium*[62]. Eventually the *ius gentium* became the common law of the Roman Empire and was deemed to be of universal application[63]. Certain Roman philosophers incorporated the Greek idea of 'natural law' into their own legal theories, often as a kind of justification of the *ius gentium*, which was deemed to enshrine rational principles common to all civilised nations. However, the law of nature was held to have an existence over and above that of the *ius gentium*. All those rules of Roman law were later codified in the *Corpus Iuris Civilis*, completed in 534 AD[64].

The Islamic approach to international relations and law evolved as a result of hostility towards the non-Moslem world and the concept of unity between Moslem states.

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58 Akehurst 44 23, Shaw 43 13

59 Akehurst 44 23, Shaw 43 14

60 Shaw 43 14/15

61 Applicable only to Roman citizens

62 Rules to govern the relations between foreigners, and between foreigners and citizens

63 Shaw 43 15/16

64 Shaw 43 16

Generally, humane rules of warfare were developed. After the consolidation of power, norms governing conduct with non-Moslem states began to develop. Diplomatic rules were founded upon notions of hospitality and safety, while rules governing international agreements grew out of the concept of respecting promises made[65].

1.2.3 PRESENT PUBLIC INTERNATIONAL LAW

1.2.3.1 INTRODUCTION

Public International Law in the present century had to a large extent been influenced by the First and Second World Wars, and the subsequent establishment of the **League of Nations** and subsequently the **UN**. The Second World War in particular brought about drastic changes as far as human rights issues were concerned.

Present-day Public International Law has to cope with a wide range of issues such as nuclear technology, environmental issues, the law of the sea (and in particular deep seabed mining), international labour law, international trade, outer space exploration, and the 'common heritage of mankind'. The emergence of many newly-independent states during the past three decades has brought about many new actors in the international law arena, with a consequent decline in the 'Eurocentric' emphasis in thinking on international issues. International law today is no longer exclusively concerned with issues relating to the territory or jurisdiction of states, but with the specialised problems of contemporary society as a whole.

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[65] Such as the rules that both parties to a law suit must be heard, or that one cannot be a judge in his own cause, or that a special law derogates from a general law - O'Connell 47 6

1.2.3.2 SOURCES OF PUBLIC INTERNATIONAL LAW

1.2.3.2.1 INTRODUCTION

Many writes distinguish between formal sources[66] and material sources[67] of law. Because of the lack of a constitutional machinery for law-making in international law[68] that distinction between the two sources is more difficult to maintain in international law than in municipal law. That focuses attention on the sources of international law - evidence of the exisence of consensus among states concerning particular rules or practices. That may take the form of decisions of the **International Court of Justice (ICJ)**, resolutions of the **UN** General Assembly, or treaties.

> Moreover, there is a process of interaction which gives these evidences a status somewhat higher than mere 'material sources'. Thus neither an unratified treaty nor a report of the International Law Commission to the General Assembly has any binding force either in the law of treaties or otherwise. However, such instruments stand as candidates for public reaction, approving or not, as the case may be: they may stand for a threshold of consensus and confront states in a significant way[69].

1.2.3.2.2 TREATIES

1.2.3.2.2.1 GENERAL

Article 38(1)(a) of the Statute of the **ICJ** provides that 'international conventions,

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66 Those legal procedures and methods for the creation of rules of general application which are legally binding on the addressees - see Brownlie 45 1

67 Providing evidence of the existence of rules which (when proved) have the status of legally binding rules of general application - Brownlie 45 1

68 See Brownlie 45 1/2, Shaw 43 58/59

69 Brownlie 45 2

whether general or particular, establishing rules expressly recognized by the contesting States' will form one of the sources of international law[70].

Treaties (or international conventions) are contracts by which the parties agree to certain undertakings. They may, however, be evidence of a practice (and hence of customary law) and their provisions may become customary international law by virtue of a general conviction that they oblige all states, even non-participating states[71]. That is the distinction often drawn between 'law-making' treaties[72] and other treaties[73].

'Law-making' treaties create legal obligations, the observance of which does not dissolve the treaty obligation[74]. 'Law-making' treaties create general norms for the future conduct of the parties in terms of legal propositions, and the obligations are basically the same for all parties. Such treaties are in principle binding only on parties, but the number of parties, the explicit acceptance of rules of law, and sometimes the declaratory nature of the provisions produce a strong law-creating effect (at least as strong as the general practice[75] considered sufficient to support a customary rule)[76]. By their conduct non-parties may accept the provisions of a multilateral convention as

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70 Brownlie 45 3, Grenville J A S *The Major International Treaties 1914-1945* London: Methuen 1987 4, O'Connell 47 10, Shaw 43 77

71 Shaw 43 78/79. For definitions and the different names given to treaties, see Grenville 70 6-8

72 The 1856 **Paris Declaration** on neutrality in maritime warfare, the 1899 and 1907 **Hague Conventions** on the law of war and neutrality, and the **Geneva Red Cross Conventions** are - in respect of some of their provisions at least - of a law-making character - see Brownlie 45 12, O'Connell 47 10, Shaw 43 78/79

73 See Akehurst 44 38/39, Brownlie 45 13/14

74 Thus a treaty for the joint carrying out of a single enterprise is not law-making, since fulfilment of its objects will terminate the obligation - Brownlie 45 12

75 See 3.3.13 *infra*

76 Brownlie 45 12

representing general international law[77]. Even an unratified treaty may be regarded as evidence of generally accepted rules (at least in the short run)[78].

Some treaties are merely declaratory of international law, and are entered into simply to reinforce a principle which may be in danger of erosion[79]. Other treaties may explain or place beyond doubt the interpretation of a customary rule of law[80].

However, even if provisions of a treaty become new principles or rules of customary international law, the customary norms retain a separate identity (even if the two norms appear identical in content)[81].

There is another sense in which treaties are said to be 'law-making' or legislative. Multilateral conventions are entered into for a variety of important economic, political and administrative reasons, and they create a technical regime of complicated rules between many - and in some cases, all - states. They are in that respect analogous to legislative enactments in the domestic sphere[82].

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77 That had been the case with the 1907 **Hague Convention IV** and the rules annexed relating to warfare - see Brownlie 45 12

78 See the *North Sea Continental Shelf* cases (2.6.3 *infra*) and Brownlie 45 12

79 For example, in 1871 the **Declaration of London** proclaimed that it is an essential principle of the law of nations that states cannot disengage themselves from a treaty or modify its stipulations without the consent of the contracting parties - see O'Connell 47 10

80 O'Connell 47 10

81 Brownlie 45 13

82 For example, the regimes of international postage, telegraph, radio frequency, and aerial navigation are universal, and the relevant treaty provisions are in reality rules of international law. But it is important to remember that they are such by virtue of universal participation in the regime and not by virtue of the supervening authority of the rule - see Grenville 70 5, O'Connell 47 10/11

Treaties other than 'law-making' treaties (such as bilateral treaties) may provide evidence of customary rules, and there is in fact no clear distinction between 'law-making' treaties and others[83].

The conclusions of international conferences[84] may likewise be a form of multilateral treaties. Even before the necessary ratifications have been received, a convention embodied in a 'Final Act' and expressed as a codification of existing principles may be of importance[85].

Resolutions of the UN General Assembly - although strictly speaking not treaties - are in general not binding on member states. However, when they are concerned with general norms of international law, acceptance by a majority vote constitutes evidence of the opinions of governments in the widest *forum* for the expression of such opinions. Even when they are framed as general principles, resolutions of that kind provide a basis for the progressive development of international law and speedy consolidation of customary rules[86].

Soni[87] opines that treaties are not only the chief source of international law, but also a prime form of control. 'In other words, and quite simply, the law works through the form of agreed conduct exposed in treaty terms'[88].

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83 For example, if bilateral treaties on extradition are habitually framed in the same way, a court may regard the usual form as the law even in the absence of a treaty obligation - see Brownlie 45 13/14

84 Usually termed the 'Final Act' - see for example the 1982 **LOSC**

85 See Brownlie 45 14

86 Examples of important 'law-making' resolutions are the 'Resolution on Prohibition of the Use of Nuclear Weapons for War Purposes' [General Assembly Resolution 1653 (XVI)] and the 'Declaration on Permanent Sovereignty over Natural Resources' [General Assembly Resolution 1803 (XVII)] - see Brownlie 45 14/15. See also 4.3 *infra* for the principle of the 'common heritage of mankind'

87 Soni R *Control of Marine Pollution in International Law* unpublished LL D thesis Pretoria: University of South Africa 1980 85

88 Soni 87 85. Writers like Brownlie (45 11) may disagree with this, however, in favour of custom

There may be various reasons for that. In the first place, Akehurst notes that treaties are of growing importance in international law because of modern technology, communications and trade which have made states more interdependent than ever before, and also more willing to accept rules on a vast range of problems of common concern[89]. The rules in question are usually laid down in treaties, with the resultant expansion in international law.

Furthermore, because treaties are the major instruments of cooperation in international relations, and because cooperation often involves change in the relative positions of the states involved[90], treaties are often an instrument of change.

Akehurst furthermore notes that to some extent treaties have begun to replace customary international law. Where there is agreement about the rules of customary law, they are codified by treaty. Where there is disagreement or uncertainty, states tend to settle disputes by *ad hoc* compromises - which may also take the form of treaties[91]. A treaty is concluded when signed, but where ratification is necessary it becomes binding only when ratified[92].

1.2.3.2.2.2 TREATIES COVERING THE INTERNATIONAL LAW OF THE SEA

Singh[93] distinguishes between the following categories: navigation, safety at sea, maritime law, and training, employment, welfare and the environment. Chapter Two

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89 Such as extradition of criminals, safety regulations for ships and aircraft, economic aid, copyright, and standardisation of road signs - see Akehurst 44 39

90 For example, foreign aid by wealthy states to poor states - see Akehurst 44 39

91 Akehurst 44 39, Grenville J A S and Wasserstein B *The Major International Treaties Since 1945* London: Methuen 1987 1

92 Grenville 70 8, Grenville and Wasserstein 91 11/12. An example of the former (signature only) was the 1939 **Anglo-Polish Treaty of Alliance**, while a prime example of the latter (signature and ratification) is the 1982 **LOSC**. See also Grenville and Wasserstein 91 11 for the 1971 **Falklands** exchange of notes

93 Singh N *International Maritime Law Conventions* Vol 4 London: Stevens & Sons 1983

of this study offers a detailed overview of the treaties on the law of the sea; here it will suffice merely to list some of the most important modern-day treaties as far as the law of the sea is concerned:

1 The 1921 Barcelona **Declaration Recognizing the Right to Flag of States having no Sea-coast**[94].

2 The 1921 Barcelona **Convention and Statute on Freedom of Transit**[95].

3 The 1921 Barcelona **International Convention and Statute concerning the Regime of Navigable Waterways of International Concern**[96].

4 The 1923 Geneva **Convention and Statute on the International Regime of Maritime Ports**[97].

5 The 'Laws of Maritime Jurisdiction in Times of Peace' adopted by the 1926 Vienna **Conference of the International Law Association**[98].

6 The declaration following the 1927 Lausanne **Conference of the Institute of International Law**[99].

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94 20 April 1921 - see Singh 93 2918

95 20 April 1921 - see Singh 93 2931

96 20 April 1921 - see Singh 93 2938

97 9 December 1923 - see Singh 93 2920

98 Article 1 of the draft stated that 'for the purpose of securing the fullest use of the seas, all States and their subjects shall enjoy absolute liberty and equality of navigation, transport, communications, industry and science in and on the seas'. Article 13 provided that 'no State or group of States may claim any right of sovereignty, privilege or prerogative over any portion of the high seas or place any obstacle to the free and full use of the seas.'

99 It provided: 'The principle of the freedom of the sea implies the following consequences: (1) freedom of navigation on the high seas, subject to the exclusive control in the absence of a convention to the contrary, of the State whose flag is carried by the vessel; (2) freedom of fisheries on the high seas, subject to the same control; (3) freedom to lay submarine cables on the high seas; (4) freedom of aerial circulation over the high seas'.

7 The 1930 draft convention on 'The Legal Status of the Territorial Sea'[100].

8 The 1948 **London Convention**[101].

9 The 1954 **International Convention for the Prevention of Pollution of the Sea by Oil**[102].

10 The 1958 **Geneva Conventions**, namely the **Convention on the Territorial Sea and the Contiguous Zone, Convention on the High Seas, Convention on Fishing and Conservation of the Living Resources of the High Seas,** and **Convention on the Continental Shelf**[103].

11 The 1965 **Convention on Transit Trade of Land-Locked States**[104].

12 The 1982 **United Nations Convention on the Law of the Sea**[105].

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[100] Prepared by the 'Committee of Experts for the Progressive Codification of International Law' for the 1930 **Hague Conference** - see Colombos C J *The International Law of the Sea* 5th ed London: Longmans 1962 22

[101] See Colombos 100 338-340

[102] Concluded in 1954, entered into force in 1958, amended in 1962, 1969 and 1971, and later replaced by the 1973 **International Convention for the Prevention of Pollution from Ships** - see Harris 18 339

[103] 29 April 1958 - see Singh 93 2625-2646. To those was added the **Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes by the International Court of Justice** which entered into force in 1962 - Erasmus G 'Dispute settlement in the law of the sea' in *The Law of the Sea* edited by Bennett T W *et al* Cape Town: Juta & Co, Ltd 1986 18

[104] 8 July 1965 - see Bowett D W *The Law of the Sea* Manchester: Manchester University Press 1967 52, Harris 18 321, and 1.3.4 *infra*

[105] See 3.3 *infra*

1.2.3.2.2.3 CONCLUSION

Pacta sunt servanda (agreements must be kept) has long been recognised as a fundamental principle of international law[106]. However, it begs the question: why the belief in treaties, especially after many instances of disillusionment?[107] It is because treaties reduce uncertainties and promote reciprocal relationships, and because the interdependence of states continues to make treaties an indispensable feature of the conduct of international relations[108]. Furthermore - of particular importance after the Second World War and the era of 'colonialism' - international treaties are concluded between states, and thus presuppose their existence.

In addition, the increase in the number of treaties since the Second World War can be attributed to the fact that there are more sovereign states than ever before[109], that there are now many international organisations which sign treaties the same way states do[110], and that 'modern' treaties have been increasingly concerned with economic, social and ecological questions[111].

> The alternative to imperfect agreements is either anarchy or complete uncertainty. Treaties do not by themselves assure peace and security, but far more often than not they have contributed to stability for a measurable and worthwhile period of years. The spectacular instances where they have become instruments of aggression should therefore not blind us to the utility of treaties in general[112].

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[106] Grenville and Wasserstein 91 1

[107] See Grenville 70 1-4 for examples

[108] Grenville 70 4/5

[109] See for example 3.3 *infra* for the participation at the three **UN Conferences of the Law of the Sea** since 1958

[110] See 2.6, 2.7 and 3.3 *infra* for the signing by Azapo, the PLO and Swapo of the **LOSC**

[111] Grenville and Wasserstein 91 1

[112] Grenville and Wasserstein 91 7

1.2.3.2.3 CUSTOM

1.2.3.2.3.1 INTRODUCTION

Article 38(1)(b) of the Statute of the **ICJ** provides that 'international custom, as evidence of a general practice accepted as law' will be applied by the court in deciding international disputes[113].

There is disagreement as to the value of a customary system in international law[114]. However, Shaw offers the following:

> ... custom does mirror the characteristics of the decentralised international system. It is democratic in that all states may share in the formulation of new rules, though the precept that some are more equal than others in this process is not without its grain of truth. If the international community is unhappy with a particular law it can be changed relatively quickly without the necessity of convening and successfully completing a world conference. It reflects the consensus approach to decision-making with the ability of the majority to create new law binding upon all, while the very participation of states encourages their compliance with customary rules. Its imprecision means flexibility as well as ambiguity. Indeed, the creation of the exclusive economic zone in the law of the sea may be cited as an example of this process[115].

1.2.3.2.3.2 EVIDENCE OF CUSTOMARY LAW

The main evidence of customary law is to be found in the actual practice of states, other sources of international law like writings of scholars, treaties, and international and national decisions[116].

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[113] Akehurst 44 40, Brownlie 45 4

[114] See Shaw 43 60 for the various arguments

[115] Shaw 43 61

[116] Akehurst 44 40, Brownlie 45 5

1.2.3.2.3.2.1 PRACTICE OF STATES

An idea of a state's practice can be gathered from published material[117], from a state's laws[118], and from judicial decisions[119]. However, the majority of material which would throw light on a state's practice concerning questions of international law[120] is normally not published (or rather, it is only recently that efforts have been made to publish digests of the practice followed by different states)[121].

1.2.3.2.3.2.2 OTHER SOURCES OF CUSTOMARY INTERNATIONAL LAW

Other sources are the writings of international lawyers, or judgements of national or international tribunals. The latter are mentioned as separate but subsidiary sources of international law in Article 38(1)(d) of the Statute of the ICJ[122]. Even when they do not attempt to restate customary law, writings and judgements can be cited as subsidiary sources of law. However, when they do purport to restate customary law, they acquire a greater weight, since they are then not only a subsidiary source of law but also evidence of a principal source of law[123].

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[117] For example newspaper reports of actions taken by states, and from statements made by government spokesmen to Parliament, to the press, at international conferences, and at meetings of international organisations - see Akehurst 44 40, Brownlie 45 5

[118] See for example the decision of the US Supreme Court in *The Scotia* (1871) - Akehurst 44 40 n1, Brownlie 45 5

[119] International as well as national - see Akehurst 44 40, Brownlie 45 5

[120] Correspondence with other states, and the advice which each state receives from its own legal advisers - see Akehurst 44 40

[121] See Akehurst 44 40 n2

[122] Akehurst 44 40/41, Brownlie 45 3

[123] Akehurst 44 41, Brownlie 45 21

1.2.3.2.3.2.3 TREATIES

Treaties can be evidence of customary law, but care should be taken in deducing rules of customary law from treaties. For example, treaties dealing with a particular subject-matter may habitually contain a certain provision. Extradition treaties thus almost always provide that political offenders shall not be extradited. It has been argued that a standard provision of that type has become so habitual that it should be regarded as a rule of customary law, to be inferred even when a treaty is silent on that particular point[124].

However, there is another way in which a treaty can constitute evidence of customary law. If the treaty claims to be declaratory of customary law, or is intended to codify customary law, it can be quoted as evidence of customary law even against a state which is not party to a treaty[125]. Such a state is not bound by the treaty, but by customary law. Therefore, if it can produce other evidence to show that the treaty misrepresents customary law, it can disregard the rule stated in the treaty[126].

Finally, there is the possibility that customary law may change so as to conform with an earlier treaty. For example, the 1856 **Declaration of Paris** altered certain rules about the conduct of war at sea. As a treaty, it only applied between the parties to it[127]. Subsequently, however, the rules contained in the declaration were accepted by a large number of other states as rules of customary law[128].

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[124] Brownlie 45 13/14. On the other hand, Akehurst asks why states would bother to insert such standard provisions in treaties if the rule already existed as a rule of customary law. He suggests that one needs to know more about the intentions of the parties to the treaty in question before invoking a standard treaty provision as evidence of customary law - see Akehurst 44 41

[125] Akehurst 44 41

[126] That possibility is not open to states which are parties to the treaty, since they are bound to the treaty regardless of whether it accurately codifies customary law or not - see Akehurst 44 41

[127] Austria, France, Great Britian, Prussia, Russia, Sardinia and Turkey

[128] Akehurst 44 41/41

1.2.3.2.3.3 THE ELEMENTS OF CUSTOM

1.2.3.2.3.3.1 REPETITION

It had at times been suggested that a single precedent is not enough to establish a customary rule[129], and that there should be a degree of repetition over a period of time. Thus, in the *Asylum* case, the **ICJ** stated that a customary rule should be based on 'a constant and uniform usage'[130].

On the other hand, where there is evidence against an alleged rule of customary law, there would seem to be no reason why a single clear precedent should not be enough to establish the rule (at least provisionally)[131].

Provided the consistency and generality of a practice are proved, no particular duration is required: the passage of time will be part of the evidence of generality and consistency, however. A long practice is not a requirement[132]: the **ICJ** does not emphasise the time element as such in its practice.

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[129] See Shaw 43 65

[130] 1950 **ICJ** Reports 266. That statement should, however, be seen in the light of the facts of the *Asylum* case, where the court stated: 'The facts ... disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on various occasions, ... that it has not been possible to discern ... any constant and uniform usage, accepted as law'. See Akehurst 44 42, Brownlie 45 6, Shaw 43 63

[131] There had been cases where national courts have relied on a single resolution of the **UN** General Assembly as the sole evidence of a rule of customary law - see Akehurst 44 42/43, Brownlie 45 5

[132] For example, rules relating to airspace and the continental shelf have emerged relatively quickly - see Brownlie 45 5, Shaw 43 63

1.2.3.2.3.3.2 CONSISTENCY AND UNIFORMITY OF THE PRACTICE

State practice consists of what states do, not of what they say[133]. Therefore, resolutions passed at international conferences and at meetings of international organisations are not evidence of state practice unless it can be proved that states act in accordance with them[134].

Complete uniformity is not required, but substantial uniformity is[135]. The extent and uniformity of the practice was emphasised by the **ICJ** in the *Asylum* case[136] and the *North Sea Continental Shelf* cases[137].

1.2.3.2.3.3.3 GENERALITY OF THE PRACTICE

Generality of the practice complements the requirement of consistency. Universality is not required, but the problem is to determine the value of abstention from protest by a substantial number of states in face of a practice followed by some others. Silence may denote either tacit agreement or a simple lack of interest in the issue[138]. In the *Fisheries Jurisdiction* case (United Kingdom v. Iceland)[139] the court referred to the extension of a fishery zone up to a 12-mile limit which appeared to be generally

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133 See for example the *Anglo-Norwegian Fisheries case* (1951 **ICJ** Reports 116), Akehurst 44 43, Brownlie 45 5, Shaw 43 64

134 Akehurst 44 43

135 See Brownlie 45 5, Shaw 43 64

136 See 130 at 276/277. The court held that ' [t]he party which relies on a custom ... must prove that this custom is established in such a manner that it has become binding on the other party ... that the rule invoked ... is in accordance with a constant and uniform usage practiced by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State.'

137 1969 **ICJ** Reports 3. See also Shaw 43 64

138 Brownlie 45 6, Shaw 43 67

139 1974 **ICJ** Reports 3

accepted, and to an increasing and widespread acceptance of the concept of preferential rights for coastal states[140].

1.2.3.2.3.3.4 *OPINIO IURIS*

The technical name given to the psychological element in the formation of customary law is *Opinio iuris sive necessitatis* (*opinio iuris*). It is usually defined as a conviction felt by states that a certain form of conduct is required by international law[141]. The *opinio iuris* - or belief that a state activity is legally obligatory - is the factor which turns the usage into a custom and renders it part of the rules of international law. That view was also expressed by the **Permanent Court of International Justice (PCIJ)** in the *Lotus* case[142].

The main problem with *opinio iuris* is that of proof, and in particular the incidence of the burden of proof. The **ICJ** has followed two methods of approach. In many cases the court is willing to assume the existence of *opinio iuris* on the basis of evidence of a general practice, or a consensus in the literature, or the previous determinations by the court or other international tribunals[143]. However, in a minority of cases the court, in a more rigorous approach, has called for more positive evidence of the recognition of the validity of the rules in question in the practice of states[144]. The choice of approach appears to depend upon the nature of the issues and the discretion of the court[145].

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[140] See 139 at 23-26

[141] Article 38(1)(b) of the Statute of the **ICJ** refers to a 'general practice accepted as law'. See also Brownlie 45 7, Shaw 43 70/71

[142] 1927 **PCIJ** Series A No 10 18

[143] See Brownlie 45 7, Shaw 43 71 and the *Gulf of Maine* case (1984 **ICJ** Reports 293-294)

[144] See the *Lotus* case *supra*, the *North Sea Continental Shelf* cases *supra* and the *Case of Nicaragua v. United States* (Merits) (1986 **ICJ** Reports 14)

[145] See Brownlie 45 7

1.2.3.2.3.4 PROTEST, ACQUIESCENCE AND CHANGE IN CUSTOMARY LAW

Firstly, there is the position of the so-called 'persistent objector'[146]. The way in which - as a matter of practice - custom resolves itself into a question of special relations[147] is illustrated by the rule that a state may contract out of a custom in the process of formation[148]. Evidence of objection must be clear, and Brownlie is of the opinion that there is probably a rebuttable presumption of acceptance[149]. The principle is well recognised by international tribunals[150] and in the practice of states[151].

Secondly, there is the so-called 'subsequent objector'[152]. In the *Anglo-Norwegian Fisheries* case part of the Norwegian argument was that certain rules were not rules of general international law, and even if they were they did not bind Norway, which had consistently and unequivocally manifested a refusal to accept them[153]. The ICJ held, however, that Norway had departed from the alleged rules - if they existed - and other states had acquiesced in that practice.

That leads to the problem of change in a rule of customary international law. Brownlie offers the following:

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[146] See Bennett T W 'The Status of the Law of the Sea Convention' in *The Law of the Sea* edited by Bennett T W *et al* Cape Town: Juta & Co, Ltd 1986 10, Brownlie 45 10

[147] Usually bilateral relations between two specific states

[148] See the *Anglo-Norwegian Fisheries* case 133 *supra*

[149] Brownlie 45 10

[150] See the *Anglo-Norwegian Fisheries* case 133 at 131 and the *North Sea Continental Shelf* case 137 at 26-27

[151] Brownlie 45 10, Shaw 43 75. Brownlie opines that - given the majoritarian tendency of international relations - the principle is likely to have increased prominence

[152] Brownlie 45 10

[153] See Brownlie 45 10. The UK admitted the general principle of the Norwegian argument on that issue while denying that - as a matter of fact - Norway had consistently and unequivocally manifested a refusal to accept the rules. Thus the UK regarded the question as one of persistent objection. See also Shaw 43 75 for the reasons why states may initially fail to protest

> Presumably, if a substantial number of states assert a new rule, the momentum of increased defection, complemented by acquiescence, may result in a new rule, as in the case of the law on the continental shelf. If the process is slow and neither the new rule nor the old have a majority of adherents then the consequence is a network of special relations based on opposability, acquiesence, and historic title[154].

1.2.3.2.3.5 CONCLUSION

From the above it can be seen that custom plays an important role as one of the sources of international law. That is particularly so in the international law of the sea, as will be seen later on[155].

1.2.3.2.4 GENERAL PRINCIPLES OF LAW

1.2.3.2.4.1 INTRODUCTION

Article 38(1)(C) of the Statute of the **ICJ** provides that 'the general principles of law recognized by civilized nations'[156] will form one of the sources of international law.

The formulation appeared in the *compromis* of arbitral tribunals in the 19th century, and similar formulae appeared in draft instruments concerned with the functioning of tribunals[157]. The phrase was inserted in the Statute of the **PCIJ** in order to provide a solution in cases where treaties and custom provide no guidance; otherwise, it was feared, the court might be unable to decide some cases because of gaps in treaty law

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[154] Brownlie 45 11. See also Shaw 43 75/76

[155] In particular, the provisions in the 1982 **LOSC** which may be regarded as evidence of customary law - see 3.3.14 *infra*

[156] See Akehurst 44 1, Shaw 43 4

[157] See Brownlie 45 15

and customary law[158]. However, although the motives of the statesmen who drafted the Statute of the **PCIJ** in 1920 are clear, neither those statesmen nor subsequent commentators are in agreement about the meaning of the phrase. Some say it means general principles of international law, while others say it means general principles of national law[159].

Between the two approaches, most writers accept that general principles do constitute a separate source of law, but of fairly limited scope[160]. It is not always clear, however, whether what is involved is a general principle of law appearing in municipal systems or a general principle of international law[161].

1.2.3.2.4.2 GENERAL PRINCIPLES OF LAW IN THE PRACTICE OF TRIBUNALS

Gaps in international law may be filled by 'borrowing' principles which are common to all or most national systems of law[162].

General principles of law have proved most useful in 'new' areas of international law[163]. When the modern system of international law began to develop in the 16th

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158 Grotius, Pufendorf and Suarez - see O'Connell 47 3

159 Akehurst is of the opinion that 'there is no reason why it should not mean both; the greater the number of meanings which the phrase possesses, the greater the chance of finding something to fill gaps in treaty law and customary law - which was the reason for listing general principles of law in the Statute of the Court. Indeed, international law tribunals had applied general principles of law in both these senses for many years before the **PCIJ** was set up in 1920' - Akehurst 44 53. See also Brownlie 45 15/16, Shaw 43 82

160 See Hosten *et al* 44 836, Shaw 43 82. That is also reflected in the decisions of the **PCIJ** and **ICJ**

161 However, Shaw is of the opinion that that is not very important: both municipal legal concepts and those derived from existing international practice can be defined 'as falling within the recognised catchment area' - Shaw 43 82

162 Akehurst 44 52, Shaw 43 82

163 Such as the law of evidence, the law of procedure, and jurisdictional questions - see Brownlie 45 18, Shaw 43 83

and 17th centuries, writers like Grotius drew heavily on Roman law, and a Roman ancestry can still be detected in many of the rules which have now been transformed into customary law[164]. In the 19th century international arbitration - which had previously been rare - became common, and the need for rules of judicial procedure was met by 'borrowing' principles from national law[165]. In the present century international law has come to regulate certain contacts made by individuals or companies with states or international organisations. Treaties and customary law contain few rules applicable to such topics, and the gap has been filled by recourse to general principles of mercantile and administrative law, 'borrowed' from national legal systems[166]. However, the **ICJ** has used that source sparingly[167].

1.2.3.2.4.3 GENERAL PRINCIPLES OF PUBLIC INTERNATIONAL LAW

Akehurst is of the opinion that general principles of law are not so much a source of law as a method of using existing sources - thus an extension of existing rules by analogy and reasoning, and application of rules which have not yet crystallised into a definite custom[168].

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[164] Akehurst 44 53

[165] *Ibid*

[166] Akehurst 44 53, Shaw 43 82

[167] See Brownlie 43 17

[168] He points out that English judges develop English law in that way without needing any statutory authorisation, and English lawyers therefore have difficulty in understanding why an international court should need statutory authorisation before it can do the same thing. However, in continental countries with a detailed written code, it is generally supposed that the function of judges is to apply the law and not to develop it. Consequently, continental statesmen would have accused the **PCIJ** of exceeding its jurisdiction if it had sought to develop the law without being expressly authorised to do so. USSR international lawyers use the expression 'general principles of law' in a slightly different sense. According to them it means the most basic principles of international law laid down by treaty and custom, and nothing else. That view is not accepted by anyone outside the communist bloc, and is impossible to reconcile with the fact that general principles of law are mentioned as a separate source in the court's Statute, distinct from treaties and custom - Akehurst 44 52

'General principles of international law' may refer to rules of customary law, to general principles of law[169], or to logical propositions resulting from judicial reasoning on the basis of existing parts of international law and municipal analogies[170]. Examples of that type of general principles are the general principles of consent, reciprocity, equality of states, finality of awards and settlements, the legal validity of agreements, good faith, domestic jurisdiction, and the freedom of the seas[171].

1.2.3.2.4.4 THE DEDUCTIVE AND INDUCTIVE ASPECTS OF GENERAL PRINCIPLES OF LAW

O'Connell points out another classification or twofold aspect of general principles of law[172]. He distinguishes between precepts which are demonstrably necessary to achieve justice[173] and concepts which are of universal currency since they have been pragmatically adopted by all or most states, but which cannot logically be derived from the category of justice[174].

Courts and writers have tended to avoid philosophical justification for using general principles and have preferred to base their resort to them upon proof that they are in

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169 As in Article 38(1)(c) of the Statute of the **ICJ**

170 See Brownlie 45 19

171 In many cases those principles are to be traced to state practice. However, they are primarily abstractions from a mass of rules and have been so long and so generally accepted as to be no longer directly connected with state practice - Brownlie 45 19

172 Shaw 43 16

173 Such as the rules that both parties to a law suit must be heard, or that one cannot be a judge in his own cause, or that a special law derogates from a general law - O'Connell 47 6

174 Such as the requirement of acquiescence in prescription, or the coincidence of *animus* and *factum* in the occupation of territory, or unjust enrichment, or servitudes. The author argues that - philosophically speaking - there is little difficulty in justifying the jurist's resort to general principles that are of moral necessity (such as the obligation to perform a treaty in good faith), but it is still unclear to what extent the second category of 'positive' general principles binds states in international relations, unless it be accepted that international law is an intellectual construction which no state is permitted to repudiate lest the common good of mankind be prejudiced - see O'Connell 47 6

fact adopted into most legal systems. The *Nuremberg Military Tribunal* is evidence of that[175].

1.2.3.2.4.5 EQUITY AS A GENERAL PRINCIPLE

Equity plays a role in the international judicial process in the correction of over-rigorous law, in the filling of gaps, and in the abrogation of law[176].

In the *Diversion of Waters from the Meuse* case[177] Judge Hudson said:

> In a proper case, and with scrupulous regard to the limitations which are necessary, a tribunal bound by international law ought not to shrink from applying a principle of ... obvious fairness[178].

A distinction is to be drawn between authorisation to a tribunal to resort to equity, and an authorisation to decide a question *ex aequo et bono*. The latter is an authorisation to decide without deference to the rules of law, while an authorisation to decide on a basis of equity does not absolve the judge from giving a decision based upon law, but only to apply that law in such a way that any injustice which might result from a strict application of the law can be avoided[179].

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[175] The *Tribunal* asserted: 'In determining whether such a fundamental rule of justice is entitled to be declared a principle of international law, an examination of the municipal law of states in the family of nations will reveal the answer. If it is to be found to have been accepted generally as a fundamental rule of justice by most nations in their municipal law, its declaration as a rule of international law would seem to be fully justified' - see O'Connell 47 6

[176] O'Connell 47 6

[177] 1937 **PCIJ** Series A/B No 70 73. See also O'Connell 47 6, Shaw 43 84

[178] O'Connell 47 7. See also Brownlie 45 26

[179] Brownlie 45 26/27, O'Connell 47 7

The concept of equity has been referred to in several cases[180]. It should be clear, however, that equity has been used by the courts as a way of mitigating certain inequities, and not 'as a method of refashioning nature to the detriment of legal rules'[181].

1.2.3.2.4.6 CONCLUSION

The use of equitable principles have been taken up in the 1982 **LOSC**. It provides that conflicts between coastal and other states regarding the exclusive economic zone be resolved 'on the basis of equity'[182]. Furthermore, the delimitation of the zone between states with opposite or adjacent coasts is to be effected by agreement on the basis of international law in order to achieve an equitable solution[183]. A similar provision applies to the delimitation of the continental shelf[184].

Shaw points out that the status of those provisions is uncertain. He argues:

> These provisions possess flexibility, which is important, but are also very uncertain. Precisely how any particular dispute may be resolved, and the way in which that is likely to happen and the principles to be used are far from clear and an unfortunate element of unpredictability has been introduced[185].

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[180] See Brownlie 45 26, Shaw 43 84/85

[181] Shaw 43 85. The author therfore opines that its existence as a separate and distinct source of law is at best highly controversial, even though Brownlie (45 27) points out that 'on occasion equity is regarded as an equivalent of the general principles of law'

[182] Article 59 of the 1982 **LOSC**

[183] Article 74(1) of the 1982 **LOSC**

[184] Article 83(1) of the 1982 **LOSC**

[185] Shaw 43 86

1.2.3.2.5 JUDICIAL DECISIONS AND OPINIONS OF THE **INTERNATIONAL COURT OF JUSTICE**

Article 38(1)(d) of the Statute of the **ICJ** provides that 'subject to the provisions of Article 59, judicial decisions' will serve 'as subsidiary means for the determination of rules of law'[186].

Although judicial decision are thus to be utilised as a subsidiary means for the determination of rules of law rather than an actual source of law, judicial decisions can be of great importance[187]. The **ICJ** itself generally closely examines its previous decisions and in the process may determine the law[188].

That does not, however, mean that a decision of the court will invariably be accepted in later formulations of the law[189].

Apart from the **PCIJ** and **ICJ**, as well as the **Court of Justice of the European Communities**, judicial decisions also encompass international arbitral awards and the rulings of national courts[190].

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[186] See also Brownlie 45 3, Shaw 43 86

[187] While by virtue of Article 59 of the Statute of the **ICJ** the decisions of the court have no binding force except as between the parties and in respect of the case under consideration, the court has striven to follow its previous judgements and to ensure a certain measure of certainty within the process. Thus, while the doctrine of precedent does not exist in international law, states in disputes and authors quote judgements of the **PCIJ** and the **ICJ** as authoritative decisions - see Hosten *et al* 44 836, Shaw 43 86

[188] See for example the *Anglo-Norwegian Fisheries* case 133 *supra*. In that case the **ICJ** stated the criteria for the recognition of baselines from which to measure the territorial sea, which were later incorporated into the 1958 **Geneva Convention on the Territorial Sea and Contiguous Zone**. See Brownlie 45 20/21 and Shaw 43 86-88 for further examples

[189] See the *Lotus* case 142 *supra*, Article 59 and Brownlie 45 21/22, Shaw 43 87. The debate in the committee of jurists responsible for the Statute clearly indicates that Article 59 was not intended merely to express the principle of *res iudicata* but to rule out a system of binding precedent. However, as mentioned before, the court does strive to maintain judicial consistency - see Brownlie 45 21

[190] See Brownlie 45 19-21, Shaw 43 87

Tribunals set up by agreement between states for some *ad hoc* purpose may produce valuable pronouncements on specific issues[191]. Decisions by arbitral tribunals such as the **Permanent Court of Arbitration**[192] as well as various mixed-claim tribunals[193] have been significant in the development of international law[194].

The decisions of national (municipal) courts may provide evidence of the existence of a customary rule. They may also constitute evidence of the actual practice of states[195]. Similarly, decisions by the highest courts of federal states[196] have on occasion decided on disputes between members of the federal communities involved on the basis of doctrines of international law[197].

1.2.3.2.6 ACADEMIC WRITINGS

Article 38(1)(d) of the Statute of the **ICJ** provides that 'subject to the provisions of Article 59, ... the teachings of the most highly qualified publicists of the various nations' will serve 'as subsiduary means for the determination of rules of law'[198].

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[191] However, much depends on the status of the tribunal and its members, as well as the conditions under which it does its work

[192] Set up by the 1899 and 1907 **Hague Peace Conferences** - see Shaw 43 87

[193] Such as the *Iran-US Claims Tribunal* - see Brownlie 45 24, Shaw 43 87. The latter author mentions in particular the *Alabama Claims* arbitration, which 'marked the opening of a new era in the peaceful settlement of international disputes, in which increasing use was made of judicial and arbitration methods in resolving conflicts' - see Shaw 43 87

[194] Evidence of that is the existence and number of the *Reports of International Arbitral Awards* published by the **UN** since 1948

[195] Which, while not a description of the law as it has been held to apply, nevertheless affords examples of state practice and thus the material act necessary in establishing a rule of customary law - see Shaw 43 88

[196] For example the Supreme Court of the US, the Swiss Federal Court and the **Staatsgerichtshof** of the Weimar Republic - see Brownlie 45 24, Shaw 43 88

[197] See Brownlie 45 24, Shaw 43 88

[198] See also Brownlie 45 24, Shaw 43 88

As in the case of judicial decisions, the source only constitutes evidence of the law, but in certain subjects individual writers have had an important influence. In earlier centuries in particular academic writing was more important as a source of international law than state practice and judicial decisions[199]. With the rise of positivism and the consequent emphasis upon state sovereignty, treaties and custom assumed the dominant position in the exposition of the rules of the international system, and the importance of legalistic writings began to decline[200]. However, there are still writers who have a formative impact upon particular laws[201].

Even though caution must be exercised in the use of academic writings[202], the opinions of publicists are used by states in the presentation of claims, national law officials in their opinions to governments, the various international judicial and arbitral bodies in considering their decisions, and the judges of municipal courts[203].

1.2.3.2.7 HIERARCHY OF SOURCES AND *IUS COGENS*

Article 38 of the Statute of the **ICJ** is generally regarded as a complete statement of the sources of international law. 'Yet the article itself does not refer to 'sources' and, if looked at closely, cannot be regarded as a straightforward enumeration of the sources'[204].

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199 See the influence of scholars like Gentilis, Grotius, Pufendorf, Bynkershoek and Vattel who - from the 16th to the 18th centuries - determined the scope, form and content of international law - Shaw 43 88

200 Thus, textbooks were used as a method of discovering what the law was on any particular point rather than as a source of actual rules - Shaw 43 89

201 Gidel on the law of the sea, for example, with his *Droit International Public de la Mer*, as well as the works of Oppenheim and Rousseau - see Brownlie 45 24, Shaw 43 89

202 Brownlie warns that 'subjective factors enter into any assesment of juristic opinion, that individual writers reflect national and other prejudices, and, further, that some publicists see themselves to be propagating new and better views rather than providing a passive appraisal of the law' - Brownlie 45 24/25

203 Brownlie 45 25, Shaw 43 89

204 Brownlie 45 3

Article 38(1) does not purport to represent a hierarchy of sources. However, Brownlie points out that the draftsmen of the Statute of the **ICJ** intended to give an order, and in one draft the word 'successively' appeared[205]. Thus treaties and custom would be regarded as the most important sources, followed by general principles and the subsidiary sources mentioned in Article 38(1)(d)[206].

The priority of treaties to international custom may be explained by the fact that the former refers to a source of mutual obligations of the parties, and is therefore not primarily a source of rules of general application[207]. In any case, as a general rule, of the two the later in time will have priority. Treaties are usually formulated to replace or codify existing custom, while treaties in turn may themselves fall out of use and be replaced by new customary rules[208].

The 1969 **Convention on the Law of Treaties** provides that a treaty will be void 'if, at the time of its conclusion, it conflicts with a peremptory norm of general international law'[209]. That rule - *ius cogens* - will also apply in the context of customary rules so that no derogation would be permitted from such norms by way of local or special custom[210].

The important issue at stake is the identification of the mechanism by which rules of *ius cogens* may be created, because once created no derogation is permitted. The approach is twofold[211]: firstly, the establishment of the proposition as a rule of general

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205 Brownlie 45 3

206 Brownlie 45 3/4, Shaw 43 94

207 Although treaties may provide evidence of the formation of custom - see Brownlie 45 3/4

208 Shaw 43 94

209 Article 53. A peremptory norm is defined by the convention as one 'accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'

210 Shaw 43 94

211 In the light of Article 53

international law, and secondly the acceptance of that rule as a peremptory norm by the international law community of states as a whole. There is thus a stringent process involved, 'and rightly so, for the establishment of a higher level of binding rules has serious implications for the international law community. The situation to be avoided is that of foisting peremptory norms upon a political or ideological minority, for that in the long run would devalue the concept'[212].

The test would thus require universal acceptance of the proposition as a legal rule by states and recognition of it as a rule of *ius cogens* by an overwhelming majority of states, crossing ideological and political divides[213].

A treaty that is contrary to an existing rule of *ius cogens* is void *ab initio*[214], whereas an existing treaty that conflicts with an emergent rule of *ius cogens* terminates from the date of the emergence of the rule[215]. It is not void *ab initio*, nor[216] is any right, obligation or legal situation created by the treaty prior to its termination affected, provided that its maintenance is not in itself contrary to the new peremptory norm[217].

1.2.4 MODERN DEVELOPMENTS

It has been noted that in considering the various sources of international law prescribed by the Statute of the **ICJ**, there is a distinction between actual sources of rules[218] and

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[212] Shaw 43 95

[213] *Ibid*

[214] Article 53 of the 1969 **Convention on the Law of Treaties**

[215] By virtue of Article 64

[216] By virtue of Article 71

[217] Shaw 43 96

[218] Those devices capable of instituting new rules such as law-making treaties, customary law, and decisions of the **ICJ** (because they cannot be confined to the category of merely determining or elucidating the law) - Shaw 43 90

those practices and devices which afford evidence of the existence of rules[219]. However, to a certain extent each source is capable of both developing new law and identifying existing law. 'This results partly from the disorganised state of international law and partly from the terms of article 38 itself'[220].

A similar confusion between law-making, law-determining and law-evidencing can be found in the various other methods of developing law that have emerged since the Second World War. The most important of those is the question of the status of the resolutions and declarations of the General Assembly of the UN[221].

The classic position had been that certain resolutions[222] of the General Assembly are binding upon the organs and member states of the UN, while others are not legally binding and are merely recommendatory[223]. At present the situation is more complex: the General Assembly has produced a number of highly important resolutions and declarations impacting upon the direction adopted by modern international law. The way states vote in the General Assembly (and the explanations given for doing so) constitute evidence of state practice and state understanding as to the law[224]. Where the majority of states consistently vote for resolutions and declarations on a particular

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219 Such as academic writings, certain treaty-contracts and certain judicial decisions on the national as well as international level - Shaw 43 90

220 Shaw 43 90

221 Reflecting the growth in importance of the developing states and the decline of 'Eurocentrism' in international law - Shaw 43 90

222 See for example Article 17 of the Charter of the UN, Shaw 43 90

223 For example, putting forward opinions on various issues with varying degrees of majority support - Shaw 43 90

224 Shaw cites the following example: 'Where a particular country has consistently voted in favour of ... the abolition of apartheid it could not afterwards deny the existence of a usage condemning racial discrimination and it may even be that that usage is for that state converted into a binding custom' - Shaw 43 91

issue, that amounts to state practice and a binding rule may emerge[225]. Not only can such declarations thus be regarded as examples of state practice leading to a binding rule of customary law[226], but they can be understood as authoritative interpretations by the General Assembly of the various principles of the UN Charter[227].

Similarly, the **International Law Commission (ILC)**[228] is involved in at least two of the major sources of law. In the first place, its drafts form the bases of international treaties[229] which bind states parties (and thus provide evidence of state practice which can lead to new rules of customary law). In the second place, the **ILC** is composed of eminently qualified scholars whose reports and studies may be used as a method of determining what the law actually is (in much the same way as academic writings)[230].

Other sources analogous to the writings of publicists (and at least as authoritative) are certain **UN organs**[231], specialised agencies[232], and independent bodies[233].

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225 See for example the 1960 'Declaration on the Granting of Independence to Colonial Countries and Peoples' (adopted with no opposition and only 9 abstentions) following a series of resolutions in general and specific terms attacking colonialism and calling for the self-determination of the remaining colonies. That declaration has, 'it would seem, marked the transmutation of the concept of self-determination from a political and moral principle to a legal right and consequent obligation, particularly taken in conjunction with the 1970 Declaration on Principles of International Law' - Shaw 43 91

226 See the 1963 'Declaration on the Legal Principles Governing Activities of States in the Exploration and Use of Outer Space'

227 Shaw 43 91

228 For its formation, see 2.5.4 *infra*

229 For example its drafts for the 1958 **Geneva Conference on the Law of the Sea** - see 2.6.1 *infra*

230 Brownlie 45 25, Shaw 43 93

231 **United Nations Commission on International Trade Law (UNCITRAL), United Nations Conference on Trade and Development (UNCTAD)**

232 **International Labour Organization (ILO), UNESCO**

233 The **International Law Association (ILA), Institut de Droit International**, and the **Harvard Research Drafts** - see Brownlie 45 25, Shaw 43 93

1.3 THE INTERNATIONAL LAW OF THE SEA

1.3.1 INTRODUCTION

International law has long faced the question of whether the community of states which enjoyed the benefits of the freedoms of the seas was confined to coastal states - to the exclusion of land-locked states - or whether the community embraced the latter category. Should the latter view be accepted, then it is possible to view the refusal by other states to accord the necessary transit rights across their territory as an abuse of rights. The right of territorial sovereignty is thus, in that view, asserted in an unreasonable way so as to deny the legitimate rights of a land-locked state[234].

Some writers had argued for a right of access on the basis of natural law[235], the principle of the freedoms of the seas[236], and the notion of a 'servitude of necessity'. But, in practice, it was left for specific treaties to confer such rights of access. Those consisted either of bilateral treaties[237] or of multilateral treaties such as the treaties providing for a special international regime for rivers like the Rhine or the Danube, or the 1921 **Barcelona Convention** (which was not confined to waterways), or the 1923 **Geneva Convention on the Regime of Maritime Ports**[238]. The question whether, apart from a treaty, there existed any general, customary right of access would probably have to be answered in the negative[239].

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[234] Bowett 104 50

[235] See Bowett 104 50 n2

[236] See Bowett 104 50 n3

[237] See Bowett 104 50 n5

[238] See Bowett 104 50. For the conventions see 2.5.4 *infra*

[239] Bowett 104 50

1.3.2 DEFINITIONS

In this study the following definitions used will refer to the terminology of the international law of the sea as used at **UNCLOS III**. The source of the definitions will thus be the 1982 **LOSC** (even though not in force yet).

Area means 'the sea-bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction'[240].

Activities in the area means 'all activities of exploration for, and exploitation of, the resources of the Area'[241].

Authority means 'the International Sea-Bed Authority'[242].

Land-locked state means 'a State which has no sea-coast'[243].

Means of transport means '(i) railway rolling stock, sea, lake and river craft and road vehicles; (ii) where local conditions so require, porters and pack animals'[244].

Ports are the 'outermost permanent harbour works which form an integral part of the harbour system' and are regarded as 'forming part of the coast. Off-shore installations and artificial islands shall not be considered as permanent harbour works'[245].

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[240] Article 1(1) of the 1982 **LOSC**

[241] Article 1(3)

[242] Article 1(2)

[243] Article 124(1)(a)

[244] Article 124(1)(d)

[245] Article 11

Resources means '(a) ... all solid, liquid or gaseous mineral resources *in situ* in the Area or beneath the sea-bed, including polymetallic nodules; (b) resources, when recovered from the Area, are referred to as "minerals"'[246].

Traffic in transit means 'transit of persons, baggage, goods and means of transport across the territory of one or more transit States, when the passage across such territory, with or without trans-shipment, warehousing, breaking bulk or change in the mode of transport, is only a portion of a complete journey which begins or terminates within the territory of the land-locked State'[247].

Transit state means 'a State, with or without a sea-coast, situated between a land-locked State and the sea, through whose territory traffic in transit passes'[248].

1.3.3 LAND-LOCKED STATES

The problems facing land-locked states (and in particular the question of access to the sea) proved to be of such concern that, prior to the opening of the 1958 **Geneva Conference on the Law of the Sea**, a special meeting of land-locked states was convened in Geneva, and the conference was presented with a set of principles agreed upon at the preliminary meeting, which covered the right of access to the sea for land-locked states, the right to fly a flag on their vessels, rights of navigation, the regime to be applied in ports, rights of free transit, rights of states of transit, and the preservation of existing agreements[249]. The cornerstone, however, was the first principle, which stated that the

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[246] Article 133

[247] Article 124(1)(c)

[248] Article 124(1)(b)

[249] Delegations taking part were Afghanistan, Austria, Bolivia, Byelorussia, Czechoslovakia, the Holy See, Laos, Luxembourg, Nepal, San Marino and Switzerland - see Bowett 104 51

right of each land-locked state of free access to the sea derived from the fundamental principle of the freedom of the high seas[250].

That principle was not endorsed by the 1958 **Geneva Conventions**. The **Convention on the High Seas and Territorial Waters** recognised that the high seas were open to all nations, including non-coastal states[251], and conceded their right to the use of a maritime flag[252]. However, it also clearly provided that the rights of land-locked states regarding 'all matters relating to freedom of transit and equal treatment in ports' should be settled 'by mutual agreement' with transit states[253]. Land-locked states were in that respect thus still no better off than before.

1.3.4 CONCLUSION

Although the 1958 **Geneva Conference on the Law of the Sea** and its conventions brought about recognition of the moral claims to access to the sea for land-locked states, their legal rights remained subject to specific, negotiated agreements[254]. That position was left virtually unchanged by the 1982 **LOSC**[255]. The conflict of interests which lay behind the refusal to give general recognition to their rights was fundamentally of an economic nature. It was therefore not surprising that land-locked states have shifted their argument to the economic sphere and after 1960 presented the denial of their 'rights' as a restrictive and unreasonable attitude in an era pledged to promote economic development and to reduce artificial barriers to trade. The outcome

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[250] See Bowett 104 51

[251] Article 2 of the set of principles

[252] Article 4 of the convention

[253] Article 3(2). For a full discussion, see 2.6.2.1 *infra*

[254] Even though the **LOSC** has stronger and more detailed provisions on - for example - transit trade for land-locked states - see Harris 18 321

[255] See 3.3 *infra*

of that had been the resolution[256] towards the **Convention on Transit Trade of Land-Locked States** of 8 July 1965[257]. That convention included a set of principles similar to those proposed at the preliminary 1958 conference, as well as a set of Articles on bilateral negotiation. However, most of the states that signed the convention were land-locked states[258]. Thus, the advances for land-locked states were minimal and presented virtually no step forward from 1921, because it represented no substantial reconciliation of conflicting interests.

1.4 CONCLUSION

The problems facing land-locked states had been elaborated upon before[259]. The 1982 **LOSC** goes a long way towards addressing the plight of those states. Indeed, many provisions on the seabed area 'rightly "discriminate" positively in favour of land-locked States'[260]. The recognition that the seabed and its resources belong to mankind - the 'common heritage of mankind'[261] - has brought about a new dimension in the international law of the sea.

However, it has also been pointed out that the 1958 **Geneva Conventions** and potentially the 1982 **LOSC** have brought about certain specific limitations to the generally accepted rights and freedoms of land-locked states[262].

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[256] Under the auspices of **UNCTAD**

[257] See Bowett 104 52

[258] *Ibid*

[259] See 1.1 and 1.3 *supra*

[260] Rembe 3 75

[261] See 4.3 *infra*

[262] See 1.3.4 *supra*

Even so, and even though the **LOSC** is not in force yet, it is probably the most significant development as far as land-locked states (but also the law of the sea in general) is concerned, for several reasons.

In the first place, the **LOSC** is the most comprehensive international treaty to date. It is the result of more than nine years of work by the representatives of virtually all states in the world.

Secondly, it was the first international treaty where the developing states played a significant role in international law-making. Ever since the Second World War and the post-colonial era there had been growing dissatisfaction in the so-called 'Third World grouping'[263] about its role in international affairs. Criticism about 'Eurocentrism' in international law is widespread[264] and to a degree probably well-founded. Anand sums it up thus:

> New law is needed for the expanded international society in an entirely new age. Surpressed and neglected for a long time, the Asian and African states, along with other equally ignored Latin American states, have begun to play an active and assertive role in the development and formulation of a new maritime law[265].

Lastly, it is inevitable that the principles agreed upon at the outset of **UNCLOS III**[266] will play an important role in future treaty-making. Not only was participation at the conference almost universal[267] but right from the start it was decided that a 'gentleman's agreement' would be adopted whereby decisions should be taken by

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[263] In this study the term 'developing states' will be used in preference

[264] See Anand R P *Origin and Development of the Law of the Sea* The Hague: Martinus Nijhoff Publishers 1983 3-6, Rembe 3 5-13

[265] Anand 264 6

[266] See 3.3.1 *infra*

[267] Anand 264 209

consensus. Only when no consensus on any issue could be reached would a two-thirds majority vote be utilised[268].

The conclusion of the 1982 **LOSC** could thus have been regarded as a truimph for Public International Law in general, and 'law-making' treaties in particular, had all participants signed the treaty and at least 60 ratified it. As it is, it is a clear indiciation of how opposition by one or two major powers[269] can derail a long process of international law-making (even if it can be argued that some of the provisions of the **LOSC** may be regarded as stating customary international law).

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[268] The agreement read as follows: 'Bearing in mind the fact that the problems of ocean space are closely inter-related and need to be examined as a whole and the desirability of adopting a Convention on the Law of the Sea which will secure the widest possible acceptance, the Conference should make every effort to reach an agreement on substantive matters by way of consensus and there should be no voting on such matters until all efforts at consensus have been exhausted' - UN Doc. A/CONF. 62/30, Rev. 1

[269] It was the US whih finally requested a vote at the Eleventh Session, despite the 'gentleman's agreement'

CHAPTER TWO: A BRIEF SURVEY OF THE HISTORY OF THE INTERNATIONAL LAW OF THE SEA

2.1 INTRODUCTION

It is often believed that the law of the sea is of recent origin[1] and the product of the European or Western Christian civilization[2]. However, long before the 17th century writings on the law of the sea by scholars like Hugo de Groot (Grotius) and John Selden many forms of interaction took place in the oceans in the struggle for the control thereof[3].

O'Connell[4] points out that the history of the law of the sea has been dominated by one central theme: the competition between the exercise of governmental authority over the sea and the concept of freedom of the seas[5]. The tension between these has fluctuated through the centuries, and has reflected the political, strategic, and economic circumstances of each particular age[6]. Whenever one or two great commercial powers have been dominant or have achieved parity of power, the emphasis has been upon the freedom of navigation and the immunity of shipping from local control. At such times the seas have been viewed more as strategic than economic areas of competition. When, on the other hand, great powers have been in decline or have been unable to impose their wills upon smaller states, or when an equilibrium of power has been

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1 See *inter alia* Nordquist M H and Park C *Reports of the United States Delegation to the Third United Nations Conference on the Law of the Sea* Honolulu: Law of the Sea Institute, University of Hawaii 1983, Oda S *The Law of the Sea in Our Time - 1* Leyden: A. W. Sijthoff 1977 and Platzöder R *Third United Nations Conference on the Law of the Sea* Hamburg: Institute of International Affairs 1975 for some of the statements during the deliberations of UNCLOS III

2 Anand R P *Origin and Development of the Law of the Sea* The Hague: Martinus Nijhoff Publishers 1983 1

3 See Anand 2 12-19

4 O'Connell D P *The International Law of the Sea* Vol 1 Oxford: Clarendon Press 1982

5 O'Connell 4 1

6 Dupuy R-J *The Law of the Sea* Dobbs Ferry, N.Y.: Oceana Publications, Inc. 1974 3, O'Connell 4 1

attained between a multiplicity of states, the emphasis has been upon the protection and preservation of maritime resources and consequently upon the assertion of local authority over the sea[7].

For the purpose of this historical survey it is deemed unnecessary to delve deeply into the events of the centuries before Grotius: international law as a 'modern' concept only really gained recognition at that time. Before the 17th century the seas were generally regarded as the 'common heritage of mankind' (although not expressed in those terms) and thus free. Since then there had been two basic (but opposing) principles in the attempt to develop a sea regime: on the one hand coastal states extended their domain by appropriating ever widening maritime zones, while on the other hand a desire to establish the marine environment as part of the public international domain for the equal benefit of all provoked the demand for collective management based on the principle of the 'common heritage of mankind'.

2.2 *MARE LIBERUM* v *MARE CLAUSUM*

2.2.1 INTRODUCTION

The main theme running through the early history of the law of the sea is seen by many writers[8] as Grotius's idea of the freedom of the seas (*mare liberum*) as opposed to Selden's idea that the sea is capable of private dominion (*mare clausum*).

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7 That, for example, was the case in the first half of the 17th century when the Habsburg Empire was in decline and new local forces (notably England and Sweden) were asserting themselves on the high seas. At that time there was much talk about marine resources being exhaustible and in need of conservation - O'Connell 4 1

8 Dupuy 6 14, O'Connell 4 1, Shaw M N *International Law* 2nd ed Cambridge: Grotius Publications Limited 1986 23, and see also 2.1 n1 *supra*

2.2.2 *MARE LIBERUM*

Soni[9] - referring to a thesis by Professor Frans de Pauw before the Law Faculty of the University of Brussels in 1961[10] - sums up the development of Grotius's ideas regarding the law of the sea as follows:

1604: The sea is free. That is an obligatory rule of the divine and immutable law of nature.

1625: The law of the sea is governed by the human law of nations. Inland seas, bays and straits are capable of ownership. In other cases the permissive law of nature applies: there the sea is a thing common to all (*res communis*).

1637: Every country can take possession of its coastal waters. The question is simply how far territorial waters extend[11].

Although the doctrine of the freedom of the seas has been put forward from time to time long before the 17th century[12] it remains closely linked with Grotius, not so much as the author of *De jure belli ac pacis*, but as the the advocate of the **Netherlands United East-Indian Company** (**VOIC**) in defence of its rights with regard to the Netherlands overseas trade. The first occasion on which Grotius was able to develop his ideas was in response to a request by the Amsterdam Chamber of the **VOIC** in 1604 to defend the capture - on 25 February 1603 in the Strait of Malacca - of a Portuguese vessel the *Santa Catharina*, which carried a valuable cargo. That defence was intended to refute the criticism which had been voiced in Holland itself against the judgement of the

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9 Soni R *Control of Marine Pollution in International Law* unpublished LL D thesis Pretoria: University of South Africa 1980

10 Soni 9 36

11 Soni 9 36. See also Dupuy 6 50

12 See in particular Anand 2 24-26 where he recounts the experiences of Marco Polo in 1292 and the efforts of the Ming Dynasty in in 12th century to increase maritime trade with Southeast Asia, Ceylon, India and West Asia

Admiralty Court of Amsterdam of 9 September 1604 whereby a vessel and its cargo were declared good and lawful prize. Grotius drafted his defence about 1605. That work - *De jure praedae* - was not published at the time and was only rediscovered in 1864 and printed in 1868[13].

However, Anand argues that Grotius merely codified what was already practice in the East:

> His genius lies in pointing at the existence of that practice, as well as in systematically presenting it as a doctrine relying on the ever-respected Roman law, and recommending it to the Europeans as the most sensible practice[14].

A few years later Grotius was appointed as one of the delegates to the **Anglo-Dutch Colonial Conference** of 1613 (London) and 1615 (The Hague). The conference was convened to seek a settlement of the disputes between the English and the Dutch with their respective East-Indian trading companies. At that time Grotius's task of defending the trading interests of his country proved to be more demanding than before. That was because England objected to the Dutch pretension to monopolise, and thus to exclude the British East-India Company from, the lucrative trade of buying spices from the indigenous rulers of the Moluccas and the islands of Banda. Verzijl opines therefore that '*Mare liberum* was originally written against the pretensions of the Portuguese, was published against Spain, and has conquered the world against British claims'[15].

According to Verzijl there is an inconsistency between Grotius's argumentation of 1613/1615 and that of 1606/1609. He also offers the following:

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[13] Verzijl J H W *International Law in Historical Perspective* Part IV Leyden: A.W. Sijthoff 1970 32. Despite minor alteration the 12th chapter of that work appeared to be identical to a much shorter treatise of Grotius's entitled *Mare liberum*

[14] Anand 2 86

[15] Verzijl 13 32/33. See also Anand 2 96/97

It must be remarked from the outset that Grotius's arguments in support of the freedom of the seas were not original, since he derived most of them from Spanish authors such as De Vitoria and Suarez, whom he quotes repeatedly[16].

As regards the principle of *mare liberum* in its narrow confines, Grotius founded it essentially on a supposed law of nature. The theoretical foundation of the freedom of the seas - as developed by him in 1605 - was mainly two-fold. According to him, (a) the nature of the maritime domain, its vastness, its lack of boundaries, its fluidity and mobility, and its constant exposure to storms made its acquisition by means of occupation physically impossible, and (b) the general interest of mankind was in opposition to the appropriation of parts of the high seas by individual states for egoistic national purposes as being unreasonable[17].

2.2.3 *MARE CLAUSUM*

Absolutely opposed to the doctrine of the freedom of the seas was the doctrine advanced by the advocates[18] of exclusive rights of individual states to specific parts of the high seas. In 1635 John Selden published his well-known work *Mare clausum*. Unlike the Grotian theory[19] the vindication of England's sovereign rights over large stretches of the high seas by Selden and others consisted essentially of a linking together[20] of historical arguments, drawn from practice and legislation. However, the attitude of England has also been inconsistent and only gradually evolved towards the freedom principle.

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16 Verzijl 13 33

17 The first ground was widely recognised as obviously lacking in sufficient foundation and has accordingly long since been abandoned. The second ground remained the main argument in favour of the freedom of the seas, in particular in relation to overseas commerce - see Verzijl 13 34, and also Dupuy 6 14/15

18 Such as De Freitas, Gentilis and Selden - see Churchill R R and Lowe A V *The Law of the Sea* 2nd ed Manchester: Manchester University Press 1988 3, Verzijl 13 36

19 Which was mainly based on abstract reasoning from a postulated law of nature

20 Or 'concatenation' as Verzijl calls it - see Verzijl 13 36

Selden relied on historical data and state practice at that time in Europe to try and prove that the sea was not common to all and had in fact been appropriated many times[21]. Even though he conceded that humanitarian grounds would not deny freedom of all harmless navigation and commerce, he maintained that it was not contrary to the law of nature and the law of nations to forbid free navigation and commerce[22].

Selden did agree with Grotius in denying the sovereignty claimed by Portugal and Spain in the seas: not because it was opposed to reason and nature, but because it was not founded on legitimate title, and those states did not have the necessary naval forces to assert and maintain it. He also denied that the sea was inexhaustible from profligate use.

Verzijl indicates that certain English claims would seem to date back as far as the second half of the 10th century, to the days of King Edgard, but in any case to an ordinance of King John of 1201, the authentic text of which was printed in 1699 by the Keeper of the Records of the *Black Book of the Admiralty*[23]. The text, already made known to Selden in 1635, ordered that the lieutenant or admiral of the king could arrest the crew and confiscate the cargo of any ship that refused to strike and lower its sails at the command of the king's lieutenant or admiral[24]. Those claims related initially to the so-called narrow seas[25] but gradually spread to large portions of the open sea, especially during the reign of the Stuarts. The obligation of rendering a maritime salute[26] was laid down in a number of provisions in Anglo-Netherlands peace and other

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21 However, Anand argues that Selden 'altogether omitted the various countries in the East Indies and India which never claimed in antiquity and did not claim then any such sovereignty over the open sea' - Anand 2 105

22 Anand 2 105/106. Dupuy (6 11) is of the opinion that it was for the protection of British fishermen at a time when England was not yet a great maritime power that Selden defended the thesis of the closed seas

23 Verzijl 13 9

24 See Verzijl 13 9/10

25 The Bristol, St Patrick and St Georges Channels, and the Irish Sea

26 Refused to Admiral Blake by the Dutch Admiral Tromp in the Strait of Dover in 1651, which then resulted in the First Dutch War - see O'Connell 4 8

treaties, but without any accompanying recognition of England's sovereignty at sea[27]. The 1654 **Treaty of Westminster** declared that the honouring of the flag would continue in such manner as was observed at any time under any previous regime. That was regarded by England as recognition of its claims to sovereignty, but by the Dutch as 'a voluntary mark of esteem'[28]. The claim reappeared in a general version as late as 1805 in the *British Admiralty Regulations*[29].

In the days of Queen Elizabeth I and later of King Charles I those rights were consistently asserted, and England waged four naval wars with the Republic of the United Netherlands to enforce them. However, what England claimed for itself in respect of the oceans it denied to others (in particular Spain, Portugal and Denmark)[30].

Apart from England, other countries also claimed sovereignty of parts of the seas. Particular examples are those of Genoa, Pisa and Monaco. The claims of Genoa with regard to the Liguarian sea dated back to 1143 when certain treaties prohibited the vessels of Montpellier to sail past Genoa, even on the open sea[31].

Pisa also aspired to a position of *imperium* in the Tyrrhenian sea. A remainder of those old pretensions subsisting until the latter part of the 18th century was the so-called *dazio* or *diritto di Villafranca* levied by the Kingdom of Sardinia on foreign vessels passing through 'i mari di Nizza e Villafranca'[32].

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27 Verzijl 13 10

28 O'Connell 4 8

29 Verzijl 13 10. However, in this respect O'Connell cites the *Naval Instructions* of 1806 - see O'Connell 4 9

30 Anand 2 75, Verzijl 13 11

31 Colombos C J *The International Law of the Sea* 5th ed London: Longmans 1962 46, Dupuy 6 50, Verzijl 13 11/12

32 Verzijl 13 12/13

The Prince of Monaco levied a tax of 2% on the cargoes conveyed by foreign vessels passing along his coast as compensation for his protection against pirates, on penalty of confiscation. The tax was the responsibility of a private tax collector and had the effect that passing vessels rather sailed out into the open sea where they ran even greater risks from pirates[33].

The best-known international claims of that nature were, however, those of Venice to sovereignty over the Adriatic. They were recognised by Pope Alexander III in 1177 in the **Peace Treaty of Venice**[34], and were also enforced since 1269 by the levying of a toll on all vessels sailing in the Adriatic to the north of a line of Ravenna to Fiume[35].

Legal development in that domain depended (as in the related field of the law of prize) upon the relative positions of strength of the principal maritime powers. Verzijl opines that theories condemning claims as contrary to a supposed 'natural law' would in those days have been met with 'a complete lack of understanding'[36].

Denmark had in earlier times advanced (and during the 15th century to a certain extent achieved recognition of) similar claims to exclusive jurisdiction over the seas between Norway (then under Denmark's sovereignty), Greenland and Iceland, on the one hand, and the Faeroer, on the other. The main object was to monopolise the catching of herrings and whales[37].

During the same period Portugal and Spain (following their voyages of discovery to and around Africa, the East Indies and the Americas) advanced claims to exclusive rights

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[33] Verzijl 13 13

[34] Dupuy 1 50, Verzijl 13 13

[35] Verzijl 13 13

[36] Verzijl 13 14

[37] Those claims, however, provoked clashes both within England and the Netherlands. In connection with its sovereignty over the Sound and the Belts, Denmark had also at the time claimed sovereignty over the whole of the Baltic - see Verzijl 13 14/15

to navigation to, and trading with, the newly discovered continents. Those two (then) superpowers were supported in their claims by a series of **Papal Bulls**. One of those claims led to a dispute over the Canary Islands. The dispute over the Canaries was still continuing in 1435 when the Bishop of Burgos at the Church Council of Basel formulated the claims of King Juan II of Castile to the islands as a defence against the claims advanced by the Portuguese king[38].

Bulls of subsequent Popes granted to the kings of Portugal and Spain the exclusive right to explore and occupy African territories, and reserved for their nationals navigation on the adjacent parts of the Atlantic Ocean[39].

The rights so derived by the kings of Portugal and Spain implied a navigational monopoly: in the Atlantic to the south of Morocco and in the Indian Ocean for Portugal, and in the Caribbean and the Pacific Ocean for Spain. O'Connell explains that the Pope's role arose because of the question raised in canon law of the jurisdiction of the religious orders which sent out missions in the wake of the discovery of new land. 'It was not intended as a reservation of the seas to Spain and Portugal, but it was later thought that it had that effect when both countries forbade trade within their respective areas'[40].

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38 Verzijl 13 15. See also Anand 2 43, Colombos 31 46/47, Shaw 8 315

39 Since the boundary line in the Atlantic Ocean, drawn in the Bulls, left the delimitation of the eastern hemisphere undecided, Pope Alexander VI (by a further Bull during 1493) supplemented the demarcation by fixing another line in the western part of the Indian Ocean corresponding with that through the Atlantic. However, both those demarcation lines were based on the sketchy geographical knowledge available at the time. Also, the king of Portugal was dissatisfied with the last line fixed. A request for its modification addressed to the Roman *Curia* was unsuccessful, and the two powers concerned - on their own authority - shifted that line far towards the west, partly across the South American mainland - at 370 sea miles west of the Cabo Verde islands - by the Treaty of Tordessilas of 7 June 1494 - Anand 2 44, Dupuy 6 50, Koh T T B 'The Origins of the 1982 Convention on the Law of the Sea' 1987 *Malaya Law Review* Vol 29 1, O'Connell 4 2, Verzijl 13 18

40 O'Connell 4 2. See also Anand 2 60-67 for the Portuguese attempts to halt freedom of navigation and trade

Those claims were contested not only by other maritime powers (in particular England in 1580 and the United Netherlands in 1609), but also by the Spanish theologian and jurist Fransisco de Vitoria[41].

The contribution of the Republic of the United Netherlands to the confusion of contradictory claims was firstly a basic vindication against all rivals of the freedom of the seas for navigation and trading. Secondly, it asserted a presumption that it was entitled to exclude foreign merchants and companies from its own trading preserve in the East Indies on the special ground that it had secured for itself a trade monopoly in respect of spices in those areas through contracts with local rulers[42].

France also played an important role in those developments. Colonial rivalry sometimes led states to adopt compromise solutions, such as those laid down in the Franco-Spanish **Treaty of Crespy-en-Laonnais** of 18 September 1544 by which Spain gave France permission to trade with its West Indian colonies, while France in return undertook to abstain from all voyages of discovery and conquest overseas[43]. After war had broken out between the two states in 1552, a new agreement was entered into to the effect of placing a ban on future hostilities on the near side of certain agreed lines running along the first meridian and the tropic of cancer. On the other hand, acts of violence which might be committed beyond those lines were not to be regarded as infringements of the agreement, but would only entail the legal consequences that all existing treaties would cease to operate there[44].

The doctrine of the sovereignty of the seas, as a general concept, can be traced back to the publication of Bodin's treatise on sovereignty in 1582, when 'he wrongly ascribed to Baldus the idea that governmental power was exercisable over shipping within sixty

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41 Verzijl 13 19

42 Anand 2 82-90, Verzijl 13 19

43 Verzijl 13 19

44 Verzijl 13 19/20

miles from the coast'[45]. That appeared at the time to vindicate a vague idea that the Italian maritime cities had traditionally exercised such a jurisdiction. It propagated the notion at a time when governments were susceptible (and the political circumstances favourable) to it. By 1600, the idea of sovereignty had itself gained a hold on political and legal theory, and the formulation of the sovereignty of the seas during the following two decades was 'a plausible corollary to it. To that extent, the doctrine can be regarded as a Renaissance artefact'[46].

During the 17th century overseas trade was, as a rule, in the hands of chartered companies, trading under a concession granted by the government concerned and vested with derivative public powers. It was not only the group of great colonial powers that engaged in trading through chartered companies: other states such as Sweden also did so[47].

O'Connell observes that the two notable claims to sovereignty of the seas - out of which the controversy leading to the modern law of the sea arose - were those of England and Sweden[48]. The latter's claim to sovereignty over the Baltic, which was a feature of the expansionist policy of Gustaphus Adolphus, was really a claim to a closed sea. That was intended to prohibit non-Baltic Powers from commercial activity there except upon payment of tolls[49].

James I introduced to England the Scottish notion of 'land-kenning', according to which the king of Scotland was deemed to possess whatever lay within the range of vision of

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45 O'Connell 4 2. See also Koh 39 3

46 O'Connell 4 3

47 Verzijl 13 21

48 O'Connell 4 3

49 That claim was thus different in character as well as in geographical scope from the claims of England - see O'Connell 4 3

a ship in sight of the coast. It is likely to have influenced James I's policy of claiming sovereignty over the British seas[50].

The academic exposition was set out by Craig, a Scottish lawyer who (as early as the reign of James VI of Scotland) contended that property in the sea belonged to those to whom the nearest continent belonged. Craig was followed by another Scottish jurist, Welwood, who in 1613 defended the theory of separate ownership of the sea[51].

John Selden's *Mare clausum*, in which he claimed to find evidence for the Crown's authority at sea, was not confined to Admiralty matters in the more modern sense of the term, but 'extended to what contemporaries would have regarded as proprietorial matters'[52].

Whereas Grotius based his case for the freedom of the seas on nature, Selden based his on divine law: God's intention that the earth should be divided[53] had been executed with respect to the sea as well as the land by means of a social contract[54]. Private dominion of the sea, Selden concluded, was thus permitted by the divine order and had been achieved by human consent[55].

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50 That claim, with its accompanying diplomatic entanglements and academic debates, stimulated contemporary English jurists to engage in extensive researches in order to establish the authenticity and antiquity of the Crown's pretensions. The latter exercise was regarded as indispensable, because mere assertion, or even the display of power, was regarded as insufficient in itself to create rights which others were morally obliged to recognise. 'It was thought necessary to postulate a primordial *divisio rerum* ... this *divisio rerum* was universally regarded as affecting the seas around nations as much as their land' - O'Connell 4 3/4. See also Koh 39 3

51 Colombos 31 58, O'Connell 4 4

52 O'Connell 4 5

53 Selden dated the division of the earth to Noah, who represented the person of Adam. The injunction to replenish the earth was one addressed to Noah's sons, so that that 'Divine Act of Donation' made them 'Joint Lords of the Whole World' - see O'Connell 4 11

54 '[A]s witness the passages from scripture referring to the bounds of the sea' - O'Connell 4 11

55 O'Connell 4 11

In the early 17th century it was generally accepted that exclusive property in the sea could result from the domination of the sea by ships. The naval wars of the middle of the century, however, exposed 'the essentially ephemeral character of any such domination'[56].

2.2.4 CONCLUSION

Verzijl points out that there was a lack of consistency in Grotius's earlier and later expositions of the law of nations regarding the freedom of the sea and overseas commerce[57]. The issues on which Grotius had shown himself inconsistent in his successive writings were, according to Verzijl:

1 His attitude towards the possibility of the extension of state sovereignty over an adjacent coastal belt;
2 his change of opinion as to the admissibility of trade monopolies with regard to overseas possessions; and
3 his downgrading of the *mare liberum* principle from an absolute precept of the primary and immutable law of nature and of nations, from which no deviation is possible, to a secondary rule only, susceptible of variations[58].

It was previously noted that the doctrine advanced by the advocates of exclusive rights of individual states to specific parts of the high seas was mainly based on abstract reasoning from a postulated law of nature and linking together historical arguments, drawn from practice and legislation (especially in England), but that the attitude of England was inconsistent and only gradually evolved towards the freedom principle[59].

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56 O'Connell 4 13

57 Verzijl 13 34

58 *Ibid*

59 See 2.2.3 *supra*, and also Verzijl 13 36, Koh 39 2

The original inferences from the principles of the freedom of the sea (especially the freedom of overseas navigation and trade) were as follows:

1 No state can legally acquire territorial sovereignty over parts of the open sea by occupation or otherwise;
2 no state is entitled to exercise exclusive jurisdiction over foreign vessels in the high seas, either generally or in particular areas;
3 any claim of a particular state that foreign vessels should salute its warships as a token of recognition of its sovereignty over specific areas of the high seas is without legal foundation;
4 no state is entitled to levy a tribute from passing foreign vessels on the high seas;
5 no state has the right to hinder foreign shipping from sailing to overseas countries and trading there, on the pretext of exclusive authority over specific sea areas;
6 no state can arrogate to itself exclusive fishing rights in respect of any part of the high seas;
7 neither can any of the asserted exclusive rights listed above be obtained by acquisitive prescription or otherwise[60].

Some of the legal inferences from the principle of the freedom of the high seas listed above have through time lost their practical importance because the claims on which they were based became obsolete. For example, as far as the salute of warships is concerned, no maritime power any longer lays claim to a salute for its warships passing on the high sea by vessels flying the flag of another power as a recognition of its sovereignty over the sea. Furthermore, few traces remain of the old pretensions of colonial powers to prohibit foreign shipping from sailing to and trading with their overseas possessions. That trade limitation has gradually faded out. One of the stages of that development was documented by Great Britain's grant of freedom of colonial

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[60] Verzijl 13 37

trade to Russia in virtue of a most-favoured-nation clause in the *British Navigation Act*[61].

Apart from certain claims of a few smaller states[62] no claims to large areas of the high seas, as once advanced by England, Venice, Genoa and Pisa, Denmark, Sweden, Portugal and Spain[63], were made in modern times.

In the doctrine that became established in 1700, the power to rule (*imperium*) and the ownership of the sea (*dominium*) merged into a single criterion of jurisdiction, which dominated legal thought for the following 250 years. According to that latter view, *imperium* and *dominium* could exist only in conjunction, so that the power to rule and to legislate (the power of *imperium*) could extent only so far as the ruler and legislator possessed *dominium* (the rights of an owner). It followed from that that foreign ships were beyond the authority of the coastal state when outside the boundaries of its territory. The sea, therefore, would be either totally *mare liberum* or totally *mare clausum*, and the intermediate situations where the coastal state would have mere 'jurisdiction' would be inconceivable[64].

During the 19th century, when changing views on the nature of the state and of government made it possible to achieve that intermediate situation, authors exploited the distinction which they perceived in Grotius's arguments between *imperium* and *dominium*. Even at present, the relevance of Grotius's distinction to the question of the territorial sea is taken for granted, 'although insufficiently explained'[65]. If in fact

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61 Verzijl 13 37

62 Such as Indonesia, to exclusive sovereignty over the sea areas inside its archipelago, and attempts by some states to extend their normal maritime domain over adjacent sea areas by such devices as the creating of artificial bays, such as the Peter the Great Bay by the USSR, the annexing of the 'epicontinental waters' by Chili, Ecuador and Peru, by their Maritime Zone Declaration of Santiago of 1952, or the claiming of exclusive fishery zones, for example by Iceland - see Verzijl 13 37

63 Anand 2 60-67, Colombos 31 46, Verzijl 13 37/38

64 O'Connell 4 15

65 *Ibid*

Grotius did promote the theory that the coastal state could exercise *imperium* over foreigners at sea, without necessarily importing *dominium* in the coastal sovereign, his text would support the projection back into the 17th century of the 'jurisdictional', or 'police' view of the territorial sea. 'But it is difficult to agree with this interpretation of its texts'[66].

O'Connell argues that the key to an understanding of Grotius's texts is the distinction which he made between personal and territorial jurisdiction[67]. The former did not depend on property but on the relationship of ruler and subject. The latter was localised, and thus intrinsically connected with possession of the terrain. While Grotius did not explicitly state that outside his territorial boundaries no prince might exercise *imperium* except over his own subjects, that is what he may have believed, because he made the point that revenues levied on fishing were personal and not territorial imposition, and hence limited to subjects. (That had nothing to do with the areas of sea included within the national boundary, such as waters *intra fauces terrae*, but was concerned with the high seas.) It seems, then, that Grotius would limit the exercise of *imperium* over foreign ships to waters over which the sovereign possessed *dominium*[68].

O'Connell sums up that period as follows:

> In the seventeenth century, elaborate philosophical constructions were attempted in order to explain or justify the freedom of the seas or the extent of coastal state jurisdiction, but it was the facts of power and the pragmatic needs of commerce and strategy that eventually endowed the rules of the law of the sea with whatever stability they came to possess[69].

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[66] O'Connell 4 15

[67] O'Connell 4 16

[68] O'Connell 4 16/17

[69] O'Connell 4 29

2.3 FREEDOM OF FISHING

The common theme of debate during the 17th century was the understanding that claims made to maritime jurisdiction should be intellectually as well as militarily defensible. 'The starting point of all the advocacy and criticisms of these claims was the mode of acquisition of property *ex lege naturae et gentium*, and the analysis tended to be compounded of various elements, theological and philosophical, projected through the institutions of Roman Law'[70].

The struggle for the freedom of the seas came to the fore again as the issue of trading monopolies with overseas colonial possessions received a new momentum in the 20s and early 30s of the 18th century as a result of the establishment of a number of national overseas trading companies, such as the **General Imperial Company of Ostend** by Emperor Charles VI (1722) and the **Danish Company of Altona**[71].

One of the main interests involved in the fight for the freedom of the seas was that of fishing. Agreements and controversies concerning the freedom of fishing date back to the 13th century. Probably the oldest reference to the freedom of fishing in Dutch history goes back to 1295, and in 1307 disputes arose because British fishermen disliked the freedom granted to foreigners. According to the *Magnus Intercursus* of 24 February 1496 fishing off the English coast was free. The freedom of fishing in treaties was usually combined with the freedom of *Mercatura*. When Denmark in 1600 attempted to restrict the freedom of fishing by British fishermen in the Northern Seas, Queen Elizabeth defended that freedom by virtue of earlier treaties of 1490 and 1523[72].

An area of the sea which had become the scene of international disputes over fisheries was that between Norway, the Faeroer, Greenland and Iceland; this area was claimed by the Kingdom of Denmark-Norway as its *dominium*. It was not only fishing by foreign

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[70] O'Connell 4 14

[71] Verzijl 13 21/22

[72] Verzijl 13 25

fleets in those seas which provoked sharp altercation, but also any form of foreign trade with Iceland and Norway's dependencies[73].

Relations between Denmark and the other trading fishing countries of Europe worsened in the 1740s when Denmark stressed the asserted traditional sovereignty of the Danish kings over the Northern Seas. That diplomatic struggle had been preceded by isolated incidents in 1688 and 1698 when a Dutch vessel, *De Hoop*, was confiscated because of cod-fishing near the Faeroer contrary to a Danish ordinance of 1682. At stake was the legality of the claim of Denmark to a four mile wide territorial sea, but at a later stage the issue of such a wide reserved zone was extended to the asserted Danish *imperium* over the Northern Seas as a whole[74].

Verzijl opines that the 'impassioned discussions relative to the fisheries around Iceland at the Conference of Geneva on the Law of the Sea (1958) are a late echo to the historic struggle of earlier centuries'[75].

On 2 August 1839 the **Anglo-French Agreement** was signed by the UK and France. That agreement provided for a commission to be appointed to prepare a set of regulations as a guide to the fishermen of the two countries. The commission drafted regulations, consisting of 89 articles which were sanctioned by the **Anglo-French Declaration** of 23 June 1843[76]. Those included provisions reserving oyster fishing in specific areas, rules for the protection of fish on the high seas, and the use of fishing tackle[77].

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[73] Verzijl 13 27

[74] Verzijl 13 28/29

[75] Verzijl 13 30

[76] Colombos 31 368

[77] *Ibid*

That bilateral agreement was the first of many of its kind[78] which tried to regulate interaction between states as far as the sea and its resources was concerned.

Seen from the point of view of the development of the doctrine of the law of nations, the dogma of the freedom of the sea has emerged as a reaction against the far-reaching national claims surveyed above. It has since 'spread its influence all over the world to become in the long run a universally recognised basic principle of international law'[79].

In tracing that legal development, it should be borne in mind that since the journeys of discovery in the 15th century the oceans came to be viewed in the first place as an area where the maritime powers were entitled to display their naval power and as a highway for navigation and international commerce, and only secondly as a reservoir of aquatic riches. However, the latter aspect has certainly played a major role in specific parts of the northern Atlantic, such as the sea between England, Denmark and Iceland, and the maritime areas off the coast of Newfoundland. During the 20th century it has come into much greater prominence, as witnessed by developments which have shifted the balance from navigational and trading interests on the one hand, to the economic exploitation of the resources of the sea on the other[80].

That period also saw the gradual dwindling of the claim to exclusive jurisdiction over large parts of the high sea, to the much more modest claim to sovereignty over a coastal belt only (the so-called 'territorial sea'). However, that shift had been counteracted by a development in the opposite direction, consisting of a tendency on the part of the coastal states to considerably increase the breadth of their territorial sea, and of new claims to exclusive fishery zones (or at least to preferential rights in maritime areas nearest to their coast). That development to the detriment of the freedom of the sea was caused by the same economic needs of maritime nations, and it found its first

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78 See 2.5 *infra*

79 Verzijl 13 30

80 Verzijl 13 30/31. See also Anand 2 40-53, Dupuy 6 10/11

detailed expression in the conclusions of a 1955 conference convened in Rome by the **Food and Agricultural Organization (FAO)**[81].

2.4 HIGH SEAS, TERRITORIAL WATERS AND INTERNAL WATERS

The philosophy of effective power, which underlay the idea that the limits of coastal state authority were those within the range of cannon, imposed upon the evolving law of the sea after about 1680 a boundary between high seas and territorial waters. The process was extended into the second half of the 18th century when there was a stage of controversy and ambiguity during which claims to various forms of jurisdiction were made (and at times enforced) to distances far in excess of the range of cannon[82]. Those claims cannot be explained away as special exceptions to a general principle of the freedom of the seas because at the time they were defended on much broader grounds. However, the fact that they needed to be defended at all was indicative of a growing doubt as to the criterion of the extraterritorial display of governmental power[83].

O'Connell points out that there was - until 1800 and probably into the 19th century - an inconsistency of opinion and practice which would justify the view that there were several overlapping jurisdictions in force at various times and in various places (for neutrality and prize war, for fisheries and for protection against smuggling). The philosophy of effective power embodied in the cannon-shot rule had the tendency to aggregate those various jurisdictions, and fuse them into the single notion of territorial

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81 By virtue of Resolution 900 (IX) of the UN General Assembly - see Verzijl 13 31

82 See the examples of the British *Hovering Act* and that of exclusive traffic on the Spanish Main - see O'Connell 4 18 and also Anand 2 52, Brownlie I *Principles of Public International Law* 4th ed Oxford: Clarendon Press 1990 182, Colombos 31 83

83 O'Connell 4 18

waters, but it was not until after the Napoleonic Wars (and indeed not before the 1840s) that the process was completed[84].

The concept of the freedom of the seas remained ambiguous until then because of the effects of the practice of mercantilism. The situation changed in the 19th century with the evolution of the philosophy of free trade, the development of the steamship and the 'open door' policy in Latin America. One feature of the change was the development (or at least the clarification) of the right of innocent passage through territorial waters from the 1840s onwards. Even though the boundaries between high seas and territorial waters had by that date become accepted, the regime of the territorial had become relaxed in the changed economic, political and commercial circumstances of the time. Its extent as much as its quality became a matter of preoccupation only because (after the abolition of the slave trade and the recognition in the **Webster-Ashburton Treaty** that the era of unilateral action against trade had ended[85]) the freedom of the seas acquired an absolute character that it had not previously possessed.

It retained that character for a little more than a century. The absoluteness of the freedom of the seas reached its peak with the award in the *Bhering Sea Fur Seals Arbitration* in 1893 when the tribunal rejected conservationist arguments for unilateral restriction of fishing beyond the limits of the territorial sea[86].

There were various factors for the exclusive appropriation of the seas. As far as navigation is concerned, some of the earlier claims[87] were made with the objective of ridding the seas of pirates. Those so-called 'free-boaters' as the pirates were called[88] - roamed the seas in the Baltic, the North Sea, the English Channel and the

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84 O'Connell 4 19

85 See O'Connell 4 19/20

86 O'Connell 4 19/20. See also Colombos 31 147/148

87 Particularly immediately after the fall of the Roman Empire

88 Sinjela A M *Land-Locked States and the UNCLOS Regime* New York: Oceana Publications, Inc. 1983 102/103

Mediterranean terrorising the merchants and seizing their cargoes. To counteract that menace, merchants sought to protect themselves by forming associations which patrolled and safeguarded the coastal seas for navigation. During the 13th century their functions were taken over by states themselves. Some states, however, exceeded their jurisdiction by claiming sovereignty over the adjacent areas[89].

The major reason for claiming exclusive jurisdiction to parts of the seas was an economic one. States felt that acquiring sovereign jurisdiction over the seas would enable them to secure exclusive access to the resources off their coastal waters. Furthermore, the levying of tolls on all foreign ships and vessels passing through their waters increased their national incomes. Similarly, the overriding objective in Spain and Portugal's claims was their desire to assert complete monopoly over the new commercial trade routes that were opening up between Europe and the then newly discovered worlds of India, the Far East, Latin America and the Caribbean Islands[90].

The third motivating factor for the appropriation of parts of the seas was induced by the religious beliefs shared by the Christian states of Europe. In partitioning the Atlantic Ocean between Spain and Portugal the Pope wished to counteract the threatening influence of the Crusades on the church. Those unilateral assertions of exclusivity to parts of the high seas could not, however, pass unnoticed and unchallenged by others, and were followed by a period of considerable unrest in the history of the seas[91].

It can thus be stated that, in general, a coastal state could exercise its jurisdiction over foreign ships within its internal waters to enforce its laws, although the judicial authorities of the flag-state could also act where crimes have been committed on board ship[92]. Where the foreign vessel involved had been a warship, however, the

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89 Sinjela 88 103

90 *Ibid*

91 See Sinjela 88 103 and 2.2.3 *supra*

92 See Harris D J *Cases and Materials on International Law* 3rd ed London: Sweet & Maxwell 1983 316-319, Shaw 8 295/296 for the cases of *R v Anderson* and *Wildenhus* on that issue

authorisation of the captain or of the flag-state was necessary before the coastal state could exercise its jurisdiction over the ship and its crew[93].

2.5 THE CODIFICATIONS

2.5.1 INTRODUCTION

It has already been pointed out[94] that the 19th century brought about the evolution of the philosophy of free trade, the development of the steamship and the 'open door' policy in Latin America. Thus, states like Britain began to realise that the greatest good - including peace and stability - could be realised by keeping the seas open to all. In addition, it would no longer be necessary to expend a great deal of money and human resources to protect and defend their vessels at sea. Britain in particular also realised that continued claims to sovereign rights over the seas inhibited the development of commerce and industry. Britain therefore voluntarily abandoned its previous claims and became one of the strongest advocates for the freedom of the seas[95].

The stability thus attained in the law of the sea in the second half of the 19th century warranted the codification of its rules. That was because there were implications to be drawn in the field of the conflict of laws from the operation of the rules of public international law, especially in matters such as collisions at sea[96]. The international community was also anxious to prevent another situation from arising in which a few

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93 That was due to the status of a warship as a direct arm of the sovereign of the flag-state - see Shaw 8 296. See also the Declaration Respecting Maritime Law of 18 April 1856, Paris - Bowman M J and Harris D J *Multilateral Treaties* London: Butterworths 1984 5

94 See 2.4 *supra*

95 Sinjela 88 109

96 O'Connell 4 20

states could again begin to lay claim to large parts of the open seas for their exclusive use[97].

2.5.2 EARLY ATTEMPTS AT CODIFICATION

Long before the 20th century there were attempts at codification of the law of the sea. A brief look at these early attempts follows.

The sea laws of the Rhodians, for the Mediterranean, was a very old set of rules, endorsed by the Greeks and the Romans[98]. In the 13th century, there were the *Assizes of Jerusalem*, also for the Mediterranean area[99]. From an uncertain date in the 13th or 14th century came the *Rolls of Oleron*, a French island on the Atlantic coast off Bordeaux[100]. The *Consolato del Mare* was probably the best known of all the then existing codes. It dated from the 14th century and was also intended for the Mediterranean area. It was originally drafted in Catalan (Barcelona), but also made its influence felt outside its area of origin[101].

The *Black Book of the Admiralty* dated from the second half of the 14th century[102]. *Wisby Sea Laws*, for the Baltic - Gothland and the cities of the Hanseatic League - was adopted in a definite form in the 15th century. The Hanseatic League later adopted its own code at the beginning of the 17th century, namely *Jus maritimum Hanseaticum*[103].

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97 Sinjela 88 109

98 Anand 2 10/11, Verzijl 13 38

99 Verzijl 13 38

100 *Ibid*

101 *Ibid*

102 Its original disappeared in the 18th century, but was published in 1871 from a rediscovered transcript - see Verzijl 13 38

103 Verzijl 13 39

Guidon de lar Mer was a collection of customary rules of maritime law which originated in the North of France (Rouen) in the early 17th century - 1607[104].

2.5.3 THE 18TH AND EARLY 19TH CENTURIES

As far as the more recent history of the law of the sea is concerned, in 1856 the **Congress of Paris** agreed on the **Declaration Respecting Maritime Law** (better known as the **Declaration of Paris**) which laid down four fundamental rules on the abolition of privateering, on the immunity of neutral goods in enemy vessels (other than contraband), of enemy goods in neutral vessels (with the exception of contraband), and on the effectiveness of blockades. All those rules have been consistently treated as binding by all nations[105]. The **Geneva Convention** of 22 August 1864 was applied to maritime warfare by the 1899 **Hague Peace Conference**[106].

During the 1880s and 1890s the **Institut de Droit International** devoted itself to a codification of the rules of the law of the sea[107]. Its programme was modest - to establish the geographical areas for the choice of maritime laws - but it became problematic on the questions of the extent of, and the nature of, territorial waters. As far as extent was concerned, the difficulty was that the increasing range of cannon was invalidating the criterion underlying the three-mile limit, and raised new questions of strategic importance for naval operations in time of war. Those questions came into

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[104] Verzijl 13 39

[105] Bowman and Harris 93 5, Colombos 31 20

[106] See the International Convention for Adapting to Maritime Warfare the Principles of the Geneva Convention of 22 August 1864 - Bowman and Harris 93 16/17, Colombos 31 20

[107] O'Connell 4 20

perspective in the drafting of four conventions at the 1907 **Hague Peace Conference**[108], and at the 1909 **London Naval Conference**[109].

2.5.4 THE 20TH CENTURY

The 1899 **Hague Peace Conference** marked the beginning of the movement for the pacific settlement of international disputes.

The results of the second **Hague Peace Conference** of 1907 were particularly important from the view of the law of the sea[110] as it produced several conventions codifying many of the rules of naval warfare and maritime neutrality. It also drafted a convention for the establishment of an **International Prize Court**, specialising in the problems of the capture of foreign vessels at sea by belligerents[111].

In 1908 a **Naval Conference** was held in London for the purpose of formulating the then acknowledged principles of international law[112]. The conference concluded its work in February 1909, when the **Declaration of London** was signed by ten contracting parties[113].

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[108] The Convention Relative to the Laying of Automatic Submarine Contact Mines, the **Convention Respecting Bombardments by Naval Forces in Time of War**, the **Convention for the Adaptation of the Principles of the 1906 Geneva Convention to Maritime War** and the **Convention Relative to Certain Restrictions on the Right of Capture in Maritime War** - Bowman and Harris 93 28-30

[109] O'Connell 4 20

[110] As far as other aspects of law was concerned the conference was less successful - see O'Connell 4 21

[111] Colombos 31 20. However, the court was never established - see Erasmus G 'Dispute Settlement in the Law of the Sea' in *The Law of the Sea* edited by Bennett T W *et al* Cape Town: Juta & Co, Ltd 1986 18

[112] That was because there were doubts regarding the law which the International Prize Court would have to apply to the cases to be submitted to it

[113] Because of the opposition encountered in the British Parliament and public opinion it failed to secure ratification, although it incorporated the views of all the major naval powers on the principal rules of naval warfare before the outbreak of World War I in 1914 - see Colombos 31 20

After World War I the **League of Nations** was established. Among its various activities it tried to codify various matters of maritime law. In particular, Article 23 of the Covenant of the **League** provided that 'subject to and in accordance with the provisions of international Conventions existing or hereafter to be agreed upon, the members of the League will make provision to secure and maintain freedom of communications and of transit and equitable treatment for the commerce of all members of the League'[114].

The establishment of the **League of Nations** brought about various efforts at a final codification of the law of the sea. Various bodies in the 1920s worked towards that ideal and reached a remarkable degree of unanimity. Those were *inter alia* the **Institut de Droit International**, the **International Law Association**, the German and Japanese **Societies of International Law** and the **American Institute of International Law**[115]. In addition, two private codifications were attempted, one by Strupp in a volume dedicated to the Reichsgericht, and another by the Harvard Law School[116].

De iure recognition was given for the first time to a land-locked state to claim and possess a maritime flag under the 1919 **Treaty of Versailles**, when the 'High Contracting Parties' agreed to recognise the flag flown by the vessels of an allied or associated power having no seaboard[117].

Similarly, the 1919 **Treaty of Saint-German** and the 1920 **Treaty of Trianon** granted to all the 'Contracting Powers' the privilege of recognition of their respective flags. The

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[114] Colombos 31 21

[115] Churchill and Lowe 18 11, Colombos 31 93, O'Connell 4 20

[116] See further O'Connell 4 20/21

[117] The vessels in that case were to be registered at a specific place situated within the territory of the land-locked state, which was to serve as a port of registry - Article 273, and see also Bowman and Harris 93 37, Singh N *International Maritime Law Conventions* Vol 4 London: Stevens & Sons 1983 2918

1921 Barcelona **Conference on Communications and Transit** resulted in the **Declaration Recognising the Right to a Flag of States having no Sea-coast** of 20 April 1921[118].

The 1921 **Barcelona Conference** also agreed on the **Convention and Statute on Freedom of Transit** and the **Convention and Statute on the Regime of Navigable Waterways of International Concern**. That codification was continued at the 1923 **Geneva Conference**, which resulted in the **Convention and Statute on the International Regime of Maritime Ports**[119].

The efforts at codification undertaken by the **League** were assisted by a 'Committee of Experts for the Progressive Codification of International Law' (established by the **League** in 1924) which had been entrusted with the task of preparing a provisional list of topics whose regulation by international agreement was deemed desirable and practicable.

In September 1927, the Assembly of the **League** considered the committee's report and decided that a conference should be convened for the purpose of codifying the following three subjects: nationality, territorial waters, and the responsibility of states for damage done in their territory to the person or property of foreigners. The first **Conference on**

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[118] See Bowman and Harris 93 37, Singh 117 2918. The declaration, also known as the Barcelona Declaration, reads as follows:

> The undersigned, duly authorised for the purpose, declare that the states which they represent recognise the flag flown by the vessels of any State having no sea-coast which they are registered at some one specified place situated in its territory: such place shall serve as the port of registry of such vessels.

The signatories were Albania, Austria, Belgium, Bolivia, Bulgaria, Chile, China, Czechoslovakia, Denmark, Estonia, France, Greece, Guatemala, India, Italy, Japan. Kingdom of the Serbs, Croats and Slovenes, Latvia, Lithuania, Netherlands, New Zealand, Norway, Panama, Persia, Poland, Portugal, Spain, Sweden, Switzerland, the UK and Uruguay. The then Union of South Africa acceded to the treaty on 31 October 1922, Swaziland on 16 October 1970 and Lesotho on 23 October 1973 - Singh 117 2919

[119] Bowman and Harris 93 45/46 and 56/57, Colombos 31 21. See also the Treaty between the United States, the British Empire, France, Italy and Japan limiting naval armament of 6 February 1922, the **Convention regarding the regime of the Straits (Lausanne Convention)** of 24 July 1923 and the **International Convention Regarding the Regime of Straits Between the Mediterranean and the Black Sea (Montreux Convention)** of 20 July 1936 - Bowman and Harris 93 100, Grenville J A S *The Major International Treaties 1914-1945* London: Methuen 1987 80-89

the Progressive Codification of International Law met at the Hague from March 13 to April 12 1930. Although the **Hague Conference** was unable to reach an agreement on the subject of territorial waters, it succeeded in preparing a draft convention on 'The legal status of the territorial sea' for future consideration[120].

In addition to the three topics mentioned above, the Assembly of the **League** concurred with the report of the 'Committee of Experts' that the question of the exploitation of the products of the sea should also be considered[121].

In evaluating the 1930 **Hague Codification Conference** it should be borne in mind that a **Preparatory Committee** was set up to draft articles for submission to the conference, and that the draft was prepared on the basis of a questionnaire sent to governments. The replies so received were then commented upon. The whole procedure - which took several years - was directed at establishing what the rules of international law were; not what they might become. To that extent, argues O'Connell, the emphasis at the conference was more legal than political[122], and the delegations included prominent legal experts.

However, the **Hague Conference** failed for a particular (political) reason, namely the fact that not enough states were prepared to commit themselves indefinitely to a three-mile limit for fisheries[123]. By that time the issue of fishery conservation had already become politically significant. At various conferences from the 1890s onwards[124] attention had been drawn to the dangers of over-fishing, and to the need for legal controls, and those had led to recurrent demands for coastal fishing jurisdiction beyond the limit of three miles.

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[120] Colombos 31 22, Koh 39 6

[121] *Ibid*

[122] O'Connell 4 20/21

[123] Brownlie 82 189, Churchill and Lowe 18 12, O'Connell 4 20/21. South Africa was one of 10 states to favour a three-mile limit - see Koh 39 7

[124] See 2.5.3 *supra*

When the **Hague Conference** reported to the **League of Nations** that it was unable to reach agreement on the extent of the territorial sea, the intention was to explore the question further later and reconvene the conference. However, the outbreak of the Second World War prevented that, and it was not until the establishment of the UN that it was possible to return to the codification of the law of the sea[125]. That was one of the first tasks undertaken by the **ILC** which was established by the General Assembly on 21 November 1947. The **ILC** began its work on the subject in 1950[126].

The emphasis of the **ILC** differed from that of the **Preparatory Committee** of the **Hague Codification Conference** because its mandate was not only the codification of international law, but also its progressive development. That obscured the distinction between the recording of law and the enunciation of proposals. Since the draft articles which the **ILC** prepared were peremptory in character, they could not by themselves indicate whether they were codificatory or not. That could only be determined from the commentaries which the **ILC** attached to the draft articles, or from the debates in the **ILC** about them[127].

The legal regimes of the high seas and of territorial waters formed a substantial part of the **ILC**'s work and a report on both these subjects was approved for submission to the planned **UN Conference on the Law of the Sea** at the commission's eighth session in Geneva in July 1956.

Other codifications worthy of note during that period were the **Convention on the International Maritime Organisation** of 6 March 1948, Geneva, the **Convention Concerning the Regime of Navigation on the Danube** of 18 August 1948, Belgrade, the

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[125] As far as codification by the UN is concerned, Article 13 of the Charter of the UN stipulates that the General Assembly 'shall initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification' - Colombos 31 22

[126] O'Connell 4 21. Some of the major influences towards that were the 1945 Truman Proclamation (see 2.6.2.4 *infra* and Birnie P W 'The Law of the Sea Before and After UNCLOS I and UNCLOS II' in *The Maritime Dimension* edited by Barston R P and Birnie P London: George Allen & Unwin 1980 10/11) and the 1947 Latin American claims to a 200 mile patrimonial sea (see 2.6.2 *infra*)

[127] O'Connell 4 21/22

Agreement for the Establishment of a General Fisheries Council for the Mediterranean of 24 September 1949, Rome, the **International Convention for the High Seas Fisheries of the North Pacific Ocean** of 9 May 1952, Tokyo, and the **International Convention for the Prevention of Pollution of the Sea by Oil** of 12 May 1954, London[128].

2.5.5 CONCLUSION

It should be clear from the above that Europe played a central role in the development of the law of the sea until at least the beginning of the 20th century. However, that view is not shared by all writers. Anand[129] opines:

> It is submitted that the contribution of Asian and African countries toward the development of modern international law, or their attitude, outlook and behaviour toward its rules in their international relations, is more often than not based on ignorance of their history and lack of understanding of their cultures and cultural traditions. Conditioned by the still prevailing Eurocentrism in international law and thinking, the traditions, customs, laws and histories of these countries have been either altogether ignored or underplayed[130].

Anand further points out that the international law of the sea developed in response to the need of the European states to trade with the Asian states, and:

> Thanks to their [Asian states'] liberal traditions of freedoms of peaceful navigation and trade, and permission to foreign merchants to establish themselves by their own laws, the Europeans got an easy foothold in Asia. European sovereign or semi-sovereign agencies which appeared on the Asian scene were automatically drawn into the Asian legal system and affected by its rules[131].

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[128] Bowman and Harris 93 138-192

[129] Anand 2 4-6

[130] Anand 2 5

[131] *Ibid*

Anand therefore argues that writers such as Grotius derived their ideas from the Asian states:

> ... the rules of maritime law, as practised by Asian states and explained and recommended in a European context by Grotius and other classical jurists, were not immediately accepted or acceptable to the European states who were too busy vying with each other to grab as much of the Asian spice trade as they could to the exclusion of others. It was only after two hundred years of bickering and fighting that the need and usefulness of the freedoms of navigation and trade came to be realized and appreciated in Europe. But the law as it developed since the late eighteenth century was geared to the furtherance of European interests and to the protection of European rights. Law of the sea, as other rules of international law, developed in response to the needs of the European industrial Powers for wider markets in Asia and Africa[132].

It is indeed a well-documented fact that much interaction took place on the seas of the East from early centuries[133].

Be that as it may, it should also be noted that writers like Grotius and Selden have done much for the codification of the international law of the sea in their time. The development of international law depends not only on state practice, but also on other elements like *inter alia* the writings of scholars. Anand may well be justified in his criticism of Eurocentrism when thinking about international law, but the works of scholars like Grotius, Selden and others on the international law of the sea at that time should not be denounced merely because of a lack of documentation of previous thinking in that field.

As far as codification is concerned, the work undertaken by the **Hague Peace Conferences**, the **League of Nations** and the **ILC** in particular laid the foundations for the subsequent three **UN Conferences on the Law of the Sea.**

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[132] Anand 2 6

[133] For examples see Anand 2 12-19

2.6 THE 1958 GENEVA CONFERENCE ON THE LAW OF THE SEA

2.6.1 INTRODUCTION

Article 13 of the Charter of the UN stipulates that the General Assembly 'shall initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification'[134]. As noted before, the result of that was the establishment by the General Assembly of the ILC on 21 November 1947[135].

At its very first session in 1949, the ILC included the regime of the high seas and the territorial seas in its 'provisional list of topics whose codification is considered necessary and feasible'[136].

However, the ILC decided to give priority to the 'regime of the high seas'[137] and appointed Professor J P A Francois special *rapporteur* for it. The General Assembly itself recommended in 1949 that the ILC also study the regime of the territorial waters on a priority basis.

After considering reports of Professor Francois, together with comments of governments, the ILC drew up drafts on three problems: the continental shelf, fisheries, and the contiguous zone. But when those drafts were discussed in the General Assembly, Iceland raised the question of the unity of various problems of the law of the sea and stressed the inadvisability of considering any of its various problems separately.

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134 Colombos 31 22, Grenville J A S and Wasserstein B *The Major International Treaties Since 1945* London: Methuen 1987 66, Koh 39 11

135 The ILC was charged with the duty of surveying the whole field of international law with a view to selecting topics for codification and to submitting recommendations to that end to the General Assembly - see 2.5.4 *supra*, Birnie 126 13

136 Anand 2 175 n1, Elias T O *New Horizons in International Law* Alphen aan den Rijn: Sijthoff & Noordhoff 1980 13

137 Anand 2 175. See also Koh 39 11

The General Assembly accepted that view in a resolution[138], and decided not to deal with any of the problems until all had been studied and reported upon by the **ILC**[139].

At its next session the General Assembly reaffirmed the idea of the unity of the subject. But on the problem of the conservation of the living resources of the sea (on which the **ILC** had already prepared a draft) the General Assembly agreed to convene a technical international conference 'to study the problems of conservation of the living resources of the sea and to make appropriate scientific and technical recommendations ... '[140].

The report of the conference was to be referred to the **ILC** 'as a further technical contribution to be taken into account in its study of the questions to be dealt with in the final report ...'[141].

The **International Technical Conference on the Conservation of the Living Resources of the Sea** met at Rome from 18 April to 10 May 1955 and submitted a report which was considered by the **ILC** at its seventh session in 1955. In its final report in 1956, the **ILC** recommended that the General Assembly should convene an international conference to examine the law of the sea, taking into account not only the legal but also the technical, biological, economic, and political aspects of the problems, and to embody the results of its work in one or more international conventions or other appropriate instruments[142].

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138 '...having regard to the fact that the problems relating to the high seas, territorial waters, contiguous zones, continental shelf and the suprajacent waters are closely linked together juridically as well as physically' - see Anand 2 175

139 Anand 2 175

140 Because it involved technical and scientific aspects beyond the competence of the commission - see Anand 2 175

141 Anand 2 175/176

142 Anand 2 176

2.6.2 THE 1958 GENEVA CONFERENCE ON THE LAW OF THE SEA

After the 1956 recommendations of the ILC, the General Assembly called for a conference on the law of the sea. It met in Geneva from 24 February to 29 April 1958. 86 states were represented at the conference, and most of the interested specialised agencies of the UN and inter-governmental bodies sent observers. It was decided to adopt the report of the ILC as the basis for consideration of the law of the sea[143]. It should be noted that, for the first time in history, a majority of the participants[144] at that conference - which was called to codify or make new international law - consisted of either newly independent Asian-African states[145] or Latin American states which had previously played only a minor role at international conferences. Supported by the Soviet bloc in terms of 'anti-colonialism', those 'dissatisfied' states were determined to change the traditional Western-oriented law of the colonial era under which they felt discriminated against, or at least modify it to suit what they saw as the changed needs of the expanded international society[146].

Dupuy[147] notes that that period contrasted sharply with the classic law of the sea, which was unidimensional in that navigation on the surface of the sea was all that mattered, not the underwater environment[148]. During the 1950s, however, the international law of the sea took on a pluridimensional character[149].

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143 Anand 2 176, Koh 39 12, Nordquist and Park 1 3

144 54 of the 86 states represented

145 Which since the 17th century had played no role in its formulation and since the 19th had been considered merely its objects, according to Anand

146 Anand 2 176

147 Dupuy 6 6

148 Questions relating to the regime of the seabed took on a theoretical character in the absence of technically feasible economic uses - Dupuy 6 6

149 Reflected also in the principle of the 'common heritage of mankind'. Dupuy explains that the expression 'ocean space' was then used in preference to 'ocean' or 'sea' to denote the new character - Dupuy 6 7

While not one state disputed - and virtually all generally supported - the peaceful freedom of navigation, the smaller states were critical of the numerous other activities of the maritime powers in the name of the freedom of the sea which, they felt, should be exercised subject to the legitimate rights of other states. Those smaller states insisted that the old concept of the freedom of the seas could no longer be regarded as sacrosanct or absolute. The rights and duties of the coastal states, it was argued, needed protection in the light of new technological developments. Most of the smaller states wanted (or extended) coastal state jurisdiction for the protection of the continental shelf, fisheries and other economic interests, although there was little agreement on a uniform limit[150].

2.6.2.1 THE HIGH SEAS

Prior to the 1958 conference the **ILC** was entrusted with the task of preparing draft articles that would form the basis of negotiation. After much debate the conference adopted the **Convention on the High Seas**[151]. Article 2 of the convention stated:

> The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty[152].

The article also listed the four freedoms that may be enjoyed by both coastal and non-coastal (or land-locked) states, namely freedom of navigation, freedom of fishing, freedom to lay submarine cables and pipelines, and freedom to fly over the high seas[153].

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150 Some of those argued that the maritime belt should vary according to the economic, geographical, biological, technical, political, and defence needs of the state concerned. Some pleaded for six miles, some nine miles, some 12 miles, and some of the Latin American states wanted to maintain 200 miles - see Anand 2 177

151 Bowman and Harris 93 227/228, Koh 39 13, Sinjela 88 110

152 Article 2. Article 1 defined the high seas as 'all parts of the sea that are not included in the territorial sea or in the internal waters of a state.'

153 Article 2. See also Birnie 126 17, Brownlie 82 235

While codifying those freedoms the convention also proclaimed that there are other freedoms which are recognised as general principles of international law. Article 2 further stated that those freedoms are not absolute and that they are to be enjoyed with reasonable regard for the interests of other states in the exercise of the freedom of the high seas[154].

Article 3 of the convention specifically provided for rights of land-locked states. Article 3(1) provided that states having no sea-coast should have free access to the sea, and to that end transit states should 'by common agreement' with the land-locked state and 'in conformity with existing international conventions'[155] accord:

(a) To the state having no sea-coast, on a basis of reciprocity free transit through their territory and

(b) To ships flying the flag of that state treatment equal to that accorded to their own ships, or to the ships of any other states, as regards access to seaports and the use of such ports[156].

It further provided that land-locked and transit states should settle ('taking into account the rights of the coastal state or state of transit and the special conditions of the state having no seacoast') all matters relating to freedom of transit and equal treatment in ports[157].

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154 Article 2, and see also Sinjela 88 110. Some of those freedoms have now been reflected in the 1982 **LOSC**, for example the freedom to construct artificial islands and other installations permitted under international law [Article 87(1)(d) of the **LOSC**] and the freedom to conduct scientific research [Article 87(1)(f) of the **LOSC**]. See Birnie 126 17 for the disputes concerning the identity of the 'unnamed freedoms'. Harris (92 320) opines that those freedoms recognised by the 'general principles of international law' should also include the freedom to use the high seas for weapon testing and naval exercises. However, Article 88 of the **LOSC** limits the use of the high seas to 'peaceful purposes'. See also Brownlie 82 219/220

155 See here the 1965 **Convention on Transit Trade of Land-Locked States** - Harris 92 320/321

156 Article 3(1)

157 However, subject to states parties to existing international conventions - see Article 3(2)

The convention further provided for the nationality of ships on the high seas[158], jurisdiction on the high seas[159], hot pursuit[160], and pollution of the high seas[161].

2.6.2.2 THE TERRITORIAL SEA

The ILC was requested by the General Assembly to prepare draft articles on the territorial sea which would form the basis of discussion at the conference. Several proposals were made by its members but not one was accepted[162].

The divergent views held by the members of the ILC themselves made it difficult for them to agree on a proposal for a uniform breadth of the territorial sea. The commission submitted a report to the General Assembly in 1955[163].

In submitting its report, the ILC requested comments from member states on the breadth of the territorial sea. 25 replies were received. Those replies once again indicated considerable divergence of opinion on the issue. The ILC therefore felt that

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158 Articles 4-7, and see Brownlie 82 249

159 Articles 8-22, and see Brownlie 82 249/250

160 Article 23, and see Brownlie 82 245-248

161 Articles 24/25 and 192-194

162 The proposals ranged from suggestions that each state should fix its own breadth of the territorial sea according to its real needs and that states should feel free to fix the breadth of the territorial sea from three to 12 miles, to those preferring that a state be permitted to adopt a breadth greater than three miles as long as that was not enforced against states which did not adopt an equal or greater breadth - Anand 2 177-180, O'Connell 4 162, Sinjela 88 187

163 Article 3 of the 'Draft Articles on the Regime of the Territorial Sea' merely stated that:

1. The Commission recognizes that international practice is not uniform as regards the traditional limitation of the territorial sea to three miles.

2. The Commission considers that international law does not justify an extension of the territorial sea beyond twelve miles.

3. The Commission, without taking any decision as to the breadth of the territorial sea within that limit, considers that international law does not require States to recognize a breadth beyond three miles.

it was unable to suggest a breadth of the territorial sea. It expressed the hope that the 1958 **Geneva Conference on the Law of the Sea** might be able to fulfil that function (which it did not, however)[164].

The **ILC** submitted its 'Draft Articles on the Law of the Sea' to the **UN** General Assembly in 1957[165]. The failure of the **ILC** to agree or at least make a suggestion of a preferred breadth of the territorial sea was in itself an obstacle to agreement at the conference[166]. At the conference itself several proposals - most of them reflecting bloc or regional thinking - were put forward. Almost all of them proposed greater breadths than three miles. The UK[167] changed its original position to advocate a six-mile territorial sea in the hope that agreement could be reached. The USSR asserted its former position in proposing that each state determine the breadth of its territorial sea, but only within three to 12 miles[168]. Peru's proposal did not contemplate any precise limit beyond which states could not go in their delimitations of their territorial sea[169].

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164 Koh 39 12, O'Connell 4 162, Sinjela 88 187

165 Article 3 on the breadth of the territorial sea read:

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 twelve miles.

3. The Commission, without taking any decision as to the breadth of the territorial sea up to that limit, notes, on the one hand, that many States have fixed a breadth greater than three miles and, on the other hand, that many States do not recognize such a breadth when that of their own territorial sea is less.

4. The Commission considers that the breadth of the territorial sea should be fixed by an international conference.

166 Colombos 31 98, O'Connell 4 162, Sinjela 88 188

167 Long time proponents and defenders of the three-mile rule

168 Taking into consideration its historical and geographical conditions, economic interests, the interests of the security of the coastal state, and the interests of international navigation - see Sinjela 88 189

169 Its proposal read: 'Each State is competent to fix its territorial sea within reasonable limits, taking into account geographical, geological and biological factors, as well as the economic needs of its population, and its security and defence' - see Sinjela 88 189

Peru had made unilateral claims to a 200-mile territorial sea as early as 1962 - according to Peru's proposal that limit was reasonable.

In an attempt to break the deadlock the US amended its earlier proposal for a three-mile limit, extending it to six miles. Furthermore, an additional zone of 12 miles from the baseline was proposed. In that zone the coastal state would have the right to exploit the living resources of the sea. States whose vessels had been fishing in the area for a period of five years were, however, not to be excluded. That proposal attracted the largest number of votes by far but still failed to achieve the two-thirds majority required for adoption by the conference. The conference ended without establishing a uniform breadth of the territorial sea[170].

However, the **Convention on the Territorial Sea and the Contiguous Zone** did provide for sovereignty in the territorial sea[171], the delimitation of the territorial sea[172], and jurisdiction over foreign ships in the territorial sea[173].

2.6.2.3 THE CONTIGUOUS ZONE

While there was no agreement on the extent of the territorial waters, a contiguous zone extending up to 12 miles was accepted without difficulty[174].

The 1930 **Hague Codification Conference** had failed - at least partly - because the UK at that time refused to accept coastal states' claims to a contiguous zone beyond a

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170 Colombos 31 98/99, O'Connell 4 163, Sinjela 88 189

171 Articles 1 and 2

172 Articles 3-13. See Brownlie 82 187 where he points to the fact that Article 4 confirms the place of the 1951 *Anglo-Norwegian Fisheries Case* in the law

173 Articles 14-23

174 Anand 2 180

narrow three-mile territorial sea. However, despite the UK's opposition many states[175] continued to claim contiguous zones of varying limits (not only for the enforcement of their custom, fiscal and other regulations, but also for their security). While recommending that the contiguous zone should not extend beyond 12 miles, the **ILC** commented in its 1956 report that international law accords states the right to exercise preventive or protective control for certain purposes over a belt of high seas contiguous to their territorial sea[176]. The **ILC** stated that that right was meant to exercise customs control and to apply fiscal and sanitary regulations, but that the **ILC** did not recognise special security rights or exclusive fishing rights in the contiguous zone. It thought that 'the extreme vagueness of the term "security" would open the way for abuses and that the granting of such rights was not necessary'[177].

Although that was a much narrower view of the practice of states in regard to the contiguous zone, the conference accepted it in its **Convention on the Territorial Sea and the Contiguous Zone**. It is important to note that that was the first time that the right of a coastal state to have a contiguous zone came to be accepted in a multilateral treaty[178].

Article 24 of the **Convention on the Territorial Sea and the Contiguous Zone** provided for certain forms of control by a coastal state over the contiguous zone[179], as well as

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175 Including some of the maritime powers like Canada, France, Italy, the US and others

176 Anand 2 180, Dupuy 6 83

177 Anand 2 180

178 Anand 2 181, Bowman and Harris 93 226/227, Brownlie 82 201, Koh 39 13

179 For a discussion of Article 24(1) and the *travaux preparatoires* see Brownlie 82 205/206. Article 24(1) provided that the coastal state may exercise the control necessary to:

(a) Prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea;

(b)Punish infringement of the above regulations committed within its territory or territorial sea.

the extent of the contiguous zone[180], and also for the position of opposite or adjacent states[181].

2.6.2.4 THE CONTINENTAL SHELF

The period between 1945 and 1948 was crucial with respect to claims to the continental shelf and its natural resources. The claims were precipitated by the discovery of large reserves of oil on the continental shelf and the fact that the technology already existed for the exploitation of it, even beyond the three-mile limit of the territorial sea[182].

On 28 September 1945 President Truman of the US issued the **Truman Proclamation**. It provided in part that the government of the US regarded the natural resources of the subsoil and seabed of the continental shelf beneath the high seas - but contiguous to the coasts of the US - as appertaining to the US, subject to its jurisdiction and control[183]. That, according to Sinjela, 'opened a floodgate of claims to the continental shelf all over the world'[184].

However, the **Truman Proclamation** only claimed jurisdiction and control over the continental shelf. It did not claim sovereignty or ownership over the area. It also

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180 Not more than 12 miles from the baseline from which the breadth of the territorial sea is measured - Article 24(2)

181 Article 24(3) provided:

> Where the coasts of two states are opposite or adjacent to each other, neither of the two states is entitled, failing agreement between them to the contrary, to extend its contiguous zone beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of the two states is measured.

182 Sinjela 88 238

183 The **Truman Proclamation** was inspired by US fears of a shortage of hydrocarbons - see Brownlie 82 215/216, Colombos 31 66, Dupuy 6 4, Sinjela 88 238

184 Sinjela 88 238. See also Hjertonsson K *The New Law of the Sea* Leiden: A. W. Sijthoff 1973 21-23

provided that the waters above it would not affect the continued exercise of freedom of the high seas and - in particular - freedom of navigation[185].

Mexico followed the example of the US, claiming 'each and all the natural resources of the continental shelf'[186]. On 9 October 1946 Argentina issued a Presidential decree also claiming sovereign power over the area[187]. On 1 May 1947 Nicaragua also claimed the extension of national sovereignty over the adjacent continental shelf[188]. On 23 June 1947 Chile issued a Presidential decree confirming and proclaiming its national sovereignty over the continental shelf and the epicontinental sea adjacent to its coast[189].

Those claims were followed by claims from Costa Rica[190], the UK[191], Jamaica, and British Honduras[192]. Iran, Saudi Arabia, the Persian Gulf Sheikdoms, Pakistan[193], and El Salvador[194] did likewise.

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185 For further analysis of the declaration see Colombos 31 66, Sinjela 88 238/239

186 Colombos 31 69, Sinjela 88 239

187 Argentina preferred the use of the term 'epicontinental sea' '...as a term of legal art to include the sea-bed and subsoil beneath' - Sinjela 88 239. See also Hjertonsson 184 22

188 That became the most extensive claim on Central America's Atlantic Coast - Sinjela 88 239

189 That was despite the fact that Chile has virtually no continental shelf off its coast - Sinjela 88 239. See also Dupuy 6 4

190 28 July 1948

191 In 1948 the UK - by Order-in-Council (*Alteration of Boundaries*) extended the boundary of the Bahamas, then a colony - Sinjela 88 240

192 Colombos 31 69, Sinjela 88 241

193 Colombos 31 70, Sinjela 88 241

194 In Article 7 of its Constitution. That was the most far-reaching claim until then by declaring that the territory of the Republic included the adjacent seas to a distance of 200 nautical miles from low-water mark and includes the corresponding aerial space, subsoil and continental shelf - see Sinjela 88 241

Sinjela advances several reasons for the lack of protest by the world community following those claims[195]. He points out, however, that neither the claims themselves nor the the fact that no protests were registered can serve as a basis for a new norm or doctrine of the continental shelf. In that conclusion he cites the judgement of Lord Asquith in the 1952 *Abu Dhabi Arbitration* (Persian Gulf)[196].

The **ILC** had stated as early as 1950 that the rights of coastal states over adjacent submarine areas could not be limited to the geological concept of the continental shelf[197]. At its eight session in 1956 the **ILC** - impressed by the criterion of 'equality'[198] (and convinced of the reasonableness of the definition adopted by the **Inter-American Specialized Conference** in 1956) - defined continental shelf to include the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres[199] or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas[200].

At the 1958 **Geneva Conference on the Law of the Sea** several proposals were made to change or amend the definition of the continental shelf as recommended by the **ILC**. However, the only amendment to the **ILC**'s draft accepted at Geneva - as the **Convention on the Continental Shelf**[201] - was a proposal by the Philippines to the effect that the rules relating to the continental shelf would be understood to apply also to similar submarine areas adjacent to and surrounding the coasts of islands.

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195 Sinjela 88 241-243

196 Sinjela 88 243. See also Colombos 31 70

197 See Anand 2 182 and also Sinjela 88 243/244. The date 1950 refers to the time when the members of the **ILC** began exchanging views about the legal status of the continental shelf

198 Anand 2 182

199 Approximately 100 fathoms - see Colombos 31 71

200 See Article 67 of the **Draft Articles** submitted by the **ILC** to the 1958 conference, and also Anand 2 182/183, Brownlie 82 216

201 Anand 2 183, Bowman and Harris 93 228/229, Colombos 31 71

Article 2 of the convention granted to the coastal state sovereign jurisdiction for the purpose of exploiting its natural resources[202].

Article 3 made it clear that the rights of the coastal state over the continental shelf did not affect the legal status of the superjacent waters as high seas, or that of the air space above such waters[203]. Furthermore, subject to its right to take reasonable measures for the exploration and exploitation of the natural resources of the continental shelf, the coastal state was not allowed to impede the laying or maintenance of submarine cables or pipelines on the continental shelf[204]. In addition, such measures should not have resulted in either any unjustifiable interference with navigation, fishing or the conservation of the living resources of the sea, or any interference with fundamental oceanographic or other scientific research carried out with the intention of open publication[205].

2.6.2.5 FISHERIES AND THEIR CONSERVATION

The doctrine of the continental shelf encouraged the claims for wider exclusive fisheries jurisdiction[206]. The main objective of those claims was to stop indiscriminate exploitation of the coastal fishery resources and their conservation[207].

The problem of conservation of fishery resources had been the subject of several international conferences after 1950 and numerous commissions had been established

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202 Article 2(1)

203 Anand 2 183, Brownlie 82 217, Koh 39 13

204 Article 1

205 Article 5

206 Not only several Latin American states but also Iceland and South Korea had staked wide claims in that regard - see Anand 2 183, Brownlie 82 207

207 Anand 2 183

to study the issues that arose in various areas and to suggest ways to cope with them. The 1955 **International Technical Conference**[208] was the biggest international effort in that direction[209].

While considering the report of the **International Technical Conference** and adopting its recommendations in the form of draft articles the **ILC** confirmed the principle of the right to fish on the high seas[210]. Taking into account the need for conservation measures, the **ILC** stated that issues surrounding conservation should be resolved primarily on the basis of international cooperation through the concerted action of all states concerned[211].

The draft submitted by the **ILC** was adopted (with minor modifications) by the 1958 **Geneva Conference** in the form of the **Convention on Fishing and Conservation of the Living Resources of the High Seas**[212]. The convention confirmed the traditional freedom of fishing, but at the same time declared that all states have the duty to adopt, or to cooperate with other states in adopting, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas. However, no conservation measures could be taken unilaterally by any state in any part of the high seas beyond territorial limits unless its own nationals and nationals of no other state were fishing in that area. In case of a dispute the convention provided for a compulsory arbitration procedure by a special arbitration commission of five members[213].

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208 It met in Rome that year to study the problem of international conservation of the living resources of the sea and to make appropriate scientific and technical recommendations

209 Anand 2 183

210 Anand 2 183/184

211 Anand 2 184

212 Bowman and Harris 93 228

213 See Dupuy 6 18, Koh 39 13

The convention further provided that unilateral adoption of conservation measures for fishery resources of the areas of the high seas adjacent to the territorial waters of a coastal state could only be imposed in certain instances[214].

However, that convention 'largely proved to be a dead letter'[215]. Not only was it signed by the least number of parties compared to the other three conventions[216], but many major fishing states did not ratify it because firstly, it did not correspond to the interests of coastal states, and secondly, in many regions international fishery commissions had already been set up to take care of conservation measures[217].

2.6.2.6 TRANSIT RIGHTS

2.6.2.6.1 INNOCENT PASSAGE

Ever since the beginning of the 19th century the UK and other maritime powers tried to open various straits[218] through bilateral or multilateral treaties, which then turned into an international custom relating to freedom of passage through straits[219]. Prior to the 1949 *Corfu Channel Case* (U.K. v Albania)[220] the law relating to passage in regard to warships was vague and they were generally treated differently from merchant vessels with respect to passage (in the sense of requiring notification and authorisation).

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214 If there was a need for the urgent application of conservation measures [Article 7(2)(a)], if the measures adopted were based on scientific findings [Article 7(2)(b)], and if the measures did not discriminate against foreign fishermen [Article 7(2)(c)]. See also Brownlie 82 264, Churchill and Lowe 18 230

215 Churchill and Lowe 18 230

216 36 as opposed to 57, 54 and 46 - see Bowman and Harris 93 226-229

217 Churchill and Lowe 18 230

218 Straits are important waterways which are vital for international navigation. In geographical terms a strait is 'a narrow passage connecting two sections of the high seas' - see Anand 2 181

219 Anand 2 181

220 See Colombos 31 122, Elias 136 129, Harris 92 301-305

In the *Corfu Channel Case* the court held that it was generally recognised and in accordance with international custom that states in time of peace had a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorisation of a coastal state provided that the passage is innocent[221].

The 1958 **Geneva Convention on the Territorial Sea and the Contiguous Zone** generally confirmed the customary law recognition of the right of innocent passage through the territorial sea[222]. However, the convention - in its provisions relating to straits - added a controversial clause to cover the dispute over access to Israel's territorial waters in the Gulf of Aquaba through the Straits of Tiran. It provided that there shall be no suspension of the innocent passage through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign state. That provision[223] extended the definition of a strait in law. The 1958 conference therefore not only reaffirmed the right as laid down in the **Corfu Channel Case** of warships and merchant vessels to pass unobstructed through straits, but made it even wider[224].

The convention declared that passage is innocent so long as it is not prejudicial to the peace, good order and security of the coastal state[225].

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221 It added that, unless otherwise prescribed in an international convention, there was no right for a coastal state to prohibit such passage through straits in time of peace

222 Brownlie 82 194/195, Nordquist and Park 143 5

223 Article 16(4) of the **Convention on the Territorial Sea and the Contiguous Zone** (called the 'Aquaba clause')

224 See Anand 2 182 for a full discussion

225 Article 14(4) of the **Convention on the Territorial Sea and the Contiguous Zone**

2.6.2.6.2 ACCESS TO THE SEA FOR LAND-LOCKED STATES

In 1956 the **UN Economic Commission for Asia and the Far East (ECAFE)** adopted a recommendation regarding transit problems of land-locked states. It urged that the needs of land-locked states and states having no easy access to the sea in the matter of transit trade be given full recognition by all member states and that adequate facilities be accorded in terms of international law and practice in that regard[226]. That recommendation started a movement through the **UN** and its agencies to address the problems of transit for land-locked states.

At its eleventh session in 1957 the **UN** General Assembly adopted a similar resolution[227] and - after considering the previously-mentioned report of the **ILC** - recommended that the proposed conference should study the question of free access to the sea for land-locked states, as established by international practice of treaties[228].

At the 1958 **Geneva Conference** the **Fifth Committee** was designated to address the question of free access for land-locked states[229]. Together with the legal principles of freedom of the high seas and equal sovereignty of member states in the international community, the practical necessity of economic relations between states was emphasised as a reason to codify that right. The **Fifth Committee**'s recommendations were submitted to and accepted by the conference as general principles of international law[230].

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226 Sinjela 88 46

227 *Ibid*

228 *Ibid*

229 Sinjela 88 46

230 In slightly modified form, as Article 3 of the 1958 **Convention on the High Seas** - see 2.6.2.1 *supra*

However, land-locked states have objected to Article 3(2)[231] on the grounds that that provision requires an agreement with transit states before the right of access is recognised[232].

The right of access was also conditioned by the requirement that a land-locked state grant its neighbour a reciprocal right of transit[233]. If the transit state had no need of access through the land-locked state the issue was unresolved whether such a state therefore could withhold the right of transit from its land-locked neighbour. The historic position of land-locked states had been that their right of access to and from the sea is a fundamental right of sovereign states, not a conditional privilege. They thus argued that only the modalities of implementation should be agreed upon with states of transit[234].

2.6.3 CONCLUSION

The four 1958 **Geneva Conventions**[235] on the whole reasserted the traditional freedom of the seas. All four have entered into force and have been ratified by a large number of states[236].

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231 See 2.6.2.1 *supra*

232 In the terms of Article 3 no obligation is apparent for states of transit to accord land-locked states a right of access even when final terms of transit are under negotiation - see Sinjela 88 47

233 Article 3(1)(a)

234 Sinjela 88 47/48

235 Added to by the **Optional Protocol (To the 1958 Law of the Sea Conventions) Concerning the Compulsory Settlement of Disputes** which provided for the reference to the **ICJ** of disputes arising out of the interpretation or application of the conventions - see Bowman and Harris 93 229, Colombos 31 23

236 The **Convention on the High Seas** on 20 September 1962 (57 contracting parties), the **Convention on the Continental Shelf** on 11 June 1964 (54 contracting parties), the **Convention on the Territorial Sea and the Contiguous Zone** on 10 September 1964 (46 contracting parties) and the **Convention on Fishing and Conservation of the Living Resources of the High Seas** on 20 March 1966 (36 contracting parties) - see Harris 92 284

If the **Geneva Conventions** could have been regarded as altogether codificatory of customary international law, the number of participants and the fact that they fragmented the subject-matter would have been immaterial. That, however, was not the case.

The **Convention on the High Seas** declared in its Preamble to be 'generally codificatory of established principles of international law'[237]. No such claim was made for any of the other conventions, and 'it is clear that they are a mixture of "codification" and "progressive development" in the sense of the terms of reference of the International Law Commission'[238]. However, it is not always easy to determine within which of those two categories a particular rule falls and whether - if within the latter - practice has so developed since its adoption that it could be regarded as a rule of customary international law.

The 1969 *North Sea Continental Shelf* cases[239] have indicated that it should not be too readily assumed that a treaty provision - even in a 'law-making' treaty - states a rule of customary international law. In those cases the **ICJ** regarded the Articles which set out the basic nature of the continental shelf as stating customary law. It held that the rules for delimitation in the case of adjacent states were not customary law because they were advanced as proposals in the first place, did not reflect the intrinsic doctrine of the continental shelf, were open to reservation, and had not sufficiently been implemented in subsequent practice to have become customary law after the event. That illustrated the disparity between the two sets of rules in just one of the conventions[240].

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237 Harris 92 284

238 Harris 92 284/285

239 1969 **ICJ** *Reports* 3. See Brownlie 82 208, Elias 136 130, Harris 92 285, Hjertonsson 184 163-166

240 Harris 92 285, O'Connell 4 22

The 1974 *Fisheries Jurisdiction Case* (United Kingdom v Iceland)[241] endorsed a further discrepancy when the court inferred that the rule concerning freedom of fishing was not an impediment (apparently even for parties to the 1958 **Convention on Fishing and Conservation of the Living Resources of the High Seas**) to the establishment of adjacent zones outside the territorial sea (at least to 12 miles from the coast)[242].

An example of the legislative as distinct from the codificatory character of the **Convention on the Territorial Sea and the Contiguous Zone** is the set of rules for determining bays. 'These are so artificial as to be contrivances rather than rules of customary law; they may clarify and induce certainty, but only for the parties to the Conventions'[243].

The 1958 **Geneva Conventions** cannot be regarded as a 'package' with all of the provisions incumbent without regard to their character[244]. The character of the **Geneva Conventions**, at least for parties to them, became controversial when in 1971 Senegal denounced the **Convention on the Territorial Sea and the Contiguous Zone** and the **Convention on Fishing and Conservation of the Living Resources of the High Seas**. The Secretary-General of the UN declined to accept the denunciation because the **Geneva Conventions** do not provide for denunciation. That in turn gave rise to an issue between him and Senegal respecting the scope of his depositary functions, and he referred the question to parties to the conventions. Only one government replied: the UK said that in its view the **Geneva Conventions** are not susceptible to unilateral denunciation, and that therefore, the validity or effectiveness of the Senegal

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241 See Brownlie 82 235/236, Elias 136 130, Harris 92 346/347, O'Connell 4 22

242 Brownlie 82 208, O'Connell 4 22

243 O'Connell 4 23

244 For parties they are such a package, but for non-parties their rules apply in as much as they are customary rules. That has led to a spectrum of sanctions. Only a minority of states (see n236 *supra*) are at present thus bound by the Geneva rules to the extent that those are customary law. As to that, the conventions themselves give only slight indication - see O'Connell 4 23

denunciations could not be accepted. The UK would continue to regard Senegal as bound by the conventions[245].

In the 1978 *Channel Continental Shelf Arbitration* (U. K. & France)[246] France contended that the **Geneva Conventions** had been rendered obsolete by the evolution of customary law stimulated by the work of the **Third UN Conference on the Law of the Sea**, at which, it argued, a consensus had been reached regarding the right of a coastal state to a 200-mile economic zone. That development was not compatible with the continuance in force of the **Geneva Conventions**, it said. The **Court of Arbitration** held that 'only the most conclusive indications of the intentions of the parties to the 1958 Convention to regard it as terminated could warrant this Court in treating it as obsolete and inapplicable'[247]. In the court's opinion, neither the records of the third law of the sea conference nor the practice of states provided any such conclusive indications.

Although each of the 1958 **Geneva Conventions** constituted a general code of law embodying the greatest measure of agreement that could be reached at that time, 'several holes were left in the codes'[248]. In particular, they did not contain a rule on the basic question of the width of the territorial sea or on the related question of the fishing rights, if any, of coastal states beyond their territorial sea[249]. Agreement on the definition of the continental shelf was vague and uncertain. Anand opines that the 1958 treaties codified what had been accepted and left unsettled what had not, including where the high seas began[250].

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245 O'Connell 4 23

246 See O'Connell 4 23

247 O'Connell 4 24

248 Anand 2 184, Fincham C and Van Rensburg W *Bread Upon the Waters* Montreal: Turtledove Publishing 1980 213

249 Colombos 31 23, Harris 92 285, Koh 39 13

250 Anand 2 184

In addition, they have been overtaken by events, both scientific and political. The development of new techniques for underwater exploitation of oil and other mineral resources made it necessary to reconsider the regime of the continental shelf and to establish a regime for the deep seabed[251].

Politically, the developing states felt that the major naval powers dominated the conference and - through their political influence - controlled a majority of the votes taken. It is true that the major naval powers proposed most of the amendments accepted. However, they were unable to get the required two-thirds majority on some of the key issues[252]. On the other hand, while the developing states were not very effective because of their weaknesses, conflicting interests, divisions and vulnerabilities[253], they did succeed in blocking passage of various proposals by the maritime powers[254]. They also succeeded in enlarging to 24 miles the baselines to be drawn from headland to headland in delimiting bays, acceptance of 'sovereignty' rather than 'jurisdiction and control'[255] over the continental shelf, and in gaining majorities for several of their proposals which increased the authority of the coastal states in waters off their coasts[256].

The **Geneva Conventions**, if not altogether codificatory in character, did at the time they were adopted embody a fair degree of agreement because of the two-thirds majority voting rule of procedure at the conferences. However, the implications of that relative unanimity were dispelled by the proliferation of newly independent states which came into being in the years immediately following the conference. Some new states

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251 Harris 92 285, Nordquist and Park 1 5

252 Such as the breadth of the territorial sea and fishing rights in areas beyond the territorial sea

253 Anand 2 185

254 Such as the proposal made by the US for a six-mile territorial sea and a 12-mile contiguous fishing zone, and a British proposal for a 15-mile limit on the use of straight baselines - see Anand 2 185

255 Anand 2 185

256 *Ibid*

acknowledged succession to the conventions which the 'imperial' powers had ratified, while others did not. Most of the new states, however, escaped the issue of succession altogether because they attained independence between the date of the 1958 conference and the date of the ratifications. The result was to upset the balance between affirmation and non-affirmation attained at the conference[257].

On several issues on which the law was uncertain or disputable, the conference adopted a series of resolutions recommending to various UN organs further study of those matters or suggesting further cooperation among states[258]. In addition, at the conclusion of the discussions a resolution was adopted inviting the General Assembly to consider calling a new conference on the law of the sea. That led to the 1960 **Geneva Conference on the Law of the Sea**[259].

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257 Some new states had legitimate grievances at despoliation of neighbouring fisheries which the **Geneva Conventions** did not permit them, they believed, to resist. Others claimed to have their hands tied by the conventions in the interests of the major powers, and were disposed to overthrow the whole Geneva system as having been contrived without their consent and against their interests - see O'Connell 4 24

258 The conference adopted such resolutions as 'nuclear tests on the high seas', 'pollution of the high seas by radio-active materials', fishery conservation conventions', 'special situations relating to coastal fisheries', 'humane killing of marine life' and 'regime of historic waters' - see Anand 2 185

259 Colombos 31 23

2.7 THE 1960 GENEVA CONFERENCE ON THE LAW OF THE SEA

2.7.1 INTRODUCTION

Prior to its adjournment, one of the resolutions adopted by the 1958 **Geneva Conference** requested the UN General Assembly to study the advisability of convening a second international conference for further consideration of the questions left unsettled by the 1958 conference. The General Assembly acted upon that request and at its 30th session in 1958, by an almost unanimous vote, requested the Secretary-General to convene a second conference in March or April of 1960 'for the purpose of considering further the questions of the breadth of the territorial sea and fishery limits'[260].

Within a few months of the termination of the 1958 conference, several states[261] discarded the three-mile rule and extended their territorial sea beyond the three-mile limit, generally to 12 miles. They believed (as the Foreign Minister of Mexico declared right after the close of the 1958 **Geneva Conference**) that 'the old concept of three miles as the limit of the territorial sea has generally been abandoned and repudiated and has disappeared forever from the juridical world as a standard of international law'[262]. Protests by the maritime powers merely strengthened their resolve to maintain their new wider limits[263]. However, despite the protests the upcoming conference would be attended by 82 states (and thus four fewer than those attending the 1958 conference)[264].

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260 Anand 2 185. See also Nordquist and Park 1 5

261 Like Iran, Iraq, Libya, Mexico, Panama and Sudan

262 Anand 2 185/186

263 Such as Japan, the UK and the US - see Anand 2 186

264 Nordquist and Park 1 5. However, Anand (2 187/188) mentions 87 participants

2.7.2 THE 1960 GENEVA CONFERENCE ON THE LAW OF THE SEA

When the second **United Nations Conference on the Law of the Sea** met at Geneva from 17 March to 26 April 1960, the US proposed a six-mile fishing zone beyond a six-mile territorial sea[265]. That would be subject to historic fishing rights in the outer six miles for vessels of states which could prove a practice of fishing in the area during a five-year period of time, which was referred to as the 'base period' or five years preceding 1 January 1958[266]. Unless modified by the subsequently negotiated agreements, those 'historic' rights were to be perpetual[267].

That proposal was later modified as a joint US-Canadian proposal to suggest a six-mile fishing zone beyond a six-mile territorial sea, with 'historic rights' for a period of ten years from 31 October 1960, in the fishing zone in favour of those states 'whose vessels have made a practice of fishing in the outer six miles of the fishing zone' for the five year 'base period', 1 January 1953 to 1 January 1958[268].

The US (and other maritime states which supported the US-Canadian proposal) pointed out that the joint proposal had been put forward at 'considerable sacrifice' of their interests 'in a sincere effort to meet other points of view and with the sole purpose of achieving international agreement'[269]. It tried to reconcile the diverse and often conflicting interests of coastal states seeking a larger share of the resources of the sea

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265 Looking at the growing defection from the three-mile rule - after considerable consultation with numerous countries between the 1958 and 1960 conferences - the US concluded that '[i]t is generally recognized that the next Conference will accept no proposal which limits the territorial sea to three miles, nor will it accept any proposal providing for a territorial sea of 12 miles or greater' - see Anand 2 186, Colombos 31 99

266 Anand 2 186

267 A similar proposal had earlier been made by the US at the 1958 conference with the exception of one limitation which was added in 1960, namely that such 'historic rights' would only permit fishing 'for the same group of species as were taken therein during the base period to an extent not exceeding in any year the annual average level of fishing carried out in the outer zone during the said period' - see Anand 2 186

268 Anand 2 186, Colombos 31 99, Koh 39 13, O'Connell 4 164

269 Anand 2 186

off their coasts with the interests of those states which wanted the greatest possible freedom of the seas[270]. The US representative said that the joint proposal 'involved a sacrifice of fundamental principles and large economic and human proportions for those states ... whose nationals for generations fished areas of the high seas up to the three-mile limit'[271]. He emphasised, however, that without sacrifice by both groups of states no agreement could be reached. The UK representative stressed that 'the Conference should be under no illusion about the exceedingly severe loss to the fishing states'[272]. Similar sentiments were expressed by Australia, France, Japan, the Netherlands, and several other states[273].

While the maritime powers wanted to keep the territorial waters as narrow as possible and to permit extension of fisheries jurisdiction with due regard to their 'historic rights', the developing coastal states, supported by the USSR, wanted to extend their exclusive sovereign jurisdiction to at least 12 miles. On 21 March 1960, the USSR proposed a flexible rule permitting each state to choose for itself any limit to its territorial sea from three to 12 miles, and an exclusive fishing zone out to 12 miles, if the breadth of its territorial sea was less than that limit. Mexico submitted a similar proposal, but later cosponsored a proposal by 18 states on 11 April 1960. That proposal provided for a flexible territorial sea of three to 12 miles and an exclusive fishing zone of 12 miles[274].

France, the UK, the US, and other maritime powers opposed that proposal permitting extension of the territorial sea and/or fisheries jurisdiction to 12 miles for the same reasons they had done so in 1958. They maintained that it was a misconception to imagine that the national security of the coastal states 'would be increased if they had

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270 Anand 2 186/187

271 Anand 2 187

272 *Ibid*

273 *Ibid*

274 Anand 2 187, Koh 39 13

wider territorial waters'[275]. In fact, a wider belt of waters would not be 'a suit of armour that would isolate these states from danger' in modern warfare, would be 'difficult and costly to police and control', would make it 'hard to fix precisely the position of ships at sea', and would 'increase the likelihood of incidents and so jeopardise the safety of coastal states'[276].

The US and other Western maritime powers were convinced that, as at the 1958 conference, the USSR was responsible for the discord. They thought that 'it was the purpose of the USSR and its satellites to fix the breadth of the territorial sea at 12 miles and to deny the right of aerial overflight and the right of innocent passage not only to warships but also to the merchant ships of commerce of the free world through such wider territorial sea in many crucial areas of the globe'[277]. The USSR's own proposals having been defeated, according to that view, it even prompted the developing states to submit proposals (for example on fisheries) which could not be acceptable to the Western maritime powers in order to create dissensions among them[278].

None of those arguments could convince the developing coastal states, more than they did in 1958, to change their minds and to desist from trying to modify the traditional law. During the six weeks of the conference there was a continuous struggle between the Asian-African and Latin-American nations supported by the Soviet bloc, on the one hand, and the Western maritime powers and some small Asian-African and Latin American states, on the other[279].

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275 Anand 2 187

276 *Ibid*

277 Anand 2 187. See also Koh 39 13

278 Anand 2 187

279 While the maritime powers reasserted the freedom of the seas as a 'time-honoured' principle, the developing states thought it was a 'time-worn' and old doctrine which could still serve and be useful but only if modified and adapted according to changed needs of the international society - see Anand 2 188

Rejecting the three-mile rule for territorial sea as a 'fallen idol', the new members of the international community said that 'agreement among the maritime Powers alone was not law', and that 'rules should be based on general state practice, not on that of a handful of states that had repeatedly been challenged and now finally rejected'[280]. Pleading for a 12-mile limit for territorial waters, they said that 'it would be consistent not only with state practice and security, with political and psychological consideration, but with the needs and interests of humanity'[281].

The smaller coastal states received powerful support from the USSR which had itself been claiming a 12-mile territorial sea for a long time. Thus, indirectly defending the USSR's claim, the Soviet representatives sided with the newly independent states in criticising the Western maritime powers for their conservative attitude[282].

Although the USSR had itself been a long-distance fishing state, it attacked the Western maritime powers even on that issue:

> While the development of technical fishing methods had created new possibilities for the rational exploitation of the resources of the sea, large monopolies were using well-equipped fishing fleets to cause depredations of the fish resources near the shores of foreign countries, where the fish usually abounded. The coastal state could best be protected from such forays by the extension of their territorial sea to twelve miles[283].

In fact a Soviet delegate, Tunkin, advised that 'any state which wished to help under-developed countries could do so by recognizing their right to expand their fisheries within a twelve-mile limit'[284].

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280 Anand 2 188

281 *Ibid*

282 *Ibid*

283 Anand 2 189

284 *Ibid*

2.7.3 CONCLUSION

The main reason for all the diverse attitudes by various states was summed up by the Chilean delegate who said that the rise and development of the law of the sea had been prompted by one single factor: interest. Political or economic interest had always prevailed in defining the law of the sea through the centuries, he maintained. Grotius had thus not argued for the freedom of the seas simply as an intellectual concept, but to defend the interests of the Dutch East Indies Company. Selden's sole aim in refuting Grotius had been to defend England's interests, the delegate argued[285].

Since no formula could be found to reconcile the conflicting interests that had to be protected, the conference failed to adopt any proposal on the territorial sea and fisheries jurisdiction. The 18-power proposal, sponsored by the developing states and supported by the Soviet group, did not receive a majority vote in the **Committee of the Whole**. It was rejected by 39 votes to 36, with 13 abstentions.

The joint US-Canadian proposal was accepted and recommended by the **Committee of the Whole**. However, in the **Plenary Session** it received 54 votes in favour, 28 against with five abstentions, and thus failed to obtain the required two-thirds majority of those present and voting. That meant that it could not be adopted[286].

The opposition of the developing states led to disappointment for the maritime powers. In his closing statement, Arthur H Dean, chairman of the US delegation, said that 'although the joint proposal had failed to obtain the required two-thirds majority by a single vote, it had received considerably greater support than any proposal before either of the two Conferences'[287]. He pointed out that the US proposal to agree on a six-mile breadth of the territorial sea on certain conditions had been no more than an

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285 Anand 2 189

286 Anand 2 189, Colombos 31 99/100, Koh 39 13, O'Connell 4 24

287 Anand 2 190. See also Colombos 31 100

offer; its non-acceptance therefore left the pre-existing situation unchanged[288]. He said that his country was satisfied with the three-mile rule and would continue to regard it as established international law. Three miles was the sole breadth of territorial sea on which there had been anything like common agreement, and was regarded by the US as a time-tested principle which offered the greatest opportunity to all nations without exception. Unilateral acts by states claiming a greater breadth of territorial sea was not sanctioned by international law, the US maintained, and therefore there was no obligation on the part of states adhering to the three-mile rule to recognise claims of other states to a greater breadth[289].

2.8 CONCLUSION

The history of the law of the sea went through many stages over different centuries, as has been indicated above. Probably one of the most fervent stages had been that concerning the debates about *mare liberum* v *mare clausum*. It may indeed be true that the advocates of the latter merely defended it out of interest (self- as well as that of their defendants). However, in retrospect it did indeed make for some of the most ingenious legal constructions in this field of the law.

However, until that stage of the development of the law of the sea the basic principles of the freedom of the seas were: no territorial sovereignty over the seas, no exclusive jurisdiction over foreign vessels on the high seas, no claim to a salute by warships, no levying of a tribute from passing foreign vessels, no hindering of foreign shipping on the grounds of exclusive authority over certain sea areas, no arrogation of exclusive fishing rights in the high seas, and no acquisition of exclusive rights by prescription[290].

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288 Anand 2 190. See also Koh 39 14

289 Anand 2 190. See also Hjertonsson 184 125, O'Connell 4 169

290 Verzijl 13 37

During the 18th century the power to rule and the ownership of the sea merged into a single criterion of jurisdiction. That was exploited by many states during the 19th century[291]. Also at that time, the cannon-shot rule, the line-of-sight rule, and the marine league merged to become the three-mile territorial sea[292]. Gradually the three-mile territorial sea was incorporated into domestic laws, upheld by courts, and advocated by publicists. In 1818 the three-mile rule was for the first time incorporated into a treaty, the **Convention Respecting Fisheries, Boundary, and the Restoration of Slaves** of 20 October 1818 between the UK and the US[293]. The three-mile rule became almost universally accepted in the 19th century.

The First World War brought about important changes to the political geography of the world. Four defeated empires[294] were broken up and new states came into being[295]. A new international organisation, the **League of Nations**, was established. That, and the establishment of the 'Committee of Experts', directly led to the 1930 **Hague Codification Conference**[296].

The **Hague Conference** failed partly because a possible compromise consisting of a three-mile territorial sea and a nine-mile contiguous zone was squashed by opposition from the UK to it. From 1930 onwards the three-mile rule was subjected to increasing criticism, and its significance became diminished by the development of the concept of the contiguous zone[297].

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291 O'Connell 4 15

292 Koh 39 4/5. See also the 1793 Jefferson declaration fixing the territorial sea at three miles

293 See Koh 39 5

294 Austro-Hungarian, German, Ottoman and Russian

295 Arabia, Czechoslovakia, Egypt, Estonia, Finland, Latvia, Lithuania, Poland, Yemen and Yugoslavia all became independent

296 Koh 39 7

297 Koh 39 8

After the Second World War the US eclipsed the UK in both naval and land power, and the defence of the principle of the freedom of the seas in general, and the three-mile territorial sea in particuar, was transferred from the UK to the US[298]. US policy was not consistent, however, as shown forcibly by the **Truman Proclamation**. That had an immediate effect on the US's regional neighbours, with them emulating (and some exceeding) the provisions of the proclamation[299].

The Second World War also saw the establishment of the **UN**, as well as the subsequent establishment of the **ILC** to encourage the progressive development of international law and its codification. That in turn led to the 1958 **Geneva Conference on the Law of the Sea**. Unlike the 1930 **Hague Codification Conference** the 1958 conference produced the four 1958 **Geneva Conventions** discussed above[300].

As far as land-locked states are concerned, the **Geneva Conventions** did take note of the problems facing those states. However, many land-locked states felt that they were worse off in certain areas, for example the fact that they had to negotiate with transit states in respect of transit and other rights.

The issues left unsettled by the 1958 conference - mainly the limits of the territorial sea and fishing zone - were to be discussed at the 1960 **Geneva Conference on the Law of the Sea**. However, that conference ended inconclusively. Thus, 'for the third time in thirty years, the representatives of the international community had been unable to agree on the maximum permissible breadth of the territorial sea'[301].

The law of the sea was the subject of the first completed attempt of the **ILC** to place a large segment of international law on a multilateral treaty basis. The result of its work

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298 It had been noted before that the UK had defended the three-mile territorial sea for more than a 100 years up to that time

299 See 2.6.2.4 *supra*

300 See 2.6 *supra*

301 Koh 39 14

at the first and second **Geneva Conferences on the Law of the Sea** of 1958 and 1960 had been the four **Geneva Conventions**. Although the 1958 **Geneva Conventions** were a considerable achievement on previous codifications, they were still far from perfect and had given rise to several disputes[302].

Apart from the weaknesses in the conventions themselves, developments on a scientific as well as a political level rapidly followed on the heels of the 1958 and 1960 conferences and overtook the conventions.

On the scientific level, the development of new techniques for underwater exploitation of oil and other mineral resources made it necessary to reconsider the regime of the continental shelf and to establish a regime for the deep seabed. Concern for the conservation of fishing resources and the prevention of pollution had grown, and led to a general approval of an approach based upon control by the coastal state over wide areas of the sea adjacent to its coastline. State practice on the width of the territorial sea had changed (once again) in favour of the coastal state, with consequential problems for innocent passage and overflight. Archipelagic and land-locked states had pressed their claims for better treatment. Those and other considerations led to the general acceptance of the need for a third conference on the law of the sea[303].

Equally important had been the political events following the 1958 and 1960 conferences. It had been noted before that most post-colonial and newly-independent states felt that they had no say in (or no real impact upon) the drawing up of the 1958 codifications.

Some new states had legitimate grievances at despoliation of neighbouring fisheries in which the **Geneva Conventions** did not help them in any way, they believed. Others claimed to have their hands tied by the conventions in the interests of the major powers, and were disposed to overthrow the whole Geneva system as having been contrived

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302 See 2.6.3 *supra*, and also Nordquist and Park 1 5

303 Harris 92 284/285, Koh 39 16

without their consent and against their interests. Thus the **Geneva Conventions** had barely come into force before their psychological basis became threatened by the political changes of the 1960s[304].

Furthermore, the **Geneva Conventions** had been ratified by relatively few states and were rapidly overtaken by state practice. That is why Pardo's call for an acceptance of the 'common heritage of mankind'[305] was universally welcomed.

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304 O'Connell 4 24

305 See 3.1 *infra*, and also Nordquist and Park 1 6

CHAPTER THREE : THE 1982 LAW OF THE SEA CONFERENCE

3.1 INTRODUCTION

In the 1960s it became clear that the 1958 **Geneva Conventions on the Law of the Sea** did not meet all the needs related to maritime matters, nor did they provide a basis for legal regulation with respect to new technological developments or new political or economic demands. For example, when the **Convention on the Continental Shelf** was adopted at the 1958 **Geneva Conference on the Law of the Sea**, the exploitation of seabed areas of more than 200 metres in depth was not generally considered to be a realistic possibility. However, the rapid progress of technology since then has made the exploitation of such areas possible, and the development of the deep ocean floor has become an actual, not merely theoretical, problem. Even so, it was only after the Maltese draft resolution at the 22nd Session of the UN General Assembly in 1968 that the regime for the deep ocean floor was discussed as a practical problem on the international level. Arvid Pardo, Malta's permanent representative to the UN, in 1967 emphasised the imminent need for establishing a regime for the deep ocean floor. In response the General Assembly began to consider such a regime by setting up an *ad hoc* committee on the seabed[1].

The **Third United Nations Conference on the Law of the Sea** (hereinafter referred to as **UNCLOS III**) had its origins in this **Seabed Committee**, established to examine the question of the deep seabed beyond the limits of national jurisdiction over the continental shelf. Many states were keen to have the deep seabed and its resources declared the 'common heritage of mankind'. That would involve defining the limits of

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[1] In fact the Maltese proposal was not altogether new; the opportunity had gradually matured both inside and outside the UN. But, after the Maltese proposal, in parallel with the debates at the UN, there were also many discussions on the regime for the deep ocean floor at the non-governmental level - Dupuy R-J *The Law of the Sea* Dobbs Ferry, N.Y.: Oceana Publications, Inc. 1974 15, Erasmus G 'Dispute settlement in the law of the sea' in *The Law of the Sea* edited by Bennett T W *et al* Cape Town: Juta & Co, Ltd 1986 20, Oda S *The Law of the Sea in our Time - I* Leyden: Sijthoff 1977 3. See also Churchill R R and Lowe A V *The Law of the Sea* Manchester: Manchester University Press 1988 13/14, Nordquist M H and Park C *Reports of the United States Delegation to the Third United Nations Conference on the Law of the Sea* Honolulu: Law of the Sea Institute, University of Hawaii 1983 6, Rembe N S *Africa and the International Law of the Sea* Alphen aan den Rijn: Sijthoff & Noordhoff 1980 36/37

national jurisdiction, and thus revision of parts of the 1958 **Convention on the Continental Shelf** and the 1958 **Convention on the High Seas**. Other states were reluctant to review the codifications of the 1950s. However, the presence in the UN of many newly independent states (who did not participate in the 1958 and 1960 conferences) provided a majority in favour of reviewing the earlier law. Furthermore, many states were increasingly concerned about the problems of overfishing and marine pollution off their coasts (neither of which could satisfactorily be controlled within the narrow jurisdictional limits on which the 1958 regime was based).

The developing states thus introduced new demands and pressed for the creation of a 'New International Economic Order', which was an active programme for the redistribution of wealth on a global scale. The existence of these factors, and the recognition that the various parts of the sea were all closely interrelated, led to widespread support for a review of the whole law of the sea. It was agreed in 1970 by virtue of General Assembly Resolution 2570 C (XXV) to convene a UN conference with the task of producing a comprehensive convention on the law of the sea. The conference, **UNCLOS III**, would eventually after years of deliberation produce the 1982 **United Nations Convention on the Law of the Sea (LOSC)**[2].

3.2 PROPOSALS FOR A NEW CONFERENCE ON THE LAW OF THE SEA

3.2.1 INTRODUCTION

In this section a fairly detailed overview will be given of the build-up to **UNCLOS III**. It may be argued that it is not necessary in view of the lengthy period during which the conference took place. On the other hand, such a detailed overview may be relevant for several reasons.

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[2] Churchill and Lowe 1 13/14, Erasmus 1 20, Ogley R *Internationalizing the Seabed* Hampshire: Gower Publishing Company Limited 1984 1

In the first place, as mentioned before, the period in question saw a complete change in terms of the actors in the international arena. The newly independent states saw the negotiating of a new treaty on such a big scale as their first opportunity to actively take part in international treaty-making. Secondly, the deliberations in the **Seabed Committee**, the committee system within that committee, and the consensus principle all had a very important impact in terms of setting the tone for the deliberations at **UNCLOS III**. Thirdly, the relative importance given to events in the US during that period were eventually reflected in its refusal to sign the **LOSC**.

With hindsight, it is almost incomprehensible that the 1982 **LOSC** became a reality, even though not in force yet. This section denotes the new trends on thinking about international law of that period (especially the concept of 'common heritage of mankind').

3.2.2 DEVELOPMENTS PRIOR TO THE MALTESE PROPOSAL

3.2.2.1 ACTIVITIES OF NON-GOVERNMENTAL ORGANISATIONS IN THE UNITED STATES PRIOR TO 1967

Prior to the Maltese proposal at the General Assembly in 1968 a movement was emerging among non-governmental organisations in the US to place the deep ocean floor under a certain kind of international control. A brief survey of these follows.

1 **The Committee on Natural Resources Conservation and Development of the National Citizen's Commission of International Cooperation**[3].

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[3] The committee was established after the so-called 'White House Conference', convened in October 1964 by the President of the US. The area of study and discussion covered some 30 items, including 'Natural Resources Conservation and Development'. The committee of 18 members met from 29 November to 1 December 1965 in Washington DC. In the report of the meeting, a specialised agency of the UN for marine resources (including mineral resources) was proposed. Pointing to the ambiguity of the continental shelf, the report suggested international control of exploitation of the seabed area - see Oda 1 4

2 The **Commission to Study the Organization of Peace**[4].

3 The First Annual Meeting of the **Law of the Sea Institute**[5].

4 The **American Bar Association National Institute on Marine Resources**[6].

5 The Second Annual Meeting of the **Law of the Sea Institute**[7].

6 The **World Peace Through Law Centre**[8].

3.2.2.2 THE INTERNATIONAL LAW ASSOCIATION (DEEP-SEA MINING COMMITTEE) 1966-1967

A committee of the Netherlands branch of the **ILA** placed the problem of the deep ocean floor on the agenda of the association's Helsinki session in 1966, and a sub-committee was appointed to investigate the issue. Its report stated that the exploitation

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[4] The commission, originally set up in 1939 to study possible organisations to replace the **League of Nations**, was an auxiliary organ of the **United National Association of the United States**. In 1965 the commission proposed that the **UN** should supervise and control the deep ocean resources. Its report - entitled 'New Dimensions for the United Nations: The Problems for the Next Decade' - dealt with the problems of the sea, and in particular the exploitation of the deep ocean floor. That part proposed that the **UN** be vested with title over the mineral resources of the deep ocean floor and that a specialised agency called the **UN Marine Resources Agency** be established - see Oda 1 4/5

[5] In 1965 the **Law of the Sea Institute** was established at the University of Rhode Island for the purpose of exchanging ideas and information on matters relating to the control and the use of the sea. The institute worked mainly through its annual meetings, the first of which was held from 27 June to 1 July 1966 - see Oda 1 5-7

[6] Under the auspices of the **ABA's Section on Resources Law** a meeting on 'Marine Resources' was held in California from 7 to 10 June 1967. Reports on various subjects of marine resources were given, but the meeting did not come to any concrete conclusions - see Oda 1 7

[7] This meeting took place from 26 to 29 July 1969 at Rhode Island

[8] The centre had its headquarters in Geneva, but the chairman of its committee on the **UN** Charter was Aaron L Danzig, a lawyer from New York. A conference of the **World Peace Through Law Centre** recommended on 13 July 1967 (in its Resolution 15 on 'Resources of the High Seas') that the General Assembly should declare that non-living resources of the high seas beyond the continental shelf were subject to the jurisdiction and control of the **UN** - see Oda 1 8/9

of the deep ocean floor had become technologically possible. The Executive Council of the **ILA** decided in 1967 to create the **Deep-sea Mining Committee**, consisting of the members of the above-mentioned sub-committee and six additional members[9].

3.2.2.3 DELIBERATIONS BY THE UNITED STATES CONGRESS IN 1967

On 29 September 1967 Clairborne Pell, a Senator from Rhode Island, proposed an idea of a draft convention on the sea and ocean floor in the US Senate. He suggested an international regime for the ocean floor and its floor analogous to the Antarctic and outer space. He submitted a draft resolution to the effect that: (i) the US should urge the **UN** to consider the problem of marine resources beyond the continental shelf and any licensing or other arrangement necessary for regulation; (ii) there was an urgent need for the establishment of an international agreement under which the deep ocean floor and its resources would be considered free to all nations and capable of coming under the sovereignty of any nation; (iii) the agreement should incorporate proposals for arms control on the seabed; and (iv) the outer boundaries of the continental shelf should be defined by an international conference which was to consider the revision of the **Continental Shelf Convention**[10].

Soon after, Pell submitted another draft resolution. That draft was characterised by the fact that the exploration and exploitation of the resources of the deep ocean floor would only be permissible after obtaining a licence from an agency designated by the **UN**. In

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[9] Oda 1 9/10. See also Ogley 2 12-17 for the technological aspects

[10] Oda 1 11

addition, it referred to the idea of the use of the deep ocean floor exclusively for peaceful purposes, to the prohibition of dumping of radioactive wastes into the ocean, and to delimiting the outer limits of the continental shelf at the 600-metre depth[11].

3.2.3 THE MALTESE PROPOSAL AT THE 22ND SESSION OF THE UNITED NATIONS GENERAL ASSEMBLY

3.2.3.1 INTRODUCTION

At the 40th Session of the **Economic and Social Council** (**ECOSOC**) in 1966, the US representative pointed out the importance of marine resources to mankind. He also proposed submitting a draft resolution inviting the Secretary-General to undertake a survey of the available information concerning the resources of the sea and the techniques for exploiting them. **ECOSOC** - on the basis of a proposal by the US, Ecuador and Pakistan - on 7 March 1966 adopted resolution 1112 (XL) 'Non-agricultural resources'[12].

At the **Second Committee** of the General Assembly (1966, 21st Session) a draft resolution on the resources of the sea sponsored by 16 nations was submitted on the

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[11] Pell's idea was not well received in the US Congress, however. Nearly two dozen draft resolutions were submitted in the House of Representatives from August to October 1967, all of which opposed the idea of bestowing the title to the resources of the deep ocean floor upon the **UN**. The US Senate also received similar proposals. Oda suggests, however, that these proposals were submitted not particularly to oppose Pell, but to counter the Maltese proposal which had already been discussed in the **UN** - Oda 1 11/12

[12] The resolution *inter alia* requested the Secretary-General to survey the then state of knowledge of the sea beyond the continental shelf, to identify these resources, and also to identify any gaps in the knowledge thereof. The Secretary-General completed a report entitled 'Resources of the Sea' in February 1968 - Oda 1 13, Rembe 1 37/38

initiative of the US. The revised draft resolution was adopted at the plenary meeting on 6 December 1966[13].

3.2.3.2 THE MALTESE PROPOSAL

On 17 August 1867 Arvid Pardo, Malta's representative to the UN, requested inclusion of the following new item concerning the development of the deep ocean floor in the agenda at the 22nd Session of the General Assembly: 'Declaration and treaty concerning the reservation exclusively for peaceful purposes of the sea-bed of the ocean floor, underlying the seas beyond the limits of present national jurisdiction, and the use of their resources in the interests of mankind'[14].

In an explanatory memorandum, Malta stressed that, in view of the rapid progress of technology, it was feared that area beyond the continental shelf would become subject to national appropriation. The result, Malta said, would be the militarisation of the accessible ocean floor through fixed military installations, and the exploitation of the immense resources for the national advantage of technologically developed countries. Malta considered that the time had come to declare the ocean floor to be the 'common heritage of mankind'. It proposed that immediate steps should be taken to draft a treaty on the law of the sea[15]. Malta proposed, in addition, the creation of an

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13 As General Assembly Resolution 2172 (XXI), 'Resources of the Sea', the General Assembly endorsed **ECOSOC** resolution 1112 (XL) and requested the Secretary-General to set up a group of experts to assist him **inter alia** to undertake a comprehensive survey of activities in marine science and technology, formulating proposals for an extended programme of international cooperation to assist in a better understanding of the marine environment, and to submit his survey and proposals to the General Assembly at its 23rd Session, through **ECOSOC** - Oda 1 15, Rembe 1 38

14 Erasmus 1 20, Oda 1 16, Rembe 1 39 n14

15 The treaty should have embodied the following principles: (i) the seabed and ocean floor beyond the limits of national jurisdiction are not subject to national appropriation; (ii) the exploration of the sea shall be undertaken in a manner consistent with the principles and purposes of the **UN** Charter; (iii) the use of the area and its economic exploitation shall be undertaken with the aim of safeguarding the interests of mankind and the benefits shall be used primarily to promote the development of poor countries; and (iv) the area shall be reserved exclusively for peaceful purposes - Oda 1 16, Rembe 1 40

international agency to assume jurisdiction over the area and to ensure that activities in the area conform to the provisions of the treaty.

3.2.3.3 DELIBERATIONS CONCERNING THE MALTESE PROPOSAL

The General Assembly on 6 October 1967 adopted the 'Examination of the question of the reservation exclusively for peaceful purposes of the sea-bed and the ocean floor, and the subsoil thereof, underlying the high seas beyond the limits of present national jurisdiction, and the use of their resources in the interests of mankind' as agenda item 92. It also approved the general committee's recommendation to allocate that item to the **First Committee**[16].

In the discussions in the **First Committee** from 8 to 16 November 1967 the idea of the establishment of an international agency, as suggested by Malta, received general support. However, the US seemed to favour a 'committee on the ocean which would assist the General Assembly in promoting long-term international cooperation in marine science. The USSR advised that the creation of another new UN body could duplicate the organisations already in existence in view of the fact that the Secretariat and other existing international organs had been dealing with the problems of the sea, and suggested that the **IOC** be more effectively utilised[17].

At the same time, there was also a variety of opinions among the delegates with respect to the legal principles applicable to the deep ocean floor. The USSR regarded as premature the declaration of any legal principle. Canada and Italy were also of the same opinion. However, there was agreement among the delegates that claims of sovereignty should be suspended. Japan, Sweden, the US and others supported that idea. Sweden in particular proposed that claims should be frozen, and that received the support of African and Asian states. The USSR gave full support to the idea that the

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[16] Oda 1 17

[17] Oda 1 19, Ogley 2 57/58

deep ocean floor should only be used for peaceful purposes, while the US considered its use in terms of the effective control of armaments. With regard to the military aspect, however, developed states (including the USSR) were of the opinion that the matter might be considered by the **Eighteen Nation Committee on Disarmament**[18].

3.2.3.4 ADOPTION OF THE MALTESE PROPOSAL

A working group of 27 delegations, informally set up in accordance with the request of Malta, prepared a draft resolution, which was afterwards introduced by Belgium. The number of cosponsoring states (which finally increased to 43) included those of both the Western and Eastern blocs, and the developed and the developing states[19].

The General Assembly on 18 December 1967 unanimously adopted resolution 2340 (XXII): 'Examination of the question of the reservation exclusively for peaceful purposes of the sea-bed and the ocean floor, and the sub-soil thereof, underlying the high seas beyond the limits of present national jurisdiction, and the use of their resources in the interests of mankind'[20].

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[18] Oda 1 19/20, Rembe 1 43/44

[19] The membership of the *ad hoc* committee referred to in the proposal was left open, but the chairman of the **First Committee** suggested the names of 30 states. The proposal was agreed upon. However, at the request of some states, the chairman suggested the addition of five more members. Thus, a resolution which recommended the establishment of an *ad hoc* committee of 35 members was approved on 8 December 1967 by the **First Committee**, 93 to 0 with one abstention - see Nordquist and Park 1 6, Oda 1 20, Rembe 1 40

[20] Firstly it provided for the establishment of an *ad hoc* committee to study the peaceful uses of the seabed and the ocean floor beyond the limits of national jurisdiction (hereinafter referred to as the **Seabed Committee**) of 35 nations. Secondly, it requested the **Seabed Committee** to prepare a study which would include (i) a survey of the past and present activities of the **UN**, the Specialised Agencies, the **IAEA** and other inter-governmental agencies, (ii) an account of scientific, technical, economic, legal and other aspects, and (iii) an indication regarding practical means to promote international cooperation - Dupuy 1 111, Oda 1 20

3.2.4 DEVELOPMENTS WITHIN THE UNITED STATES GOVERNMENT 1966-1967

3.2.4.1 INTRODUCTION

Interest in ocean development emerged in the US during 1966. On 13 July 1966 President Johnson launched the *Oceanographer*, an ocean research vessel. On that occasion he referred to the riches of the oceans and foresaw the dawn of a new era of the oceans[21].

On 17 June 1966 the *Marine Resources and Engineering Development Act* was enacted. Under that act the President was called upon to develop a comprehensive national programme in marine science with the assistance of the **National Council on Marine Resources and Engineering Development** and the **Commission on Marine Science, Engineering and Resources**[22]. The council's first report, 'Marine Science Affairs - A Year of Transition', was completed in February 1967, after which the President sent a message to Congress on the ocean resources and the development of ocean technology, and recommended a budget of $462 million for the 1967-1968 fiscal year. The report itself did not pay any particular attention to the development of the deep ocean floor. On the other hand, the commission, whose members and counsellors were appointed by the President, began its activities in January 1967[23].

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[21] He said: 'Under no circumstances, we believe, must we ever allow the prospects of rich harvest and mineral wealth to create a new form of colonial competition among the maritime nations. We must be careful to avoid a race to grab and hold the lands under the high seas. We must ensure that the deep seas and the ocean bottoms are, and remain, the legacy of all human beings' - Oda 1 21, Rembe 1 38

[22] The council was composed of five cabinet members and three directors of Federal government agencies, with the Vice-President of the US as chairman - Oda 1 21

[23] Oda 1 21/22

3.2.4.2 REACTIONS OF THE UNITED STATES GOVERNMENT TO THE DEBATES IN CONGRESS

In September 1967 the **Sub-Committee on International Organizations and Movements** of the **House Committee on Foreign Affairs** met, and at the hearing David H Popper, Deputy Assistant Secretary of State for **International Organization Affairs**, stated that the treaty envisaged by Malta could not be supported because it was premature and that the US did not intend at that session of the General Assembly to dispose of title to the deep ocean floor to the UN[24]. Popper also suggested at a hearing held on 19 October 1967 that it would be a mistake to develop conclusions on the regime of the deep ocean floor at that time[25]. On 29 November 1967 at a hearing before the **Senate Committee on Foreign Affairs**, Joseph Sisco, Assistant Secretary of State for **International Organization Affairs**, stated that the real intent of the Maltese proposal was difficult to understand[26]. Negative voices about the regime of the deep ocean floor by high-ranking officials of the US government were heard in Congress on other occasions as well[27].

The **Sub-Committee on International Organizations and Movements** recommended in its *interim* report of 7 December 1967 to the **Committee on Foreign Affairs** that the US government actively discourage any action to reach a decision at that time with respect to the vesting of title to the seabed and its resources in any international organisation[28].

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[24] Oda 1 22

[25] He pointed out that with regard to the regime of the outer space (which was often referred to as analogous to the deep ocean floor) the process which began in 1958 had culminated in the conclusion of the **Outer Space Treaty** only a few weeks previously - see Oda 1 22

[26] He also said that the US was far from ready to establish a new international organisation to preside over the amalgam of uncertainties of that regime - see Oda 1 22

[27] See further Oda 1 22/23

[28] It also recommended that the US government proceed with the greatest caution so as not to limit or prejudice the national interests of the US. The subcommittee was of the opinion that hasty action in this field could create more problems than it would solve or avert - Oda 1 23/24

3.2.4.3 REACTIONS TO THE MALTESE PROPOSAL

The lukewarm attitude of the US towards the Maltese proposal in the UN seemed to indicate that the general consensus was that a cautious approach should be followed. It was also suggested that the General Assembly of the UN should take action to establish a committee on the oceans, analogous to the **Outer Space Committee**. The committee should then assist the General Assembly in considering all proposals on marine questions in promoting long-term international cooperation in marine science, and in considering questions of law including such matters as the rights of use and exploration, arms control, and the problem of pollution of the sea[29].

3.2.4.4 PROPOSAL FOR AN INTERNATIONAL DECADE OF OCEAN EXPLORATION

On the basis of 'Marine Science Affairs - A Year of Plans and Progress'[30] the US President sent a message to Congress concerning marine resources and engineering development. He also recommended a budget of $516 million for the 1968-1969 fiscal year. As in the previous year, the report did not take any clear attitude towards the development of the deep ocean floor[31].

At the same time however, the President on 8 March 1968 proposed the launching of 'an historic and unprecedented adventure - an international decade of ocean exploration

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[29] Oda 1 24, Rembe 1 42

[30] The second report of the **National Council on Marine Resources Engineering Development**, published in March 1968 - Oda 1 25

[31] Oda 1 25

for the 1970's[32]. He urged all nations to join together in a concerted, long-term cooperative programme of ocean exploration on a world-wide basis[33].

3.2.5 DISCUSSIONS BY NON-GOVERNMENTAL ORGANISATIONS 1968-1970

In parallel with the discussions on a regime of the deep ocean floor in the UN which began in 1968, many non-governmental organisations and individuals took up that problem. However, their views were not always reflected in the deliberations of the UN[34].

3.2.5.1 THE 'REALISTS' WITHIN THE UNITED STATES

The opinions of the mining industry of the US were expressed in 1968 by various organisations. What follows is a brief survey of the most important of these.

1 US National Petroleum Council (Committee on Petroleum Resources Under the Ocean Floor)

The council was established in 1964 as an advisory body representing all sections

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[32] Oda 1 25

[33] Specifically, mention was made of (i) determination of the geological structure and the mineral and energy resources potential of the world's continental margins, (ii) preparation of topographic, geological and geophysical maps of selected areas of the deep ocean floor, and (iii) coring and drilling on the continental margins and deep ocean floor in selected areas - Oda 1 25

[34] Oda 1 26

of the oil and gas industries of the US. It would not, however, represent the views of the US government[35].

2 The American Branch of the **International Law Association** (**Committee on Deep-Sea Mineral Resources**)

This committee of the American Branch of the **ILA** presented an *interim* report on 19 July 1968, dealing with the outer limit of the continental shelf and the legal regime for the deep ocean floor. The committee suggested that the outer limits of the continental shelf extend to the submerged portion of the continental land mass, pointing out that that would result from the proper interpretation of the **Continental Shelf Convention**, and provisionally proposed a depth of 2 500 metres[36].

3 The **American Bar Association**

On the initiative of the **ABA** Section on Resources Law, the **Advisory Committee on Ocean Resources**[37] was set up in 1967. This advisory committee drew up a

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35 In March 1969 the **National Petroleum Council** presented a report entitled 'Petroleum Resources Under the Ocean Floor'. The report suggested that the continental shelf include not only the continental slope but also the landward portion of the continental rise, and that international law impose no prohibition on the freedom of a state or its nationals to explore or exploit the seabed resources of the area beyond. While the establishment of an international registry to serve as a public record of the exploratory activity was acceptable, the council was of the view that it would be premature to move towards the establishment of an international agency with licensing authority. The council suggested that a movement to unify the limits of the continental shelf at the lines of the 200-metre depth would mean the abandoning of the acquired rights under the **Continental Shelf Convention** - Oda 1 26-28

36 It also suggested, as an alternative, a combination of the depth as suggested above and the stated distance, for instance, of 100 miles from the coast, whichever limitation encompassed the larger area. With respect to the regime applicable to the area beyond coastal jurisdiction, the committee considered under the circumstances not to vest jurisdiction in the **UN** or any other international organisation to administer an international licensing system with power to grant to deny exploration and production concessions. It preferred creating an international commission with instructions to draft a convention, which would have as its objectives the creation of an international agency concerning the development of the ocean floor, establishment of reasonable payments of royalties, and establishment of norms of conduct by states - Oda 1 29

37 Consisting of the representatives of its Sections on Natural Resources Law, International and Comparative Law, Administrative Law, and the representatives of the **Standing Committee on Peace and Law Through the United Nations** of the **World Peace Through Law Centre** - Oda 1 30

'Joint Report' of the Sections of Natural Law, International and Comparative Law, and the Standing Committee on Peace and Law Through the United Nations in August 1968[38].

3.2.5.2 DRAFTS OF A REGIME FOR THE DEEP OCEAN FLOOR IN THE UNITED STATES

While the above opinions - representing mainly the mining industry - were published, a number of proposals were published in the form of private drafts. These suggested that the deep ocean floor be placed under international control and management[39]. Briefly, they were:

1 The **Commission to Study the Organization of Peace**.

2 The **Danzig Draft**.

3 The **Pell Draft**.

4 The **Borgese Draft**.

5 The **American Assembly**.

6 The **Massachusetts Institute of Technology** (MIT) Group.

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[38] The conclusion of the report was identical to that of the 1968 'Interim Report of the American Branch of the International Law Association' referred to above, except that the exact figure for the limit of the continental shelf was dropped. Later, the two sections mentioned above and the **Standing Committee on World Order Under Law** held a meeting at Dallas from 10 to 11 August 1969, which adopted a report 'Non-living Resources of the Sea'. Regarding the outer limit of the continental shelf and the regime beyond, the report stated that the 200-metre depth was already outdated, that the activities within the area of exploitability fell clearly within the jurisdiction of the US, that there would be no need to freeze the claims, and that the jurisdiction of a state would be extended to the limit of adjacency. It was stated in the report that the greater the depth of water at the site to be exploited, the greater the investment that would be required, and that an idea which will discourage that trend could not be supported - see Oda 1 30/31

[39] For a discussion of each of these, see Oda 1 31-45

3.2.5.3 DISCUSSIONS AT INTERNATIONAL GATHERINGS

Interest in the regime for the deep ocean floor first emerged in the US. Stimulated by the Maltese proposal and the establishment of the **Seabed Committee**, however, several international symposia were planned, including some in Europe. The most important of these were:

1 **The Stockholm International Peace Research Institute**[40].

2 **Instituto Affari Internazionali** (Symposium on International Regime of the Seabed)[41].

3 **The Ditchley Conference**[42].

4 **Pacem in Maribus**[43].

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[40] This institute (**SIPRI**) - established by the Swedish Parliament - held a symposium entitled 'Towards a Better Use of the Ocean' from 10 to 14 June 1968 in Stockholm. The recommendations of the symposium covered the problems of the development of the ocean in general - see further Oda 1 45/46

[41] The **IAI** organised a planning committee in Rome in June 1968 to prepare for a 'Symposium on the International Regime of the Seabed'. The symposium was held in Rome from 30 June to 5 July 1969, with the participation of about 50 experts in the field. The outcome was a statement of principles, *inter alia* proposing that an international treaty on the law of the sea should be concluded - Oda 1 47/48

[42] The **Ditchley Foundation** held a conference on 'The Resources of the Ocean Floor' near Oxford from 26 to 29 September 1968. The conference was devoted to discussions concerning the resources of the seabed beyond the limits of the continental shelf, dealing with such problems as the existing regime, technical and economic problems, the problems of safety, marine pollution, military uses and neutralisation of the seabed, and international cooperation in scientific research - Oda 1 48

[43] The Santa Barbara **Centre for the Study of Democratic Institutions** planned to hold a large-scale conference in Malta, scheduled for June 1970. For its purposes, some exploratory meetings were held on the subjects of disarmament of the seabed, legal issues, exploitation, roles of enterprises, and the roles to be played by science and scientists. **Pacem in Maribus** was held in Malta from 28 June to 3 July 1970, and was attended by 200 invitees, including political and industrial representatives as well as delegates to the **Seabed Committee** - see Dupuy 1 27, Oda 1 49/50

3.2.5.4 THE **DEEP-SEA MINING COMMITTEE** OF THE **INTERNATIONAL LAW ASSOCIATION** SINCE 1968

3.2.5.4.1 THE 1968 REPORT

The **ILA** decided on 14 October 1967 to establish the **Deep-Sea Mining Committee**. The preliminary report of the preparatory committee was amended by the newly established international committee on 22 November 1967, 30 January 1968, and 21 February 1968. The formal report of the committee was submitted to the **ILA**'s Beunos Aires conference in August 1968[44].

3.2.5.4.2 THE 1970 REPORT

The committee held a meeting in Utrecht from 11 to 13 April 1969. The meeting resulted in a draft report to be submitted to the conference of the **ILA** in August 1970 and it was distributed among the members of the committee, seeking comments[45]. Comments were received *inter alia* from the Netherlands, Norway, and the US, and a revised draft report was submitted in March 1970[46]. That in turn resulted in a final report in April 1970. The **ILA** took up the report at its 54th conference at the Hague in August 1970.

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[44] The main points dealt with in the report of 21 February 1968 were the outer limits of the continental shelf and the regime of deepsea mining. The committee decided at its August 1968 meeting to deal both with the outer limits of the continental shelf and the regime of deepsea mining as the main subjects in the future. It was agreed at the conference that the committee would submit a further report at the following session in 1970 - Oda 1 50-52

[45] The draft report was entitled 'Declaration on the Exploration and Exploitation of Mineral Resources of the Sea-bed and Subsoil of the High Seas beyond the Recognized Limits of National Jurisdiction' - Oda 1 52

[46] The report was entitled 'Draft Declaration of Principles Which Should Govern the Activities of States in the Exploration and Exploitation of the Mineral Resources of the Seabed and Subsoil beyond the Limits of National Jurisdiction'. It consisted of 15 articles and did not differ materially from the previous one - Oda 1 55

3.2.5.5 OTHERS

In addition to the above-mentioned activities, there were several academic meetings which dealt with the regime of deepsea mining, as well as private discussions among individuals about these problems. However, most of these did not suggest any concrete proposals, and therefore they are just listed here[47]:

1 **The American Society of International Law.**

2 **The Law of the Sea Institute** at Rhode Island.

3 **The Brown Draft** (after its author, the well-known Dr E D Brown).

3.2.6 DEVELOPMENTS WITHIN THE **UNITED NATIONS** 1968-1970

3.2.6.1 THE 1968 **SEABED COMMITTEE**

The first session of the committee took place from 18 to 27 March 1968 at the **UN** Headquarters in New York under the chairmanship of Hamilton S Amerasinghe of Ceylon. Two working groups - **Legal**, and **Economical and Technical (ECOTEC)** - were established.

The second session took pace from 17 June to 9 July 1968 in New York. The main committee met three times, but the substantial discussions took place in the **Legal Working Group** and **ECOTEC**[48].

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[47] For a full discussion see Oda 1 55-58

[48] In the **Legal Working Group** several delegates suggested that a draft declaration of legal principles be drawn up. In **ECOTEC** discussions were mainly based on 'Resources of the Sea', the previously-mentioned report of the Secretary-General - Nordquist and Park 1 6, Oda 1 60

The third session took place from 19 to 30 August 1968 in Rio de Janeiro at the invitation of Brazil. The deliberations at that session were held chiefly in the main committee[49].

The report adopted by the **Seabed Committee** on 30 August 1968 outlined the deliberations and contained two sets - 'Set A' and 'Set B' - of legal principles in its conclusion. The reports at the second session of **ECOTEC** and of the **Legal Working Group** were attached as appendices[50].

3.2.6.2 THE 23RD SESSION OF THE GENERAL ASSEMBLY

The report which the **Seabed Committee** adopted at its third session in August 1968 was referred to the **First Committee** of the General Assembly. Relevant proposals were put to a vote on 20 December 1968 at the **First Committee**. The proposals passed by the **First Committee** were sent to the plenary meetings, which pout them to a vote without any discussion on 21 December[51]. Thus four General Assembly resolutions were adopted:

1 The resolution on the 'Establishment of the Seabed Committee' [General Assembly Resolution 2467 A (XXIII)][52].

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[49] The efforts of the committee were concentrated on finalising the result of its last work, since the committee had to submit its report to the General Assembly at its 23rd Session just a few weeks later - Oda 1 60/61

[50] Oda 1 62, Ogley 2 59

[51] Oda 1 63

[52] The resolution concerned the establishment of a committee on the **Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction** - see Dupuy 1 113, Oda 1 63

2 The resolution on the 'Prevention and Control of Marine Pollution' [General Assembly Resolution 2467 B (XXIII)][53].

3 The resolution on the 'Study on an Appropriate International Machinery' [General Assembly Resolution 2467 C (XXIII)][54].

4 The resolution on the 'International Decade of Ocean Exploration' [General Assembly Resolution 2467 D (XXIII)][55].

These resolutions were joined by the 'Draft Declaration of Legal Principles concerning Deep-Sea Mining' already mentioned[56].

3.2.6.3 THE 1969 SEABED COMMITTEE

The 1969 **Seabed Committee**[57] was composed of 42 states[58]. It was agreed that the committee should retain that composition for two years. After that, one-third of the

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53 This resolution called for the Secretary-General to prepare a study in order to clarify all aspects of protection of the living and other resources of the seabed, the superjacent waters and the adjacent coasts against the consequences of pollution and other harmful effects arising from exploration and exploitation, and to submit a report thereon to the General Assembly and the **Seabed Committee** - see Dupuy 1 135, Oda 1 64

54 The resolution called upon the Secretary-General to undertake a study on the question of establishing appropriate international machinery for the promotion of the exploration and exploitation of the resources of the area, and the use of these resources in the interests of mankind, irrespective of the geographical location of states, and taking into special consideration the interests and needs of the developing states, and to submit a report thereon to the **Seabed Committee** during one of its sessions in 1969 - see Oda 1 64/65

55 In this resolution the General Assembly welcomed the idea of an international decade of ocean exploration, and invited member states to formulate proposals to **UNESCO** for the **Inter-Governmental Oceanographic Commission (IOC)** - see Dupuy 1 131, Oda 1 65/66

56 The draft declarations of legal principles concerning deepsea mining, that is 'Set A' supported mostly by developing states and 'Set B' supported by 'Western Europe and Others' at the **Seabed Committee** - see 3.2.6.1 *supra*

57 Established pursuant to General Assembly Resolution 2467 A (XXIII) of 21 December 1968

58 7 from Asia, 11 from Africa, 7 from Latin America, 11 from Western Europe and other states and 6 from Eastern Europe - for a breakdown see Oda 1 68, Rembe 1 40

members of each regional group would be rotated every two years[59].

The first session took place from 6 to 7 February 1969 in New York. At that session it only elected its officers and drew up a programme of its work[60].

The second session took place from 10 to 28 March 1969, also in New York. The **Legal** subcommittee devoted its 11 meetings to the preparation of the draft declaration of legal principles, but could not go beyond general discussion. It failed to produce even a single paper on the report[61]. On the other hand, **ECOTEC**, through its 14 meetings, discussed two main topics, the economic and technical requirements which such a regime of deepsea mining should satisfy in order to meet the interests of humanity as a whole, and the study of the ways and means of promoting exploitation, as well as the use of the resources of that area, and of international cooperation to that end. The subcommittee adopted its *interim* report which covered those two subjects[62].

The third session took place from 11 to 29 August in New York. In the **Legal** subcommittee a report was presented by the **Informal Drafting Group**[63]. **ECOTEC** continued the discussions of the second session and prepared a comprehensive report which included the *interim* report adopted at the second session[64].

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59 Oda 1 68

60 This session was no more than a preparatory one for future sessions. Amerasinghe of Ceylon was again elected chairman of the committee, and the composition of the bureau of the committee remained almost unchanged - Oda 1 68

61 Oda 1 69

62 It should be noted that the *interim* report often mentioned the international machinery to be established, as well as the present situation and the foreseeable development of the deep sea - Oda 1 69

63 It became almost certain after only a week that a declaration of legal principles would be impossible; even the preparation of a report summarising the discussions of legal principles would be extremely difficult. However, at the final stage of the sessions the **Legal** subcommittee managed to adopt its report - Oda 1 70

64 Oda 1 70

The 1969 report of the **Seabed Committee** was adopted by the main committee on 29 August 1969. The greater part of the report consisted of the reports of the two subcommittees[65].

The report of the **Legal** subcommittee simply mentioned the discussion of legal principles, which covered the applicability of international law, the exclusive reservation for peaceful purposes, the uses of the resources for the benefit of mankind as a whole, the freedom of scientific research and exploration, the reasonable regard for the interests of other states in the exercise of the freedom of the high seas, and the prevention of pollution of the sea[66].

In the report of **ECOTEC** the discussion covered subjects such as the progress achieved in the techniques for exploration of seabed resources, economic and technical aspects of the draft comprehensive outline of a long-term programme of ocean exploration, and the question of international machinery[67].

The **Seabed Committee** held some additional meetings in November 1969 during the course of the 24th Session of the General Assembly. A report of the conference of the **Committee on Disarmament** of 3 November was submitted to the General Assembly, together with the 'Draft Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and Ocean Floor and in the Subsoil Thereof'[68].

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65 Oda 1 70, Ogley 2 60

66 It may be said that in this synthesis the confrontation was continued between the two proposals of the Rio de Janeiro session of the *ad hoc* committee in August 1968, namely 'Set A' supported by the developing states and 'Set B' supported by 'Western Europe and Others' - see Oda 1 71

67 The latter aspect deserves special mention. The discussion focused on whether the machinery would constitute a 'registry office' where the claims for exploitation would merely be recorded, or a more powerful 'licence-issuing agency' - see Oda 1 71

68 Oda 1 72

3.2.6.4 THE 24TH SESSION OF THE GENERAL ASSEMBLY

The report of the **Seabed Committee** as discussed by the **First Committee** and the relevant draft resolutions were put to the vote on 2 December 1969. The draft resolutions passed by the **First Committee** were placed on the agenda of the plenary meeting on 15 December, and put to a vote without discussion. Four resolutions were adopted by the General Assembly[69]:

1 The 'Resolution to Ascertain the Views of Member States on the Desirability of Convening a Conference on the Law of the Sea' [General Assembly Resolution 2574 A (XXIV)][70].

2 The 'Resolution on the Continuation of the Seabed Committee' [General Assembly Resolution 2574 B (XXIV)][71].

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69 Dupuy 1 29, Oda 1 72, Rembe 1 41

70 The resolution originated in a draft resolution by Malta to the effect that the Secretary-General should obtain the views of member states on whether or not to convene a conference to review the continental shelf in order to clarify the definition of the outer limits of the continental shelf. The Maltese proposal was amended to incorporate the idea of convening the conference to deal with more comprehensive aspects of the law of the sea, namely the breadth of the territorial sea, passage through straits, fisheries and the exploitation of the seabed. The draft was adopted at the plenary meeting of the General Assembly, 65 to 12, with 30 abstentions. The opposing states included Japan and the US, in addition to the Eastern European states - see Oda 1 73.

The gist of the resolution was that the Secretary-General should ascertain the views of member states on the desirability of convening a conference on the law of the sea to review the whole law of the sea, but in particular the regimes of the high seas, the continental shelf, the territorial sea and the contiguous zone, and fishing and conservation of the living resources of the high seas, in order to clarify the definition of the area of the seas beyond the limits of national jurisdiction, in the light of an international regime for that area - see Oda 1 72/73, Rembe 1 41. It is important to note that the convening of such an international conference was welcomed by the 32 African states participating in the **Third Conference of Non-aligned Countries** held in Lusaka in 1970 - see Rembe 1 41/42

71 Under the resolution the **Seabed Committee** was requested: (i) to expedite its work of preparing comprehensive and balanced legal principles for submission to the General Assembly at its 25th Session; and (ii) to formulate recommendations regarding the economic and technical conditions and the rules for exploitation of resources - see Oda 1 74

3 The 'Resolution on a Study of the International Machinery' [General Assembly Resolution 2574 C (XXIV)][72].

4 The 'Resolution on the Moratorium on Exploitation of the Resources' [General Assembly Resolution 2574 D (XXIV)][73].

3.2.6.5 THE 1970 SEABED COMMITTEE

The first session took place from 2 to 6 March 1970[74]. In the **Legal** subcommittee there was little progress except that the general discussions were held on the basis of the 'synthesis' contained in the report of the previous year[75]. **ECOTEC** dealt with the economic and technical conditions and rules for the exploitation of resources, but did not produce any concrete proposal at that stage[76].

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[72] The resolution requested the Secretary-General to prepare a study on various types of machinery covering the status, structure, functions and powers of an international machinery having jurisdiction over the peaceful uses of the deep ocean floor, 'including the power to regulate, co-ordinate, supervise and control all activities relating to the exploration of their resources, for the benefit of mankind as a whole, irrespective of the geographical location of States, taking into account the special interests and needs of the developing countries, whether land-locked or coastal' - see Nordquist and Park 1 7, Oda 1 74

[73] The resolution *inter alia* stated that, pending the establishment of the international regime, (i) states and persons, physical or juridical, were bound to refrain from all exploitation of the resources of the ocean floor; and (ii) no claim to any part of that area or its resources would be recognised - see Hjertonsson K *The New Law of the Sea* Leiden: A. W. Sijthoff 1973 44, Nordquist and Park 1 7, Oda 1 76, Ogley 2 61. South Africa was one of the states opposing the resolution

[74] Oda 1 76

[75] Instead of preparing a report, the subcommittee sent a letter to the chairman of the committee, informing him that the subcommittee could not reach a consensus on a generally acceptable draft, but would be able to obtain a consensus at the forthcoming August session - Hjertonsson 73 45, Oda 1 76/77

[76] The 'List of Topics Suggested by Some Members to be Studied in Preparing Economic and Technical Rules and Conditions for the Exploitation of the Resources of the Seabed and Sub-Soil Thereof Beyond the Limits of National Jurisdiction Within the Context of the Regime to be Set Up' which was annexed to the *interim* report submitted to the main committee offered, however, a very important basis for discussion at the subsequent session - Oda 1 77

The second session took place from 3 to 28 August 1970. The **Legal** subcommittee recognised the failure of its work in drafting legal principles after only three meetings. **ECOTEC** also met only six times[77].

The main committee dealt primarily with the question of marine pollution[78]. The US - on the first day of the session - introduced the 'Draft United Nations Convention on the International Seabed Area'. France and the UK followed the US in submitting working papers[79].

The 1970 report of the **Seabed Committee** was adopted by the main committee on 28 August 1970. In Chapter II, entitled 'Activities of the Committee', the discussions were summarised under the following headings: (i) Legal principles, (ii) Economic and Technical conditions and rules, (iii) Exploration and research, (iv) Pollution, (v) Peaceful uses, and (vi) International machinery[80].

3.2.6.6 THE 25TH SESSION OF THE GENERAL ASSEMBLY

The number of relevant subjects for consideration at that 1970 session was increased in comparison with those of the 23rd and 24th sessions[81]. The declaration on legal principles, which the **Seabed Committee** could not succeed in drafting after its three years of effort, was adopted upon the initiative of the committee's chairman. The

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77 Oda 1 77

78 The dumping of nerve gas by the US in the Atlantic Ocean during the course of that session was drawn to the committee's attention, and the US was condemned for that by Malaysia and some other states. The committee adopted the statement of the chairman, which contained assurances given by the American delegation that such action would not be repeated - see Oda 1 77/78

79 Oda 1 78

80 Oda 1 79

81 It consisted of: (i) the report of the **Seabed Committee**, (ii) a note by the Secretary-General on marine pollution, (iii) a report of the Secretary-General on views of member states on the desirability of convening conferences on the law of the sea, and (iv) the question of the breadth of the territorial sea and related matters - Oda 1 79

convening of **UNCLOS III** which would deal with comprehensive matters on the law of the sea was decided, and the **Seabed Committee** was enlarged and reorganised to prepare for the conference. Two resolutions were adopted at that session (but in substance there were actually four resolutions)[82]:

1 The 'Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction' [General Assembly Resolution 2749 (XXV)][83].

2 The 'Resolution on Economic Implications of Deep-Sea Mining' [General Assembly Resolution 2750 A (XXV)][84].

3 The 'Resolution Concerning Problems of Land-Locked Countries' [General Assembly Resolution 2750 B (XXV)][85].

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82 Oda 1 79

83 The declaration consisted of 15 provisions, ranging from a definition of the deep ocean floor and the fact that the resources thereof are the 'common heritage of mankind', to the resolution of disputes - see further Dupuy 1 24/25, Erasmus 1 20, Hjertonsson 73 45, Nordquist and Park 1 8, Oda 1 80-82

84 The resolution called for the Secretary-General to cooperate with **UNCTAD** and specialised agencies of the **UN** system in order to identify and to study problems arising from the production of minerals from the deep ocean, and to propose solutions for dealing with those problems. It also called for the Secretary-General to submit a report to the **Seabed Committee** during 1971 regarding raw materials and international trade - see Hjertonsson 73 45, Oda 1 82

85 The resolution originated with the draft resolution cosponsored by 20 land-locked states. The resolution was adopted, 111 to 0, with 11 abstentions - see Oda 1 82. In terms of the resolution the Secretary-General was to prepare an up-to-date study on the question of free access to the sea by land-locked states, and to supplement that document with a report on the special problems of land-locked states in the exploration and exploitation of the resources of the deep ocean floor. The study was to be referred during 1970 to the **Seabed Committee**, enabling it to prepare a report in time for the 26th session of the General Assembly - see Dupuy 1 97, Oda 1 82/83

4 The 'Resolution on the Convening of the Third Law of the Sea Conference and the Reorganization of the Seabed Committee' [General Assembly Resolution 2750 C (XXV)][86].

3.2.7 ACTIONS BY UNITED NATIONS ORGANS OTHER THAN THE SEABED COMMITTEE 1968-1970

In parallel with the **Seabed Committee, ECOSOC** and the **Second Committee** of the General Assembly often dealt with problems concerning the sea. Those activities were mainly derived from **ECOSOC** Resolution 112 (XL) of 1966 and from General Assembly Resolution 2172 (XXI) of 1966. The results were briefly as follows:

1 'Group of Experts on Marine Science and Technology'[87].

2 The 45th Session of **ECOSOC** (1968)[88].

3 The 23rd Session of the General Assembly (1968)[89].

4 The 47th Session of **ECOSOC**[90].

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86 The resolution noted 'with satisfaction' the progress made toward the 'elaboration' of the international regime for the deep ocean floor, decided to convene a conference on the law of the sea in 1973, decided to enlarge the **Seabed Committee** by 44 members, and reaffirmed the mandate of the **Seabed Committee** as supplemented - see Churchill and Lowe 1 13/14, Nordquist and Park 1 8, Oda 1 84, Rembe 1 43

87 This group, in April 1968, published 'Marine Science and Technology - Surveys and proposals - Report of the Secretary-General' - see Oda 1 85

88 Two reports of the Secretary-General had been submitted at this session, and three resolutions concerning the sea were adopted - see further Oda 1 86

89 At this session agenda item 41: 'Resources of the sea - Report of the Secretary-General' was referred to the **Second Committee** - see Oda 1 86

90 **ECOSOC** decided to authorise the report of the Secretary-General, 'Mineral Resources of the Sea', with some amendments, as a **UN** document, and to request the Secretary-General to make regular reports to **ECOSOC** on progress in the field of oceanography. **ECOSOC** Resolution 1470 (XLVII) 'The Sea - comprehensive outline of a long-term and expanded programme of oceanographic research' was adopted on 17 November 1969 - Oda 1 86/87

5 The 24th Session of the General Assembly (1969)[91].

6 The 49th Session of **ECOSOC** (1970)[92].

3.2.8 DEVELOPMENTS WITHIN THE UNITED STATES GOVERNMENT AFTER 1968

Only in 1870 did the US government begin to make its position clear concerning the regime of the deep ocean floor. Prior to that, however, there was the report of the **Commission on Marine Science, Engineering and Resources**[93]. The commission submitted an extensive report to the President and Congress on 9 January 1969[94].

It soon became clear, however, that the US could not decide on any definite unanimous policy on detailed matters as far as the law of the sea was concerned. However, it indicated through its statements at the **Seabed Committee** that it showed full understanding of the idea that, with the deep ocean floor placed under certain

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91 At the 24th Session, agenda item 12: 'Report of the Economic and Social Council' was referred to the **Second Committee**, and was discussed in conjunction with the topics 'Marine Science' and 'Promoting effective measures for the prevention and control of marine pollution'. With regard to the former, the **Second Committee** adopted the draft resolution, as amended, on 25 November 1969. That was adopted by the plenary meeting without objection on 13 December 1969 as General Assembly Resolution 2560 (XXIV) 'Marine Science' - Dupuy 1 29, Oda 1 87. Concerning the subject of pollution control, a draft resolution was submitted by 15 nations. The **Second Committee** unanimously adopted that draft resolution with minor amendments on 5 December 1969. The plenary meeting unanimously adopted it on 13 December 1969 as General Assembly Resolution 2566 (XXIV), 'Promoting effective measures for the prevention and control of marine pollution' - Oda 1 87

92 **ECOSOC** adopted on 27 July 1970 **ECOSOC** Resolution 1537 (XLIX), 'Marine co-operation'. It requested the Secretary-General to prepare a background review of (i) trends in the various traditional uses of the sea, such as fisheries, shipping, and mineral exploitation, (ii) foreseeable new uses and the likely growth in existing uses by the second half of the 1970s, (iii) the likely effect of those uses and of technological advances on the marine environment, and (iv) likely conflicts of technical use - see Oda 1 88/89

93 See 3.2.3.1 *supra*. It became known as the **Stratton Commission** after its chairman, Julius A Stratton of the Ford Foundation

94 While general marine policies were reviewed in the eight chapters of the report, the regime of the deep ocean floor was extensively discussed in 'International legal-political framework' in the section on 'Development of non-living marine resources' in Chapter IV - 'Marine resources'. The main issues in the report dealt with the limit of the continental shelf, and a proposal for an international **Registry Authority** - Oda 1 90-92

international controls, part of the profits available from deepsea mining should be dedicated for the purposes of the international community[95].

By 1970 the State Department began to determine its maritime policy step-by-step. First came President Nixon's report to Congress in February 1970[96]. It was followed by the statement by President Nixon on US policy for the oceans[97]. In the third place, there was the introduction on 3 August 1970 by the US of the 'Draft United Nations Convention on the International Seabed Area'[98].

3.2.9 DEVELOPMENTS IN THE SEABED COMMITTEE AFTER 1970

3.2.9.1 INTRODUCTION

Despite its four conventions on the law of the sea, the 1958 **Geneva Conference on the Law of the Sea** failed to adopt a uniform limit for the territorial sea. In the period following the 1960 **Geneva Conference**, the 12-mile fishery zone had gradually materialised through repeated claims by a number of states and through recognition in bilateral or regional agreements[99]. Apart from that, there had been little progress for

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95 Oda 1 94

96 The report stated: 'As man's uses of the oceans grow, international law must keep pace. The most pressing issue regarding the law of the sea is the need to achieve agreement on the breadth of the territorial sea, to head off the threat of escalating national claims over the ocean. We also believe it is important to make parallel progress toward establishing an internationally agreed boundary between the continental shelf and the deep seabed, and on a regime for exploitation of deep seabed resources' - Oda 1 95

97 This statement, made on 23 May 1970, was the first step by the US government towards forming a policy on the seabed - Oda 1 96

98 See Oda 1 98-104 for a summary of the comprehensive draft of 77 articles

99 With this movement the idea of a 12-mile fishery zone had gained acceptance as a general rule of international law, and there had been a strong movement toward recognising a 12-mile limit for the territorial sea. It was the US that advanced the concept of the 12-mile fishery zone at the 1958 and 1960 **Geneva Conferences**. However, the American formula failed at both conferences in the face of the categorical claim of the developing states to a 12-mile territorial sea. In the period that followed, the 12-mile fishery zone came to stand alone

some time in the law of the sea. A new movement, however, emerged with the rapid progress in the development of the seabed during 1966 and 1967[100].

Extensive studies were carried out on the then existing status of the development of the ocean floor and on its future potential[101]. In addition, a debate on the international regime was held on the assumption that some international machinery would inevitably be set up for that region of the seabed[102].

However, since the development of the deep ocean floor was not yet a question of reality to most states, either developed or developing, no judgement could be made on the possible impact of the development of the ocean. The debate was thus theoretical rather than practical. Nevertheless during the years 1967 to 1970 the idea became accepted by most - but not all - states that the deep ocean floor was not the object of appropriation by any state, but the 'common heritage of mankind', taking into consideration the special interests of the developing states. That paved the road for the development of the deep seabed[103].

For various reasons on the part of the various states[104] there was a call for an earlier than planned opening of the **Third Conference on the Law of the Sea**. The year 1970 was completely different from the period of the 1950s, when the first conference was being prepared. In addition to the increase in their numbers, the developing states had gained an understanding of the implications of the different uses of the sea. The law of the sea, simply as a theory of international law, no longer offered any solutions to

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[100] Some private suggestions had been made that the profit derived from exploitation of the seabed beyond the continental shelf should be used for the benefit of the international community or to save the **UN** from financial difficulties. There were even rumours of that in the US Congress. In **ECOSOC** and in the **Second Committee** of the General Assembly, the **UN** also (around 1966) came to realise the importance of the area beyond the continental shelf - see Oda 1 115

[101] Particularly in the **ECOTEC** working group - see 3.2.6.3 *supra*. See also Ogley 1 44/45

[102] Oda 1 116

[103] Oda 1 116/117

[104] See Oda 1 120/121

their problems. The apprehension that determination of the agenda items for the third conference would inevitably prescribe the future law of the sea dominated the General Assembly debates in 1970. That was clearly indicated by the fact that the debate at that session in the General Assembly was extremely complicated[105].

The question was one of how to prepare for the third conference. Prior to the first conference in 1958, the **ILC** spent seven years in deliberation on the subject. However, in 1970, the law of the sea had become highly political in character. In spite of the high quality of its membership, the **ILC** was no longer considered an appropriate body for the future conference on the law of the sea. It was felt necessary to have a preparatory body of some political nature corresponding to the highly political nature of the subject. That was why the General Assembly decided to entrust the task to the reorganised **Seabed Committee**[106].

The **Seabed Committee** was reorganised into three subcommittees: the **First Sub-Committee** dealt with the regime of the seabed, the **Second** with the law of the sea in general, and the **Third** with pollution and scientific research of the ocean[107].

3.2.9.2 THE REGIME OF THE SEABED, AS DISCUSSED IN THE **SEABED COMMITTEE**

During 1970 and 1971 the **Seabed Committee** held four sessions over 20 weeks. Debate on the regime of the seabed was entrusted to the **First Committee**[108].

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[105] See Oda 1 122

[106] Under General Assembly Resolution 2750 C (XXV) of 1970, the **Seabed Committee** was enlarged from 42 member states to 86. Under General Assembly Resolution 2881 (XXVI) of 1971, the membership was further increased to 91, including the People's Republic of China. The enlarged **Seabed Committee** was to prepare, in addition to the draft convention concerning the regime of the deep ocean floor, a comprehensive list of the subjects and issues relating to the law of the sea - Dupuy 1 46, Oda 1 122/123, Rembe 1 43

[107] Nordquist and Park 1 9, Oda 1 123

[108] Oda 1 123

In 1970 the US submitted a draft to the **Seabed Committee**, followed by the UK and France. Those drafts resulted in a declaration of principles covering the deep seabed, as General Assembly Resolution 2749 (XXV)[109], even though very few states at that time were prepared to start discussions on concrete regimes for the deep seabed. However, during 1971 drafts were submitted by some developed states (Canada, Poland and the USSR), Tanzania and a group of Latin American states, some land-locked and shelf-locked states, and Malta and Japan[110]. The debates were dead-locked on discussions of general principles, however, rather than substantive items in the draft treaties.

After the adoption of the UN declaration of principles the US and other states realised the necessity of preparing comprehensive draft treaties to cover the issues involved. As a result of that, after 1972 the **First Committee** focused its work on the preparation of a uniform draft of articles[111].

In 1973 the subcommittee completed 21 draft articles relating to the international regime of the deep seabed, as well as 31 articles covering the recommended implementation machinery[112]. The draft did not represent a consensus among all committee members, and almost all articles were submitted with alternative drafts.

Despite the preliminary nature of the draft articles, some states were by then already suggesting provisional application of a deep seabed regime[113]. The US in particular had to face strong domestic demand by industrialists for access to deep ocean mineral

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[109] See 3.2.6.5 *supra* and also Oda 1 123/124

[110] See Oda 1 124

[111] Nordquist and Park 1 10, Oda 1 147/148

[112] See Dupuy 1 27, Oda 1 148

[113] These states were concerned that the lengthy delays in the negotiation, agreement, ratification and ultimate acceptance of the treaty would neutralise its effectiveness. Many participants in fact believed that the exploitation of minerals from manganese nodules on the deep ocean floor would soon be commercially viable - see Oda 1 148, Rembe 1 42

resources[114], and it could not ignore that demand even though it was fully aware of the necessity of maintaining good relations with other states on the regime of the deep seabed. As a result, the US in 1973 suggested the provisional implementation of a deep seabed regime which could authorise mineral development prior to the ratification of an international treaty. A number of states responded favourably to the suggestion, but no formal or informal action was taken to set up a provisional authority to guide the exploitation of deepsea minerals[115].

3.2.9.3 THE LAW OF THE SEA IN GENERAL, AS DISCUSSED IN THE SEABED COMMITTEE

The **Second Committee** was entrusted with preparing a comprehensive list of subjects and issues to be dealt with at the forthcoming conference on the law of the sea. The list was finally completed in 1972[116]. However, the preparation of the list faced some serious difficulties from the outset[117]. Furthermore, the drafting of each item was also controversial[118].

One of the main problem areas had been the original conflict of interests in determining the limits of the territorial since the 1958 conference, and in particular the attitude of the US towards that problem. The US adhered to the concept of the narrower

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[114] In 1971 the 'Metcalf bill' was introduced in Congress calling for procedures which would allow the immediate exploitation of those resources, irrespective of the status of the international regulations - see Oda 1 148

[115] Oda 1 148/149

[116] Oda 1 127

[117] This was due to the apprehension by both developed and developing states that inclusion of any item in the list of subjects and issues would in itself be interpreted as giving support to the said items - Oda 1 127, Rembe 1 43

[118] There was little trust between the developed and developing states even though it was understood from the start that the list would neither necessarily be exhaustive nor determine the priority of discussion, and that acceptance of the list would not prejudge the position of any particular state towards each item on the list - Oda 1 127, Rembe 1 43

territorial sea for reasons of security and was prepared, in return, to abandon its own freedom of fishing in the off-shore areas of other states[119]. In 1971 the US presented a draft treaty on the territorial sea to the **Seabed Committee**, which provided for the following: preferential fishing rights of coastal states, offered at the expense of existing fishing rights of major distant-water fishing states in order to gain freedom of passage for warships and military aircraft through certain straits[120].

These proposals faced some stiff opposition. Some states did not agree with the idea of freedom for all vessels and aircraft (including warships and military aircraft)[121], while for the developing states the 12-mile territorial sea had been a premise and not something to be granted or given as compensation[122]. Furthermore, many states were in favour of the 200-mile exclusive economic zone[123].

The 'List of subjects and issues relating to the law of the sea to be submitted to the Conference on the Law of the Sea' contained 25 items (as well as 90 sub-items). An agreement was reached that inclusion of any item on the list would not necessarily determine that the concept be adopted at the **Conference on the Law of the Sea**[124].

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[119] Oda 1 128-132

[120] Oda 1 128/129

[121] Particularly states bordering on straits like Indonesia, Malaysia and Spain - see Oda 1 128

[122] If this had been the case, the US's claim to free passage through straits as if they were high seas appeared to the developing states as a violation of their sovereignty. On the other hand, the fishing interests beyond the 12-mile territorial sea had been considered by the developing states to be an acquired right and again not as anything to be granted as compensation - Oda 1 129

[123] Claims for such a zone had already been made by Chile, Ecuador and Peru, while the developing African and Asian states were increasingly interested in extended fishery zones. The idea of a 200-mile exclusive economic zone was first mooted at the **Asian-African Legal Consultative Committee** at Lagos in 1972, and confirmed that same year by the **African Seminar on the Law of the Sea** at Yaoundé, Cameroon, and the **Ministerial Conference of the Caribbean States** at Santo Domingo. The concept of the exclusive economic zone was formally submitted to the **Seabed Committee** the same year. Under it, while the freedom of navigation was guaranteed, all resources - fishery or mineral, in or under the ocean - would be placed under the jurisdiction of the coastal states - Dupuy 1 40, Oda 1 131

[124] Oda 1 132/133

3.2.9.4 MARINE POLLUTION AND SCIENTIFIC RESEARCH, AS DISCUSSED IN THE SEABED COMMITTEE

The **Third Committee** was entrusted with the questions of pollution and the scientific research of the ocean.

As far as marine pollution was concerned, very little happened within this subcommittee after 1970 because it was waiting for the results of the **UN Conference on the Human Environment** scheduled for 1972 in Stockholm. However, that conference did not deal with marine pollution in substance. Discussions on the topic started in the **Third Committee** in 1972, but no concrete proposal was ever submitted to that session[125].

As to the scientific research of the ocean, it was discussed in the subcommittee but once again no formal proposals were submitted to the **Seabed Committee**[126].

In 1973 the subcommittee received 13 proposals on pollution and seven on scientific research. These were compiled into draft articles, but the draft articles merely constituted a description of various alternative suggestions rather than concrete recommendations[127].

3.2.10 CONCLUSION

During the preparatory stages for **UNCLOS III** the **First Committee** established a general guide for the resolution of deep seabed issues and supplied substantial content in the form of draft articles for consideration by the conference. The **Second** and **Third**

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[125] However, a new approach, advanced in particular by Canada, was proposed to the effect that pollution could be prevented by establishing an anti-pollution zone in the coastal areas - see Oda 1 126/127, Rembe 1 101

[126] Oda 1 127

[127] Oda 1 151

Committees could not achieve the same levels of preparation. However, factors outside the **Seabed Committee** had generated a trend towards a 200-mile exclusive economic zone, and focused world attention on problems such as transit through straits and other forms of expansion of national jurisdiction[128].

It was stated at the outset[129] that a fairly detailed overview of the preparations for **UNCLOS III** is necessary to comprehend the eventual failure of the conference to achieve complete consensus. Various factors can be highlighted here.

In the first place, the division between the high seas and territorial waters had for long been considered one of the most fundamental features supporting the regime of the sea. In an age when the use of the sea was limited chiefly to navigation, the division between the two was not of serious importance as long as the concept of innocent right of passage through territorial waters was accepted. However, since the resources of the sea - both fishery and mineral - became of interest to all states, the division between the two regimes became problematical. The attitudes towards marine resources varied according to different states[130]. However, one general trend toward the expansion of coastal interests emerged, namely the exclusive use by coastal states of the seabed of off-shore areas under the concept of the continental shelf. The US initiated the concept of the continental shelf, and both the developed and developing states followed it[131].

The problem was not related to whether claims of coastal states to off-shore areas had been legal or illegal under the then existing international law, but rather a fundamental difference in philosophy between the the two groups. Whether off-shore resources

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[128] Oda 1 151/152

[129] See 3.2.1 *supra*

[130] Some had good fishing stations and rich deposits of mineral resources off their coasts. Others - including land-locked states, but also states like Belgium, Germany, the Netherlands and Singapore, squeezed in by neighbouring states - could not expect much from the exploitation of their off-shore areas. Yet another group of states faced only unproductive oceans - the so-called geographically disadvantaged states. In addition, states interested in the resources of their own off-shore areas also thought of the possibility of distant areas closer to other states

[131] See further Oda 1 134/135

should be regarded as within the exclusive territory of each coastal state, or the 'common heritage of mankind', was not a question that could be solved merely by legal techniques.

In the second place, the question of international control for fishing in the oceans came to the fore. A trend emerged in terms of the division between the exclusive interest of coastal states in the extended exclusive economic zone and the international control of the high seas for the exploitation of their resources, rather than the traditional dualism between the exclusive interests in the narrow territorial sea and the freedom in the high seas[132].

Thirdly, there was the problem of marine pollution. Under the traditional rules of international law, the prevention of pollution was largely the responsibility of the flag state of each vessel. However, the idea of an anti-pollution zone as advanced by Canada[133] started becoming acceptable as a logical development of the concept of the contiguous zone[134].

As far as land-locked states were concerned, proposals to have been put to **UNCLOS III** were *inter alia* the right of access to and from the sea, the right of transit over neighbouring states, and also the accommodation of land-locked states as far as the mineral and living resources of the seas were concerned[135]. There were also further proposals dealing with participation and representation in all organs of the **Authority**, and in decisions affecting their interests[136].

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[132] Oda 1 136/137

[133] See 3.2.9.3 *supra*. See also the Canadian *Arctic Waters Pollution Prevention Act* 1970 - Dupuy 1 95, Rembe 1 101 n56

[134] The contiguous zone was established not to expand the exclusive rights of coastal states at the expense of legitimate interests of other states, but to strengthen the competence of the coastal state to protect its interests without violating any legitimate interests of others - see Oda 1 139

[135] Rembe 1 142-150

[136] Rembe 1 76

From the above overview of this period it can be seen that there were divergent opinions on the part of states on virtually each and every aspect of the law of the sea. It also became quite clear that **UNCLOS III** would not merely be a 'codificatory' conference on the law of the sea: the resulting treaty would have had to accommodate positive law as well as acceptance of general principles (like for example the principle of 'common heritage of mankind'). Furthermore, it became quite clear that the preparations for the eventual treaty would be far from an easy task.

3.3 THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA

3.3.1 INTRODUCTION

UNCLOS III was convened in New York in December 1973 for the purpose of formulating a complete set of rules of international law to govern all aspects of ocean management exclusively for peaceful purposes. Ambassador Arvid Pardo had visualised a total revision of all issues pertaining to the oceans, including arms control. The latter subject had not, however, at any stage been included in the agenda of **UNCLOS III** but was negotiated separately[137].

The mode of procedure adopted for the conference by the **UN** General Assembly was that all matters would be determined by consensus. There was to be no voting until all efforts at consensus had failed[138].

Various reasons have been advanced for the use of the consensus rule: the importance of new law being formulated, the comprehensive nature of the negotiations, the unsuitability of a straightforward voting procedure due to the numerical strength of the developing states, and lastly the fact that the **Seabed Committee** did not proceed by vote and preferred to reach agreement by way of negotiation[139].

Because of these factors the General Assembly in 1973 reached a so-called 'Gentleman's Agreement' which provided that since the problems of ocean space were clearly interrelated and should be considered as a whole, and since it was important that a convention on the law of the sea should have the widest possible acceptance, the

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[137] Van Meurs L H *The Law of the Sea: Changing Concepts of Sovereignty and Territoriality - A South African Perspective* unpublished D Phil thesis Johannesburg: University of the Witwatersrand 1986 1

[138] Barston R P 'The Law of the Sea Conference: The Search for New Regimes' in *The Maritime Dimension* edited by Barston R P and Birnie P London: George Allen & Unwin 1980 155, Erasmus 1 21, Oda 1 153, Van Meurs 137 2

[139] See further Erasmus 1 20/21, Van Meurs 137 2-4

conference should make every effort to reach agreement on substantive matters by way of consensus[140].

Consensus had been described as a way of proceeding without formal objection and as not necessarily being a unanimity rule demanding affirmative support of all participants: a minority of delegations not fully supporting a text could simply state their reservations for the record without the need for a negative vote[141]. Failing agreement, states were encouraged by the consensus procedure to air their discontent, as their views would have to be reconciled in order to arrive at an agreed text[142]. Even though negotiating under such circumstances would be difficult and time-consuming, it was seen as the most equitable to all.

The concept of consensus is now defined in the 1982 **LOSC** as meaning the absence of any formal objection to a proposal[143].

3.3.2 THE FIRST SESSION

The first session took place in New York from 3 to 15 December 1973. The session was organisational in nature. Ambassador Hamilton S Amerasinghe of Sri Lanka was elected President of the conference. Chairmen of three working committees were also elected and a **General Committee**, a **Drafting Committee** and a **Credentials Committee** were constituted[144].

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[140] Anand R P *Origin and Development of the Law of the Sea* The Hague: Martinus Nijhoff Publishers 1983 210, Van Meurs 137 2/3

[141] See Van Meurs 137 4

[142] Anand 140 210, Van Meurs 137 4

[143] 1982 **LOSC** Article 313(3)

[144] Nordquist and Park 1 11, Oda 1 154, Van Meurs 137 1. The conference revived the three working committees which existed under the **Seabed Committee** so that they could continue their discussions with the background and experience they had acquired during the six preparatory years

A number of amendments to the draft rules of procedure were proposed during the session. Subsequent informal consultations on the rules of procedure were conducted from 25 February to 1 March 1974 and from 12 to 14 June 1974. The draft rules of procedure with the amendments were presented to the second session in 1974[145].

The most important substantive discussions centred around the consensus procedure. It was quite clear that the industrialised states showed little enthusiasm for the consensus principle, but that they also felt that there was a great danger of the imposition of majority views on the conference and that it would be impossible to solve international problems by majority votes. Because they were conscious of the significance of the treaty they therefore called for its adoption by consensus. The developing states, on the other hand, hesitated to authorise a single developed state to overrule majority opinion at the conference through the consensus system. They were convinced that they could work within the framework of the majority vote system to achieve legal order on the world's oceans. Just the single issue of voting methods raised a multitude of difficult problems[146].

3.3.3 THE SECOND SESSION

The second session took place in Caracas, Venezuela from 20 June to 29 August 1974. 149 delegates were present at that session.

The debate on the consensus procedure continued at the session, and the rules of procedure permitting a vote only when all attempts at reaching consensus have failed were finally adopted[147].

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[145] Oda 1 154, Van Meurs 137 5

[146] See Anand 140 210, Bennett T W 'The status of the Law of the Sea Convention' in *The Law of the Sea* edited by Bennett T W *et al* Cape Town: Juta & Co, Ltd 1986 1, Churchill and Lowe 1 15, Oda 1 153/154

[147] Anand 140 210, Nordquist and Park 1 11, Oda 1 154, Van Meurs 137 5/6

Among the rules of procedure adopted were Rules 62 and 63 which provided for the role of official observers to **UNCLOS III** in the following three categories:

1 Specialised agencies, the **International Atomic Energy Agency**, and other intergovernmental organisations invited to the conference (as observers without the right to vote);

2 the **UN Council for Namibia**[148] (as participant without the right to vote); and

3 international non-governmental organisations invited to the conference (as observers at public meetings of the conference)[149].

The substantive work of the conference fell into two main categories:

1 The consideration and adoption of provisions governing an international regime, with appropriate international machinery, for the area of the seabed and the subsoil thereof beyond the limits of national jurisdiction, and

2 a review and revision of the existing law of the sea, with emphasis on the need to draw new boundary lines for areas subject to national jurisdiction. The new treaty would therefore be declaratory of existing rules, and creative of new rules, of international law[150].

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[148] The council was created by General Assembly Resolution 2248 (XXII) on 19 May 1967 with the purpose of administering the territory of Namibia on behalf of the UN until independence. The council operated on an international plane but did not possess the status of a state, nation, or non-autonomous territory - see Van Meurs 137 6

[149] Van Meurs 137 6

[150] Van Meurs 137 7

As noted before, the conference had organised itself into three working committees: the **First Committee**[151], the **Second Committee**[152] and the **Third Committee**[153].

Instead of working from a draft text for a treaty, each delegation to the conference could submit draft articles and working papers. That resulted in the submission of hundreds of different alternative provisions. It was a major accomplishment of the session that all the proposals were collated into a draft set of articles which could serve as the basis of future discussions[154].

As far as land-locked states were concerned, several proposals were tabled, *inter alia* on the right to participate in the exploration and exploitation of the living resources of the sea, the right to establish jointly regional economic zones, fishing in the neighbouring areas of the economic zone, and reservation of a part of the allowable catch of a coastal state for land-locked and geographically disadvantaged states[155].

3.3.4 THE THIRD SESSION

The third session took place in Geneva from 17 March to 9 May 1975. Delegates and

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[151] Which dealt with the international regime and machinery for the seabed beyond the limits of national jurisdiction, primarily for the regulation of exploring deep-sea deposits of manganese nodules and mining the nodules effectively - Churchill and Lowe 1 14, Oda 1 155/156, Van Meurs 137 7

[152] Concerned with a list of 15 items (out of 25 listed by the **Seabed Committee**) which covered all the 'traditional' law of the sea issues, namely the territorial sea and contiguous zone, the continental shelf, navigation on the high seas and in straits, fisheries, islands and archipelagoes, enclosed and semi-enclosed seas, the rights of land-locked states, and the 200-mile exclusive economic zone - Churchill and Lowe 1 14, Oda 1 156, Van Meurs 137 7

[153] Charged with the protection and preservation of the marine environment including pollution control, and with scientific research and development and transfer of marine technology - Churchill and Lowe 1 14, Oda 1 157

[154] See Platzöder R *Third United Nations Conference on the Law of the Sea* Hamburg: Institute of International Affairs 1975 217-243, Van Meurs 137 7/8

[155] Submitted by the 'Group of 22' as well as Bolivia, Haiti, Nigeria and Paraguay - see Platzöder 154 1/2, Sinjela A M *Land-Locked States and the UNCLOS Regime* New York: Oceana Publications 1983 290-293

observers from 148 states attended the session[156].

At that session an **Informal Single Negotiating Text** (**ISNT**) was prepared for the purpose of serving as a basis for future negotiations. Part I of the **ISNT** consisted of 75 articles and an annex, and dealt with the international seabed area (the 'Area'). It provided that any exploitation done in the Area was to benefit all states, whether coastal or land-locked. The **International Sea-bed Authority** (the **Authority**) would control all aspects of deep seabed mining, and states could mine under contract or in joint venture with the **Authority**[157]. The **Authority** had exclusive jurisdiction over the Area, ensuring its direct and effective control over all activities.

The proposed **Authority** would consist of five entities: an **Assembly** (the policy-making organ consisting of all states parties to the convention), a **Council** (the executive organ consisting of 36 members[158], the **Enterprise** (empowered to execute and supervise activities of the **Authority** (empowered to execute and supervise activities of the Authority in the Area), a **Secretariat** (for performing administrative and financial functions and a **Tribunal** (for settling disputes and consisting of members appointed by the **Assembly** from candidates nominated by states parties to the convention).

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[156] Nordquist and Park 1 12, Oda 1 159. The South African delegation had taken part in the second session, but for political reasons unrelated to the law of the sea no delegation was sent to the third session - see Van Meurs 137 8

[157] Although most states agreed that an **Authority** should be established, they differed widely as to the nature of its operation. While many developing states wanted to see the **Authority** alone to be permitted to exploit the resources, the US did not accept the idea of a single new international entity controlling these resources. The USSR had proposed that individual states should act under contract with the **Authority** and that each state should have available to it a limited and equal number of contracts. Van Meurs suggests that the consensus procedure in relation to deepsea mining appears at that stage to have operated more on a basis of agreement to postpone further debate to the following session, rather than on reconciling irreconcilable views - see Van Meurs 137 9

[158] Elected by the **Assembly**, 24 in accordance with equitable geographical representation and 12 representing special interests: six from states with advanced technology and six from developing states - see Van Meurs 137 9

Part II of the **ISNT** consisted of 137 articles covering the work of the **Second Committee**. A 12-mile limit was set as the maximum for the territorial sea and the concept of a 200-mile exclusive economic zone was introduced[159].

Part III of the **ISNT** consisted of 92 articles dealing with protection of the environment, scientific research and transfer of technology. It gave exclusive rights to states to explore and exploit their natural resources, subject to policies of conservation and preservation of the environment[160].

As far as land-locked states were concerned, they collectively submitted draft articles on the exclusive economic zone to the conference, and for the first time a distinction was drawn between developing and developed land-locked states. Article 57 specifically defined the rights of land-locked states in the exclusive economic zone, while Articles 108-116 were devoted to land-locked states' right of access to the sea, and terms of transit[161].

3.3.5 THE FOURTH SESSION

The fourth session was held in New York from 15 March to 7 May 1976. The session resulted in a **Revised Single Negotiating Text (RSNT)**. Thet text was in four parts:

1 Part I dealt with the general principles for the implementation of the basic concept that the resources of the international seabed area beyond the limits of

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[159] Van Meurs 137 10

[160] Oda 1 162

[161] Sinjela 155 54

national jurisdiction are the 'common heritage of mankind'[162].

2 Part II made provision for states' rights and duties within a 12-mile territorial sea, a contiguous zone extending up to 24 miles from the shore, a 200-mile exclusive economic zones, the continental shelf underlying these areas, archipelagic waters, and the high seas[163].

3 Part III concerned the marine environment and scientific research, including states' powers to enforce antipollution regulations and the promotion of the development and transfer of marine technology, as well as the permission to foreign states to conduct research with other states in the economic zone and on the high seas[164].

4 Part IV contained provisions dealing with compulsory settlement of disputes[165]. It included reference to a proposed **Law of the Sea Tribunal**, resort to the **ICJ**, arbitral tribunals, conciliation commissions, and a committee to settle technical disputes over fisheries, pollution, scientific research, and navigation[166].

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[162] It sought to establish an **International Sea-bed Authority** which would have the power to exploit the ocean bed for its mineral wealth, and also enter into contracts with states, corporations, and other entities which might be permitted to participate in mining the ocean floor in parallel with the **Authority** and under the overall control of the latter - Elias T O *New Horizons in International Law* Alphen aan den Rijn: Sijthoff & Noordhoff 1980 55, Van Meurs 137 11. The latter author points out, however, that the Area to which the **RSNT** applied (the seabed and subsoil beyond the limits of national jurisdiction) had at that stage not yet been clearly defined. Paragraph 8 of the **RSNT** dealt with the method for selecting mine sites. It provided that, in applying for a contract, an applicant had to indicate the co-ordinates of either one area twice as large as the intended mine site, or two areas of equivalent commercial value. (That was the beginning of what became known as the 'parallel system'.) Further activities in the area were to be conducted directly by the **Enterprise** at its discretion, or in association with the **Authority**, by developing states or entities sponsored by them or under their control. The author points out that it is difficult to visualise how the **Enterprise** would conduct activities on its own or in association with developing states if in fact the **Enterprise** had no independent means of conducting such activities. The intention was, however, to ensure benefit for the **Authority** by enabling it readily to obtain data and information on areas deemed economically attractive

[163] Elias 162 55

[164] *Ibid*

[165] Unlike in the **ISNT** it was then deemed to be important enough to warrant a section on its own - Van Meurs 137 10

[166] Elias 162 55/56, Nordquist and Park 1 14

During the session it became quite clear that there was a conflict of interest between the US and the majority of developing states on the deep seabed (and deepsea mining in particular)[167].

As far as land-locked states were concerned, Karl Wolf of Austria (chairman of the 'Land-Locked and Geographically Disadvantaged States Group') stated in a letter addressed to the chairman of the **Second Committee** on 8 April 1976 that certain provisions in the **ISNT** should be revised, and submitted new draft Articles 57 and 58 on the rights of land-locked states to exploration and exploitation of the living resources of the sea[168]. Furthermore, and 'Informal Group of Juridical Experts' proposed an additional paragraph to Article 57, providing for developing land-locked states to be entitled to exercise their rights on the basis of preference over other third states[169]. As far as transit was concerned, a new Article 117 granted greater transit facilities to land-locked states than the old Article 110[170].

3.3.6 THE FIFTH SESSION

The fifth session was held in New York from 2 August to 17 September 1976. At the session the chairmen of the main committees issued detailed reports, but no newly revised texts. Further progress was made in revising the **RSNT** in that the President of

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[167] In an address before the American Foreign Policy Association on 8 April 1976 the then US Secretary of State, Henry A Kissinger, unequivocally stated that the US was far ahead of any other state in the technology of deepsea mining, and that the US was prepared to protect its own interests. The US would not accept that the right of access to deep seabed minerals be given exclusively to an international authority, or be so severely restricted as to deny effective access to firms of any individual state, including the US - see Van Meurs 137 11/12

[168] See Sinjela 155 296/297

[169] Sinjela 155 297

[170] Sinjela 155 56

the conference issued a revised text on dispute settlement ton bring the text on that subject to the same stage as the other parts[171].

The **First Committee** was concerned with the **Authority**. The report of the co-chairmen of the committee placed on record a detailed summary of three working papers presented to its workshop by the 'Group of 77' developing states, the UK, and the USSR[172]. The committee also examined the financial problems of exploitation. Four types of financial sources were indicated in a report by the Secretariat to be studied by the committee[173].

The 'Territorial Sea and Other General Aspects of the Law of the Sea' was a group of subject assigned to the **Second Committee**. This group of subjects was committed to three negotiating groups for detailed discussions[174]. In addition to these three groups, two new ones were established at this session[175]. However, no concrete results were achieved by the **Second Committee** at this session[176].

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171 Nordquist and Park 1 14, Van Meurs 137 13

172 For a discussion of these, see Elias 162 58-60. The USSR delegation again stressed its views on deepsea mining, and maintained that the convention should guarantee that each and every state should have equal rights with respect to the use of seabed resources, and that the 'common heritage of mankind' belonged to the people of each and every state - Van Meurs 137 13. At that stage, however, it was already quite clear that there was a multiplicity of interpretations as to the practical implications of the 'common heritage of mankind' - Elias 162 58/59, Van Meurs 137 13

173 These were: (i) amounts determined from time to time by the General Assembly out of the Special Fund referred to in Article 49 of the **RSNT**; (ii) voluntary contributions made by states parties to the **LOSC**; (iii) amounts borrowed by the **Enterprise**; and (iv) other funds made available to the **Enterprise**, including charges to enable it to commence operations as soon as possible for carrying out its function

174 The first negotiating group dealt with the legal status of the exclusive economic zone and the rights and duties of states with respect to the living resources of this zone. The second group dealt with the right of access to the sea and freedom of transit for land-locked states. The third group was mainly concerned with the definition of the outer edge of the continental margin and the question of revenue-sharing with respect to the exploitation of the continental shelf beyond 200 miles

175 One on straits used for international navigation, and another on delimitation of sea areas between states adjacent to or facing one another

176 Elias 162 57

The **Third Committee** discussed the marine environment, scientific research, and technology. Article 60 of the **RSNT** was the main focus of attention in regard to the proposed requirement that a coastal state must consent before marine scientific research is carried out in its exclusive economic zone[177].

The conference as a whole examined the question of settlement of disputes. The main issues concerned the competence to be enjoyed by each judicial body[178], whether each should be empowered to indicate *interim* measures, and the exclusivity of the compulsory settlement of disputes in respect of the rights of a coastal state in the exclusive economic zone[179].

The fifth session did not achieve the sought-after convention on the law of the sea, but only decided on the holding of yet another eight-week session in 1977[180].

As far as land-locked states were concerned, an important development was the formation of an informal 'Group of 21'[181], chaired by Mr Satya Nandan of Fiji, with the objective of producing a text on the rights of land-locked and geographically disadvantaged states which would be acceptable to both sides. This resulted in the so-called 'Nandan Text'. Mr Nandan issued a text on Articles 58, 59, 59(Bis) and 60 for consideration by the 'Group of 21'. The text introduced some substantial changes which he thought improved the chances for consensus[182]. Due to lack of time, however, detailed discussion and scrutiny had to wait for the following session.

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[177] Most delegations favoured the so-called 'consent regime' in which the express - as opposed to tacit - consent of the coastal state first had to be obtained before any research could be carried out within the exclusive economic zone or on the continental shelf. It was favoured because the researching state should have due regard for the security implications of such research for the coastal state

[178] Three bodies were proposed: a **Tribunal of the Law of the Sea**, the **ICJ**, or an arbitral tribunal

[179] Elias 162 61

[180] Elias 162 55, Nordquist and Park 1 16

[181] Consisting of 10 members from land-locked and geographically disadvantaged states, 10 from coastal states, and a chairman

[182] Sinjela 155 299-301

3.3.7 THE SIXTH SESSION

The sixth session was again held in New York from 23 May to 15 July 1977. The session resulted in an **Informal Composite Negotiating Text (ICNT)**[183].

Because of the virtual deadlock at the fifth session over the issue of deep seabed mining, Norwegian Minister Jens Evensen early in 1977 arranged an intersessional meeting on the deep seabed system of exploitation. All participants to the conference were invited to this meeting in Geneva[184]. Minister Evensen continued these efforts at the conference itself, reporting to the chairman of the **First Committee**.

The **ICNT** reorganised all the material from the earlier texts into a comprehensive draft treaty form with certain significant changes. The so-called 'Evensen Text'[185] or alternatively 'Engo Text'[186] was not a negotiated or approved text, but rather an informal basis for discussion, and major elements of the text were incorporated into the **ICNT**.

The 1977 **ICNT** differed from earlier texts on the following aspects:

1 The **Tribunal** no longer appeared as an organ of the **Authority**, but rather as a panel of the **Law of the Sea Tribunal**[187].

2 A major change from the **RSNT** was a provision giving the **Assembly** the power to adopt the rules, regulations, and procedures provisionally adopted by the

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[183] Elias 162 65/66, Sinjela 155 302/303, Van Meurs 137 14

[184] Nordquist and Park 1 16, Van Meurs 137 14

[185] Van Meurs 137 14

[186] After Paul Engo, Chairman of the **First Committee** - see Barston 138 162, Elias 162 65/66

[187] Van Meurs 137 14

Council. The **Assembly** thus became the most influential body in the **Authority**[188].

3 As far as the composition of the Council was concerned, the **ICNT** still provided for 36 members. However, the categories from which members were chosen[189] differed[190]. As far as voting in the Council was concerned, the **ICNT** provided for a complete change from earlier texts: a three-quarter majority of those present and voting would be required on matters of substance[191].

4 As far as the system of exploitation was concerned, the **ICNT** provided for a parallel system with dual nomination of mine sites to be made on application for a contract, as well as discretionary powers to the **Authority** to require transfer of technology from prospective applicants and contractors[192].

5 As far as revenue sharing was concerned, the **ICNT** provided for a mandate[193] to the effect that the **Authority** should establish a system for the equitable sharing of benefits with emphasis on developing states, and in particular land-locked and geographically disadvantaged developing states and countries which had not attained full independence or self-governing status[194].

6 In addition, the **ICNT** provided for a review clause in terms of a five-year periodic review and a 20-year review conference. However, basic principles were

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188 Van Meurs 137 14

189 See 3.3.4 *supra*

190 The **ICNT** provided for 18 members (instead of 24) selected in accordance with geographical distribution principles, including at least one from each region, and that the group of importers should include one Eastern (Socialist) European state and the group of exporters should include two developing states

191 Van Meurs 137 15/16

192 Van Meurs 137 15/16

193 In terms of Article 151(9)

194 Van Meurs 137 17

not reviewable. It furthermore provided for a mandate to eliminate the parallel system if the conference was unable to reach agreement on it within five years[195].

In the **Second Committee** the legal status of the exclusive economic zone became the focus of attention, in particular the residual rights within the exclusive economic zone[196]. Furthermore, the demands of the land-locked and geographically disadvantaged states for access to the resources of the neighbouring exclusive economic zones were also extensively discussed[197]. A 'Group of 21' was formed to bridge the gap between the two main groups[198].

A second issue was the extent of the outer limit of the continental shelf[199]. Opposition to the definition of the outer limit came mainly from the land-locked and geographically disadvantaged states[200]. Although no precise formula was included in the **ICNT**, the Irish formula[201] received broad support. Further progress on that question was linked

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195 Van Meurs 137 17. See also the comments on the ambiguity of the nature of the **Authority** - Van Meurs 137 18

196 That is, the traditional high seas freedoms of navigation, visiting ports in passage, cable-laying, overflight, fishing, and marine scientific research. Japan, the UK, the US and the USSR, along with other maritime states, argued that the exclusive economic zone should be regarded as high seas except for those rights provided for by the proposed convention. The 'Group of 77' considered that the exclusive economic zone was distinct from high seas, and that the coastal state had the exclusive prerogative to make regulations and enforce standards

197 Discussions centred on the 'right' of participation and whether the 'right' of access applied to surplus fisheries which the coastal state was unable to harvest, or whether it should also apply to cases where there was no surplus

198 See 3.3.6 *supra* and also Nordquist and Park 1 16

199 That was a source of concern particularly to those states with 'wide' margins such as Australia, India, New Zealand and the UK

200 They would neither gain economically nor be able to extend their limits

201 The formula, introduced in April 1976, provided that the outer edge of the shelf would be determined by distance criterion from the foot of the continental slope, or by a depth of sediment test

to the related issue of revenue-sharing[202].

A third area of discussion in the **Second Committee** was the choice of the baselines for the delineation of the limits of archipelagic states, and the regime for passage through archipelagic waters[203]. The **ICNT**[204] provided for a new concept of archipelagic sealanes passage, analogous to the right of passage through straits[205], for routes across an archipelago.

The question of the legal status of the 200-mile exclusive economic zone was substantially resolved by the close of the session. A negotiating group[206] produced a compromise package around the existing articles concerned with rights and obligations in the exclusive economic zones, and the high seas freedoms[207].

The **Third Committee**'s section of the **ICNT**[208] contained *inter alia* provisions on states' obligations to protect the marine environment, regional cooperation, and land-based sources of pollution. The bulk of that part was devoted to measures aimed at

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[202] The **ICNT** provided for a revenue-sharing regime (Article 82) under which - after the fifth year of operating an off-shore site between the outer limits of the exclusive economic zone and the continental margin - 1% of the value or volume of production would be paid to the **Authority**. The rate of payment would increase by 1% per year until the tenth year, and thereafter remain at 5%

[203] That was of particular importance to Indonesia and the Philippines

[204] Article 53

[205] Article 38

[206] Formed on 2 July 1977 under Casteneda of Mexico - see Barston 138 160, Nordquist and Park 1 16

[207] The framework of the regime - as set out in Articles 55-58 - was based on the distinction drawn - in Article 56 - between the 'sovereign rights' and 'jurisdiction' of the coastal state. The former extended *inter alia* to exploring and exploiting, conserving, and managing the natural resources - whether living or non-living - of the seabed and subsoil and superadjacent waters. Other coastal state powers were limited to jurisdiction over artificial islands, installations and structures, marine scientific research, and the preservation of the marine environment

[208] Part XII of the **ICNT**

controlling vessels-source pollution[209]. The concern of those states vulnerable to pollution[210] found expression in a draft article which gave the coastal state regulatory powers to designate special areas within the exclusive economic zone[211]. In addition the text contained a provision[212] which would allow coastal states to establish non-discriminatory regulations within the exclusive economic zone in order to reduce the likelihood of major pollution damage in certain ecologically vulnerable ice-covered areas such as might be found in the Arctic.

The revised regime for maritime scientific research modified the traditional regime (high seas freedom of research) in three respects:

1 The coastal state was given jurisdiction with regard to maritime scientific research within the exclusive economic zone, including the water column of the zone[213].

2 While states would have the right to conduct maritime scientific research in the water column beyond the exclusive economic zone in conformity with the 1958

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[209] As such the text reflected the dissatisfaction of a number of developing coastal states with the flag state regime. The latter regime was modified in a number of respects, including new provisions on qualified state enforcement rights in the exclusive economic zone. In addition the text provided for a type of universal port state jurisdiction in which the port state might under certain conditions initiate investigations, and subsequently commence proceedings for pollution offences, committed outside its own internal waters, territorial sea, and economic zone. These and other changes to the traditional regime (including innocent passage) were subject to a number of safeguards such as release of a vessel on bonding, which the maritime powers have sought in order to protect their worldwide shipping interests

[210] Because of their location on important shipping routes, or whose sea areas are vul;nerable for ecological and oceanographic reasons

[211] Subject to international approval of such areas by the competent international organisation

[212] Article 235 of the ICNT

[213] A consent regime was provided for (Articles 247-253), and although it was qualified in two ways - the coastal state might not in normal circumstances withhold its consent for scientific research projects, and the researching organisation had the right to proceed with a project six months after notification if no request for further information or objection was received - it seemed likely that the regime would in practical terms become one of full consent for all marine scientific research projects within the exclusive economic zone

Geneva Continental Shelf Convention[214], under the **ICNT** the **Authority** would harmonise and coordinate research in the Area.

3 The **ICNT** envisaged a role in marine research projects in neighbouring exclusive economic zones for land-locked and geographically disadvantaged states[215].

Despite a press release following the sixth session in which the US made it clear that the seabed provisions of the **ICNT** were unacceptable to the US[216], it was significant that general accommodation was achieved on questions pertaining to the high seas status of the economic zone, passage through straits, and the essential elements of a system of dispute settlement[217].

The acceptance in principle by most states of the concept of 'common heritage of mankind' came into strong focus at this session. It has been suggested that the absence of legal elaboration of the concept could be attributed to the fundamental differences of approach, and the dual nature of the **Authority**[218].

As far as land-locked states were concerned, the 'Nandan Text' was discussed at the session. The question of a 'right' of access to the resources of the neighbouring

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214 See 2.6.2.4 *supra*

215 In the Area all states, irrespective of their geographical location, would have equal right to conduct research, subject to Part XI of the convention

216 See the press release by Ambassador Elliot Richardson, special representative of the President of the US - Van Meurs 137 17/18. The text of the **ICNT** was criticised by Richardson on procedural grounds in that it had not been discussed widely within the conference framework, nor did it take into account sufficiently the detailed discussion which had taken place within the framework of the Evensen meetings. Apart from the procedural issue, three questions of substance divided the Western states and the 'Group of 77': the conditions of access to the Area, production levels, and the balance of political power within the various organs of the **Authority**

217 Van Meurs 137 17/18

218 See Van Meurs 137 19. The author opines that the necessity simultaneously to pin on the **Authority** certain attributes of an independent state and yet to identify it with the essentially abstract concept of the 'common heritage of mankind', constituted the dilemma which had caused **UNCLOS III** to become increasingly enmeshed in problems with every succeeding attempt at a more lucid text. See also Rembe 1 49-57

exclusive economic zones for those states in particular was extensively discussed[219]. The rights of access to the sea and of transit were also addressed in Articles 124-132[220].

The group of land-locked and geographically disadvantaged states expressed its willingness to discuss the 'Nandan Text' because - even though the text fell short of their stated demand for 'equal and non-discriminatory rights' in the exclusive economic zone - it did recognise the fact that they had rights in the exclusive economic zone[221]. The coastal states group, however, had different views on the text, and some members of the group even questioned whether the text should be accepted as the basis for future negotiations because - according to them - it made too many concessions to the land-locked and geographically disadvantaged states.

Article 58 of the **RSNT** remained unchanged as Article 69 of the **ICNT**, but a new Article 71 was introduced[222].

3.3.8 THE SEVENTH SESSION

The seventh session was held in Geneva from 28 March to 19 May 1978 and resumed in New York from 21 August to 15 September 1978. Seven negotiating groups were set

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219 See 3.3.6 *supra*

220 Sinjela 155 56/57

221 Sinjela 155 301/302

222 The article excluded the application of the provisions of Article 69 (as well as those of Article 70 dealing with the rights of geographically disadvantaged states) 'in the case of a costal State whose economy is overwhelmingly dependent on the exploitation of the living resources of the exclusive economic zone' - see Sinjela 155 303

up to discuss selected so-called 'hard-core' issues which were regarded as essential to consensus[223].

The session resulted in a comprehensive compilation of all the reports of the conference and the seven negotiating groups[224]. Only one of the hard-core issues[225] achieved some measure of consensus. However, some progress was recorded on the terms under which land-locked and other disadvantaged states would be entitled to fish in the exclusive economic zone of neighbouring states[226].

Marine pollution - although not then regarded as a hard-core issue - was also a subject of discussion, and a measure of agreement was reached on rules to strengthen the powers of coastal states for the protection of their coastlines against the threat of pollution[227].

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[223] See Barrie G N 'The Third United Nations Conference on the Law of the Sea: Seventh Session (1978)' 1978 *South African Yearbook of International Law* Vol 4 275, Barston 138 155, Platzöder R *Third United Nations Conference on the Law of the Sea: Documents* Vol V Dobbs Ferry, New York: Oceana Publications, Inc. 1984 219, Sinjela 155 304, Van Meurs 137 20. These topics concerned resource policy for a deepsea exploitation system, financial arrangements for such a system, organs of the **Authority**, access of land-locked states and certain disadvantaged states to fisheries in the exclusive economic zone areas, dispute settlement for the exclusive economic zones, the definition of the outer limits of the continental shelf, the question of contributions in respect of the exploitation of the continental shelf if it extended beyond 200 miles, and the delimitation of maritime boundaries between adjacent and opposite states

[224] Van Meurs 137 20

[225] A rule of compulsory conciliation in disputes arising out of inadequate management policies or the refusal of the costal state to allocate surplus fisheries from the exclusive economic zone - revised Article 296

[226] It was suggested that if a coastal state was fishing in its own waters on a joint venture basis it would be inequitable to exclude the neighbouring land-locked and geographically disadvantaged states, and a new section was proposed for inclusion in the exclusive economic zone articles to enable land-locked and geographically disadvantaged states to have adequate participation in such joint ventures or other similar arrangements satisfactory to all parties concerned. However, it would only apply to *developing* states, with particular emphasis on those developing states which had actually been fishing in the particular exclusive economic zone

[227] The necessity for such measures was brought home to the conference by the *Amoco Cadiz* disaster off the Brittany coast of France - see Barrie 223 275, Barston 138 165, Van Meurs 137 21. Discussions at New York revealed some support for further extensions of coastal state enforcement powers. Some states such as France and West Germany nevertheless felt that adequate powers had not been given to the coastal state. By contrast a number of states with extensive shipping interests - such as Greece and Liberia - or located in sensitive military regimes - such as Iraq, Israel and the Republic of Korea - expressed reservations on the extension of port or coastal state powers to include information on routing and detention in the exclusive economic zone for pollution offences

At the close of the session it was decided that the negotiating groups should resume their work right at the outset of the eighth session. Although the seventh session highlighted sharp differences that remained to be solved[228], there was enough progress made on major issues[229] to sustain the belief that a treaty was in sight.

As far as land-locked states in particular were concerned, the main discussion centred around whether such states have a 'right' to the living resources of the exclusive economic zone, or merely 'access' to the 'surplus' of the zone. Negotiating Group 4 eventually reached a compromise on the issue[230] but it became quite clear that there were deep-seated differences between the land-locked and geographically disadvantaged states group and the coastal states group.

3.3.9 THE EIGHTH SESSION

The eighth session was held in Geneva From 19 March to 27 April 1979 and resumed in New York from 19 July to 24 August 1979[231]. The Geneva part of the session resulted in the issuing on 28 April 1979 of an **Informal Composite Negotiating Text/Revision 1 (ICNT/Rev. 1)**[232].

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[228] See Nordquist and Park 1 17, Van Meurs 137 21

[229] Barrie 223 275, Van Meurs 137 21-23

[230] Barrie 223 276, Sinjela 155 306-310

[231] Platzöder 223 220, Van Meurs 137 23-25

[232] Sinjela 155 311, Van Meurs 137 23. The procedure determined by the conference was that any modifications or revisions in the **ICNT** should emerge from the negotiations themselves, and should not be introduced on the initiative of any one single person, unless presented to the plenary and found to offer a substantially improved prospect for a consensus. The revision of the **ICNT** was to have been the collective responsibility of the President and the chairmen of the main committees acting together as a team headed by the President. The team decided to include in the revision the changes presented to the plenary by the chairmen of the three committees, which included all provisions of which there had been a clearly discernible consensus

The achievement of broad consensus on the regime for preventing and controlling marine pollution was an important outcome of the Geneva part of the session. It was seen by decision-makers from a widespread group of states as largely removing yet another contentious, though not critical, issue area from the agenda of outstanding problems.

At the end of the Geneva part of the session work was halted in the three new negotiating groups to deal with seabed questions and a 'Working Group of 21' was established instead[233]. The move was an important procedural innovation: unlike previous formal groups membership was restricted[234].

By the New York stage of the eighth session the major outstanding issue remained the regime for the **Authority**. Two additional issues remained unresolved: the definition of the outer limit of the continental margin, and boundaries between opposite and adjacent states. Progress was made though in a newly established 'Working Group of 38' on the compromise formula put forward on the outer limit of the continental shelf, and on revenue-sharing[235].

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[233] Barston 138 155/156, Sebenius J K *Negotiating the Law of the Sea* Cambridge, Massachusetts: Harvard University Press 1984 38

[234] Membership was drawn from 10 developed industrialised states, including Australia, Canada, Federal Republic of Germany, France, the UK, US, and USSR, and 10 developing states (represented for example by Brazil, Mexico, People'S Republic of China, and Peru), and a chairman. In practice, however, the membership of the group tended to 'expand' due to the presence of alternates and observers

[235] The formula - called the 'Aguilar formula' after its proposer, Venzuela's Andres Aguilar, chairman of Negotiating Group 6 - would allow states a choice of two criteria for fixing the outer edge of the continental margin. One would be based on the thickness of sedimentary rock beyond the foot of the continental slope, and the other on a line 60 miles seaward of the continental slope. The outer limits for states whose shelves extend beyond 200 miles would be set at either 350 miles from the baseline from which the territorial sea is measured, or 100 miles from the 2 500 metre isobath

Within the **Third Committee** negotiations centred around the marine scientific research regime[236]. Compromise formulae were reached at New York but the issue remained contentious.

At the New York session the seabed mining regime was also discussed. Detailed negotiations were continued on the parallel system for mining by the **Enterprise** and private contractors, initial finance for the **Enterprise**, and the question of what majority would be required for taking decisions in the **Council**[237].

As far as land-locked states were concerned, all further efforts to reach an acceptable accommodation of their rights were unsuccessful. In fact, Negotiating Group 4 held only one meeting at the Geneva session, where it became apparent that there would be no point in convening further meetings until intensive consultations had been held on the issues involved. Indeed, no further meetings of the group took place.

3.3.10 THE NINTH SESSION

The ninth session was held in New York from 3 March to 4 April 1980 and resumed in Geneva from 28 July to 29 August 1980[238]. At the New York meeting considerable

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[236] The issue had been reopened by the US at the seventh session. Proposals by the US sought to remove some of the restrictions in the regime - in particular the consent regime for marine scientific research in the exclusive economic zone - and to improve the conditions of access for research on the continental shelf beyond 200 miles. Opposition to the US proposals came from those members of the 'Group of 77' favouring a full consent regime for marine scientific research in the exclusive economic zone. In addition, reservations were expressed by a number of states which felt that substantive amendments on marine scientific research would disturb the overall balance of the marine scientific research regime which had been negotiated at the sixth session

[237] The negotiations on the economic and financial aspects of deep seabed mining proved to be the most technically complex of the **UNCLOS III** proceedings up to that stage. It covered issues such as debt equity ratios of mining companies, the tax system for the **Authority** and the financial structure enabling the **Enterprise** to carry out integrated or single metal mining projects. The negotiations became protracted because of the continual need to revise financial data, modify proposals in the light of reports from technical groups and to take account of the financial implications of mining and financing the **Authority** for differing economic systems - see Sebenius 233 13-23

[238] Platzöder 223 222, Van Meurs 137 25

progress was made towards the formulation of a draft convention, and a second revision of the **ICNT** was produced - **ICNT/Rev. 2**[239].

The **First Committee** arrived at a compromise on the issue of a transfer of technology[240]. One clause was modified in the **ICNT/Rev. 2**, limiting transfer obligations to developing states to circumstances where the **Enterprise** chose not to exercise its own right of access[241]. A time limit for the transfer of technology was also introduced[242]. Two stringent criteria for assessing whether approval of a mining contract would lead to monopolisation were also adopted[243]. Furthermore, outstanding issues concerning the settlement of seabed disputes were also resolved at the New York meeting[244].

The **Second Committee** introduced a compromise formula on coastal state jurisdiction over the continental shelf which took into account oceanic ridges[245]. A new Annex II to the **ICNT/Rev. 2** detailed the functions to be performed by the proposed **Commission on the Limits of the Continental Shelf**. Although the method of delimiting

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239 Nordquist and Park 1 22, Van Meurs 137 25

240 Although it was generally recognised that to make the operating capability of the **Enterprise** feasible the organ should be provided with access to seabed technology, the industrialised states still wished to clarify and limit the obligation to transfer technology

241 Van Meurs 137 25/26

242 Contractors would be subject to the duty to transfer technology until the commencement of commercial operations by the **Enterprise**, and thereafter the technology would be applicable to such contracts for a maximum of 10 years

243 The first would limit a state's operations to two percent (reduced from 3) of the total seabed area open to exploitation by states and private parties. The second, aimed at preventing a monopolisation of sites in a given area, would limit any state's approved and current mining areas to 30% of the circular area of 400 000 square kilometres

244 Commercial arbitration was made compulsory at the request of either party to a dispute, with concurrent compulsory referral to the **Sea-Bed Disputes Chamber** of the **Law of the Sea Tribunal**. The **Tribunal** would consist of 21 members of differing nationalities, representing the principal legal systems of the world, and the **Sea-Bed Disputes Chamber** would consist of 11 members. Disputes concerning technology transfer obligations, being part of a contractual undertaking, would also be subject to compulsory arbitration - see Van Meurs 137 26/27

245 Article 76 of the **ICNT/Rev. 2**

boundaries between adjacent or opposite states was not resolved, a new text was submitted defining the criteria for delimiting exclusive economic zone and continental shelf boundaries, and incorporating both the 'equitable principles' approach and the 'equidistance' approach[246].

The **Informal Plenary** considered in detail for the first time the creation of a **Preparatory Commission**. It was decided that the commission would function from the conclusion of negotiations until such time as the convention entered into force[247].

At the resumed ninth session in Geneva the conference decided to continue negotiations on outstanding issues with the aim of revising the **ICNT** for the third time. This resulted in the transformation of the **ICNT/Rev. 2** into a draft convention by the 'Collegium'[248]. The 'Draft Convention on the Law of the Sea (Informal Text)' was considered by the delegates to be a breakthrough[249].

The main issue resolved by the **First Committee** was agreement on a new voting procedure for the **Council** of the projected **Authority**. The substantive issues were separated into three categories, each requiring a different majority for approval, namely two-thirds, three-fourths, or consensus[250].

The **Informal Plenary** approved a series of general provisions for inclusion in the draft convention. One provision related to the protection of archaeological and historical objects removed from the seabed, and another ensured that states would not be compelled to supply information if the disclosure thereof would be contrary to the

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[246] Nordquist and Park 1 22, Van Meurs 137 27

[247] The most significant function of the commission would be the adoption of draft rules, regulations, and procedures for the regulation of seabed mining - Van Meurs 137 27

[248] Consisting of the President of the conference, the chairmen of the main committees, the chairman of the **Drafting Committee** and the Rapporteur-General - see Platzöder 223 222

[249] Nordquist and Park 1 21, Platzöder 223 223, Van Meurs 137 27

[250] See further Van Meurs 137 28

essential interests of their security[251]. A further general provision[252] - aimed at protecting the consensus nature of the convention - stated that no reservations or exceptions would be permitted unless expressly provided for by other articles in the convention[253].

As far as land-locked states were concerned, no changes were made in the articles relating to land-locked states, either in the **ICNT/Rev. 2** or the 'Draft Convention'.

3.3.11 THE TENTH SESSION

The tenth session was held in New York from 9 March to 24 April 1981 and resumed in Geneva from 3 to 28 August 1981. Events took a dramatic turn when only a week prior to the commencement of the tenth session the US announced that it sought to ensure that the negotiations would not end at the tenth session, pending a thorough policy review by the US government regarding the problems raised by the 'Draft Convention'[254]. The main thrust of the US policy review focused on the deepsea mining issue, as well as on the **UNCLOS III** position that the deep seabed resources were the 'common heritage of mankind'[255]. The US objections to the 'Draft Convention' - mainly on the grounds of totally insufficient incentive and economic

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[251] Van Meurs 137 28/29

[252] Article 309 of the 'Draft Convention'

[253] Van Meurs (137 29) points out that the effect of a reservation is to exempt a state from the application of a particular provision, and such exemption may operate against the 'package' character of the convention. To balance the generality of Article 309, Article 310 provided that states would be permitted when signing, ratifying or acceding to the convention, to make declarations or statements not purporting to alter the legal effect of particular provisions if such declarations or statements should be necessary for the purpose of harmonisation of national laws and regulations with the provisions of the convention

[254] Nordquist and Park 1 22, Van Meurs 137 32

[255] See 4.3 *infra*

benefit to the US deepsea mining interests - evoked a strong response from other states[256].

In the **Second Committee** a special negotiating team was established to arrive at a solution to the disagreement concerning delimitation of boundaries between adjacent and opposite states[257].

At the Geneva part of the session Ambassador James Malone[258] reiterated the US position and the reasons for undertaking review[259], and asked other states to react to the US objections. Most states argued that the compromises which had been reached comprised a 'package deal', and that no new negotiations could be entered into at that stage[260]. Although a significant amount of time was spent on discussion of the US position, no final decision was arrived at on the matter during the session.

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[256] In particular Soviet bloc states and developing states - see Anand 140 217, Van Meurs 137 34

[257] The team comprised two interest groups led by Ireland and Spain which respectively favoured equidistance or median lines in determination of maritime boundaries (ireland) and equitable principles (Spain) - Platzöder 223 224, Van Meurs 137 34

[258] Special representative of the US President at **UNCLOS III**

[259] See Van Meurs 137 33/34. They were:

1 The establishment of a 'supranational mining company' which would benefit from discriminatory advantages as against companies of industrialised states.
2 The compulsory sale of proprietary information and technology through the transfer of technology provisions.
3 The limitation of annual production of manganese nodules to avoid damage to the economy of land-producing states of the same commodities.
4 The substantial discretion of the **Authority** in allocating seabed production.
5 The creation of a one-man-one-vote international organisation.
6 The review and amendment provisions of the 'Draft Convention'.
7 The revenue sharing obligations on seabed mining operations which would significantly increase the costs of seabed mining.
8 The imposition of an international revenue-sharing obligation on the production of hydrocarbons from the continental shelf beyond the 200-mile limit, and the provision that developing states importing hydrocarbons would be exempt from that obligation.
9 The provisions concerning liberation movements and their eligibility to obtain a share of the revenues of the **Authority**.
10 The lack of any provisions for protecting investments prior to the entry into force of the convention.

[260] See Nordquist and Park 1 23, Van Meurs 137 34/35

The **Second Committee** did not meet formally during the Geneva meeting, but negotiations continued on the still unresolved issue of delimitation of boundaries between states with adjacent coasts. A solution was arrived at to the effect that express reference to the median or equidistance line be eliminated, and that delimitation was to be effected by equitable agreement between the states concerned[261].

The **Informal Plenary** chose Jamaica as the site of the projected **Authority**, and Hamburg in the Federal Republic of Germany as the site of the proposed **International Tribunal for the Law of the Sea**[262].

Once again, no changes were made as far as land-locked states were concerned.

3.3.12 THE ELEVENTH SESSION

The eleventh session was held in New York from 9 March to 30 April 1982. An intersessional meeting was held in New York from 24 February to 2 March 1982 for the purpose of beginning preliminary negotiations for the eleventh session[263].

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[261] Platzöder 223 224, Van Meurs 137 35

[262] Van Meurs 137 35

[263] Platzöder 223 224, Van Meurs 129 36

At the intersessional meeting the US elaborated on six objectives deemed necessary for an 'acceptable' comprehensive treaty[264]. It suggested several changes to the 'Draft Convention' relating to the potential discouragement of seabed mining[265] and the administrative procedures of the **Authority**[266].

Even though the US's position was strengthened by several factors[267], the 'Group of 77' and others appealed to the US to reconsider its decision in the light of the years of collective labour by all delegations (including the US delegation). Reaction to the US position at the intersessional meeting related to the breadth and scope of the changes in the 'Draft Treaty' sought by the US, and to the fact that the concept of the 'common heritage of mankind' had previously been adopted unanimously[268]. In addition, a further point of difference between the US and developing states related to the continuing attempts by the US to seek the signing of reciprocating states agreements in respect of deepsea mining[269].

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[264] On 29 January 1982 President Reagan had announced the following necessary objectives:

1. Development of deep seabed mineral resources should meet national and world demand.
2. Sufficient national access to resources, security of supply, and avoidance of monopolisation by the **Authority**.
3. A decision-making role in the deepsea regime sufficient to protect the political and economic interests and financial contributions of participating states.
4. Protection against amendments made without approval of participating states.
5. Prevention of other undesirable precedents for international organisations.
6. Modification so that approval by the US Senate would be likely.

[265] It objected to manganese nodule production limitations, financial burdens imposed by the **Authority**, and the licensing limits on mining operations allowed to each state - see Van Meurs 137 37

[266] The Reagan administration criticised the imbalance in favour of developing states as against developed states in the **Assembly** and **Council** of the **Authority**, as well as the **Authority**'s methods of distributing proceeds which would accrue from the **Enterprise**'s deep seabed mining ventures - see Sinjela 155 363, Van Meurs 137 37

[267] The **Enterprise** would have difficulty in financing mining operations or securing the necessary technology without US support. Moreover, the Reagan administration believed that the US would be able to mine the seabed in the 200-mile exclusive economic zone without recourse to treaty provisions - see Van Meurs 137 37

[268] See 3.3.11 *supra*

[269] Van Meurs 137 38

At the opening of the eleventh session there was adverse reaction to the proposed changes[270] by the US. As a result a group of heads of delegations from 11 Western states[271], known as the 'Group of 11', produced a set of proposals aimed at attempting to bridge the gap between the US and the developing states[272]. However, no amendments - proposed mainly by the US and the 'Group of 11' - were passed.

At that session the 'Collegium' - on the basis of the debate in meetings of the conference - proposed a set of amendments for incorporation into the 'Draft Convention'. A number of delegations also proposed formal amendments, but all but two of the amendments were withdrawn or not pressed to a vote. On 26 April 1982 the remaining two amendments were put to the vote, but neither received the required majority[273]. Work had also been proceeding with the draft resolutions[274] which were to be adopted with the convention, but which were not incorporated into the 'Draft Convention' because they were intended to take effect before the convention would enter into force[275].

On 30 April 1982 the 'Draft Convention' and the four resolutions were put to the conference as agenda item 'Adoption of the Convention on the Law of the Sea'. Because the attempted compromises on seabed mining issues did not satisfy US

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[270] Which covered all substantive matters in Part XI of the **Draft Convention** dealing with deepsea mining

[271] Australia, Austria, Canada, Denmark, Finland, Iceland, Ireland, New Zealand, Norway, Sweden and Switzerland

[272] Van Meurs 137 38

[273] See Platzöder 223 224/225

[274] The four resolutions were as follows:

1 Resolution I established a **Preparatory Commission (PREPCOM)** for setting up the **Authority** and the **Tribunal.**

2 Resolution II governed the preparatory investment in pioneer activities by states and private consortia relating to deepsea nodule mining.

3 Resolution III proclaimed that non-independent territories should benefit from the resource provisions of the convention.

4 Resolution IV recognised the right of national liberation movements to sign the **Final Act.**

[275] Van Meurs 137 38

demands, the conference had to resort to voting on the question of adoption of the whole of the 'package'[276].

130 states voted in favour of the convention[277], 17 states abstained[278], and four voted against[279]. The voting resulted in the **Convention on the Law of the Sea**. Subsequent to the completion of the work of the **Drafting Committee** the convention was adopted on 7 October 1982[280].

As regards the four resolutions which were passed simultaneously with the convention, the passing of Resolution I resulted in the confirmation of the functioning of the **PREPCOM**, from the conclusion of negotiations until the convention enters into force[281]. The commission held its first meeting on 15 March 1983, and had held regular meetings after that. The rules of procedure which applied during **UNCLOS III** also apply with

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[276] Platzöder 223 225. Van Meurs 137 39 is of the opinion that it can be assumed that the US action in pressing for a vote was taken in order to avoid the possibility that consensus on seabed mining provisions by the body of delegates at **UNCLOS III** might create emerging customary international law. See also 3.3.14 *infra*

[277] None of the US allies in seabed mining capabilities - Canada, France and Japan - joined the US in voting against the convention - Van Meurs 137 39

[278] Including Belgium, the Federal Republic of Germany, Italy, Luxembourg, the Netherlands, the Soviet bloc (except for Romania), Spain, Thailand, and the UK - Van Meurs 137 39

[279] The US (for obvious reasons), Israel (because of its inability to accept any text which gave standing to the **Palestine Liberation Organization**), Turkey (because some of the provisions of the convention could jeopardise its vital legitimate interests and because it disapproved of the non-acceptance by the conference of its proposal to approve reservations) and Venezuela (because of the provisions on delimitation of marine and submarine areas between states with adjacent or opposite coasts) - Van Meurs 137 39/40. See *United Nations Press Release* SEA/494 New York: Department of Public Information, Press Section, United Nations 30 April 1982 10

[280] Van Meurs 137 40

[281] The commission's most important work is the drafting of rules and regulations for deepsea mining and the setting up of the **Authority** and the **Tribunal**, and the development of rules for the implementation of the resolution governing preparatory investments by pioneer miners - see Van Meurs 137 41

respect to the adoption of rules by the commission. Four special commissions were also established[282].

Resolution II provided for the adoption of rules for the registration of pioneer investors[283]. The USSR was the first entity to inform the commission of its intention to apply for registration as a pioneer investor[284]. Once the convention enters into force and the **Enterprise** begins operating, a consortium cannot commence mining activities until all its members have ratified the convention[285].

Resolutions III and IV provided for the rights of entities other than states to participate in **UNCLOS III** and in any function or committee or body created as a result of **UNCLOS III**. In particular, three groups who sought participation were considered[286].

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[282] See Churchill Lowe 1 16, Van Meurs 137 42. They were:

1 **Special Commission 1** for the study of possible adverse effects of seabed mining on those developing states which depend on land-based mining.
2 **Special Commission 2** for handling the operative start of the **Enterprise** including joint ventures.
3 **Special Commission 3** to draft a mining code for deepsea mining.
4 **Special Commission 4** to prepare a report on the establishment of the **Tribunal.**

[283] In terms of the resolution a state or private investor may qualify as a pioneer if it had expended $30 million in pioneering activities before 1 January 1983, with not less than 10% of that sum spent on site specific activities (location, survey, exploration, and mining area evaluation). See also Devine D J and Luyt F M 'Comments on Developments in the Law of the Sea in 1984' 1985 *Sea Changes* No 1 43, and *United Nations Press Release* SEA/494 17 28

[284] On 8 April 1983

[285] Devine and Luyt 283 44, Van Meurs 137 43

[286] See Van Meurs 137 44/45. Those were:

1 Intergovernmental organisations (for example the **European Economic Community).**
2 Self-governing associated states and territories (Namibia, represented by the **UN Council for Namibia**; the Cook Islands, Antilles, Niue, St Kitts-Nevis-Anguilla in the Caribbean Sea, and the Trust Territory of the Pacific Islands).
3 National liberation movements (the **South West African People's Organization**, the **African National Congress of South Africa**, the **Pan Africanist Congress of Azania**, and the **Palestine Liberation Organization).**

The 1982 **LOSC** comprises 320 articles and nine annexes and covers almost the entire range of ocean issues[287]. As far as the 'common heritage of mankind' is concerned, it stipulates that states parties should agree that there can be no amendments to the basic principle relating to the 'common heritage of mankind'[288]. It also provides that the **LOSC** shall prevail - as between states parties - over the 1958 **Geneva Conventions**, but that the **LOSC** shall not alter the rights and obligations of states parties arising from other agreements compatible with the **LOSC**[289]. Until entry into force of the **LOSC** the 1958 **Geneva Conventions** are still in force as between parties thereto, except in those instances where states parties have created new rules of law superseding those created under the 1958 **Geneva Conventions**[290].

The 1982 **LOSC** has been described as a virtual constitution for the oceans[291]. However long it may take for the convention to enter into force, it has already had a fundamental impact on all aspects of the law of the sea, and as such cannot be ignored or wished away.

3.3.13 SIGNATORIES AND RATIFICATION

The final meeting of **UNCLOS III** was held in Montego Bay, Jamaica from 6 December to 10 December 1982. After closing statements by the delegations the **Final Act** was signed. The 1982 **LOSC** was opened for signature in Jamaica on 10 December 1982 until 9 December 1984, and at the UN Headquarters in New York from 1 July 1983 to 9

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[287] The 12-mile territorial sea limit and 200-mile exclusive economic zone, a new definition of the outer limits of the continental shelf, rules for navigation through straits, rights accorded to islands, archipelagoes and land-locked states, prevention of marine pollution, conduct of marine scientific research, transfer of technology, fisheries management, settlement of disputes, and deepsea mining beyond areas of national jurisdiction - see Anand 140 218, Van Meurs 137 46

[288] 1982 **LOSC** Article 311(6)

[289] Article 311(1) and 311(2) of 1982 **LOSC**

[290] Van Meurs 137 47

[291] See Van Meurs 137 46

December 1984[292]. On the first day, signatures from 119 delegations[293] were appended to the convention.

South Africa attached its signature to the **LOSC** on 9 December 1984[294]. As of 2 March 1989 159 signatures were appended to the **LOSC**[295].

The US had announced on 9 July 1982 that its representatives would not sign the convention. The US did, however, sign the **Final Act**. Only one state, Turkey, did not sign either. States that have signed the **Final Act** but not the convention are entitled to attend future meetings of the agencies created by the convention as non-participating observers[296].

As of 31 December 1989 42 states have ratified the **LOSC**[297]. Article 308(2) of the convention provides that it shall enter into force 12 months after the date of deposit of the 60th instrument of ratification or accession[298]. Thus, although the convention has been signed by a large majority of the world's states and remains open for accession to states that did not sign prior to 9 December 1984 - as provided for in Article 307 - it is not yet a source of binding legal obligations[299].

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[292] Bennett 146 2, Devine D J 'The Law of the Sea Convention: Signatories and Non-signatories and the Alternative Track to Part XI' April/May 1987 *Paper Delivered at the University of Bophuthatswana Symposium 'New Trends in International Law'* Mmabatho 1

[293] Comprising 117 states, the Cook Islands (a self-governing associated state), and the **UN Council for Namibia**

[294] Devine D J 'Southern Africa and the law of the sea: problems common, uncommon and unique' in *The Law of the Sea* edited by Bennett T W *et al* Cape Town: Juta & Co, Ltd 1986 29, Sizani R K 'Selected Aspects of the South African Fisheries Policy' 1991 *Special Publication: Institute of Marine Law UCT* No 13 20, *The Star* 1984-12-14

[295] Bennett 146 1, Luyt F M 'Signature and Ratification: A Brief Note' 1985 *Sea Changes* No 1 124, Sizani 294 20 n105

[296] Van Meurs 137 40

[297] Sizani 294 65 n383. None of those were by major maritime nations, however

[298] 1982 **LOSC** Article 308(2)

[299] Bennett 146 2

However, certain writers argue that, for various reasons[300], 'dramatic moves to accelerate the ratification process of the 1982 Convention in order to achieve early entry into force are not desirable'[301].

3.3.14 CONCLUSION

The above begs the question as to the legal status of the 1982 **LOSC**. The full implications of the **LOSC** should be seen against the background of existing legal arrangements applicable to ocean space. First of all, there is the international customary law that has evolved through the practice of states[302]. Secondly there are the four 1958 **Geneva Conventions**[303]. The **LOSC** is partly a codification of existing customary international law and, in addition, it incorporates many of the provisions of the **Geneva Conventions**. Otherwise, the **LOSC** is legislative in the sense that it is a source of new rights and obligations applicable to ocean space[304].

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300 Kirsh P and Fraser D 'The Law of the Sea Preparatory Commission after Six Years: Review and Prospects' in 1988 *The Canadian Yearbook of International Law* Vol XXVI 151-153

301 Kirsh and Fraser 300 153: 'Entry into force of the Convention without some prior agreement on the approach to be taken to these issues would create considerable legal and political complications in the search for generally acceptable solutions. Some assurances will be needed on the preservation of the essence of the regime and a number of other factors such as its costs, commercial viability, and political and economic implications, before such solutions can be found.' See also Burke W T 'Customary Law of the Sea: Advocacy or Disinterested Scholarship?' in 1989 *Yale Journal of International Law* Vol 14 526/527

302 See Bennett 146 4

303 The **Convention on the High Seas** entered into force in 1962 and has 57 contracting parties, the **Convention on the Continental Shelf** and the **Convention on the Territorial Sea and the Contiguous Zone** came into force in 1964 and have 54 and 46 parties respectively, and the **Convention on Fishing and Conservation of the Living Resources of the High Seas** came into force in 1966 and has 36 parties - see Harris D J *Cases and Materials on International Law* 3rd ed London: Sweet & Maxwell 1986 284

304 Bennett 146 2 points out that it is ill-founded to refer to the **LOSC** as a 'code of law': no treaty has the same force as law. Treaties are binding only on the states that consent to them, and it is illogical to speak of treaties making law when treaties derive from a rule of customary law. See also Devine 294 30 for his division of the content of the convention into four different kinds of rule: documentary, legislative, clarificatory and doubtful provisions. Churchill and Lowe 1 15 also points to the 'hybrid nature' of the convention. See also Erasmus 1 21/22

As far as the status of the **LOSC** is concerned Bennett[305] distinguishes between four types of situations:

1 States that have signed but have not ratified the convention:

Articles 305 and 306 specifically state that ratification is the final and conclusive act by which a state signifies its consent to be bound by the provisions of **LOSC**, but the convention has not yet acquired full force and effect for the states that have ratified[306].

Although the **LOSC** is not yet in force signature does have some effect on the signatory states' international rights and duties. The **Vienna Convention on the Law of Treaties**[307] provides as follows:

> A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:
>
> (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty[308]; or
>
> (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed[309].

The implication that a state's activities are limited in certain respects and, conversely, that it can claim - as against other states in the same position - that

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[305] Bennett 146 3-10

[306] Bennett 146 3-10, Luyt 295 126

[307] Article 18

[308] For example the position of South Africa, which has until recently (see 7.2 *infra*) done nothing more than to sign the treaty

[309] For example the position of Zambia which has both signed and ratified the convention

they too refrain from the same activities[310] is difficult to apply to the diverse provisions of the **LOSC**. However, two fundamental principles that emerge from the Preamble to the convention and from certain articles in the text are the desire to preserve the areas of the seabed beyond the limits of national jurisdiction as the 'common heritage of mankind'[311], and the desire to settle all disputes peacefully[312]. In these areas at least, states' activities would be restricted[313].

2 States that decline to sign or ratify the convention:

Under the general principles of international treaty law, such states would not be bound by the treaty. Accordingly, if they were parties to the earlier **Geneva Conventions** they would continue to be bound by those conventions and additionally would be bound by international customary law. However, such states might find their position eroded by the new system of customary law evolving from the basis of the **LOSC**[314]. The very essence of customary law is that it binds, and so - as the **LOSC** becomes customary law - it will bind parties and non-parties alike[315].

Yet, as Bennett observes, the position of the so-called 'persistent objector' should not be ignored[316]. If a state consistently persists in its refusal to be bound by

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310 See Bennett 146 4, Devine 294 3

311 See the Preamble to the **LOSC** and Articles 136-138

312 See the Preamble to the **LOSC** and Articles 279/280

313 Bennett 146 4

314 Bennett 146 4, Churchill and Lowe 1 19

315 See 1.2.3.2.3 *supra* on customary international law, the *North Sea Continental Shelf* cases (1969 **ICJ** *Reports* 41ff), and Article 38 of the **Vienna Convention on the Law of Treaties.** See also Bennett 146 4-8

316 Bennett 146 5. See also Kirsh and Fraser 300 125, Shaw M N *International Law* 2nd ed Cambridge: Grotius Publications Limited 1986 75

a convention[317] it cannot be argued that that state is nevertheless bound by customary international law[318]. The situation is complicated even further in the case of the US and the **LOSC** because of the proposed 'mini-treaty'[319]. The outcome of that will depend upon whether or not the assertion that the seabed is the 'common heritage of mankind' has become a rule of customary international law or not. The practice of states will be crucial: if parties to the **LOSC** are the first to engage in mining operations, their practice will probably tend to confirm a conventional arrangement as a customary one. Conversely, if parties to the 'mini-treaty' were the first to start operations, they could assert the same argument[320].

Whatever the case, one thing does seem to be clear: third parties are unlikely to acquire obligations under the convention[321].

3 States that ratify the convention:

Before the **LOSC** enters into force, the position of a state which has ratified or acceded to the convention would be much the same as a signatory: it would be obliged to refrain from any act that would undermine the purpose or object of the convention[322].

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317 See 3.3.12 *supra* for the position of the US

318 This was the view in the *Anglo-Norwegian Fisheries Case* - see Bennet 146 5

319 See Bennett 146 5

320 Bennett 146 5, Weisburd A M 'Customary International Law: The Problem of Treaties' in 1988 *Vanderbilt Journal of Transnational Law* Vol 21 No 1 45, Wolfrum R 'The Emerging Customary Law of Marine Zones: State Practice and the Convention on the Law of the Sea' in 1987 *Netherlands Yearbook of International Law* Vol XVIII 143/144

321 Bennett 146 8

322 Article 18(b) of the 1969 **Vienna Convention on Treaties**

States that ratify or accede to the convention after it has entered into force become bound 30 days after the deposit of their instrument of ratification or accession[323]. Accession implies that a state becomes party to a treaty of which it was not a signatory. Article 307 of the **LOSC** provides that states might accede to the convention before it enters into force[324].

Once a state has ratified or acceded and once the **LOSC** enters into force, the states which are parties become bound by the terms of the convention. If a state is also party to one of the 1958 **Geneva Conventions**, its obligations under these conventions are superseded by the **LOSC**[325]. On the other hand, any matter not covered by the **LOSC** continues to be governed by the rules and principles of general international law[326].

4 States that accept only part of the convention:

Article 309 of the **LOSC** provides that no reservations or exceptions may be made to the convention unless expressly permitted by other articles of the convention - the 'package deal' principle underlying the convention[327]. When a state declares that it is prepared to accept only parts of the convention, such a declaration can create binding obligations for the declarant provided that such

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323 Article 308(2) of the 1982 **LOSC**

324 See Bennett 146 8

325 Article 311(1) provides that - as between states parties - the **LOSC** shall prevail

326 Bennett 146 8 - see also the author's argument that Article 311(3) of the **LOSC** runs counter to the 'package deal' approach in that the article allows two or more states parties to the convention to conclude agreements modifying or suspending the operation of the **LOSC** solely to the relations between them. See also Churchill and Lowe 1 19

327 It was because of the US's dissatisfaction with the regime established for the deep seabed that it refused to sign the convention, even though it does broadly accept the other provisions of the **LOSC**. See Churchill and Lowe 1 17

a state intends to be bound[328]. The effect of the declaration is to create an estopppel, although it also seems that other states might not need to reply to or react on the declaration[329]. Thus, by unilateral declaration a fragmentation of the **LOSC** is indirectly facilitated.

The above sets out the present status of the **LOSC**. As far as the long-term status of the convention is concerned, Articles 312-314 make special provision for amendments to the convention. Article 312 imposes a 10-year moratorium on any amendment to the **LOSC**. Thereafter any state may propose specific amendments to the Secretary-General of the **UN** and may ask him to convene a conference to consider the amendments[330]. At the conference the same consensus procedure as at **UNCLOS III** would apply.

Article 312(2) addresses the possibility that unanimity may not be achieved at the conference on amendment and that a decision may have to be taken by the procedure of majority vote[331]. In such a case the unity of the convention will be infringed: parties voting in favour of the amendment would be bound *inter se* by the amendment while parties voting against or abstaining would be bound by the original version of the **LOSC**[332].

Another (and simpler) procedure for amendment is provided for in Article 313 of the **LOSC**. Any state party to the **LOSC** may through the Secretary-General propose to other

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328 Intention can be inferred from the acts of the declarant and the circumstances of the declaration

329 Bennett 146 9, Van Meurs 137 41. See for example Proclamation No. 5928 of 27 December 1988 in which President Reagan extended the territorial sea of the US, the Commonwealth of Puerto Rico, Guam, American Samoa, the US Virgin Islands, the Commonwealth of the Northern Mariana Islands, and any other territory or possession over which the US exercises sovereignty, to 12 nautical miles from the baselines of the US 'in accordance with international law' - Leich M N 'Contemporary Practice of the United States Relating to International Law - Limits of the Territorial Sea' 1989 *The American Journal of International Law* Vol 83 No 2 349/350

330 The Secretary-General must then advise all states party to the **LOSC** of the proposals and if, within 12 months of the date of circulating the proposal, not less than one half of the states party to the convention reply favourably, the Secretary-General must convene the conference

331 See also Article 316(1) of 1982 **LOSC**, which deals with the entry into force of amendments

332 Bennett 146 9

parties an amendment to the convention other than an amendment relating to the activities in the Area. If, 12 months after the proposal had been circulated to all parties, no objections have been received, the amendment will be considered to have been adopted. However, objection by a single state would be sufficient to defeat the proposal[333].

Certain writers[334] are also of the opinion that the **LOSC** can be changed by the informal process of custom. Even though that may be the case, the provisions of Articles 312 and 313 clearly indicate that that would be far more difficult to achieve in the case of the **LOSC** than in many other instances of customary international law due to the moratorium period and the consensus principle.

3.4 CONCLUSION

When in 1973 seven land-locked states submitted a proposal[335] to the **Seabed Committee** concerning land-locked states the intention was that it should form part of proposed law of the sea convention and not stand alone. The fundamental precepts of the proposal were far-reaching: concerned with issues such as rights for land-locked states to free access to and from the sea[336], and rights to enjoy the freedom of the seas and to participate in the exploration and exploitation of the seabed and its resources on an equal basis with coastal states. At the Caracas session of **UNCLOS III** in 1974 the states which had submitted the above proposal also issued an explanatory statement. That document emphasised that adequate legal guarantees of a right of access to the sea were essential to the equal participation to which the land-locked states were entitled in the resources and uses of the oceans.

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[333] In that manner Article 313 preserves the unity of the **LOSC** and the 'package deal' approach

[334] Bennett 146 10

[335] **Draft Articles Relating to Land-locked States** UN Doc. A/Ac.138/93 (1973)

[336] Article II of the above

When the **ICNT** was released in 1977 those issues were addressed[337], but the objections of the land-locked states directed at several of the provisions[338] were not reflected in the **ICNT**. They were also not incorporated in the original draft convention, which was subsequently adopted as the 1982 **LOSC**.

Even though the final 1982 **LOSC** might in certain respects be disappointing for land-locked states, there is little doubt that they did gain valuable recognition[339].

Here it is necessary to take a closer look at the global impact and consequences of the treaty, the change in the international law of the sea, and also the US's reasons for rejecting the treaty. Those must also be seen against the background of the treaty. The mere fact that on the opening day of signature of the treaty it was signed by 119 delegations is unprecedented in the history of treaty law.

Looking at the **LOSC** itself it is divided into 17 parts and nine annexes. It contains provisions governing *inter alia* the limits of national jurisdiction over ocean space, access to the seas, navigation, protection and preservation of the marine environment, exploitation of living resources and conservation thereof, scientific research, seabed mining and other exploitation of non-living resources, and the settlement of disputes. In addition it establishes new international bodies to carry out functions for the realisation of specific objectives.

The basis of the 'package' of the convention is the concept that enjoyment of rights and benefits involves the concomitant undertaking of duties and obligations so that an overall equitable order may be created. The paramount duty of all states parties is to respect the rights of others[340].

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[337] In **ICNT** Part X Articles 124-132

[338] For examples see Sinjela 155 56/57

[339] See 4.2 *infra*

[340] The concept of the balance of rights and duties is emphasised by Article 300 of the **LOSC**. That article mandates good faith in the fulfilment of obligations and proscribes the abuse of rights

The convention allows for the establishment of a territorial sea of up to 12 miles in breadth, providing various methods for determining baselines and for distinguishing between territorial waters and internal waters. The traditional right of innocent passage through territorial waters is recognised.

Beyond territorial waters the convention allows the creation of an exclusive economic zone of up to 200 miles. The convention allows coastal states certain rights[341] in the exclusive economic zone for the purpose of economic advantage. At the same time neighbouring land-locked and geographically disadvantaged states shall be allowed access to those resources of the zone which the coastal state does not exploit. Furthermore the traditional freedoms of the high seas are to be maintained in the area.

The convention also sets out the principles and regulations governing the seabed and ocean floor beyond the limits of national jurisdiction (the 'common heritage of mankind')[342]. The body empowered to administer the 'common heritage of mankind' and to regulate its exploration and exploitation shall be the **International Sea-bed Authority**[343].

Furthermore the convention deals with other matters of global concern like ecological and environmental issues, amongst others. The general principles and policies governing prevention, reduction and control of pollution throughout the marine environment are established, as are the specific rights and duties of states concerned for the realisation of their environmental and ecological goals.

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[341] Notably rights over fishing and exploitation of non-living resources as well as concomitant limited jurisdiction in order to realise these rights

[342] The formulation of these provisions was especially difficult since it wholly represents the progressive development of law and was therefore unaided by the guidance of precedent

[343] An international organisation open to membership by all states as well as international organisations and entities meeting specific criteria. Article 156 provides that parties to the **LOSC** are *ipso facto* members of the **Authority**

The convention also includes provisions intended to foster the development and facilitate transfer of all kinds of marine technology to encourage the conduct of marine scientific research[344].

The convention stipulates a comprehensive set of provisions concerning the settlement of disputes. It obliges parties to settle their disputes peacefully and provides a selection of methods for doing so in the event that they are otherwise unable to reach agreement even with third party intervention. The system under the **LOSC** is compulsory and binding in that - with certain exceptions - a party has no choice but to submit to a settlement procedure if requested to do so by another disputant. Parties are also bound to abide by the findings of the body to which the dispute is submitted[345].

As far as the resolutions passed simultaneously with the convention[346] are concerned, **PREPCOM** held its initial meeting on 15 March 1983 and has held a series of regular meetings since then[347]. The commission's most important work is the drafting of rules and regulations for deepsea mining and the setting up of the **Authority**. The commission is also responsible for implementing the **Tribunal**, and another of its functions is the development of rules for the implementation of the second resolution

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[344] The inclusion of such provisions was dependent upon the establishment of adequate safeguards for the holders of the rights concerned

[345] The convention allows for a choice from among the **ICJ**, arbitration, or the **International Tribunal for the Law of the Sea**. In certain cases where the convention does not call for a binding method of settlement the parties are enjoined to submit their dispute to conciliation - see further Erasmus 1 20-25

[346] See 3.3.12 *supra*

[347] Kirsh and Fraser 300 140/141 and 146/147, Van Meurs 137 41/42

governing preparatory investments by 'pioneer miners'[348]. The third and fourth resolutions[349] have already been implemented.

As far as the US's rejection of the treaty is concerned, it is important to note that until the 1980s it had played the role of 'positive' negotiator towards concluding the **LOSC**. When the Reagan administration took office in 1980, however, it indicated that it had some strong objections to the draft text of the treaty. Many of the objections had to do with limits to be imposed on companies mining the metallic ores of the deepsea floor[350]. Other complaints were mainly ideological[351].

When earlier on the Nixon administration consented to negotiation involving the whole range of ocean questions, the US defense establishment in particular envisioned an agreement for continual navigational freedoms mainly brought about by accommodating 'Third World' interests in continental shelves, fishing rights and the nodule regime. As the negotiations progressed the US took unilateral actions with respect to oil on its outer continental shelves and fishing out to 200 miles. These claims conferred increasing legitimacy on similar actions around the world and reduced the importance of these subjects in **UNCLOS III**.

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[348] By 1985 applications for registration as pioneer investors had been received from France, India, Japan and the USSR, and **PREPCOM** requested these four states to resolve conflicts stemming from the overlapping of areas which they have claimed. Indeed, the problem of overlapping claims appears to have been approached outside **PREPCOM** with a greater degree of success than within it. A 'Provisional Understanding regarding Deep Sea-Bed Matters' was concluded on 3 August 1984 between Belgium, the Federal Republic of Germany, France, Italy, Japan, the Netherlands, the UK and the US. It was a matter of concern at the 1984 Geneva meeting of **PREPCOM**, where the 'Group of 77' and the Eastern European (Socialist) states voiced their opposition to instruments based on national legislation and reciprocal agreements as being outside the regime established by the LOSC and therefore illegal - see Kirsh and Fraser 300 126/127, Luyt 295 127, Van Meurs 137 43/44

[349] Concerning benefits for non-independent territories and recognition of national liberation movements to sign the **Final Act**

[350] See Marshall E 'U.S. Readies for Confrontation on Sea Law' in 19 March 1982 *Science* Vol 215 1480, *The Star* 1982-03-22, *The Star* 1983-08-22

[351] For example, the fact that the treaty would create an **International Sea-bed Authority** to govern mining and other ventures taking place in international waters. The **Authority** would have an organ called the **Enterprise** which would itself engage in commercial ventures. The Reagan administration objected to the concept of an international bureaucracy which would both make rules for the competition and be a competitor itself

Sebenius[352] argues that an explanation of the Reagan decision can be constructed with primary reference to the seabed and the high seas. He argues further that the Reagan negotiators judged their alternatives to a law of the sea treaty as being far more attractive than before. These shifts over time in the perception of interests and alternatives culminated in the 1982 rejection by the US of the **LOSC**. He also points out that there are certain benefits for the US in rejection of the treaty[353]. However, the disadvantages of rejection may far outweigh the advantages[354].

As far as the convention itself is concerned, it can be described as a serious setback that the US, Israel, Turkey and Venezuela rejected the treaty, especially in the light of attempts from certain US quarters to create a 'mini-treaty'[355].

Nevertheless, the 1982 **LOSC** is of great significance as a code for the oceans. The following factors are of particular importance[356]:

1 The all-embracing character of the convention as regards the number of issues involved.

2 The participation in **UNCLOS III** of most of the world's states including many developing states which did not exist as independent or associated states at the time of the previous law of the sea conferences.

3 The lengthy period of time during which matters were negotiated and renegotiated, and articles were drafted and redrafted.

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[352] Sebenius 233 107

[353] Sebenius 233 107-109

[354] See in particular Van Dyke J 'Going It Alone Is Bad for America' in 2 June 1985 *The Guardian* 17/18

[355] See Sebenius 233 108/109, Van Dyke 354 17/18

[356] See Barston 138 156-158, Erasmus 1 20/21, Rembe 1 199-202 and 206/207, Van Meurs 137 47

4 The recognition that technical development cannot be halted and consequently that law cannot be halted.

5 The realisation of the dangers of marine pollution and overexploitation of resources.

6 The reallocation of control and jurisdiction over ocean areas.

7 The success of the consensus procedure which was employed during the **UNCLOS III** negotiations.

8 The recognition given to the problems of land-locked states.

The highly politicised nature of the negotiating process was a key distinguishing feature of **UNCLOS III**. Unlike at the 1958 and 1960 **Geneva Conferences**, negotiating texts were prepared in the three main committees and other forums rather than initially drawn up in a legal drafting committee prior to general debate. Obligations were frequently qualified to allow for a state's level of development[357].

Yet, unlike other multilateral negotiations[358], **UNCLOS III** negotiations involved many cross-cutting alignments, and negotiations were characterised by changing and shifting groups around both limited or special interests[359].

Furthermore, another feature of **UNCLOS III** was the diffusion of political power. Both the US and the USSR, finding much in common in the need to defend global maritime

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[357] Barston 138 156

[358] Such as those within **UNCTAD** before the **Manilla Conference**, in which divisions of opinion have tended to be on strong north-south lines

[359] Barston 138 156, Rembe 1 200/201

interests, have similarly found it difficult to wield influence in the conference[360]. That made it easier for the minor powers to achieve a degree of importance within the framework of the conference which was generally higher than its ranking and international role in non-law of the sea matters would suggest[361].

In addition, the highly personalised nature of the political process - of building consensus upon a complex range of issues - should be noted. Individual representatives of minor and small powers played highly active roles, with the capacity to block, delay or facilitate compromise (like others), yet with the advantage of far fewer constraints than might be imposed by a large and divided delegation, a domestic constituency[362], or the need to appear frequently constructive. The personalised nature of the diplomacy was underlined by the number of minor states which have retained the same representatives from the outset of the conference, and thus gaining expertise and even obtaining important positions in the formal and informal machinery of the conference[363].

Finally, the proceedings of **UNCLOS III** were so protracted because of the concept of negotiating until consensus is reached. The pace of the negotiations was shaped not only by the diversity of issues but also the size of the negotiating groups. The practice of allowing membership of official negotiating groups to be open to all states (open-ended negotiation) inevitably led to delay. Attempts to limit their membership[364] had until the eighth session consistently met with opposition, particularly from the smaller members of the conference[365].

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[360] That difficulty stemmed partly from the different maritime perspectives of the major powers and partly from the very diverse range of interest groups, each seeking to promote or secure its particular set of interests - see Barston 138 157

[361] See for example Bulgaria, Cameroon, Fiji and Malta

[362] See for example the position of the US delegation after the entering into office of President Reagan

[363] See Barston 138 157, Rembe 1 201/202

[364] The 'Group of 21', for example

[365] Barston 138 158

The resulting 1982 **LOSC** can thus be regarded as a remarkable success in the face of all odds, but flawed in certain respects as a result of the negotiation procedure. As one writer puts it:

> At present ... the Convention remains a curious mix of the customary and the innovative, a combination that is at once exciting but possibly fatal to its success[366].

It should be noted that the **ICJ** was specifically requested to take into consideration principles of the **LOSC** (in other words, accepted trends which were emerging from **UNCLOS III**), irrespective whether the convention was in force or not. In the *Case Concerning the Continental Shelf* (Tunisia/Libya Arab Jamahirija)[367] the parties had been requested by the court to state which rules of international law may be applied for delimitation of the continental shelf, taking into account 'equitable principles and the relevant circumstances which characterize the area, as well as the new accepted trends admitted at the Third Conference on the Law of the Sea'[368]. Article 83(1) of the **LOSC** provides that opposite and adjacent states should reach an equitable solution in determining the continental shelf boundary. The **ICJ** interpreted Article 83(1) as 'embodying the trend in customary international law to de-emphasize the equidistance principle in favour of a solution based on equitable principles'[369]. In a report on the law of the sea the **UN** Secretary-General, commenting on the *Tunisia/Libya* case, stated that the developments in the law that took place through **UNCLOS III** were recognised as providing the legal basis for resolving maritime issues[370].

UNCLOS III and the resulting 1982 **LOSC** therefore proved to be a basis or foundation for judicial interpretation, and in other respects the signing of the convention has not

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[366] Dibb T 'Exploitation of the Deep Seabed - Do Land-locked States and the Third World Get a Look In?' 1987 *Sea Changes* No 6 64

[367] See Shaw 316 332, Van Meurs 137 48

[368] Van Meurs 137 48

[369] See Van Meurs 137 48

[370] *Ibid*

halted the continuing process of formulating the law of the sea. Mainly as a result of the negative vote of the US - which led to some degree of doubt as to the convention's ultimate impact - but also because of the possibility that the convention might not be ratified by enough states in the forseeable future to bring it into operation, politicians, deepsea mining experts, and academic lawyers have continued the debate on the oceans and focused attention on the distinction between deepsea mining issues (mostly regarded as only 'treaty law') and other issues (recognised as being part of international customary law whether or not a treaty exists)[371].

Devine[372] cautions that the **LOSC** is composed of 'actual law' and 'potential law'. Where the convention is declaratory it contains actual law - presently operative. Where the convention is legislative - in introducing new rules - it contains potential law only and is not presently operative. It may, however, become law in the future[373].

Even though some writers argue that the process of ratification of the **LOSC** should not be rushed[374], one can sympathise with Sinjela[375] when he opines that 'the compromise that was arr
ived at was the best that could be achieved at that time'[376]. He continues:

> States should now demonstrate their willingness to make this arrangement work by ratifying and acceding to the Convention. They should also proceed towards implementing the provisions of the Convention in good faith and to the fullest extent possible[377].

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[371] Van Meurs 137 48/49

[372] Devine 294 31

[373] *Ibid*

[374] See 3.3.13 *supra*

[375] Sinjela 155 377. See also Anand R P *Legal Regime Of The Sea-Bed And The Developing Countries* Leyden: A.W. Sijthoff 1976 269/270

[376] Sinjela 155 377

[377] *Ibid*

However, the problems with Part XI remain and will not simply go away. Possible alternatives to the 'package' will be discussed later on[378].

[378] See 7.2 *infra*

CHAPTER FOUR : THE CONTRIBUTION OF LAND-LOCKED STATES TO THE LAW OF THE SEA CONVENTION, AND THE PRINCIPLE OF THE 'COMMON HERITAGE OF MANKIND'

4.1 INTRODUCTION

> Taken as a whole, the quantities of materials available from the sea are so gigantic that they can hardly be computed. Thus one cubic mile of sea water is estimated to contain 125 million tons of sodium chloride, about 6.5 million tons of magnesium, 300,000 tons of bromine, 38,000 tons of strontium, 280 tons of iodine, 14 tons of arsenic, one ton of silver, 0.02 tons of gold, and 14 tons of uranium. Multiply these figures by 324 million cubic miles of sea water found in the world's oceans and you get a staggering figure. ... The red clay, covering half of the floor of the Pacific Ocean, and a fourth of the Atlantic and Indian Oceans, is supposed to contain 920 trillion tons of aluminium, 650 trillion tons of iron, 73 trillion tons of titanium, and more than 1.5 trillion tons of vanadium, cobalt, nickel, copper, lead and zirconium. ... Thus, the sea is a source of an almost limitless amount of all the minerals and metals we use[1].

Given these figures[2] it is not surprising that most states in the world are anxious to share in the resources of the sea. There could be no more convenient a phrase than the 'common heritage of mankind' to enable all states to do just that, and then legitimately so. The principle of 'common heritage of mankind' may be one of the most equitable principles yet accepted as part of international law, but there is no denying that it came about as a result of self-interest of states in sharing in the resources of the sea[3].

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1 Anand R P *Legal Regime Of The Sea-Bed And The Developing Countries* Leyden: A. W. Sijthoff 1976 14/15

2 Even though the figures may differ, most authors seem to agree that the resources are indeed vast - see Ogley R *Internationalizing the Seabed* Hampshire: Gower Publishing Company Limited 1984 10-12

3 See 4.3 *infra*

Van Rensburg and Bartlett[4] defines three oceanic zones that have both geological and legal significance: (i) the nearshore zone corresponding to the 12-mile teritorial sea, (ii) the continental shelf zone corresponding to the 200-mile exclusive economic zone, and (iii) the abyssal plain or deep seabed 'corresponding to an international area beyond the legal jurisdiction of individual nations'[5].

Most marine mineral deposits occur within the 200-mile zone[6], and are thus relatively easy to mine or extract. However, the deep seabed contains two major types of deposits with the potential to provide minerals, namely marine manganese deposits (manganese nodules and ferromanganese crusts) and polymetallic sulfides (enriched in certain transition metals like zinc, copper, iron, lead, gold and silver).

Many states[7] have invested heavily in evaluations of deepsea metal deposits. Despite these investments, however, the recovery of metals from the deep seabed remains many years away[8]. Even so, the mere possibility that the gains from the deep seabed could one day possibly comfortably outstrip those from land-based sources has for many years ensured the interest in the area by especially the developed states, and led to the efforts by the developing states to preserve the 'common heritage of mankind' for all to share in[9].

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4 Van Rensburg W C J and Bartlett P M 'Technical, economic and institutional constraints on the production of minerals from the deep sea-bed' in *Law of the Sea* edited by Bennett T W *et al* Cape Town: Juta & Co, Ltd 1986 69

5 Van Rensburg and Bartlett 4 69. See also Prescott V 'The Deep Seabed' in *The Maritime Dimension* edited by Barston R P and Birnie P London: George Allen & Unwin 1980 54/55

6 See Van Rensburg and Bartlett 4 69 for examples

7 In particular France, India, Japan, the UK, the US, the USSR, and West Germany

8 Prescott 5 57, Van Rensburg and Bartlett 4 69. At the same time, it may be difficult to calculate in the light of technological advances made thus far - see Anand 1 16, Ogley 2 15

9 Paradoxically, there are also producing developing states who are convinced that seabed mining will cause a depression in the prices received for cobalt (Morocco, Zaire and Zambia), copper (Zambia) and manganese (Brazil, Gabon, India and South Africa), and nickel - see Prescott 5 70/71

In the 1970s, at the heat of the law of the sea debates, it was clear that there were certain definite alignments of states on seabed issues. One of these (and one of the most prominent) was the 'Group of 77'. Another was the group of land-locked states. Buzan[10] distinguishes between alignments that had their base outside the seabed and law of the sea negotiations, and those that had their base within the negotiations. The former (of which the 'Group of 77' is an example) thus consisted primarily of established regional or political groups. An example of a group with its base inside the negotiations would be the land-locked states group[11], which owed its existence wholly to factors arising out of the negotiations.

The developing states nearly all belonged to the 'Group of 77', which by 1968 had become an established institution in global negotiations (especially of an economic nature). The group's objective was to reduce the economic disparity between developing and developed states regardless of the social system, and it was on that basis that it became a major force in the seabed negotiations. At the outset of the **UNCLOS III** negotiations, the 'common heritage' proposal appeared to offer an innovative opportunity to further the interests of the 'Group of 77'. Not only would it provide for measures that would ensure utilisation of new resources in a framework that would reduce rather than enhance economic inequalities, but there was also the fact that the 'common heritage' proposal seemed to sidestep many of the difficulties confronting the 'Group of 77' because of its existence outside the geographical and legal framework of state sovereignty[12].

It is thus understandable that there was a fear among many developed coastal states that the land-locked states, especially whithin the 'Group of 77', could play a significant role at **UNCLOS III**. In the words of Dupuy[13] (in 1974):

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[10] Buzan B *Seabed Politics* New York: Praeger Publishers 1976 127

[11] Or what Buzan calls an 'issue-specific' alignmnent - see Buzan 3 127

[12] Buzan 10 128

[13] Dupuy R-J *The Law of the Sea* Dobbs Ferry, N.Y.: Oceana Publications Inc. 1974

> The discovery of the seabed had had as a result the promotion of the position of countries without coastlines. This paradox is explained by the designation of the seabed as the common heritage of mankind, a notion which admits of no discrimination between peoples, no matter what their situation with respect to the sea. This egalitarian thirst today, leads to a great desire to correct all disparities including those resulting from nature. Enlarged by the shelf-locked States, the land-locked States form a total of 40 States who could have the "blocking" one-third of the votes at the conference on the sea[14].

He warned further:

> It is remarkable to note that this heterogeneous collection of States (although most are developing, certain ones are industrialized countries) distributed among the divers [sic] parts of the world, has caused the break-up of regional groups, the identity or community of interests being substituted with respect to the sea for a geographical grouping. Thus the contradictions of the law of the sea are multiplied by those of interest, to the extent that the latter are not always clearly perceived by all; certain States consider at length and hesitate to adopt a position either for lack of maritime experience or because of the diversity of their preoccupations, sometimes very diversified, depending on the problems envisaged[15].

Even though understandable, such fears by some (developed) coastal states proved to be without much substance, however, for a variety of reasons.

The 'Group of 77' had several strengths, such as the fact that it was a solidly established entity with familiar procedures clearly relating to specific issues (such as economics), and the fact that it commanded a formidable block of votes in a forum where voting counted.

On the other hand, the group contained a large number of states representing a variety of needs and interests. While the size of its membership was the essence of its strength,

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[14] Dupuy 13 21

[15] *Ibid*

it meant that building a consensus on even the most general position became a major task, and that elaborating very detailed positions was almost impossible.

That was exactly one of the major obstacles facing the group of land-locked states since the negotiations at **UNCLOS III**: while it initially hoped that the 'Group of 77' would be the vehicle to push through its demands, it soon became clear that their specialised demands could not be fully accommodated within the 'Group of 77' only. That made it imperative for the land-locked states to look to other avenues and alignments as well.

Quite apart from the ideological similarities and differences between the group of land-locked states and other states, there is also a broad cross-section of political and economic diversities within the land-locked states group itself. These states range from developed, industrialised states like Austria and Switzerland to some of the poorest states in the world. Thus, even though the group derived its very reason for its existence from geographical considerations, it was never able to treat its unity as a matter of course precisely because of its diverse membership[16].

Thus, in a discussion of the contribution and the role of land-locked states towards the 1982 **LOSC**, it is sometimes impossible to distinguish between that of the group of land-locked states only, that of the land-locked states and otherwise geographically disadvantaged states, or that of the group of land-locked states with (and within) the 'Group of 77'. Amongst all these states and groupings of states there were overlapping or conflicting interests over different issues at different times.

In addition, it is important to distinguish numerically between the developing and

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[16] Vasciannie S C *Land-Locked and Geographically Disadvantaged States in the International Law of the Sea* Oxford: Clarendon Press 1990 3

developed land-locked states on a geographical basis[17]. Of the nine European land-locked states[18], only one (San Marino) can be classified as developing: the other eight are all developed[19]. Of the 14 African land-locked states[20], not one can realistically be classified as a developed state[21]. The same applies to the two Asian[22] and the two South American[23] land-locked states[24]. Thus, all land-locked states but one outside Europe can be classified as developing land-locked states. Furthermore, the majority of these are in Africa.

The above serves to illustrate that while this section of the study concentrates on the role of land-locked states towards the 1982 **LOSC**, the numerical strength of the developing land-locked states (as against their developed counterparts) as well as their mainly African geographical location might indicate that the developing land-locked states played a more important role at **UNCLOS III** than their developed counterparts[25]. Therefore - but for the purposes of this section only - 'land-locked', 'developing' or 'African' states may at times be used interchangeably.

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17 On that see Afolabi J O *The Impact of the African States on the Third Law of the Sea Conference: Its Ramifications for the Emerging World Order* unpublished D Phil thesis Miami: University of Miami 1980 127, Cervenka Z 'The limitations imposed on African land-locked countries' in *Land-locked Countries of Africa* edited by Cerveka Z Uppsala: The Scandinavian Institute of African Studies 1973 17-33, Glassner M I *Access to the Sea for Developing Land-locked States* The Hague: Martinus Nijhoff 1970 4-9, Sinjela A M *Land-Locked States and the UNCLOS Regime* New York: Oceana Publications, Inc. 1983 1-10, Vasciannie 16 4

18 Austria, Beylorussian SSR, Czechoslovakia, Hungary, Liechtenstein, Luxembourg, San Marino, Switzerland and Vatican City

19 See Afolabi 17 127

20 Botswana, Burkino Faso, Burundi, Central African Republic, Chad, Lesotho, Malawi, Mali, Niger, Rwanda, Swaziland, Uganda, Zambia and Zimbabwe

21 Afolabi 17 127

22 Afghanistan, Bhutan, Lao People's Democratic Republic, Mongolia and Nepal

23 Bolivia and Paraguay

24 Afolabi 17 127, Vasciannie 16 4

25 See 4.4 *infra* for a conclusion on that issue

4.2 THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA: THE ROLE OF LAND-LOCKED STATES

4.2.1 INTRODUCTION

When **UNCLOS III** met at its first substantive session in 1974 at Caracas, the developing states were determined to play an active role in the formation of new law[26]. They were convinced that freedom of the seas would have to be regulated in accordance with and balanced against the needs of all nations to safeguard their economic interests as well as their national security and sovereignty. In seeking to establish a new legal order 'in a constructive rather than destructive spirit' the developing states would be 'seeking not charity based on equality of rights of sovereign countries with respect to the sea'. 'There could be no justice', the President of the conference said, 'if entrenched rights acquired by the major maritime nations merely through custom and usage, without the consent of the over-whelming majority of the international community, were perpetuated'[27].

It has been noted earlier that (compared to 44 participants at the 1930 conference and more than 80 at the 1958 and 1960 conferences) participation at the 1974 Caracas session became almost universal with 137 parties involved (149 had been invited), and it grew to 158 in 1980. Also, the major confrontation at **UNCLOS III** after 1974 had been the opposed interests between the developed and the developing states. The former sought to maximise their benefits from the sea and the newly found seabed riches on the basis of their advanced technology. The latter wanted firstly to modify and change the traditional law which - they believed - had not served them well, and secondly to develop a new equitable law for the exploitation of the seabed resources so that they would be equal partners in the new bounty[28].

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[26] It has been mentioned that most of the land-locked states in the world are at the same time developing states - see 4.1 *supra*

[27] Anand R P *Origin and Development of the Law of the Sea* The Hague: Martinus Nijhoff Publishers 1983 209

[28] *Ibid*

Numerous issues were debated at **UNCLOS III**, and there is no doubt that it made tremendous progress towards the codification of international law in a comprehensive treaty. Furthermore, it was generally accepted that most of the issues were interconnected. Several delegations made it quite clear that their willingness to accept one or more of the claims and proposals were dependent on the acceptance of their other claims and proposals.

More importantly, **UNCLOS III** had achieved agreement in principle on issues which could not be resolved at the Hague and earlier Geneva conferences, in particular on fundamental questions of environmental protection that were not even faced at the earlier conferences. A general consensus in favour of a 12 mile territorial sea and the concept of a 200 mile economic zone giving the coastal state exclusive control over living and non-living natural resources is now an accepted fact. There is also no longer any dispute about the legal continental shelf extending to the end of the continental margin. Moreover, many states - whether forced to do so by **LOSC** or not - will try to control the conduct of scientific research in their offshore waters, and to lay down standards relating to ship-generated marine pollution. Furthermore, even in the absence of a ratified treaty, the areas beyond the limits of extended national jurisdiction will continue to be accepted as 'common heritage of mankind', which will in turn influence state practices. International law is a living discipline which cannot remain unaffected by technological, political, economic and sociological changes in the international society.

However, there is no escaping the fact that the 1982 **LOSC** is not in force yet. The full implications of that fact will be discussed later[29], but here it is necessary to analyse the impact of land-locked states on the negotiations at **UNCLOS III** and the resulting 1982 **LOSC**.

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[29] See 4.4 and 7.2 *infra*

4.2.2 THE ROLE OF LAND-LOCKED STATES

It is important to bear in mind that the developing land-locked states and the geographically disadvantaged states comprised virtually half of the 'Group of 77'[30]. Given that factor, and the increase in newly-independent states after the Second World War, it is understandable that there was an increasing reaction against traditional international law after 1945[31].

> After this year [1945], a number of Asian and African States emerged as independent nations and subjects of international law. These States were required to accept the bulk of existing international law, largely customary, which had been developed against their interests or were ill equipped to accommodate them. The new States have reacted particularly against the customary international law established before they were independent. For example, the law of the sea, which was codified in 1958, is mainly based on customs and usages observed by the European maritime powers. The above reaction has increased the interest of these States in playing a more intense and direct part in the progressive development of universally accepted international law. It is emphasized that the diverse political, social and cultural values of these States, together with their underdevelopment, will continue to generate attitudes that will certainly influence future international relations[32].

The attitudes adopted by developing (and thus also most land-locked) states towards various international issues were influenced by their historical background and the problems (mainly economic and social) prevailing in those states. Those included the colonial past, the perceived negative impact of traditional international law, their preoccupation with national construction, and the perceived disparity in wealth, trade, and power between the developed and developing states[33].

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30 See 4.1 *supra*

31 See Rembe N S *Africa and the International Law of the Sea* Alphen aan den Rijn: Sijthoff & Noordhoff 1980 8

32 Rembe 31 8/9

33 Rembe 31 9

There was thus a conflict between the national requirements and priorities of the 'new' states and the rules of international law (as conceived and applied by developed states). This was particularly true in regard to the laws of nationalisation and state succession:

> African States are advocating a reformist attitude in international law generally, as well as changes in specific rules. A structural change in the international system, to allow their participation in and redistribution of development, is also advocated[34].

In the process many developing states, rather than adopting a defiant attitude towards international law, have advocated international law as a strategy for their protection and development[35]. Many developing states have provided for the reception of international law in their municipal laws[36]. In addition, on the international level the developing states have in the main supported efforts aimed at the progressive development and codification of international law[37].

To quote Rembe again:

> Four points should be emphasized: Firstly, the attitudes and practices of the African States [and thus many land-locked states] depart from traditional international law. Secondly, African States do not, however, reject a just system of international law. Thirdly, the challenge to traditional rules of international law is not restricted to African States only; it is part of a widely shared phenomenon shared among many developing countries of Asia and Latin America, although there are certain areas where the African contribution is second to none. Lastly, African States have enjoyed a relatively shorter period of statehood than their European counterparts, and it will therefore take some

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34 Rembe 31 10

35 This is evident from their active participation in the UN and other international organisations, and their emphasis on certain rules and principles of international law such as sovereignty, non-aggression, permanent sovereignty over natural resources, and normative regulation of international economic relations

36 The adoption of international law in the municipal sphere and the acceptance of the principles of the UN and the OAU, for example, indicated a willingness to accept rather than reject international law by these states

37 For example, the creation of the **United Nations Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States** (to examine and rewrite international law) represented various areas of emphasis favoured by the developing and land-locked states

time before they reflect all areas of international law, and before their attitudes crystallize into regional unity[38].

Specific areas where the developing and land-locked states had an impact on international law were in terms of permanent sovereignty over natural resources, the law relating to succession of states, and decolonisation[39].

As far as the law of the sea is concerned, land-locked states are particularly interested in the questions of the right to navigate the sea, access to the sea, and access to the resources of the sea. Most of these issues have been addressed in particular after the First World War in a number of forums[40].

As far as **UNCLOS III** - in particular the role of land-locked states - is concerned, the Maltese proposal was enthusiastically received, because it focused on development as the end product, peaceful uses as being in the interests of all, and the exploitation of the resources of the sea as essentially dedicated to the advancement of the disadvantaged states. It was further endorsed by the **Third Conference of Non-aligned Countries** held in Lusaka in 1970, with 32 African states participating[41].

Probably the biggest impact of the land-locked and other geographically disadvantaged states had been in the acceptance of the 'common heritage of mankind' as a general principle even before **UNCLOS III** was convened[42]. Even though legal significance of

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38 Rembe 31 12/13

39 See Rembe 31 13-27

40 The **League of Nations, UNCTAD,** and the 1958 **Geneva Conference on the Law of the Sea** - see Churchill R R and Lowe A V *The Law of the Sea* 2nd ed Manchester: Manchester University Press 1988 316, and also Anand 1 158

41 See Buzan 10 141, Rembe 31 41/42

42 See 4.3.4 *infra*

the 'Declaration of Principles'[43] might have been (or still may be) open to interpretation, it embodied an international consensus on a new area[44].

It is important to note that the impact of land-locked states on the international law of the sea and the proceedings at **UNCLOS III** was particularly effective during the first stages of the proceedings[45]. However, with every successive meeting of **UNCLOS III** the problems facing land-locked states had to take a back seat to the wider issues facing the international deep seabed regime[46], and the initial momentum was lost. There were various reasons for that fact.

Firstly, it should be borne in mind that even before the 1958 conference the group of land-locked states had already met to discuss their problems to be considered at the conference. The **Preliminary Conference of Land-locked States** was held in February 1958, and that resulted in a memorandum submitted to the 1958 conference[47].

In addition, at the 1958 conference the land-locked states as a group were represented in a specific forum, namely the **Fifth Committee**. This meant that at the 1958 conference the group was the only 'issue-specific' group that had been formed[48].

Another factor that added to the early show of strength at **UNCLOS III** of the group of land-locked states was the fact that it - as a voting bloc - had a potential membership

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43 See 4.3.5 *infra*

44 See Buzan 10 141, Rembe 31 55. Should a cynical view be adopted, however, there was no real consensus on what the principles were - see 4.3 *infra*

45 See for example the **Kampala Declaration** 2 May 1974 (A/CONF.62/63.). See also Buzan 10 141, Rembe 31 59, and 4.2.3 *infra*

46 See 3.3 *supra*

47 The main reason was that the problems of land-locked states had not been considered by the **ILC** prior to the 1958 conference - see Churchill and Lowe 40 316

48 See Buzan 10 141, Churchill and Lowe 40 316

of nearly 30 states[49]. Its voting strength became even more impressive when considered in the light of its potential allies. The shelf-locked states[50] shared many - but not all - of the problems faced by land-locked states[51]. A second possible ally could have been the group of maritime powers, likely to share the objective - although for different reasons - of restraining coastal state expansion.

Against these factors weighed several others. Probably the most important had been the fact that at **UNCLOS III** there was no separate committee or forum to deal with questions relating to land-locked states. Issues concerning land-locked (and other geographically disadvantaged) states were discussed in each of the conference's three main committees. Although the 'Group of 53'[52] agreed - in spite of its political, economic and geographical diversity - in attempting to obtain confirmation of existing navigational rights of land-locked states, transit rights through transit states, access to the resources of neighbouring states' exclusive economic zones, and proper recognition of their interests in the international seabed regime, it met with mixed success.

As far as access to the sea for land-locked states was concerned, the **OAU Declaration**[53] endorsed the right of access to and from the sea and its inclusion in the 1982 **LOSC**. However, the land-locked states met with opposition on that issue from

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49 Buzan 10 141, Dupuy 13 21

50 20 in all (nine developed and 11 developing states)

51 See Buzan 10 141, Churchill and Lowe 40 316/317. Taken together the two groups thus could amount to about one-third of the votes in the international community

52 Land-locked and some geographically disadvantaged states - see Churchill and Lowe 40 317

53 See Rembe 31 145

coastal states[54]. The incorporation into the 1982 **LOSC** of a general 'right' of transit[55] was qualified by Articles 125(2)[56] and 125(3)[57].

As far as the legal regime of the high seas was concerned, land-locked states viewed the doctrine of freedom of the high seas as having a negative impact on their interests. They called for the review of these freedoms in line with the principle of sovereign equality of states, modern technological developments, and environmental requirements[58]. In particular the African (and thus also African land-locked) states took an active part in **UNCLOS III** in advocating the formulation of a satisfactory international regime that would take into account modern technological developments and meeting the ends of social international justice.

Concerning navigational rights of land-locked states, the 1982 **LOSC** provides that the ships of all states (whether coastal or land-locked) have the right of innocent passage in the territorial sea and in the waters beyond[59].

As far as the resources of the high seas and other economic activities were concerned, it should be noted that most land-locked states had no large-scale and developed fishing industries. They thus advocated the internationalisation of the resources of the high seas, thus eliminating the *laissez faire* system allowed for under the 1958 **Geneva Conventions**[60].

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54 Rembe 31 145

55 Article 125(1) of the 1982 **LOSC**

56 Concerning the terms and modalities of freedom of transit to be agreed between land-locked states and transit states through bilateral, sub-regional or regional agreements

57 Concerning the infringement of the 'legitimate interests' of transit states

58 Rembe 31 165

59 Articles 17, 38(1), 52(1), 53(2), 58(1), 87 and 90 of the 1982 **LOSC**. It should be noted that there are in fact seven land-locked states with merchant fleets: Austria, Bolivia, Czechoslovakia, Hungary, Paraguay, Switzerland and Uganda - see Churchill and Lowe 40 317

60 Rembe 31 169

Article 87 of the 1982 **LOSC** provides that the freedoms of the high seas may be exercised by all states, whether coastal or land-locked. This means that land-locked states have access to and may exploit the resources of the sea, whether living or non-living[61].

As far as marine scientific research and the transfer of technology was concerned, there were proposals by the 'Group of 77', opposing one tabled by the maritime states and cosponsored by a number of African land-locked states. While the former put all scientific research in the international area under the direct and effective control of the **Authority**, the latter stressed that little attention was given in the proposal to the interests of land-locked and geographically disadvantaged states[62]. In terms of transfer of technology, the demands of land-locked states similarly took a back seat to those of coastal states.

The 1982 **LOSC** offers land-locked states less guarantee of active participation in and benefit from the international seabed regime than they sought. On marine scientific research, it only provides that third states and international organisations undertaking research in the exclusive economic zone of a coastal should notify neighbouring land-locked states of that project, and offers them an opportunity to participate in the project 'whenever feasible'[63]. On seabed mining, it does provide for the special representation of land-locked (and geographically disadvantaged) states on the **Council**[64], but it does not contain any special provisions as far as land-locked states' right to seabed mining is concerning. It does, however, provide specifically for

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61 See Churchill and Lowe 40 318/319

62 Rembe 31 181

63 Article 254 of the 1982 **LOSC**

64 Article 161(1)(d) of the 1982 **LOSC**

developing land-locked states in several articles, *inter alia* Articles 148[65], 152[66] and 160(2)(k)[67].

As far as the rights and duties of land-locked states over the resources of the exclusive economic zone were concerned, these states felt that 'a significant number of land-locked States and other geographically disadvantaged States had not been independent when treaties and other conventions were negotiated on their behalf by colonial Powers, and their interests had been completely ignored', and that the history of the continental shelf had begun only in the 1940's'[68]. However, proposals from land-locked states claiming a right to all living and non-living resources (which would include the continental shelf) met with stiff opposition (particularly from African coastal states)[69].

The end result was that the rights accorded to land-locked states under the 1982 **LOSC** are subject to the modalities being worked out regionally or bilaterally[70]. At least, however, Articles 69(1) and 70(1) provide that land-locked states have the right to participate 'on an equitable basis' in the exploitation of 'an appropriate part of the surplus of the living resources of the exclusive economic zones of coastal States of the same subregion or region'[71].

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65 Guiding principles as far as Part XI is concerned

66 Special consideration for developing land-locked states by the **Authority**

67 Special consideration by the **Assembly** of problems 'of a general nature in connection with activities in the Area arising in particular for developing States, ... particularly for land-locked ... States'

68 Rembe 31 147

69 See Rembe 31 149

70 See Articles 69(2) and 70(3) of the 1982 **LOSC**

71 Articles 69(1) and 70(1) of the 1982 **LOSC**, and see further Churchill and Lowe 40 320/321

As far as the breadth and delimitation of the exclusive economic zone was concerned, the **Yaoundé Conclusions**[72] and the proposals submitted by land-locked states to **UNCLOS III** did not provide any limit for the breadth of the exclusive economic zone. 'However, the land-locked States spoke in the plenary session and in the Second Committee in favour of a 200-mile economic zone'[73].

Although it has been noted before that many coastal states have already claimed 200-mile exclusive economic zones or fishing zones, there appears as yet to be no agreements providing for the access of land-locked states to such zones[74].

As far as the preservation of the marine environment was concerned, the developing states stressed that certain international measures and standards could not be implemented because of their low level of technology, and thus demanded a double standard that discriminated in their favour. The emphasis was on regional and international cooperation in that field[75].

The African land-locked states in particular have advocated a regional approach in the management of the resources of the seas. A regional approach is particularly desirable for land-locked states, because it can vest in the region (rather than only in the coastal states) certain important issues like access to the sea and sharing in the resources of the sea within the jurisdiction of coastal states.

> The concept of the economic zone was significantly articulated and advanced as a regional concept, although its beneficiaries are mostly the coastal States. Whereas an exclusive economic zone for coastal States is almost a *fait accompli*, there is still a place

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[72] See Rembe 31 151

[73] Rembe 31 151

[74] See Churchill and Lowe 40 322

[75] Rembe 31 178

> for regional co-operation and organization in the exploitation and management of those resources, including an equitable distribution of revenues[76].

In conclusion, land-locked states probably enjoyed a higher profile than ever before in international law-making. However, the **UNCLOS III** negotiations also highlighted (probably for the first time) the major differences between developing land-locked and coastal states.

4.2.3 CONCLUSION

Even though land-locked states may in the final analysis have had less impact on the negotiations at **UNCLOS III** than they would have hoped for, the following is important to keep in mind:

> ... the participation of a State in any treaty-making process has political and legal values which are important even if the treaty does not come into force, or the State does not sign or ratify it. States participate in negotiations in good faith; by the same token it is reasonable and logical to expect compliant behaviour from those States, to act in conformity, and not to frustrate, the emerging Convention or State practice that is consistent with it[77].

The reasons for the initial optimism about the negotiating strength of land-locked states at **UNCLOS III** (their previous track record at the 1958 conference, their various potential opportunities for bloc support, and voting strength because of relatively straightforward issues) have been discussed before[78]. However, the mere fact they did not achieve all they had hoped for indicates that they also faced serious weaknesses as a negotiating group.

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[76] Rembe 31 187. See also Buzan 10 141

[77] Rembe 31 200/201

[78] See 4.2.2 *supra*

Thus, although the group of land-locked states played an active role in various aspects of **UNCLOS III**, its strength as a negotiating unit was hampered by a number of factors. In the first place the membership policy of the group of land-locked and geographically disadvantaged states placed it in a very ambivalent position to the 'Group of 77'. At the start of **UNCLOS III** it was expected that the latter group would play an important role in the proceedings, but to some extent the alliance between the land-locked states and the geographically disadvantaged states (at the same time members of the 'Group of 77') divided the 'Group of 77' along geographical lines (especially as far as the developing coastal states were concerned), and therefore they could not rely on the 'Group of 77' support in several crucial areas of the negotiations[79].

In the second place, even on the assumption that the 'Group of 77' would not have been able to agree on unified positions in support of developing land-locked (and geographically disadvantaged) states, their alliance with the developed land-locked states was politically misguided. Firstly, it gave the impression that they were willing to derive advantages in the law of the sea even if that meant undermining solidarity among the developing states in the process. Secondly, it opened developing land-locked states to the accusation that they were prepared to accept the benefits of membership within the 'Group of 77' while seeking to avoid the burdens of such membership[80].

In the third place, the credibility of the developing land-locked and geographically disadvantaged states was weakened by their link with their developed counterparts, and the resulting damage limited the efficacy of the former group throughout **UNCLOS III**[81]. In particular, because nearly all of the developing land-locked states were among the poorest and least technically capable states in the world, many of them were vulnerable to pressure from their neighbours and from regional groups. Because they

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[79] For a full discussion, see Vasciannie 16 16/17

[80] Vasciannie 16 17

[81] 'The Group of 77 has been an important force in international relations largely because its members have made special efforts to minimize their economic and political differences in their negotiations with developed States. The attitude taken by the LLGDS paid little regard to this fact, and may well encourage division among developing States in the future' - Vasciannie 16 18

were frequently the weakest members of regional groups (and since any implementation of rights for land-locked states - in particular transit rights - would require local and regional cooperation) they were disinclined to move too much in conflict with majority regional interests[82].

A fourth weakness of the land-locked states concerned the extent to which the group was perceived to be a united force on various issues in the law of the sea. As a negotiating unit, it had to be associated with the group of geographically disadvantaged states to potentially prevent the adoption of an agreed text at the end of **UNCLOS III**[83].

In the fifth place, the most fundamental weakness of the group of land-locked and geographically disadvantaged states derived from the fact that most of its members relied almost exclusively on the **UNCLOS III** negotiations for the solutions to their maritime problems:

> 'More specifically, while it was open to coastal States to implement unilateral measures with respect to various issues in the law of the sea, this option was clearly not available to the land-locked States ... Indeed, the weakness of the [land-locked states] in this area was increasingly highlighted as the UNCLOS III proceeded, for, at various stages in the negotiations, several coastal States took steps to implement unilateral legislation on the EEZ. In the face of such action, States without coastlines or with only narrow outlets to the sea could respond only by issuing verbal protests and pleas for restraint on the part of their coastal adversaries'[84].

Thus, the land-locked states by definition had no unilateral options whatever in relation to any of the law of the sea issues, and therefore had very little to fall back on should the negotiations turn against their interests. This made them wholly dependent upon

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82 Buzan 10 142

83 Vasciannie 16 18

84 Vasciannie 16 19

the success of the negotiations to protect their share of the 'common heritage of mankind' from unilateral expropriation by coastal states[85].

The rights of land-locked states are now entrenched in the 1982 **LOSC**[86]. Yet it is also true to say that the rights of land-locked states enjoyed a much higher profile at the start rather than at the conclusion of the proceedings of **UNCLOS III**. Paradoxically, in the intervening years after the 1982 **LOSC**, these states (particularly developing land-locked states) have enjoyed a much higher profile than before (mainly through economic considerations), and it is possible that their problems may enjoy more attention in the future than ever before.

4.3 THE COMMON HERITAGE OF MANKIND

4.3.1 INTRODUCTION

> New law is taking the place of old dogmas. The sea is no longer a mere navigation route, a recreation centre or a dumping ground. It is the last phase of man's expansion on earth and must become an area of co-operation for orderly, progressive world development in which all will share equally and equitably[87].

The background to **UNCLOS III** and the subsequent 1982 **LOSC** included the fundamental changes and developments that had taken place in relation to the oceans, technology, economics, strategics and politics after the Second World War. These developments, fundamental and rapid, created such a need for total changes and re-evaluations that they could almost be described as revolutionary. Over the past three decades, the gap between the increasing importance and changed uses of the oceans and

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85 Buzan 10 142

86 See 5.1 *infra*

87 Anand 7 219

the ocean floor on the one hand, and established rules and principles of international law and foreign policy on the other, has become virtually unbridgeable.

Here it is necessary to briefly examine the concept of the 'common heritage of mankind', try to determine the influence it exercised during the deliberations of **UNCLOS III**, and pose a few questions as to its future role in international law and international law-making treaties.

4.3.2 DEFINITION AND APPROACHES

The concept of 'common heritage of mankind', which first became prominent in the 1970s in relation to the resources of the deep seabed, originated in the long-familiar legal notion of *res communis*: a thing which is naturally common property and is incapable of being appropriated by any person[88].

In traditional international law, *res communis* implied that every state had equal rights of use in the thing concerned, unregulated by other states (for example in fishing or navigation on the high seas). The 'common heritage of mankind' goes one step further: what may be used by all should be regulated by all. Whatever is the common heritage of mankind should be subject to the wishes of the international community as a whole through the **UN** or some regulatory body established specially for that purpose[89].

The 1970 **UN** General Assembly Resolution 2749 (XXV) 'Declaration of Principles Governing the Sea-bed and the Ocean Floor, and the Subsoil thereof, beyond the Limits of National Jurisdiction'[90] proclaimed the seabed and its resources the 'common heritage of mankind' and not subject to sovereignty or sovereign rights. The declaration called for regulation of all activities in the area by an international regime 'for the

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[88] See Rembe 31 50

[89] Ott D H *Public International Law in the Modern World* 1987 126, Rembe 31 52

[90] See 4.3.4 *infra*

benefit of mankind as a whole, irrespective of the geographical location of all states, whether land-locked or coastal, and taking into particular consideration the interests and needs of the developing countries'[91].

According to certain writers[92] the concept of the 'common heritage of mankind' represented the cornerstone of the evolving law of the sea, as well as progressive development of international law. However, much uncertainty surrounded the definition of the principle:

> The meaning and content of this principle, as well as its legal significance, is a subject of controversy. Although no views have been expressed opposing the fundamental ideas and aspirations reflected by the concept of common heritage of mankind, differing interpretations have, however, emptied it of its original meaning[93].

What that 'original meaning' was is still shrouded in mystery after all these years. Certain writers[94] have attempted to give a philosophical content to the principle:

> The basic philosophy of the concept is not only harmonistic; it is also prospectivist and strategist. The notion of mankind has a twofold meaning:
> - it is transpatial, in that it regroups all contemporaries irrespective of the location of their establishment:
> - its scope is transtemporal, because mankind does not include only today's peoples, but also those who will come. Mankind thinks beyond the living[95].

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91 Ott 89 233. See also the Preamble to the **North Atlantic Treaty** between Belgium, Canada, Denmark, France, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, the UK and the US: Washington, 4 April 1949 - Grenville J A S and Wasserstein B *The Major International Treaties Since 1945* London: Methuen 1987 106

92 See Rembe 31 49/50

93 Rembe 31 50. See also Anand 1 178

94 See Dupuy R-J 'The Notion of Common Heritage of Mankind Applied to the Seabed' in *The New Law of the Sea* edited by Rozakis C L and Stephanou C A Amsterdam: North-Holland 1983 199-204

95 Dupuy 94 201. He argues that the transpatial character of the concept is based on universalism (common ownership, non-discrimination, and participation), while the transtemporal character revolves around the managers of the 'common heritage' and the accountability of the managers - see Dupuy 94 201-207

Anand[96] sums up the concept as having to embody the following principles: inappropriability and indivisibility of the seabed beyond national jurisdiction, international regulation of the exploration and exploitation activities of that common property, equitable distribution of benefits among all states irrespective of their geographical location, freedom of access, use, and navigation, use of the seabed only for peaceful purposes, and international cooperation[97].

However cynical one may be as to the content of the principle of the 'common heritage of mankind', there is no denying that it expressed the deep-seated sentiments of the developing states at the time that they should be allowed to share in the resources of the sea. With hindsight it may be argued that instead of frantically trying to justify the 'common heritage of mankind' as a general principle, it should merely have been accepted as expressing the sentiments of the developing states regarding the resources of the deep seabed, and be left at that. On the other hand, it may also be said that the extensive discussion surrounding the concept was needed to jolt the major maritime powers into accepting the needs (not only material, but also psychological) of the developing states to be accepted as full members of the world community, and that acceptance of the principle 'legitimised' those states as full members of the international community of states.

Furthermore, the principle has now been taken up into the 1982 **LOSC** - see *inter alia* the Preamble as well as Articles 125(1)[98], 136[99] and 140[100]. At the same time, it is significant to note that nowhere in the convention a defintion of the 'common heritage of mankind' is offered.

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96 See Anand 1 212

97 However, the same author quotes Gidel as saying (on the *res communis* debate) that '[t]his controversy turns on Latin expressions the proper meaning of which in Roman law has incidentally been distorted and should be disregarded as entirely futile and artificial' - see Anand 1 178

98 Concerning the right of access to and from the sea and freedom of transit for land-locked states

99 'The Area and its resources are the common heritage of mankind.'

100 With the heading 'Benefit of mankind'

At the time of the **UNCLOS III** negotiations there were different approaches to the concept of the 'common heritage of mankind'. In the first place, there were the 'realists' who insisted on the primacy of autonomous territorial units (states) as the only hope for holding total chaos and disintegration at bay - each state pursuing its own interests and to that end maximising its own power. The realists pointed out that there are many examples (the Korean War and the Congo, for example) in support of their theory[101].

Another viewpoint - the 'Grotian conception' of international society - maintained that states by recognising each other as sovereign equals constitute a society with mutual rights and obligations: some (but by no means all) of which are embodied in international law. Thus states might in general conform 'to some common standards in the dealings with one another ... out of a certain self-respect, [and] ... entities created to reflect honourable and respectable conceptions of what is the common good for a human group'[102].

Marxism was another tradition in thinking about world politics which - while challenging the underlying assumptions of the previous two schools - was in its implications equally inimical to the notion that the **LOSC** could make a reality of the 'common heritage of mankind'[103]. The USSR was soon to recognise that the transition from capitalism to socialism would be protracted and that during that time the two worlds would have to

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[101] Ogley 2 31-32

[102] Ogley 2 33

[103] For Marxists, classes and not states are the fundamental units of world politics. The state is a bourgeois institution and cannot claim to speak for its people. The proletariat shall inherit the earth, and by means of a violent overthrow of such bourgeois governments

co-exist[104]. However, the rapid transformation that has taken place in the Eastern bloc states during the past two years has changed it to a large extent.

A fourth approach was that of the 'world federalists'. However, they did not see a seabed authority or even a whole complex of ocean space institutions as constituting a world government, but they could see it (if appropriately constituted and authorised) as filling a power vacuum which - for technical reasons - states had hitherto permitted to exist, and thereby acquiring some of the power and legitimacy that a world government would need. The federalists saw no contradiction in states declaring some of the earth's resources the 'common heritage of mankind': it was rather an opportunity to create an agent for mankind and to give it the powers it needs on mankind's behalf. However, this theory strongly opposes the disposition of most states to retain - in practice if not in theory - the maximum freedom of action.

Another theory was that of functionalism. The core of the functional analysis is that loyalties are given to the institutions that best appear to meet human needs (notably economic and social needs)[105]. However, seabed mining in the 'common heritage of mankind' cannot be either totally internationalised (as the federalists might hope) or totally depoliticised (as the functionalists would be tempted to assume). According to Ogley, gradualism argues that - to be a significant international actor - an international organisation has to be both technically competent and politically balanced, and that the decisions to endow it with important powers must be 'reversible'[106]. International cooperation governed by the principle of 'reversibility' would permit states to rethink

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[104] The Soviet theorists have depicted a three-fold division of the world into socio-economic systems or camps (each with its own group of progressive forces): the international working class in the capitalist world, the national liberation movement in the developing states and the socialist bloc itself. Since existing governments in developing states could in most cases not be identified with national liberation movements, and Western governments were (in Marxist eyes) even further from representing the international working class, this concept of world politics hardly made it easier to imagine fashioning an agent for 'mankind' out of existing states as now constituted

[105] The functionalist, for example, would ask whether the **Authority** has adequate and direct representation of the main interest groups such as ocean miners, consumers, land-based producers and environmentalists, and whether it has got the expertise to work out compromises so efficient and so balanced that none will be tempted to reject them in favour of unilateral national action

[106] Ogley 2 33

their positions: gradualism relies not on by-passing foreign offices but on developing habits of cooperation among them[107].

Ogley puts it thus:

> The 'common heritage of mankind' as applied to the sea-bed is thus an idea on the borderline between dream and reality. It is novel, and would be ruled out of court by realists or, as conceivably capable of emerging from the world's existing political and economic structure by Marxists. Its very resonance conjures a vision akin to that of the world federalists, which may both have aroused expectations and nursed suspicions; yet other less implausible modes of putting it into effect are feasible. It does not have to be seen as generating a powerful international authority, only an effective one. It is indeed a task and an opportunity that cries out for international collaboration and institutional inventiveness; but such collaboration might have the most lasting political effects if, rather than insisting on devising something that from the start would be as perfect a realisation of the concept as possible, it concentrated rather on building flexibility, review and adjustment so pervasively into the initial embodiment of the idea, that none could see themselves as being asked to commit themselves to what they might fear would prove an 'irretrievable error'[108].

4.3.3 HISTORY AND ORIGINS OF THE CONCEPT OF THE 'COMMON HERITAGE OF MANKIND'

In 1872 the survey ship *HM Challenger* explored the deep seabed of the Pacific Ocean for four years. It located and extracted samples of manganese nodules. About 30 years later another ship, the *Albatross*, ascertained that those nodules covered an extensive area of the Pacific[109]. These discoveries first made the international community aware of the economic potential of the deep ocean floor. 'However, given the state of

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[107] Accordingly, there is more chance of realising the 'common heritage of mankind' through arrangements that are tentative in character and do not - in themselves - imply an irreversible commitment to a given set of norms, institutions or procedures

[108] Ogley 2 42

[109] See Vasciannie 16 140

technology and the inaccessibility of these resources, questions concerning the legal status of the deep sea-bed and entitlement to its resources were hardly regarded as pressing at the turn of the century'[110].

In the first half of the 20th century there were two main schools of thought on the seabed and subsoil thereof. The first maintained that states were deemed to be equally entitled to exploit the resources, and exclusive rights to seabed areas could be obtained only by virtue of prescription or the acquiescence of states. The second school of thought maintained that the seabed and subsoil should be regarded as *res nullius* and thus capable of effective occupation. According to that view, occupation (as the basis for title) did not require the consent of other states, but to be valid it was not to result in any unreasonable interference with the traditional freedoms of the high seas[111].

The **Truman Proclamation** of 28 September 1945[112] heralded a new era as far as the continental shelf was concerned. By virtue of the proclamation the US claimed jurisdiction and control over the natural resources of the seabed and subsoil of the high seas (but contiguous to its coasts). However, it emphasised that there would be no interference with the traditional freedoms associated with the superjacent waters[113]. The **Truman Proclamation** was followed in rapid succession by similar[114] or more extensive[115] claims[116].

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[110] Vasciannie 16 140

[111] Vasciannie 16 81

[112] See 2.6.2.4 *supra*

[113] Sinjela 17 238, Vasciannie 16 82

[114] The UK, Saudi Arabia and the Persian Gulf Sheikdoms

[115] Mexico, Argentina, Chile and Ecuador

[116] See Hjertonsson K *The New Law of the Sea* Leiden: A. W. Sijthoff 1973 21-23, Sinjela 17 238, Vasciannie 16 82/83

In 1949 the **ILC** considered *inter alia* the legal status of the continental shelf and its superjacent waters. The outcome of its deliberations - a set of 'Draft Articles on the Continental Shelf' - was eventually incorporated into the 1958 **Geneva Convention on the Continental Shelf**[117]. The general consensus (later incorporated into the convention as Article 2) was that coastal states were not dependent on occupation or proclamation of the areas, and sovereign rights of exploration and exploitation were exclusive in the sense that if the coastal state chose not to utilise them, no other state could do so without express consent of the coastal state.

The emergence of the continental shelf doctrine brought the issue of the legal status of the deep seabed into sharper focus. Although there were divergent views on the issue, no state contended that deep seabed areas could be appropriated. In general, none of the 1958 **Geneva Conventions** contained detailed rules on the legal regime of the deep seabed beyond national jurisdiction[118].

The 1958 **Geneva Conventions** were never generally accepted by all nations. Most of the newly independent Asian, African and Latin-American states failed to ratify these conventions[119], which they criticised as inimical to their interests. Since then, under the current of the principle of self-determination, many new nations acquired independence and emerged as fully-fledged members of the international society. Realising the effectiveness of concerted action, the developing states organised themselves into the so-called 'Group of 77' (in fact containing more than 120 members at present).

Apart from that change in the geography of international law (and the need of the expanding new society to change and readjust the law according to the preponderant interests of the changing society), the developing technology upset the balance arrived at at the 1958 **Geneva Conference**. Conventional fishing was transformed, and the

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[117] See 2.6.2.4 *supra*

[118] Vasciannie 16 140/141

[119] Anand 27 194

advanced fishing technology of a few states - a computer-run industry making use of sonars, helicopters and even satellites for spotting fish, automatic gutting machines and deep-freezing at sea - further upset the balance between fishing fleets of the developed distant-water fishing states and the poorly-equipped sail-boats of coastal states. So-called 'vacuum-cleaner' fleets of less than half a dozen states were indulging in massive over-fishing, taking away half of the total catch of fish and thereby threatening the already inadequate protein and foreign exchange resources of the developing states.

Although some members of the **ILC**[120] and some delegates at the earlier Geneva conferences[121] did warn of the dangers of limitless expansion of the shelf regime under the vague and flexible definition in Article 1 of the 1958 Geneva **Convention on the Continental Shelf**[122], it was generally believed that it would not be possible to exploit the natural resources beyond 200 metres depth 'for a long time to come'[123]. Contrary to these expectations, technology soon made it feasible to exploit the vast resources of the seabed - especially oil and gas - at depths beyond 200 metres of the geological shelf or even beyond the continental margin (which extended to a depth of 2 500 metres). It also became clear that beyond the continental margin there lay intensive deposits of incalculable manganese nodules, rich in metals that are essential for a modern industrial economy.

In the years following its establishment in 1960 the **Intergovernmental Oceanographic Commission (IOC)** highlighted the need for greater scientific knowledge in the deep seabed area, and in 1965 the US urged General Assembly **Committee Two** to consider the role which the **UN** could play in harnessing the minerals on the ocean floor. In addition, in 1966 **ECOSOC** requested the Secretary-General of the **UN** to undertake a

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[120] See Anand 27 195

[121] *Ibid*

[122] See 2.6.2.4 *supra*

[123] Anand 27 195, and see also Prescott 5 57

survey of the state of knowledge of resources of the sea (mineral as well as food, but excluding fish) beyond the continental shelf[124].

Looking at the seabed beyond the limits of national jurisdiction, Arvid Pardo in his well-known speech of 1 November 1967 before the **First Committee** pointed to the strategic importance of the area, and warned that some states might be tempted 'to use their technological competence to achieve near-unbreakable world dominance through predominant control over the seabed and the ocean floor'[125]. He suggested that 'claims to sovereignty over the seabed and ocean floor beyond present national jurisdiction ... should be frozen until a clear definition of the continental shelf is formulated', and acceptance of this area as 'common heritage of mankind' to be used for peaceful purposes and its resources 'exploited primarily in the interests of mankind, and with particular regard to the needs of the poor countries'[126].

As regards the 'common heritage of mankind' objective, certain factors combined to give the proposal considerable political significance right from the start. In the first place, because it was made by a state not patently involved in superpower relations, it was free from the suspicion generally accorded to East-West proposals. Secondly, developing states' solidarity and numerical support for Pardo's proposal were generated both by Malta's status as a developing state and by the emphasis in the proposal on the benefits for developing states. Thirdly, its timing was ideal because it coincided with growing scientific awareness about seabed deposits and yet seemingly came as a complete surprise to the major maritime powers. Finally, the initial proposal was so carefully worded that - although the main thrust towards the internationalisation of the seabed was evident - it was clear that the modalities would have to be settled through agreement among a wide cross-section of states[127].

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[124] As part of the mandate the Secretary-General was expected to identify resources which could be exploited economically, particularly for the benefit of developing states - see Vasciannie 16 141

[125] Anand 27 195

[126] *Ibid*

[127] Vasciannie 16 144

Pardo's internationalist approach was almost universally welcomed, and the General Assembly responded by establishing the **Seabed Committee**. This committee became for nearly five years (1968 to 1973) the most important forum for preliminary negotiations on a new law of the sea. However, an atmosphere of confrontation soon emerged between the developing states (expecting and demanding a share in the new-found riches of the seabed) on the one hand, and the developed maritime powers (with latent technological capability to exploit and acquire those riches) on the other hand. Although nobody had by then developed the technology to recover or smelt the manganese nodules, there was a fear among the developing states that the technologically advanced states would soon develop such technology and then quickly exploit the wealth of the seabed leaving nothing for the latecomers. In 1968 - on the suggestion of the **Seabed Committee** and over the strong objections of the technologically advanced states - the General Assembly adopted a 'moratorium resolution'[128] which expressed the conviction that exploitation of the seabed resources must 'be carried out under an international regime including appropriate international machinery'[129].

This development was followed in 1970 by the acceptence in a General Assembly resolution of the principle of the 'common heritage of mankind'[130].

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[128] General Assembly Resolution 2574D (XXXXIII). See also 3.2.6.4 *supra*

[129] Until such a regime was established, it declared that:

(a) States and persons, physical or juridical, are bound to refrain from all activities of exploitation of the resources of the seabed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction;

(b) No claim to any part of that area or its resources shall be recognised.

[130] See 4.3.4 *infra*

4.3.4 THE 'COMMON HERITAGE OF MANKIND'

On 17 December 1970 the General Assembly adopted the 'Declaration of Principles Governing the Sea-bed and Ocean Floor, and the Subsoil thereof, beyond the Limits of National Jurisdiction' which declared *inter alia* that the seabed beyond national jurisdiction was not subject to national appropriation or sovereignty but was 'the common heritage of mankind'; that it should be 'exploited for the benefit of mankind as a whole, and take into particular consideration the interests and needs of the developing countries'; and 'that a regime applying to the area, including international machinery, shall be established ... for the orderly and safe development and rational management of the area and its resources and ensure equitable sharing by states in the benefits therefrom'[131].

Article 7 of the declaration read:

> The exploration of the Area and the exploitation of its resources shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States, whether land-locked or coastal, and taking into particular consideration the interests and needs of the developing countries.

It may be argued that the 'Declaration of Principles', adopted (without opposition) by a large majority of the UN members at the time, laid the basis for the development in customary international law of the principle that deep seabed mining should be subject to international regulation, a principle that was strengthened by the emergence of a consensus in its favour during the negotiations on the new convention. Whatever the case may be, the principle was repeatedly affirmed in the negotiating texts at **UNCLOS III**[132] and explicitly incorporated into Part XI of the 1982 **LOSC**[133].

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[131] General Assembly Resolution 2749 D (XXV). See also Anand 27 196-7, Vasciannie 16 145, and 3.2.6.6 *supra*

[132] See 3.3 *supra*

[133] See for example Articles 140(1) ('Benefit of mankind'), 148 ('Participation of developing States in activities in the Area'), and 160(2)(k) (consideration of problems of land-locked and geographically disadvantaged states in the Area) of the 1982 **LOSC**

The principle of an international regime was seen by many to present an opportunity for moving international law much further along the road to a supranational system in which the interests of the individual states would be subordinated to the will of the international community, in the process promoting a fairer international economic order[134].

How far resolutions - such as the 'Declaration of Principles' - of the General Assembly are binding on states and declare the law is a moot question[135]. While the maritime powers generally denied any legal force to the declaration, the developing Asian, African and Latin American states criticised the 1958 **Geneva Conventions** which, they felt, had jeopardised their economic development. The practical application of the four **Geneva Conventions**, it was pointed out, brought to light their gaps, deficiencies and imprecisions. While participating in the development of a common law for the exploration and exploitation of the deep seabed and its resources, the new developing states wanted to revise the old maritime law which had been developed by a few maritime powers to protect their interests in a very different age and which needed total revision and recasting. Besides the opportunity it would give to many of those states (who had not participated in the 1958 conference) to review the law and participate in its codification, they would be able 'to analyse, question and remould, destroy if need be, and create a new, equitable, and rational regime for the world's oceans and the deep ocean'[136]. Most of the developing states contended that the problems relating to the territorial waters, contiguous zone, the continental shelf, superjacent waters and the high seas were all linked together juridically, and no one 'problem should be considered *in vacuo* - that is, to the exclusion of others, however expedient it seems at the moment to do so'[137].

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[134] Ott 89 233

[135] See 1.2.4 *supra* for a full discussion

[136] Anand 27 197

[137] *Ibid*

After the 1970 General Assembly resolution to convene the 1973 conference, the developing states continued to emphasise the need for a conference 'broad in scope' and warned against 'artificially' isolating 'narrow and specific topics' and 'running the risk of confining the discussion to incomplete concepts'[138]. In accordance with this approach, the 'Group of 77' introduced a very comprehensive list of subjects and issues relating to the law of the sea to be submitted to the conference. Some of the land-locked and shelf-locked states and some maritime powers - not satisfied with the list on the ground that it failed to emphasise their special problems - submitted amendments to the list.

During this period there was thus a trend towards wider national jurisdictions, a stretching of the old continental shelf jurisdiction (especially after the discovery of oil and undersea hydrocarbons as well as the effect of the *North Sea Continental Shelf* cases)[139], mid-ocean archipelagic claims (especially those of the Philippines, Indonesia, Fiji and Mauritius, with a lot of support from the 'Group of 77'), passage through straits, and transit through archipelagic waters.

The 'common heritage of mankind' became a rallying cry. Constant reiteration of the principle symbolised 'the hopes and needs of the developing countries, which could legitimately expect to share in the benefits to be obtained from the exploitation of the resources' of the deep seabed. 'These benefits', they hoped, 'would help to dissipate the harsh inequalities between the developed and the developing countries'[140]. To the criticism of the sceptics that it was a novel concept, 'a neologism' without any specific legal content, which 'meant different things to different people', the chairman of the **Seabed Committee** (Amersinghe of Sri Lanka) said:

> There are, we realise, many who are alarmed by what they consider to be the formulation of a novel concept hitherto unknown, but the traditional legal concepts are

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[138] Anand 27 198

[139] See 2.6.3 *supra*

[140] Anand 27 198, Sebenius J K *Negotiating the Law of the Sea* Cambridge, Massachusetts: Harvard University Press 1984 8

> not, we feel, applicable to this unique area and its resources. If the area and its resources are to be saved from competitive exploitation restricted necessarily to those with financial resources and the technological power to exploit them - it is necessary for us to abandon those traditional concepts and evolve a new concept[141].

Refuting the criticism that the 'common heritage of mankind' was not an established term of international law, the Norwegian Ambassador, Hambro, said:

> That may be, but the problems with which we are confronted are novel and the solutions we must offer in this area in order to establish international justice and maintain international peace can hardly be found in the bookshelves of international law libraries. We must not be afraid of new concepts or of new terms to explain them. New words are needed for new concepts[142].

Therefore, while the maritime powers remained sceptical about the meaning and content of the concept of 'common heritage of mankind' which - they thought - was no legal principle but merely embodied a moral commitment, the developing states insisted that it was the new consensus which had replaced the outmoded freedom of the seas.

4.3.5 CONCLUSION

It has already been noted that the principle of 'common heritage of mankind' was carried over into the 1982 **LOSC**[143]. However, certain difficulties in that regard must be borne in mind. In the first place, it is questionable whether the principle can be regarded as applicable to states not parties to the **LOSC**[144]. As far as the purely conventional concepts of the **LOSC** are concerned, it might not be possible to impose these on any state not party to it except insofar as such concepts may be regarded as

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[141] Anand 27 203

[142] Anand 27 203-204, Rembe 31 53-54

[143] See 4.3.2 *supra*

[144] See 3.3.14 *supra*

declaratory of international law and thus binding. However, Part XI (which relates exclusively to the Area) is controversial and innovative in character and as such will probably only apply to states parties to the **LOSC**.

Secondly, there is the question of ratification of the **LOSC**. It is still uncertain when (or, as some cynics say, indeed if) the required 60 ratifications will be obtained. Dibb[145] points out that it is not inconceivable that all such ratifying states might belong to the 'Group of 77' or were 'largely made up of land-locked or otherwise geographically-disadvantaged states'[146]. This type of scenario may not only create almost insurmountable practical and administrative difficulties in enforcing the principles of the **LOSC**, but may also in the process lead to discrediting of the **LOSC** in the eyes of non-participating states of other groupings. In order to be effective, decisions made and rules relating to the Area should be seen as being representative of mankind as a whole. At present this is not the case yet.

In the third place, some writers[147] argue that discrediting of the principles of the **LOSC** may lead to an uncontrolled scramble for the resources of the seabed and possibly even a war between the US and the USSR. This, however, is unlikely in the light of the lack of adequate technological and economic means of exploiting the Area in the first place, and secondly, the recent marked change in relations between the US and the USSR. What would be more plausible is an even deeper wedge driven between the developing and developed states should actual exploitation of the resources of the deep seabed become practically feasible.

Some writers[148] furthermore argue that until such time as the authority of some international body in the Area is definitely established it might be better, for practical

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[145] Dibb T 'Exploitation of the Deep Seabed - Do Land-locked States and the Third World Get a Look In?' 1987 *Sea Changes* No 6 58

[146] *Ibid*

[147] Dibb 145 59

[148] Dibb 145 59

reasons, to regard the Area as *res communis*. However, the past two decades brought about such careful scrutiny of all practices relating to the law of the sea that it is highly unlikely that any one state will try to establish sovereignty over any one area of the sea.

In conclusion, the principle of the 'common heritage of mankind' in its initial stages seemed to be a worthy ideal and a lifeline for disadvantaged states. However, in practical terms the concept may in the long run have done more damage than good to the eventual outcome of **UNCLOS III**[149]. In the words of Dupuy[150]:

> The concept of Common Heritage of Mankind was solemnly established when it was applied to the deep seabed since the presentation of the Pardo Doctrine... However, one could not forget that it also relates to the moon and to celestial bodies, to the orbit of geostationary satellites, to the frequency spectrum and to the cultural heritage. The introduction of such a notion is intriguing to jurists, since, so far, humanity only appeared in the humanitarian law in the broadest sense, including not only the choice of armed conflicts but also "humanitarian intervention" or "crimes against humanity". ... The reference to the notion of heritage insistingly raised the question of whether humanity or mankind could be considered as a "subject" of international law able to be endowed legally with a heritage. One wondered then in which mankind could be embodied to be [sic] the holder of rights, and one sometimes believed that the United Nations, an organisation with universal vocation, could act on behalf of mankind. Indeed, some objected that as a strictly interstate system the United Nations could not properly pretend to represent peoples and individuals but others answered that governments have this twofold pretention and that, in the absence of a federal structure at world level, one had no alternative but to consider that it was simpler to suppose that the United Nations were able to do so[151].

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[149] See 7.4 *infra*

[150] Dupuy 94 199

[151] *Ibid*

One of the most critical reviews of the concept is that of Goldwin[152]. The author argues that the word 'heritage' has two meanings: mankind's true heritage lies in great human accomplishments[153], while the other meaning of the word refers to material possessions that are heritable. Thus he criticizes the advocates of the 'common heritage of mankind' who are worried about the present-day decline of the value of the 'common heritage of mankind', especially concerning the manganese nodules. He opines:

> One can see *how* it happened. But *why* do intelligent and principled people collaborate in the debasement of such a splendid phrase and allow thought-polluters to give ugly little rocks lying in the darkest depths of all creation the noble title of mankind's common heritage? Even if the nodules were pure gold, such usage would be desecration[154].

Even though this may be an extreme view, it does highlight the fact that the prompt embracement of the principle of 'common heritage of mankind' might have been premature, and thus may be one of the reasons (if not the main one) why the **LOSC** is not in force yet.

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[152] Goldwin R A 'Common Sense vs. "The Common Heritage"' in *Law of the Sea* edited by Oxman B H, Caron D D and Buderi C L O San Francisco: ICS Press 1983 59-75

[153] Books, music, plays, and paintings - Goldwin 152 74

[154] Goldwin 152 74. The author argues that even though mankind is bound to materials, one aspect of the best in mankind is the ability to make something out of raw materials, and that it is thus futile to think of the materials as such of being something special. He goes further (at 75):

> If most practical minded diplomats would consider this a strange approach to useful thinking about the deep seabed, they would be right. But we must not forget that *they* are the ones who introduced "the common heritage of mankind" into the proceedings and never ceased to brandish it thereafter. Their failure to understand what they were talking about explains, at least in part, why a decade of their brilliant work has ended in contention, bitterness, and failure. In my opinion, nothing could be more practical than to reflect on the two different meanings of the "heritage" and to instill into the proceedings, should there be more of them, some of the higher meaning of the word. Let those who are unwilling or unable to rise to that level acknowledge, honestly, that they were never really serious when they used the phrase, and let them get on with the job without singing anthems to "the common heritage of mankind".

4.4 CONCLUSION

It is perfectly understandable that the 'Group of 77' should have put a lot of hard work into trying to get all states to work within the **LOSC** system. The **LOSC** is simply too important to become a total failure. However much the major industrial powers may be frightened or scared off by the concept of 'common heritage of mankind', the success of the **LOSC** will ultimately be measured by the degree of co-operation between states.

The prevailing view of states on the principle of 'common heritage of mankind' was shaped mainly by political considerations. For the members of the 'Group of 77', the notion of a universal regime had become 'a convenient article of faith' by the time of the 'Declaration of Principles'. 'No doubt it would have been self-defeating for individual members to identify factors which would disqualify any States from entitlement, for such an effort would have encouraged developed States to formulate arguments to limit the range of beneficiaries under the regime, and could ultimately have weakened the entire Third World approach in this area'[155]. It was for exactly this reason that influential coastal states from the developing world[156] were strong supporters of full entitlement of land-locked states to seabed resources.

This was not always the case, however. At the time of the General Assembly elections for the **Ad Hoc Committee** and the first **Sea-bed Committee** land-locked states were almost completely disregarded[157]. Some authors suggest that this situation reflected coastal state misgivings about the role which land-locked states should play in the formulation of basic rules for the regime to be established[158].

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[155] Vasciannie 16 145

[156] Such as Brazil, India, Kenya and Tanzania - see Vasciannie 16 145/146

[157] Out of 35 members in the **Ad Hoc Committee** only Austria and Czechoslovakia were land-locked, while out of 42 members in the first **Sea-bed Committee** those two states were once again the only land-locked members

[158] See Vasciannie 16 145: 'This was only a short step from the view that land-locked States should not be entitled to full rights in the Area.'

It should also be kept in mind that the developing land-locked states (together with the developing geographically disadvantaged states) comprised virtually half of the 'Group of 77' and were important participants in regional groupings of developing states. They were thus well placed to influence the world policy of developing states on the basic issue of entitlement. Two factors combined to enhance their influence. In the first place, developing coastal states were not able to threaten or undertake unilateral action with respect to the deep seabed. This weakened their position in the developing states or 'Third World' coalition, and consequently meant that more respect was accorded the views of land-locked states. In the second place, in seabed negotiations it was not necessary for developing land-locked states and coastal states within the same region to view themselves as competitors for the limited resources of a particular part of the sea, and they were thus able to work together towards common goals[159].

> The case for land-locked States was also compatible with the political objectives of the developed States. At the time of the negotiations, one of the primary concerns of the Western industrialized nations and the USSR was that the access provisions of the future regime should not allow discrimination against developed countries or their enterprises. Against this background it was prudent for them to deny open discrimination against any other group of States. Moreover, the basic attitude of the developed States on the question of entitlement for land-locked States has not been affected by the decision of some industrialized countries to remain outside the conventional regime. For such opponents of Part XI, land-locked states remain fully entitled to exploit the resources of the Area in the exercise of the freedom of the high seas[160].

Erasmus[161] points out that the 'Group of 77' managed to maintain - in almost all international matters - a strategy of unity. This became particularly clear during the negotiations towards the **LOSC**. Moreover, he recognises the fact that the 'Group of

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[159] Vasciannie 16 146

[160] *Ibid*

[161] Erasmus M G *The New International Economic Order and International Organizations* Frankfurt/Main: Haag und Herchen 1979 145

77' has no formal, institutionalised structure[162]. 'Its usefulness as a pressure tool depends to a large extent on its flexibility'[163]. He also points to the fact that the formation of the 'Group of 77' brought to order the fragmented efforts - in international law - of the developing states.

The abovementioned flexibility may just be the decisive factor that will bring about ratification of the **LOSC**: flexibility firstly on the part of the major powers to realise that Part XI may not be insurmountable and, indeed, will be almost meaningless for quite some time in the future; flexibility secondly on the part of major industry to realise that in practical terms their 'rights' are not drastically infringed upon and therefore their ability to convince their states of that point; and flexibility finally on the part of all states concerned to realise that the **LOSC** - in time to come - may be regarded by all international actors as the first major legal instrument to signify acceptance of a new world order.

The developing states have come to stay, as has the concept of 'common heritage of mankind' (flawed as it might be). Future developments in international law await the outcome of the **LOSC**. An encouraging sign for international cooperation has been the recent agreement on chemical weapons, which bodes well for the future. The variety of issues surrounding environmental law in the international sense will play an increasingly important role in the future. And finally, the major issue of the international monetary order will in all probability be a decisive factor in all future forms of international cooperation.

At the same time, however, it seems as if the problems in the **LOSC** have similarly come to stay. The mere fact that two of the world's maritime powers (the US and the Federal Republic of Germany) failed to sign the convention, means that the much sought-after consensus hoped for at the start of the conference had not been achieved. Many

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[162] Erasmus 161 147

[163] *Ibid*

developed states are indeed of the opinion that Part XI is a fatal flaw in the convention as a whole.

The developing states, on the other hand, have long been in favour of the convention and have tried to ensure observance of its provisions on a number of occasions[164]. The 'Group of 77' has even in 1985 - with Eastern bloc support - tried to pressurise the non-signatories to the convention to help implement the convention, but without success.

Consistency and sustained commitment is going to be needed by the developing states for years to come if the convention is to enter into force, because it has become clear that the major industrial powers will not take the lead (even though it might be in their interests to do so). There are already signs that the developing states appreciate the enormity of the consequences of the **LOSC** should it enter into force. In Africa alone there is a growing awareness of the importance of guaranteed access to the sea. It is only comparatively recently that land-locked African states have become aware that many of their problems - mainly of an economic nature - are the direct result of their being land-locked. Another area of similar importance, particularly to African states, is that of pollution, and in particular the 'greenhouse effect'. The prominence given to environmental issues in the **LOSC** could thus be a powerful tool for these states to press for its entering into force. A further factor - not peculiar to African states - is the growing awareness of the population explosion with the concomitant need for higher food production. This, in turn, has led to the increased search for protein resources, which the seas provide in abundance. However, that has to be preserved and looked after, and in this respect the **LOSC** can likewise play an important role.

There are certainly grounds for hoping for at least non-defiance of - if not the positive act of accession to - the convention by the US. Contrary to expectations, the Reagan administration did not succeed in drawing other Western industrialised states into a

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[164] Dibb 145 62

'mini-treaty' in opposition to the convention[165]. Had that been the case it would have been a severe blow to the viability of the **LOSC**. Furthermore, it is becoming more and more likely that nodule production will rather start within the exclusive economic zones of various coastal states and that consortia - including the main US firms - will enter into bilateral agreements with such states to operate there. This would mean that the controversy surrounding Part XI of the convention is premature and will remain so for quite some time to come.

However, some states think that there might be a need for a revision of Part XI (some saying that that section should be removed and made the single subject of negotiation at a new law of the sea conference). But the complexities are there and they will not disappear through the device of calling a further conference to simplify Part XI before the convention comes into force[166].

Part XI is in the convention but it may well remain dormant for some time to come. This is not in any way meant to denigrate the convention. Measures provided in such a comprehensive treaty should be able to stand the test of time. However, it should be clear that economic forces - if nothing else - militate against the impending exploration and exploitation of the Area.

Alternatives to Part XI will be discussed in Chapter Seven of this study. What cannot be denied is that the US rejection of the 1982 **LOSC** (and by implication also of the principle of the 'common heritage of mankind') created a major international controversy. Whether the US had taken the 'right' or 'wrong' course of action only time will tell. However, one author opines:

> America's rejection of the Law of the Sea Convention has grave implications that should not be easily discounted. The treaty contains innovative provisions long sought by the U.S. for compulsory international settlement of disputes. It also, through its promotion of common expectations as to the rights of nations, offers the possibility of reducing needless conflicts and

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[165] See 7.2 *infra*

[166] See 7.4 *infra*

tensions at sea. The decision nonetheless to reject the treaty flowed from the perception that it was contrary to basic American beliefs. That such a fundamental disagreement could exist after the most extensive negotiations in history suggests more than a mere failure of the conference. It suggests institutional problems in the formation of American policy and an underlying division of opinion within the United States as to the most appropriate policy. Most significantly, such a fundamental disagreement suggests a tremendous rift in the international community itself in the area of international economic relations. Cicero once wrote that it is the existence of a community that allows the creation of law and that, conversely, if there is no community, there can be no law[167].

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[167] Caron D D 'Reconciling Domestic Principles and International Cooperation' in *Law of the Sea* edited by Oxman B H, Caron D D and Buderi C L O San Francisco: ICS Press 1983 9/10

CHAPTER FIVE: THE PROBLEMS FACING LAND-LOCKED STATES, AND PROVISIONS PERTAINING TO LAND-LOCKED STATES IN THE 1982 LAW OF THE SEA CONVENTION

5.1 INTRODUCTION

It has been noted before that of the 30 land-locked states in the world 14 are in Africa[1]. Before 1914 there were only four independent land-locked states outside Europe[2], which meant that the emphasis in the problems of such states had shifted markedly after the First and especially the Second World Wars[3].

The 1982 **LOSC** defines a land-locked state as a state which has no sea-coast and a transit state as a state, with or without a sea-coast, situated between a land-locked state and the sea, through whose territory traffic in transit passes[4].

Before the problems facing land-locked states are discussed, it is necessary to briefly examine the factors that may (or may not) bind together land-locked states as a group.

The diverse geographical distribution of land-locked states[5], coupled with differences

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1 See 4.1 *supra*. See also Churchill R R and Lowe A V *The Law of the Sea* Manchester: Manchester University Press 1988 316, Rembe N S *Africa and the International Law of the Sea* Alphen aan den Rijn: Sijthoff & Noordhoff 1980 143, Sinjela A M *Land-Locked States and the UNCLOS Regime* New York: Oceana Publications, Inc. 1983 1, Vasciannie S C *Land-Locked and Geographically Disadvantaged States in the International Law of the Sea* Oxford: Clarendon Press 1990 4. For the position of Bophuthatswana and Venda see 6.6 *infra*

2 Afghanistan, Bolivia, Ethiopia and Paraguay - see Glassner M I *Access to the Sea for Developing Land-locked States* The Hague: Martinus Nijhoff 1970 1

3 Mainly because many of these states only attained independence well after the Second World War and faced a different set of economic, political, and social problems relative to the established land-locked states

4 Articles 124(1)(a) and 124(1)(b) of the 1982 **LOSC**, 1.3.3 *supra*. See also the latter for the definitions of 'traffic in transit' and 'means of transport'. See further Glassner 2 2/3

5 See 4.1 *supra*

relating to factors such as size, population, and topography indicate that their political unity in international relations cannot be presumed as a matter of course[6].

On the surface, the main point of unity among land-locked states is their remoteness from the sea. However, even on that primary level there are substantial differences between land-locked states. Remoteness from the sea is largely a question of degree, and for this reason it may be said that some land-locked states are more handicapped (geographically speaking) than others[7]. On this basis it could thus be argued that there should be a hierarchy of disadvantage based on distance from the sea, and that states located most deeply inland should receive special attention from the international community[8].

However, such an approach would negate the wider issue of access. The degree of disadvantage suffered by any land-locked state is also influenced by factors such as the availability of adequate transport facilities and by the actual number of outlets the state may utilise to reach the sea.

In addition, it can be said that European land-locked states are in a superior position to those in other parts of the world. Not only are they not isolated from major international markets, but they are also able to use technologically advanced means of transportation, and in general have access to the sea via several outlets[9]. On the other

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6 See Afolabi J O *The Impact of the African States on the Third Law of the Sea Conference: Its Ramifications for the Emerging World Order* unpublished D Phil thesis Miami: University of Miami 1980 127/128, Vasciannie 1 4/5

7 For example, if remoteness is measured purely in terms of distance from the sea, Mmabane (Swaziland) is 200 kilometres from its nearest port of Maputo (Mozambique), while Fort Lamy (Chad) is 2 050 kilometres away from its nearest port, Lagos (Nigeria)

8 Vasciannie 1 5

9 See Vasciannie 1 6. See also 4.1 *supra* where it had been pointed out that out of the nine European land-locked states only one could be classified as developing (as against developed)

hand, developing (but in particular African) land-locked states appear to be particularly handicapped as a result of their location[10].

Furthermore, land-locked states with access to navigable waterways are often less disadvantaged than those which rely exclusively on railway and road networks. Once again, European land-locked states seem to be in a more favourable position than developing land-locked states[11]. There are developing land-locked states which rely on waterways[12], but in many of these cases river transportation constitutes only a part of the overall journey to the sea (and its advantages are often counterbalanced by problems of having to change from one mode of transit to another)[13].

Another point of unity among land-locked states (as a group) is that during the **UNCLOS III** negotiations they achieved a degree of importance they have never enjoyed before, particularly when coupled with the group of geographically disadvantaged states[14].

The dominant interests of land-locked states - as far as the sea is concerned - are access to and from the sea, the right of transit in the territory of the coastal state, the use of the facilities and ports of the transit state, and access to the marine resources of the seas[15].

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10 For examples, see Afolabi 6 128/129, Cervenka Z 'The limitations imposed on African land-locked countries' in *Land-locked Countries of Africa* edited by Cervenka Z Uppsala: The Scandinavian Institute of African Studies 1973 17-33, Vasciannie 1 6

11 See for example Switzerland and its access via the Rhine to the North Sea, and Austria and Hungary with the use of the Danube

12 For example Paraguay with access via the Parana-Paraguay river system to major ports at Buenos Aires and Montevideo

13 For example Afghanistan, Chad, the Central African Republic, and Rwanda - see Vasciannie 1 7

14 See 4.2 *supra*. However, it should at the same time be noted that the combined group employed a very liberal policy on membership within its ranks during the **UNCLOS III** negotiations. Thus, as membership numbers grew, the notion of 'geographical disadvantage' also lost some of its focus. As states which could not arguably be regarded as disadvantaged were allowed to join the group, it created the impression that the concept was being used for reasons of convenience - see Vasciannie 1 7/8

15 See 5.2, 5.3, 5.4 and 5.5 *infra*

Land-locked states face certain effects as a result of their land-lockedness. They 'enjoy' a geographical status which places them at a disadvantage relative to coastal states. The mere fact of being land-locked can have a negative impact on the economic, social, and political lives of the people living in such states. Most land-locked states are far from the sea, and to gain access to and from the sea by land or river they have to pass through one or more transit states. Some land-locked states are also transit states[16].

Because access to the sea for land-locked states is dependent upon their ability to pass through one or more transit states, they are denied the power to determine the suitability of transport facilities accorded them by transit states, and they do not have the authority to determine the availability of such facilities[17]. The availability of suitable transport facilities is generally subject to little or no control by the land-locked states, and transit states have in the past used their strategic position as an economic or political lever against land-locked neighbours[18].

Occasionally transit is denied altogether, thereby forcing the land-locked state to seek alternative routes or means for the transport of its goods to and from the sea. Sometimes goods in transit of land-locked states are subjected to seizure for the satisfaction of orders issued in states of transit[19].

Routine impositions on the external trade of land-locked states may include the levying of heavy customs duties for the mere movement of goods through territory of the transit state, as well as cumbersome and costly formalities of procedure. Furthermore, land-locked states have little leverage to determine tariff schedules for their goods in

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16 For example Uganda is a land-locked state for the double land-locked states of Rwanda and Burundi - see Sinjela 1 1, Vasciannie 1 6. Another example is Mongolia - see Glassner 2 3

17 See Sinjela 1 39

18 *Cf* the 1970 incident between Uganda and Kenya when the government of Kenya threatened to refuse handling Uganda's goods at the port of Mombasa, and also the January 1985 incident between South Africa and Lesotho when the former closed its borders to Lesotho

19 Sinjela 1 39

transit. This is ordinarily a function that is monopolised by officials of transit states (in the absence of an agreement or treaty to the contrary)[20].

The distance to and from the sea also raises transport costs for land-locked states. Such high transport costs often frighten away potential investors[21].

The problems of being land-locked have therefore significantly contributed to the continued underdevelopment of a large number of states. As **UNCTAD** concluded:

> Land-locked developing countries are generally among the very poorest of the developing countries. The lack of territorial access to the sea, compounded by remoteness and isolation from world markets, appears to be an important cause of their relative poverty, and constitutes a major obstacle to their development. Indeed, all but four of the 20 land-locked developing countries are on the list of countries identified by the United Nations as the least developed[22].

Here it is important to note that not all land-locked states possess identical problems, and that the developing land-locked states differ significantly from their developed counterparts[23]. It is also significant to note that most of the problems of the developed land-locked states have been solved or alleviated by a number of bilateral and regional treaties[24]. This is in sharp contrast with the situation in most developing land-locked states, particularly in Africa. This is even more so in the southern parts of Africa, where fundamental differences in the political, social, and cultural systems between the

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20 See Cervenka 10 18/19, Sinjela 1 39

21 A case in point is that of the Central African Republic and a group of Japanese prospectors. The uranium deposits which the latter discovered in the Central African Republic had to be transported some 1200 kilometres to the port of Dovela for shipment. The high transport costs proved to be the decisive factor in discouraging the Japanese from making further investments in exploiting the deposits

22 See Dupuy R-J *The Law of the Sea* Dobbs Ferry, N.Y.: Oceana Publications Inc. 1974 97, Rembe 1 143

23 It has already been pointed out that certain European land-locked states like Switzerland are developed with a very high standard of living, and that such developed land-locked states enjoy adequate transport infrastructure in terms of railway networks, roads, waterways, pipelines and air links

24 Churchill and Lowe 1 323, Rembe 1 143

different states have in the past made coexistence, cooperation and good neighbourliness most difficult[25].

Furthermore, while the level of economic development of a particular land-locked state may not be much different from that of a coastal state (and may in some instances even be higher), the geographical isolation from the sea reduces its political options and subordinates its economic growth to that of its neighbours to a much greater degree than in the case of a coastal state, however poor. It can be argued that an underdeveloped coastal state derives little advantage from a sea port for which it has very little use[26]. However, while the economic growth of the coastal state[27] would have a direct impact on its own port through the state's entry into the world market, in the case of a land-locked state even a spectacular expansion of its economy would be meaningless if not accompanied by a comparable improvement in the communication links of its neighbours on which it depends[28].

A factor that is often overlooked is the psychological implication of being land-locked. States that are land-locked are not only dependent on transit states for access, but they know that they are so dependent. This psychological disadvantage can - and often does - further impair progress in such states.

Almost all developing land-locked states are striving to improve their position, but material and manpower resources in most of these states are limited. Only a few of them have mineral resources[29]. This means that most land-locked states have to look elsewhere for the much needed means of developing their economies and improving the quality of life of their peoples. 'Since the process of discovery, occupation and

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25 Rembe 1 144. However, recent developments in South Africa have shown that a regional approach could be of great benefit to all states in Southern Africa - see 6.7 *infra*

26 See the port of Lüderitz in Namibia, for example

27 Which could be brought about by foreign aid and the mobilisation of its national resources

28 Cervenka 10 19

29 Zambia with its copper, for instance

exploitation of land areas has long since been accomplished, there is only one frontier remaining on earth for mankind to conquer, and that is the sea'[30].

Given the living and mineral resources of the sea, it is only equitable that land-locked states should share in these resources. However, an organising system is needed for exploring and exploiting these resources[31].

Besides material wealth, the seas also link continents together and provide opportunities for scientific research. In order for the world to derive any substantial benefits from the riches of the sea there should be a continuation of conducting both basic and applied scientific marine research[32], and land-locked states should also be allowed to play a role in this.

Given all the above, the essential legal question is whether land-locked states have certain rights to the sea, or whether the enjoyment of such 'rights' is merely a privilege.

There are four basic approaches to the question of access to the sea for land-locked states[33].

In the first place, the established principle of innocent passage through the territorial sea of coastal states is cited in support of an analogous right of transit for land-locked states[34]. As the **United Nations Commission for Africa** stated:

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30 Sinjela 1 6

31 See Dupuy 22 137-139, Prescott V 'The Deep Seabed' in *The Maritime Dimension* edited by Barston R P and Birnie P London: George Allen & Unwin 1980 54

32 Sinjela 1 6

33 Glassner 2 16

34 Sinjela 1 41/42

> The problem of the free access to the open sea by a land-locked country is part of the more general one of freedom of transit. The latter comprises in itself the fundamental economic interests and the legal safeguards of the countries concerned[35].

The second view is that access to the sea derives directly from the concept of freedom of the seas[36]. The claims of land-locked states were originally founded on principles of natural law. It was argued that the right of transit was conferred on every land-locked state by its very sovereignty, a necessary corollary to accepted notions of freedom of the high seas[37]. The argument is that if the ocean is free to all mankind, it is reasonable to suppose that all people should have access to the shores of the seas and the right to navigate all navigable rivers discharging into it since this is only an extension of the freedom of the high seas[38].

A third approach supporting the right of access is derived from the Roman concept of servitude, a limited right of ownership[39]. According to that theory transit constitutes a public law servitude roughly comparable to an easement in municipal law. It maintains that the right of way under public law provides land-locked states with an unquestionable right of passage over territories separating them from the sea, without need of any treaty or - in theory - even of an international agreement[40].

The fourth approach is the result of the evolution of the concept of freedom of communications for all nations as expressed in a principle of international law adopted

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35 Glassner 2 16

36 Birnie P W 'The Law of the Sea Before and After UNCLOS I and UNCLOS II' in *The Maritime Dimension* edited by Barston R P and Birnie P London: George Allen & Unwin 1980 8/9, Glassner 2 16

37 Sinjela 1 40

38 Glassner 2 16

39 Sinjela 1 40

40 Glassner 2 16/17. However, there has always been a question as to whether in fact a land-locked state has a permanent and unrestricted right of transit across intervening states to the sea

by **UNCTAD** in 1964 and incorporated *verbatim* in the Preamble to the 1965 **Convention on Transit Trade of Land-Locked States**[41]. Principle I of the convention stated:

> The recognition of the right of each land-locked State of free access to the sea is an essential principle for the expansion of international trade and economic development[42].

The argument therefore boils down to a concept of fundamental necessity. Oceans have always provided the most economical means of transporting goods among world markets. As states become increasingly dependent on international commerce - so the argument goes - no state can remain isolated without suffering economic stagnation. Therefore, a right of passage should be recognised, provided that its exercise causes no damage to interests of the transit state[43].

Over the years there have been various attempts to address the international legal issues concerning land-locked states. The first major 20th century codification to deal with the problems of such states was the **Convention and Statute on Freedom of Transit**, 20 April 1921, Barcelona[44]. The treaty provided that 'the principle of freedom of transit must be observed to the utmost possible extent'[45]. Furthermore, it provided for the

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41 See Glassner 2 17, Vasciannie 1 206

42 See Glassner 2 17

43 Sinjela 1 41. The concept of access to the sea as a matter of concern to the international community played an important role in the deliberations at **UNCLOS III**. However, Vasciannie (1 206/207) points out that the Preamble to the 1965 treaty contains no express reference to established principles of international law, failed to specify that the treaty was intended to codify norms, and clearly distinguished between states which ratify the the treaty and others. It should furthermore be noted that the treaty has been ratified mainly by land-locked states, and only a limited number of transit states have formally accepted its provisions - see Vasciannie 1 197

44 See Glassner 2 Appendix I. For the 1919 **Treaty of Versailles**, the 1919 **Treaty of Saint-German** and the 1921 **Declaration Recognizing the Right to a Flag of States having no Sea-coast** see 2.5.4 *supra*

45 Article 7 of the **Statute**

facilitation of 'free transit'[46], levies[47], tariffs[48], future agreements[49] and dispute settlement[50].

However, even though the treaty embraced the principle of freedom of transit in Article 7, Article 6 made it quite clear that this 'freedom' extended only to states parties to the treaty[51]. Furthermore, the treaty only provided for transit by rail or waterways[52], which considerably limited its scope and application.

The next major treaty was the 1958 **Geneva Conference on the Law of the Sea** with its consequent conventions[53]. The **Convention on the High Seas** affirmed the right of transit for land-locked states[54], but did not specify how this right should be exercised. Land-locked states thus had to rely on bilateral treaties with transit states for access and other rights, rather than on the convention itself.

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46 Article 2 of the **Statute** provided:

> ... the measures taken by Contracting States for regulating and forwarding traffic across territory under their sovereignty or authority shall facilitate free transit by rail or waterway on routes in use convenient for international transit. No distinction shall be made which is based on the nationality of persons, the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods or of vessels, coaching or goods stock or other means of transport.

47 Article 3 of the **Statute**

48 Article 4 of the **Statute**

49 To be in line with the provisions of the treaty - see Article 10 of the **Statute**

50 Arbitration of referral to the **PCIJ** - Article 13 of the **Statute**

51 Article 6 provided:

> This Statute does not of itself impose on any of the Contracting States a fresh obligation to grant freedom of transit to the nationals and their baggage, or to the flag of a non-Contracting State ...

52 Article 2 of the **Statute**

53 In between came the **General Agreement on Trade and Tariffs**, 30 October 1947, Geneva, and the **Havana Charter**, 24 March 1948 - see 5.2.1 *infra*

54 Article 3

The 1960 **Geneva Conference on the Law of the Sea** ended inconclusively and did not address the problems of land-locked states at all[55].

As noted before, the 1965 **United Nations Conference on Transit Trade of Land-locked Countries** resulted in the New York **Convention on Transit Trade of Land-Locked States** of 8 July 1965. Even though it recognised the right of land-locked states of transit to and from the sea, it did not manage to proclaim this right as a general principle of international law[56].

At **UNCLOS III** the land-locked states (especially developing land-locked states) pressed hard to get their problems addressed. They did manage to achieve a certain measure of success in this regard[57], but the controversy regarding Part XI of the 1982 **LOSC** and the subsequent request of the US to put the adoption of the convention to a vote completely overshadowed the demands of land-locked states.

Because land-locked states are thus in real terms not much better off (in terms of international legal safeguards) than in 1921, it is necessary to examine the specific needs (or rights) of those states.

5.2 TRANSIT RIGHTS

5.2.1 INTRODUCTION

There are two types of states which have a particular interest in claiming a right of transit to the sea: those which are completely cut off from the sea (land-locked states) and those states which (because of their geographical poisition) are cut off from the

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55 See 2.7.3 *supra*

56 See 5.2 *infra*. It did, however, provide for the enjoyment by land-locked states of the freedoms of the seas, and freedom of transit for goods. It was signed by 30 parties, among them Lesotho, Swaziland and Zambia

57 See 3.4 *supra*

main international trade routes. This study is mainly concerned with the first group of states, the land-locked states.

It is vital to the economic prosperity and development of any land-locked state that its international trade should proceed without interference and as efficiently and cheaply as possible over the territory of its neighbouring coastal states for the purposes of obtaining access to international sea routes[58].

However, it is important to note that access to international sea routes is not the only concern for land-locked states. It is just as important for the development of their regional and international trade that such states should have easy access through their neighbouring coastal and land-locked states to markets in states which are not contiguous to them. The concern with such general transit rights is not exclusive to land-locked states, but shared by potentially nearly all the states in the world. Furthermore, for the same reasons land-locked states have an interest in transit across contiguous and non-contiguous states, so these states themselves - whether land-locked or not - have a corresponding interest (for like reasons) in transit across land-locked states[59].

It is furthermore important to note that many developing land-locked states are not only in themselves transit states, but also states which have only recently achieved statehood. This factor necessitates a brief look at the nature of transit-trade treaties[60].

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58 This is a concern shared not only by all land-locked states, but also by coastal states which, because of some geographical disadvantage, are effectively land-locked - see Glassner 2 6-7, Tilbury M 'The International Law of Non-Aerial Transit Trade: The Case of Zimbabwe' 1980 *The Zimbabwe Law Journal* Vol 20 part 1 6. A state may effectively be land-locked even though it has a seacoast if its coastline provides no effective access to the sea because there is no adequate harbour

59 For example South Africa, Zambia and Zaire in the case of Zimbabwe

60 Tilbury 58 9 n19

At the heart of the legal issues surrounding the problems of the transit trade of a land-locked state is the difficulty of reconciling the sovereignty of the transit state with the needs of the land-locked state[61].

The first question is to establish the extent to which a land-locked state can claim, or is obliged to grant, rights of transit by virtue of international conventions, whether general or particular[62]. The second question is to establish the extent to which a land-locked state's transit rights and obligations can be founded on customary international law (whether general or local), or upon general principles of law[63].

Bilateral treaties are the most important source of the creation or securing of transit rights[64]. A right in territory may be the product of one of two types of particular treaty. Firstly, it may be a treaty which establishes a territorial regime which is essentially of local interest and is usually (though not necessarily) bilateral[65]. The second type of treaty, usually (but not necessarily) multilateral, is one which sets up a territorial regime of general or international concern. Such treaties are often referred

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61 However, Tilbury suggests that a reconciliation is possible because sovereignty is not an absolute but rather a relative concept, and there is no reason why limitations should not be placed on a state's sovereignty (either by convention or by customary international law) - Tilbury 58 9/10

62 For this purpose, 'particular' conventions are bilateral or multilateral treaties which establish specific transit regimes, whether such regimes benefit one or a number of states. 'General conventions' refers to multilateral treaties which set forth - without reference to any particular transit regime(s), general rules in respect of transit matters, whether the parties thereby intended only to create norms applicable in their relationships *inter se*, or whether they (or some of them) intend the treaty in question to be 'law-making' in the sense of forming the basis of the creation of norms of general application - see Tilbury 58 10

63 Tilbury 58 10

64 From a report submitted in 1971 by the Secretary-General of the **UN** to the **Committee on the Peaceful Uses of the Sea-bed and the Ocean Floor Beyond the Limits of National Jurisdiction** it is clear that most - if not all - land-locked states have at one time or another concluded bilateral or regional arrangements with neighbouring states in order to obtain rights of transit across such states

65 Examples of such servitudes in favour of one state over the territory of another state are rights of ways, rights of navigation on a national waterway, rights of fishery, rights to draw on water for economic purposes, and the creation of customs-free zones - see Tilbury 58 12

to as 'constitutive' or 'semi-legislative' and create an international status for the territory concerned[66].

As opposed to particular treaties, there are also a number of general conventions by which a land-locked state may claim (or may be subject to) rights of transit[67]. The nature of a right of transit may be all-embracing or limited to a particular purpose[68], and/or absolute or inchoate[69]. As far as the substance of the right of transit is concerned, that will depend on the treaty itself, and also on whether it creates a rule of customary law or not[70]. As far as the principle of reciprocity is concerned, that implied in the 1958 **Convention on the High Seas**[71] and the 1965 **New York Convention**[72] is 'either absurd or meaningless'[73]. Exceptions to the principle of free transit (or to allow suspension or variation of the right in certain circumstances) may also be contained in a treaty[74].

As far as transit conventions in general are concerned, Tilbury offers the following:

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66 Examples of such treaties are those which create a particular status - such as a mandated or demilitarised status - for a specific territory, or a particular regime for a river - see Tilbury 58 13

67 These are the 1921 **Convention and Statute on Freedom of Transit**, the 1947 **General Agreement on Tariffs and Trade**, the 1958 **Convention on the High Seas**, the 1965 **New York Convention on Transit Trade of Land-Locked States** and, of course, the 1982 **Law of the Sea Convention** (when in force)

68 Such as is provided for in Article 2 of the 1921 **Barcelona Statute** and Article V(2) of the 1947 **GATT**, providing for a general freedom of transit through the territories of the parties to the treaties in favour of the other contracting parties

69 Such as is provided for in Article 3 of the 1958 **Convention on the High Seas** concerning agreements to secure the right of transit

70 See Tilbury M 'The International Law of Non-Aerial Transit Trade: The Case of Zimbabwe' 1980 **The Zimbabwe Law Journal** Vol 20 part 2 143-146

71 Article 3(1)(a)

72 Article 15

73 Tilbury 70 146. See also Glassner 2 198

74 Article 7 of the 1921 **Barcelona Statute**, Article 12 of the 1965 **New York Convention** and Article 125(3) of the 1982 **LOSC**

> It is submitted that it is unfortunate that transit problems have been, and continue to be, discussed in the context of the Law of the Sea, since attention has been diverted from the universality of the problem of transit. The problem is common to all states, land-locked or coastal,since not all transit trade involves the utilization in whole or in part of international sea routes; and, whether the transit of goods is by sea, land or air, such transit must still be as unrestricted, convenient, cheap and fast as possible. ... Therefore, in so far as general conventional law attempts to deal with the question of transit only in the context of access to and from the sea it is *ipso facto* defective and incomplete[75].

A right of transit across the territory of another state for *inter alia* purposes of trade may also exist by virtue of customary international law. Customary international law may thus recognise a right of access to and from the sea for land-locked states. However, to establish such a right it will be necessary to point to state practice as a justification for its existence, and thus not only consistency, uniformity and generality, but also to demonstrate the conviction amongst states that such practice is obligatory upon them, and is thus accepted by them as law (*opinio iuris*)[76].

As far as transit rights by virtue of general principles of law are concerned, it seems unlikely that these principles would support either a general right of transit or a right of access to and from the sea for land-locked states except in a case of absolute necessity[77].

As far as the historical aspects of transit are concerned, land-locked territories have from ancient times[78] had to face obstructions, restrictions, tolls, or heavy transit dues on goods and persons passing between them and the sea through more advantageously placed territories. As trade grew in importance, the commercial advantages of free rights of way gradually began to loom larger than the need to maintain absolute

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[75] Tilbury 70 148/149

[76] See 1.2.3.2.3 *supra*, and also Tilbury 70 155

[77] See 1.2.3.2.4 *supra* and Tilbury 70 160. However, see also Sinjela 1 41

[78] Glassner 2 17, O'Connell D P *The International Law of the Sea* Vol 1 Oxford: Claredon Press 1982 1-21

territorial sovereignty. As early as the 11th and 12th centuries territories in Europe - particularly Italy - began giving treaty rights to land-locked territories and began the internationalisation of rivers[79]. Even so, by the late 18th century restrictions and heavy tolls on transit were still common. The principle of free transit was, however, given a new lease of life when in 1792 the armies of France reopened the mouth of the river Scheldt[80], and also by the diplomacy of Thomas Jefferson, which resulted in the **Treaty of San Lorenzo el Real**[81].

Throughout the 19th century the principles of free transit through straits, on rivers and overland gradually became firmly established as recognition grew that such transit was necessary for the development of commerce and industry to the benefit of both land-locked and coastal or riverine states[82].

By the time of the First World War most navigable waterways - natural and artificial - in Europe, East Asia, South America and Africa had been internationalised. Access to the sea had however not yet been accepted as a specific right of land-locked states[83].

In January 1917 President Woodrow Wilson of the US, in an address to the US Senate, advocated that every great nation in the process of development should be assured a direct outlet to the sea and that no nation should be 'shut away from free access to the open paths of the World's commerce...'[84].

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79 Rivers being the first means of assuring access to the sea for land-locked states

80 After it had been closed by the Dutch in 1648

81 See Glassner 2 18. That treaty gave Americans the right to navigate the Mississippi river and other Spanish rivers to the sea, conceding - in fact, if not in principle - Jefferson's claim that the ocean is free to all men, and their rivers to their inhabitants

82 Glassner 2 18, Sinjela 1 40

83 Glassner 2 18

84 *Ibid*

The framers of the Covenant of the **League of Nations** did not deal specifically with the question of access to the sea, but rather with the broader one of freedom of transit, including that between inland points. Article 23(e) of the covenant is significant because it was the first attempt to deal with the matter on a world-wide basis. It provided that the members of the **League** 'will make provision to secure and maintain freedom of communications and of transit and equitable treatment for the commerce of all Members of the League'[85].

Following the above provisions a series of conferences took place during the 1920s which produced both multilateral conventions and bilateral treaties aimed at the facilitation of free transit. Among these the most important for the purposes of this study are two of the **Barcelona Conventions** of 1921[86] and the **Geneva Convention** of 1923[87].

Although the **Barcelona Conventions** in particular attempted to provide an internationally recognised right of transit, several deficiencies - from the land-locked states' point of view - were evident in its scope and coverage. In the first place, it would have benefitted the land-locked states if the right of transit had been declared of universal application rather than confined to states parties to the conventions. Secondly, the conventions only applied to railway and waterway transport. The failure to address road transport excluded extensive parts of Africa and Asia which are largely dependant on overland routes to and from the sea. A third limitation was the fact that the conventions - while according great prominence to transit problems of land-locked states in Europe - failed to take sufficient account of other states in the world, especially the developing states[88].

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85 Glassner 2 19

86 The **Convention and Statute on Freedom of Transit** and the **Statute on the Regime of Navigable Waterways of International Concern**, both signed at Barcelona on 20 April 1921 - see 2.5.4 *supra*

87 The **Convention and Statute on the International Regime of Maritime Ports**, signed at Geneva on 9 December 1923 - see 2.5.4 *supra*

88 Because of - for example - the exclusion of road transport. See Sinjela 1 43

Despite its limitations, the **Barcelona Conventions** came to be regarded as a minimum standard to be used in negotiations for bilateral and multilateral agreements on transit, including those involving access to the sea. They retained their value for more than 40 years - 'a not inconsiderable accomplishment in the twentieth century'[89].

As far as the Charter of the **United Nations** is concerned, Rubin[90] criticises Article 2(4) of the Charter[91], and argues that the article could be interpreted as a retrograde step as far as transit rights were concerned[92].

The **General Agreement of Tariffs and Trade (GATT)**[93] adopted at Geneva on 30 October 1947 made no express reference to the position of land-locked states, but reaffirmed the principles of the **Barcelona Conventions** on freedom of transit[94].

The **Havana Charter** of 24 March 1948 reaffirmed and in some ways strengthened the **Barcelona Conventions'** provisions for freedom of transit[95].

In January 1956 the **United Nations Economic Commission for Asia and the Far East (ECAFE)** considered the problems of its members[96] and approved a resolution in which it recommended that 'the needs of land-locked member States and members having no

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89 Glassner 2 21

90 Rubin A P 'Land-locked African countries and rights of access to the sea' in *Land-locked Countries of Africa* edited by Cervenka Z Uppsala: The Scandinavian Institute of African Studies 1973 44-62

91 Requiring members of the **UN** 'in their international relations' to refrain from threatening the use of force 'against the territorial integrity' of any state

92 See further Rubin 92 44-47

93 See Glassner 2 22, Sinjela 1 44/45

94 See specifically Articles 2 and 6

95 Glassner 2 23, Sinjela 1 45

96 Afghanistan, Laos and Nepal

easy access to the sea in the matter of transit trade"[97] be given full recognition by all member states and that adequate facilities thereof be accorded in terms of international law and practice in that regard. This was the first time that a major international body gave special consideration to the needs - as opposed to rights - of land-locked states[98].

The 1956 recommendations of **ECAFE** initiated a drive in the **UN** to deal with the question of land-locked states in a comprehensive manner. At the 11th session of the **UN** General Assembly in 1957 some land-locked states requested the inclusion of the question of access to the sea in the agenda of **UNCLOS I**[99].

The 1958 **Geneva Conference on the Law of the Sea** emphasised the economic necessity of free access to the sea, and also that access is a corollary of the freedom of the seas. Article 3 of the **Convention on the High Seas** firmly established the legal right of transit for land-locked states, but did not address the practical aspects thereof[100]. Thus pressure for a more definite solution to the question of access to the sea for especially the developing land-locked states increased after 1958.

After 1958 Mongolia and 12 African land-locked states joined the **UN** and entered the world trading community as independent entities. However, the interference with and threats to free transit continued, particularly in the case of Afghanistan and Pakistan[101]. These deliberations resulted in the 1965 **United Nations Conference on Transit Trade of Land-locked Countries**[102].

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97 Glassner 2 25, Rubin 90 53

98 Significantly, reliance was still placed on existing 'international law and practice', but with no indication of a necessity for new rules or procedures for the benefit of land-locked states. See Sinjela 1 46-48

99 This was despite the fact that the **ILC**, an organ of the General Assembly, had not been consulted and was not asked to prepare draft articles on the subject

100 Glassner 2 32

101 Glassner 2 32

102 The conference was attended by delegates of 58 states and observers of 10 states - see Glassner 2 35/36

The conference adopted the New York **Convention on Transit Trade of Land-locked States**, which dealt with transit not only to and from, but also through, land-locked states. The convention went beyond previous instruments in recognising land-locked states' rights of transit to and from the sea. However, a number of the limitations in previous instruments were also present in the convention. Furthermore, while the convention relied on principles of economic necessity and the right of land-locked states to enjoy the freedom of the seas on equal terms with coastal states, it did not proclaim these principles as principles of international law[103].

The convention entered into force on 9 June 1967. However, by 1982 only 20 coastal states had either signed or ratified the convention, as opposed to 24 land-locked states. This limited the impact of the convention and resulted in continuing efforts by the land-locked states to seek solutions for the problem at **UNCLOS III**[104].

The convening in 1973 by the **UN** of **UNCLOS III** raised the hopes of land-locked states that their problems would be addressed once and for all. In particular, the manner of decision-making at the conference (the 'consensus' principle, for example), the impact of the developing states (equity and the 'common heritage of mankind', the 'Group of 77') and the role of the **EEC** boded well for their future[105]. Suffice it to say that the 1982 **LOSC** was the culmination of more divergent influences and ideas than ever before to shape the future thinking on international law.

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[103] Article 15 of the convention, for instance, provided that land-locked states should grant reciprocal rights of transit to transit states. See also Glassner 2 38 and Sinjela 1 48-51

[104] Glassner 2 38, Sinjela 1 51 n67

[105] These issues have already been discussed before - see 1.2.3.2.4.5 and 4.3 *supra*. See also Dupuy 22 39-45, Oda S *The Law of the Sea in our Time - I* Leyden: A. W. Sijthoff 1977 136, Rembe 1 74

The **LOSC** provides that 'land-locked States shall have the right of access to and from the sea for the purpose of exercising the rights provided for in this Convention including those relating to the freedom of the high seas and the common heritage of mankind. To this end, land-locked States shall enjoy freedom of transit through the territory of transit States by all means of transport'[106].

This article therefore establishes a definite right of access to the sea for land-locked states. However, article 125(2) provides: 'The terms and modalities for exercising freedom of transit shall be agreed between the land-locked States and transit States concerned through bilateral, subregional or regional agreements[107].

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[106] Article 125(1) of the 1982 **LOSC**

[107] **LOSC** art 125(2). Thus, even though a definite right of access does exist, the land-locked state will still have to negotiate with transit states before this right can be enforced

5.2.2 TRANSIT BY ROAD

Transit by road for goods is the second most expensive mode of transport, second only to air transport[108]. It is especially expensive in difficult or mountainous terrain areas. Other disadvantages are disintegration of road surfaces, losses through pilfering and damage, and congestion[109]. However, for most land-locked states roads play one of the most important roles in the development process and are widely utilised for the transportation of exports and imports to and from the sea. Also, because most of the developing land-locked states have poor roads linking them with the coastal areas, journeys to and from the sea take much longer than they would on good roads[110].

The **Convention on Road Traffic** and its Protocols of 19 September 1949, Geneva, terminated the 1926 **International Convention relative to Motor Traffic** and the 1926 **International Convention relative to Road Traffic**, and was aimed at promoting the development and safety of international road traffic by establishing uniform rules concerning motorists and their vehicles, cyclists and pedestrians, and road signs and signals[111].

The **Convention on the Contract for the International Carriage of Goods by Road (CMR)** of 19 May 1956, Geneva, established uniform provisions for contracts for the international carriage of goods by road[112]. It was followed by the **European Agreement Concerning the International Carriage of Dangerous Goods by Road (ADR)** of 30 September 1957, Geneva[113].

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[108] See Glassner 2 191 Chart 1

[109] See Anglin D G 'The politics of transit routes in land-locked southern Africa' in *Land-locked Countries of Africa* edited by Cervenka Z Uppsala: The Scandinavian Institute of African Studies 1973 114

[110] Of the developing land-locked states, only Afghanistan, Bolivia, Botswana and Zambia have good highways linking them with the coast - see Sinjela 1 3/4

[111] Bowman M J and Harris D J *Multilateral Treaties* London: Butterworths 1984 156/157

[112] Bowman and Harris 111 208

[113] Bowman and Harris 111 221/222

The **Convention on the Contract for the International Carriage of Passengers and Luggage by Road (CVR)** of 1 March 1973, Geneva, contained rules standardising the conditions governing the contracts of carriage named in the title[114].

Article 124(1)(d)(i) of the 1982 **LOSC** provides for the use of 'road vehicles' between a land-locked state and transit states, but the 'terms and modalities for exercising freedom of transit' have to be agreed upon between the parties concerned[115].

5.2.3 TRANSIT BY RAILWAY SYSTEMS

Generally speaking, rail transport is less costly than either air or road transport[116]. However, railways are difficult and very expensive to build - the main reason why most developing land-locked states only have one rail line connecting them with the sea. By contrast, the European land-locked states have several railways connecting them with each other and with transit states[117].

A serious problem with railway transport is the lack of standardisation between the various railway networks. Other problems relate to maintenance, lack of railway rolling stock, and inadequate facilities at sea ports for handling goods transported by rail[118].

One of the first conventions on railway systems was the **Convention and Statute on the International Regime of Railways** of 9 December 1923, Geneva[119]. It was

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[114] Bowman and Harris 111 369

[115] Article 125(2) of the 1982 **LOSC**

[116] See Glassner 2 191 Chart 1

[117] Sinjela 1 2/3

[118] Cervenka Z 'The limitations imposed on African land-locked countries' in *Land-locked Countries of Africa* edited by Cervenka Z Uppsala: The Scandinavian Institute of African Studies 1973 19-22

[119] Bowman and Harris 111 57/58. It was signed by 27 parties

an attempt at a systematic codification of recognised international obligations in respect of international railway traffic. It provided for interchange of international rail traffic, technical uniformity in the use of rolling stock, rail tariffs, and financial arrangements between railway administrations.

It was followed by the **International Convention to Facilitate the Crossing of Frontiers for Passengers and Baggage Carried by Rail** and the **International Convention to Facilitate the Crossing of Frontiers for Goods Carried by Rail**, both of 10 January 1952, Geneva[120], and the **Convention for the Establishment of a European Company for the Financing of Railway Rolling Stock (Eurofirma)** of 20 October 1955, Berne[121].

The **International Conventions Concerning the Carriage of Goods by Rail (CIM)** and **Passengers and Luggage by Rail (CIV)** with **Additional Protocol** of 7 February 1970, Berne, regulated in detail the contract of carriage of goods and passengers by rail as well as questions of legal liability[122].

While Article 124(1)(d)(i) of the 1982 **LOSC** provides for the use of 'railway rolling stock' between a land-locked state and transit states, it is once again subject to agreement between the parties.

5.2.4 TRANSIT BY RIVER AND NAVIGABLE WATERWAYS

Generally, river transport is of limited value to the developing land-locked states[123]. If a land-locked state has the use of an internationalised navigable waterway to reach

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[120] Bowman and Harris 111 175

[121] Bowman and Harris 111 204

[122] Bowman and Harris 111 335/336

[123] Glassner 2 192

the sea it clearly has an advantage over states which lack such a route. The advantage is limited, however, not only by geographical factors, but also by the lack of complete sovereignty over the waterway. Should the coastal state interfere with the interior state's traffic on the waterway, such action would not necessarily be considered hostile under international law, as it would be if the intrusion were made on land, or across a state's boundary anywhere. However, of the developing land-locked states few have reliable, adequate, all-water routes to the sea[124]. The exceptions are Afghanistan, the Central African Republic, Chad, Paraguay and Rwanda[125]. By contrast, certain European land-locked states like Austria, Hungary and Switzerland have access to the sea through navigable waterways.

The biggest advantage of the use of navigable waterways is that of cost: in general, transport by waterway is considerably cheaper than the previous three modes of transit mentioned.

Article 124(1)(d)(i) provides for the use of 'lake and river craft' between a land-locked state and transit states, but yet again it is subject to agreement between the parties.

5.2.5 TRANSIT BY AIR

The most expensive mode of transport is aircraft[126]. This factor limits its use except under special topographic, political, or other circumstances. Air transport is generally not an important instrument for economic development, even in land-locked states.

There are three major limitations underlying all use of aircraft to and from land-locked states. In the first place, it is dependent upon permission to overfly transit - permission

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[124] Glassner 2 200

[125] However, only in the case of Paraguay is the transit by waterway uninterrupted by other forms of transport - Vasciannie 1 6/7

[126] See Glassner 2 191 Chart 1

which could readily be withheld or revoked since international law recognises that as a sovereign right of states. Secondly, it is economical only for low bulk-high value goods - goods which few land-locked states export in quantity. In the third place, it is feasible only for relatively long flights: it is competitive with surface transportation (except under most difficult terrain conditions) only at distances over about 1 000 kilometres[127].

Aside from cost, international legal principles[128] are the greatest hindrance to air transport for land-locked states.

One of the earliest treaties as far transit by air is concerned was the **International Convention for the Unification of Certain Rules Relating to International Carriage by Air** of 12 October 1929, Warsaw[129]. It contained detailed rules concerning air transportation documents and carriers' liability and was signed by 123 parties[130]. It was eventually amended by four protocols in 1975, Montreal[131].

The **Convention on International Civil Aviation** of 7 December 1944, Chicago, created certain rules for air navigation and established the **International Civil Aviation Organisation (ICAO)**, a **UN** specialised agency. It effectively replaced (and required the parties to it to denounce) the 1919 **Paris Convention** for

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[127] Glassner 2 192/193. The author points out that even in Afghanistan, where air transport is more practical (and even more necessary) than in most land-locked states, it is surface transport - and in particular roads and railroads - that carries the burden of internal development and foreign trade

[128] In particular, the principle of territorial sovereignty and the principle of national airspace

[129] Bowman and Harris 111 81/82

[130] It was later followed by the **Protocol Amending the 1929 Convention for the Unification of Certain Rules Relating to International Carriage by Air** of 28 September 1955, The Hague - Bowman and Harris 111 202/203

[131] See Bowman and Harris 111 400-402

the Regulation of Aerial Navigation. It was signed by 150 parties[132]. It was complemented by the **International Air Services Transit Agreement**[133] and the **International Air Transport Agreement**[134] of the same date and place.

The **Convention Relating to Co-operation for the Safety of Air Navigation (Eurocontrol)** of 13 December 1960, Brussels, established the organisation **EUROCONTROL** to strengthen cooperation in matters of air navigation and to provide for the regulation of air traffic services in the upper air space[135].

It should be emphasised, however, that the above conventions have been ratified by relatively few developing land-locked states[136]. In addition, the overflight and non-traffic landing rights provided for in the 1944 convention have consistently been regarded as contractual derogations from general international law, with the result that it has not helped land-locked states in the establishment of any general rights. Thus, even though Article 124(2) of the 1982 **LOSC** provides for means of transport 'other than those included in paragraph 1' (which might thus include air transport), it still has to be agreed upon between the land-locked state and the transit state.

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[132] Bowman and Harris 111 109-111. Article 1 of the convention reaffirmed the exclusive and complete sovereignty of each state over the airspace above its territory, while Article 6 expressly forbade scheduled international air service over or into the territory of a contracting state except with the special permission or authorisation of that state, and according to the terms of that authorisation or permission - see Amissah A N E 'Air transport in Africa and its importance for African land-locked countries' in *Land-locked Countries of Africa* edited by Cervenka Z Uppsala: The Scandinavian Institute of African Studies 1973 70/71

[133] The agreement, known as the 'Two Freedoms Agreement', required parties to grant each other, in respect of scheduled international air services, the privilege to fly across their territory without landing and the privilege to land for non-traffic purposes - see Amissah 132 71, Bowman and Harris 111 111

[134] The agreement, known as the 'Five Freedoms Agreement', required parties to grant each other, in respect of scheduled air services, freedoms *inter alia* concerning the taking on and putting down of passengers, mail and cargo - see Bowman and Harris 111 112

[135] Bowman and Harris 111 249/250

[136] See Amissah 132 71/72

5.2.6 TRANSIT BY PIPELINE

Along with water transport, transport by pipeline is by far the cheapest form of transport. Potentially it can also prevent many of the other problems associated with transport such as pilfering and damage of goods. Generally speaking, however, pipeline transport is of limited value to developing land-locked states. Of the developing land-locked states only Afghanistan, Bolivia and Zambia make use of transport by pipeline[137]. The biggest drawback is the cost of the construction of a pipeline in the first place, and few developing land-locked states can afford that. In addition, the bulk of transport for land-locked states consists of goods that cannot be transported by pipeline.

5.2.7 CARRIAGE OF HAZARDOUS MATERIALS, AND POLLUTION

Although the above two topics do not relate specifically to land-locked states, a brief mention of certain conventions (that may be applicable to land-locked states)[138] may be relevant.

The Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material of 17 December 1971, Brussels, sought to ensure that the operator of a nuclear installation would be exclusively liable for damage caused by nuclear incident occuring in the course of maritime carriage of nuclear material, and exonerated other persons unless they have deliberately caused the damage. **The Basle Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal** was signed at Basel on 22 March 1989[139].

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[137] Glassner 2 192, Sinjela 1 4

[138] Article 87 of the 1982 **LOSC** provides that the 'high seas are open to all states, whether coastal or land-locked'. Article 90 provides that every state, 'whether coastal or land-locked, has the right to sail ships flying its flag on the high seas'. Thus - even though it had been mentioned that only seven land-locked states do so in reality - the protection discussed here may well be applicable to land-locked states

[139] July 1989 *International Legal Materials* Vol XXVIII No 4 649-686

The **Agreement Concerning the International Commission for the Protection of the Rhine from Pollution** of 29 April 1963, Berne, was signed to prevent the contamination of the Rhine and to improve its condition through the acquisition of information and recommendation of protective measures[140].

The **Agreement Concerning Pollution of the North Sea by Oil** of 9 January 1969, Bonn, provided for the cooperation between the parties in cases where oil pollution in the North Sea constituted a danger to their coasts or related interests[141].

The **International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties** of 29 November 1969, Brussels, was prompted by the *Torrey Canyon* incident in 1967 when the UK bombed a stranded foreign oil tanker on the high seas to prevent further oil spillage and pollution[142]. The convention authorised such action.

The **Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof** of 11 February 1971, London, Moscow and Washington, provided for verification of compliance with its terms by observation, inquiry and consultation and ultimately for reference to the UN Security Council[143].

The **Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft** of 15 February 1972, Oslo, established the **Oslo Commission** to administer the prevention of pollution of the sea by dumping from ships and aircraft[144].

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[140] Bowman and Harris 111 275

[141] Bowman and Harris 111 327

[142] Bowman and Harris 111 332/333

[143] Bowman and Harris 111 347/348

[144] Bowman and Harris 111 358/359

The **Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter** of 29 December 1972, London, Mexico City, Moscow and Washington, required a party to prohibit the dumping of wastes at sea without permit primarily by vessels and aircraft registered in its territory or flying its flag, or loading in its territory or territorial sea. The **Paris Commission** was established to administer the convention[145].

The **Protocol Relating to Intervention on the High Seas in Cases of Pollution by Substances Other than Oil** of 2 November 1973, London, authorised direct action with respect to threats named in the title[146].

The **Convention on the Protection of the Marine Environment of the Baltic Sea Area** of 22 March 1974, Helsinki, established the **Baltic Environment Protection Commission** to enforce the convention[147].

The **Commission for the Prevention of Marine Pollution from Land-Based Sources** of 4 June 1974, Paris, concerned marine pollution from land-based sources such as rivers, pipelines and man-made structures[148].

5.2.8 CONCLUSION

As can be seen from the above, there are advantages and disadvantages to each and every mode of transport. More important than the mode of transport, however, may be other transportation factors such as inefficiency leading to loss, damage and delay; overstaffing of transport facilities; natural hazards such as steep grades necessitating

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[145] Bowman and Harris 111 368/369

[146] Bowman and Harris 111 384

[147] Bowman and Harris 111 387

[148] Bowman and Harris 111 389

cogs or floods which wash out bridges and roadbeds; and strikes in ports and in the transportation industry.

At the same time, the above applies to every state, whether land-locked or not. However, transportation in developing states is today a critical factor in their economic, social, and political processes. 'The pressures of time, the almost frenetic competition in import and export trade, rapidly rising populations, and that modern phenomenon which economists call "the international demonstration effect" and which laymen call "the revolution of rising expectations" all combine to produce an urgency and complexity in transport development unknown before'[149].

All of these factors could be translated into cash value: all of them add to the eventual cost of developing and operating a modern economy. But even if all modes of transport could be operated economically and efficiently in a developing state and the state could freely choose which it wanted to use, the inherent cost of installation and operation would still weigh heavily in the choice, and consequently in the cost of economic development.

> The ability to sell in world markets is often limited by the difficulties of overland transport. Moving fifty miles to port may be costlier than moving thousands of miles by sea. And nearer home, there may be no land connections with neighbouring countries, hence no way to benefit from specialization and trade. The problem is not always the complete absence of transport, but its unreliability, high cost, slow schedules, and high rates of damage and pilferage[150].

States with a low standard of living are also states with inadequate means of transport[151]. For a state to supply itself with the necessities of life, transport is essential. To the extent that inadequate transport curtails developement, land-locked states are the first to suffer. The adverse effects of land-locked states are greater the

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[149] Glassner 2 190

[150] Wilfred Owen quoted by Glassner 2 189

[151] Cervenka 118 19

less efficient the transit routes and ports, the less the capability of the land-locked state to absorb increased transport costs, and the less physically secure the transit routes.

5.3 ECONOMIC RIGHTS

Land-locked states face economic problems because of geographical, historical and other factors that set them apart from their coastal counterparts. Problems facing land-locked states have already been discussed in general terms[152]. In this section the emphasis will be on particular economic problems facing developing land-locked states, and their claims to preferential (or 'special') treatment in international law.

Unlike most arguments about the weak economic position of land-locked states (often blaming it mainly on geographical factors), Szentes[153] argues that the economic problems of developing land-locked states are fundamentally of a structural nature. He identifies the distinguishing features as the following:

1 Structural deformations of economy and infrastructure both in land-locked states and their coastal neighbours, stemming from the unfavourable investment patterns of foreign interests;

2 the existence of duplicated production facilities of a competitive character which inhibit regional cooperation and the development of local trade;

3 the disadvantages to the land-locked states of competitive specialisation and subservient infrastructure;

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[152] See 5.1 *supra*

[153] Szentes T 'The economic problems of land-locked countries' in *Land-locked Countries of Africa* edited by Cervenka Z Uppsala: The Scandinavian Institute of African Studies 1973 273-277

4 the priority given to transport links between primary producing inland enclaves and harbours with overseas contact at the expense of interregional transport networks;

5 the decreasing interest of foreign investors in agricultural enclaves and their related infrastructure;

6 the indifference of the coastal states in promoting the overseas trade of their land-locked neighbours; and

7 the resort of the land-locked states to foreign aid for infrastructural development and to international legal arrangements for free access to the sea[154].

He thus argues that if the problem is fundamentally one of structure, both internally and externally, then the solution is to be found in restructuring: that is, an investment policy for internal and regional integration.

At the negotiations during **UNCLOS III** the land-locked states, grouped with the geographically disadvantaged states, favoured the proposition that - as a class of states - they should be entitled to preferential treatment so as to overcome problems which they face as a result of their disadvantaged location[155]. There are in the main three arguments frequently used to support the above proposition.

In the first place, preferential treatment for land-locked states is frequently supported on the grounds that it will enhance the cause of justice and true equality in international affairs. It is argued that economically underdeveloped states should receive special consideration under the law so that they may attempt to overcome some of the basic and pervasive problems facing their populations. These states have greater needs than

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[154] Szentes 152 275

[155] This, notwithstanding the prevailing doctrine presupposing the sovereign equality of states (as affirmed in Article 2(1) of the UN Charter)

others, it is said, and therefore it is unjust that they should be accorded the same treatment as their economically advanced counterparts[156].

This approach has received substantial support in internationational organisations and other bodies[157]. However, objections may be raised to the exact content of the argument. In the first place, if it is based on human rights considerations, then it may be argued that states with the greatest means to effect redistribution of resources to others are more concerned with issues of redistribution within their own borders, and that it would thus be unfair to expect them to accept a general obligation to introduce preferential treatment with the objective of achieving international equality. Secondly, the land-locked states' argument is that it is unjust to apply the same rules on access to resources to them as to states with extensive coastlines and broad continental shelves; instead, different rules should be applied in their favour in order to foster true equality in the international community. However, if this argument is to be accepted as valid, the land-locked and geographically disadvantaged states will have to prove that such discrimination is not arbitrary and is reasonable in the circumstances[158].

A second argument in favour of preferential treatment is based on interdependence. The interdependence of states in the international community has generated strong pressures on developed states to assume responsibility for their developing counterparts. Hoewever, when developed states agree to such preferential treatment, they often do so out of self-interest: interdependence has meant *inter alia* the creation of a global economy in which deprivation among developing states can have serious repercussions in the industrialised world. In any case, if the argument based on interdependence is used to justify preferential treatment for the land-locked and geographically disadvantaged states as a distinct group, developed land-locked and geographically disadvantaged states would be ineligible for consideration. In the second place, it would

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[156] See Vasciannie 1 21

[157] See General Principle Four of the first **UNCTAD**, the **Manila Declaration** adopted by the **Third Ministerial Meeting** of the 'Group of 77', and also the *South West Africa Cases* (Second Phase) (**ICJ** *Reports* 1966 at 284 ff) - Vasciannie 21-22

[158] Vasciannie 1 24/25

be untenable for the developing states of this group to claim preferential treatment as against other developing states[159].

A third argument used to justify preferential treatment for developing states is that former colonial powers and some other industrialised states which benefitted from colonial activities have a moral - if not a legal - duty to make reparations for past exploitation[160]. Western states have not accepted this interpretation of moral responsibility, but have tended to grant preferential treatment to their former colonial territories in the area of economic development[161]. In any case, even if a moral obligation does exist, it is unlikely that it would advance the cause of the developing land-locked and geographically disadvantaged states: it would be virtually impossible to prove that colonialism has had a more negative impact on such states than on other states[162].

However, there is no denying that land-locked states do face economical problems by virtue of their location. These problems affect all aspects of the development process

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159 Vasciannie 1 25/26

160 This idea has become the cornerstone of the philosophy of the **NIEO** - see Erasmus M G *The New International Economic Order and International Organizations* Frankfurt/Main: Haag und Herchen 1979 87. See also the report of the 1970 **Lusaka Seminar on Economic and Social Rights** - Vasciannie 1 27

161 For instance, cooperation under the four **Lomé Conventions** has been predicated at least partly on the assumption that the colonial experience has created a special relationship between certain European states and their African, Caribbean, and Pacific counterparts. The first (1975) and second (1980) **Lomé Conventions** were the *nuclei* of development between the **EEC** and the states of Africa, the Caribbean, and the Pacific (**ACP** states). The third **Lomé Convention** (signed on 8 December 1984, with 66 members) differed from the previous two in spelling out the partners' responsibilities and duties in their objectives and principles, shifting the burden of proof to the **EEC** when refusing **ACP** requests for derogation from **Protocol I**, and gave increased importance to fishing and transportation - see May 1985 *International Legal Materials* Vol XXIV No 3 571. The fourth **Lomé Convention** was signed on 15 December 1989 - to run for 10 years as from 1 March 1990 - by 12 **EEC** states and 69 **ACP** states (the Dominican Republic, Haiti and Namibia were the three new members). Among the signatories were Botswana, Lesotho, Malawi, Mozambique, Swaziland, Zambia, and Zimbabwe. Apart from the general provisions relating to 'special attention', specific measures relating to land-locked states are on agricultural cooperation, food security and rural development (Article 52), development of fisheries (Article 62), industrial cooperation [Article 97(1)], development of services (Article 116), regional cooperation [Articles 159(g) and 165], allocation of resources (Article 238), and development finance cooperation [Article 220(o)] - see July 1990 *International Legal Materials* Vol XXIX No 4 783

162 While it is possible to identify a number of common features in the practice of colonialism, details of the colonial process in different territories varied according to a multitude of factors - see Vasciannie 1 27

in land-locked states, but they have a particularly marked impact in the area of external trade. Exports from land-locked states are often limited to a narrow range of products, and in addition those products tend to be relatively uncompetitive in foreign markets. Furthermore, the problems of some land-locked states are exacerbated by the fact that their transit needs are not always regarded as matters of high prioroty in the neighbouring states through which their goods must pass[163].

The question is thus whether the above grounds are sufficient reason for preferential treatment for land-locked states. In the first place, however, it should be clear that preferential treatment for land-locked states would include their developed European counterparts (states that have already overcome the obstacles they face as a result of their location). Exactly because those states have achieved development without privileges in the law of the sea, it can be argued that such privileges are not necessary for the improvement of conditions in developing land-locked states[164].

More importantly, the arguments in favour of developing land-locked states tend to underestimate the difficulties faced by other developing states. Developing states as a group suffer from shortages of capital and skilled manpower, poor transit facilities, limited access to technology, and structural weaknesses in agriculture and manufacturing. Under those circumstances it would seem invidious to identify one obstacle to the development (in this case land-lockedness) and to create special rights for states facing that particular obstacle.

One could thus identify with Szentes that the answer to the problem would rather be in restructuring, and creating an investment policy for internal and regional integration[165] (presumably with the the same foreign aid that would have been used to bolster the infrastructure of developing states in the first place).

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[163] Vasciannie 1 30/31

[164] Vasciannie 1 31

[165] Szentes 153 275

5.4 ACCESS TO THE LIVING RESOURCES OF THE SEA

The question of access for land-locked states to the living resources of the sea (and especially in the exclusive economic zones of coastal states) was highly controversial throughout the negotiations at **UNCLOS III**. It was furthermore of considerable economic importance because - at the time of the negotiations - over 95% of the world's marine fish catch was taken within 200 miles from the shore[166].

In general, the basic principle which governs the exploration of living resources in areas outside zones of national jurisdiction is freedom of fishing. This is provided for in the 1958 Geneva **Convention on the High Seas**[167] and the **Convention on Fishing and Conservation of the Living Resources of the High Seas**[168]. In addition, the principle is well established as a rule of customary international law[169].

However, it had been noted before that in the period after the 1945 **Truman Proclamation** a number of coastal states (in particular Latin American states) unilaterally extended their territorial seas or fishing zones to up too 200 miles.

In addition, neither the 1958 nor the 1960 Geneva conference could reach agreement on either the breadth of the territorial sea or on fishing limits. Thus, even though the

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[166] Vasciannie 1 34

[167] Article 2

[168] Article 1

[169] Not only does the **Convention on the High Seas** declare itself to be declaratory of established principles of international law, but the **ILC** had stated that the provision on freedom of fishing in the **Convention on Fishing and Conservation of the Living Resources of the High Seas** was a confirmatory one

above-mentioned two 1958 conventions affirmed the basic rule of freedom of fishing in the high seas, the actual area of application was in doubt[170].

The first proposal using the term 'exclusive economic zone' was made by Kenya at the 1972 meeting of the **Asian-African Legal Consultative Committee** in Lagos. The Kenyan proposal[171] was followed up by Caribbean states at the 1972 Santa Domingo **Specialized Conference on the Law of the Sea** and the African states participating in the **Regional Seminar on the Law of the Sea** at Yaoundé the same year[172]. The 1974 **Kampala Declaration** stressed that **UNCLOS III** should take into consideration the 'needs and interests of developing countries, particularly those of the land-locked and other GDS'[173].

Throughout the negotiations at **UNCLOS III** the land-locked and geographically-disadvantaged states maintained that they should be granted special rights in the exclusive economic zones of neighbouring coastal states. Their main argument was that they were entitled to access to living resources under the pre-existing high seas regime, and that they should therefore remain entitled to a similar right of access under the new regime. Another important factor was the economically underdeveloped condition of developing states (and thus also developing land-locked states). The land-locked states stressed that arguments concerning access to living resources based on development needs should apply to them as well. In the third place, a number of

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[170] After the two Geneva conferences the 12-mile territorial sea claimants grew in numbers from 30 to 50, in spite of opposition by *inter alia* the UK and the US (who favoured a 3-mile limit). Furthermore, several states unilaterally claimed 12-mile exclusive fishing zones and entered into bilateral agreements recognising such claims. The practice grew to such an extent that the **ICJ** in 1974 pronounced that such zones had crystallized in customary international law - see Vasciannie 1 36. See also the *Fisheries Jurisdiction Cases* 2.6.3 *supra*

[171] Recommending a 200-mile zone in which coastal states would possess exclusive jurisdiction in matters pertaining to fisheries and pollution control. It maintained, however, that the establishment of the zone should not affect the traditional freedoms of navigation and overflight for third states

[172] The latter unanimously endorsed the concept of an economic zone in which individual coastal states would have exclusive jurisdiction for the purpose of control, regulation, and exploitation of living resources. However, land-locked and 'near-land-locked' states should be able to take part in exploitation of living resources in the zone - Vasciannie 1 38

[173] Vasciannie 1 38

states used the disadvantaged geographical position of certain states to support arguments for equitable readjustment at **UNCLOS III** (as a means by which the international system could correct the hazards of nature)[174].

During the **UNCLOS III** negotiations the land-locked and geographically disadvantaged states made it quite clear that - in their view - they were entitled to participate in the exploration and exploitation of neighbouring coastal zones on an equal and non-discriminatory basis. Even though this was a fairly radical demand, its chances of success initially seemed fair because of the numerical strength of the group. Furthermore, it was also boosted by the willingness of certain coastal states to offer qualified support for the principle of equal access[175]. However, the opponents to the principle of equal access wanted to make the actual sharing of the living resources for land-locked and geographically disadvantaged states subject to coastal state discretion[176].

At stake was not just the question of access to the living resources as such. In the first place, there was the so-called 'surplus question'. A number of European and some Latin American states wanted to confine land-locked and geographically disadvantaged states' access to the surplus living resources[177] of the exclusive economic zone. The land-locked and geographically disadvantaged states, however, contended that if rights were limited to surplus, the full allowable catch by a coastal state would render their

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[174] Vasciannie 1 42

[175] See Vasciannie 1 44/45 for the 1973 **Declaration on the Issues of the Law of the Sea** by the African states, and the 'Draft Articles on Fisheries' of the same year by Canada, India, Kenya, and Sri Lanka

[176] See Vasciannie 1 46/47

[177] That is, coastal states would have the power (subject to scrutiny by relevant regional or sectoral organisations) to fix the total allowable catch which would ensure the maintenance of the maximum sustainable yield. The coastal state would then have the right to reserve for itself that portion of the allowable catch of one or more species which it had the capacity to take, while the rest would be 'surplus'

rights in the exclusive economic zone meaningless[178]. However, the negotiating texts favoured the view that access should be defined in terms of surplus living resources.

The 1982 **LOSC** proved to be a disappointment for land-locked and geographically disadvantaged states in this respect. Articles 69 and 70 of the **LOSC** clearly define their rights to surplus resources[179] which must be exercised in conformity with these articles giving coastal states the power to determine the allowable catch in the exclusive economic zone[180], and their capacity to harvest that catch[181].

A second question at stake during the negotiations was the issue of participation on an 'equitable basis'. The land-locked and geographically disadvantaged states initially insisted on the term 'equal access'. However, according to the 1982 **LOSC**, land-locked[182] and geographically disadvantaged[183] states shall have the right to exploit the surplus resources from the exclusive economic zones of coastal states in the same region or subregion on an equitable basis, taking into account the relevant economic and geographical circumstances of the states concerned. The vagueness of the concept of equitable participation is somewhat lessened by the factors specified to be

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[178] Because, in the first place, coastal states might (through joint ventures with advanced fishing nations) harvest their entire allowable catch, and secondly, it could be expected that coastal states might accelerate the development of their fishing technology in order to exploit all of their allowable catch. See also Burke W T 'The Law of the Sea Convention and Fishing Practices of Nonsignatories, with Special Reference to the United States' in *Consenus and Confrontation: The United States and the Law of the Sea Convention* edited by Van Dyke J M Honolulu: University of Hawaii 1985 320

[179] Article 69(1)

[180] Article 61(1)

[181] Article 62(2)

[182] Article 69(1)

[183] Article 70(1)

considered when agreements concerning participation are being made between coastal states and land-locked and geographically disadvantaged states[184].

A third issue concerns the question of whether the rights of the land-locked and geographically disadvantaged states are preferential as against third states. The 1982 **LOSC**[185] specifies a non-exhaustive list of state interests to be considered in the allocation of the surplus[186], but does not indicate any priority that may exist *inter se*[187].

A fourth issue concerns the question as to what happens when there is no surplus. As far as land-locked states are concerned[188], Article 69(3) of the 1982 **LOSC** provides that 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 cooperate in the establishment of equitable arrangements on a bilateral, subregional or regional basis 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 zones of coastal states of the subregion or region, 'as may be appropriate in the circumstances and on terms satisfactory to all the parties'[189]. The provision seems to favour the coastal states in terms of not placing them under any constraint, and one author opines that the

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184 The factors are (i) the need to avoid effects detrimental to fishing communities or fishing industries in the coastal state, (ii) the extent to which the land-locked or geographically disadvantaged state is participating or entitled to participate in the exclusive economic zones of other coastal states, (iii) the extent to which other land-locked or geographically disadvantaged states are exploiting the living resources of the exclusive economic zone of the coastal state, and (iv) the nutritional needs of the populations of the respective states - see Articles 69(2) and 70(3) of the 1982 **LOSC**

185 Article 62(3)

186 In addition to land-locked and geographically disadvantaged states, the interests mentioned are those of (i) developing states in the subregion or region, (ii) states with traditional fishing rights, and (iii) states which have made substantial efforts in research and the identification of stocks

187 See Vasciannie 1 53/54 for the various possibilities as far as the interpretation of this question is concerned

188 See Article 70(4) of the 1982 **LOSC** for the provisions concerning geographically disadvantaged states

189 Article 69(3) of the 1982 **LOSC**

land-locked states 'will have a highly circumscribed right of participation' at best when there is no surplus in the exclusive economic zones of their coastal neighbours[190].

A fifth issue concerns the exception for 'overwhelmingly dependent' states[191]. That restriction was justified (during the negotiations at **UNCLOS III**) on the ground that it would be inequitable to expect a coastal state in that category to share its fishery resources with others. The main problem with the clause is that the convention provides no defintion of criteria for identifying 'overwhelming dependence'[192].

A sixth issue concerns the determination of the surplus and dispute settlement. Articles 61(1) and 62(2) of the 1982 **LOSC** respectively provide that the coastal states determine the allowable catch and the harvesting capacity. As a result, land-locked states (as well as other geographically disadvantaged states) may have access to only a small surplus or no surplus at all. This discretion given to coastal states is reinforced by the provisions on dispute settlement[193]. Although the convention provides for the compulsory settlement of fisheries disputes[194], those concerning coastal states' rights over living resources are specifically exempted[195]. This underlines the weak position of land-locked states regarding disputes that concern surplus determination.

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[190] Vasciannie 1 55

[191] Where the economy of a state is overwhelmingly dependent on the exploitation of living resources, the provisions of Articles 69 and 70 of the 1982 **LOSC** do not apply - see Article 71

[192] Vasciannie (1 56) warns that Article 71 may induce other coastal states to plead overwhelming independence and thus erode the rights of land-locked states

[193] See Part XV of the 1982 **LOSC**

[194] Article 297(3)(a) of the 1982 **LOSC**

[195] Included in the exempted category are disputes concerning discretion with regard to the determination of the allowable catch, harvesting capacity, and surplus allocation. Even though Article 297(3)(b) does establish a compulsory conciliatory procedure in relation to certain coastal state actions which may infringe the rights of land-locked states, this procedure would not cover the situation where a coastal state has incorrectly determined its capacity to harvest, or its allowable catch - see Vasciannie 1 58

As far as the terminological debate about 'rights' for land-locked states is concerned, the term is now included in the 1982 **LOSC** despite vigorous opposition to it at the **UNCLOS III** negotiations[196].

While the group of land-locked and geographically disadvantaged states advocated 'discrimination' in their favour at the **UNCLOS III** negotiations on *inter alia* the basis of economics, the 1982 **LOSC** has accepted the principle that both developing and developed land-locked and geographically disadvantaged states should be entitled to rights in neighbouring zones[197], but at the same time provides that only developing land-locked and geographically disadvantaged states are identified for special consideration concerning the allocation of the exclusive economic zone resources where a given coastal state approaches the point where it may harvest its entire allowable catch[198].

Finally, as far as land-locked states and marine scientific research is concerned, the interests of land-locked states (and geographically disadvantaged states) are promoted in certain respects[199]. However, it can be argued that in real terms Article 254 may be deficient in certain respects as far as land-locked states are concerned[200].

In conclusion, even though there may be definite benefits for land-locked states in the provisions of the 1982 **LOSC**, it is certainly less than they might have hoped for[201].

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196 See Article 69 of the 1982 **LOSC** for the rights of land-locked states

197 See Vasciannie 1 63

198 See again Articles 69(3) and 70(4) of the 1982 **LOSC**, and also Articles 69(4) and 70(5) which limits the exploration of exclusive economic zones of developed states in the same subregion or region (but not applicable to developing land-locked or geographically disadvantaged states)

199 Article 254 provides that (i) in certain cases, states or organisations should inform the land-locked state when they intend undertaking research in the exclusive economic zone or continental shelf of a neighbouring coastal state. (ii) such states or organisations should inform the land-locked state with details and information concerning the project, and (iii) at their request land-locked states should be given the opportunity to participate in such projects through qualified experts whom they may wish to appoint

200 See Vasciannie 1 66-68 for the arguments

201 See 5.8 *infra*

5.5 ACCESS TO THE MINERAL RESOURCES OF THE SEA

The history of and claims to the 'common heritage of mankind' have been discussed before[202]. Here the question of entitlement to seabed resources for land-locked states - as provided for in the 1982 **LOSC** - will be examined.

All the proposals made by the group of land-locked and geographically disadvantaged states at **UNCLOS III** were based on the assumption that members of the group would be entitled to resource rights in the Area as a matter of course[203]. This approach[204] was furthermore not challenged until 1982[205]: the majority of states participating in the seabed debates based their positions on the view that the Area and its resources were the 'common heritage of mankind', and it would thus have been logically inconsistent for them to maintain that a 'significant part of mankind should be banned automatically from full access'[206].

The 1982 **LOSC** makes no special provision in favour of developed land-locked states in matters relating to deep seabed participation[207]. At the same time, the **LOSC** contains only three articles which refer explicitly to the positions of land-locked states in the context of direct participation[208].

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202 See 4.3 *supra*

203 See Vasciannie 1 143/144

204 As laid down in Paragraph 7 of the 1970 General Assembly **Declaration of Principles Governing the Sea-bed and Ocean Floor, and Subsoil thereof, beyond the Limits of National Jurisdiction**

205 See 7.2 *infra*

206 Vasciannie 1 144

207 These states will have access to the resources of the Area under the same terms and conditions as developed coastal states

208 'Direct participation' refers to direct involvement of states in the exploration and exploitation of the deep seabed and its subsoil, and thus not to participation in the organs of the **Authority**

Article 148 provides that the effective participation of developing states in activities in the Area shall be promoted 'having due regard to their special interests and needs, and in particular to the special need of the land-locked and geographically disadvantaged among them to overcome obstacles arising from their disadvantaged location, including remoteness from the Area and difficulty of access to and from it'[209].

In addition, Article 152(2)[210] provides that special consideration for developing states - in particular, consideration for the land-locked and geographically disadvantaged states - shall be permitted[211].

Article 160(2)(k) gives the **Assembly** the power to consider problems which land-locked and geographically disadvantaged states may have in connection with activities in the Area.

However, both Articles 152(2) and 160(2)(k) seem to be superfluous[212], and it would seem that the **Authority** would have to rely on Article 148 when it decides on the participation of land-locked states. At the same time, Article 148 is not entirely clear. In particular, it does not indicate when liability will arise for breach of its terms, and it fails to specify the penalties which may be enforced in that event. Therefore, the **Authority** will have great discretion in deciding the precise rules which govern this particular area.

Certain specific rules designed to promote the participation of developing states as a whole are included in the 1982 **LOSC**, for example in matters such as the transfer of

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[209] Article 148 of the 1982 **LOSC**

[210] 'Exercise of powers and functions by the Authority'

[211] Even though this may be in breach of the principle of non-discrimination - see Articles 152(1) and 157(3)

[212] See Vasciannie 1 162

technology[213], the training of personnel[214], and the selection of applicants for reserved areas[215].

As far as the **Enterprise** is concerned, Article 12(3)(b)(ii) of Annex IV of the 1982 **LOSC** provides that the **Enterprise** shall give preference to goods and services originating in developing states, including the land-locked and geographically disadvantaged states, in conformity with guidelines approved by the **Council**[216].

The primary objective of land-locked states in the area of revenue-sharing had been to maximise their share of the financial benefits to be derived from the exploitation of the deep seabed. However, the 1982 **LOSC** contains no general reference to special treatment for them in this regard. It means that these states may have to be content with financial benefits on the same basis as coastal states. At the same time, because there is no clear rule prohibiting preferential treatment for developing land-locked states, it may be that the **Authority** would be acting within the scope of its discretion if it were to elect to treat these states more favourably than others[217].

As far as representation in the **Council** is concerned, Article 161 of the 1982 **LOSC** provides that states representing special interests shall occupy one half of the seats in

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[213] Articles 144(1)(b), and 144(2)(a) and (b)

[214] Article 143(3)(a) and (b)

[215] Article 9 of Annex III

[216] However, particular reference to preferential treatment is omitted

[217] Vasciannie 1 167

the 36-member body[218]. In practical terms, however, it may not mean much to land-locked states[219].

At the same time, much depends on the manner of application of the provisions of the convention. If the international community adheres to the spirit of the provisions on membership, land-locked and geographically disadvantaged states could play a critical role in decision-making. The voting rules in the **Council** have been designed to protect minority interests: by virtue of Article 161(8)(d) certain important decisions by the **Council** can only be made on the basis of consensus among all members. This ensures that even a small group of land-locked and geographically disadvantaged states can prevent the introduction of rules which are contrary to its fundamental interests. In addition, they would be able to exercise considerable influence over policy decisions because almost all major decisions in the **Council** require a two-thirds majority of those present and voting[220].

Once again, however, it is quite clear that land-locked states did not achieve everything they wished for. The reasons for that will be discussed in Chapter Seven. At the same time, the 1982 **LOSC** is not in force yet, and land-locked states may well have time to reflect on their strategies should the matter under discussion come up for negotiation again at a later stage.

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[218] They shall be elected by the **Assembly** in the following order:

(a) Four members from among States Parties that are the largest consumers or importers of commodities produced from the types of minerals to be derived from the Area. The largest consumer and one Eastern European State shall be included in this category;
(b) Four members from among the eight States Parties which have the largest investments in preparation for and in the conduct of activities in the Area, including at least one Eastern European country;
(c) Four from among the major net exporters of the categories of minerals derived from the Area; including at least two developing States;
(d) Six developing States representing special interests. The special interests to be represented shall include States with large populations, land-locked states or geographically disadvantaged states, major importers of the categories of minerals derived from the Area, potential producers of these minerals, and least developed States.

[219] See Vasciasnnie 1 174/175

[220] Article 161(8)(c) of the 1982 **LOSC**

5.6 ENFORCEMENT

It may be argued that the provisions in the 1982 **LOSC** pertaining to enforcement[221] do not particularly apply to land-locked states. However, a brief comment may be necessary.

Pollution from land-based sources[222] may be applicable to land-locked states with rivers flowing into the sea from their territories through transit states. Similarly, should a land-locked state be in a position to take part in the activities in the Area, Articles 214[223] and 215[224] could apply.

Article 216(1)(b) refers to enforcement by the flag state with regard to vessels flying its flag or vessels or aircraft of its registry. Thus, by virtue of the provision of Article 90[225], it will also apply to land-locked states. The same applies to Article 217[226].

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[221] Articles 213-222 of the 1982 **LOSC**. See also D'Amato A 'The Enforcement of Norms and Rules with Respect to Nonparties' in *Consensus and Confrontation: The United States and the Law of the Sea Convention* edited by Van Dyke J M Honolulu: The Law of the Sea Institute, University of Hawaiii 1985 492-495 where he distinguishes between three types of enforcement: judicial, military, and systemic

[222] Addressed in Article 213

[223] 'Enforcement with respect to pollution from sea-bed activities'

[224] 'Enforcement with respect to pollution from activities in the Area'

[225] 'Every state, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas'

[226] 'Enforcement by flag states'

5.7 SETTLEMENT OF DISPUTES

The original support for the establishment of a viable disputes settlement system for the **LOSC** was based upon the understanding that the substantive parts of the convention were the result of delicate compromises. Thus, the competing rights and obligations of the states parties could easily disintegrate through unilateral interpretations of the treaty itself in the case of a dispute. Accordingly, it was felt necessary to establish[227] viable third-party procedures, including judicial procedures, for the settlement of disputes that may arise under the convention: not only for the objective interpretation and application of the treaty, but also for removing law of the sea disputes from the arena of settlement through the threat or the use of force[228]. A viable system of settlement of disputes was thus one of the focal points towards the new order in the oceans that **UNCLOS III** tried to create.

In the convention there is no general clause for submission of disputes to the **ICJ**. However, the convention does introduce two innovations in the field of dispute settlement. In the first place, the procedure of dispute settlement is objectively determined by the type of legal relationships created by the relevant substantive provisions of the convention: different procedures of settlement are applicable to different types of substantive legal relationships. In the second place, there is much scope left for a subjective determination - or choice - of the applicable procedure of dispute settlement by the party or parties concerned, and some scope for the unilateral subjective exclusion of dispute settlement procedures[229].

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[227] As part of the 'package deal' approach

[228] Adede A O *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea* Dordrecht: Martinus Nijhoff Publishers 1987 241

[229] See Riphagen W 'Dispute Settlement in the 1982 United Nations Convention on the Law of the Sea' in *The New Law of the Sea* edited by Rozakis C L and Stephanou C A Amsterdam: North-Holland 1983 283

The convention makes provision for some 12 different mechanisms of settlement of disputes[230]. Of particular interest to land-locked and transit states are the following: (i) conciliation[231], (ii) arbitration[232], (iii) judicial settlement by the **International Tribunal for the Law of the Sea (ITLOS)**[233], (iv) settlement by a special chamber of **ITLOS**[234], and (v) judicial settlement by the **ICJ**.

Section 1 of Annex V deals with conciliation: institution of proceedings, list of conciliators, constitution of conciliation commission, procedure, amicable settlement, functions of the commission, report, termination, fees and expenses, and the right of parties to modify procedure[235]. The procedures are clearly non-compulsory: they can only be set in motion if the parties to an existing dispute agree to do so[236].

Annex VII deals with arbitration. Article 1 states:

> Subject to the provisions of Part XV, any party to a dispute may submit the dispute to the arbitral procedure provided for in this Annex by written notification addressed to the other party or parties to the dispute. The notification shall be accompanied by a statement of the claim and the grounds on which it is based[237].

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230 Riphagen 229 283/284

231 Annex V, Section 1

232 Annex VII

233 Annex VI

234 Annex VI, Article 15

235 Annex V Articles 1-10

236 See Erasmus G 'Dispute settlement in the law of the sea' in *The Law of the Sea* edited by Bennett T W *et al* Capte Town: Juta & Co, Ltd 1986 22

237 Annex VII Article 1

This Annex furthermore provides for a list of arbitrators to be drawn up and maintained by the Secretary-General (four each to every state party)[238].

Unless the parties to the dispute otherwise agree, the arbitral tribunal shall determine its own procedure, 'assuring to each party a full opportunity to be heard and to present its case'[239]. Any controversy which may arise between the parties as regards the interpretation or manner of implementation of the outcome of the proceedings may be submitted to the arbitral tribunal[240], or to another court or tribunal under article 287 by agreement of all the parties to the dispute[241].

Arbitration procedure under Annex VII is compulsory in the sense that it can be set in motion by one party to the dispute. However, the competence or jurisdiction of the third party often does not rest on the convention alone, but also on the choice made by a party before the dispute has arisen[242].

Annex VI deals with judicial settlement by **ITLOS**. The tribunal is to consist of 21 independent members, no two of which may be nationals of the same state[243]. The members shall be elected for nine years and may be re-elected[244]. Article 2(2) contains a provision that - in the Tribunal as a whole - the representation of the principal legal systems of the world and equitable geographical distribution shall be assured[245].

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[238] Annex VII Article 2(1)

[239] Annex VII Article 5

[240] Annex VII Article 12(1)

[241] Annex VII Article 12(2)

[242] Erasmus 236 22

[243] Annex VI Articles 2(1) and 3(1)

[244] Annex VI Articles 5(1)

[245] Annex VI Article 2(2)

The jurisdiction of the tribunal comprises all disputes and all applications submitted to it in accordance with the **LOSC** and all matters specifically provided for in any other agreement which confers jurisdiction on the tribunal[246]. All questions are to be decided by a majority of the members of the tribunal present, with a casting vote by the President of the tribunal[247].

Article 15 of Annex VI makes provision for special chambers (composed of three or more of the elected members of the tribunal) for dealing with particular categories of disputes[248]. The purpose of such a special chamber seems to be 'the speedy dispatch of business'[249]. A decision handed down by such a special chamber 'shall be considered as rendered by the Tribunal'[250].

Another mechanism for the settlement of disputes is the **ICJ**[251]. For the purposes of such a hearing the court may appoint experts on scientific or technical matters to sit with the court (but without the right to vote)[252].

Article 287 offers a state the possibility to choose between the different procedures in this article[253]. However, Riphagen[254] points out that this is only a choice: if no

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246 Annex VI Article 21

247 Annex VI Articles 29(1) and 29(2)

248 Annex VI Article 15(1)

249 Annex VI Article 15(3)

250 Annex VI Article 15(5)

251 Artice 287 and Annex IX Article 7

252 Article 289

253 Article 287(1). See also Taniguchi C 'Jurisdiction, Enforcement, and Dispute Settlement in the Law of the Sea Convention' in *Consensus and Confrontation: The United States and the Law of the Sea Convention* edited by Van Dyke J M Honolulu: The Law of the Sea Institute, University of Hawaii 1985 481

254 Riphagen 229 284

written declaration under article 287 is made, the state is deemed to have chosen the procedure of arbitration under Annex VII. Furthermore he contends:

> In its written declaration, the State may choose "one or more" of the four courts or tribunals. It is not quite clear whether, in doing so, it may also specify that it accepts one court or tribunal for one category of disputes, and another for another category. One might argue that such diversified choice complicates the application of the system, but that is hardly a decisive argument in view of the difficulties already inherent in the technique of dispute settlement adopted by the Convention itself. Moreover, the wording of Art. 287(3) rather seems to point in the direction of the admissibility of the multiple diversified choice[255].

In conclusion, the guiding principle (as also reflected in the drafting history of the specific articles) is that the will of the parties must prevail. Thus the parties may - by agreement - select any dispute settlement method they wish. They are also able to bypass the provisions of the convention by agreeing in advance to use some other bilateral, regional or general settlement system. Furthermore, even after a dispute has arisen and has been submitted to a procedure provided for in the convention, the parties can agree at any time to settle the dispute in question by a different procedure[256].

The need to maintain the flexibility - aimed at achieving a wider acceptability of the dispute settlement system as an integral part of the convention - led to Article 287[257] 'offering parties a cafeteria of jurisdictions'[258]. If parties to a dispute have not accepted the same forum of procedure, they are obliged to submit the dispute to arbitrartion. Thus, the system favours a state which makes a declaration choosing arbitration in the first place.

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[255] Riphagen 229 284/285. See also Adede 228 242/243, Erasmus 236 22

[256] Adede 228 283, Erasmus 236 22

[257] The so-called 'Montreux formula'

[258] Adede 228 283

At the same time, Erasmus points out that the outstanding positive point in connection with the dispute settlement procedure is that - with exception of the limitations contained in Articles 297 and 298 - the system is a compulsory one. If none of the proposed methods is selected, arbitration is to be accepted[259].

> The final evaluation of the system will have to await the eventual entering into force of the Convention and especially the activities of the Sea-Bed Authority in the Area. The very nature of the Area scheme seems to be such as to make its successfull implementation dependent on near universality. This does not appear very promising at present[260].

5.8 CONCLUSION

Devine[261] divides the contents of the convention into four different kinds of rule: declaratory, legislative and clarificatory rules, and so-called 'doubtful provisions'[262]. As far as land-locked states and the convention are concerned, he offers the following:

> The provisions (which favour land-locked states) are legislative, ie new. They do not represent the existing law. Hence it is only by ratifying the Convention that a landlocked state could acquire these rights and it would acquire them against a coastal state which also ratified the Convention. On these matters it is clear that in Southern Africa the interests of South Africa, Mozambique and Angola would diverge from those of Botswana, Lesotho, Swaziland, Malawi, Zambia and Zimbabwe. This divergence of interest would be a factor to be taken into consideration by the different states in deciding whether or not to ratify the Convention[263].

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259 Erasmus 236 25. See also Anand R P 'The Settlement of Disputes and the Law of the Sea Convention' in *Consensus and Confrontation: The United States and the Law of the Sea Convention* edited by Van Dyke J M Honolulu: The Law of the Sea Institute, University of Hawaii 1985 484

260 Erasmus 236 25

261 Devine D J 'Southern Africa and the law of the sea: Problems common, uncommon and unique' in *The Law of the Sea* edited by Bennett T W *et al* Cape Town: Juta & Co, Ltd 1986 30

262 *Ibid*

263 Devine 261 31

It should be apparent from the above and also from the deliberations at **UNCLOS III** that there exists a general consensus on certain fundamental principles as far as access to the sea for land-locked states is concerned. In the first place, as a matter of necessity - and to enable their participation in the common heritage of mankind - a right of access to the sea must be recognised for land-locked states. In the second place, implicit to meaningful recognition is the proposition that general principles governing the exercise of that right must be provided for in a single internationally binding legal instrument.

The 1982 **LOSC** is a positive step towards these goals. However, it is quite clear that the convention is not yet in force. It is therefore not yet a legally binding instrument. To realise its promise, the convention must be ratified by transit states. Such states should also be bound to recognise and respect the right of access and freedom of transit guaranteed to land-locked states in the convention. In addition, these rights will have to be guaranteed in bilateral agreements between land-locked states and transit states.

Furthermore, certain provisions of the convention (the ones relating to **ITLOS**, for instance) could be applicable to states and other entities not parties to the convention only if they themselves provided for such an application and if third parties agreed to submit themselves to these conventional rules[264]. However, one of the convention's characteristics is that it almost completely ignores states which do not become parties to it.

It is obvious that the success of the convention will be measured in large part by the number of participants it attracts. Without the support of a significant majority of transit states, the right of access recognised in the convention could never be of much assistance for many land-locked states. Furthermore, even with universal acceptance of an international rule, details for the day-to-day administration of trade necessarily must be agreed upon between the individual land-locked and transit states concerned.

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[264] Vukas B 'The Impact of the Third United Nations Conference on the Law of the Sea on Customary Law' in *The New Law of the Sea* edited by Rozakis C L and Stephanou C A Amsterdam: North-Holland 1983 49

Nevertheless, the scope of such bilateral agreements should be limited to an accommodation of local circumstances and facilitation of trade implementing the broader purposes of the convention.

Indeed, Sinjela suggests that absence of agreement on the above terms may not legally justify the suspension or abrogation of an otherwise valid right of access[265].

One could therefore sympathise with Sinjela that '(p)ursuant to provisions of the Convention allowing establishment of greater transit facilities than mandated, land-locked countries could seek agreement with transit States for the grant of international servitudes'[266]. This would of course mean that such land-locked states have greater rights than those provided for in the convention. An international servitude is a real right whereby the territory of one state can be 'used' on a permanent basis by another state for a particular purpose[267]. As Sinjela points out, such arrangements would also protect a land-locked state from suspension or abrogation of its right of access to and from the sea because, once granted, a servitude attains in international law an existence independent of the agreement which created it, with the result that it is not abolished with the cancellation of the agreement.

Koh[268] poses the question as to what led to breakdown of the old legal order governing the seas. He answers the question as follows:

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[265] Sinjela 1 59. See also Vukas 264 48/49

[266] Sinjela 1 59

[267] Such servitudes might include the actual grant of a corridor linking the territory of the land-locked state with the sea, or a right to use existing rail, road or river systems on a permanent basis - see Sinjela 1 59

[268] Koh T T B 'The Origins of the 1982 Convention on the Law of the Sea' in 1987 *Malaya Law Review* Vol 29 1-17 14

> The old legal order collapsed under the weight of three causes: first, the progress of technology; second, the failure of the traditional law to deal adequately with the concerns of coastal states regarding the utilisation of oceanic resources; and third, the emergence of the developing countries[269].

A fourth reason (but linking up with the third) may be that for too long land-locked states (and their special problems) have taken a back seat to developments in the international law of the sea.

Sinjela points out that it has to be borne in mind that assured access to the sea for land-locked states is but one focal point in a broad spectrum of legal and economic issues facing the new international order. Expanding use of the sea (and a concomitant heavier reliance on its resources) is inevitable in the future. Therefore the needs of land-locked states (especially if they are also developing states, as most land-locked states are) demand legal recognition if a new international economic order is to be established. 'Implementation of the widest possible right of access is essential if these States are to attain their goals of economic development and enhanced quality of life for their people'[270].

However, even with universal acceptance of an international rule, details for the day-to-day administration of transit trade necessarily must be agreed upon between the individual land-locked and transit states concerned. The scope of such bilateral agreements should be limited to an accommodation of local circumstances and facilitation of trade to implement the broader purposes of the convention. Absence of agreement on these terms may not legally justify the suspension or abrogation of an otherwise valid right of access.

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[269] Koh 268 14

[270] Sinjela 1 60

CHAPTER SIX : A COMPARISON OF SOUTHERN AFRICAN LAND-LOCKED STATES

6.1 INTRODUCTION

Any discussion of Southern African land-locked states hinges on two particular bodies to address the problems of those states: the **Southern African Customs Union (SACU)**, and the **Southern African Development Coordination Conference (SADCC)**. However, a brief look is necessary at the different strata of economic cooperation in Southern Africa. These are: (i) organisations from which South Africa is excluded[1], (ii) organisations in which South Africa and neighbouring states are formal members[2], (iii) sectoral working agreements between South Africa and neighbouring states[3], and (iv) multilateral cooperation within South Africa's traditional borders[4].

The **SACU** used to consist of Botswana, Lesotho, South Africa, and Swaziland. It dates back to 1910, but its ancestry may be traced to the 1889 **Customs Union Convention** between the Cape Colony and the Orange Free State[5]. Lesotho[6] and Botswana[7] were admitted as accessors to the convention in 1891 and 1893 respectively, and subsequently also to the 1898, 1903, and 1906 conventions (which covered larger areas of the subcontinent). Swaziland was part of the Transvaal customs area from 1984 to 1904 and

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1 The **SADCC** and the **Pereferntial Trade Area for Eastern and South Africa**

2 The **SACU**, the **Rand Monetary Area Agreement** of 1974, and the **Trilateral Monetary Area Agreement** of 1986

3 Labour agreements with Mozambique, Malawi, and Botswana, Lesotho and Swaziland; transport arrangements with the railway administrations of Malawi, Mozambique, Swaziland, Zambia, and Zimbabwe; and airways agreements with Botswana, Lesotho, Malawi, Mozambique, Swaziland, Zambia, and Zimbabwe

4 See Maasdorp G G 'Economic and Political Aspects of Regional Cooperation in Southern Africa' 1986 *South African Journal of Economics* Vol 54 No 2 163-168

5 Maasdorp G 'The Southern African Customs Union - An Assessment' 1982 *Journal of Contemporary African Studies* Vol 2 No 1 81

6 Then Basutoland

7 Then the Bechuanaland Protectorate

was admitted as a member of the 1903 **Customs Union Convention** under a protocol in 1904[8].

The 1906 convention was terminated with the formation of the Union of South Africa in 1910. In that year a **Customs Union Agreement** was signed between South Africa and the High Commission Territories[9]. The advent of political independence for Botswana and Lesotho in 1966 and Swaziland in 1968 brought about new negotiations in 1969, formally establishing the **Southern African Customs Union** on 11 December 1969. Namibia became the fifth member of the **SACU** on 10 July 1990. The accession was in accordance with Article 23 of the **Customs Union Agreement** of 1969, a new article which was adopted by the original members and which entered into force on 9 April 1990[10].

One of the main arguments of Botswana, Lesotho and Swaziland for concluding a new agreement in 1969 was that they should be compensated for trade-diversion effects. At the time of the 1910 agreement, the Union of South Africa and the High Commission Terrritories were all unindustrialised and there were no protective tariffs. The **Customs Union** could not have resulted in any trade diversion during its early years. From 1925, however, South Africa began to develop secondary industry behind tariff walls, and that must have led to trade diversion. The High Commission Territories did not attract industry, and thus felt that they were subsidising South African industrial growth (although only marginally because of their limited purchasing power). To date these states obtain the bulk of their imports from South Africa[11]. Areas of concern tthe **SACU** are industrial development, revenue-sharing, and loss of fiscal sovereignty[12]. Later negotiations were concerned with the revenue-sharing formula, in particular the

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8 Maasdorp 5 81

9 Basutoland, Bechuanaland, and Swaziland

10 It was necessary because the agreement contained no provision for the admission of new members

11 Maasdorp 5 88

12 See Maasdorp 5 93-103

range of the stabilisation factor, and the time-lag in payments from the common revenue pool, and resulted in certain amendments to that effect in 1975[13].

The first **Southern African Development Co-ordination Conference** was held in Arusha, Tanzania, from 3 to 4 July 1979. It was attended by ministers from Angola, Botswana, Mozambique, Tanzania and Zambia, as well as by representatives of nine Western potential donor states (Belgium, Canada, Denmark, the Federal Republic of Germany, the Netherlands, Norway, Sweden, the UK and the US), and six international organisations. The conference prepared a draft declaration entitled 'Southern Africa - towards Economic Liberation'.

At a meeting of heads of state and government (from Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe) held in Lusaka, Zambia, from 1 to 2 April 1980, the participants adopted a Lusaka declaration on economic liberation and a programme of action designed to achieve the liberation. It was aimed at closer integration of the nine states' economies in order to accelerate their development, and to reduce their economic dependence on South Africa[14].

The second **SADCC** conference was held by the nine states in Maputo, Mozambique, from 27 to 28 November 1980, to discuss development projects with representatives of potential donor states and 17 international organisations. Subsequent meetings have taken place in Salisbury, Zimbabwe (1981), Blantyre, Malawi (1981), Maseru, Lesotho (1983), Lusaka (1984), Gaborone, Botswana (1984), and every year subsequent to that.

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13 See further Baffoe F 'Some Aspects of the Political Economy of Economic Cooperation and Integration in Southern Africa: The Case of South Africa and the Countries of Botswana, Lesotho and Swaziland' in *Economic Cooperation and Integration in Africa* edited by Ndongko W A Dakar: Codesria Book Series 1985 254-285, Guma X P 'The Revised Southern African Customs Union Agreement: An Appraisal' 1990 *South African Journal of Economics* Vol 58 No 1 63-77, Hudson D J 'Brief Chronolgy of Customs Agreements in Southern Africa, 1855-1979' 1979 *Botswana Notes and Records* Vol 11 89-95, Setai B 'Integration and Policy Constraints to Industry and Trade in Botswana, Lesotho and Swaziland' 1988 *African Journal of Political Economy* Vol 2 No 1 101-119

14 The programme of action included *inter alia* proposals for the creation of a Southern African transport and communications commission based in Maputo, the preparation of a food security plan for the region, the establishment of a regional agricultural research centre, plans for the harmonisation of industrialisation and of energy policies, and studies leading to proposals for the establishment of a Southern African development fund

As the **SADCC**[15] celebrated its 10th birthday in 1990, the atmosphere was markedly different from when it first joined forces in Lusaka in 1980. The latter event coincided with the independence of Zimbabwe, which became the ninth member of the **SADCC**. In 1990, the independence of Namibia[16], and the unbanning of the **ANC** and the release of Mr Nelson Mandela in South Africa, promised an even more radical shift in regional politics.

The members of the **SADCC** sought to ease the region's economic dependence on South Africa, mainly by raising donor money to restore non-South African transport routes. Formed after nearly two decades of failed or mediocre efforts at regional cooperation elsewhere on the African continent, **SADCC** tried to avoid some of the pitfalls. Rather than by creating large bureacracies, the organisation delegated sectoral responsibilities to each of its members, maintaining only a tiny secretariat in Gaborone.

Unlike most African regional groups, which had trade as their primary focus, the **SADCC** argued that there is no point in easing nonphysical barriers to trade if physical barriers still exist. The argument is especially valid in Southern Africa. The ports of Angola, Mozambique and Tanzania are the closest for all the southern African states[17]. Yet by mid-1980[18], fully half of the region's traffic was moving through South African ports. However, the **SADCC** was able to raise about half the $6 000 million it sought for development projects - mostly in the transport and communications sectors.

Despite the developments along the transport corridors, some one-third of the **SADCC** trade still uses the longer and more expensive South African routes.

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15 Consisting of Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia, and Zimbabwe

16 Namibia became the 10th member of the **SADCC** in 1990

17 Apart from Lesotho, whose overseas trade is minimal, and Botswana, though only in the south

18 Largely because of South African-sponsored rebel activity in Angola and Mozambique, coupled with poor maintenance and management along the Tazara railway line linking Zambia with Tanzania

As far as rail and road-transportation in the region is concerned, the major features of the past 25 years have been the dislocation of the traditional transport routes of most of the land-locked states, a decline in operating and maintenance standards, and the growing competition between rail and road transport for long distance international traffic.

South African ports are not natural ones for the Southern African land-locked states (except in the case of Lesotho), but they have been increasingly used by those states because of route dislocation. The major cause of that situation was political[19]. A second cause was infrastructural deficiency, especially in the key maritime states of Mozambique and Tanzania[20]. A third cause was the inefficiency at managerial, operational, and technical levels[21]. It was in an effort to reduce the perceived dependence of neighbouring states on South Africa that the SADCC was formed in 1980. One of its major thrusts was in the field of transport, a special sectoral agency[22] having been established in Maputo for the purpose of coordinating projects.

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19 It began with the Rhodesian **UDI** of 1965, which prompted Zambia to look eastwards to Tanzania as a substitute for its southern route through Rhodesia. The Tazara Railway was opened in 1975. The Portuguese *coup d'etat* was the forerunner of a second round of distortions. Angola was soon engulfed in civil war and the Benguela Railway from Lobito (serving the copper mines of southern Zaire and Northern Zambia) was cut in 1975, thereby preventing the country from playing any further role in the subcontinental system, while the Mozambican government imposed sanctions on Rhodesia in 1976 by closing the Beira and Maputo lines. Rhodesia then made greater use of its direct line from Rutenga to the South African system at Beit Bridge which had been completed in 1974. Since the early 1980s, guerrillas in Mozambique have been able to close or severely disrupt railway lines (including the Nacala line built by Malawi and Portugal with South African financial assistance in 1970) and roads linking the land-locked states with their natural ports. See Maasdorp G 'A strategy for rail and road transportation in Southern Africa' 1991 *Africa Insight* Vol 21 No 1 7

20 Some of the deficiencies after 1980 were inadequate port installations and equipment for the handling of ships; inadequate track standards, line capacity, and motive power on a number of railways; poor telecommunications links between ports and land-locked states; and gaps in the railway and road networks which rule out the easy use of alternative ports for land-locked states - see Maasdorp 19 7

21 Once again, that applies particularly to Mozambique and Tanzania. In the former, the mass exodus of the Portuguese segment of the population just before and after independence meant the loss of almost all top and middle management, as well as technical staff. Shortages of skilled personnel also resulted in growing inefficiency in port and rail services in Tanzania - see Maasdorp 19 7

22 The **Southern African Transport and Communications Commission** (SATCC)

During the last few decades road haulage has been increasingly able to compete with railways in the region for long-distance international traffic. The dislocation of traditional railway corridors between the land-locked states and Mozambique entailed the diversion of traffic to the south, and much of this (especially from Malawi) has been conveyed by road rather than railway.

Against the above background, the major transport challenges facing Southern Africa are the following: (i) the restoration of the traditional transport routes of land-locked states[23], (ii) adequate maintenance of infrastructure (especially roads)[24], (iii) the optimal division of traffic between the modes of transport[25], and (iv) adequate standards of operational and administrative efficiency[26].

6.2 BOTSWANA

Because of its geographical location, Botswana is forced to seek some form of cooperation with Namibia, South Africa and Zimbabwe. Militarily, it faces an almost indefensible position, with borders 3 360 kilometres long[27]. The main arteries of Botswana's communications system are the railways and roads which run through the populated eastern part of the state and connect with the South African and Zimbabwean railway systems. Severance of these routes would effectively divide

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23 Imperative for this would be the resolution of the armed conflicts in Angola and Mozambique, as well as of South Africa's political future, in such a way that peace and stability return to the region. In addition, it would entail the rehabilitation of infrastructure destroyed or damaged, and the upgrading of port facilities, as well as of some railway track and motive power

24 In view of the financial constraints, this is an issue that should receive far more emphasis than it has up to now, especially in relation to the construction of new routes

25 This should be based on a number of factors, including full cost recovery from users

26 This is a factor that underpins each of the above three factors. Increased efficiency is necessary if the investment required in infrastructural rehabilitation and improvement is to yield the best results, if insfrastructure is to be adequately maintained, and if the various modes of transport are to be able to compete with one another in such a way as to facilitate an optimum division of traffic

27 Hermans H C L 'Botswana's options for independent existence' in *Land-locked Countries of Africa* edited by Cervenka Z Uppsala: The Scandinavian Institute of African Studies 1973 198

Botswana, or isolate it[28]. Similary, Botswana cannot ignore the fact that its telephone and postal communications with the outside world are to a large extent controlled by South Africa and Zimbabwe.

Botswana attained independence in September 1966, and has since then launched itself on a course sharply divergent from its neighbours. Majority rule produced responsible government, and economic development brought about progress. Only if this progress should be halted would Botswana's vulnerable geographical position become a potential international issue.

Botswana is a member of the SACU, but its economic relationshp with its neighbours is unsatisfactory[29]. Despite the drawbacks of being land-locked, however, Botswana has managed - through an austerity programme - to considerably bolster its foreign reserves in comparison with its neighbours[30].

In 1990 Botswana and Namibia agreed in principle to build two new highways which would provide a link between the land-locked hinterlands and Walvis Bay. The Trans-Caprivi Highway would be tarred eastward to Katimo Mulilo, south to enter Botswana at Ngoma, and then east again to link up with the tarred road leading to Zambia. The Trans-Kalahari would run from Jwaneng in southern Botswana to Buiterpos in Namibia, which is already linked to Windhoek[31]. The extension of road links would enable both Botswana and Zimbabwe to export beef, agricultural products, and minerals through Namibia, as well as setting up a joint marketing venture for selling beef to Europe.

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[28] The railway line which runs through eastern Botswana is about 650 kilomteres long. From its mid-point (Mahalapye) it is about 1 360 kilometres due west to Walvis Bay, and about 1 100 kilometres to Maputo or Durban

[29] See Hermans 27 204-205 for the factors at work

[30] See Jones D *Aid and Development in Southern Africa* London: Croom Helm 1977 77

[31] Already in 1984 a railway link across the Kalahari was mooted by President Masire of Botswana, but at that time the **South African Transport Services** announced that the branch line to Luderitz was to be closed - *Rand Daily Mail* 1984-08-21

However, transport in the region still face formidable obstacles[32]. Goods conveyed by rail between South Africa and Botswana must be carried by two railway systems and thus cannot enjoy the full advantage of normal tapering rail tariffs. In addition, there is the penalty of being a marginal user of the railway system. Similarly, there is discrimination in road transportation. Local road hauliers in Botswana, Lesotho and Swaziland have for a long time been prevented by South African licensing authorities from carrying loads to markets or railheads in South Africa.

Another problem which Botswana had to face for many years was that of refugees fleeing to it from Angola, Lesotho, Namibia, South Africa, and Zimbabwe.

6.3 LESOTHO

The kingdom of Lesotho (formerly Basotholand) is one of the 14 independent land-locked African states. It is small in area[33] and has a population of just over one million[34]. Lesotho is completely surrounded by South Africa. It has often been described as unique and unlike any other member of the UN in its insular position[35].

> The geographic location of Lesotho in the middle of South Africa would probably not create too many difficulties if it shared the political, social and economic goals with its only neighbour. But since this is not the case, Lesotho's problems are difficult and complex. Co-operation with South Africa, with whose political philosophy Lesotho strongly disagrees, is dictated by considerations of survival rather than preference[36].

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32 See 6.7 *infra*

33 Approximately 11 720 square miles - Jones 30 159

34 In 1974 its population was about 1,15 million - see Jones 30 159

35 'A political anachronism', a 'black-ruled island within a white-ruled country' and an 'island of human dignity within a sea of apartheid' - see Thahane T T 'Lesotho, the realities of land-lockedness' in *Land-locked Countries of Africa* edited by Cervenka Z Uppsala: The Scandinavian Institute of African Studies 1973 239, Jones 30 12

36 Thahane 35 239

During the scramble for Africa by the colonial powers Lesotho was never conquered, even though it lost large parts of its territory. Prior to the 19th century the Basotho - together with other tribal groups such as the Zulus - had settled in the interior of South Africa. In the 1830s, when the Boers trekked inland from the Cape and away from British encroachment, they engaged in many battles with the African tribes inhabiting the interior of the subcontinent. In the face of the enemy's technically superior weapons, the Basotho under the leadership of King Moshoeshoe I retreated from the plains towards the mountains (which formed good natural defences). From there the Basotho were able to repel the Boers while at the same time seeking the protection of the British government. In 1868 the British government declared Basotholand a British Protectorate. As a Protectorate Basotholand remained under British rule until 4 October 1966, when it was granted independence as the Kingdom of Lesotho[37].

During the formation of the Union of South Africa in 1910 the British government expected Basotholand and the other territories of the subregion (Bechuanaland and Swaziland) to eventually join or be incorporated into the Union of South Africa. This would have made economic sense, with unified administration under the leadership of the Union. It was in anticipation of such an arrangement that a **Customs Union Agreement**, which gave South Africa power to collect and levy duties, was signed by Britain on behalf of Basotholand, Bechuanaland and Swaziland. There was no concurrent monetary agreement to make the South African currency legal tender in the three states, however: its use was extended on a *de facto* basis[38].

It is only natural to ask why Lesotho never joined the Union of South Africa but rather opted for full independence. Two possible reasons may be offered[39]. The first is the

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37 Thahane 35 240

38 The Union was to pay 1.311% of the customs and excise it collected to the three territories, Basutoland getting a fixed share of 0,886%, Bechuanaland 0,276% and Swaziland 0,149%. By the 1960s an adjustment was made within the 1,311% share, Basutoland receiving 0,471%, Bechuanaland 0,310% and Swaziland 0,530% - see Jones 30 28, Thahane 35 240

39 Thahane 35 240/241

latent historical animosities between the Basotho and the 'Boers'[40], coupled to the fact that South Africa still occupies what the Basotho consider to be their rich arable land.

Secondly, there had been the racial attitudes and policies of the Union government towards African people. Moshoeshoe had built the Basotho nation out of a mixture of many tribes by emphasising peace, reconciliation and the brotherhood of man. He practised and preached these principles[41], and those who fled from the 'Boer' conquests and tribal brutalities found a welcome home in Lesotho and were fully integrated into the society[42].

The above principles are so deeply rooted in the whole nation that they could not agree to join the Union of South Africa, which discriminated between races. They objected to the failure of South Africa to recognise their traditional democratic institutions for administration and decision-making[43]. This social stand led to a move to seek independence whatever the costs.

Prior to independence a small administration was maintained to keep law and order, and education was left to the missionaries. The commercial sector was an open field for agents of South African traders, financial institutions, commercial banks, and insurance and building societies[44]. The South African government expected that severe

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40 The tragedies of the frontier battles are still, after all those years, too fresh in the mind of many Basotho leaders to wish to unite with the former enemy. Even on the part of the 'Boers' there is still much animosity. Furthermore, many Basotho fought with the British during the 1899-1902 Anglo-Boer war - see Thahane 35 241

41 As demonstrated by his invitation to French missionaries in 1833 and the pardoning of cannibals who killed his grandfather in 1824

42 This explains the policy of integrating political refugees from South Africa into the social life of the people rather than segregating them in refugee camps - see Thahane 35 243

43 Chief Jonathan - in a statement against racial discrimination - said on 21 March 1972: 'Lesotho's opposition to racism is part of a national history and goes back to pre-1910 days. It is the abhorrence of racism that led the people of this country to oppose incorporation of the territory into the Union of South Africa in 1910. When, on the attainment of independence in 1966, Lesotho embarked on a policy of peaceful co-existence, this was by no means an indication that she had abandoned her opposition to racism and racial discrimination' - see Thahane 35 241

44 Which South Africa forbade by law to make investments in Lesotho

unemployment coupled with bleak economic prospects would soon convince the Basotho about the advisability of joining South Africa. Furthermore, lack of domestic development in Lesotho during the colonial era greatly weakened the bargaining power of future governments and built a strong case for incorporation.

A general conception is that many political problems confronting land-locked states and their neighbours can be traced in varying degrees to the differences in their respective political and social philosophies. The more divergent the national political objectives and attitudes to life of the government of the land-locked state and those of its transit neighbours, the more the areas of tension. The same is true for other fields of policy such as economic and monetary arrangements. Tension may be aggravated if the transit state wishes to control or dominate the national politics of the surrounded state or if it wishes to create a sphere of influence.

This argument appears to be valid in the case of Lesotho, Botswana and Swaziland. The political and social views of Lesotho and its government have long been at variance with those of South Africa. These differences in social objective in turn create areas of tension between the states[45].

In addition to friction arising from the differences in social systems between Lesotho and South Africa, another bone of contention has been in the area of foreign affairs. Lesotho wishes to make its political independence a reality by following an independent line. South Africa, however, has for a long time wished to control or exercise political influence on developments in Lesotho.

Up until recently even greater tension arose from Lesotho's declared objective to increase its political and economic cooperation with other African countries. The implementation of this policy could be seen from ever-increasing visits of African diplomats to Lesotho after independence. Similarly, the increasing cooperation with

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[45] Thahane 35 243

especially the Scandinavian countries (openly supporting liberation movements in Southern Africa) likewise irked successive South African governments.

The economic problems which Lesotho faces as a result of its geographic position are many and complex. The main economic problem facing the country is the employment of over 45% of its economically active men outside its borders. Approximately 150 000 Basotho men work in the South African mines and industries[46]. This means that the burden of internal development (especially agriculture) is left in the hands of women, children and old men. While it is true that the men earn income from their employment in South Africa, the social costs of their absences on their families are very high because they spend a small fraction of their time with their wives and children. The economic costs are even higher[47].

The Lesotho government's strategy for economic development is largely dictated by the problem of dependence on foreign countries for employment and incomes (and even for balancing its budget). Freeing the country from this dependence will involve job-creation in Lesotho, increasing local incomes and accelerating formal and non-formal training. If the annual increase of labour can be absorbed in economically sound opportunities, the relative importance of migrant workers will be gradually reduced in the long run. However, international assistance will be required on a large scale to make an impact on the problem.

The second problem[48] is the lack of a good social infrastructure. The educational system is broad at the base but tapers sharply at the secondary level. It is not geared towards providing in appropriate quantities and quality the skills required for economic

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[46] Thahane 35 245. Jones (30 159) is of the opinion that the figure could be as high as 200 000

[47] Because there are few - if any - retirement benefits and because the wages are usually low, the men become Lesotho's burden when they retire. This increases the dependency ratio in the population to almost 50%

[48] Although not linked to the land-locked nature of the country but rather deriving from some of the historical factors outlined above

development. As a result, Lesotho (a country poorly endowed with natural resources) faces a critical shortage of middle-level technical and professional manpower[49].

In addition to the underdeveloped human resources there is a lack of adequate hospitals and clinics throughout the country. A serious constraint on the development of social services such as education, health services, housing and water supply facilities is a shortage of financial resources.

The most serious constraint to development and hence the attainment of economic independence is the lack of a good economic infrastructure. Lesotho's road network is poor, and it is oriented towards South Africa as a matter of necessity.

Another serious obstacle to economic development is the lack of internal sources of energy and power. The dependence of Lesotho on South Africa for energy is a strong weapon in time of conflict or policy disagreement from the security and development points of view.

In the field of telecommunications it can be observed that before independence no efforts were made towards internal development. On the other hand, telephone connections between South Africa and the lowland towns are well developed[50].

As far as foreign aid is concerned, most of it came from the UK aid programme. Budgetary aid was the largest part of this programme[51]. The other major components were Commonwealth Development and Welfare grants (mainly for capital expenditure) and Exchequer loans (drawn upon for safe, self-liquidating projects).

At independence Lesotho found itself confronted with a budgetary deficit of approximately 55% of its recurrent budget. The UK used to provide grants to cover

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[49] Thahane 35 246

[50] Thahane 35 247

[51] Thahane 35 247/248

these deficits from 1958/1959 on an increasing basis until 1966/1967. At the time, it was stated that the Lesotho government should try and reduce its external dependence. Therefore, any increase in domestic revenue should first have been applied to the reduction of British grant-in-aid rather than expansion of government services. This meant that the desperately needed infrastructural and other facilities could not be met. The country's executive capacity could not be expanded by employing more technical and professional personnel usually carried on the recurrent budget, hence the abortive capacity for capital aid remained low. To make things even more difficult any capital aid provided by the UK in one financial year and not used reverted back to the UK Treasury, and thus Lesotho lost a substantial amount of development revenue[52] (mainly because its economists were not used to the practice).

Lesotho received little other aid that was comparable to the UK programme. Sweden was at one stage a significant donor, but withdrew direct aid following the 1970 *coup d'etat* and did not resume it until 1973/1974. The two largest categories of non-UK aid were essentially multilateral: the Food Aid Programme[53] and the UN Development Programme[54].

One of the most complex problems relates to the monetary union existing between Botswana, Lesotho, South Africa and Swaziland. This is not covered by any formal agreement that makes the South African currency legal tender in other states. The three states have no say in the policies of the South African Reserve Bank. There are certain feelings that some of its credit policies may not be compatible with the stages of development of Botswana, Lesotho and Swaziland.

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[52] Thahane 35 247/248, Jones 30 214. See also Matlosa K 'Impact of IMF Structural Adjustment Programmes on Lesotho' 1990 *South African Political and Economic Monthly* Vol 4 No 3-4 12-15

[53] See Jones 30 204-207

[54] See Jones 30 207-208

The four above-mentioned states are in a **Customs Union Agreement** which is dominated by South Africa[55]. The effect of this agreement, the monetary arrangements and the large scale labour movements between South Africa on the one hand and Botswana, Lesotho and Swaziland on the other is to create a network of economic linkages that approximate an economic community. There are reasons, however, why the relationships fall short of this[56].

Under the agreement South Africa is not bound to consult the smaller partners in changing its foreign trade and payment policies (although it has been doing so since the 1970s). The agreement also permits Botswana, Lesotho and Swaziland to give limited protection to their domestic industries. However, this provision is not supported by positive measures to locate industries in these states[57].

The problem facing Lesotho and other smaller land-locked partners of the **Customs Union Agreement** in their relationship with South Africa is very difficult. They are faced with a dilemma in deciding how to balance the pressures created by their geographic situation with their reluctance to become too closely integrated into the South African economic and social system. To change the situation would require time and consistent implementation of policies for self-reliance.

If one looks at the structure of the trade in the three smaller states, it is evident that raw materials and manufactured goods are the basis of the interchange. In 1968 the

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55 The present arrangement is a revision of the 1910 Agreement and is significant in that it was negotiated by four independent nations, while the 1910 Agreement was drawn up by South Africa on behalf of the others. It should, however, be pointed out that the smaller partners have no control over the entry of goods into their territories because the borders are controlled by South Africa - see Kowet D 'Lesotho and the Customs Union with the Republic of South Africa' in *Land-locked Countries of Africa* edited by Cervenka Z Uppsala: The Scandinavian Institute of African Studies 1973 250, Jones 30 28

56 Firstly, apart from consultations provided for in the agreement there is no machinery for coordinating the economic policies of the four states. Secondly, because of the uneven distribution of decision-making powers under the agreement and the small size of the other three states, the situation arising from this network of trade and monetary relationships is one of dependence on South Africa (rather than interdependence). Thus, the economic policies taken by South Africa in its own interests are likely to have adverse effects on the economies of the three smaller partners, rather than the other way round - see Kowet 55 250

57 Kowet 55 251

total value of imported manufactured goods accounted for R11 331 million (representing 47% of the total). During the same year, Lesotho exported agricultural products and diamonds worth only R3 380 million (representing 13,5% of its balance of payments). In 1964 South Africa supplied 89% of the imports of Botswana, Lesotho and Swaziland, and had a favourable balance of trade with them amounting to R67 million. The trade imbalance between South Africa and its partners is highly relevant to the problems in relations between a developed nation and an underdeveloped one[58].

It should be borne in mind that South Africa refused to be a party to the **UN Convention on Land-locked Countries**. This means that, apart from the inadequate legal obligations of the UN convention, South Africa reserved its right to decide which of its neighbours can be availed with that right. The clause 'Freedom of Transit' actually allows South Africa the discretion of 'protecting public morals, public health, or security'[59].

Most of the opposition party members in the three states were until recently not allowed transit through South Africa. In the case of Lesotho it meant that they could not get out of the country at all. No aircraft was allowed to overfly South Africa.

The **Customs Union Agreement** has a clause on 'consultation' which implies a necessity to 'inform' the underdeveloped partners when important decisions are about to be reached by the South African government. The governments of Botswana, Lesotho and Swaziland were for example informed, rather than consulted, about the raising of tariffs in South Africa to protect its industries[60].

In conclusion, Lesotho's dependence on South Africa is part of its underdevelopment, its land-lockedness and its historical circumstances. In theory, there are two alternatives for a state like Lesotho. The first is to withdraw from the system. However, the state

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[58] Kowet 55 250/251

[59] Kowet 55 253

[60] Kowet 55 254

is completely surrouded by South Africa and this poses a dilemma for Lesotho. The second is regional cooperation between Botswana, Lesotho and Swaziland, but it is significant that - even thought the leaders of those three states acknowledge this approach - they have until recently only paid lip service to it[61].

Of major importance as far as relations between South Africa and Lesotho is concerned, is the Lesotho Highlands Water Project. The awarding of a R5 200 million project for the first phase was announced at the end of December 1990. One of the major advantages of the project is that it is financially viable. Lesotho will be able to generate its own hydroelectricity, and thus no longer pay R12 million a year for electrical power from South Africa, and will also obtain R1,3 billion in water royalties. Some 94 000 people will be affected one way or another, but Lesotho and South Africa agreed from the outset that full compensation would be paid to all parties concerned. A comprehensive package, including a R104 million rural development programme over the next 15 years, has been worked out.

6.4 SWAZILAND

Swaziland is a relatively rich state, possessing minerals, fertile soil, a good climate, and an abundant supply of water. Under British colonial rule, however, its economic development was slow: the British government was not prepared to spend money in the territory because it was assumed that Swaziland would ultimately become a part of South Africa. The pace of economic development has only accelerated after independence.

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61 Kowet 55 255

Swaziland's most important communication link is the railway connecting Ngwenya with the Portuguese railway at Goba on the Mozambique border[62]. The railway carries 95% of all its exports (iron ore, sugar, wood pulp, and citrus).

In 1978 a railway connecting Kadake with Richard's Bay was taken into operation. However, the Swaziland asbestos mining industry still depends on an arrangement with South Africa to transfer ore by overhead cableway across the border into South Africa for subsequent rail shipment.

About 2 800 kilometres of roads traverse the country. The trans-territorial East-West highway is Swaziland's main link with South Africa (and also the only alternative export route available). It carries nearly 80% of all Swaziland's imports from South Africa.

Despite its mineral resources, Swaziland is still very dependent on South Africa. Not only is it a member of the SACU, but South Africa is also the main supplier of Swaziland[63]. In addition, South Africa provides employment for almost 25 000 Swazi workers. Furthermore, Swaziland is also faced with the Mozambican refugee problem.

Despite its land-locked position, Swaziland has made remarkable progress both in its trade and its diplomatic relations with the outside world. Thus, while South Africa is the main supplier to Swaziland, the country exports virtually its total production of iron ore to Japan, and most of the sugar and asbestos to the UK. Trade agreements exist between Swaziland and Kenya, Tanzania, and Uganda. It also has an agreement on common policy regarding the export of sugar with Malawi and Mauritius, as well as diplomatic and trade missions in many Western states, *inter alia* France, Germany, Portugal, the Netherlands, the UK, and the US[64].

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62 It is just under 200 kilometres long and cost R79 million, half of which was provided by the UK and the other half by the Anglo-American Corporation and De Beers - see Cervenka Z 'Swaziland's links with the outside world' in *Land-locked Countries of Africa* edited by Cervenka Z Uppsala: the Scandinavian Institute of African Studies 1973 265

63 Imports from South Africa constitute about 90% of the total value of imports to Swaziland - see Cervenka 62 267

64 See Cervenka 62 268

6.5 ZIMBABWE

Zimbabwe shares the characteristic of being 'land-locked'[65] with 13 other African states[66].

It is vital to the economic prosperity and development of Zimbabwe that its international trade should proceed without interference and as efficiently and cheaply as possible over the territory of its neighbouring coastal states[67] for the purposes of obtaining access to international sea routes. This is a concern shared not only by all land-locked states, but also by coastal states which, beause of some geographical disadvantage, are effectively land-locked[68].

It is important to note that access to international sea routes is not Zimbabwe's only concern. It is just as important to Zimbabwe's development of its regional and international trade that it should have easy access through its neighbouring coastal and land-locked states[69] to markets in states which are not contiguous to Zimbabwe. The concern with such general transit rights is not being exclusive to land-locked states but shared by potentially nearly al the states in the world[70].

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65 See Tilbury M 'The International Law of Non-Aerial Transit Trade: The Case of Zimbabwe' 1980 *The Zimbabwe Law Journal* Vol 20 part 1 5 n6

66 Botswana, Burundi, Central African Republic, Chad, Lesotho, Malawi, Mali, Niger, Rwanda. Swaziland, Uganda, Burkina Faso (Upper Volta), Zambia - see Tilbury 65 6 n7. That figure is of course dependent upon international recognition - see 6.6 *infra*

67 Mozambique and South Africa

68 Glassner M I *Access to the Sea for Developing Land-Locked States* The Hague: Martinus Nijhoff 1970 6-7, Tilbury 65 6. A state may effectively be land-locked even though it has a seacoast if that coastline provides no effective access to the sea because there is no adequate harbour, for instance

69 Zambia and Botswana - see Tilbury 65 7

70 Tilbury 65 7

Furthermore, for the same reasons Zimbabwe has an interest in transit accross contiguous and non-contiguous states, so these states themselves - whether land-locked or not - have a corresponding interest (for like reasons) in transit accross Zimbabwe[71].

It is also important to note that Zimbabwe is not only a land-locked state and in itself an important transit state, but it is also a country which has only recently[72] achieved statehood. This is a factor which may effect the nature of its transit-trade treaties.

When particular transit treaties affecting Zimbabwe is discussed, it should be borne in mind that some of these treaties also affect Zimbabwe's neighbours, which is why these treaties are all grouped here.

Zimbabwe may be a party to a few bilateral treaties concerned *inter alia* with transit matters. How many of such treaties are still in force depends on a number of factors. The most important factor is the position which Zimbabwe ultimately adopts in relation to treaty succession. Here it is sufficient to assume that there are two groups of treaties which may possibly bind Zimbabwe:

1 Treaties which were entered into by the UK before 18 April 1980 in respect of Southern Rhodesia, and

2 Treaties entered into by Southern Rhodesia (or by the Federation of Rhodesia and Nyasaland in respect of Southern Rhodesia) before 11 November 1965[73] and between 12 December 1979 and 17 April 1980[74].

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71 For example South Africa, Zambia and Zaire - see Tilbury 65 8

72 The former British colony of Southern Rhodesia became the independent Republic of Zimbabwe on 18 April 1980 - Tilbury 65 9 n18. See also Grenville J A S and Wasserstein B *The Major International Treaties Since 1945* London: Methuen 1987 329-335

73 Before the **Unilateral Declaration of Independence (UDI)** on 11 November 1965 Southern Rhodesia possessed some measure of international personality - see Tilbury M 'The International Law of Non-Aerial Transit Trade: The Case of Zimbabwe' 1980 *The Zimbabwe Law Journal* Vol 20 part 2 126 n148

74 Tilbury 73 126/127

In practical terms, as no treaties of interest here were validly entered into in respect of Southern Rhodesia after 10 November 1965, the point of departure will be the study of those treaties which appear in the various **Rhodesian Treaty Lists**, none of which is concerned with any treaties which may have been entered into after 10 November 1965[75].

Another factor to be taken into account is the relatively recent attainment of independence by all of Zimbabwe's neighbours with the exception of South Africa. In so far as these states are potential parties to the conventions mentioned hereinafter, their attitudes are relevant for two reasons. In the first place, it is essential to know whether they regard themselves as bound by the treaty in question[76]. Secondly, even assuming that they regard themselves as parties to the treaty in question, it may theoretically be necessary to know whether they regard Zimbabwe's independence as having any effect on the treaty in question[77].

Finally, it should be borne in mind that the treaties of concern here may well be able of classification as dispositive treaties which are likely to survive as a matter of reality simply because of the inherent nature of such treaties[78].

Mozambique is the most important transit state as far as Zimbabwe is concerned. It provides Zimbabwe with its shortest possible access to the sea through the ports of Beira and Maputo, to both of which Zimbabwe is linked by rail. Before the closure of the border between Rhodesia and Mozambique in 1976 as much as three-quarters of Rhodesia's external trade passed through Mozambique. When it became clear that

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75 Tilbury 73 126

76 This depends on the position - if any - which they have adopted in respect of their own succession to pre-independence treaties - see Tilbury 73 127

77 Tilbury 73 126/127

78 Tilbury 73 127

Rhodesia was not to have its own sea-coast, efforts were made to obtain secure transit rights for the country over Mozambique[79].

The following treaties are of interest here:

1 **Treaty between Great Britain and Portugal defining their respective Spheres of Influence in Africa**

This treaty, concluded on 11 June 1891, was the first in a series[80] which delimited the boundaries between Zimbabwe and Mozambique[81].

In addition to delimiting boundaries, a part of the agreement was also devoted to the regime of the Zambesi river, the importance of which as an international waterway was probably overestimated at the time. The navigation of the Zambesi and Shire rivers was declared free for the ships of all nations[82] and national treatment was to be granted to the merchant ships of Great Britain and Portugal[83]. It furthermore provided that no transit dues were to be levied on ships and goods in transit on the Zambesi[84].

More importantly, because the Zambesi does not provide Zimbabwe with a feasible outlet to the sea for its international trade, the treaty guaranteed[85] general freedoms of transit 'between the British sphere of influenece and Pungwe

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79 Tilbury 73 127

80 The last of which was concluded in 1940

81 Tilbury 73 128

82 Article XII

83 Article XIII

84 *Ibid*

85 In Article XIV

Bay (Beira) for all merchandise of every description, and to give the necessary facilities for the improvement of the means of communication'[86].

2 **Convention between the United Kingdom on its own behalf and on behalf of Southern Rhodesia and Portugal relative to the Port of Beira and Connected Railways**

This convention - sometimes referred to as the **Beira Convention** - was concluded on 17 June 1950. It was designed to regulate the situation arising from the nationalisation of **Rhodesia Railways** and of **Beira Works Ltd**[87].

In two respects the **Beira Convention** was an advance over the 1891 treaty. In the first place, the Portugese government agreed to establish in the port of Beira[88] a free zone 'into which and from which goods proceeding to or from these territories may be imported, stored, processed, manufactured and exported to foreign countries without payment of any charges in respect of import, export or re-export'[89]. Secondly, the convention established an **Advisory Board** whose function was 'to consider and advise as to the best means of developing and facilitating the traffic passing through the Port of Beira and on the Beira Railway to or from Southern Rhodesia, Northern Rhodesia and Nyasaland'[90].

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86 See Tilbury 73 128

87 Of the means of communication which Portugal agreed to construct under the 1891 treaty, the railway linking Britain's inland possessions to Beira turned out to be the most important route for the transit trade of these possessions. The railway was in fact financed by British capital, and Beira and Mashonaland were not only largely controlled by the same group but were also operated to a large extent as a joint concern. **Rhodesia Railways** was nationalised in 1949 and **Beira Works Ltd** (which was responsible for port operations at Beira) also the same year - see Tilbury 73 129

88 For the benefit of Southern Rhodesia, Northern Rhodesia and Nyasaland

89 Article VII - see also Tilbury 73 132

90 Article X

Mozambique, Southern Rhodesia, Northern Rhodesia and Nyasaland were all represented on the **Beira Port Authority**, which functioned until 1975. This authority established the important principle of continuing negotiation to smooth out problems as they arose in the implementation of a convention between transit and land-locked states[91].

3 **Convention between Portugal and the Federation of Rhodesia and Nyasaland Relative to the Construction and Operation of the Beira-Feruka Oil Pipeline**

This agreement was concluded on 19 November 1962. The construction of an oil pipeliene between Beira and the Rhodesian border was entrusted to a private Portugese company that was effectively controlled by the **London and Rhodesian Mining and Land Company**. The agreement was therefore entered into relative to the construction and operation of the pipeline. It impliedly guaranteed uninterrupted passage for oil through the pipeline over Mozambique[92].

The only treaty provision which could govern transit rights between Zimbabwe and Zambia is Article VI(a) of the **Vienna Convention**[93]. Tilbury[94] is of the opinion that this provision can create no such *general* transit rights between Zimbabwe and Zambia (as it may do between Zimbabwe and Mozambique). This view is based in the first place on the grammatical construction of Article VI(a)[95]. Secondly, he says that it is important to note that the parties to the **Beira Convention** are, on the one hand, the

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91 See Tilbury 73 132/133

92 Article 1 and Article 6(c). Tilbury 73 133/134 is of the opinion that an express provision for freedom of transit may not even have been necessary because it could be covered by Article XIV of the 1891 convention or by Article VI of the 1950 convention

93 The article refers to '(t)he passage of ... goods ... to or from Mozambique or to or from Southern Rhodesia, Northern Rhodesia or Nyasaland ... in the territories (of Mozambique, Southern Rhodesia, Northern Rhodesia and Nyasaland)'

94 Tilbury 73 136

95 Which suggests that rights of transit must be asserted between Mozambique *on the one hand*, and *either* Zimbabwe *or* Zambia *or* Malawi *on the other hand*. The author says that it does not suggest that such rights can be asserted between Zimbabwe, Zambia or Malawi

UK[96] and, on the other hand, Portugal. If Zimbabwe, Zambia, Malawi and Mozambique had all succeeded to the **Beira Convention**, the effect of Article VI(a) between Zimbabwe and Zambia would according to Tilbury *only* be that Zimbabwe is obliged to grant Zambian goods a right of transit to and from Mozambique across Zimbabwean territory[97].

It can thus not be said that the various state successions upon Article VI(a) of the **Beira Convention** created a satisfactory transit regime between Zimbabwe and Zambia[98]. Furthermore, even if Zambia's right of transit across Zimbabwe under Article VI(a) turned out to be an effective one, there was no treaty in force between the two states in respect of transit dues[99].

No treaties are known to exist between Zimbabwe and Botswana relating to rights of passage. As far as Zimbabwe is concerned, the absence of any such treaty is hardly a cause for concern since the **National Railways of Botswana** own and operate the railway route through Botswana. Botswana, however, has thus no general right of passage across Zimbabwe by virtue of any bilateral treaty[100].

It is important to note in the first place that there is no highly developed network of treaty relationships. There are historical reasons for this: with the exception of Mozambique, all the territories in question were at one stage or another under British

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96 Acting on its own behalf and on behalf of Southern Rhodesia

97 See Tilbury 73 137. The author further says that it would then mean that if Zimbabwe refused to grant a right of transit to or from Mozambique for Zambian goods, an aggrieved Zambia's right could only be enforced at the instance of Mozambique. If Mozambique refused to act, Zambia would have no legal recourse against either Mozambique or Zimbabwe

98 Tilbury 73 137

99 In fact, during the **UDI** period in Rhodesia, not only were *de facto* arrangements necessary to carry Zambian goods through Rhodesia, but unfavourable differential rates were also imposed on Zambia's transit copper trade - see Tilbury 73 138. The application of **UN** sanctions by Zambia, which led to the closure of the border with Rhodesia, forced Zambia to seek an alternative (but more lengthy and costly) rail, road and pipeline link with Tanzania

100 Tilbury 73 138/139

colonial rule, and the conclusion between them of treaties guaranteeing rights of passage must have accordingly seemed unnecessary[101]. Problems which might have arisen in respect of transit trade were therefore practically eliminated[102].

Secondly, it was therefore only with Portugal in respect of Mozambique that treaties dealing with transit rights were concluded. However, the treaty structure which resulted is unsatisfactory in that it is unnecessarily complex and obscure. In addition, it is deficient in that a general right of transit is nowhere guaranteed free of transit dues[103].

In the third place, it is noticeable that there are no regional arrangements covering the problems of transit trade. These are often the most effective means of guaranteeing freedom of transit[104].

In the light of the classification of transit rights it is unlikely that (in the present state of international law) transit trade between Zimbabwe and its neighbours is regulated by general customary international law, and no local customary law exists[105].

It follows that transit trade problems must be regulated (if at all) by conventional international law[106].

The existence of such conventional law is dependent upon the realities of treaty succession both as regards Zimbabwe itself and as regards its neighbours. However, it is likely that particular treaties dealing with transit trade have survived changes in

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[101] This is especially so in the light of the fact that the railway system, which is effectively the means of transit trade, was for a long period controlled in the same hands in Northern Rhodesia, Southern Rhodesia and Bechuanaland

[102] Tilbury 73 139

[103] *Ibid*

[104] Tilbury 73 140

[105] Tilbury 73 161

[106] *Ibid*

sovereignty either because of their very nature or because legally they are 'dispositive' treaties. Again general (especially 'law-making') treaties are likely - by their nature - to survive[107].

With the possible exception of the **Beira Convention**, there are no truly satisfactory treaties which regulate transit trade between Zimbabwe and its neighbours, and even the **Beira Convention** makes no real attempt to regulate the exercise of the right of transit[108].

General conventional law in the form of **GATT** probably does provide for rights of transit between Zimbabwe and its neighbours, but again no detailed attempt at regulating the right of transit is made[109].

In terms of conventional law, Zimbabwe therefore needs to negotiate particular treaties with its neighbours, whilst at the same time supporting the development of transit rights in general conventional law[110].

As was noted earlier on, this also applies to Zimbabwe's neighbours like Botswana and Swaziland. Furthermore, it is quite clear that the 1982 **LOSC** - while providing for a general right of transit - requires such a right to be agreed upon between the parties concerned.

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[107] Tilbury 73 161, and note the position after the 1982 **LOSC**

[108] Tilbury 73 161

[109] *Ibid*

[110] *Ibid*

6.6 BOPHUTHATSWANA/VENDA

At the outset it should be pointed out that the inclusion of Bophuthatswana and Venda in this discussion does not imply that their 'independence' is recognised. However, as opposed to the self-governing territories in South Africa, these two land-locked entities within South Africa have been granted 'independence'[111] by South Africa. Leaving aside political arguments regarding the status of their independence, these two territories will be examined as part of the general discussion on Southern African land-locked states, because their problems stemming from land-lockedness are similar to those of other states discussed here.

Should the point of departure thus be to accept these two entities as sovereign states, the general position as set out in 6.5 *supra* will apply. However, in practice this has not been the case. Botswana in particular has steadfastly refused to deal with Bophuthatswana on any official level, and has indeed on occasion closed its southern border to Bophuthatswana.

On the attainment of Bophuthatswana's independence in 1977, a total of 71 agreements were signed between Bophuthatswana and South Africa, followed by a further 28 agreements concluded between 23 November 1979 and 25 November 1983. One of the first sets of agreements is a non-aggression pact between the two states.

In recognition by South Africa of Venda's attainment of independence in 1979, a total of 80 agreements between South Africa and Venda were signed between 13 August 1979 and 10 December 1985.

However, there is a question mark behind the status of these bilateral agreements. It can be argued that such agreements prior to independence cannot be legally binding because of the fact that the territories then lacked the international legal personality

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[111] By virtue of the *Status of Bophuthatswana Act*, 89 of 1977, and the *Status of Venda Act*, 107 of 1979. Vasciannie S C *Land-Locked and Geographically Disadvantaged States in the International Law of the Sea* Oxford: Clarendon Press 1990 4 n3 points out that no existing state has formally recognised these entities as states, and that the UN General Assembly has repeatedly condemned the 'homelands' policy

required for the conclusion of treaties. Furthermore, the Bophuthatswana courts have held that citizens' rights are not affected by the treaty unless legislation is passed to give effect to such a treaty[112].

6.7 CONCLUSION

It should be clear from the above that no transit state has a duty to grant access to the sea or transit rights to a land-locked state unless the modalities of such access had been agreed upon. The *onus* will be on a land-locked state to initiate such agreements with transit states.

As far as transport in the region is concerned, the dislocation of natural routes to ports[113], and the substantially higher transport costs incurred as a consequence, have been major causes of the economic problems experienced by states such as Malawi and Mozambique[114]. In a post-apartheid Southern Africa, the transport sector is likely to be a key determinant of economic recovery - enabling the region to conduct its foreign trade (and especially its vital export trade) efficiently, facilitating intraregional trade, promoting governmental policies such as pricing and deregulation, and providing a training ground for local entrepeneurs. This requires a development strategy built around (i) ensuring that shippers are able to use the most economic route and mode for any particular consignment, (ii) promoting the better utilisation and maintenance of existing facilities, and (iii) improving regional cooperation.

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[112] For a full discussion see Lowe M J 'Bophuthatswana agreements: International treaties or binding legislation?' October 1982 *De Rebus* 470-476, and *Maluleke v Minister of Internal Affairs* 1980 **BSC** *Reports* 59

[113] See 6.1 *supra*

[114] In the case of Malawi, net earnings from export crops were down and net costs of imports up, while Mozambique was for some years unable to supply transport services to land-locked states and thus lost its main source of foreign exchange - see Maasdorp G 'A strategy for rail and road transportation in Southern Africa' 1991 *Africa Insight* Vol 21 No 1 7-13 8

Once there is a normalisation of political relations between South Africa and the SADCC states, and a solution to the conflicts in Angola and Mozambique is found, the natural routes for the land-locked states should be reopened. This will make it possible for the shippers to choose the most economical route for any particular consignment, rather than having to use a route either forced upon them for security reasons, or one expeditious for political reasons. The freedom to select the most economical route would lead to a considerable saving in transport costs for the land-locked states north of the Limpopo, and to greatly increased foreign exchange earnings for Angola and Mozambique[115].

It is a well-known argument in transport economics that the criterion for route selection is the minimisation of total distribution costs. These include the cost of time in transit. Thus, routes will compete on the basis not only of rates, but of service. Shippers need to know that their consignments will reach their destinations within a certain time and that they will be intact, and not damaged, lost, or stolen.

Although the restoration of natural routes in Southern Africa would mean that traffic on the South African system to and from the SADCC states would be a reflection largely of South African/SADCC trade, it is likely that certain southern routes would be able to compete with SADCC ports on the basis of these criteria for some of the overseas traffic of the land-locked states north of the Limpopo[116].

One problem that will have to be resolved is that there could be a conflict between the route preferred by a shipper and that preferred by a particular railway

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[115] For example, it has been conservatively estimated that the net income of the **Mozambican Railways (CFM)** would rise by at least $18 million yearly merely from the normal operation of the ports in the state - see Maasdorp 114 8

[116] For example, shippers suffer considerable losses through pilferage at Dar es Salaam, Beira and Maputo, and are reluctant to use these ports for high-volume goods. Moreover, land-locked states prefer to have many options regarding ports. Of course, Lesotho's overseas trade has no option but to use the South African system, and some Botswana and Swaziland trade will continue to do so as well

administration[117]. Should natural routes be used, the financial position of the railways of Botswana and Swaziland, which depend largely on transit traffic for their revenue, would be prejudiced.

Among the SATCC's proposed future projects are railway links from Zambia to Malawi, Zimbabwe, Angola, and Namibia. Some Zambian copper is being trucked to Walvis Bay because of the problems in the SADCC transport corridors, but the cost of constructing a rail link from Livingstone to Namibia would be high in relation to the traffic that would use the route once the existing SADCC routes were rehabilitated[118]. It is unlikely that Walvis Bay will become a major regional port: whatever competitive advantage it might enjoy would be in the transport of high-value goods to Zambia, but the tonnages would be too low to justify a rail link. Another project which has been shown not to be viable (except with very high volumes of mineral traffic) is a trans-Kalahari line linking Botswana and Namibia[119].

Regional cooperation is important in Southern Africa, where the majority of states are land-locked. Such states often have relatively high transport costs. Sea transport is the cheapest form of intercontinental transport in most cases. Land-locked states thus lack direct access to the major mode of transport for overseas trade. For their access to the sea, they depend on the transport facilities of transit states (which are usually maritime, but could also be a neighbouring land-locked state). This dependence relates to various aspects, including foreign vessels, efficient port operation, efficient loading of export traffic, efficient clearing and forwarding of import traffic, adequate storage and warehouse facilities at ports, efficient railway and road systems, investment in transport and telecommunications links, investment in rolling stock and harbour equipment, political stability, and political goodwill.

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[117] For example, now that the **Botswana Railway** is independent, the **National Railways of Zimbabwe (NRZ)** favours the Beit Bridge route rather than the Botswana route for traffic to and from South Africa, since the latter route provides a longer haul for the **NRZ.** For similar reasons the **Swaziland Railway** favours the Natal route as opposed to the line to the state's natural port, Maputo

[118] Moreover, almost all the construction, and hence the bulk of the costs, would be on the Namibian side while the benefits would accrue mainly to Zambia

[119] See Maasdorp 114 10

Cooperation agreements in transport should be among the easiest international arrangements to work out. They confer benefits upon all parties, the value of these benefits is known, and the costs of cooperation are low. Yet, despite the existence of the **SATCC**, there are examples within the Southern African region of the failure of states to cooperate[120]. The World Bank recently recommended that regional cooperation in sub-Saharan Africa be improved in three areas: the preparation of investment projects for international links, international land transport, and the standardisation of railway and other transport equipment[121].

The institutional structure for transport cooperation in Southern Africa at present rests mainly on the **SATCC** (for the **SADCC** states), the **General Managers' Conference of Railway Administrations in Southern Africa**, and the **Southern African Liaison Meeting on Roads**. Although South Africa participates in the railway and road discussions, the institutional framework needs to be revamped to bring South Africa into an all-embracing regional body which should devote more attention to achieving uniformity in transport policy than has the **SATCC** in the past.

There are major problems in the way of emergence of an efficient transport system for Southern Africa as a whole. The mere solution of the present political and security problems in Angola, Mozambique and South Africa will not ensure an easy future for the region, and transport will be no exception. Problems of cooperation will have to be overcome, especially in formulation and impelementation of a common transport policy, and the human resource factor will remain a major constraint for some time to come. It will also be necessary to persuade aid donors to pay greater attention to the problems of efficient and reliable operation of transport infrastructure and facilities which they have financed. With efficient management and cooperation, and the goodwill of all parties concerned, however, this achievement may be possible.

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[120] For example, Zimbabwe and Mozambique have found it difficult to establish a system for the smooth running of joint operations on their railways

[121] See Maasdorp 114 11

The task of setting up the SADCC was unprecedented, not only in its scope but also in its very conceptualisation. However, South Africa has effectively arrested its development. Ten years later, all but 20% of the region's exports are routed through South Africa itself. 'In a word, the asymmetrical economic interdependence of the region has not fundamentally changed'[122].

The hoped-for independence from South Africa has not materialised. The level of intraregional trade has fallen to 5%. The SADCC is seen by many as nothing more than a restructuring of the regional economy in which Western investment continues to play the leading role, and Western capital projects - railway networks in particular - reinforce the region's continued accessibility to foreign trade and investment.

The changes and developments in South Africa during the past year have had such an impact on the programme of the SADCC that - during its annual summit held on 26 August 1991 in Arusha, Tanzania - its leaders were forced to seriously reexamine the organisation's original four objectives and strategies for accomplishing the programme of action. Having recognised that Southern Africa has undergone far-reaching economic, political, and social changes, the leaders of the SADCC states noted that these would have a major impact on the organisation's future. In order to prepare for this, they decided that the SADCC should develop a new vision for the future.

The summit agreed that the most important factor in the creation of that 'new vision' was the role a democratic South Africa could play in the region and within the organisation itself. The leaders affirmed their earlier hopes and expectations that South Africa's membership and participation in SADCC activities would have to be on the basis of equity, balance, and mutual benefit[123].

In order to facilitate the process towards this envisaged relationship between South Africa and the SADCC states, a regional joint planning committee was established,

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[122] Coker C 'Experiencing Southern Africa in the twenty-first century' 1990 *Africa Insight* Vol 20 No 4 219

[123] Kongwa S 'SADCC: Creating a new vision for the future' 1991 *AI Bulletin* Vol 31 No 10 1

comprising representatives of **SADCC** member states and the South African liberation movements[124].

At the summit it was decided[125] that the organisation should conduct a critical review of its original mandate as represented in the four principal objectives of the 1980 **Lusaka Declaration**. The review exercise is aimed at creating suitable conditions so that the second objective[126] becomes the organisation's new priority.

Towards that end, the **SADCC**'s new development programme focuses on four economic aspects: (i) the integration of the economics of the region through coordination, rationalisation, and harmonisation of member-states' macro-economic and sectoral policies, (ii) adjustment of the **SADCC** 'Programme of Action' away from the discrete project-by-project approach, to a coordinated, integrated sectoral and macro-policy analysis, (iii) planning, in order to provide a coherent holistic sectoral and macro framework for programme and project development, and (iv) the theme for the 1992 annual **Consultative Conference, SADCC**: 'Towards Economic Integration', which elaborates the working basis for the creation of a common vision for regional integration[127].

The summit, having recognised that 'donor aid fatigue' is already evident[128], agreed upon the following alternative measures: (i) **SADCC** member states are to assume

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[124] The committee's main functions are (i) to analyse and assess issues likely to impact on future regional cooperation and affect relations between South Africa and **SADCC** members in a post-apartheid era, (ii) to identify areas of possible cooperation, (iii) to agree on options, strategies, and institutional arrangements required for the development and management of such relations, and (iv) to ensure that **SADCC** cooperating partners liaise with the **SADCC** in order to achieve a coordinated and coherent approach towards the new regional setup - see Kongwa 123 1

[125] As a result of the realisation that the **SADCC**'s present preoccupation with achieving as its primary objective the reduction of economic dependence on South Africa may not aid the process towards the new regional order (or encourage South Africa to play its rightful regional role)

[126] Namely the forging of links to create a genuine and equitable regional integration

[127] Kongwa 123 1

[128] Which in turn casts doubt on the successful implementation of the 'Programme of Action'

greater responsibility in the funding of the organisation, (ii) a post-apartheid South Africa is expected to fill the role of present cooperating partners through the provision of aid and investment to SADCC member states, and (iii) appropriate long-term budgetary plans are to be devised, such as the phasing out of cooperating partners' contributions for certain operational costs, and ensuring that costs arising from small research studies, pilot studies, seminars, and workshops are financed out of regional sources[129].

To conclude:

> The Soviet Union has turned its back on the Marxist experiments of its erstwhile allies. The West has begun to turn its back on the region's strategic significance. In the past, local states have made too many demands of the outside world in terms of arms, sanctions or aid - and asked too little of each other. It is now up to the states of Southern Africa to forge a model of development, an intraregional, not international, model of reconciliation[130].

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[129] Kongwa 123 1

[130] Coker 122 221

CHAPTER SEVEN : EVALUATION

7.1 INTRODUCTION

UNCLOS III began amid high expectations, and resulted in the 1982 **LOSC**. However, it is well documented that the **LOSC** is not in force yet. This fact begs many questions, not the least of which concerns the legal status of the **LOSC**. There are questions about the reasons for the US decision not to sign the convention, the current state of customary international law, the prospects of the so-called 'mini-treaty', the future of deep seabed mining, and the rights of land-locked states, to name but a few.

It should by now be clear that the group of land-locked states undoubtedly played an important part in the negotiations at **UNCLOS III**. Not only did they - in alliance with the geographically disadvantaged states and the 'Group of 77' - strongly feature in airing the views of developing states in general and geographically disadvantaged states in particular, but they also initially served to impress on the major maritime powers that they wanted to change many of the traditional rules of international law.

Despite their efforts, however, the 1982 **LOSC** does not satisfy their main aspirations. Briefly, the idea of equal access to the exclusive economic zone was not accepted in the **LOSC**. The coastal states in particular objected strongly to the argument that land-locked states stood to gain little in terms of benefits from the development of the exclusive economic zone concept, and that they should therefore be allowed equal access to the zones of neighbouring coastal states. Even though Article 69 of the **LOSC** grants land-locked states access on an equitable basis, the standard of equitable participation is left vague. However, since equity implies a certain degree of fairness in the procedural sense, it may reasonably be expected that the interests of land-locked states cannot be dismissed without due consideration on the part of their coastal counterparts. On the other hand, because the general right of equitable participation applies only to surplus living resources in foreign exclusive economic zones, its significance will diminish as individual coastal states implement measures to enhance their harvesting capacity. In addition, while the **LOSC** appears to grant access for land-locked states even where

there is no surplus, these provisions are open to a number of conflicting interpretations[1]. Similarly, even though land-locked (and geographically disadvantaged) states are singled out for special attention in Part V of the **LOSC**, there is no clear guarantee that they will have access to 'foreign' exclusive economic zones on terms which are as favourable as those offered to other states.

With respect to the non-living resources of the exclusive economic zone and the continental shelf, land-locked states have fared even less well. Firstly, because it retains the rule that only coastal states may claim sovereign rights to exploration and exploitation of the shelf resources, the **LOSC** has made no allowance for the aspirations of land-locked states in this regard. Secondly, because of its approach to the continental shelf, the **LOSC** ensures that land-locked states will be barred from access to large areas of the seabed[2].

The provisions in the **LOSC** pertaining to the deep seabed represent a series of compromises on the part of all the participants at **UNCLOS III**. They acknowledge that land-locked states are fully entitled to participate in seabed exploitation, and in some areas provide for special consideration of the needs of those states by the **Authority**. By virtue of the provisions of Part XI land-locked states can also benefit from the revenue-sharing provisions concerning activities in the Area, even if they do not undertake seabed mining on their own or through the **Enterprise**, and they can also be represented in the **Council**. However, their voting strength may be severely circumscribed in the **Council**, and they have no guarantee that their share of seabed revenues will be substantial[3].

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1 Vasciannie S C *Land-Locked and Geographically Disadvantaged States in the International Law of the Sea* Oxford: Clarendon Press 1990 218/219

2 'Admittedly, Article 82, requiring coastal States to share a proportion of their revenue from shelf exploitation beyond 200 miles from the shore, shows some regard for the interests of developing LLGDS; but even here the scope for potential benefits for the LLGDS seems somewhat limited' - Vasciannie 1 219

3 Vasciannie 1 219

As far as the right of access to the sea for land-locked states is concerned, Part X provides for a right of access in clear, mandatory terms, and there is no specific requirement that transit must take place on the basis of reciprocity between land-locked states and their coastal counterparts. However, individual land-locked and coastal states still need to reach agreement on the terms and modalities of free transit across the territory of the latter, and the convention is silent on what happens in the event of failure to reach agreement. Furthermore, Article 125(3) seems to allow transit states a fair degree of latitude in taking measures to protect their 'legitimate interests', and the possibility remains that - even as between parties to the **LOSC** - the right of access may remain subject to a number of restrictions.

It has been noted before that the provisions of the convention can be divided into declaratory, legislative and clarificatory law[4]. This also begs the question as to which parts of the **LOSC** could be regarded as innovative and which as a codification of existing customary international law. Apart from the obvious declaratory rules[5], there seems to be agreement that in case of doubt as to whether a particular rule in the convention is a legislative or a declaratory one, the convention should be examined article by article and the question posed whether it reflects state practice or not[6].

As far as the 'package deal' approach is concerned, the 'Group of 77' has advanced the view that industrialised states which reject Part XI of the convention should not be allowed to derive benefits from legal regimes described in other parts of the treaty. However, those developing coastal states which have declared exclusive economic zones without granting rights to the land-locked and geographically disadvantaged states (and which have not yet ratified the convention) seem to be violating the 'package deal'

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4 See 3.3.14 *supra* and Devine D J 'Southern Africa and the law of the sea: problems common, uncommon and unique' in *The Law of the Sea* edited by Bennett T W *et al* Cape Town: Juta & Co, Ltd 1986 31

5 For example the right to navigate the high seas, claims to a 12-mile territorial zone, and claims to a 200-mile exclusive economic zone

6 Devine 4 30, Vasciannie 1 220. See also Burke W T 'Customary Law of the Sea: Advocacy or Disinterested Scholarship?' 1989 *Yale Journal of International Law* Vol 14 510/511, Wolfrum R 'The Emerging Customary Law of Marine Zones: State Practice and the Convention on the Law of the Sea' 1987 *Netherlands Yearbook of International Law* Vol XVIII 122

themselves. It is thus left primarily to the developing land-locked and geographically disadvantaged states to take the lead in presenting the 'package deal' approach.

7.2 THE VIABILITY OF THE 1982 LAW OF THE SEA CONVENTION

The mere fact that the 1982 **LOSC** is not yet in force, nearly 10 years after its conclusion, begs the question as to whether it will ever enter into force. More important, however, is the question as to the present status of the provisions of the treaty.

Arvid Pardo[7] offers the following:

> The recently concluded law of the sea negotiations ... are - together with questions of disarmament, the New International Economic Order, and others - a part of the contemporary global *problematique* of peace. They are influenced by and in turn influence negotiations in other areas of the *problematique*[8].

In evaluating **UNCLOS III** Pardo lists the the important innovations of the **LOSC**[9]. However, he also notes that - from the point of view of world order - the major concern should be whether the **LOSC** adequately serves the functions 'that all international law must serve'[10]. He concludes that the convention 'because of its silence, vagueness, or ambiguity on many fundamental questions, does not consistently serve any of the

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7 Pardo A 'An Opportunity Lost' in *Law of the Sea* edited by Oxman B H, Caron D D and Buderi C L O San Francisco: ICS Press 1983 13-25

8 Pardo 7 13

9 The concept of transit passage through straits used for international navigation; the concept of archipelagic baselines and archipelagic waters; the concept of the exclusive economic zone; fundamental change in the definition of the legal continental shelf; explicit recognition of scientific research and construction of artificial islands and other installations as freedoms of the high seas; the duty of international cooperation in the development and transfer of marine science and technology; and the concept of a comprehensive environmental law of the sea based on the obligation of all states to protect and preserve the marine environment - see Pardo 7 14

10 Namely accommodation of interests, prevention of conflict, predictability, and promotion of common or community objectives - see Pardo 7 15

functions that all international law must serve'[11]. At the same time, he points out that a treaty 'of limited value in itself could be extremely valuable if it were to strengthen world order by furthering equity between states or by suggesting effective solutions to resource management and conservation problems in the marine environment'[12]. However, even on that count he finds the convention deficient.

This view may be unnecessarily negative, but at the same time understandable, given the author's personal involvement in the negotiations right from the start. However, a more constructive approach may be in considering the alternatives to or options under the **LOSC**.

A personal view is that the correct approach would be to examine ways in which to make the **LOSC** work, rather than suggesting radical alternatives. The **LOSC** and the many years of hard work that went into it does not stand alone: it will surely have an influence on the international law of the future.

One approach to the future of the **LOSC** would be to wait for ratification at a future date. However, it has been pointed out before that this is unlikely, and even if it is ratified in its present form, few of the major maritime powers would do so. Such ratification may thus ultimately be to a large degree meaningless.

A second approach may be to convene another conference on the law of the sea. However, not only is it unlikely that this would in itself lead to a different outcome to that of the 1982 **LOSC**, but it may even lead to more dissension on the law of the sea than is the case at present.

A third approach may be to amend the **LOSC** so as to ensure acceptance by the majority of states. However, Article 312 only provides for amendment '[a]fter the expiry of a period of 10 years from the date of entry into force' of the convention, while

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[11] Pardo 7 19

[12] *Ibid*

Article 313 (on amendment by simplified procedure) provides that the said procedure may be used for any amendment except that relating to activities in the Area. Article 314 (on amendment relating exclusively to activities in the Area) is also of no real assistance because of the fact that the convention is not in force yet. The proposed review conference[13] is to take place 15 years 'from 1 January of the year in which the earliest commercial production commences under an approved plan of work', but because the convention is not yet in force, no such production has been officially approved to date. Article 154 refers to periodic review, but once again it can only take place '[e]very five years from the entry into force' of the convention.

From the above it appears that the provisions of the **LOSC** militate against reconsideration of the issues until such time as the convention has entered into force. At the same time, the mere fact that it has not entered into force cannot prevent the international community from negotiating another convention to replace one that is for all practical reasons (but for the possible evidence of customary international law) non-existent.

The provisions of the convention pertaining to amendment seems to rule out another possible approach, namely that of accepting the mainly non-controversial parts and seeking a solution to Part XI. However, an important guiding principle may be offered in Article 197 (even though it relates only to the the protection and preservation of the marine environment). The article provides that states 'shall co-operate on a global basis and, as appropriate, on a regional basis directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, ... taking into account characteristic regional features'.

It is submitted that the wording of Article 197 may indeed be prophetic for the **LOSC** as a whole, and that a regional approach may be the only workable solution for a subject as wide and diverse as the law of the sea. A regional approach wherein the

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[13] Article 155

issues of security, conservation, and upliftment of particular areas (particularly of the developing states) are of prime concern may yet be the answer to the questions posed (but so far unanswered) at **UNCLOS III**.

7.3 THE IMPACT OF THE 1982 LAW OF THE SEA CONVENTION ON PUBLIC INTERNATIONAL LAW

It has been noted before that none of the particular provisions of the **LOSC** were voted upon, and that the consensus principle was followed right from the start. The idea was that general acceptance of the complete 'package' would increase its chances of ratification and strengthen its claim to be regarded as 'instant' customary international law[14].

When the US could not obtain the changes it wanted and requested a vote, the convention was adopted - in accordance with traditional conference practice - by a majority vote. Thus the adoption of the consensus principle and the early expectations of a 'package deal' came to nought.

The fact that the US voted against the convention and that certain other maritime states abstained is not a good omen for its future (particularly for the deep seabed regime). Even so - and allowing for the *North Sea Continental Shelf* cases[15] - it seems likely that state practice will confirm or come to accept many of the particular **LOSC** provisions[16] as being binding as custom. However, it should be borne in mind that the consensus favouring the inclusion of a particular rule as a part of the overall package may mask opposition to the rule taken by itself. A number of provisions in the area of the more traditional law of the sea, as well as the acceptance of compulsory judicial and arbitral settlement, were for example concessions by developing states to which acceptance of

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[14] Harris D J *Cases and Materials on International Law* 3rd ed London: Sweet & Maxwell 1983 286

[15] *Ibid*

[16] Whether those duplicating or building upon the 1958 **Geneva Conventions** or those adding to them

the deep seabed regime was a necessary counterweight. Paradoxically, the attempt at consensus may in the event have hindered the development of customary international law in some cases. Had each provision been voted upon, the presence or absence of genuine agreement would have been more evident, and - in some cases - further efforts to obtain a compromise text that was generally acceptable at the more particular level might have borne fruit[17].

A golden thread running throughout the provisions of the 1982 **LOSC** - at least as far as land-locked states are concerned - is that they are granted rights on many levels, but that these rights should be agreed upon with other (normally neighbouring) states. The question then arises whether one can really describe these provisions as 'rights', since they will not come into effect unless the further step of negotiation is undertaken.

As far as public international law in general, and international treaty-making in particular is concerned, this factor may just be an important pointer to the future. It has already been shown that it is unlikely that the **LOSC** will enter into force in its present form. But even if it were to enter into force, most states - not just land-locked states - would have to enter into some form or other of regional cooperation with states around them to derive the maximum benefit from the provisions of the **LOSC**.

This implies that international law-making on a wider scale will have to take cognisance of the fact that states operate optimally when their immediate (regional) needs are satisfied. The principles of non-intervention, security, and self-interest may be of much more immediate importance to any particular state than obliging the rules of the international system.

This is also exactly the reason why it may be wrong to accuse the US for 'scuttling' the **LOSC**. Whatever the arguments against the US action, it is clear that the US realised that its own interests would not be fully served by the provisions of the **LOSC** in general, and Part XI in particular. It may be argued that the US should have taken the

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[17] Harris 14 286

wider interests of the world community rather than its own into account, but at the same time the US (probably more so than any other state in the world) has to answer to its domestic constituency when it it takes part in international law-making.

However, it has become quite clear that the costs for the US in navigation, environment and dispute settlement might outweigh the benefits of deepsea mining. The US position is that any state can mine the resources of the deep seabed as a freedom of the high seas. This view has however been rejected by most states of the world who argue that mining must be done according to the rules established by the **LOSC**. They further argue that even if the norms of the convention have not yet become law, the actions of so many states acting together to develop that new regime would have the effect of nullifying the view that deep seabed mining is a high seas freedom, thus leaving the matter in a state of confusion[18].

It is perfectly understandable that the proceedings at **UNCLOS III** were so protracted: for the first time, many newly independent states had a say in international law-making, and the nature of the proceedings lent themselves to posturing and debate on a scale never seen before in international law-making. The above is not to denigrate the role of developing states. Rather, it should be seen as an important exercise in 'learning the rules' of international law, so to speak. However, sufficient time had gone by for those states now to realise that they have an important role to play in future international law, and that the best way to go about it is to participate responsibly towards realising their goals.

For developing states in general, there are lessons to be learnt from the proceedings at **UNCLOS III**. Despite the relatively strong basis of their objections (both numerically and philosophically speaking) to traditional international law, the eventual contribution

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[18] See the opening remarks at the January 1984 workshop 'Consensus and Confrontation: The United States and the Law of the Sea Convention' in Honolulu. That workshop brought together representatives of the US government, diplomats from the Asia-Pacific region who had represented their states at **UNCLOS III**, and scholars from both the US and the Asia-Pacific region to analyse all aspects of the **LOSC** - see 'Introduction' by Van Dyke J M in *Consensus and Confrontation: The United States and the Law of the Sea Convention* edited by Van Dyke J M Honolulu: The Law of the Sea Institute, University of Hawaii 1985 4

they made to the convention was not as substantial as they could have hoped for. No doubt that can be ascribed to a variety of factors. However, one in particular comes to mind, and that is the general lack of clarity in articulation as to their demands. Even though many developing states were vociferous in their demands, the formulation of practical rules to satisfy those demands was sadly lacking[19].

This may well be a factor to bear in mind should negotiations on the law of the sea be reopened. Unless all states are clear and unambiguous in their contributions, it may well be that such future negotiations also come to nought[20]. In particular, land-locked states should ensure that they have a platform from which to articulate their demands in such a way that they can derive the greatest benefits from a resulting treaty.

The above is not confined to developing states only. In the words of Nye[21]:

> Perhaps the most important lesson from our [the US] experience with the Third Law of the Sea Conference is that we need to prepare ourselves much better before we enter multilateral negotiations[22].

Finally, Oxman[23] suggests three hypotheses for the future of the international law of the sea. In the first place, it is 'unnecessary and unwise' to suppose that there is an inherent conflict between the interests and values of the major maritime powers and those of public international law as classically understood[24]. Secondly, while freedom of state action is deeply embedded in the traditions of public international law and the

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19 See 7.4 *infra* for possible solutions to future negotiations

20 This is, of course, not peculair to the law of the sea only, but to international law-making in general

21 Nye J S 'Political Lessons of the New Law of the Sea Regime' in *Law of the Sea* edited by Oxman B H, Caron D D and Buderi C L O San Francisco: ICS Press 1983 113-126

22 Nye 21 125

23 Oxman B H 'The Two Conferences' in *Law of the Sea* edited by Oxman B H, Caron D D and Buderi C L O San Francisco: ICS Press 127-144

24 Namely peace, order, and stability of expectations - see Oxman 23 141

perceptions of governments, freedom of action of the individual (whether political or economic) is not. Thus, to the extent that freedom of action for the individual is an underlying objective in international negotiations, it may be easier to secure that freedom of action if it is addressed on the level of public law rather than private law, namely in terms of freedom of action of states rather than of individuals or companies[25]. In the third place, caution should be taken when concluding that customary international law is necessarily more conducive to free enterprise than law-making treaties can be. 'Although both are imperfect, customary international law cannot offer businessmen the same measure of precision, long-term predictability, and dispute settlement mechanisms as treaty law'[26].

7.4 CONCLUSION

Future prospects for the entry into force of the **LOSC** are bleak. The international political arena of today is very much different to that of 1973 or even 1982. In 1973 the newly-independent states were vociferous in their demands, and as such were awarded a great deal of attention. The major powers did much to accommodate the demands of the developing states, and **UNCLOS III** was a prime example of international treaty-making on a wider scale than ever before. New concepts of equity and fairness abounded. The 'common heritage of mankind' and the 'new international economic order' were but two of these. Furthermore, the consensus principle indicated a willingness on the part of the developed states to allow the developing and newly-independent states the greatest opportunity to have a full say in every part of the process.

However, the realities of the 1980s brought about a disillusionment with the practical implementation of these new concepts. African and Latin American states in particular

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[25] Oxman (23 141) suggests that the freedom of the high seas works in precisely this way - it is enjoyed by states, and states then extend that freedom on more or less liberal terms to their nationals

[26] Oxman 23 141

were the recipients of vast sums of foreign aid, but in many cases it was used to finance expensive projects that did not generate new income. The 'new international economic order' came to mean redistribution of wealth from wealthy to poor states, without much to be shown for the grants in foreign aid. Many poor states could simply not pay the interest on loans, and were forced to take on additional burdens.

In addition, another factor which irked especially the Western industrialised states was the fact that many of the newly-independent states (after decolonisation) merely went from one form of autocracy to another. Few states in Africa and Latin-America are truly democratic in the full sense of the word, with the result that human rights are often ignored. Furthermore, there have been on-going civil wars in many of these states for years, with successive governments from industrialised states financially backing one group or another. The aid was unproductive because it was mainly used to finance war operations.

A further factor in the general weakening of the political position of the developing states is the fact the the 'Cold War' no longer exists, with the resultant warming of relations between the East and the West. The past two years in particular showed a remarkable cordiality between the East and the West, with the result that many African and Latin American states have lost their strategic importance to the major powers.

Even so, the developing states did play an important role at the negotiations towards the **LOSC**. Furthermore, even though the **LOSC** is not yet in force, it cannot simply be discounted. The 1982 **LOSC** covers all the ground of the 1958 **Geneva Conventions**, and more. Many of its provisions are essentially the same as that of the **Geneva Conventions**. Some contain different or more detailed rules on matters covered by them. Others - in particular those on the exclusive economic zone and the deep seabed - spell out new legal regimes. The main changes or additions are the acceptance of a 12-mile territorial sea, provision for transit passage through international straits, increased rights for archipelagic and land-locked states, stricter control of marine pollution, further provision for fisheries conservation, acceptance of a 200-mile exclusive economic zone for coastal states, changes in the continental shelf regime, and provision

for the development of deep seabed mineral resources. A considerable achievement was the provision for the compulsory settlement or arbitration of most kinds of disputes that may arise under the convention at the request of just one of the parties to a dispute[27].

Thus, the role of developing states in international law cannot be negated. In addition, the law of the sea will not come to a standstill simply because the **LOSC** has not entered into force yet. The law of the sea, like all forms of international law, is a living organism. In the years subsequent to the **LOSC** many states - whether signatories to the **LOSC** or not - have in general abided by the principles governing the law of the sea. While the importance of self-interest and regional formations have been emphasised earlier on, these - however important - cannot take the place of an international organising system for the seas.

> When the work and hoopla of defining ... oceans policy are over and emotions have settled, it will be the task of the serious-minded to formulate and execute an international oceans strategy... That strategy will, as it must, include an effort to build common global understandings regarding the rules of the game. If not in form, then in fact, the point of departure will be the 1982 convention[28].

At the same time, the value of a regional approach cannot be discounted. For Southern Africa a regional approach may be of particular importance. Recent events in Mozambique and Angola, as well as a general improvement in relations between South Africa and most of its neighbours, augur well for a system of regional cooperation. While there are still deep-seated political differences in the region, economic factors may be decisive in bringing about such cooperation. As far as the law of the sea is concerned, South Africa - with its long coastline and many land-locked states in close proximity - is uniquely poised to play an important role in that regard.

In the words of US Ambassador William Swing:

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[27] Article 286. The 1958 **Geneva Conventions** made no such provision - see Harris 14 285/286

[28] Oxman 23 144

> Regional integration in Southern Africa ... might usefully take three basic forms: security cooperation, economic integration and human rights coordination. Fortunately, in two of these three areas, regional structures already exist which require only adjustment and evolvement to the new realities in Southern Africa - that is, the Joint Commission on Namibia and SADCC. For the third, a potential model already exists in Europe, the CSCE. The challenge is thus to adapt two outdated structures and one foreign prototype into regional bodies suited to the peacemaking and democratization needs of Southern Africa. Like South Africa, the emergent Southern African sub-area offers Africa its best hope yet for peace and democracy[29].

The ambassador pointed to previous efforts at regional cooperation in Africa, and noted that there were many failures in this regard (**ECOWAS, the Central African Customs and Economic Union**, and the **East African Customs and Economic Union**). However, he adds:

> Having mentioned these regional failures, I wish to argue that Southern Africa at present offers Africa its greatest prospect for a functioning, even vibrant, region in the short to medium term. I say that regional cooperation has an opportunity to succeed in Southern Africa - although it has largely failed elsewhere in Africa - because of a twin dynamic that is at work here: peacemaking and democratization. These two developments are far more advanced in the ten-state region south of Zaire and Tanzania than they are anywhere else on the African continent[30].

As far as the three areas of security cooperation, economic integration, and human rights are concerned, the success of those would obviously require full consultation and consensus among all competing political forces within the region.

One way of maintaining regional peace would be the establishment of an organisation analogous to the **Joint Commission on Namibia**. The idea of establishing such a mechanism would be (i) to ensure regular consultations among Southern African states

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[29] Swing W L 'Peacemaking and Democracy in Southern Africa: An American View' an address given on 23 October 1991 to the **South African Institute of International Affairs** Johannesburg 7. **CSCE** refers to the **Conference on Security and Cooperation in Europe**

[30] Swing 29 2. See also Cloete F 'Regionalism in South Africa: Constraints and possibilities' 1991 *Africa Insight* Vol 21 No 1 30/31

on security issues and for the exchange of security information, (ii) to have it serve as a confidence building measure and early warning system for any regional security problems, (iii) to have it function as a forum for discussion of regional security issues, and (iv) to deal with potentially troublesome military- and ocean-related issues. Such a body would also be in a position to convene and investigate cross-border complaints on short notice, address any concerns about troop levels, arms transfers and arms purchases, raise potential disputes to the political level well before they give rise to serious misunderstandings, and provide a regional arms control forum.

As far as economic integration is concerned, the arguments against it concentrate mainly on bleak economic prospects within South Africa for the future, and that the SADCC might collapse should South Africa join it (because of South Africa's economic weight, and the fact that South Africa might so dominate the organisation that cooperation could become meaningless). However, there is a strong argument to be made out that regional economic cooperation is the only viable alternative. In addition, Southern Africa (unlike the rest of Africa) is rich in resources, infrastructure, and development potential. What is needed is for the SADCC to review its 10-year old mandate and to reduce the dependency of Southern African states on South Africa, and to devise a new mandate designed to increase, rather than decrease, Southern African interdependence.

Thirdly, the protection of human rights should also be a common concern in Southern Africa. No single state can fully isolate itself from the effects of civil conflict or human rights abuses in neighbouring states. Refugee flows are the most obvious illustration of this fact. At some stage in the future governments in the region may consider mechanisms for regular consultation on human rights issues, and this may lead to the establishment of an organisation for that purpose. If Southern African states individually commit themselves to the protection of civil liberties, they should expect to be open to scrutiny on that level by their neighbouring states. A regional human rights organisation would send a strong signal to the rest of the world about the region's commitment to human rights values, and such a signal would be received with great interest internationally.

Global trends argue for some serious rethinking about how a post-apartheid South Africa and its neighbours could achieve a greater degree of integration. In a world where Africa as a whole runs the increasing risk of being regarded with scepticism, the states of Southern Africa have little option but to build together an integrated region, or otherwise risk oblivion and irrelevance.

Even though the international law of the sea is but one of the factors that may lead to such integration, it may just be one of the most forceful ones. The geographical realities of the region, coupled with the need for more resources (living and non-living), may be decisive in bringing about such integration.

7.5 TABLE OF CASES

Anglo-Norwegian Fisheries Case 1951 **ICJ** *Reports* 116

Asylum Case (Colombia v. Peru) 1950 **ICJ** *Reports* 192

Continental Shelf Case (Tunisia/Libyan Arab Jamahiriya) 1982 **ICJ** *Reports* 18

Diversion of Waters from the Meuse Case 1937 **PCIJ** Series A/B No 70 73

Fisheries Jurisdiction Case (United Kingdom v. Iceland) 1974 **ICJ** *Reports* 3

Land, Island and Maritime Frontier Dispute (El Salvador/Honduras) 1990 **ICJ** *Reports* 3

Maluleke v Minister of Internal Affairs 1980 **BSC** *Reports* 59

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA) 1986 **ICJ** *Reports* 14

North Sea Continental Shelf Cases (Denmark, Netherlands v. Federal Republic of Germany) 1969 **ICJ** *Reports* 3

South-West African Cases (Ethiopia, Liberia v. South Africa) (2nd Phase) 1966 **ICJ** *Reports* 6

The Gulf of Maine Case 1984 **ICJ** *Reports* 293

The Lotus Case (France v. Turkey) (1927) **PCIJ** Series A No 10 18

7.6 SELECTED BIBLIOGRAPHY

7.6.1 PRIMARY SOURCES

7.6.1.1 DEBATES

United States House of Representatives **Hearing before the Committee on Foreign Affairs** 19 November 1974 24-49

Republic of South Africa **House of Assembly Debates** 3 June 1977 cols 9194-9196

United States Senate **Hearing before the Subcommittee on Arms Control, Oceans and International Environment** 16 June 1978 72-90

United Nations **Round-up of Session** United Nations Press Release: Department of Public Information 30 April 1982

7.6.1.2 TREATIES

Treaty of Crespy-en-Laonnais of 18 September 1544 between France and Spain

Convention Respecting Fisheries, Boundary, and the Restoration of Slaves of 20 October 1818 between the UK and the US

International Convention for Adapting to Maritime Warfare the Principles of the Geneva Convention of 22 August 1864, Geneva

Customs Union Convention of 1889 between the Cape Colony and Lesotho of 1889

Treaty between Great Britain and Portugal defining their respective Spheres of Influence in Africa of 11 June 1891

Customs Union Agreement between South Africa and the High Commission Territories of 1910

Paris Convention for the Regulation of Aerial Navigation of 1919

Convention and Statute on Freedom of Transit of 9 December 1921, Barceloma

Statute on the Regime of Navigable Waterways of International Concern of 9 December 1921, Barcelona

Convention and Statute on the International Regime of Railways of 9 December 1923, Geneva

Convention and Statute on the International Regime of Maritime Ports of 9 December 1923, Geneva

1926 **International Convention relative to Motor Traffic** and the 1926 **International Convention relative to Road Traffic**

International Convention for the Unification of Certain Rules Relating to International Carriage by Air of 12 October 1929, Warsaw, amended by four protocols in 1975, Montreal

Convention on International Civil Aviation of 7 December 1944, Chicago

International Air Services Transit Agreement and the **International Air Transport Agreement** 7 December 1944, Chicago

General Agreement on Tariffs and Trade of 30 October 1947, Geneva

Convention on the International Maritime Organisation of 6 March 1948, Geneva

Convention Concerning the Regime of Navigation on the Danube of 18 August 1948, Belgrade

Havana Charter of 24 March 1948, Havana

Convention on Road Traffic and its Protocols of 19 September 1949, Geneva

Agreement for the Establishment of a General Fisheries Council for the Mediterranean of 24 September 1949, Rome

Convention between the United Kingdom on its own behalf and on behalf of Southern Rhodesia and Portugal relative to the Port of Beira and Connected Railways of 17 June 1950, Beira

International Convention to Facilitate the Crossing of Frontiers for Passengers and Baggage Carried by Rail and the **International Convention to Facilitate the Crossing of Frontiers for Goods Carried by Rail**, both of 10 January 1952, Geneva

International Convention for the High Seas Fisheries of the North Pacific Ocean of 9 May 1952, Tokyo

International Convention for the Prevention of Pollution of the Sea by Oil of 12 May 1954, London

Convention for the Establishment of a European Company for the Financing of Railway Rolling Stock (Eurofirma) of 20 October 1955, Berne

Convention on the Contract for the International Carriage of Goods by Road (CMR) of 19 May 1956, Geneva

European Agreement Concerning the International Carriage of Dangerous Goods by Road (ADR) of 30 September 1957, Geneva

Convention on the High Seas of 1958, Geneva

Convention on the Continental Shelf of 1958, Geneva

Convention on the Territorial Sea and the Contiguous Zone of 1958, Geneva

Convention on the Living Resources of the High Seas of 1958, Geneva

Convention Relating to Co-operation for the Safety of Air Navigation (Eurocontrol) of 13 December 1960, Brussels

Convention between Portugal and the Federation of Rhodesia and Nyasaland Relative to the Construction and Operation of the Beira-Feruka Oil Pipeline of 19 November 1962

Agreement Concerning the International Commission for the Protection of the Rhine from Pollution of 29 April 1963

Convention on Transit Trade of Land-Locked States of 8 July 1965, New York.

Agreement Concerning Pollution of the North Sea by Oil of 9 January 1969, Bonn

International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties of 29 November 1969, Brussels

Customs Union Agreement between Botswana, Lesotho, South Africa and Swaziland of 11 December 1969

International Conventions Concerning the Carriage of Goods by Rail (CIM) and Passengers and Luggage by Rail (CIV) with Additional Protocol of 7 February 1970, Berne

Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof of 11 February 1971, London, Moscow and Washington

Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material of 17 December 1971, Brussels

Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft of 15 February 1972, Oslo

Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter at Sea of 29 December 1972, London, Mexico City, Moscow and Washington

Convention on the Contract for the International Carriage of Passengers and Luggage by Road (CVR) of 1 March 1973, Geneva

Protocol Relating to Intervention on the High Seas in Cases of Pollution by Substances Other than Oil of 2 November 1973, London

Convention on the Protection of the Marine Environment of the Baltic Sea Area of 22 March 1974, Helsinki

Convention for the Prevention of Marine Pollution from Land-based Sources of 4 June 1974, Paris

Basle Convention on the Control of Transbounbdary Movements of Hazardous Wastes and their Disposal of 22 March 1989, Basel

Convention on the Law of the Sea of 30 April 1982, Montego Bay

7.6.1.3 ACTS

Republic of South Africa *Carriage by Air Act* 17 of 1946

Republic of South Africa *Road Transportation Act* 74 of 1977

Republic of South Africa *Status of Bophuthatswana Act* 89 of 1977

Republic of South Africa *Carriage by Air Amendment Act* 81 of 1979

Republic of South Africa *Status of Venda Act* 107 of 1979

Republic of South Africa *Road Transportation Amendment Act* 8 of 1983

Republic of South Africa *Sea Fishery Act* 12 of 1988

Republic of South Africa *Sea Fishery Amendment Act* 98 of 1990

United States Congress *Marine Resources and Engineering Development Act* 17/06/1966

7.1.6.4 REPORTS

United Nations Conference on the Law of the Sea **Report of the United States Delegation to the Resumed Tenth Session** 3-28 August 1981

United Nations Conference on the Law of the Sea **Report of the President to the Conference in Accordance with Rule 37 of the Rules of Procedure** 22 April 1982

United Nations Conference on the Law of the Sea **Report of the President to the Conference** 29 April 1982

7.6.2 SECONDARY SOURCES

7.6.2.1 BOOKS, THESES AND DISSERTATIONS

Adede A O *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea* Dordrecht: Martinus Nijhoff Publishers 1987

Afolabi J O *The Impact of the African States on the Third Law of the Sea Conference: Its Ramifications for the Emerging World Order* unpublished D Phil thesis Miami: University of Miami 1980

Akehurst M *A Modern Introduction to International Law* 2nd ed London: George Allen and Unwin Ltd 1971

Alexandre P 'The land-locked countries of Afrique Occidentale Francaise (AOF)' in *Land-locked Countries of Africa* edited by Cervenka Z Uppsala: The Scandinavian Institute of African Studies 1973 137-145

Amer J 'Lesotho - Physical and Social Geography' in *Africa South of the Saharah* 10th ed London: Europa Publications Limited 1980 551

Amissah A N E 'Air transport in Africa and its importance for African land-locked countries' in *Land-locked countries of Africa* edited by Cervenka Z Uppsala: The Scandinavian Institute of African Studies 1973

Anand R P *Legal Regime Of The Sea-Bed And The Developing Countries* Leyden: A.W. Sijthoff 1976

Anand R P *Origin and Development of the Law of the Sea* The Hague: Martinus Nijhoff Publishers 1983

Anand R P 'Odd Man Out: The United States and the UN Convention on the Law of the Sea' in *Consensus and Confrontation: The United States and the Law of the Sea Convention* edited by Van Dyke J M Honolulu: The Law of the Sea Institute, University of Hawaii 1985 73-124

Anand R P 'The Settlement of Disputes and the Law of the Sea Convention' in *Consensus and Confrontation: The United States and the Law of the Sea Convention* edited by Van Dyke J M Honolulu: The Law of the Sea Institute, University of Hawaii 1985 483-487

Andrassy J *International Law and the Resources of the Sea* New York: Columbia University Press 1970

Antrim L N and Sebenius J K 'Incentives for Ocean Mining under the Convention' in *Law of the Sea* edited by Oxman B H, Caron D D and Buderi C L O San Francisco: ICS Press 1983 79-99

Attard D J *The Exclusive Economic Zone in International Law* Oxford: Clarendon Press 1987

Badura P 'Ports' in *Encyclopedia of Public International Law, Instalment 11* edited by Bernhardt R Amsterdam: Elsevier Science Publishers B.V. 1989 262-266

Baffoe F 'Some Aspects of the Political Economy of Economic Integration in Southern Africa: The Case of South Africa and the Countries of Botswana, Lesotho and Swaziland' in *Economic Cooperation and Integration in Africa* edited by Ndongko W A Dakar: Codesria Book Series 1985 254-285

Barile G 'The Way of Negotiating at the Third United Nations Conference on the Law of the Sea' in *The New Law of the Sea* edited by Rozakis C L and Stephanou C A Amsterdam: North-Holland 1983 21-31

Barrie G N *Topical International Law* Durban: Butterworths 1979

Barrie G N 'Fisheries and the 1982 United Nations Law of the Sea Convention' in *The Law of the Sea* edited by Bennett T W *et al* Cape Town: Juta & Co, Ltd 1986

Barston R P 'The Law of the Sea Conference: The Search for New Regimes' in *The Maritime Dimension* edited by Barston R P and Birnie P London: George Allen & Unwin 1980 154-168

Barston R P and Birnie P W 'The Marine Environment' in *The Maritime Dimension* edited by Barston R P and Birnie P London: George Allen & Unwin 1980 108-127

Beazley P B 'Baselines' in *Encyclopedia of Public International Law*, Instalment 11 edited by Bernhardt R Amsterdam: Elsevier Science Publishers B.V. 1989 43-45

Bennett T W 'The status of the Law of the Sea Convention' in *The Law of the Sea* edited by Bennett T W *et al* Cape Town: Juta & Co, Ltd 1986

Bernaerts A *Bernaerts' Guide to the United Nations Convention on the Law of the Sea* Coulsdon: Fairplay Publications Ltd. 1988

Birnie P W 'The Law of the Sea Before and After UNCLOS I and UNCLOS II' in *The Maritime Dimension* edited by Barston R P and Birnie P London: George Allen & Unwin 1980 8-26

Birnie P W 'Contemporary Maritime Legal Problems' in *The Maritime Dimension* edited by Barston R P and Birnie P London: George Allen & Unwin 1980 169-189

Booysen H *Volkereg* Cape Town: Juta & Co. 1980

Borgese E M 'Making Part XI of the Convention Work' in *Consensus and Confrontation: The United States and the Law of the Sea Convention* edited by Van Dyke J M Honolulu: The Law of the Sea Institute, University of Hawaii 1985 236-240

Bouchez L J *The Regime of Bays in International Law* Leyden: A.W. Sythoff [sic] 1964

Bouchez L J 'Bays and Gulfs' in *Encyclopedia of Public International Law, Instalment 11* edited by Bernhardt R Amsterdam: Elsevier Science Publishers B.V. 1989 45-48

Bowett D W *The Law of the Sea* Manchester: Manchester University Press 1967

Bowett D W 'Islands' in *Encyclopedia of Public International Law, Instalment 11* edited by Bernhardt R Amsterdam: Elsevier Science Publishers B.V. 1989 165-167

Bowman M J and Harris D J *Multilateral Treaties* London: Butterworths 1984

Brown E D 'Deep-Sea Mining: The Consequence of Failure to Agree at UNCLOS III' in *The New Law of the Sea* edited by Rozakis C L and Stephanou C A Amsterdam: North-Holland 1983 209-257

Brown E D *The Areas Within National Jurisdiction* London: Graham & Trotman 1984

Brown E D 'Law of the Sea, History' in *Encyclopedia of Public International Law, Instalment 11* edited by Bernhardt R Amsterdam: Elsevier Science Publishers B.V. 1989 191-196

Brownlie I *Principles of Public International Law* 4th ed Oxford: Clarendon Press 1990

Burke W S and Brokaw F S 'Ideology and the Law of the Sea' in *Law of the Sea* edited by Oxman B H, Caron D D and Buderi C L O San Francisco: ICS Press 1983 43-58

Burke W T 'The Law of the Sea Convention and Fishing Practices of Nonsignatories, with Special Reference to the United States' in *Consensus and Confrontation: The United States and the Law of the Sea Convention* edited by Van Dyke J M Honolulu: The Law of the Sea Institute, University of Hawaii 1985 314-337

Buzan B *Seabed Politics* New York: Praeger Publishers 1976

Caflisch L C 'The Settlement of Disputes Relating to Activities in the International Seabed Area' in *The New Law of the Sea* edited by Rozakis C L and Stephanou C A Amsterdam: North-Holland 1983 303-344

Caflisch L 'Land-Locked and Geographically Disadvantaged States' in *Encyclopedia of Public International Law, Instalment 11* edited by Bernhardt R Amsterdam: Elsevier Science Publishers B.V. 1989 169-174

Caflisch L 'Maritime Boundaries, Delimitation' in *Encyclopedia of Public International Law, Instalment 11* edited by Bernhardt R Amsterdam: Elsevier Science Publishers B.V. 1989 212-219

Caron D D 'Reconciling Domestic Principles and International Cooperation' in *Law of the Sea* edited by Oxman B H, Caron D D and Buderi C L O San Francisco: ICS Press 1983 3-10

Carroz J 'Fishery Zones and Limits' in *Encyclopedia of Public International Law, Instalment 11* edited by Bernhardt R Amsterdam: Elsevier Science Publishers B.V. 1989 121-124

Carty A *The decay of international law?* Manchester: Manchester University Press 1986

Castren E 'What We Expect of International Law' in *Essays on International Law* edited by Nawaz M K Leyden: A. W. Sijtoff 1976 42-47

Castren E 'Present State and Future Development of International Law, with particular reference to the United Nations' in *Essays in Honour of Berndt Godenhielm, E J Manner and Sigurd von Numers* Helsinki: Publications of the Finnish Branch of the International Law Association 1984

Cervenka Z 'The limitations imposed on African land-locked countries' in *Land-locked Countries of Africa* edited by Cervenka Z Uppsala: The Scandinavian Institute of African Studies 1973 17-33

Cervenka Z 'Swaziland's links with the outside world' in *Land-locked Countries of Africa* edited by Cervenka Z Uppsala: The Scandinavian Institute of African Studies 1973 263-270

Cervenka Z 'The need for a continental approach to the problems of African land-locked states' in *Land-locked Countries of Africa* edited by Cervenka Z Uppsala: The Scandinavian Institute of African Studies 1973 316-328

Chitasombat N 'Regional Approaches to Environmental Protection' in *Consensus and Confrontation: The United States and the Law of the Sea Convention* edited by Van Dyke J M Honolulu: The Law of the Sea Institute, University of Hawaii 1985 444-449

Churchill R R and Lowe A V *The Law of the Sea* Manchester: Manchester University Press 1988

Cliffe L 'The implications of the TanZam railway for the liberation and development of south Eastern Africa' in *Land-locked Countries of Africa* edited by Cervenka Z Uppsala: The Scandinavian Institute of African Studies 1973 293-299

Cohen L I 'International Cooperation on Seabed Mining' in *Law of the Sea* edited by Oxman B H, Caron D D and Buderi C L O San Francisco: ICS Press 1983 101-109

Cohen M 'Reflections on International Rivers' in *Essays on International Law* edited by Nawaz M K Leyden: A. W. Sijthoff 1976 141-144

Colombos C J *The International Law of the Sea* 5th ed London: Longmans 1962

Colson D A 'The United States, the Law of the Sea, and the Pacific' in *Consensus and Confrontation: The United States and the Law of the Sea Convention* edited by Van Dyke J M Honolulu: The Law of the Sea Institute, University of Hawaii 1985 36-49

Corbett P E *The Growth of World Law* Princeton: Princeton University Press 1971

Couper A D *The Law of the Sea* Hampshire: Macmillan Education Ltd 1978

Dahmani M *The Fisheries Regime of the Exclusive Economic Zone* Dordrecht: Martinus Nijhoff Publishers 1987

D'Amato A 'The Law-Generating Mechanisms of the Law of the Sea Conferences and Convention' in *Consensus and Confrontation: The United States and the Law of the Sea Convention* edited by Van Dyke J M Honolulu: The Law of the Sea Institute, University of Hawaii 1985 125-137

D'Amato A 'The Enforcement of Norms and Rules with Respect to Nonparties' in *Consensus and Confrontation: The United States and the Law of the Sea Convention* edited by Van Dyke J M Honolulu: The Law of the Sea Institute, University of Hawaii 1985 488-495

Danelius H 'Ten Years of Fishery Co-operation in the Baltic Sea' in *Essays in Honour of Berndt Godenhielm, E J Manner and Sigurd von Numers* Helsinki: Publications of the Finnish Branch of the International Law Association 1984

De Pauw F 'Grotius and The Law of the Sea' in *A Grotius Reader* edited by Van Holk L E and Roelofsen C G The Hague: T.M.C. Asser Instituut 1983 145-175

Devine D J 'Southern Africa and the law of the sea: problems common, uncommon and unique' in *Law of the Sea* edited by Bennett T W *et al* Cape Town: Juta & Co, Ltd 1986

Devine D J 'Sea passage in South African maritime zones: actualities and possibilities' in *Law of the Sea* edited by Bennett T W *et al* Cape Town: Juta & Co, Ltd 1986

Djalal H 'The Effects of the Law of the Sea Convention on the Norms that Now Govern Ocean Activities' in *Consensus and Confrontation: The United States and the Law of the Sea Convention* edited by Van Dyke J M Honolulu: The Law of the Sea Institute, University of Hawaii 1985 50-56

Djalal H 'Developments in the Law of the Sea During the Next Decade' in *Consensus and Confrontation: The United States and the Law of the Sea Convention* edited by Van Dyke J M Honolulu: The Law of the Sea Institute, University of Hawaii 1985 531-533

Driver P A 'International Fisheries' in *The Maritime Dimension* edited by Barston R P and Birnie P London: George Allen & Unwin 1980 27-53

Dupuy R-J *The Law of the Sea* Dobbs Ferry N.Y.: Oceana Publications Inc. 1974

Dupuy R-J 'The Notion of Common Heritage of Mankind Applied to the Seabed' in *The New Law of the Sea* edited by Rozakis C L and Stephanou C A Amsterdam: North-Holland 1983 199-208

Economides C 'The Contiguous Zone, Today and Tomorrow' in *The New Law of the Sea* edited by Rozakis C L and Stephanou C A Amsterdam: North-Holland 1983 69-81

Elias T O *New Horizons in International Law* Alphen aan den Rijn: Sijthoff & Noordhoff 1980

Elias T O *The International Court of Justice and some contemporary problems* The Hague: Martinus Nijhoff Publishers 1983

Elias T O *Africa and the Development of International Law* 2nd revised edition by Akinjide R Boston: Nijhoff 1988

Erasmus M G *The New International Economic Order and International Organizations* Frankfurt/Main: Haag und Herchen 1979

Erasmus G 'Dispute settlement in the law of the sea' in *The Law of the Sea* edited by Bennett T W *et al* Cape Town: Juta & Co, Ltd 1986

Evans M D *Relevant Circumstances and Maritime Delimitation* Oxford: Clarendon Press 1989

Evensen J 'The Delimitation of Exclusive Economic Zones and Continental Shelves as Highlighted by the International Court of Justice' in *The New Law of the Sea* edited by Rozakis C L and Stephanou C A Amsterdam: North-Holland 1983 107-154

Fincham C and Van Rensburg W *Bread Upon the Waters* Montreal: Turtledove Publishing 1980

Gertenbach L P D 'Fishery Convention areas in the Southeast Atlantic and adjacent seas: overlapping issues' in *Law of the Sea* edited by Bennett T W *et al* Cape Town: Juta & Co, Ltd 1986

Glassner M I *Access to the Sea for Developing Land-locked States* The Hague: Martinus Nijhoff 1970

Glassner M I *Bibliography on Land-locked States* 2nd edition Boston: Martinus Nijhoff Publishers 1986

Glazewski J I 'The admiralty reserve - an historical anachronism or a bonus for conservation in the coastal zone?' in *Law of the Sea* edited by Bennett T W *et al* Cape Town: Juta & Co, Ltd 1986

Goldie L F E 'Archipelagos' in *Encyclopedia of Public International Law, Instalment 11* edited by Bernhardt R Amsterdam: Elsevier Science Publishers B.V. 1989 33-37

Goldwin R A 'Common Sense vs."The Common Heritage"' in *Law of the Sea* edited by Oxman B H, Caron D D and Buderi C L O San Francisco: ICS Press 1983 59-75

Grenville J A S *The Major International Treaties 1914-1945* London: Methuen 1987

Grenville J A S and Wasserstein B *The Major International Treaties Since 1945* London: Methuen 1987

Grindley J R, Glazewski J I and Rabie M A 'The control of South Africa's living marine resources' in *The Law of the Sea* edited by Bennett T W *et al* Cape Town: Juta & Co, Ltd 1986

Hafner G 'Fishing Boats' in *Encyclopedia of Public International Law, Instalment 11* edited by Bernhardt R Amsterdam: Elsevier Science Publishers B.V. 1989 125-125

Hailbronner K 'Airspace over Maritime Areas' in *Encyclopedia of Public International Law, Instalment 11* edited by Bernhardt R Amsterdam: Elsevier Science Publishers B.V. 1989 27-31

Halpern J 'Lesotho - Recent History' in *Africa South of the Sahara* 10th ed London: Europa Publications Limited 1980 552-556

Hambro E 'Some Reflections on the United Nations in the 70's' in *Essays on International Law* edited by Nawaz M K Leyden: A.W. Sijthoff 1976 185-190

Harris D J *Cases and Materials on International Law* 3rd ed London: Sweet & Maxwell 1986

Harrison C S 'Costs to the United States in Fisheries by Not Joining the Law of the Sea Convention' in *Consensus and Confrontation: The United States and the Law of the Sea Convention* edited by Van Dyke J M Honolulu: The Law of the Sea Institute, University of Hawaii 1985 342-368

Harrison C S 'Costs to the United States in Environmental Protection and Marine Scientific Research by Not Joining the Law of the Sea Convention' in *Consensus and Confrontation: The United States and the Law of the Sea Convention* edited by Van Dyke J M Honolulu: The Law of the Sea Institute, University of Hawaii 1985 425-443

Hartwig M 'Onassis Incident' in *Encyclopedia of Public International Law, Instalment 11* edited by Bernhardt R Amsterdam: Elsevier Science Publishers B.V. 1989 249-251

Hayman C 'International Shipping' in *The Maritime Dimension* edited by Barston R P and Birnie P London: George Allen & Unwin 1980 128-141

Henry C E *The Carriage of Dangerous Goods by Sea* London: Frances Pinter (Publishers) 1985

Higgins R *The Development of International Law through the Political Organs of the United Nations* London: Oxford University Press 1963

Hill B H W *Reference and Finding Tools: V. Indexes to Documents in Related Sets A. - New Directions in the Law of the Sea* Dobbs Ferry, New York: Oceana Publications, Inc. 1989

Hill C *Maritime Law* London: Pitman 1981

Hjertonsson K *The New Law of the Sea* Leiden: A. W. Sijthoff 1973

Horn F *Reservations and Interpretative Declarations to Multilateral Treaties* Amsterdam: North-Holland 1988

Hosten W J, Edwards A B, Nathan C and Bosman F *Introduction to South African Law and Legal Theory* Durban: Butterworth 1983

Hveem H 'Relationship of underdevelopment of African land-locked countries with the general problem of economic development' in *Land-locked Countries of Africa* edited by Cervenka Z Uppsala: The Scandinavian Institute of African Studies 1973 278-287

Ioannou K M 'Some Preliminary Remarks on Equity in the 1982 Convention on the Law of the Sea' in *The New Law of the Sea* edited by Rozakis C L and Stephanou C A Amsterdam: North-Holland 1983 97-106

Jaafar A B 'The Changing Legal Status of the Malacca and Singapore Straits' in *Consensus and Confrontation: The United States and the Law of the Sea Convention* edited by Van Dyke J M Honolulu: The Law of the Sea Institute, University of Hawaii 1985 285-291

Jaenicke G 'Law of the Sea' in *Encyclopedia of Public International Law, Instalment 11* edited by Bernhardt R Amsterdam: Elsevier Science Publishers B.V. 1989 174-191

Jessup P C *The Law of Territorial Waters and Maritime Jurisdiction* New York: G. A. Jennings Co., Inc. 1972

Johnson D H N 'Innocent Passage, Transit Passage' in *Encyclopedia of Public International Law, Instalment 11* edited by Bernhardt R Amsterdam: Elsevier Science Publishers B. V. 1989 150-153

Johnson D H N 'Navigation, Freedom of' in *Encyclopedia of Public International Law, Instalment 11* edited by Bernhardt R Amsterdam: Elsevier Science Publishers B.V. 1989 233-235

Johnson D H N 'Straits' in *Encyclopedia of Public International Law, Instalment 11* edited by Bernhardt R Amsterdam: Elsevier Science Publishers B.V. 1989 323-326

Johnston D M *The Theory and History of Ocean Boundary Making* Montreal: McGill-Queen's University Press 1988

Jones D B 'Lesotho - Economy' in *Africa South of the Sahara* 10th ed London: Europa Publications Limited 1980

Kittichaisaree K *The Law of the Sea and Maritime Boundary Delimitation in South-East Asia* Oxford: Oxford University Press 1987

Klemm U-D 'Continental Shelf, Outer Limits' in *Encyclopedia of Public International Law, Instalment 11* edited by Bernhardt R Amsterdam: Elsevier Science Publishers B.V. 1989 99-102

Koh T T B 'Deep Seabed Resources Are the Common Heritage of Humankind' in *Consensus and Confrontation: The United States and the Law of the Sea Convention* edited by Van Dyke J M Honolulu: The Law of the Sea Institute, University of Hawaii 1985 228-232

Koh T T B 'How Can the United States and Other Nations Promote Order for the Oceans?' in *Consensus and Confrontation: The United States and the Law of the Sea Convention* edited by Van Dyke J M Honolulu: The Law of the Sea Institute, University of Hawaii 1985 537-539

Kolodkin A and Zakharov A 'The UN Convention on the Law of the Sea and Customary Law' in *Consensus and Confrontation: The United States and the Law of the Sea Convention* edited by Van Dyke J M Honolulu: The Law of the Sea Institute, University of Hawaii 11985 166-168

Kolodkin A and Zakharov A 'Some Aspects of Soviet State Practice on the Development of Ocean Resources' in *Consensus and Confrontation: The United States and the Law of the Sea Convention* edited by Van Dyke J M Honolulu: The Law of the Sea Institute, University of Hawaii 1985 213-217

Kolodkin A and Zakharov A 'The Common Heritage of Mankind of the Seabed: The Notion and Substance' in *Consensus and Confrontation: The United States and the Law of the Sea Convention* edited by Van Dyke J M Honolulu: The Law of the Sea Institute, University of Hawaii 1985 241-248

Kowet D 'Lesotho and the Customs Union with the Republic of South Africa' in *Land-locked Countries of Africa* edited by Cervenka Z Uppsala: The Scandinavian Institute of African Studies 1973 250-257

Kudej B *The New Law of the Sea* New York: Oceana Publications, Inc. 1984

Kwiatkowska B 'Conservation of Living Resources of the High Seas' in *Encyclopedia of Public International Law, Instalment 11* edited by Bernhardt R Amsterdam: Elsevier Science Publishers B.V. 1989 76-78

Kwiatkowska B *The 200 Mile Exclusive Economic Zone in the New Law of the Sea* Dordrecht: Martinus Nijhoff Publishers 1989

Lagoni R 'Cables, Submarine' in *Encyclopedia of Public International Law, Instalment 11* edited by Bernhardt R Amsterdam: Elsevier Science Publishers B.V. 1989 48-51

Lagoni R ' Internal Waters' in *Encyclopedia of Public International Law, Instalment 11* edited by Bernhardt R Amsterdam: Elsevier Science Publishers B.V. 1989 153-155

Lagoni R 'Internal Waters, Seagoing Vessels In' in *Encyclopedia of Public International Law, Instalment 11* edited by Bernhardt R Amsterdam: Elsevier Science Publishers B.V. 1989 155-160

Laursen F *Superpower at Sea* New York: Praeger Publishers 1983

Lay S H Churchill R and Nordquist M *New Directions in the Law of the Sea - Documents* Vol I Dobbs Ferry, New York: Oceana Publications, Inc. 1973

Legum C 'The problems of the land-locked countries of Southern Africa in the confrontation between independent Africa and South Africa, Rhodesia and Portugal' in *Land-locked Countries of Africa* edited by Cervenka Z Uppsala: The Scandinavian Institute of African Studies 1973 165-181

Lerche C O and Said A A *Concepts of International Politics in global perspective* Englewoord Cliffs, New Jersey: Prentice-Hall, Inc. 1963

MacDonald C G *Iran, Saudi Arabia, and the Law of the Sea* London: Greenwood Press 1980

Mangone G J *Marine Policy for America* London: Taylor & Francis 1989

Marston G 'Maritime Jurisdiction' in *Encyclopedia of Public International Law, Instalment 11* edited by Bernhardt R Amsterdam: Elsevier Science Publishers B.V. 1989 221- 224

Matsebula J S M *A History of Swaziland* Cape Town: Longman 1987

McKinnell R 'Land-locked countries and the United Nations Conference of Trade and Development (UNCTAD)' in *Land-locked Countries of Africa* edited by Cervenka Z Uppsala: The Scandinavian Institute of African Studies 1973 300-315

Merrills J G *A Current Bibliography of International Law* London: Butterworths 1978

Mouton M W *The Continental Shelf* The Hague: Martinus Nijhoff 1952

Münch F 'Artificial Islands and Installations' in *Encyclopedia of Public International Law, Instalment 11* edited by Bernhardt R Amsterdam: Elsevier Science Publishers B.V. 1989 38-40

Nailor P 'The Contemporary Use of Maritime Power' in *The Maritime Dimension* edited by Barston R P and Birnie P London: George Allen & Unwin 1980 142-153

Namaliu R 'The U.S. Position on Tuna and the Pacific Island Nations' in *Consensus and Confrontation: The United States and the Law of the Sea Convention* edited by Van Dyke J M Honolulu: The Law of the Sea Institute, University of Hawaii 1985 376-378

Nanda V P 'Protection of the Internationally Shared Environment and the United Nations Convention on the Law of the Sea' in *Consensus and Confrontation: The United States and the Law of the Sea Convention* edited by Van Dyke J M Honolulu: The Law of the Sea Institute, University of Miami 1985 403-419

Nandan S 'The Law of the Sea Convention Today' in *Consensus and Confrontation: The United States and the Law of the Sea Convention* edited by Van Dyke J M Honolulu: The Law of the Sea Institute, University of Hawaii 1985 28-31

Nandan S 'Implementing the Fisheries Provisions of the Convention' in *Consensus and Confrontation: The United States and the Law of the Sea Convention* edited by Van Dyke J M Honolulu: The Law of the Sea Institute, University of Hawaii 1985 383-388

Nordquist M H and Park C *Reports of the United States Delegation to the Third United Nations Conference on the Law of the Sea* Honolulu: Law of the Sea Institute, University of Hawaii 1983

Nordquist M H *United Nations Convention on the Law of the Sea* 1982 Vol 1 Dordrecht: Martinus Nijhoff Publishers 1985

Nordquist M H, Rosenne S, Yankov A and Grandy N R *United Nations Convention on the Law of the Sea* 1982 Vol IV Dordrecht: Martinus Nijhoff Publishers 1991

Nye J S 'Political Lessons of the New Law of the Sea Regime' in *Law of the Sea* edited by Oxman B H, Caron D D and Buderi C L O San Francisco: ICS Press 1983 113-126

O'Connell D P *International Law for Students* London: Stevens & Sons 1971

O'Connell D P *The International Law of the Sea* Vol I Oxford: Clarendon Press 1982

O'Connell D P *The International Law of the Sea* Vol II Oxford: Clarendon Press 1984

Oda S *The International Law of the Ocean Development* Leiden: Sijthoff 1972

Oda S *The Law of the Sea in our Time - 1* Leyden: A. W. Sijthoff 1977

Oda S *The Law of the Sea in our Time - 2* Leyden: A. W. Sijthoff 1977

Oda S 'Exclusive Economic Zone' in *Encyclopedia of Public International Law, Instalment 11* edited by Bernhardt R Amsterdam: Elsevier Science Publishers B.V. 1989 102-109

Odell P 'Offshore Resources: Oil and Gas' in *The Maritime Dimension* edited by Barston R P and Birnie P London: George Allen & Unwin 1980 76-107

Oellers-Frahm K 'Continental Shelf Case (Libyan Arab Jamahiriya/Malta)' in *Encyclopedia of Public International Law, Instalment 11* edited by Bernhardt R Amsterdam: Elsevier Science Publishers B.V. 1989 91-94

Oellers-Frahm K 'Continental Shelf Case (Tunisia/Libyan Arab Jamahiriya)' in *Encyclopedia of Public International Law, Instalment 11* edited by Bernhardt R Amsterdam: Elsevier Science Publishers B.V. 1989 94-99

Oellers-Frahm K 'Gulf of Maine Case' in *Encyclopedia of Public International Law, Instalment 11* edited by Bernhardt R Amsterdam: Elsevier Science Publishers B.V. 1989 131-134

Oeter S 'Flags of Convenience' in *Encyclopedia of Public International Law, Instalment 11* edited by Bernhardt R Amsterdam: Elsevier Science Publishers B.V. 1989 125-131

Oeter S 'Heleanna Incident' in *Encyclopedia of Public International Law, Instalment 11* edited by Bernhardt R Amsterdam: Elsevier Science Publishers B.V. 1989 135-136

Ogley R *Internationalizing the Seabed* Hampshire: Gower Publishing Company Limited 1984

Olmstead C J 'The Law of the Sea and International River Law: Similarities and Differences' in *Essays in Honour of of Berndt Godenhielm, E J Manner and Sigurd von Numers* Helsinki: Publications of the Finnish Branch of the International Law Association 1984

Omer-Cooper J D 'Southern and Central Africa' in *The Making of Modern Africa* Vol 2 edited by Afigbo A E *et al* Essex: Longman 1986 165-293

Oudendijk J K *Status and Extent of Adjacent Waters - A Historical Orientation* Leyden: A.W. Sijthoff 1970

Oxman B H 'The Two Conferences' in *Law of the Sea* edited by Oxman B H, Caron D D and Buderi C L O San Francisco: ICS Press 1983 127-144

Oxman B H 'Summary of the Law of the Sea Convention' in *Law of the Sea* edited by Oxman B H, Caron D D and Buderi C L O San Francisco: ICS Press 1983 147-161

Oxman B H 'Customary International Law and the Exclusive Economic Zone' in *Consensus and Confrontation: The United States and the Law of the Sea Convention* edited by Van Dyke J M Honolulu: The Law of the Sea Institute, University of Hawaii 1985 138-161

Oxman B H 'Balancing the Costs and the Benefits' in *Consensus and Confrontation: The United States and the Law of the Sea Convention* edited by Van Dyke J M Honolulu: The Law of the Sea Institute, University of Hawaii 1985 508-515

Pardo A 'An Opportunity Lost' in *Law of the Sea* edited by Oxman B H, Caron D D and Buderi C L O San Francisco: ICS Press 1983 13-25

Pechota V 'The right of access to the sea' in *Land-locked Countries of Africa* edited by Cervenka Z Uppsala: The Scandinavian Institute of African Studies 1973 37-43

Pedersen O K and Leys R 'A theoretical approach to the problems of African land-locked states' in *Land-locked Countries in Africa* edited by Cervenka Z Uppsala: The Scandinavian Institute of African Studies 1973 288-292

Pettman J *Zambia - Security and Conflict* London: Julian Friedmann Publishers Ltd. 1975

Platzöder R *Third United Nations Conference on the Law of the Sea* Hamburg: Institute of International Affairs 1975

Platzöder R *Third United Nations Conference on the Law of the Sea: Documents* Vol I Dobbs Ferry, New York: Oceana Publications, Inc. 1982

Platzöder R *Third United Nations Conference on the Law of the Sea: Documents* Vol II Dobbs Ferry, New York: Oceana Publications, Inc. 1982

Platzöder R *Third United Nations Conference on the Law of the Sea: Documents* Vol III Dobbs Ferry, New York: Oceana Publications, Inc. 1982

Platzöder R *Third United Nations Conference on the Law of the Sea: Documents* Vol IV Dobbs Ferry, New York: Oceana Publications, Inc. 1983

Platzöder R *Third United Nations Conference on the Law of the Sea: Documents* Vol V Dobbs Ferry, New York: Oceana Publications, Inc. 1984

Platzöder R 'Conferences on the Law of the Sea' in *Encyclopedia of Public International Law, Instalment 11* edited by Bernhardt R Amsterdam: Elsevier Science Publishers B.V. 1989 69-76

Potholm C P *Swaziland - The Dynamics of Political Modernization* Los Angeles: University of California Press 1972

Prandler A 'The New Convention on the Law of the Sea and the Land-locked Hungary' in *Essays in Honour of Berndt Godenhielm, E J Manner and Sigurd von Numers* Helsinki: Publications of the Finnish Branch of the International Law Association 1984

Prescott V 'The Deep Seabed' in *The Maritime Dimension* edited by Barston R P and Birnie P London: George Allen & Unwin 1980 54-57

Prescott J R V *The Maritime Political Boundaries of the World* New York: Methuen 1985

Queneudec J-P 'The Peaceful Use of the International Maritime Areas' in *The New Law of the Sea* edited by Rozakis C L and Stephanou C A Amsterdam: North-Holland 1983 187-197

Quing-Nan M *Land-based Marine Pollution* The Hague: Martinus Nijhoff 1987

Rabie M A and Lusher J A 'South African marine pollution control legislation' in *Law of the Sea* edited by Bennett T W *et al* Cape Town: Juta & Co, Ltd 1986

Ratiner L S 'The Costs of American Rigidity' in *Law of the Sea* edited by Oxman B H, Caron D D and Buderi C L O San Francisco: ICS Press 1983 27-42

Rembe N S *Africa and the International Law of the Sea* Alphen aan den Rijn: Sijthoff & Noordhoff 1980

Riphagen W 'Dispute Settlement in the 1982 United Nations Convention on the Law of the Sea' in *The New Law of the Sea* edited by Rozakis C L and Stephanou C A Amsterdam: North-Holland 1983 281-301

Roelofsen C G 'Grotius and International Law' in *A Grotius Reader* edited by Van Holk L E and Roelofsen C G The Hague: T.M.C. Asser Instituut 1983 3-15

Rosenthal E *Encyclopaedia of Southern Africa* 7th ed Juta and Company Limited 1978

Rozakis C L *The Concept of **Jus Cogens** in the Law of Treaties* Amsterdam: North-Holland Publishing Company 1976

Rozakis C L 'Compromises of State Interests and their Repercussions Upon the Rules on the Delimitation of the Continental Shelf: From the Truman Proclamation to the 1982 Convention on the Law of the Sea' in *The New Law of the Sea* edited by Rozakis C L and Stephanou C A Amsterdam: North-Holland 1983 155-183

Rozakis C L 'Continental Shelf' in *Encyclopedia of Public International Law, Instalment 11* edited by Bernhardt R Amsterdam: Elsevier Science Publishers B.V. 1989 82-91

Rubin A P 'Land-locked African countries and rights of access to the sea' in *Land-locked Countries of Africa* edited by Cervenka Z Uppsala: The Scandinavian Institute of African Studies 1973 44-62

Rüster B 'Fisheries, Sedentary' in *Encyclopedia of Public International Law, Instalment 11* edited by Bernhardt R Amsterdam: Elsevier Science Publishers B.V. 1989 113-117

Sabourin L 'Problems and prospects of the seven land-locked countries of French-speaking Africa' in *Land-locked Countries of Africa* edited by Cervenka Z Uppsala: The Scandinavian Institute of African Studies 1973 146-157

Salmon J J A 'Marine Environment, Protection and Preservation' in *Encyclopedia of Public International Law, Instalment 11* edited by Bernhardt R Amsterdam: Elsevier Science Publishers B.V. 1989 200-207

Sanger C *Ordering the Oceans* London: Zed Books Ltd. 1986

Sebenius J K *Negotiating the Law of the Sea* Cambridge, Massachusetts: Harvard University Press 1984

Sharma S P 'Territorial Sea' in *Encyclopedia of Public International Law, Instalment 11* edited by Bernhardt R Amsterdam: Elsevier Science Publishers B.V. 1989 328-333

Shaw M N *International Law* 2nd ed Cambridge: Grotius Publications Limited 1986

Shearer I A 'Collisions at Sea' in *Encyclopedia of Public International Law, Instalment 11* edited by Bernhardt R Amsterdam: Elsevier Science Publishers B.V. 1989 63-65

Siegfried W R 'The legal system affecting exploitation of Antarctic natural resources' in *Law of the Sea* edited by Bennett T W *et al* Cape Town: Juta & Co, Ltd 1986

Simmonds K R *Cases on the Law of the Sea* Vol I Dobbs Ferry, New York: Oceana Publications, Inc. 1976

Simmonds K R *Cases on the Law of the Sea* Vol II Dobbs Ferry, New York: Oceana Publications, Inc. 1977

Simmonds K R *Cases on the Law of the Sea* Vol III Dobbs Ferry, New York: Oceana Publications, Inc. 1980

Singh N 'The Concept of Legal Regime: Its Origin, Development and Attendant Factors' in *Essays on International Law* edited by Nawaz M K Leyden: A. W. Sijthoff 1976 20-38

Singh N *International Maritime Law Conventions* Vol 4 London: Stevens & Sons 1983

Sinjela A M *Land-Locked States and the UNCLOS Regime* New York: Oceana Publications, Inc. 1983

Sizani R K *Selected Aspects of the South African Fisheries Policy* Special Publication No 13 Cape Town: Institute of Marine Law, University of Cape Town 1991

Soni R *Control of Marine Pollution in International Law* unpublished LL D thesis Pretoria: University of South Africa 1980

Stavropoulos C A 'The Conference on the Law of the Sea in a Historical Perspective' in *The New Law of the Sea* edited by Rozakis C L and Stephanou C A Amsterdam: North-Holland 1983 11-20

Stephanou C A 'A European Perception of the Attitudes of the United States at the Final Stage of UNCLOS III with Respect to the Exploitation of the Deep Seabed' in *The New Law of the Sea* edited by Rozakis C L and Stephanou C A Amsterdam: North-Holland 1983 259-278

Szentes T 'The economic problems of land-locked countries' in *Land-locked Countries of Africa* edited by Cervenka Z Uppsala: The Scandinavian Institute of African Studies 1973 273-277

Taniguchi C 'Jurisdiction, Enforcement, and Dispute Settlement in the Law of the Sea Convention' in *Consensus and Confrontation: The United States and the Law of the Sea Convention* edited by Van Dyke J M Honolulu: The Law of the Sea Institute, University of Hawaii 1985 463-482

Thahane T T 'Lesotho, the realities of land-lockedness' in *Land-locked Countries of Africa* edited by Cervenka Z Uppsala: The Scandinavian Institute of African Studies 1973 239-249

Theutenberg B J *The Evolution of the Law of the Sea* Dublin: Tycooly International Publishing Limited 1984

Treves T 'High Seas' in *Encyclopedia of Public International Law, Instalment 11* edited by Bernhardt R Amsterdam: Elsevier Science Publishers B.V. 1989 136-141

Treves T 'Marine Research' in *Encyclopedia of Public International Law, Instalment 11* edited by Bernhardt R Amsterdam: Elsevier Science Publishers B.V. 1989 207-210

Tsaltas G and Lacatzis Y 'Straits Used for International Navigation and the New Law of the Sea' in *The New Law of the Sea* edited by Rozakis C L and Stephanou C A Amsterdam: North-Holland 1983 57-68

Tunkin G I 'International Law: The Contemporary and Classic' in *Essays on International Law* edited by Nawaz M K Leyden: A. W. Sijthoff 1976 48-57

Van Heerden C N *Off-shore Mining Law of the Republic of South Africa* unpublished LL M dissertation Johannesburg: University of the Witwatersrand 1986

Van Meurs L H *The Law of the Sea-Bed* unpublished LL M dissertation Johannesburg: University of the Witwatersrand 1974

Van Meurs L 'Legal aspects of marine archaeological research' in *Law of the Sea* edited by Bennett T W *et al* Cape Town: Juta & Co, Ltd 1986

Van Meurs L H *The Law of the Sea: Changing Concepts of Sovereignty and Territoriality - A South African Perspective* unpublished D Phil thesis Johannesburg: University of the Witwatersrand 1986

Van Rensburg W C J and Bartlett P M 'Technical, economic and institutional constraints on the production of minerals from the deep sea-bed' in *Law of the Sea* edited by Bennett T W *et al* Cape Town: Juta & Co, Ltd 1986

Vasciannie S C *Land-Locked and Geographically Disadvantaged States in the International Law of the Sea* Oxford: Clarendon Press 1990

Verzijl J H W *International Law in Historical Perspective* Part IV Leyden: A.W. Sijthoff 1970

Vignes D 'The Problem of Access to the European Economic Community's Fishing Zone as the Cornerstone for the Adoption of a Common Fisheries Policy' in *The New Law of the Sea* edited by Rozakis C L and Stephanou C A Amsterdam: North-Holland 1983 83-96

Von Glahn G E *Law Among Nations* 2nd ed New York: Macmillan Publishing Co. Inc. 1970

Vicuna F O *The Exclusive Economic Zone* Cambridge: Cambridge University Press 1989

Vitzthum W G 'International Sea-Bed Area' in *Encyclopedia of Public International Law, Instalment 11* edited by Bernhardt R Amsterdam: Elsevier Science Publishers B.V. 1989 160-165

Vitzthum W G 'Sea-Bed and Subsoil' in *Encyclopedia of Public International Law, Instalment 11* edited by Bernhard R Amsterdam: Elsevier Science Publishers B.V. 1989 277-283

Vukas B 'The Impact of the Third United Nations Conference on the Law of the Sea on Customary Law' in *The New Law of the Sea* edited by Rozakis C L and Stephanou C A Amsterdam: North-Holland 1983 33--54

Weil P *The Law of Maritime Delimitation - Reflections* Cambridge: Grotius Publications Limited 1989

Welling 'A View from the Industry' in *Consensus and Confrontation: The United States and the Law of the Sea Convention* edited by Van Dyke J M Honolulu: The Law of the Sea Institute, University of Hawaii 1985 233-235

Williams T D *Malawi - The Politics of Despair* Ithaca: Cornell University Press 1978

Wolfrum R 'Coastal Fisheries' in *Encyclopedia of Public International Law, Instalment 11* edited by Bernhardt R Amsterdam: Elsevier Science Publishers B.V. 1989 61-63

Wolfrum R 'Common Heritage of Mankind' in *Encyclopedia of Public International Law, Instalment 11* edited by Bernhardt R Amsterdam: Elsevier Science Publishers B.V. 1989 65-69

Wolfrum R 'Fishery Commissions' in *Encyclopedia of Public International Law, Instalment 11* edited by Bernhardt R Amsterdam: Elsevier Science Publishers B.V. 1989 117-121

Wolfrum R 'Fisheries, International Regulation' in *Encyclopedia of Public International Law, Instalment 11* edited by Bernhardt R Amsterdam: Elsevier Science Publishers B.V. 1989 109-113

Wooldridge F 'Contiguous Zone' in *Encyclopedia of Public International Law, Instalment 11* edited by Bernhardt R Amsterdam: Elsevier Science Publishers B.V. 1989 78-82

Yuan P C 'The New Convention on the Law of the Sea from the Chinese Perspective' in *Consensus and Confrontation: The United States and the Law of the Sea Convention* edited by Van Dyke J M Honolulu: The Law of the Sea Institute, University of Hawaii 1985 184-204

Zacklin R *The Changing Law of the Sea* Leiden: Sijthoff 1974

7.6.2.2 ARTICLES, CONFERENCE AND SEMINAR PAPERS

Ademuni-Odeke 'The New International Maritime Order, the Scramble for the Seas and Exploitation of Seabed Resources: The Common Heritage of Mankind Revisited after Twenty Years' 1986 *Sea Changes* No 3 41-78

Ademuni-Odeke 'The United Nations Convention on Conditions for Registration of Ships and Flags of Convenience' 1988 *Sea Changes* No 8 63-105

Ademuni-Odeke 'The United Nations Convention on Conditions for Registration of Ships and Flags of Convenience (continued)' 1989 *Sea Changes* No 9 80-130

Atkins N G 'Pollution - is it insurable?' 1988 *Businessman's Law* Vol 17 No 8 253-256

Baloro J 'The legal status of concession agreements in international law' 1986 *The Comparative and International Law Journal of Southern Africa* Vol XIX No 3 410-449

Barratt C 'Towards a Minerals Regime for Antarctica: The Problems Associated Therewith and Possible Solutions Offered by the Common Heritage of Mankind Principle' 1987 *Sea Changes* No 5 110-144

Barrie G N and Oelofsen P D 'Third United Nations Conference on the Law of the Sea' 1975 *South African Yearbook of International Law* Vol 1 223

Barrie G N 'The Third United Nations Conference on the Law of the Sea: Seventh Session (1978)' 1978 *South African Yearbook of International Law* Vol 4 275-278

Barrie G N 'Modern Developments in the Law of the Sea' May 1982 *Paper Delivered at the Conference on 'Maritime Strategy' of the Institute for Strategic Studies University of Pretoria* Pretoria

Barrie G N 'International law and the safe transport of hazardous material' 1990 *Tydskrif vir die Suid-Afrikaanse Reg* Vol 3 426-433

Bluett A W 'Manpower Proficiency within the S.A. Commercial Maritime Community' May 1989 *Paper Delivered at the 'National Maritime Conference 1989'* Cape Town

Borgese E M 'The Law of the Sea' 1983 *Scientific American* Vol 248 No 3 28-34

Botha L 'Managing Fisheries in Fluctuating Environmental conditions' 1991 *Paper Delivered at the 'National Maritime Conference 1991'* Cape Town

Boyd S B 'The Legal Status of the Arctic Sea Ice: A Comparative Study and a Proposal' 1984 *The Canadian Yearbook of International Law* Vol XXII 99-152

Bradlow E 'British Neutrality and the American Civil War: The Case of the Tuscaloosa' 1985 *Sea Changes* No 1 67-95

Brand C 'The Legal Relevance of South African Insular Formations off the SWA/Namibian Coast' 1986 *Sea Changes* No 4 88-105

Brennan T A 'Causal Chains and Statistical Links: The Role of Scientific Uncertainty in Hazardous-Substance Litigation' 1988 *Cornell Law Review* Vol 73 No 3 469-533

Brunnee J '"Common Interest" - Echoes from an Empty Shell?' 1989 *Zeitschrift für ausländisches offentliches Recht und Völkerecht* 49:4 791-808

Burke W T 'Customary Law of the Sea: Advocacy or Disinterested Scholarship?' 1989 *Yale Journal of International Law* Vol 14 508-527

Burmester H C 'Liability for Damage from Antarctic Mineral Resource Activities' 1989 *Virginia Journal of International Law* Vol 29 No 3 567-660

Butler W E 'Innocent Passage and the 1982 Convention: The Influence of Soviet Law and Policy' 1987 *The American Journal of International Law* Vol 81 331-347

Cathie J 'The Southern African Customs Union, cereal price policy in South Africa and food security in Botswana' 1988 *Journal of Development Studies* Vol 24 No 3 394-413

Chikove S 'The new Southern Africa: visions and realities' 1991 *Africa South* No 9 12-13

Clarkson D 'Recent Developments: International Agreements' 1989 *Harvard International Law Journal* Vol 30 No 1 216-225

Cloete F 'Regionalism in South Africa: Constraints and possibilities' 1991 *Africa Insight* Vol 21 No 1 27-31

Coetzee J D and Theunissen V H 'Towards a National Strategy for Conservation and Development of Our Coastal Environment: Small Craft Harbours and Coastal Recreation' May 1989 *Paper Delivered at the 'National Maritime Conference 1989'* Cape Town

Coker C 'Experiencing Southern Africa in the twenty-first century' 1990 *Africa Insight* Vol 20 No 4 219-224

Cole J D 'Legal Restraints Imposed by South African Legislation on Commercial Exploitation of Pelagic Fish' 1987 *Publication: Institute of Marine Law, UCT* No 3 1-101

Cole J D 'Some Observations on the Statutory Adoption in the Sea Fishery Act 1988 of the Diemont Commission's Recommendations and Comments Regarding the TAC and Quota Board' 1988 *Sea Changes* No 7 47-61

Cole J D 'A Review of the Provisions Relating to Licenses and Permits Issued in Terms of the Sea Fishery Act 1988' 1988 *Sea Changes* No 8 39-55

Cole J D 'Functions of the Quota Board Established in Terms of the Sea Fishery Act 1988: Guidelines for the Determination of Quotas' 1989 *Sea Changes* No 9 43-52

Cottrell A J 'The Strategic Situation in the Indian and South Atlantic Oceans' May 1982 *Paper delivered at the Conference on 'Maritime Strategy' of the Institute for Strategic Studies University of Pretoria* Pretoria

Devine D J and Luyt F M 'Comments on Developments in the Law of the Sea in 1984' 1985 *Sea Changes* No 1 43-53

Devine D J 'Some Observations on South African Maritime Zone Legislation' 1985 *Sea Changes* No 1 107-123

Devine D J 'Bays, baselines, passage and pollution in South African waters' 1986 *The Comparative and International Law Journal of Southern Africa* Vol XIX No 1 85-98

Devine D J 'The Law of the Sea Convention: Signatories and Non-signatories and the Alternative Track to Part XI' April/May 1987 *Paper Delivered at the University of Bophuthatswana Symposium 'New Trends in International Law'* Mmabatho

Devine D J 'Authorisation of Foreign Fishing in the South African Fishing Zone: Some Anomalies and Uncertainties' 1988 *Sea Changes* No 7 79-88

Devine D J 'Permissive rules of international customary law - An exception to incorporation?' 1988 *Bulletin* Vol 12 5-18

Devine D J 'Towards an Effective Implementation of the Intervention Convention in South Africa' 1988 *Sea Changes* No 8 65-62

Devine D J 'Civil law aspects of the Sea Fishery Act 1988' 1989 *Tydskrif vir die Suid-Afrikaanse Reg* Vol 1 125-129

Devine D J 'International Customary Law as a Possible Source of Actions in Delict' 1989 *The South African Law Journal* Vol 106 Part II 309-318

Devine D J 'Recent Developments in Marine Law of Interest in South Africa' May 1989 *Paper Delivered at the 'National Maritime Conference 1989'* Cape Town

Devine D J 'Performance of provincial functions in maritime zones' 1989 *S A Public Law* Vol 4 No 1 46-54

Devine D J 'The Sea Fishery Act 1988: Geographical Application and Court Jurisdiction' 1989 *S A Public Law* Vol 4 No 2 159-170

Devine D J 'Police Powers of Search without Warrant and Seizure in Maritime Zones' 1989-1990 *Obiter* 181-191

Devine D J 'Maritime zones of Transkei: historical perspectives, actualities and policy options' 1990 *SA Public Law* Vol 5 No 2 204-215

Devine D J 'The Lamberts Bay Regulations: A Possible Example for Municipal Control over the Sea and Sea Shore?' 1990 *Sea Changes* No 11 91-101

Devine D J 'Law Enforcement in Maritime Zones' 1991 *Paper Delivered at the 'National Maritime Conference 1991'* Cape Town

De Wet D P 'Coastal Shipping 2000' 1991 *Paper Delivered at the 'National Maritime Conference 1991'* Cape Town

De Wet G 'Technology Management in Maritime Practice' 1991 *Paper Delivered at the 'National Maritime Conference 1991'* Cape Town

Dibb T 'Exploitaton of the Deep Seabed - Do Land-locked States and the Third World Get a Look In?' 1987 *Sea Changes* No 6 52-79

Dugard J 'Grotius, the Jurist and International Lawyer: Four Hundred Years On' 1983 *The South African Law Journal* Vol 100 Part II 213- 220

Fair D 'The Transcameroon and the Transgabonais' 1988 *International Bulletin* Vol 1 No 4 78-80

Finlay M J 'International Seaborne Trade and the Role of the South African Shipowner' May 1989 *Paper Delivered at the 'National Maritime Conference 1989'* Cape Town

Gasson B and Glazewski J 'Coastal Processes, Planning and Law' 1988 *Sea Changes* No 7 89-116

Glavovic P D 'Some thoughts of an environmental lawyer on the implications of the Environment Conservation Act 73 of 1989: a case of missed opportunities' 1991 *The South African Law Journal* Vol 107 Part 1 107-114

Glazewski J and Sowman M R 'An Assessment of New Coastal Zone Regulations' 1987 *Sea Changes* No 5 145-153

Gough M P 'Aerial jurisdiction over safety zones surrounding maritime installations' 1989 *Publication: Institute of Marine Law, UCT* No 11 1-95

Graham K W T 'Offshore Oil and Gas Exploration and Production' May 1989 *Paper Delivered at the 'National Maritime Conference 1989'* Cape Town

Gray C 'International Law 1908-1983' 1983 *Legal Studies* Vol 3 No 3 267-282

Guma X P 'The revised Southern African Customs Union Agreement: An Appraisal' 1990 *South African Journal of Economics* Vol 58 No 1 63-77

Guy N R 'Possible Continental Shelf Claims of the RSA in accordance with the Law of the Sea Convention, 1982' 1991 *Paper Delivered at the 'National Maritime Conference 1991'* Cape Town

Hamman D B 'Passage Rights Through Straits' 1987 *Publication: Institute of Marine Law, UCT* No 5 1-75

Hanks R J 'Modern Principles of Maritime Strategy' May 1982 *Paper delivered at the Conference on 'Maritime Strategy' of the Institute for Strategic Studies University of Pretoria*

Heins J 'The Role of Insular Formations in the Generation and Delimitation of Maritime Zones' 1985 *Sea Changes* No 1 63-90

Hendry I D 'The Antarctic Minerals Act 1989' 1990 *International and Comparative Law Quarterly* Vol 39 Part 1 183-190

Herman L L 'The Newfoundland Offshore Mineral Rights References: An Imperfect Mingling of International and Municipal Law' 1984 *The Canadian Yearbook of International Law* Vol XXII 194-224

Herman L L 'The Modern Concept of the Off-Lying Archipelago in International Law' 1985 *The Canadian Yearbook of International Law* Vol XXIII 172-200

Highet K 'Evidence, the Court, and the Nicaragua Case' 1987 *The American Journal of International Law* Vol 81 No 1 1-56

Hitt J C 'Oceans Law and Superpower Relations: The Bumping of the Yorktown and the Caron in the Black Sea' 1989 *Virginia Journal of International Law* Vol 29 No 3 713-743

Hoffmann A J 'The Relevance of South Africa's Islands in the Generation of Maritime Zones' May 1989 *Paper Delivered at the 'National Maritime Conference 1989' Cape Town*

Hudson D J 'Brief Chronology of Customs Agreements in Southern Africa' 1979 *Botswana Notes and Records* Vol 11 89-95

Jackson L F 'International Marine Pollution Conventions and the Independent States of Southern Africa' 1989 *Publication: Institute of Marine Law, UCT* No 8 1-60

Jacobsen M P 'Recent Developments: International Agreements' 1989 *Harvard International Law Journal* Vol 30 No 1 237-247

Jewett M L 'The Evolution of the Legal Regime of the Continental Shelf' Part I 1984 *The Canadian Yearbook of International Law* Vol XXII 153-193

Jewett M L 'The Evolution of the Legal Regime of the Continental Shelf' Part II 1985 *The Canadian Yearbook of International Law* Vol XXIII 201-225

Kindt J W 'Dispute Settlement in International Environmental Issues: The Model Provided by the 1982 Convention on the Law of the Sea' 1989 *Vanderbilt Journal of Transnational Law* Vol 22 No 5 1097-1118

Kirsch P and Fraser D 'The Law of the Sea Preparatory Commission after Six Years: Review and Prospects' 1988 *The Canadian Yearbook of International Law* Vol XXVI 119-154

Koh T T B 'The Origins of the 1982 Convention on the Law of the Sea' 1987 *Malaya Law Review* Vol 29 1-17

Koh T T B 'The Exclusive Economic Zone' 1988 *Malaya Law Review* Vol 30 No 1 1-33

Kongwa S 'SADCC: Creating a new vision for the future' 1991 *AI Bulletin* Vol 31 No 10 1

Kuan-Ming Sun 'The Antarctic Mineral Regime and the Common Heritage of Mankind' 1989 *Sea Changes* No 10 67-76

Kuan-Ming Sun 'Some Legal Problems Regarding Control of Marine Pollution from Offshore Oil and Gas Development of the Republic of China' 1990 *Sea Changes* No 11 65-78

Kühl H 'Baseline Determination: An examination with special reference to the low-water mark' 1987 *Publication: Institute of Marine Law, UCT* No 4 1-144

Legault L H and McRae D M 'The Gulf of Maine Case' 1984 *The Canadian Yearbook of International Law* Vol XXII 267-290

Leich M 'Judicial Decisions' 1987 *The American Journal of International Law* Vol 81 No 2 411-414

Leich M N 'Contemporary Practice of the United States Relating to International Law - Limits of the Territorial Sea' 1989 *The American Journal of International Law* Vol 83 No 2 349-351

Leich M N 'Contemporary Practice of the United States Relating to International Law - Straits Used for International Navigation' 1989 *The American Journal of International Law* Vol 83 No 3 559-561

Littenberg M R '**Shell Oil Co. v. Iowa Department of Revenue**: Outer Continental Shelf Income Includable in Base of State Apportionment Formulas' 1989 *Tulane Law Review* Vol 64 Nos 2 & 3 638-644

Logan D 'Report on the Progress of the Third United Nations Conference on the Law the Sea' April 1980 *Paper Delivered at the 'Symposium on the Law of the Sea' University of Cape Town* Cape Town

Lord D A 'South African Coastal Waters: Assimilation or Pollution?' May 1989 *Paper Delivered at the 'National Maritime Conference 1989'* Cape Town

Lowe M J 'Bophuthatswana agreements - International treaties or binding legislation?' 1982 *De Rebus* 470-471

Luyt F M 'Signature and Ratification: A Brief Note' 1985 *Sea Changes* No 1 124-128

Maasdorp G 'The Southern African Customs Union: An Assessment' 1982 *Journal of Contemporary African Studies* Vol 2 No 1 81-112

Maasdorp G G 'Economic and political aspects of regional cooperation in Southern Africa' 1986 *South African Journal of Economics* Vol 54 No 2 151-171

Maasdorp G 'A strategy for rail and road transportation in Southern Africa' 1991 *Africa Insight* Vol 21 No 1 7-13

Macdonald R St J 'The Nicaragua Case: New Answers to Old Questions' 1986 *The Canadian Yearbook of International Law* Vol XXIV 127-160

Mackie K P 'South African Small Harbours - Need and Reality' 1991 *Paper Delivered at the 'National Maritime Conference 1991'* Cape Town

Marshall E 'US Readies for Confrontation on Sea Law' 1982 *Science* Vol 215 1480-1481

Marston G 'The Strait of Georgia Reference' 1985 *The Canadian Yearbook of International Law* Vol XXIII 34-79

Martin W G 'Region formation under crises conditions: South vs Southern Africa in the interwar period' 1990 *Journal of Southern African Studies* Vol 16 No 1 112-138

Matlosa K 'Impact of IMF structural adjustment programmes on Lesotho' 1990/1991 *Southern Africa Political and Economic Monthly* Vol 4 No 3-4 12-15

Matthews J 'Economic integration in Southern Africa: progress or decline?' 1984 *South African Journal of Economics* Vol 52 No 3 256-265

McDorman T L 'The Libya-Malta Case: Opposite States Confront the Court' 1986 *The Canadian Yearbook of International Law* Vol XXIV 335-367

McDorman T L 'The Canada-France Maritime Boundary Case: Drawing a Line around ST. Pierre and Miquelon' 1990 *American Journal of International Law* Vol 84 No 1 157-189

McKibben L A 'The Political Relationship Between the United States and Pacific Island Entities: The Path to Self-Government in the Northern Mariana Islands, Palau, and Guam' 1990 *Harvard International Law Journal* Vol 31 No 1 257-293

McKinnon J B 'Arctic Baselines: A Litore Usque ad Litus' 1987 *The Canadian Bar Review* Vol 66 No 4 790-817

McRae D M 'The Gulf of Maine Case: The Written Proceedings' 1983 *The Canadian Yearbook of International Law* Vol XXI 266-283

Menefee S P 'The Salvador and Guatemala Affair - A Nineteenth Century American Response to Maritime Terrorism' 1987 *Sea Changes* No 6 80-111

Meyer R G 'The Role of the State in Maritime Matters' May 1989 *Paper Delivered at the 'National Maritime Conference 1989'* Cape Town

Moldan A G S 'Oil Spill Response Capability in the RSA' 1991 *Paper Delivered at the 'National Maritime Conference 1991'* Cape Town

Moll F G 'Antarctica, the Antarctic Treaty and the Antarctic Treaty System' 1985 *Sea Changes* No 1 96-106

Monteiro P M S 'Marion and Prince Edward Islands: The Legal Regime of the Adjacent Maritime Zones' 1987 *Sea Changes* No 5 63-109

Myburgh P 'Recognition of Foreign Maritime Liens' 1989 *The South African Law Journal* Vol 106 Part II 263-269

Mwase N 'Regional cooperation and socialist transformation' 1984 *Pula* Vol 4 No 1 45-57

O'Connor B 'Shipbuilding and Ship Repair in South Africa' May 1989 *Paper Delivered at the 'National Maritime Conference 1989'* Cape Town

Oelofsen P D 'Some Observations on the Concept of the Exclusive Economic Zone' 1975 *South African Yearbook of International Law* Vol 1 46-62

Oelofsen P D 'Some Comments on the Proposed Procedures for Dispute Settlement under a new Law of the Sea Convention' 1976 *South African Yearbook of International Law* Vol 2 192-200

Oelofsen P D 'Seventh Session (First Part) of the Third United Nations Conference on the Law of the Sea, Geneva, 28 March-19 May' 1977 *South African Yearbook of International Law* Vol 3 314-317

Oosthuizen N W 'The Ports and their Hinterlands within Southern Africa' May 1989 *Paper Delivered at the 'National Maritime Conference 1989'* Cape Town

Orford T 'Exclusion Zones at Sea: Some Observations on the Conduct of The Falklands War 1982' 1985 *Sea Changes* No 1 91-120

Orford T 'Self-defence at Sea: Contemporary Developments in the International Law of Naval Engagements' 1986 *Sea Changes* No 4 68-87

Orford T M 'The Iran-Iraq Conflict: Recent Developments in the International Law of Naval Engagements' 1988 *Publication: Institute of Marine Law, UCT* No 7 1-165

Peters P, Schrijver N and de Waart P 'Responsibility of States in Respect of the Exercise of Permanent Sovereignty over Natural Resources' 1989 *Netherlands International Law Review* Vol XXXVI No 3 285-313

Putter A P 'South African Maritime Strategy' May 1982 *Paper delivered at the Conference on 'Maritime Strategy' of the Institute for Strategic Studies University of Pretoria*

Rabie A 'The applicability of legislation through contract: Soekor and the Mossel Bay offshore gas development project' 1988 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* Band 51 Nr 4 528-533

Rabie A 'The conservation of rivers in South African Law' 1989 *S A Public Law* Vol 4 No 1 1-18

Rabie A 'The conservation of rivers in South African Law' (continued) 1989 *S A Public Law Vol* 4 No 2 186-204

Rabie A 'Rationalisation of environmental legislation' 1989 *S A Public Law* Vol 4 No 2 272-277

Rabie A 'A new deal for environmental conservation: aspects of the Environment Conservation Act 73 of 1989' 1990 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* Band 53 Nr 1 2-27

Redgwell C 'Current Developments: International Law: Antarctica' 1990 *International and Comparative Law Quarterly* Vol 39 Part 2 474-481

Reinecke D R 'Marine Pollution and Controls' May 1989 *Paper Delivered at the 'National Maritime Conference 1989'* Cape Town

Reuland R C F 'Interference with Non-National Ships on the High Seas: Peacetime Exceptions to the Exclusivity Rule of Flag-State Jurisdiction' 1989 *Vanderbilt Journal of Transnational Law* Vol 22 No 5 1161-1229

Royer K F 'Japan's East China Sea Ocean Boundaries: What Solutions Can a Confused Legal Environment Provide in a Complex Boundary Dispute?' 1989 *Vanderbilt Journal of Transnational Law* Vol 22 No 3 581-630

Rycroft A 'Proximate Cause, Marine Insurance and the Law' 1987 *The South African Law Journal* Vol 104 Part II 259-263

Scheepers G P J 'South African Law of Shipwrecks: Contemporary and International Law Perspectives' 1989 *Sea Changes* No 10 41-66

Schippers A 'The extent of rights under the Soekor leases' 1989 *Publication: Institute of Marine Law, UCT* No 9 1-71

Scott G L and Carr C L 'The ICJ and Compulsory Jurisdiction: The Case for Closing the Clause' 1987 *The American Journal of International Law* Vol 81 No 1 57-59

Serfontein J 'Die Suid-Afrikaanse Visbedryf: 'n Oorsig' May 1989 *Paper Delivered at the 'National Maritime Conference 1989'* Cape Town

Setai B 'Integration and policy constraints to industry and trade in Botswana, Lesotho and Swaziland' 1988 *African Journal of Political Economy* Vol 2 No 1 101-119

Siddle A M 'The International Collision Regulations in the context of International Law and the Municipal Law of the United Kingdom and of South Africa: A Critical Analysis' 1988 *Publication: Institute of Marine Law, UCT* No 6 1-136

Sizani R K 'Selected Aspects of the South African Fisheries Policy' 1991 *Special Publication: Institute of Marine Law, UCT* No 13

Smit N M 'Hydrography in the RSA' 1991 *Paper Delivered at the 'National Maritime Conference 1991'* Cape Town

Staniland H 'Should Foreign Maritime Liens Be Recognized?' 1991 *The South African Law Journal* Vol 108 Part II 293-305

Stewart A 'Civil Liability for Pollution Damage Caused by the Discharge of Oil from Vessels - Some Aspects of International and South African Law' 1986 *Sea Changes* No 4 106-143

Syndercombe G 'The Need for a National Maritime Policy' May 1989 *Paper Delivered at the 'National Maritime Conference 1989'* Cape Town

Theodoropoulos C 'The Wealth of the International Sea-Bed Area - Benefit of Mankind and Private Profit' 1983 *Zambia Law Journal* Vol 15 16-36

Tilbury M 'The International Law of Non-Aerial Transit Trade: The Case of Zimbabwe' 1980 *The Zimbabwe Law Journal* Vol 20 part 1 4-33

Tilbury M 'The International Law of Non-Aerial Transit Trade: The Case of Zimbabwe (2)' 1980 *The Zimbabwe Law Journal* Vol 20 part 2 125-161

Trappler G 'The Legal Relevance of Man-Made Constructions in Maritime Zones' 1990 *Sea Changes* No 11 46-64

Trimble P R 'International Law, World Order, and Critical Legal Studies' 1990 *Stanford Law Review* 811-845

Van der Wal J M 'Flags of Convenience: A Review of Recent International Conventions' 1989 *Sea Changes* No 10 77-88

Vanderzwaag D and Pharand D 'Inuit and the Ice: Implications for Canadian Arctic Waters' 1983 *The Canadian Yearbook of International Law* Vol XXI 53-84

Van Meurs L H 'Legal Aspects of Marine Archaeological Research' 1985 *Publication: Institute of Marine Law, UCT* No 1 1-85

Van Meurs L H 'Legal Aspects of Sea-bed Mining Within and Beyond Areas of National Jurisdiction' 1986 *Sea Changes* No 3 79-142

Van Meurs L H 'Marine Pollution' 1986 *Publication: Institute of Marine Law, UCT* No 2 1-114

Van Rensburg W C J 'Offshore Mineral Economics' 1985 *Sea Changes* No 1 54-66

Van Wyk J 'Citizen involvement and the Environment Conservation Act 73 of 1989' 1990 *S A Public Law* Vol 5 No 2 238-246

Van Zyl C J 'Coastal and Marine Tourism: A Conservation Perspective' 1991 *Paper Delivered at the 'National Maritime Conference 1991'* Cape Town

Van Zyl K 'Sovereignty in Antarctica' 1985 *Sea Changes* No 1 41-62

Vasciannie S 'Landlocked and Geographically Disadvantaged States and the Question of the Outer Limit of the Continental Shelf' 1987 *The British Year Book of International Law* 271-302

Vrancken P 'Sub-Saharan African Regional Marine and Coastal Environment Conventions: Analysis and Possible Implications for South Africa' 1988 *Sea Changes* No 7 62-78

Vrancken P '"Et Si Le Niveau Des Mers Decidait Monter..." or Some Legal Reflections on the Inherent Mobility of Present Maritime Boundaries' 1989 *Sea Changes* No 9 69-79

Vrancken P H G 'The Influence of Artificial Constructions on the Delimitation of Maritime Zones in the Law of the Sea Convention' 1989 *Sea Changes* No 10 89-94

Walker C A 'The United States Environmental Protection Agency's Proposal for At-Sea Incineration of Hazardous Wastes - A Transnational Perspective' 1988 *Vanderbilt Journal of Transnational Law* Vol 21 No 1 157-189

Waller D C 'Death of a Treaty: The Decline and Fall of the Antarctic Minerals Convention' 1989 *Vanderbilt Journal of Transnational Law* Vol 22 No 3 631-668

Watts A D 'The Convention on the Regulation of Antarctic Mineral Resource Activities 1988' 1990 *International and Comparative Law Quarterly* Vol 39 Part 1 169-182

Weisburd A M 'Customary International Law: The Problem of Treaties' 1988 *Vanderbilt Journal of Transnational Law* Vol 21 No 1

Wicks R L 'Coastal Shipping' May 1989 *Paper Delivered at the 'National Maritime Conference 1989'* Cape Town

Willis L A 'From Precedent to Precedent: The Triumph of Pragmatism in the Law of Maritime Boundaries' 1986 *The Canadian Yearbook of International* Law Vol XXIV 3-60

Wolfrum R 'The Emerging Customary Law of Marine Zones: State Practice and the Convention on the Law of the Sea' 1987 *Netherlands Yearbook of International Law* Vol XVIII 121-144

Wroe-Street G 'Public and Private Entitlement to the Sea and Sea-Shore' 1989 *Sea Changes* No 10 95-112

7.6.2.3 NEWSPAPERS AND MAGAZINES

Die Burger 1989-05-12

Die Volksblad 1990-04-09

Die Volksblad 1991-03-12

Die Volksblad 1991-03-18

Die Volksblad 1991-05-24

Financial Mail 1985-11-22

Financial Mail 1990-07-20

International Financial Law Review January 1989 Vol VIII No 1

International Herald Tribune 1986-11-18

Rand Daily Mail 1982-05-07

Rand Daily Mail 1984-06-29

Rand Daily Mail 1984-08-21

Rand Daily Mail 1984-12-13

Rapport 1987-08-02

Sake-Rapport 1990-03-11

Sake-Rapport 1991-04-28

Sunday Star 1986-07-06

Sunday Star 1987-03-15

Sunday Star 1987-05-17

Sunday Star 1989-02-12

Sunday Star FINANCE 1990-04-29

Sunday Star REVIEW 1986-11-16

Sunday Star REVIEW 1987-06-14

Sunday Times 1985-06-02

Sunday Times 1989-08-13

Sunday Times Business Times 1990-04-01

Sunday Times Business Times 1991-05-05

Sunday Tribune 1989-12-03

Sunday Tribune 1989-12-10

The Argus 1989-05-12

The Cape Times 1982-05-04

The Cape Times 1982-05-08

The Cape Times 1989-05-12

The Citizen 1986-01-21

The Citizen 1986-02-15

The Citizen 1986-07-29

The Citizen 1986-08-07

The Citizen 1986-10-14

The Citizen 1986-11-19

The Citizen 1987-01-23

The Citizen 1987-02-06

The Citizen 1987-03-07

The Citizen 1987-03-16

The Citizen 1987-03-18

The Citizen 1987-04-03

The Citizen 1987-05-04

The Citizen 1987-05-06

The Citizen 1987-05-09

The Citizen 1987-05-14

The Citizen 1987-05-22

The Citizen 1987-10-19

The Citizen 1987-12-08

The Citizen 1987-12-10

The Citizen 1988-02-12

The Citizen 1988-03-01

The Citizen 1989-02-01

The Citizen 1989-03-21

The Citizen 1989-03-22

The Citizen 1989-03-31

The Citizen 1989-04-24

The Citizen 1989-06-07

The Citizen 1990-11-14

The Citizen 1991-05-15

The Citizen 1991-05-20

The Guardian 1985-02-17

The Guardian 1985-06-02

The Namibian 1987-03-20

The Namibian 1987-03-27

The Natal Mercury 1989-09-05

The Natal Mercury 1989-10-24

The Pretoria News 1990-10-17

The Star 1982-03-22

The Star 1983-08-22

The Star 1984-08-25

The Star 1984-09-11

The Star 1984-12-14

The Star 1985-05-02

The Star 1986-02-20

The Star 1986-02-26

The Star 1986-07-16

The Star 1986-07-28

The Star 1986-08-09

The Star 1986-08-18

The Star 1986-09-30

The Star 1986-11-20

The Star 1986-11-26

The Star 1987-03-09

The Star 1987-04-27

The Star 1987-05-18

The Star 1987-06-02

The Star 1987-06-28

The Star 1987-07-08

The Star 1987-07-23

The Star 1987-10-07

The Star 1987-10-30

The Star 1987-11-05

The Star 1987-11-20

The Star 1988-04-27

The Star 1988-04-28

The Star 1988-05-24

The Star 1988-07-22

The Star 1988-08-09

The Star 1988-11-09

The Star 1989-01-11

The Star 1989-01-30

The Star 1989-02-22

The Star 1989-04-10

The Star 1989-04-18

The Star 1990-01-10

The Star 1990-02-19

The Star 1990-03-01

The Star 1990-03-16

The Star 1990-03-26

The Star 1990-04-03

The Star 1990-05-02

The Star 1990-07-26

The Star 1990-07-27

The Star 1990-10-02

The Star 1990-10-03

The Star 1990-10-15

The Star 1990-11-09

The Star 1990-11-27

The Star 1990-12-03

The Star 1991-01-11

The Star 1991-02-18

The Star 1991-03-12

The Star 1991-03-18

The Star 1991-03-22

The Star 1991-03-26

The Star 1991-04-02

The Star 1991-04-11

The Star 1991-04-23

The Star 1991-05-01

The Star 1991-05-02

The Star 1991-05-07

The Star 1991-05-10

The Star 1991-05-14

The Star 1991-05-19

The Star 1991-05-28

The Star 1991-07-25

Weekend Argus 1989-05-13

Weekly Mail 1986-09-26

Weekly Mail 1986-10-17

Weekly Mail 1986-10-31