

The prospect of sea-bed mining gives the so-called "EEC clause" an even more interesting feature. The status of an acceding organization will more likely be that of a principal and agent rather than of a "state party," as a state party remains a "state party to the Convention" regardless of how much competence in matters governed by the Convention (AIX, Art. 1) it might have transferred to the organization, although corresponding rights (e.g., voting) will be affected accordingly. The handling of the "EEC clause" might prove to be somewhat difficult. The European Economic Community was the only inter-governmental organization to sign the Convention.

B. ZONES AND AREAS

1. INTERNAL WATERS, "HISTORIC BAYS", AND PORTS

Internal waters are the waters of lakes, rivers, and bays landward of the baseline of the territorial sea. (Art. 5-14) A "historic bay" based on a historical title (Art. 15) is part of the internal waters, even if not on the landward side of a baseline drawn according to the principle rules provided by the Convention. (Art. 10, Para. 6) Wherever there is a port, the baseline is always drawn in such a manner as to include it in the internal waters. (Art. 11) An archipelagic state may draw the so-called "closing line" (Art. 50) accordingly, which should not be confused with the "archipelagic baseline", (Art. 47) which serves the same function as the territorial sea baseline.

The baseline is the boundary between the territorial sovereignty of the coastal state and the regime of the oceans covered by the Convention, which to some extent includes the territorial sea zone of the coastal state. But the Convention does not ignore completely the landward side of the baseline; there are regulations establishing rights of land-locked states to transit passage through other states in general (Part X) and in particular guaranteeing them the right to equal treatment in maritime ports. (Art. 131) The Convention further authorizes coastal (port) states to undertake investigations and proceedings against vessels in pollution matters, depending on circumstances such as location of the vessel and the type and scope of the pollution, (Art. 218; Art. 220) and requires that laws and regulations be implemented for access to their ports and assistance for marine scientific research vessels. (Art. 255)

A further regulatory framework for matters such as access to ports or jurisdiction over ships in ports or internal waters is not provided by the Convention. This can be derived from national law of the coastal state in conjunction with international common law and treaties, for example, from the Convention on the International Regime of Maritime Ports, 1923, which, although ratified by only a small number of states, reflects largely customary rules of international law, or the various conventions of the International Maritime Organization (IMO) with respect to safety of ships and ship pollution matters. In a few words, it can be generally said that a foreign merchant vessel which is voluntarily in a port is fully subject to the administrative civil and criminal jurisdiction of the coastal state unless applicable conventions, treaties, bilateral agreements, or international common law provide particular regulations.

2. TERRITORIAL SEA

The extent of coastal state jurisdiction in waters near the coast has been a central theme of the law of the sea since the Middle Ages. While the superpowers of the Middle Ages, Spain and Portugal, regarded “conquered” ocean space as similar to a land mass, their successors were more interested in a “free” sea for commercial, communication, and naval power purposes. The result was rather limited control by coastal states of waters adjacent to their coasts, embodied in the concept of the territorial sea. As of the beginning of this century, the breadth of this zone had been determined for almost three hundred years by the “cannon shot doctrine”, which in time had led to the rule of three nautical miles; the United States Neutrality Act of 1794, for example, translated the cannon shot doctrine into the three-mile rule. In any case, the establishment and long survival of this rule was more a result of superior British naval power and British colonial policy than of any consensus of the states.

The degree of general acceptance of this rule began declining after the First World War, and this process accelerated rapidly after the Truman Proclamation in 1945. The 1982 Convention sets the breadth of the territorial sea at twelve nautical miles. (Art. 3) The twelve mile mark emerged from a number of different factors, the simplest of which was doubling (from three to six to twelve miles). A more serious factor is the “package” of zones provided by the Convention. (Part II-Part VI) These zones were designed to satisfy the interests of all states concerned, and to a considerable extent they take into account the problems such as fishing, customs, sanitation, security, and, more recently, protection of the marine environment. The latter was closely tied to the discussion of more control over foreign vessels in pollution matters.

Today’s concept of the territorial sea foresees full sovereignty of the coastal state in this area (Art. 2) with the restriction that the right of “innocent passage” for foreign ships as provided by the Convention (Art. 17-32) must be accepted. But other provisions of the Convention also affect the full sovereignty of the coastal state. Specifically, these include the regulations on the protection of the marine environment (Part, XII) and provisions such as those that require that research installations in any area of the marine environment be subject to Convention conditions. (Art. 258)

3. CONTIGUOUS ZONE

The concept of the contiguous zone is derived from the long-established concept of a territorial sea with a breadth of three miles. Ever since the Middle Ages, coastal states have, for one reason or another, taken measures of control over space beyond the territorial sea. The more typical of these reasons have found their way into the 1982 Convention: enforcement of customs, fiscal, immigration, and sanitary laws. (Art. 33, Subpara. 1(a)) Smuggling in particular was one of the earliest concerns. In 1736, Great Britain implemented an act against smuggling, claiming jurisdiction in such cases for a distance of up to twenty-four nautical miles. In 1935, the United States established a customs enforcement area of fifty nautical miles in order to enforce its “liquor” legislation. The 1855 Chilean Civil Code, as well as the laws of other South American states, contained provisions for policing waters beyond the territorial sea if customs and security were concerned. But these and other cases remained isolated instances and did not lead to a separate concept until after the Second World War.

It was not until a quick solution to the problems of the concept, baseline, and breadth of the territorial sea was delayed in the 1930’s and early 1950’s that the concept of a contiguous zone was able to emerge at the 1958 Conference in an attempt to provide “compensation” for those states which had pressed for rights of control for security reasons. As the regime of the law of the sea has changed considerably since then, it is doubtful that there is really a further need for this concept.

4. STRAITS

The establishment of a regime for straits was a major concern of the two naval superpowers and, with less intensity, of the shipping community. The difficulties are closely connected with the breadth of the territorial sea. International shipping routes through strategically important narrow straits within which the waters have the status of the territorial sea were subjects of disputes, litigation, and treaties prior to the 1973-1982 Conference. Such straits include the Dardanelles and Bosphorus, the Sound and Belts of Denmark, the Strait of Magellan (Argentina and Chile), and, in the 1950's, the Straits of Tiran, which give Jordan and Israel access to the Red Sea. One case concerning the Corfu Channel was submitted to the International Court of Justice and decided in 1949.

Although the principle of a territorial sea with a breadth of three nautical miles remained unaltered at the 1958 and 1960 Conferences on the Law of the Sea, only the prohibition of suspension of innocent passage for foreign vessels through straits (1958 Territorial Sea Convention, Art. 16, Para. 4) was codified. This guarantee of "free passage" was no longer adequate assurance for the superpowers when it became obvious during the 1970's that the territorial sea would be extended to twelve nautical miles, as this would bring an even larger number of international navigation routes under the jurisdiction of coastal states. The negotiations centered in on the condition that a consensus for a territorial sea of twelve nautical miles would be reached only if an acceptable regime for passage through straits could be agreed on. This led to the emergence of the concept of transit passage. (Art. 37-44)

Some of the important navigation routes which became straits under the 1982 Convention are as follows:

| Name of Strait | Breadth of Strait in Nautical Miles | Bordering States |
|---------------------|-------------------------------------|-----------------------------|
| Bering | 9 | USA - Soviet Union |
| Dover | 18 | Great Britain - France |
| Gibraltar | 8 | Morocco - Spain |
| Hormuz | 20 | Oman - Iran |
| Malacca | 8 | Indonesia - Malaysia |
| Saint Lucia Channel | 22 | Saint Lucia - Saint Vincent |
| Western Chosen | 23 | South Korea - Japan |

A strait such as that of the Strait of Tiran which only gives access to a territorial sea does not possess the status of a "strait for international navigation"; consequently, only the principle of innocent passage (but which cannot be suspended) applies. (Art. 45, Subpara. 1(b) & Para. 2)

There is considerable reason to doubt that "straits" to and from archipelagic waters such as those in Indonesia (Sunda, Limbic, Makassar) are governed by the regime of straits and not solely by the compulsory concept of archipelagic sea lane passage. (Art. 53, Para. 2) It would make little sense for a vessel to be on archipelagic sea lane passage (Art. 53, Para. 1 & 12) before entering the strait between two islands, within the strait to be in strait transit passage, (Art. 37-44) and then to navigate again under the concept of archipelagic sea lane passage. (Art. 53)

5. ARCHIPELAGIC WATERS AND ZONES

An archipelago (Art. 46, Subpara. (b)) and the waters between the individual islands have a particular status. (Art. 46, Subpara. (b)) The Convention provides for the drawing of archipelagic baselines, (Art. 47) granting the waters within such lines the legal status of archipelagic waters, (Art. 49) with the resultant effect on navigation, which had previously been exercised in such areas as on the high seas. Although the large maritime powers had long opposed any attempt to restrict the freedom of navigation in these waters, the introduction of these concepts no longer raised any serious opposition when it had become evident during the mid-1970's that a 200 nautical mile wide exclusive economic zone would find its way into the Convention. When this wide economic zone was combined with the concept of islands, (Art. 121) the result was that almost all of the waters within island groups such as Indonesia fell under the corresponding sovereign rights of such "group of islands" states. However, a significant distinction remains between the archipelagic concept and the situation of coastal states: whereas the coastal state has only enumerated sovereign rights within its exclusive economic zone, (Art. 56) the archipelagic state has sovereignty over the archipelagic waters (Art. 1, Para. 2; Art. 49) (the waters between the islands and within the archipelagic baselines (Art. 47)) similar to that of the coastal state in its territorial sea. (Art. 2) Using the archipelagic baseline as a starting point, the archipelagic state may then establish a territorial sea, a contiguous zone, and an exclusive economic zone towards the high seas, and has rights to the resources of the continental shelf as provided by the Convention. (Part II-Part VI) In order to ensure freedom of navigation, the archipelagic state must accept the concept of archipelagic sea lane passage; (Art. 53) it was only under this condition that general acceptance of an archipelagic concept could be achieved.

6. ISLANDS

The regime of islands, which allows the establishment of all zones provided by the Convention if only an island can sustain human habitation or an economic life of its own, (Art. 121) has a significant effect on the colonization of the oceans. The "island effect" may well bring more ocean space under the jurisdiction of states than a 200 nautical mile zone as measured from the coastline of the continents. In quite a number of cases, a tiny island with a small population can now acquire rights to the resources in an area almost as large as France. The Republic of Kiribati (formerly Gilbert Islands) with its population of about sixty thousand has a claim on marine resources in an area bigger than that to which the People's Republic of China with its one billion people is entitled.

7. ENCLOSED AND SEMI-ENCLOSED SEAS

The very term "enclosed and semi-enclosed seas" (Art. 122) is not a traditional concept of international law. At the 1958 Conference, only a weak attempt was made to establish a special regime for navigation in certain areas, but it did not meet with any serious response until the time of the 1973-1982 Conference. By that point, it was well-known to all concerned that such seas faced immediate and serious threats to their marine environment. The states bordering the Baltic Sea signed a Marine Environment Protection Convention in 1974. In 1973, the Convention for the Prevention of Pollution from Ships (MARPOL), which provided a stricter

regime for protection of “special regions”, including the Mediterranean, the Baltic Sea, the Black Sea, the Red Sea, and the Arabian Gulf, was prepared for ratification. Further action was undertaken during the 1970's by the United Nations Environment Program (UNEP), which together with the affected states developed programmes for, among other areas, the Arabian Gulf, the Caribbean, and the Mediterranean. It soon became obvious that the measures would have the desired effect only if they could be taken on the basis of intense co-operation among the states bordering seas. The essential quality of the Convention provisions is that it requires the states to engage in this kind of co-operation. (Art. 123)

8. CONTINENTAL SHELF

The regime of the continental shelf is clearly a post-World War II development. Prior to that, practically the only cases involving rights to resources of the sea-bed were related to pearl fisheries of Bahrain and Ceylon in the last century. If European legal experts had drafted a doctrine of the rights to resources of the sea-bed before World War II, they might have required two conditions, “claim” and “exploitation”, and referred to the principle of freedom of the seas. The Truman Proclamation of 1945 changed the direction, but the European approach survived partly into the 1958 Conference, which defined the continental shelf as the sea-bed to a depth of 200 meters or, beyond that, to where the depth of the superjacent waters admits of the exploitation of the natural resources. (1958 Continental Shelf Convention, Art. 1) However, instead of granting all interested states the right to a “claim”, the 1958 Conference granted the coastal states exclusive sovereign rights over the natural resources on the continental shelf adjacent to their coasts, although in the 1950's the state of technology did not permit exploitation of the sea-bed at a depth even approaching two hundred meters. This caused concern for coastal states whose continental shelf to the two hundred meter depth limit was very narrow. When surveys in the Red Sea discovered vast mineral resources at a depth of about 2,500 meters, Saudi Arabia in 1968 claimed sovereign rights to all mineral resources up to the mid-line of the Red Sea.

The Saudi oil minister, Sheikh Ahmed Zaki Yamani, stated (excerpt):

Those vast mineral resources have attracted several companies from distant countries who are now laying claims to the ownership of these resources. We have found it necessary to issue a law declaring (our) ownership.

This development is analogous to what happened in the United States during President Truman's administration, when the United States declared its title to the hydrocarbon resources in its off-shore areas. Several nations followed the example of the United States, and it has now become an established international rule that every nation has the right to exercise sovereignty over the- subsoil resources of its continental shelf. This time it was Saudi Arabia that took the lead in establishing another fair and equitable rule in international law.

The barrier of “two hundred meter depth” or “exploitation beyond” of 1958 was threatened. Although the Red Sea is a unique situation, it was quite obvious that other coastal states would soon follow suit if the community of nations did not agree on clear and enforceable rules. The 1982 Convention found a generous solution to this problem. (Part VI, Art. 76)

9. EXCLUSIVE ECONOMIC ZONE

In describing the evolution of the concept of the exclusive economic zone, reference should first be made to the impact of fishing disputes which had arisen frequently since the eighteenth century. Although local in nature, these disputes led to such a growth in tensions in the 1960's that it was obvious that discussion of a new concept would be essential at the Third UN Conference on the Law of the Sea in 1973-1982. When the 1958 and 1960 Conferences failed to extend the territorial sea beyond three nautical miles, many states sought "compensation" by establishing a fishery zone of twelve nautical miles or more. Between 1958 and 1973, more than forty states implemented such fishery zones. A further driving force in the development of the economic zone was the unanswered questions with respect to the limits of the continental shelf. Furthermore, there was a precedent of some Latin American states (Chile, Peru, Ecuador) which in the Santiago Declaration on the maritime zone of 1952 postulated that they possessed sole sovereignty and jurisdiction over an area of the sea of not less than two hundred nautical miles from the coast. Other Latin American states followed. At the beginning of the 1970's, many African states and several Asian states adopted a policy corresponding to the South American claims. For many important maritime nations, the survival of the freedom of navigation in general and in straits in particular was becoming a matter of serious concern.

This "exclusive two hundred miles" approach ultimately found general acceptance, with the exception of three principal restrictions:

- 1) Instead of sovereignty, the coastal state has only enumerated sovereign rights; (Art. 56)
- 2) With regard to living resources, the coastal state has only "preferential rights" instead of "exclusive rights"; (Art. 62, Para. 3)
- 3) The coastal state has to accept the principles of freedom of navigation and overflight. (Art. 87; Art. 58)

But in spite of these restrictions, the practical impact of the exclusive economic zone remains close to exclusive rights. The sovereign rights granted include all economic uses known today, including marine scientific research. The "preferential rights" in respect to living resources are based on provisions which make it nearly impossible for other states to exercise their rights to a surplus of the allowable catch (Art. 61; Art. 62, Para. 3) except through friendly co-operation. Commercial shipping in general, on which every coastal state economy relies to at least a certain extent, might be affected by many political, economic, or social matters, but will concern itself very little with particulars of rights from navigation regulations; there will be great interest, however, in seeing the same rules applied consistently on a global basis. Naval vessels, on the other hand, particularly those not simply passing through the zone, might find that traditional freedom of navigation does not apply fully in the exclusive economic zone.

The following states (list not exclusive) have benefited most from the establishment of the exclusive economic zone and archipelagic regime (approximated figures in million square nautical miles):

| | |
|----------------------|--|
| More than 2 million: | Australia, Canada, Indonesia, New Zealand, USSR, USA |
| 1-2 million: | Brazil, Chile, France (including overseas dependencies), India, Japan, Mexico, United Kingdom |
| 0.5-1 million: | Argentina, China, Ecuador, Fiji, Kiribati, Madagascar, Mauritius, Norway, Papua New Guinea, Philippines, Portugal, Solomon Islands, South Africa |

10. THE HIGH SEAS

Until recently, the high seas were almost identical with the ocean space. The new order of the oceans has reduced this space by more than one-third, and the sea-bed below the seas and its resources have been given a regime of their own, the Regime of the Area. (Part XI) The high seas are the ocean space beyond the jurisdiction of coastal states, the waters superjacent to the sea-bed, the ocean surface, and the atmosphere above (Art. 86; Art. 135; Art. 78, Para. 1) and cover almost half of the planet's surface.

The 1982 Convention bases the legal regime of the high seas on the principle of freedom of the sea, (Art. 87) a term which governed the law of the sea for a long time. It is not worthwhile to reconstruct the evolution of the term, but it can be pointed out that the principle was enforced by Great Britain's sea power from the nineteenth century onwards as essential for the administration of the far-flung colonial empire. Traditional freedom of the sea, in fact, meant only freedom of navigation and freedom of fishing. As far as other means of utilization were concerned, the doctrine was ineffectual. Freedom of navigation could easily find general assent, as the substance of the ocean was unaffected by a vessel using it for passage; an unlimited number of vessels could pass through the same space without "using up" the ocean. For a long time, the same was true of fishing, at least where the catch was small or where the stocks could renew themselves before that part of the ocean was fished again. The traditional regime worked only as long as, and in places where, this was the case, and wherever these conditions were not present, tensions inevitably resulted sooner or later. Invulnerability during use was sufficiently inherent in the traditional system.

The provisions of the 1982 Convention retain the concept of invulnerability. The following examples illustrate this:

- (a) the high seas are reserved for peaceful purposes; (Art. 88)
- (b) it is forbidden to make sovereignty claims on any part of the high seas; (Art. 89)
- (c) co-operation is required among nations engaged in fishing, (Art. 118) and conservation measures may not discriminate against others; (Art. 119, Para. 3)
- (d) due regard is to be given to the interests of other states and to activities in the Area; (Art. 87, Para. 2) and
- (e) states have the obligation to protect and preserve the marine environment. (Art. 192)

The term "freedom" (Art. 87) is of less significance than would appear at first glance. The right of navigation is the logical consequence of the exclusion of sovereign rights to any part of the sea, (Art. 89) as is also the case for overflight, cables and pipelines, artificial islands, and scientific research. These and other theoretical uses can be "free" only if the invulnerability of the high seas is observed or accepted by the community of nations, e.g., in cases of lawful dumping. (Art. 210)

11. THE AREA - THE DEEP SEA-BED

The deep sea was completely unknown to man until recently, and even today it remains a mysterious part of the planet. Whereas the oceans cover roughly two-thirds of the earth's surface, the deep sea bed, designated by the 1982 Convention as the "Area", (Art. 1, Subpara. 1(1)) covers about half the globe. In general, the sea-bed of the Area starts where the oceans have a water depth of 2,500 meters, corresponding to the concept of the continental shelf. (Art. 76) The greatest depth of the ocean is over 10,000 meters. Based on present findings, the value of the sea-bed and its subsoil is in potato-sized nodules composed of metal ores. These nodules are