

# Sailing with TWAIL: A Historical Inquiry into Third World Perspectives on the Law of the Sea

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## Abstract

The contemporary law of the sea is not only a making of its own time but also a result of evolutions from the past. Indeed, the LOSC reflects a particular historical trajectory from Grotius's *Mare Liberum* to UNCLOS III and the historical circumstances under which it developed. Using TWAIL as a theoretical and methodological lens, this article critically analyzes the historical development of the law of the sea from Third World States' standpoint. The article demonstrates that the rules and principles of the traditional law of the sea were conceptualized by and designed to promote the colonial and other interests of the powerful and technologically advanced Western States. Nonetheless, Third World States consistently challenged the old legal order of the sea and played significant roles in the evolution of existing doctrines and the development of new spatial architecture of the oceans and the associated principles. The article concludes that, despite such efforts of Third World States to reorient the law of the sea in a manner to address their interests, the protections that current international law offers to Third World States remain fragile in many areas, which areas continue to be subjects of the ongoing Third World struggle.

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## I. Introduction

1. The Third World Approaches to International Law (TWAIL)—also known as the theory of decolonization of international law—is a distinctive critical approach for understanding the nature of international law. It is a scholarly movement that shifts the international legal paradigm away from the dominant Eurocentric narratives of international law (that perpetuate the interests of the colonizing and dominating Western States), towards an alternative and critical view of international law that embraces the rights and interests of Third World States and peoples.

2. The Bandung Conference of 1955 was a key moment in the development of the TWAIL approach. Since then the TWAIL approach has been continuously shaped, refined, and applied by a new generation of scholars from various fields of international law<sup>1</sup> who infuse their unique perspectives into its central concerns and tenets. However, there has been limited attempt to examine the law of the sea through the TWAIL lens. Although a few early and recent contributions explored the law of the sea from the standpoint of Third World States, such contributions focused on some specific issues and none of them offer a comprehensive historical review. Consequently, this article broadly explores the potentials and limitations of the law of the sea in addressing the concerns of Third World States and peoples from a historical perspective. The article questions and critically evaluates the historical foundations of the law of the sea, its inherent features and assumptions, as well as the traditional doctrines of the law of the sea from the standpoint of Third World States and peoples. The article further analyzes the roles and influences of Third World States in the evolution of the law of the sea through their unilateral assertions of sovereignty and jurisdiction over the sea. This analysis also considers the individual and concerted actions of Third World States in initiating and pursuing new concepts and principles—specifically the doctrines of

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1 The areas of international law where the TWAIL approach has been effectively utilized include, *inter alia*, international investment law, law of State succession, law of treaties, and human rights law. See S Pahuja, *Decolonizing International Law: Development, Economic Growth and the Politics of Universality* (2011); M Craven, *The Decolonization of International Law: State Succession and the Law of Treaties* (2007); and V Sripathi, *International Territorial Administration Through the TWAIL Looking Glass: A Review*, 31(2) *Human Rights Quarterly* (2009), 540; OA Badaru, *Examining the Utility of Third World Approaches to International Law for International Human Rights Law*, 10(4) *International Community LR* (2008), 379; and C Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart, 2000).

archipelagic States and waters, the exclusive economic zone (EEZ), and the common heritage of mankind (CHM); and examines whether and to what extent such spatial constructions and associated principles recognize and protect the rights and interests of Third World States and peoples. The temporal frame of the analysis is from the end of the 15<sup>th</sup> century—the first contact of indigenous peoples of the Western hemisphere with Europeans following the “discovery” of the “new world” by Columbus in 1492<sup>2</sup>—to the adoption of the LOSC.<sup>3</sup>

3. This article is structured as follows. Part II discusses the main tenets of the TWAIL approach, outlining the various catalysts for the emergence of the TWAIL movement and its principal objectives. This part then further delineates the contributions and influences of TWAIL on the methodology of international law emphasizing on the historicization of international law as a TWAIL-driven method. Part III, the heart of the article, provides a detailed historical review of the law of the sea in three broad time periods of international law through the TWAIL theoretical and methodological lens. Finally, Part IV offers concluding remarks and critical insights moving ahead.

## II. TWAIL: A critical theoretical lens to international law

4. TWAIL is a distinctive, critical way of understanding the nature of international law shaped by the experiences, and centered on addressing the concerns, of Third World States<sup>4</sup> and peoples. It is an intellectual movement that

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- 2 This time slot serves as the natural starting point for any historical review of international law vis-à-vis Third World States and peoples.
  - 3 A discussion of earlier conceptualizations of the ocean space is excluded; however, the post-LOSC developments of the law of the sea, including the 1994 Implementation Agreement, are incidentally included into the discussion of the relevant parts of the article. A critical investigation of the current law of the sea with more specific TWAIL examples, including developments after the 1994 Implementation Agreement and the debates on the ongoing BBNJ negotiations, is a subject of another publication this author is currently working on.
  - 4 The term “Third World” is a Cold War construct, and it was used to describe States that were not aligned with the Communist Bloc or NATO, and that had colonial pasts, in Asia, Africa, Latin America, and Oceania. Currently the term “Third World States” refers to the “developing States”, the “postcolonial States”, or the “Global South”; and this category is mainly seen as “reflect[ing] a level of unity imagined and constituted in ways which would enable resistance to a range of practices [and hegemonic policies] which systematically disadvantage and subordinate an otherwise diverse group of people” (BS Chimni, *Third World Approaches to International Law: A Manifesto*, 8 *International Community LR* (2006), 3, 5-6).

stands as a foil to the positive international law.<sup>5</sup> In keeping with other critical studies concerned with marginalized groups, such as Feminist Approaches, Critical Race Theory, and Indigenous Studies, TWAIL seeks to identify systematic discrimination, exclusion, subordination, and oppression of Third World States and peoples and the complicity of law in these actions. Third World States share a common history of colonialism and face a concerning pattern of underdevelopment and marginalization; and as such, TWAIL looks at the history, structure and process of international law and institutions from the standpoint (experiences and perspectives) of Third World States.

5. TWAIL does not only focus on Third World States but also follows a “peoples-focused” approach to international law. It is concerned with the rights of Third World peoples—particularly indigenous peoples<sup>6</sup>—as legal subjects of international law.<sup>7</sup> This is mainly because recognition of the sovereignty of Third World States does not stop such States from acting in ways which are against the interests of their diverse peoples, including minorities and indigenous peoples.<sup>8</sup> Indeed, sovereignty may provide “unlimited opportunities for operation at home” and “shield tyrannical governments”.<sup>9</sup> Thus, as Anghie and Chimni observe: “it is the actualized experience of [Third World] peoples and not merely that of States, which represent them in international fora, that is the interpretative prism through which rules of international law are to be evaluated”.<sup>10</sup> Accordingly, TWAIL approaches “seek to transform international law from being a language of oppression to a language of emancipation—a body of rules and practices that reflect and embody the struggles and aspirations of Third World peoples thereby promotes truly

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For a detailed discussion of the notion of the “Third World”, see B Rajagopal, *Locating the Third World in Cultural Geography*, 15 *Third World LS* (1999), 1.

- 5 TWAIL is a decentralized network of critical legal scholars with common ideologies but no structure of authority, see JT Gathii, *TWAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography*, 3(1) *Trade, Law and Development* (2011), 26; and JT Gathii, *Alternative and Critical: The Contribution of Research and Scholarship on Developing Countries to International Legal Theory*, 41 *Harvard ILJ* (2000), 263.
- 6 S Gordon, *Indigenous Rights in Modern International Law from a Critical Third World Perspective*, 31(2) *American Indian LR* (2007), 401.
- 7 See U Baxi, *What May the “Third World” Expect from International Law*, 27(5) *Third World Quarterly* (2006), 713.
- 8 A Anghie and BS Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*, 2(1) *Chinese JIL* (2003), 77, 78.
- 9 M Koskenniemi, *What Use for Sovereignty Today?*, 1 *Asian JIL* (2011), 61, 63.
- 10 A Anghie and BS Chimni, above n.8, 78.

global justice”.<sup>11</sup> In short, TWAIL provides analytical tools to deconstruct the colonial legacies of international law and to evaluate the engagement of contemporary international law with the realities of Third World States and peoples within the context of a continuously changing international setting.

## II.A. A trigger to, and aims of, TWAIL

6. The Eurocentrism of international law is the main catalyst for the emergence of TWAIL. International law has European and Christian origins. While Crawford observes that “members of the society whose law was international were the European States”,<sup>12</sup> Oppenheim similarly holds that international law “is in its origin essentially a product of Christian civilizations”.<sup>13</sup> Bedjaoui, a prominent TWAIL scholar and former judge of the ICJ, captures the main features of classical international law observing that: “classical international law [. . .] consisted of a set of rules with a geographical bias (it was a European law), a religious-ethical inspiration (it was a Christian law), an economic motivation (it was a mercantilist law), and political aims (it was an imperialist law)”.<sup>14</sup> As such, TWAIL bases itself on the premise that international law is inherently Eurocentric and emerged in the process of colonial encounters to justify the colonization and subjugation of the non-European States and peoples, and the exploitation of their resources.<sup>15</sup> Advocates of TWAIL allege that the use of international law—as an instrument to legitimize the actions of the powerful Western States against the non-Europeans—is not merely something of the past, but continues to be an instrument of neo-colonialism facilitating the exploitation of Third World

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11 Ibid., 78-79.

12 J Crawford, *The Criteria for Statehood in International Law*, 48(1) *British YIL* (1976), 93, 98.

13 LFL Oppenheim, *International Law: A Treatise*, 4th edn, (Longmans, Green & Co., 1928).

14 M Bedjaoui, *Poverty of the International Order*, in: RA Falk, FV Kratochwil and SH Mendlovitz (eds.), *International Law: A Contemporary Perspective* (Westview Press, 1985), 153. For a detailed discussion on the Eurocentric nature of international law, see JT Gathii, *International Law and Eurocentricity*, 9 *EJIL* (1998), 184; and M Koskeniemi, *Histories of International Law: Dealing with Eurocentrism*, 19 *Rechtsgeschichte* (2011), 152.

15 A Anghie, *Imperialism, Sovereignty and the Making of International Law* (2004), 32-65.

States and peoples in various forms.<sup>16</sup> In essence, given that international law has deep colonial roots and is primarily based on Western conceptions and worldviews, contemporary international law (be it conventional or customary international law) does not fully and properly address the rights of Third World States and peoples.<sup>17</sup>

7. Bandung is considered as the birthplace of TWAIL. The 1955 Bandung Conference, hosted in Bandung, Indonesia, brought together the first 29 independent African and Asian States.<sup>18</sup> These States condemned “colonialism in all its manifestations” as “an evil which should speedily be brought to an end”.<sup>19</sup> Subsequently, the participants established a coalition of Third World States that would articulate political and economic issues specific to them and brought these issues onto the international agenda.<sup>20</sup> Infused by the spirit of Bandung Conference the TWAIL movement emerged and several Third World scholars began to critically evaluate international law from the stand point of Third World States.<sup>21</sup>

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16 Eslava observes that imperialism “is not a historical phenomenon that can be cordoned off somewhere in the past”. Instead, Imperialism consists of “a multifarious set of asymmetrical arrangements and forms of conditional integration that have travelled across time and space, and through many scales and sites of governance—from the international to the national and the local; from the public to the private; from the ideological to the material; from the human to the non-human, and beyond”. See L Eslava, *TWAIL Coordinates*, *Critical Legal Thinking: Law and Political* ([www.criticallegalthinking.com/2019/04/02/twail-coordinates/](http://www.criticallegalthinking.com/2019/04/02/twail-coordinates/)), visited July 2022.

17 See generally DP Fidler, *Revolt Against or from within the West? TWAIL, the Developing World, and the Future Direction of International Law*, 2(1) *Chinese JIL* (2003), 29.

18 See Final Communiqué of the Asia-African Conference of Bandung (24 April 1955), 2 ([www.cvce.eu/obj/final\\_communique\\_of\\_the\\_asian\\_african\\_conference\\_of\\_bandung\\_24\\_april\\_1955-en-676237bd-72f7-471f-949a-88b6ae513585.html](http://www.cvce.eu/obj/final_communique_of_the_asian_african_conference_of_bandung_24_april_1955-en-676237bd-72f7-471f-949a-88b6ae513585.html)), visited July 2022.

19 *Ibid.*, 6.

20 See M Mutua, *What is TWAIL?*, 94 *Proceedings of the ASIL Annual Meeting* (2000), 31, 31; and more generally L Eslava, M Fakhri and V Nesiha (eds.), *Bandung, Global History, and International Law: Critical Past and Pending Futures* (2017).

21 TWAIL scholarship has been divided into two main generations. While TWAIL I comprise of scholarship during the era of decolonization following the Bandung Conference, TWAIL II refers to scholarship from the end of the 1990s. In fact, the term “TWAIL” as a concrete scholarly network was officially formulated in March 1997 at a conference titled “New Approaches to Third World Legal Studies” at Harvard Law School by scholars who now identify themselves as TWAIL II scholars (see K Mickelson, *Taking Stock of TWAIL Histories*, 10 *International Community*

8. TWAIL generally has two main objectives. First, it aims to understand, unpack, and deconstruct the uses of international law as a medium for the creation and perpetuation of a racialized hierarchy of international norms and institutions that subordinate non-Europeans to Europeans.<sup>22</sup> It aims to unpack the *modes operandi* of various doctrines of international law vis-à-vis Third World States and peoples. It critically evaluates how the doctrines of sovereignty, discovery and *terra nullius*, and civilizing mission emerged and continuously operated to legitimize colonialism and the occupation of non-European lands and territories by European powers.<sup>23</sup> TWAIL also aims to re-examine the claims and assumptions of contemporary international law, such as the claims of neutrality and universality of international law vis-à-vis Third World States. Some scholars argue that in the post-decolonization era, international law has been truly internationalized, thus assuming an anti-colonial character, and consequently has become universal.<sup>24</sup> However, TWAILers challenge this notion of the universality of international law, arguing that the universalization of international law is geographical rather than normative<sup>25</sup>; and that this universality was a result of the imperial expansion in the 19<sup>th</sup> century that subordinated non-European peoples to European conquest and domination.<sup>26</sup> Proponents of TWAIL maintain that to prescribe uniform global standards that govern all

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LR (2008), 355). It is also worth noting that some commentators proposed for identification of a third generation (TWAIL III) due to the emergence of new issues relating to global security and terrorism on the international agenda after 11 September 2001 (see for example M Khosla, *The TWAIL Discourse: The Emergence of a New Phase*, 9 *International Community LR* (2007), 291). However, this proposal for a third generation has not been accepted by the majority of TWAIL's literature. For a detailed discussion, see GRB Galindo, *Splitting TWAIL?*, 33 *Windsor Yearbook of Access to Justice* (2016), 37; and M Kumar, *Dividing TWAIL into "Generations"*, Paper presented at the Critical Legal Studies colloquium at SOAS University of London (September 2018).

- 22 M Mutua, above n.20, 31.
- 23 See A Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40(1) *Harvard ILJ* (1999), 1, 3; M Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16(4) *Michigan JIL* (1995), 1113; and RJ Miller, *The Doctrine of Discovery in American Indian Law*, 42 *IDAHO LR* (2005), 1.
- 24 M Shaw, *International Law*, 5th edn, (2003), 39.
- 25 A Anghie, above n.23, 1; and M Mutua, above n.20, 31.
- 26 A Anghie, *Francisco de Vitoria and the Colonial Origins of International Law*, 5(3) *Social and Legal Studies* (1996), 321; and L Eslava and S Pahuja, *Between Resistance and Reform: TWAIL and The Universality of International Law*, 3(1) *Trade, Law and Development* (2011), 103.

States, international law denies, erases or ignores the “specific cultures, belief systems, and political organizations” as well as condition of uneven development among Third World States.<sup>27</sup> Mutua regards this universality or “single value” approach of international law as “a forced assimilation of non-European peoples into international law, a regime of global governance that issued from European thought, history, culture, and experience”.<sup>28</sup>

9. Second, TWAIL aims not only to deconstruct the Eurocentric international law but also seeks to (re)construct and present an alternative normative legal order for international governance that properly recognizes and protects the rights and interests of Third World States and peoples. To that end, TWAIL sets a “decolonization agenda”: advocating that Third World States should not merely rely on the traditional doctrines of international law—which runs against their interests—but should instead reconstruct those doctrines in a manner that better protects their interests.<sup>29</sup> As such, TWAIL requires that the various rules of international law be (re)interpreted in a manner that rectify past injustices, and that empower Third World States and peoples to enable them to meet their contemporary needs.<sup>30</sup> TWAIL also advocates for active participation of Third World States and peoples in the making of international law, believing that their “co-authorship” would help create universal norms of international law.<sup>31</sup> In short, TWAIL seeks to decolonize and transform international law to make it responsive to the concerns of Third World States and peoples. To that end, TWAIL approaches expand and open new conceptual spaces for international legal scholarship and practice by investigating and selectively embracing the egalitarian values of Western international legal norms rather than blindly relying on dominant narratives that reinforce the hierarchical or narrow aims of European States.<sup>32</sup>

27 A Anghie, above n.23, 1; and VD Shetty, *Why TWAIL Must Not Fail: Origins and Applications of Third World Approaches to International Law*, 3(2) *Kings Student LR* (2012), 69, 71.

28 M Mutua, above n. 20, 34. For a detailed discussion of this point, see K Mickelson, *How Universal is the Universal Declaration?*, 47 *University of New Brunswick LJ* (1998), 19; and E Engle, *Universal Human Rights: A Generational History*, 12(1) *Annual Survey of International & Comparative Law* (2006), 219.

29 A Anghie, above n.15, 210.

30 In this regard, Mutua argues that “TWAIL is fundamentally a reconstructive movement that seeks a new compact of international law” (M Mutua, above n.20, 38).

31 See A Anghie and BS Chimni, above n.8, 81.

32 U Natarajan et al, *Introduction: TWAIL—on Praxis and the Intellectual*, 37 (11) *Third World Quarterly* (2016), 1946-1956; JT Gathii, above n.5, 40.



10. Generally, the discontents of international law—that it is a hegemonic and Eurocentric regime that has proclaimed neutrality and universality and yet in practice has helped to underpin practices characterized by violence, exploitation, and inequality<sup>33</sup>—triggered the scholarly movement of TWAIL. Thus, TWAIL aims to expose such injustices, imbalances (inequalities) and contradictions inherent in the Eurocentric system of international law; and to turn international law toward a truly universal, impartial, and equitable law capable of addressing the concerns of the historically disadvantaged Third World States and peoples.<sup>34</sup>

## II.B. Historicization as a TWAIL-driven methodological approach

11. As highlighted above, TWAIL is equipped with theoretical (analytical) tools to determine what international law is and should be from the perspective of Third World States and peoples. However, TWAIL is not only a theory, but also offers methods “for analyzing international law and institutions”.<sup>35</sup> While doctrinal legal method helps to establish current law (*lex lata*) by uncovering the gaps and limitations of a legal framework, it neither questions the assumptions underlying a legal system and its broader historical, social, and political context, nor does it explore possible future legal trajectories. TWAIL contributes to/influences the doctrinal method of international law, *inter alia*, by challenging and expanding the traditional doctrine of sources, and by informing the methods of treaty interpretation.<sup>36</sup> For example, TWAIL challenges the formulas by which rules of customary

33 B Rajagopal, *International Law and Its Discontents: Rethinking the Global South*, 106 ASIL Proceedings (2012), 176.

34 OC Okafor, *Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective*, 43 OSGOOD Hall LJ (2005), 171, 176.

35 See OC Okafor, *Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?*, 10 International Community LR (2008), 371.

36 TWAIL advocates that international law instruments be interpreted in a manner that advances the rights of Third World States and peoples by embracing their fundamental realities; thus, rather than treating legal texts as having fixed meaning, the TWAIL calls for an evolutionary interpretation which considers the overall context and object of the instrument and in the light of the relevant existing and emerging standards. For detailed discussion, see J Anaya, *Divergent Discourses about International Law, Indigenous Peoples, and Rights over Lands and Natural Resources: Toward a Realist Trend*, 16 Colorado JIELP (2005), 237, 257; and J Perrin, *Legal Pluralism as a Method of Interpretation: A Methodological Approach to Decolonizing Indigenous Peoples’ Land Rights under International Law*, XV Universitas (2017), 23.

international law and general principles of law are formed<sup>37</sup> holding that such formulas are designed in a manner to perpetuate and protect the interests of Western States.<sup>38</sup> TWAIL further widens the scope of legal (normative) materials to be used as sources of international law arguing that certain “soft law” instruments that reflect the views of Third World States and peoples—such as UN General Assembly (UNGA) resolutions adopted by a wide majority of States—should have some legally binding effect.<sup>39</sup> Thus, TWAIL not only helps to understand the current law but also provides extra-lens (perspective) to frame what the law should be.

12. One important TWAIL-driven method is historicization of international law. Historicization or a “turn to history” in international law has become an increasingly used method of analyzing international law since the 1990s.<sup>40</sup> The “turn” has been understood as a way to reread, rethink, and resituate the histories of international law. TWAIL adopts a historical lens when assessing international law as it aims to uncover how international law is constructed, legitimized, and operationalized in a colonial and Global North-South context.<sup>41</sup> Indeed, history is an essential part of the legitimacy of TWAIL’s perspective on international law.<sup>42</sup>

13. Historicization plays, *inter alia*, two principal roles. First, it helps to bring alternative epistemologies into the history of international law by revealing the “untold stories/narratives” of Third World States and peoples. This reveal in turn helps to counter the more celebrated histories (dominant narratives) of international law by providing a more holistic and nuanced

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37 Regarding the rules how customary international law and general principles of international law are established, see Article 38 of the ICJ Statute.

38 For an excellent critic of the doctrine of sources (focusing on customary international law), see BS Chimni, Customary International Law: A Third World Perspective, 112(1) AJIL (2018), 1.

39 Anghie and BS Chimni, above n.8, 81; and *ibid*.

40 See M Craven, Theorizing the Turn to History in International Law, in: A Orford and F Hoffmann (eds.), *The Oxford Handbook on the Theory of International Law* (2016), 21; M Koskeniemi, *Vitoria and Us: Thoughts on Critical Histories of International Law*, 22 *Rechtsgechichte* (2014), 119.

41 A Orford, *The Past as Law or History? The Relevance of Imperialism for Modern International Law*, IILJ Working Paper (2012); and GRB Galindo, *Force Field: On History and Theory of International Law*, 20 *Journal of the Max Planck Institute for European Legal History* (2012), 86.

42 Galindo, above n.21, 42.

history of the discipline.<sup>43</sup> This historical focus further helps to formulate alternative conceptions (to the dominant Western narrative) of how international law developed and what it means. In so doing, historicization facilitates an understanding of the plural conceptions of law in the postcolonial world. Second, historicization facilitates the evaluation of contemporary international law in the light of its broader historical context, using the law-in-context approach. Historicization is a useful approach to eruditely understand current international law, given that history delimits and orients what is possible today through phenomena known as “path dependence”.<sup>44</sup> Historicization also reveals the contingencies and contestations underpinning the current legal framework and its organizing principles.<sup>45</sup> As such, it opens space for exploring possible alternative trajectories.

14. This article uses historicization of the law of the sea as its methodological lens to understand and evaluate the colonial origins (historical foundations), inherent features, and assumptions of the law of the sea that enabled the powerful maritime States to dominate over non-European peoples for centuries. Historicization of the law of the sea also helps to connect some of the political contestations currently arising in ocean governance with the past histories of law of the sea and recurring debates on ocean justice. To this end, the article analyzes several instruments that are denied of formal legal validity as “soft law”, such as declarations, resolutions, and guidelines adopted by States, the UN General Assembly, or other international organizations. Several documents—including provisional conference reports, individual and joint proposals of Third World States in the various negotiations of the law of the sea, and resolutions and press releases of Third World coalitions—that reflect the views of Third World States have also been reviewed.

15. In conclusion, TWAIL represents an approach that combines critical jurisprudence and a turn to history in international law. Using this theoretical and methodological lens, the following parts of the article offer a detailed historical inquiry into the potentials and limits of the law of the sea in addressing the rights and interests of Third World States and peoples.

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43 For detailed discussion, see JV Bernstorff (ed.), *The Battle for International Law: South-North Perspectives on the Decolonization Era* (2019).

44 J Husa, *Developing Legal System, Legal Transplants, and Path Dependence: Reflections of the Rule of Law*, 6(2) *Chinese JCL* (2018), 129.

45 It is worth distinguishing between proper historiography written by legal historians and legal scholars using historiography as a method of inquiry. I will follow the latter approach in this article.

### III. Third World perspectives on the law of the sea: a historical review

16. This part examines the historical development of the law of the sea through the TWAIL lens. The purposes of the historical inquiry are twofold. First, to examine how the various rules and doctrines of the law of the sea were conceptualized and applied *vis-à-vis* the (rights of) Third World States and peoples over the years. Second, to assess the influences and contributions of Third World States in the evolution of existing doctrines that run against their interests as well as in the development of new concepts and principles of the law of the sea. It also assesses whether, and to what extent, such new concepts and principles address the rights and interests of Third World States and peoples. The discussion is organized into three-time periods of international law of the sea: the early period (from 15<sup>th</sup> century) of the law of the sea, the period of the traditional law of the sea characterized by the freedom of the sea, and the modern law of the sea focusing on the negotiations at UNCLOS III and its outcomes.

#### III.A. Early law of the sea: The era of sea power and Papal grant

17. The oceans and seas were characterized by a “legal vacuum” in the early periods of international law. National interests and sea power were the main determinants of a State’s ocean policy. The Greeks, Romans, and other ancient peoples controlled the sea by force whenever doing so was in their economic or political interest, and to the extent that the sailing capability of their ships permitted them to do so.<sup>46</sup> However, a mere use of force was not sufficient; thus, European powers used to seek Papal approval—as Papal decree was the highest form of legal instrument at the time—to give legal authority

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46 The early European navigators were not able to design vessels and sailing techniques that enabled them to navigate across the oceans. The Mediterranean civilizations, such as the Phoenicians and the Greeks, always considered the Iberian Peninsula and the Straits of Gibraltar as the western-most edge of the world. Throughout the Middle Ages, the Europeans considered the Atlantic Ocean as “unnavigable exterior sea”, which surrounded the known world. It was during the 15<sup>th</sup> century that Europeans were able to develop better quality and seaworthy vessels and better sailing techniques that led to the exploration of the entire world. For a detailed discussion, see S Cattelan, *Mare Clausum in Legal Argumentation: Claiming the Seas in the Early Modern Age*, PhD Dissertation (Aarhus University, Department of Law, 2020), 91-92; H Kamen, *Spain’s Road to Empire* (Penguin Books, 2009), 21.

and legitimacy for their control of the seas, oceans, and military expansion (particularly to non-Christian territories).<sup>47</sup>

18. In the mid-15<sup>th</sup> century, Spain and Portugal emerged as the dominant colonial European powers competing for access to and control of the oceans and distant (overseas) territories. Concerned that such competition of the two Iberian States could lead to division within the Christian world, in turn affecting the ability of Europe to extend its influence in faraway places, Pope Alexander VI issued a Bull in 1493. The Bull drew a north-south demarcation line at 100 leagues west of the Azores and the Cape Verde Islands and granted to Spain “all non-Christian lands”, including “all islands and main lands found and to be found, discovered and to be discovered”, lying west of the north-south line and to Portugal east of that line, with a reciprocal mission of spreading Christianity throughout the occupied territories.<sup>48</sup> Spain and Portugal formalized the Bull by the Treaty of Tordesillas in 1494 with a westward adjustment of the location of the north-south dividing line, which was now drawn at 370 leagues west of the Cape Verde Islands.<sup>49</sup> While the Treaty of Tordesillas omits the missionary reason for the division of territory, it declared, like the Bull, that “all lands, both islands and main lands, found and discovered already, or to be found and discovered hereafter” on the respective sides of the north-south line were to become under the exclusive authority of the respective States.<sup>50</sup>

19. The Bull and the Treaty had significant impact on the governance of the ocean space. By drawing a line dividing the oceans of the world between Portugal and Spain, the two “legal” instruments constructed the ocean as a space amenable to exclusive control.<sup>51</sup> Such conceptualization resulted in the “territORIZATION” and “enclosure” of large parts of the ocean space: while Spain claimed exclusive right of navigation in the Western portion of the Atlantic, in the Gulf of Mexico, and in the Pacific, Portugal assumed a similar right in

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47 Ibid., 101.

48 PE Steinberg, *Lines of Division, Lines of Connection: Stewardship in the World Ocean*, 89(2) *Geographical Review* (1999), 254, 255-256 (emphasis added).

49 Spain and Portugal adjusted the Pop’s demarcation line to accommodate Portuguese interest of navigation in the Atlantic Ocean that led to the Gulf of Guinea and the East Indies, which was recognized in earlier treaties between the two States, particularly in the 1479 Treaty of Alcaçovas. See S Cattelan, above n.46, 107-111.

50 Treaty of Tordesillas, 1494 cited in PE Steinberg, above n.48, 256.

51 See PE Steinberg, above n.48, 255.

the Atlantic south of Morocco and in the Indian Ocean.<sup>52</sup> These instruments also granted the two maritime States an enforcement authority in their respective zones of ocean space. For example, Portugal's ships could not sail west of the line unless the ships were engaged in transit to a Portuguese possession and *vice versa*, in which case the ships were to be guaranteed safe passage on the principle of reciprocity.<sup>53</sup> The same restriction applied to ships of any other States.<sup>54</sup> Spain and Portugal also exercised their sea power to restrict trade in territories lying within and/or near their sphere of influence and monopolized trade in large parts of the West and East Indies respectively.<sup>55</sup> As Cattelan puts it, "all other Europeans were excluded from this Hispano-Portuguese duopolistic partition of the oceans, new lands, and commerce", and the two kingdoms enforced their exclusive rights with the might of their navies.<sup>56</sup> Generally, although physical incorporation of distant ocean space into the territory of the State was not a legal norm of the time, the Bull and the Tordesillas Treaty served as main sources of legal authority for exercise of exclusive jurisdiction over large spans of ocean space by the two maritime superpowers.

20. Beyond dividing the oceans between the two States, the Papal Bull and the Tordesillas Treaty had significant effects on non-European peoples. As shown above, the spatial scopes and purposes of the Bull and the Treaty were broad: they granted "all non-Christian lands" lying west and east of the dividing line to Spain and Portugal respectively, thereby enlarging the territories of Christendom.<sup>57</sup> Indeed, the Bull and the Treaty were mainly concerned with conferring Spanish and Portuguese sovereignty over (new) land territories and islands of the non-European peoples rather than control of the oceans *per se*. This is clear from the fact that both the Bull and the Treaty did not expressly mention the seas as their primary object;<sup>58</sup> and that the North-East Atlantic

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52 TW Fulton, *The Sovereignty of the Sea* (London, 1911), 5; and T Treves, *Historical Development of the Law of the Sea*, in: DR Rothwell et al (eds.), *The Oxford Handbook of the Law of the Sea* (2015), 1, 3.

53 S Cattelan, above n.46, 122.

54 *Ibid.*

55 T Treves, above n.52, 3.

56 S Cattelan, above n.46, 122.

57 Papal grant over territories of (non-Christian) indigenous peoples, who were characterized as "infidels and enemies of Christ", was a common practice of the 15<sup>th</sup> century international law. For a detailed discussion, see *ibid.*, 100-119.

58 *Ibid.*, 118, 121.

Ocean areas were not covered by the Papal grant and the Tordesillas Treaty as those areas were Christian European territories not amenable for colonization. Thus, exclusive control of the oceans (dominion over the seas) was ancillary and a means to achieve the economic and colonial endeavors of the two European powers by connecting the “Old and the New Worlds”.<sup>59</sup> The Spanish and the Portuguese used the sea as a “space supportive of their specific strategies for dominating distant land territories”: they constructed their marine domain as a “special space” for projecting their power to non-European land territories.<sup>60</sup> Thus, the two instruments served as formal authorization of the colonization of the non-European peoples and occupation of their lands and territories by Spanish and Portuguese colonizers. Indeed, immediately after the signing of the Tordesillas Treaty, the Spanish colonizers easily invaded and subjugated the indigenous peoples of the Western hemisphere through the claim of discovery and use of arms, and they established mines and plantations and enslaved the natives through the *encomienda system*.<sup>61</sup> Similarly, although Portugal faced strong resistance in its sphere of influence due to the existence of a flourishing “Eastern civilization” and trading network in the Indian Ocean territory, it managed to establish its authority and control within the Indian Ocean, the Indian mainland, and the trade spanning the Indian Ocean to East and Southeast Asia through aggressive and violent approaches.<sup>62</sup>

21. In short, the early period of the law of the sea was demarcated by the practices of Spain and Portugal, which competed to control the world’s oceans

59 Ibid., 121; PE Steinberg, above n.48, 257-258.

60 Ibid., 257.

61 The “*Encomienda system*” is a form of slavery system employed by Spanish colonizers in the “New World”, which enabled them not only to dispossess the native Indians of their lands and territories but also to own their labor. This system constituted a *de facto* denial of indigenous rights to own lands, since it only allowed indigenous Indians to use a small parcel of the land or part of the produce while granting full ownership to the colonizers. The system turned the indigenous peoples into tenants of their own lands. For a detailed discussion, see J Anaya, *Indigenous Peoples in International Law*, 2<sup>nd</sup> edn, (2004), 16, 35.

62 The second expedition of Vasco da Gama to India in 1502 was particularly violent. Formally proclaiming suzerainty over the Indian Ocean, da Gama imposed a system of passes known as Cartaz on all shipping and ships that did not carry the Portuguese pass were plundered and burnt. Moreover, Indian and Arab ships were prohibited from carrying certain specified commodities of value, and they had to confine their sailing only to authorized ports. For a detailed discussion, see RP Anand, *Origin and Development of the Law of the Sea* (1983), 47-64.

for resources and commercial purposes. The two maritime powers legitimized their claim of sovereign authority and exclusive jurisdiction over large span of ocean space and overseas territories through the Papal Bull and the Tordesillas Treaty. These instruments served as legal tools for the colonization and occupation of the lands and territories of non-European peoples in distant territories. The legal norm of the Papal Bull and the Tordesillas Treaty lasted for over a century until it was effectively challenged in the beginning of the 17<sup>th</sup> century, which challenge led to the emergence of a new era of the law of the sea, the era of the doctrine of freedom of the sea.

### III.B. The long era of the freedom of the sea and Third World States

22. The monopolistic practices of Spain and Portugal began to be challenged upon the emergence of Britain and the Dutch as new global ocean powers in the beginning of the 17<sup>th</sup> century.<sup>63</sup> Such continued monopolies provoked different views from publicists concerning issues of access to and control of the oceans, known as the “battle of the books”, which led to the emergence of two competing doctrines: the doctrine of open seas and the doctrine of closed seas.<sup>64</sup> Defending the rights of the Dutch traders in the East Indies (the Dutch East Indian Company) against the Portuguese claims of exclusive jurisdictions of the ocean around and leading to the East Indies, Hugo Grotius argued that “it is lawful for any nation to go to any other and to trade with it”.<sup>65</sup> Grotius advocated for the freedom of the seas (*Mare Liberum*), arguing that the seas are open to all States to use for navigation and fisheries and that no State can appropriate any part of the ocean.<sup>66</sup> On the other hand, the English scholar John Selden, in his 1635 classic work titled *Mare Clausum Seu*

63 PE Steinberg, above n.48, 259.

64 DJ Bederman, *The Sea*, in: B Fassbender and A Peters (eds.), *The Oxford Handbook of the History of International Law* (2012), 359, 366. The early literature uses the phrases “the doctrine of open seas” and “the doctrine of freedom of the seas” interchangeably as does this article.

65 H Grotius, *The Free Sea*, D Armitage (ed.), (2004), 10. It is worth noting here that the term ‘State’ is a Westphalian concept that emerged after 1648; thus, during the time that Grotius articulated the doctrine of freedom of the sea (1609), the term ‘Nations’ was used to refer to ‘States’.

66 *Ibid.*, 25-26, 30 & generally ch 5. Grotius excepted this rule with respect to “a bay or narrow strait or concerning all [parts of the ocean] that may be seen from the shore” (32-33). See also I Shearer, *Grotius and the Law of the Sea*, *Bulletin of the Australian Society of Legal Philosophy* (1983), 46, 50-55.



*De Dominio Maris*,<sup>67</sup> introduced a doctrine that advocated for the consolidation of maritime jurisdiction under coastal States—the doctrine of closed seas (*Mare Clausum*). Selden argued that a “State is entitled to claim and exercise authority over a defined area of the sea including powers over any foreign ships, notably fishing vessels, that might seek to enter that area”.<sup>68</sup> Effectively, Selden argued that certain parts of the ocean are susceptible to appropriation by a State: a notion that resembles the legal norm of the Tordesillas era.<sup>69</sup> The Grotian view of the oceans prevailed and by the mid-18<sup>th</sup> century the freedom of the seas became customary international law, with the caveat that adjacent coastal States could exercise sovereign authority close to the shore (up to 3 nm limit).<sup>70</sup>

23. Grotius’s justification for the freedom of fishing is particularly significant here. He argued that marine space and its resources were not susceptible to private property, but that such resources were subject to the common use of all States, since the “seas were boundless and their resources unlimited” such that “it is sufficient for all the uses that Nations can draw from the[re . . .]”.<sup>71</sup> He considered scarcity of resources and having determinable bounds (the possibility for physical demarcation or appropriation) as essential prerequisites for the creation of private property—holding that such requirements did not exist at sea.<sup>72</sup> Vattel followed and expanded Grotius’s view, arguing that:

It is manifest that the use of the open sea, which consists in navigation and fishing, is innocent and inexhaustible; that is to say—he who navigates or fishes in the open sea does no injury to anyone, and the sea, in these two respects, is sufficient for all mankind. Now nature does not

67 For an English translation, see J Selden, *Of Dominion, Or Ownership of the Sea* (M. Nedham trans. 1652 & photo reprint, 1972).

68 D Anderson, *The Development of the Modern Law of the Sea*, in: V Lowe (ed.), *Modern Law of the Sea: Selected Essays* (2008), 1, 4-5.

69 It is important to mention here that Selden advocated his doctrine of “closed seas” with the aim of providing legal justification for Britain’s action to exclude Dutch fishing vessels from British territorial waters (see *ibid.*, 4-5).

70 DJ Bederman, above n.64, 369 & 374.

71 H Grotius, above n.65, xvi & 32. It is worth noting here that when theorists of this period spoke of “property rights to the sea”, they referred to the exclusive jurisdiction of individual States over certain parts of the sea and its resources, rather than referring to individuals or communities as rights holders.

72 *Ibid.*, 28 & 32. Grotius detailed these arguments in the *Right of War and Peace* (see H Grotius, *Rights of War and Peace: in Three Volumes*, R Tuck (ed.), (Liberty Fund Inc., 2005), 428-32 & ch 11 more generally).

give to man a right of appropriating to himself things that may be innocently used, and that are inexhaustible and sufficient for all.<sup>73</sup>

24. The notions that the sea and its marine resources were boundless and inexhaustible made conventional justifications for the creation of property rights—i.e., scarcity and boundedness of resources—inapplicable to the marine space and its resources.<sup>74</sup> This left (almost the entire) oceans, beyond the narrow limits of national jurisdiction, as “unownable commons”, allowing all States to freely access (navigate) and harvest marine resources.<sup>75</sup> This doctrine of the freedom of the sea became the hallmark of the traditional law of the sea governing the oceans until the end of the 20<sup>th</sup> century.

### *III.B.i. Effects of the doctrine of freedom of the sea on Third World States and peoples*

25. As shown, the doctrine of the freedom of the sea was the result of the practices and conceptualizations of a few Western States and theorists respectively. It was articulated and continuously used to serve the economic and colonial interests of the European maritime States of the time.<sup>76</sup> As Esmeir observes, the oceans and seas did not shield non-European States and indigenous peoples from colonialism, but rather served as the main routes of colonialism and the “main arteries of imperialism”.<sup>77</sup> The freedom of the seas doctrine

73 Emer de Vattel, *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury*, B Kaposy and R Whatmore (eds.) (Liberty Fund Inc., 2008), 250 & ch XXIII generally.

74 R Hamilton, *Indigenous Legal Traditions, Inter-societal Law and the Colonization of Marine Spaces*, in: S Allen, N Bankes and Ø Ravna (eds.), *The Rights of Indigenous Peoples in Marine Areas* (Hart 2019), 17, 35.

75 N Sharp, *Saltwater People: The Waves of Memory* (University of Toronto Press, 2002), 46; FT Christy, *Property Rights in The World Ocean*, 15 *Natural Resources Journal* (1975), 695, 696, 701-702.

76 It is worth noting here that Grotius articulated the doctrine of free seas as a lawyer of the Dutch East Indian Company to enable the Dutch to secure rights to trade in the East Indies by countering the Portuguese claim of exclusive control over the sea. Thus, even though Grotius articulated the doctrine as a vision of the sea open to every State under natural law, the doctrine emerged primarily to protect the national interests of Holland, particularly to secure the rights of the Dutch East Indian Company to trade and to “navigate forbidden waters”. See P Corbett, *The Study of International Law* (Doubleday, 1955), 23.

77 S Esmeir, *Bandung: Reflections on the Sea, the World, and Colonialism*, in: L Eslava, M Fakhri and V Nesiah (eds.), *Bandung, Global History and International Law: Critical Pasts and Pending Futures* (2017), 81, 81.

facilitated the European colonial endeavor by giving colonial powers the unrestricted right to navigate anywhere, allowing them to capture an enlarged world. Indeed, the colonial motive of European Powers was one of the core reasons for the widespread acceptance of the freedom of the sea doctrine in the mid-18<sup>th</sup> century. Anand observes that:

In the age of the Industrial revolution and European expansionism, freedom of the *seas became a necessity*. Freedom of *navigation without hindrance* was essential as much for the colonization of Asia and Africa as for the growing inter-state commerce. Instead of fighting fruitless wars among themselves, the European Powers could go out and win new colonies, provided that the seas were safe for navigation. This was the need of the time.<sup>78</sup>

26. In other words, the freedom of the sea doctrine was articulated to construct the ocean as a “friction-free space” wherein nascent colonial empires and enterprising merchants could reach far-flung land territories and markets without obstruction.<sup>79</sup> Thus, the freedom of the sea doctrine was not only used for the legitimate purposes of navigation, but also interpreted by the powerful maritime States as giving them a right to move across the wide-open seas to threaten small States and/or subjugate and colonize non-European peoples.<sup>80</sup>

27. The doctrine also gave European maritime powers free access to marine areas and the ability to exploit marine resources traditionally used by native inhabitants, ignoring the latter’s customary rights to the sea and its resources.<sup>81</sup> Johannes, focusing on the indigenous customary marine tenure system in the Pacific, notes that:

The value of [indigenous] marine tenure was not generally appreciated by western colonizers. It not only ran counter to the western tradition of

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78 RP Anand, “Tyranny” of the Freedom of the Seas Doctrine, 12(3) *International Studies* (1973), 416, 418–419 (emphasis added). Anand further pointed that, in the period of awakening of European colonial expansion (18<sup>th</sup> century), even Great Britain repudiated Selden’s argument for closed sea and became the strongest champion of the freedom of the seas to facilitate its colonial interests, and as a result, it acquired the largest territorial occupations over which the “sun never set”.

79 PE Steinberg, above n.48, 254.

80 RP Anand, above n.78, 422.

81 N Sharp, *Reimagining Sea Space: From Grotius to Mabo*, in: N Peterson and B Rigsby (eds.), *Customary Marine Tenure in Australia* (Sydney University Press, 2014), 90; SE Jackson, *The Water is Not Empty: Cross-cultural Issues in Conceptualizing Sea Space*, 26(1) *Australian Geographer* (1995), 87, 95 (note 4).

“freedom of the seas”, which they assumed to have universal validity, but it also interfered with their desire to exploit the islands’ marine resources—a right they tended to take for granted as soon as they planted their flags. Colonial governments often passed laws that weakened or abolished [indigenous] marine tenure.<sup>82</sup>

28. European colonial States simply disregarded existing indigenous traditional laws governing the sea and customary marine use systems, since the latter were regarded as contradictory to the Western notion of freedom of the seas. In other words, irrespective of any existing indigenous customary rights over certain marine spaces and their associated resources, the freedom of the seas doctrine designated such waters, traditionally used by indigenous peoples, as open spaces, “*mare nullius*”<sup>83</sup> or “*aqua nullius*”.<sup>84</sup> Since the seas were open to all States to navigate and exploit, any resistance by a non-European indigenous peoples to prevent a colonial State from entering into the waters and exploiting the resources also justified, pursuant to Vitoria’s just war theory, the use of force by such colonial State.<sup>85</sup> As such, the freedom of the sea was functionally equivalent to the doctrine of *terra nullius* that enabled European States to freely occupy lands inhabited by non-European indigenous peoples. Moreover, although the freedom of the seas doctrine recognized that coastal areas (to a distance of a cannon-shot or 3 nm) and the associated resources could be under the control of the adjacent sovereign State, non-European peoples were excluded from such entitlement as they did not qualify as a sovereign State under the law of nations.<sup>86</sup> Hamilton observes that territorial sovereignty on land being a condition precedent to sovereign rights in coastal areas, denying non-European peoples of such territorial sovereignty had the effect of excising the latter’s jurisdiction from marine spaces as well.<sup>87</sup> Thus, operating together with the general doctrines of sovereignty and *terra nullius*, the freedom of the seas doctrine facilitated the occupation of coastal areas and

82 RE Johannes, Traditional Marine Conservation Methods in Oceania and their Demise, 9 Annual Review of Ecological Systems (1978), 349, 358.

83 See ME Mulrennan and CH Scott, Mare Nullius: Indigenous Rights in Saltwater Environments, 31 Development and Change (2003), 681.

84 J Sheehan and G Small, Aqua Nullius, 13th Pacific-Rim Real Estate Conference Paper (Fremantle, Western Australia, 21-24 January 2007).

85 R Hamilton, above n.74, 36.

86 J Anaya, above n.61, 20-24.

87 R Hamilton, above n.74, 37.

islands inhabited by the indigenous non-European peoples and exploitation of marine resources traditionally used by them.

29. The impact of the doctrine of freedom of the sea on Third World States and peoples expanded over time with the development of science and technology. Grotius's freedom of the sea was formulated having in mind the limited uses of the ocean space at the time, i.e., fishing (conducted by a relatively small and harmless vessels) and free and safe navigation, and on the belief that the ocean is incapable of being appropriated and its resources were inexhaustible. However, the modern fishing technology of a few States—a computer-run industry making use of sonars, helicopters, and satellites for spotting fish, floating processing factories and automatic gutting machines, and deep freezing at sea—has belied the inexhaustibility of fishery resources.<sup>88</sup> Science and technology also revealed that huge mineral resources lay buried under the seabed beyond the territorial sea of many States, and technology made them exploitable.<sup>89</sup> Further, the uses of the ocean space have expanded over time and the high seas became sites for several new activities, including recreation, marine scientific research, laying submarine cables and pipelines, and flying over the sea.

30. These developments proved that the assumptions on which the freedom of the sea doctrine was based were no longer valid in the mid-20<sup>th</sup> century, but advanced maritime States insisted on the continued application of the doctrine as it promoted their interests. While the doctrine empowered technologically advanced States with highly mechanized fishing fleets to sail to distant waters and catch most of the fish, the developing States, with their outmoded fishing boats and techniques, could not compete with them.<sup>90</sup> This unfettered freedom of fishing in conjunction with modern technologies led to overexploitation of resources which lie off the coasts of developing States, damaged the ecological balance, threatened the nutritional needs of coastal communities, and increased the economic imbalance between the developed and developing coastal States.<sup>91</sup> Moreover, the freedom of the sea enabled technologically advanced States to undertake other emerging activities,

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88 RP Anand, *Winds of Change in the Law of the Sea*, 16(2) *International Studies* (1977), 209.

89 *Ibid.*, 210.

90 *Ibid.*, 209.

91 See R Hamilton, above n.77, 38-39; and R Dillon, *Seeing the Sea: Science, Change and Indigenous Sea Rights*, 123 *Maritime Studies* (2002), 12. Dillon explained this destructive historical incident through the example of whaling and sealing

such as marine scientific research, exploration and exploitation of seabed resources, laying submarine cables and pipelines, and flying over the sea—emerging uses of the sea that developing States did not have the means and capability to undertake. Thus, although it was claimed that freedom of the sea was in the interests of the international community, it essentially promoted the interests of a few advanced States. The freedom of the sea was based on the concept of formal (*de jure*) equality among States—i.e., each State is entitled to enjoy equal rights of access and use of the sea—but resulted in a *de facto* discrimination of the developing States.

31. In summary, when assessed through the TWAIL lens, the traditional law of the sea, which was represented by the doctrine of the freedom of the sea, was a creation of a few European maritime States to facilitate their economic interests and colonial endeavor. Contrary to the original view that navigation and fishing in the open sea “does no injury to anyone”, the doctrine facilitated the production of a large surface of the globe as an object to be captured through European navigation and trade, and served as a license for European States to colonize others via the sea in turn exploiting their resources.<sup>92</sup> As new technologies emerged in the 20<sup>th</sup> century, the doctrine also continued to perpetuate the evolving interests of advanced States at the expense of Third World States and peoples. Thus, the doctrine of freedom of the seas continued to mean “unequal freedom or only freedom for the few”.<sup>93</sup> Consequently, in the subsequent years, Third World States took various measures to erode the old legal order of the sea, as outlined in the following section.

### *III.B.ii. Attempts to erode the traditional law: challenging the “freedom of the few”*

32. The Third World States began to challenge the doctrine of freedom of the seas as it runs against their interests. Third World States argued that the freedom of the sea is a functional doctrine and that, although it could continue to serve certain important functions, it is not immutable in nature and should adjust itself to embrace their inherent interests.<sup>94</sup> Lauterpacht observes that

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operations that led to the extinction of several species traditionally used by indigenous peoples (13-14).

92 S Esmeir, above n.77, 82.

93 RP Anand, above n.78, 210, 423.

94 *Ibid.*, 427.

the freedom of the sea doctrine “cannot be treated as a rigid dogma incapable of adaptation to situations which were outside the realm of practical possibilities in the period when that principle became part of international law”.<sup>95</sup> Thus, it was necessary that the notion of the freedom of the sea be amended over time to meet newly emerging circumstances and interests. Third World States challenged the doctrine of the freedom of the sea through three modalities. First, as part of the movement for positivization of the law of the sea, in which Third World States that participated in different codification conferences challenged the traditional law of the sea. Second, through unilateral assertions of sovereignty/sovereign rights towards the sea. Third, by taking concerted actions where States, through declarations of principles, normalized (harmonized) their unilateral claims at subregional and regional levels to solidify their positions and defend their common interests.

33. The first attempt to erode the old legal order of the sea began in 1930 when the Hague Conference was held to codify the international law on the territorial sea under the auspice of the League of Nations. The Third World States which attended the Conference openly challenged the *status quo* of the traditional law expressing divergent views on the outer limit of the territorial sea.<sup>96</sup> Of the 48 States which participated in the Hague Conference, only 12 favored for a continuation of the 3 nm territorial sea limit while the remainder expressed extension of the territorial sea further seawards of various width.<sup>97</sup> Although the Conference ended without agreement on the outer limits of the territorial sea, such disagreement signaled the need for changing the existing legal order of the sea. As Schwarztrauber argues, by allowing the Conference to fail, “the great maritime powers ended their oligarchical maintenance of the maximum *mare liberum*. The Conference suggested to all that [coastal States] were no longer committed to enforcement of the three-mile limit”.<sup>98</sup>

95 H Lauterpacht, *Sovereignty over Submarine Areas*, 27 BYIL (1950), 398-399.

96 Forty-eight States attended the Hague Conference, and only 15 were Third World States: from Latin America (10 States), Africa (2 States), and Asia (3 States). See League of Nations, *Acts of the Conference for the Codification of International Law*, Vol. 1: Plenary Meetings, Off. No. C.351 (b). M145 (b) (1930), Annex 11: Final Act of the Conference, 139.

97 See League of Nations, *Acts of the Conference for the Codification of International Law*, Vol. 1: Plenary Meetings, Off. No. C.351 (b). M145 (b) (1930), Annex 10: Report of the Second Committee: the Territorial Sea, 134-137.

98 S Schwarztrauber, *The Three-Mile Limit of Territorial Seas* (Naval Institute Press, 1972), 140.

34. A more robust blow against the traditional law of the sea came from the unilateral actions of States extending their national jurisdiction further seawards, apparently in conflict with the freedom of the seas doctrine. The two Truman proclamations (1945) set a precedent for States' unilateral seaward assertions of sovereignty and jurisdiction. In the first proclamation, the US asserted jurisdiction and control over the natural resources of the subsoil and seabed of its continental shelf.<sup>99</sup> According to the Proclamation, the exercise of exclusive jurisdiction over the continental shelf and its resources by the contiguous State is reasonable and just since the shelf is “an extension of the land mass of the coastal [State] and thus naturally appurtenant to it” and because the “resources frequently form a seaward extension of a pool or deposit lying with the territory [. . .]”.<sup>100</sup> By conceptualizing the continental shelf as a geological (geophysical) extension of its continental landmass, the US excluded controversies on the application of traditional theories of international law dealing with acquisition of territory to justify its claim. In the second proclamation, given the pressing need for conservation and protection of fishery resources, the US regarded it “proper to establish conservation zones in those areas of the high seas contiguous to the coasts of the US wherein fishing activities have been or in the future may be developed and maintained on a substantial scale”.<sup>101</sup>

35. Several Latin American States immediately followed the Truman proclamations by unilaterally claiming sovereignty over the continental shelves and superjacent waters up to 200 nm for the exploitation of the living and non-living resources.<sup>102</sup> Some of these States harmonized their unilateral claims at the subregional level. For example, the 1952 Santiago Declaration on

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99 Presidential Proclamation No. 2667, concerning the Policy of the United States with respect to the Natural Resources of the Subsoil and Seabed of the Continental Shelf ([www.presidency.ucsb.edu/documents/proclamation-2667-policy-the-united-states-with-respect-the-natural-resources-the-subsoil](http://www.presidency.ucsb.edu/documents/proclamation-2667-policy-the-united-states-with-respect-the-natural-resources-the-subsoil)), visited July 2022.

100 Ibid.

101 Presidential Proclamation No. 2668, concerning the Policy of the United States with respect to Coastal Fisheries in Certain Areas of the High Seas ([www.presidency.ucsb.edu/documents/proclamation-2668-policy-the-united-states-with-respect-coastal-fisheries-certain-areas](http://www.presidency.ucsb.edu/documents/proclamation-2668-policy-the-united-states-with-respect-coastal-fisheries-certain-areas)), visited July 2022.

102 These States include, for example, Mexico (1945), Argentina (1946), Panama (1946), Chile (1947), Peru (1947), Costa Rica (1948), Honduras (1950), El Salvador (1950), Dominican Republic (1952), Cuba (1955), and Venezuela (1956). For the details of these claims, see FV Garcia-Amador, *The Latin America and the Law of the Sea*, Occasional paper No. 14 (Law of the Sea Institute, University of Rhode Island, July 1972).



Maritime Zone, which was signed by Chile, Ecuador, and Peru, declared exclusive sovereignty and jurisdiction over the sea “to a minimum distance of 200 nm” off the coasts of each signatory as “a norm of their international common maritime policy”, subject only to innocent passage for ships of all States.<sup>103</sup> The exclusive sovereignty and jurisdiction of the signatories in this zone includes sovereignty over the resources of the seabed and the subsoil thereof.<sup>104</sup> The three States also established a subregional organization, the South Pacific Permanent Commission (SPPC), to solidify their united position and defend their common interests in the 200 nm maritime zone.<sup>105</sup> Colombia acceded to the Santiago Declaration in 1979 and become part of the SPPC,<sup>106</sup> and a 200 nm claim became a common maritime policy of the Pacific coast of South America. Generally, by 1958, 11 Latin American States claimed sovereignty over the continental shelf and superjacent waters up to 200 nm. A few African States claimed a territorial sea ranging from 3-12 nm.<sup>107</sup> However, most African, Asian, and Pacific States were under colonial rule during this period and were not able to assert unilateral claims. These early attempts to erode the traditional law of the sea, together with other factors, stimulated the first UN codification conference where the participated developing States further exerted their efforts to erode the traditional law of the sea.

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103 Chile, Ecuador and Peru, Declaration on the Maritime Zone, Signed at Santiago, 18 August 1952, para.3 (II & V) ([www.treaties.un.org/doc/publication/unts/volume%201006/volume-1006-i-14758-english.pdf](http://www.treaties.un.org/doc/publication/unts/volume%201006/volume-1006-i-14758-english.pdf)), visited July 2022.

104 Chile, Ecuador and Peru, Declaration on the Maritime Zone, para.3 (III).

105 The SPPC was mandated to coordinate the conservation and development of stocks of associated species. See Chile, Ecuador, and Peru, Agreement relating to the organization of the Permanent Commission of the Conference on the exploitation and conservation of the marine resources of the South Pacific, signed at Santiago, 18 August 1952 ([www.treaties.un.org/doc/Publication/UNTS/Volume%201006/volume-1006-I-14759-English.pdf](http://www.treaties.un.org/doc/Publication/UNTS/Volume%201006/volume-1006-I-14759-English.pdf)), visited, July 2022.

106 See Declaration of Quito of the Third Meeting of the Ministers of Foreign Affairs of the State Members of the South Pacific Permanent Commission (Quito, Dec. 8, 1987).

107 While Liberia, Tunisia, Morocco, and Ghana claimed less than 12 nm, Egypt, Ethiopia, and Libya claimed 12 nm territorial sea. See NS Rembe, *Africa and the International Law of the Sea: A study of the contribution of the African States to the Third United Nations Conference on the Law of the Sea* (Sijthoff & Noordhoff, 1980), 91.

*III.B.iii. UNCLOS I, the Geneva Conventions, and persistence of the traditional law*

36. The UN convened the First Conference on the Law of the Sea (UNCLOS I) in Geneva in 1958 to codify the traditional law.<sup>108</sup> Based on the ILC's comprehensive draft articles on the law of the sea, which in turn were drawn from the understandings of the 1930 Hague Conference, UNCLOS I succeeded in adopting four conventions. These were: the Convention on the Territorial Sea and the Contiguous Zone,<sup>109</sup> the Convention on the Continental Shelf,<sup>110</sup> the Convention on the High Seas,<sup>111</sup> and the Convention on Fishing and Conservation of the Living Resources of the High Seas (hereafter CFCLRHS).<sup>112</sup> The Convention on Territorial Sea and the Contiguous Zone reaffirmed the coastal States' sovereignty over the territorial sea but failed to determine its outer limit. Although several States already unilaterally proclaimed a 12 nm territorial sea, the UNCLOS I failed to reach a consensus on such limit mainly because the maritime Powers insisted upon maintaining their maximum freedom of navigation. The extension of the territorial sea to 12 nm would make several international straits part of the territorial sea of different States and this would affect freedom of navigation through them.<sup>113</sup> The great powers, in particular the US and USSR, needed to use straits and the air space for the purpose of projecting their conventional military power, freedom of navigation for their navies, including submarines, and overflight for their military aircraft were a strategic imperative.<sup>114</sup> Accordingly, these maritime Powers refused to agree

108 86 States took part in UNCLOS I, of which 49 were developing States from Latin America, Asia, and Africa. However, most of these developing States appeared together with their administering Powers and did not have real influence. See First United Nations Conference on the Law of the Sea, Official Records, Vol. II: Plenary Meetings (Geneva, 24 February – 27 April 1958), UN Doc A/Conf.13/38, xiii-xxvii.

109 Convention on the Territorial Sea and Contiguous Zone, 29 April 1958, 516 UNTS 205, entered into force 10 September 1964.

110 Convention on the Continental Shelf, 29 April 1958, 499 UNTS 311, entered into force 10 June 1964.

111 Convention on the High Seas, 29 April 1958, 450 UNTS 11, entered into force 30 September 1962.

112 Convention on Fishing and Conservation of the Living Resources of the High Seas, 29 April 1958, 559 UNTS 285, entered into force 20 March 1966.

113 TTB Koh, *Negotiating a New World Order for the Sea*, 24 *Virginia JIL* (1983-84), 761, 768.

114 *Ibid.*, 768.

to an extension of the outer limit of the territorial sea. Thus, despite their efforts, the developing coastal States' proposals for recognition of a wider territorial sea and extended exclusive fishing zones were not accepted. It is also worth noting that another attempt in 1960 at the Second UN Conference on the Law of the Sea (UNCLOS II) to extend the coastal States' jurisdiction over the territorial sea and exclusive fishing rights farther to the sea failed.<sup>115</sup> In this instance, the positions of developing States<sup>116</sup> were ignored and the old legal system retained.

37. The Convention on the High Seas codified rules of international law related to the high seas "as generally declaratory of established principles of international law".<sup>117</sup> The Convention provides that the high seas are open to all States and "no State may validly purport to subject any part of them to its sovereignty".<sup>118</sup> Article 2 further stipulated that freedom of the high seas comprises, *inter alia*, freedoms of navigation, fishing, laying submarine cables and pipelines, and flying over the high seas. While the Convention specifically named these freedoms, they were by no means exhaustive; and States could exercise other freedoms which were "recognized by the general principles of international law [...] with *reasonable regard* to the interests of other States in their exercise of the freedom of the high seas".<sup>119</sup> As such, the Convention on the High Seas formally recognized States that have highly mechanized fishing vessels, trans-oceanic airlines and strategic airpower capabilities, as well as the capacity to lay submarine cables and pipelines, conduct oceanographic research, and mine the deep-ocean floor to enjoy the benefits of the freedom of the seas.<sup>120</sup> However, States without advanced marine technology barely benefited from the Convention on the High Seas codified rules. The

115 88 States participated in UNCLOS II. See Second United Nations Conference on the Law of the Sea, Geneva (17 March – 26 April 1960), Summary Records of Plenary Meetings and of Meetings of the Committee of the Whole, UN Doc A/CONF.19/8, Final Act, 175.

116 Particularly, Chile, Peru, and Ecuador strongly defended their position on sovereignty up to 200 nm maritime zones. At the end of UNCLOS I and II, these States issued joint declarations where they reiterated their position. See First United Nations Conference on the Law of the Sea, UN Doc A/CONF. 13/L.50 (1958); and Second United Nations Conference on the Law of the Sea, UN Doc A/CONF. 19/L. 16 (1960).

117 Convention on the High Seas, preamble, recital 2.

118 *Ibid.*, art. 2.

119 Convention on the High Seas, art. 2.

120 RP Anand, above n.78, 422-423.

CFCLRHS attempted to modify the freedom of fishing by requiring States whose nationals engaged in fishing on the high seas to adopt conservation measures.<sup>121</sup> Furthermore, the CFCLRHS implored States to recognize the “special interest” of a coastal State “in the maintenance of the productivity of the living resources in any area of the *high seas adjacent to its territorial sea*”<sup>122</sup> to ensure for conservation of its coastal fisheries. Nonetheless, those provisions were illusory and were not sufficient to stop the unabated exploitation of fisheries.<sup>123</sup> The CFCLRHS was also ratified only by a small number of States as the outer limit of the territorial sea was unsettled, and States were keen to extend their exclusive fishery rights beyond the 3 nm territorial sea.

38. The law of the sea showed some changes with respect to the continental shelf. The Convention on the Continental Shelf recognized the sovereign rights of coastal States for the purposes of exploring the continental shelf and exploiting its natural resources.<sup>124</sup> The Convention offered a legal definition of the continental shelf as “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 meters* or, beyond that limit, to where *the depth of the superjacent waters admits of the exploitation of the natural resources* of the said areas”.<sup>125</sup> This definition was a compromise between proponents of fixity and certitude (advocates of firm and definitive test, thus, the 200 meters rule) and advocates of the need for flexibility in terms of depth of exploitability; and in that sense the 200 meters isobath was arbitrarily selected without anticipating the emerging technology.<sup>126</sup> Additionally, the Convention conceptualized the rights of the coastal State over the continental shelf as being *inherent* (i.e. they do not depend on occupation, effective or notional, or any express proclamation) and *exclusive* in that no other State can explore the continental shelf or exploit its resources even when the coastal State failed to undertake such activities.<sup>127</sup> The developing coastal States which participated at UNCLOS I pushed for such

121 However, the CFCLRHS allowed high seas fishing States to exclude the duty of adopting conservation measures applicable to their nationals through reservations (see, art. 19).

122 CFCLRHS, art. 6(1). Emphasis added.

123 RP Anand, above n.88, 211.

124 Convention on the Continental Shelf, arts. 2(1) & 2(4).

125 Convention on the Continental Shelf, art. 1 (emphasis added).

126 A Pardo, UNGA, 22<sup>nd</sup> Session: First Committee, 1515<sup>th</sup> Meeting, UN Doc A/C.1/PV.1515 (1 November 1967), 8.

127 Convention on the Continental Shelf, arts. 2 (2 & 3).

conceptualization of the continental shelf. Although the developing States were unable to exploit the mineral resources of the continental shelf immediately, the inherent and exclusive nature of the rights gave them an opportunity to reserve the continental shelf up to 200 meters isobath and exploit the resources in the future when they develop the technological capability needed to do so.<sup>128</sup> Nonetheless, the exploitability criterion was favorable to technologically advanced States for it allowed them to claim any distance of a continental shelf beyond the 200 meters depth insofar as they have the technological capability to exploit the resources.<sup>129</sup> This approach enabled advanced States to legally exploit the seabed resources for their own benefit creating an exploitation regime that would not provide any benefit to the developing States.<sup>130</sup>

39. In sum, although developing States participating in the two conferences threatened to change the old legal order of the sea, they were “unable to move the entrenched Powers [. . .] and change the traditional law”.<sup>131</sup> The 1958 Geneva conventions did not bring significant changes other than formally codifying the traditional law and introducing minor changes with respect to the continental shelf. After the two UN Conferences, the law of the sea closely resembled the traditional law where the vast oceans “remained free to be used and abused, explored, and exploited by [a few maritime States] according to the chaotic play of their selfish interests”.<sup>132</sup> Thus, the coloniality of the freedom of the sea lies not only in its initial aim of facilitating Dutch trade with the East Indies, which paved the way for subsequent formal colonization of the region, but also in its productive power which persists in the field of international law of the sea.<sup>133</sup> However, with the independence of several colonial States under the decolonization process of the UN pursuant to the right to self-determination, Third World States managed to push for significant influence on the further evolution of the law of the sea.

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128 RP Anand, above n.78, 421.

129 M Hope-Thompson, *The Third World and the Law of the Sea: The Attitude of the Group of 77 Toward the Continental Shelf*, 1(1) *Boston College TWLJ* (1980), 37, 52-53.

130 See A Pardo, *Who Will Control the Seabed?*, 47(1) *Foreign Affairs* (1968), 123.

131 RP Anand, above n.88, 211.

132 *Ibid.*, 208.

133 S Esmeir, above n.77, 83, 85.

*III.B.iv. Decolonization and intensified unilateral claims for permanent sovereignty over natural resources of the sea*

40. During and after UNCLOS I & II, several parallel developments took place in other areas of international law that had significant impacts on the evolution of the law of the sea. The most notable developments related to the UN decolonization process and international human rights law, particularly the right to self-determination. The UN, in its Charter, includes “respect for the principle of equal rights and self-determination of peoples” as part of its basic purpose and objective.<sup>134</sup> To realize the right to self-determination, the UN undertook the decolonization of peoples under colonial domination as one of its primary tasks. Chapter XI of the UN Charter in general, and Article 73 in particular, provides for the responsibilities of administering powers and the procedures by which decolonization of the non-self-governing territories can be effected. The UN General Assembly (UNGA) also adopted several resolutions relating to the right to self-determination.<sup>135</sup> Of the many UNGA resolutions, the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples (UNGA Res 1514(XV)) provides detailed clarification of the content and scope of the right to self-determination.<sup>136</sup> The Declaration provides that “the subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, [and] is contrary to the Charter of the United Nations”.<sup>137</sup> The Declaration further proclaims “the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations”.<sup>138</sup>

41. Following the adoption of Resolution 1514(XV),<sup>139</sup> several colonial peoples in Asia, Africa, Latin America, and the Pacific gained independence,

134 UN Charter, signed at San Francisco on 26 June 1945, 892 UNTS 119, entered into force, 24 October 1945, preamble and arts. 1 & 55.

135 Earlier resolutions include, *inter alia*, UNGA Res 637(VII), The Right of Peoples and Nations to Self-determination, UN Doc A/2361 (1952); UNGA Res 738 (VIII), The Right of Peoples and Nations to Self-determination (28 Nov. 1953); and UNGA Res 1188(XII), Recommendations Concerning International Respect for the Right of Peoples and Nations to Self-determination (11 Dec. 1957).

136 UNGA Res 1514(XV), Declaration on the Granting of Independence to Colonial Countries and Peoples, UN Doc A/4684 (1960).

137 *Ibid.*, para.1.

138 *Ibid.*, preamble, recital 12.

139 General global and regional human rights treaties recognizing the right to self-determination of peoples—such as International Covenant on Civil and Political Rights, the International Covenant on Economic Social and Cultural Rights, and

joined the UN, and become “new” members of the international community. Most of these newly independent States were filled with resentment towards their former colonial masters, and “felt dissatisfied with the traditional law which they regarded as the product of European experience”,<sup>140</sup> and “reminiscent of the discredited colonial and imperialist age”.<sup>141</sup> Since these States did not participate in UNCLOS I, they also felt that the prevailing Geneva conventions did not represent their interests. Thus, the significant change in “the geography of international law”, caused by decolonization, catalyzed the desire of newly independent States to change and readjust the traditional law of the sea according to their views and interests.

42. These newly independent States exerted their influence through unilateral and concerted actions, at the sub-regional, regional, and global levels. Putting aside all the differences in their political, social, cultural, and religious backgrounds, Third World States established Third World coalitions. The most notable coalition is the “Group of 77” (G-77),<sup>142</sup> which has become a key forum for Third World States to create an enhanced joint negotiating capacity for confronting Western hegemony over global economic and political matters. Through the G-77, the Third World States attempted to revise international law by restructuring the unequal economic relations between developed and developing States through efforts such as the New International Economic Order (NIEO).<sup>143</sup> Control over the natural resources of the sea was considered a central factor to realize the NIEO, and the G-77 played a significant role during the Third UN Conference on the Law of the Sea (UNCLOS III) negotiations to protect the collective interest of Third World

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African Charter on Human and Peoples Rights—were also adopted to facilitate the decolonization process.

140 TTB Koh, above n.113, 766.

141 RP Anand, above n.78, 427.

142 The Group of 77 was formed in 1964 by the “Joint Declaration of the Seventy-Seven Countries” at the conclusion of the UN Conference on Trade and Development (UNCTAD). While the name G-77, referring to the number of founding States, has been retained, the number of member States have increased over time and now consists of 134 developing States. See Joint Declaration of the Seventy-Seven Developing Countries Made at the Conclusion of the United Nations Conference on Trade and Development, Geneva, 15 June 1964 ([www.g77.org/doc/Joint%20Declaration.html](http://www.g77.org/doc/Joint%20Declaration.html)), visited July 2022.

143 See UNGA Res 3201 (S-VI), Declaration on the Establishment of a New International Economic Order, UN Doc A/9555(1974), 6<sup>th</sup> Special Session, 1 May 1974; and M Bedjaoui, *Towards A New International Economic Order: New Challenges to International Law* (Holmes & Meier, 1979).

States.<sup>144</sup> Third World States also managed to influence the UNGA and succeeded in adopting a series of resolutions relating to the right to permanent sovereignty over natural resources to enable peoples under colonial domination and newly independent States to have control over their marine natural resources.<sup>145</sup>

43. The recognition of the right to permanent sovereignty over natural resources by the UNGA provided colonized peoples and newly independent States with the necessary legal basis to extend their maritime jurisdiction and protect their marine natural resources from irresponsible exploitation by (colonial) maritime powers. Third World States intensified their unilateral assertions of sovereignty/sovereign rights and jurisdiction further seawards mainly to reserve fisheries resources and to exercise control over the natural resources of the seabed as a means of ensuring their economic and political independence.<sup>146</sup> From 1958-1973, from the adoption of the Geneva conventions to the start of UNCLOS III, an overwhelming number of States unilaterally extended their maritime jurisdiction further seawards. For example, by 1973, 52 coastal States already claimed a 12 nm territorial sea and the ICJ in the *Fisheries Jurisdiction Case* declared such claims as customary international

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144 For a detailed discussion, see Friedman and Williams, *The Group of 77 at the United Nations: An Emerging Group in the Law of the Sea*, 16 San Diego LR (1979), 555. A detailed discussion of the NIEO and the G-77 is outside the scope of this article. Although the NIEO movement played a significant role during the negotiations of the LOSC on the issue of the EEZ and the deep seabed regimes, such movement normally lies outside the LOS. The brief mention of the NIEO here is simply to show the influences of developments in other areas of international law on the negotiations of the law of the sea rules. The same is true for the G-77 coalition.

145 The UNGA resolutions that specifically provide for the right of all peoples to permanent sovereignty over marine resources include, *inter alia*, UNGA Res 3016(XXVII), *Permanent Sovereignty over Natural Resources of Developing Countries* (1972); UNGA Res 3171(XXVIII), *Permanent Sovereignty over Natural Resources* (1973); and UNGA Res 3281(XXIX), *Charter of Economic Rights and Duties of States* (1974). For a detailed discussion, see NJ Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (1997); and EL Enyew, *Application of the Right to Permanent Sovereignty over Natural Resources for Indigenous Peoples: Assessment of Current Legal Developments*, 8 *Arctic Review on Law and Politics* (2017), 222.

146 Report of the 13<sup>th</sup> Session of the Asia-African Legal Consultative Committee at Lagos (18-25 January 1972, New Delhi), 320; and Arias-Schreiber (Peru), in UN Doc A/AC.138/SR.46, 15 March 1971, 82.



law<sup>147</sup>; and several other States claimed a combination of territorial sea and contiguous fishing zones of different breadth. The overwhelming number of Latin American States also extended their maritime zones to 200 nm, although such claims were characterized either as a territorial sea,<sup>148</sup> or exclusive maritime zone,<sup>149</sup> or a patrimonial sea.<sup>150</sup> Despite these variations in characterization, nearly all maritime claims of Latin American States evolved decisively in favor of the 200 nm breadth as States replaced their earlier claims with new ones.<sup>151</sup> Such unilateral claims were also strengthened and harmonized through declarations of principles at the regional and subregional levels, such as the 1970 Montevideo Declaration on the Law of the Sea,<sup>152</sup> the 1970 Declaration of Latin American States on the Law of the Sea,<sup>153</sup> and the 1972 Declaration of Santo Domingo.<sup>154</sup>

147 Fisheries Jurisdiction Case (United Kingdom of Great Britain and Northern Ireland v. Iceland) (Judgment), ICJ Reports 1974, 3.

148 For example, Argentina (1966), Ecuador (1966), Panama (1967), and Brazil (1970) claimed a 200 nm territorial sea *stricto sensu* meaning that the coastal State exercise complete sovereignty subject only to the right of other States to innocent passage.

149 The 200 nm claims by the parties to the 1952 Santiago Declaration (Chile, Peru, Ecuador, and Colombia) were characterized as “exclusive maritime zone” without distinguishing between territorial sea and exclusive fishing zone.

150 For example, Nicaragua, Uruguay, Costa Rica, and several Caribbean States claimed a 200 nm patrimonial sea. The concept of “Patrimonial Sea” is discussed in section III.C.ii below.

151 For a detailed discussion, see FV Garcia-Amador, *The Latin American Contribution to the Development of the Law of the Sea*, 68(1) AJIL (1974), 33, 38-45.

152 The Declaration was adopted at the Montevideo Meeting on the Law of the Sea held from 4-8, 1970. It was unanimously adopted by the 8 States that participated in the Meeting, namely Argentina, Brazil, Chile, Ecuador, El Salvador, Nicaragua, Panama, Peru, and Uruguay; and later adhered to by Colombia and Dominican Republic. See the Montevideo Declaration on the Law of the Sea, adopted at Montevideo, 08 May 1970 ([www.jstor.org/stable/2198967?seq=1#metadata\\_info\\_tab\\_contents](http://www.jstor.org/stable/2198967?seq=1#metadata_info_tab_contents)), visited July 2022).

153 The Declaration received the affirmative vote of 14 States: Argentina, Brazil, Chile, Colombia, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru, and Uruguay. While three States (Bolivia, Paraguay, and Venezuela) voted against, Trinidad and Tobago abstained. See the Declaration of Latin American States on the Law of the Sea, adopted at Lima, 08 August 1970 ([www.jstor.org/stable/20690726?seq=1#metadata\\_info\\_tab\\_contents](http://www.jstor.org/stable/20690726?seq=1#metadata_info_tab_contents)), visited July 2022.

154 Declaration of Santo Domingo, adopted at the Specialized Conference of the Caribbean States on Problems of the Sea held from 5-9 June 1972 ([www.jstor.org/stable/2198560?seq=1#metadata\\_info\\_tab\\_contents](http://www.jstor.org/stable/2198560?seq=1#metadata_info_tab_contents)), visited July 2022.

44. Similarly, several Asian and African States that emerged from colonialism after UNCLOS I & II extended their fisheries jurisdiction between 12 and 200 nm. Unlike the Latin American States, the claims of Asian and African States did not show regional uniformity. Particularly, African States asserted their territorial sea limits by a piecemeal approach, constantly changing from one limit to another.<sup>155</sup> The Organization of African Unity (OAU) was not able to adopt a uniform regional limit for the territorial sea although at times it adopted resolutions urging all African States to extend their sovereignty to 200 nm.<sup>156</sup> However, with respect to the seabed, most Asian and African States almost uniformly favored a 200 nm zone for exclusive exploitation of their mineral resources.<sup>157</sup> In short, Third World States frequently resorted to unilateral assertions of sovereignty/sovereign rights whenever their proposals were ignored. They considered such unilateral assertions of sovereignty/sovereign rights as a form of resistance to the Eurocentric traditional law of the sea and expression of their right to self-determination and permanent sovereignty over natural resources.

45. Generally, the unilateral claims of seawards jurisdiction by a vast majority of postcolonial States, which was supported by concerted actions of such States at the (sub)regional levels, made the traditional doctrine of the freedom of the seas practically irrelevant in the 1970s. As Gidel noted, “[t]he concept of the freedom of the high seas has now lost the absolute and tyrannical character imposed upon it by its origin as a reaction against claims to territorial sovereignty over the high seas”.<sup>158</sup> Thus, it was necessary to address the changes created by the unilateral claims of coastal States with a new legal order. Moreover, contrary to the expectations at the UNCLOS I, the emerging technology made it possible to exploit the natural resources of the seabed and ocean floor at depths beyond 200 meters; and this necessitated the international community to agree on rules and institutions for the exploitation of mineral resources of the seabed and ocean floor beyond the limits of national jurisdiction. The newly independent States of the Third World also wanted an opportunity to change the law of the sea to reflect their aspirations and interests. All these factors necessitated the convening of UNCLOS III where

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155 NS Rembe, above n. 107, 92.

156 See OAU, CM/Res 250 (XVII), Resolution on the Permanent Sovereignty of African Countries over their Fishery Resources Off the Shores of Africa, 1971; OAU, CM/Res 289 (XIX), Resolution on the Law of the Sea, 1972.

157 See NS Rembe, above n.107, 108-110; and RP Anand, above n.78, 423-424.

158 See Gidel cited in H Lauterpacht, above n.95, 408.

Third World States significantly put their mark on the evolution of the law of the sea.

### III.C. Towards a new legal order of the sea: UNCLOS III and Third World States

46. The UNCLOS III was convened in December 1973 in New York<sup>159</sup> and ten other sessions were held until the LOSC was finally adopted in 1982. UNCLOS III was significant for Third World States both in terms of the process and substance of the negotiations. Regarding the process, UNCLOS III emphasized the need to achieve the universality of participation to ensure a universal acceptance of the resulting convention. Consequently, in addition to the overwhelming number of newly independent States, several non-self-governing (trust) territories<sup>160</sup> and liberation movements, recognized by the OAU and the League of Arab States in their respective regions,<sup>161</sup> took part in the Conference initially as observers. When these nations became independent, their status changed to participating States. The inclusion of non-self-governing territories and liberation movements in the negotiations avoided a situation of *fait accompli*.<sup>162</sup> Another essential procedural aspect of UNCLOS III was that several individuals from Third World States held important positions in the leadership of the conference committees<sup>163</sup> and played significant roles in promoting the interests of Third World States during the negotiations.

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159 It is worth noting here that the UN Seabed Committee, established in 1970, served as a forum for preliminary negotiations until the start of UNCLOS III. Thus, the discussion of UNCLOS III in this section also includes the deliberations at the Seabed Committee.

160 The following non-self-governing territories were expressly allowed to participate in the sessions of UNCLOS III: Papua New Guinea, the Cook Islands, the Netherlands Antilles, Niue, Suriname, Seychelles, the West Indies Associated States, and the Trust Territory of the Pacific Islands. See UNGA Res 3334 (XXIX), Third United Nations Conference on the Law of the Sea (adopted 17 December 1974), para.3 (a-c); and Final ACT of UNCLOS III, 161, 187.

161 See Final ACT of UNCLOS III, 161, 187.

162 While 137 States participated in the initial stage of UNCLOS III, the number of participating States by the end of the Conference was 163. See Final ACT of UNCLOS III, 160-161.

163 For example, the president of the Conference, chairmen of the First and Second Committees, as well as several negotiating groups were representatives of Third World States.

47. These procedural aspects of UNCLOS III gave Third World States leverage to influence the substantive content of the law of the sea by proposing new concepts, rules, and principles. The main substantive achievements of the Third World States include, *inter alia*, the production of new ocean spaces and the associated principles, such as archipelagic waters, the exclusive economic zone (EEZ), and the deep seabed regime governed by the common heritage of mankind (CHM). This part explores and critically evaluates the role/influence of Third World States in initiating and pursuing the aforesaid concepts/principles as well as the substantive impact of those principles in protecting their interests.

### *III.C.i. Creation of new sovereignty zone: Archipelagic waters*

48. One crucial result of UNCLOS III was reaching an agreement on the outer limit of the territorial sea over which a coastal State exercises sovereignty. A maximum of 12 nm outer limit of the territorial sea was agreed upon the reciprocal recognition of innocent passage and a special regime of transit passage for ships and aircraft through and over straits used for international navigation to respond to the interests of the great maritime Powers.<sup>164</sup> However, while recognition of such breadth of territorial sea is important, it is not unique to Third World States. A significant result of UNCLOS III relevant to Third World States was the recognition of a new concept of archipelagic State and the accompanying sovereignty zone: archipelagic waters. Traditional law of the sea was designed to address continental landmasses and individual islands but was not easily applicable to groups of islands situated in the middle of the oceans.<sup>165</sup> Applying the normal regime of Islands to mid-ocean archipelagos—i.e., drawing a separate belt of territorial sea around each individual island of an archipelago—would affect the territorial integrity and national unity of certain island States leaving them fragmented, and would compromise their national security as the high sea between islands would not fall under their jurisdiction.<sup>166</sup> These unique problems were not addressed by the 1930 Hague Codification Conference nor the 1956 ILC's draft articles on the territorial sea and the high seas which formed the basis for the UNCLOS I

164 See LOSC, art. 3 and Part III of the Convention, particularly arts. 37-45.

165 M Munavvar, *Ocean States: Archipelagic Regimes in the Law of the Sea* (1995), 22.

166 C Ku, *The Archipelagic States Concept and Regional Stability in Southeast Asia*, 23(3) *Case Western Reserve JIL* (1991), 463, 463-464, 469; Wisnomoerti, *Indonesia and the Law of the Sea*, in: C Park and J Park (eds.), *The Law of the Sea: Problems from the East Asian Perspective* (Law of the Sea Inst, 1987), 392, 392.

negotiations.<sup>167</sup> To address this conspicuous gap of the traditional law in their favor, the Philippines and Indonesia unilaterally implemented the concept of archipelagic State: a State formed entirely by one or more archipelagos and that may include other islands.<sup>168</sup> Pursuant to this concept, an archipelagic State can draw straight lines connecting the outer most points of the outer most islands of the archipelago(s) where all waters enclosed by the connecting lines constitute the internal waters; and the straight lines would also serve as the baselines to delimit the territorial seas.<sup>169</sup> The maritime States opposed the Philippines' and Indonesian approach arguing that this would affect their freedom of navigation.<sup>170</sup>

49. Indonesia and the Philippines advocated for international recognition of the archipelagic approach at UNCLOS I & II, but their proposals were rejected as the concept was "thought to be too complex for solution" and that the "issue is not important enough to consider" respectively.<sup>171</sup> Thus, while the problem of coastal archipelagos was addressed under Article 4 of the 1958 Convention on the Territorial Sea and the Contiguous Zone, the issue of mid-ocean archipelagos was set back as merely a sidebar. Nonetheless, in the years leading to UNCLOS III, Indonesia and Philippines, individually and jointly, took several steps to gain formal recognition of their status as archipelagic States. First, they engaged in a series of bilateral negotiations to stimulate support for recognition of the concept of archipelagic States from the international community. In particular, Indonesia concluded more than fifteen maritime boundary agreements with its neighboring States, including Singapore, Malaysia, and Australia, prior to UNCLOS III; and it at times granted

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167 The commentary accompanying the ILC's draft articles stated that the Commission was unable to address the issue of mid-ocean archipelagos due to "lack of technical information on the subject" (see ILCYB, vol. II, 1956, 270).

168 United Nations Convention on the Law of the Sea (LOSC), concluded at Montego Bay on 10 December 1982, 1833 UNTS 3, entered into force on 16 November 1994, art. 46.

169 See J Evensen, *Certain Legal Aspects Concerning the Delimitation of the Territorial Waters of Archipelagos*, UN Doc A/CONF.13/18 (Nov 1957), 298-299; C Ku, above n.165, 468-469; JG Butcher, *Becoming an Archipelagic State: the Juanda Declaration of 1957 and the "Struggle" to Gain International Recognition of the Archipelagic Principle*, in: R Cribb and M Ford (eds.), *Indonesia Beyond the Water's Edge: Managing an Archipelagic States* (ISEA Publishing, 2009), 28.

170 T Davenport, *The Archipelagic Regime*, in: DR Rothwell et al (eds.), *The Oxford Handbook of the Law of the Sea* (2015), 134, 140.

171 RP Anand, above n.62, 202. It is worth noting here that both Philippines and Indonesia refused to sign the Geneva Conventions.

favorable terms to these States in exchange for implicit recognition of its archipelagic status.<sup>172</sup> Second, Philippines and Indonesia strategically utilized different Third World forums which addressed the law of the sea, such as the meetings of Asian-African Legal Consultative Committee, to gain support from newly independent States.<sup>173</sup> Consequently, the two newly emerged States, Fiji and Mauritius, joined the claim for archipelagic status, and these four States submitted to the 1973 session of the Seabed Committee joint draft articles outlining the archipelagic principles.<sup>174</sup> While the Seabed Committee recognized that the preservation of the political and economic unity and the protection of the security of an archipelagic State justified its sovereignty over archipelagic waters,<sup>175</sup> the nature of the regime remained undecided. These steps shaped the negotiations at UNCLOS III.

50. When UNCLOS III formally started, the aforementioned four States pushed for recognition of their archipelagic status by submitting to the 1974 session draft articles on the principles of archipelagic State and recognizing the regime of innocent passage through designated sea lanes within archipelagic waters.<sup>176</sup> In the following years, several other newly independent States, such as Tonga, Papua New Guinea, and Bahamas, also joined the claim for archipelagic status. Consequently, the Conference in its various sessions extensively debated on the concept of archipelagic statehood, including the qualifying criteria and the nature of the jurisdiction an archipelagic State may have over the waters between the islands.<sup>177</sup> Earlier bilateral agreements that the Philippines and Indonesia concluded with their neighboring States enabled them to obtain the Southeast Asian consensus at UNCLOS III.<sup>178</sup> Several other developing States, acting through the G-77, also supported the concept as an expression of Third World solidarity. Thus, through the persistent advocacy

172 JG Butcher, above n.169, 43; C Ku, above n.165, 471, footnote 45; L Bernard, *Whose Side Is It On? The Boundaries Dispute in the North Malacca Strait*, 9 *Indonesian JIL* (2012), 382, 388.

173 JG Butcher, above 169, 43.

174 See Fiji, Indonesia, Mauritius, and Philippines: Archipelagic Principles, UN Doc A/AC.138/SC. II/L.15 (1973).

175 UN, Report of the Committee on the Peaceful Uses of the Seabed and Ocean Floor Beyond the Limits of National Jurisdiction, UN GAOR, 28<sup>th</sup> Sess., vol. 1, Supp No 21, UN Doc 1/9021 (1973), 55.

176 Fiji, Indonesia, Mauritius, and Philippines: Draft articles relating to archipelagic States, UN Doc A/CONF.62/C.2/L.49 (9 August 1974).

177 JG Butcher, above n.169, 44.

178 C Ku, above n.166, 477.

of a few States interested in the question and Third World solidarity, the concept of archipelagic States as a special category of States was accepted at UNCLOS III and incorporated under Part IV of the LOSC.<sup>179</sup>

51. The recognition of archipelagic concept is considered a major achievement of Third World (most of them small) island States. Archipelagic status gives such States special entitlements acknowledging their special geographical circumstances. The concept was articulated by setting a generous “water-land ratio” and “length of baselines” requirements to enable most developing Island States to benefit from the special archipelagic status on the one hand, and to exclude certain developed Island States, such as UK, Japan, Iceland, Ireland, from claiming archipelagic status on the other.<sup>180</sup> Such generous criteria enable archipelagic States to enclose vast areas of waters—previously the high seas freely used by all States—under their sovereignty. The sovereignty of archipelagic States extends not only to the water column, but also to “the air space over archipelagic waters, as well as to their bed and sub-soil, and the resources contained therein” regardless of the depth of the waters or their distance from the coast.<sup>181</sup> As holders of sovereignty, archipelagic States have exclusive rights to regulate the exploration, exploitation, management, and conservation of all types of resources found in their archipelagic waters. The use of archipelagic baselines as a starting point for measuring maritime zones further enable archipelagic States to control immense areas of ocean space as their EEZ and continental shelf and exercise sovereign rights over the resources.

52. While archipelagic waters are recognized as additional sovereignty zones, such recognition comes with obligations. First, archipelagic States are required to recognize the right of innocent passage and archipelagic sea lanes passage through archipelagic waters and the adjacent territorial sea—a compromise to meet the interests of maritime States.<sup>182</sup> However, an archipelagic State still has wide discretion to manage (regulate) navigation. For example, an archipelagic State may enclose internal waters within archipelagic waters pursuant to Article 50 LOSC; and thus, it can legitimately exclude innocent

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179 Currently 22 States have formally claimed archipelagic status, and all are Third World States. See DOALOS, Table of Claims and Maritime Jurisdictions ([www.dl.icdst.org/pdfs/files4/0d7918aa76bf4675071f62ab252d598b.pdf](http://www.dl.icdst.org/pdfs/files4/0d7918aa76bf4675071f62ab252d598b.pdf)), visited July 2022.

180 LOSC, art. 47(1&2). See also JG Butcher, above n.169, 45; RP Anand, above n.62, 214.

181 *Ibid.*, art. 49.

182 *Ibid.*, arts. 52 & 53.

passage within that specific body of water. The archipelagic State may also regulate navigation by designating sea lanes and traffic separation schemes pursuant to Article 53 of the LOSC. The archipelagic State must designate sea lanes that include all normal passage routes, but this still affords the archipelagic State significant discretion to protect its interests.<sup>183</sup> Second, archipelagic States are obliged under Articles 47(6) and 51 of the LOSC to recognize and respect existing rights and legitimate interests traditionally exercised by neighboring States, such as traditional fishing rights, or rights that stem from existing bilateral agreements. These provisions largely reflect the bilateral arrangements made by the Philippines and Indonesia with their neighbors prior to UNCLOS III in their efforts to win support for the archipelagic concept. Thus, it is worth noting here that the major beneficiaries of traditional rights that archipelagic States are obliged to recognize are largely Third World States and their indigenous communities.<sup>184</sup>

53. The archipelagic regime of the LOSC is largely a significant innovation. The development of the regime was determined by the exclusive interests of developing Island States, which desired control over interconnecting waters surrounding their insular territory for historical, political, economic, and security reasons.<sup>185</sup> The implementation of the archipelagic regime has also been relatively uncontroversial and, overall, has enjoyed a relatively high level of compliance.<sup>186</sup>

### *III.C.ii. The exclusive economic zone and its substantive impact*

54. The concept of EEZ was motivated by developing States' strong desire to control the living resources that had been largely exploited by distant water fleets of the developed States and to effectively reserve non-living resources of the seabed that could only be exploited by technologically advanced States.<sup>187</sup> The origin of the EEZ concept was the practices of several Latin American States unilaterally claiming a patrimonial sea, which later was harmonized at the subregional level by the Declaration of Santo Domingo adopted at the

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183 EL Enyew and N Bankes, Interaction between the Law of the Sea and the Rights of Indigenous Peoples, in: N Matz-Luck, Ø Jensen and E Johansen (eds.), *The Law of the Sea: Normative Context and Interactions with Other Legal Regimes* (Routledge, 2022), 151, 162-163.

184 For a detailed discussion, see *ibid.*

185 M Munavvar, above n. 165, 10.

186 For a detailed discussion on implementation, see T Davenport, above n.170.

187 RR Churchill and AV Lowe, *The Law of the Sea*, 3<sup>rd</sup> edn (1999), 125-157.



Specialized Conference of the Caribbean States on Problems of the Sea.<sup>188</sup> Indeed, it was the Declaration of Santo Domingo that provides a detailed clarification to the concept of patrimonial sea. The Declaration describes the patrimonial sea as “an area adjacent to the territorial sea [. . .]. The whole of the area of both the territorial sea and the patrimonial sea, taking into account geographic circumstances, should not exceed a maximum of 200 nm”.<sup>189</sup> The Declaration further introduced the concept of “sovereign rights” providing that the coastal State has sovereign rights over the renewable and non-renewable natural resources, which are found in the water column, the seabed, and the subsoil of the patrimonial sea, as well as jurisdiction to regulate the conduct of scientific research and to adopt the necessary measures to prevent marine pollution in the area.<sup>190</sup> At the same time, all other States enjoy some of the traditional freedoms of the high seas, such as the freedoms of navigation, overflight, and laying submarine cables and pipelines, without restrictions other than those resulting from the exercise by the coastal State of its rights within the area.<sup>191</sup> Signed by several participating States of the Specialized Conference,<sup>192</sup> the Declaration standardized the concept of patrimonial sea in the Caribbean region. Furthermore, several Latin American States individually and jointly advocated for the recognition of the concept of patrimonial sea during the various deliberations of the UN Seabed Committee.<sup>193</sup> The draft articles of a treaty jointly proposed by Colombia, Mexico, and Venezuela, as well as the joint draft articles presented by Ecuador, Panama, and Peru during the first and second sessions of the Seabed Committee in 1973 respectively introduced the additional requirement of mutual obligation of “due regard” to the concept of patrimonial sea.<sup>194</sup>

55. Afro-Asian States coined the term “exclusive economic zone” and persuasively articulated the concept during various working group seminars and

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188 Declaration of Santo Domingo, above n.154.

189 *Ibid.*, section 2.

190 *Ibid.*

191 *Ibid.*

192 Of the 15 Caribbean States participated in the Specialized Conference, 10 States signed the Declaration.

193 See for example, UN Doc A/AC.138/SR.64, Aug. 12, 1971, 47; and Report of the Committee on the Peaceful Uses of the Seabed, 28 GAOR Supp. 21 (UN Doc 9021) at III, 30.

194 Report of the Committee on the Peaceful Uses of the Seabed, 28 GAOR Supp. 21 (UN Doc 9021) at III.

negotiations, though the substantive content remained the same as the patrimonial sea.<sup>195</sup> Developing coastal States believed that recognition of such resource zones would benefit them by enabling them to control access to and manage marine resources.<sup>196</sup> On the other hand, certain land-locked and geographically disadvantaged developing States, including Laos, Bulgaria, Bolivia, Zambia, and several other land-locked African States, opposed the EEZ concept at UNLCOS III negotiations. These States argued that the EEZ concept would benefit only a few coastal States by allowing them to expropriate and regulate the common resource of the oceans and other activities within the zone, which in turn would enable those coastal States to exercise more leverage over them.<sup>197</sup> These landlocked and geographically disadvantaged States advocated for an alternative concept of a “regional and subregional economic zone”. Under this conception, all States of a particular region or subregion, both landlocked and coastal, would have equal rights and jurisdictions “for the purpose of exploring and exploiting, conserving and managing the natural resources, whether renewable or non-renewable, of the seabed and subsoil and the superjacent waters”.<sup>198</sup> The land-locked and geographically disadvantaged developing States further proposed the establishment of regional or subregional organizations which would explore the economic zone, exploit its resources, and distribute equitably all the benefits on behalf of all States of the region or subregion concerned.<sup>199</sup> When this proposal failed, the Informal Composite Negotiating Text (ICNT) introduced a proposal that recognizes the rights of developing land-locked and geographically disadvantaged States to participate, on an equitable basis, in the exploitation of living resources in

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195 Kenya first proposed the concept of EEZ in the Asian-African Legal Consultative Committee meeting in 1971; and it again formally introduced the concept in the negotiations at the Seabed Committee in 1972.

196 DP Fidler, above n.17, 45.

197 UN, *The Third United Nations Conference on the Law of the Sea*, vol. 2 (New York, 1973), 220; *The Kampala Declaration*, adopted by the Conference of the Developing Land-locked and other Geographically Disadvantaged States, Kampala, Uganda, UN Doc A/CONF.62/23 (March 1974).

198 See “Zambia: Draft articles in keeping with the Declaration of Developing Land-locked and Other Geographically Disadvantaged States adopted at Kampala in March 1974”, UN Doc A/CONF.62/C.2/L.95 (20 Sept 1976), Arts 1, 2 & 3; and UN, *The Third United Nations Conference on the Law of the Sea*, vol. 2 (New York, 1973), 199 (see particularly the statement of Bolivia’s representative, Mr. Tredinnic).

199 Zambia, *ibid.*, Art 4.

the EEZs of other States in the same subregion or region<sup>200</sup>—a weak entitlement later incorporated under Articles 62, 69 and 70 of the LOSC.

56. Despite such an elusive promise,<sup>201</sup> the land-locked and geographically disadvantaged States gave way to the developing coastal States who strongly advocated for the EEZ concept so as to present a united challenge to the Global North—a clear instance that ideological solidarity to the North-South struggle predominated over national interest.<sup>202</sup> As a result, with the support of the overwhelming majority of developing States, the EEZ concept has been accepted and incorporated into the LOSC. The Convention recognizes the right of every coastal State to establish an EEZ up to 200 nm from the coast over which it exercises sovereign rights over the resources while recognizing the other traditional freedoms of the high seas.<sup>203</sup> As Rothwell and Stephens observe, the recognition of the EEZ regime “represents a revolutionary development in the law of the sea, bringing around one-third of ocean space within coastal State jurisdiction”<sup>204</sup>; and the EEZ rapidly became part of customary international law before the LOSC entered into force.<sup>205</sup> Generally, the development and recognition of the EEZ concept has been described as a fundamental achievement and legal success story of the Third World States.<sup>206</sup>

57. Nevertheless, a critical evaluation shows that the substantive benefit of the EEZ to Third World States is limited. The main reason for this limitation

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200 UN, Third Conference on the Law of the Sea: Informal Composite Negotiating Text from the Sixth Session, 15 July 1977. Reprinted in 16 ILM (September 1977), 1137.

201 DE Pollard, *The Exclusive Economic Zone—The Elusive Consensus*, 12(3) San Diego LR (1975), 600.

202 RJ Payne and JR Nassar, *The New International Economic Order at Sea*, 17(1) *Journal of Developing Areas* (1982), 46.

203 Part V of the LOSC (arts. 55-74) deals with the EEZ.

204 DR Rothwell and T Stephens, *The International Law of the Sea* (Hart, 2010), 82.

205 See RR Churchill and AV Lowe, above n.187, 134.

206 For example, Colombia, Chile, Ecuador, and Peru issued a joint statement two days before the adoption of the LOSC stating that: “the universal recognition of the rights of sovereignty and jurisdiction of the coastal State within the 200-mile limit provided for in the draft convention is a fundamental achievement of the [...] members of the Permanent Commission of the South Pacific, in accordance with the basic objectives stated in the Santiago Declaration of 1952 [...]”. See Letter dated 28 April 1982, from the Representatives of Chile, Colombia, Ecuador, and Peru to the President of the Conference on the Law of the Sea, reprinted in Third United Nations Conference on the Law of the Sea, UN Doc A/CONF.62/L. 143 (1984), 249.

is due to the ways in which the EEZ has been conceptualized. While EEZ was successfully initiated and recognized upon the persistent claims of Third World States, the concept itself is not exclusively reserved for such States but in fact applies to all coastal States making it a traditional “equal opportunity” concept from which Third World States could also benefit.<sup>207</sup> In other words, the EEZ was not conceptualized in a manner that exclusively benefits Third World States, such as in the form of recognition of special and differential rights. Commentators observe that the “equal opportunity approach” turned out to be more beneficial to developed coastal States than developing States insofar as it grants them exclusive right over natural resources and recognizes other traditional freedoms of the high seas, including freedom of navigation, overflight, laying submarine cables and pipelines, and “other internationally lawful uses of the sea” in the EEZ.<sup>208</sup> Churchill and Lowe note that only a few developing coastal States benefited from establishing EEZs through increasing the level of their fishing catch and/or by charging licensing fees on foreign fishing fleets.<sup>209</sup> On the contrary, several developing coastal States in Africa, the Caribbean, and the Middle East “come off badly” as such States either have small EEZs and/or their EEZs are natural resource poor.<sup>210</sup>

58. As delineated above, the EEZ concept was also recognized at the expense of land-locked and geographically disadvantaged developing States as waters which were previously open to all became enclosed under coastal State’s exclusive control. The rights of developing land-locked and geographically disadvantaged States to participate in the exploitation of resources in the EEZs of other States in the same subregion or region—recognized under articles 62, 69, and 70 LOSC—is not only limited to the surplus living resources (no access is given to non-living resources), but also that such access is solely dependent on the goodwill of the coastal States concerned.<sup>211</sup> As such, the EEZ regime leaves more than 30 land-locked and several

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207 DP Fidler, above n.17, 45.

208 See RJ Payne and JR Nassar, above n.202, 37.

209 RR Churchill and AV Lowe, above n.187, 177-178.

210 *Ibid.*, 177.

211 Articles 62, 69, and 70 of the LOSC set stringent requirements for access to surplus resources of the EEZ by land-locked and geographically disadvantaged States, and the coastal State has a wide discretion to exclude access. The discretionary power of the coastal State not to allocate surpluses to other States is protected through the exceptions to the compulsory dispute settlement procedures set out in Part XV of the LOSC (see specifically art. 297(3(a))).

geographically disadvantaged developing States with no benefit/only with symbolic benefit from the EEZ.

59. In short, recognition of the EEZ concept has not led to an equitable redistribution of the ocean's resources as many developing States have initially argued it would.<sup>212</sup> The velocity with which the EEZ became customary international law suggests that the concept was sufficiently attractive to developed States to generate general and consistent State practice.<sup>213</sup> As such, the recognition of the EEZ resonates well with Trimble's observation that States easily embrace international legal rules that are congenial to them and that confer and/or justify the practical exercise of more power.<sup>214</sup> As Fidler notes, appreciation of the weaknesses of the "equal opportunity" approach might be one reason why Third World States have rarely, if ever, brought forth the EEZ as a substantive precedent for addressing the problems that the Third World States are currently facing or for creating non-reciprocal rules that advantage developing States.<sup>215</sup> These realities tarnish the EEZ's original luster as a success story of Third World States in the development of the concept. Indeed, emerging challenges, such as the effects of climate change on Small Island States also give rise to a whole lot of questions on the fate of the EEZs, which requires separate research.

### *III.C.iii. Fear of a "seabed scramble": A driver to the common heritage of mankind*

60. As new technologies to exploit the riches of the sea quickly developed, the focus of the freedom of the sea doctrine shifted from the freedom of navigation across the oceans and to trade with distant peoples, to the freedom to descend into the depths of the oceans and to stake claim over resources.<sup>216</sup> As discussed in section III.B.iii. above, the open-ended exploitability criterion of the 1958 Convention on the Continental Shelf gave the developed States freedom to exploit the resources of the continental shelf and the deep seabed without regard to the geophysical formation of the seabed and the depth of water, to the extent their offshore drilling technology

212 RR Churchill and AV Lowe, above n.187, 177.

213 DP Fidler, above n.17, 53.

214 PR Trimble, *International Law, World Order, and Critical Legal Studies*, 42 *Stanford LR* (1990), 834.

215 DP Fidler, above n.17, 54.

216 S Esmeir, above n.77, 86.

allows them to do so.<sup>217</sup> The effects of this “vertical freedom of the sea” on developing States were twofold: i) it denied developing States of any benefits from the resources of the seabed beyond national jurisdiction as they did not have technological capability to exploit them<sup>218</sup>; and ii) developed States’ commercial exploitation of minerals from the seabed might adversely affect the prices of land-based minerals traded by developing States.<sup>219</sup> It was also feared that unregulated exploitation of seabed resources may prompt conflicts among technologically advanced States in a race to “scramble” those resources. Arvid Pardo, the then permanent representative of Malta to the UN, in his speech at the UNGA in 1967, indicated that the immense resources of the seabed and ocean floor beyond the 200 meters isobath and the dearth of proper regulation of such resources would create a “basic political problem”.<sup>220</sup> Pardo described the potential danger at great length as follows<sup>221</sup>:

[The current regime] will trigger advanced States competitively to extend their jurisdiction over [...] the ocean floor [...] and *will lead to a competitive scramble for sovereign rights over the land underlying the world’s seas and oceans, surpassing in magnitude and in its implication last century’s colonial scramble for territory in Asia and Africa.* The consequences will be very grave: at the very least a dramatic escalation of the arms race and sharply increasing world tensions, caused also by the intolerable injustice that would reserve the plurality of the world’s resources for the exclusive benefit of less than a handful of nations. Between the very few dominant Powers, suspicions and tensions would reach unprecedented levels. Traditional activities on the high seas would be curtailed, this is a virtually inevitable consequence of the present situation.

217 See TM Franck, TM Kennedy, and CV Trinko, *An Equitable Regime for Seabed and Ocean Subsoil Resources*, 4 *Denver JILP* (1974), 161, 167; A Pardo, above n.126, 9.

218 Several Third World States reflected this concern at different occasions. See, for example, the statements made by the representatives of Chile, UN Doc A/AC. 138/SR. 30, 13; the United Arab Republic, UN Doc A/C. 1/PV. 1676, para.150; Trinidad and Tobago, UN Doc A/C. 1/PV. 1677, para.25; and the Report of the Committee on the Peaceful Uses of the Seabed and the Ocean Floor beyond the Limits of National Jurisdiction, GAOR, 25th Session, Suppl.21, UN Doc A/8021), 40.

219 RR Churchill and AV Lowe, above n.178, 155-157.

220 See Maltese note verbale of 17 August 1967 to the UN secretary general (A/6695, 18 August 1967, Vol. II, Doc 12.1); and A Pardo, above n.126, 14, para.103.

221 A Pardo, above n.126, 12, para.91.

61. Pardo proposed that the seabed and its resources beyond the 200 meters depth be considered the common heritage of mankind (CHM) governed by an international regime. In that respect, he called for the establishment of “a special agency with adequate powers to administer the resources in the interest of mankind”—acting as a trustee for all, rich and poor, strong and weak, coastal and land-locked, States.<sup>222</sup>

62. The developed States viewed Pardo’s speech with skepticism, arguing that the CHM would act as a barrier to the exploitation of the seabed resources. Conversely, developing States supported the principle as it reflected their interests and aspirations.<sup>223</sup> The UNGA, numerically dominated by Third World States, responded to Pardo’s assertion by adopting several resolutions that recognized the seabed beyond national jurisdiction as the CHM. Of such resolutions, the Moratorium Resolution declared that the resources of the seabed beyond the limits of national jurisdiction must be exploited under international regime, and prohibited exploitation of the resources pending the establishment of such regime.<sup>224</sup> The UNGA also formed an *ad hoc* Seabed Committee, which later became a permanent body, to study the issue and elaborate a legal regime for the exploration and exploitation of the resources of the seabed and ocean floor.<sup>225</sup> Based on the Seabed Committee’s recommendations, the UNGA unanimously adopted a Declaration of Principles Governing the Seabed and the Ocean Floor, and the Subsoil Thereof beyond the Limits of National Jurisdiction, which articulated the principle of the

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222 A Pardo, UNGA, 22<sup>nd</sup> Session: First Committee, 1516<sup>th</sup> meeting, UN Doc A/C.1/PV.1516 (1 November 1967), 1, paras.3, 4, 8, 9 & 13 (emphasis added). It is noteworthy that the CHM concept was originally articulated to cover all areas of the sea beyond the 200 meters isobath, including those areas later recognized as EEZ and continental shelf.

223 See, for example, the statements of the representatives of the following States: Sen (India) in UN Doc A/C.1/PV. 1878, 31 October 1969, 28; Saraiva Guerreiro (Brazil) in UN Doc A/C.1/PV. 1674, 31 October 1969, 7-10; Ballah (Trinidad and Tobago) in UN Doc A/C.1/SC. 1/SR, 12-29, 6 November 1969, 47; Chairman of the Seabed Committee, Amerasinghe of Ceylon (now Sri Lanka) in UN Doc A/C.1/PV. 1673, 31 October 1969, 18-20; and Kanchet (Kuwait) in UN Doc A/C.1/PV. 1675, 3 November 1969, 51.

224 UNGA Res 2574 (XXIV) (A-D), UN Doc A/7630 (1969), adopted 15 Dec. 1969. The Resolution was adopted by the vote of 69 for, 28 against, and 28 abstentions. Those States which voted against were, inter alia, the bulk of the developed Western states and the USSR.

225 UNGA Res 2467 (XXIII) (A), UN Doc A/7128 (1969), adopted 21 Dec. 1968.

CHM in more detailed terms.<sup>226</sup> The Declaration of Principles clearly indicated the type of international regime to be established, stating that a regime shall, *inter alia*, “provide for the orderly and safe development and rational management of the area and its resources [...] and ensure the equitable sharing by States in the benefits derived therefrom, taking into particular consideration the interests and needs of the developing [States]”.<sup>227</sup>

63. A broad recognition of the general conception of the principle of the CHM emerged during the negotiations, yet disagreement persisted regarding the spatial scope of its application (i.e., whether CHM should start to apply from the 200 meters isobath). As clarified in the above sections, several States, both developed and developing, had already unilaterally declared sovereignty over the continental shelf to the extent of 200 nm regardless of its depth. Land-locked and geographically disadvantaged States requested those States unilaterally claim jurisdiction over the resources of the continental shelf to renounce their claims beyond the 200 meters isobath so that the CHM will apply right from there,<sup>228</sup> but to no avail. Indeed, in the 1969 *North Sea Continental Shelf Case*, the International Court of Justice (ICJ) gave legitimacy to extensive unilateral claims of a continental shelf pursuant to its geological meaning. The ICJ held that: “[t]he rights of the coastal State in respect of the area of continental shelf *that constitutes a natural prolongation of its land territory into and under the sea exist ipso facto and ab initio* by virtue of its sovereignty over the land, as an extension of it in an exercise of sovereign rights” for exploration and exploitation of the natural resources.<sup>229</sup> These developments made acceptance of, and adherence to, the application of the CHM starting from the 200 meters isobath difficult during the UNCLOS III negotiations. In tandem with the recognition of the 200 nm EEZ, a 200 nm

226 UNGA Res 2749 (XXV), Declaration of Principles Governing the Seabed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, UN Doc A/8028(1970), adopted 17 December 1970. It was adopted by a vote of 108 for, 0 against, and 14 abstentions.

227 *Ibid.*, art. 9.

228 It is worth noting here that the US initially supported the application of the principle of the CHM starting from the 200 meters isobath as clearly reflected in its 1970 Draft United Nations Convention on the International Seabed Area (Article 1). See Draft United Nations Convention on the International Seabed Area, working paper submitted by the United States, 3 August 1970, UN Doc A/AC.138/25.

229 *North Sea Continental Shelf Case* (Federal Republic of Germany vs. Denmark; Federal Republic of Germany vs. Netherlands), Judgement, ICJ Reports, 3, para.19 (emphasis added).



continental shelf was easily agreed upon, but the issue of extended continental shelf remained controversial for some time. Broad shelf States,<sup>230</sup> both developed and developing, sought recognition of extended continental shelf to the full extent of their geological continental shelf—a claim persistently opposed to by narrow shelf States and land-locked and geographically disadvantaged States.<sup>231</sup> After intense debate for years, the RICNT introduced a new legal definition of a continental shelf that attempted to reconcile the diverse interests of States,<sup>232</sup> which was eventually incorporated into the final text of the LOSC.<sup>233</sup> The new legal definition of continental shelf combined a 200 nm cutoff point and the geological concept with a limiting clause based on distance or a combination of distance and depth.<sup>234</sup>

64. By removing the exploitability criterion, the new continental shelf regime prevents the continental shelf from being an exclusive domain of technologically advanced States. However, the LOSC lacks a provision that permits access to, or shares, the resources of the 200 nm continental shelf by land-locked and geographically disadvantaged States. It merely requires coastal States claiming extended continental shelf to share the revenues derived from the exploitation of the natural resources to the international community based on the revenue sharing formula provided under Article 82(2).<sup>235</sup> The International Seabed Authority (ISA) is mandated to distribute the benefits to all States “on the basis of equitable sharing criteria” taking into account the special interests and needs of developing States, particularly the least developed and the land-locked among them.<sup>236</sup> The extent to which these provisions will be practically implemented in a manner to benefit the poorest States remains to be seen. Overall, there was not a unified Third World position regarding the continental shelf during UNCLOS III negotiations; rather

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230 Broad shelf States are those States which have a continental shelf beyond 200 nm.

231 For a detailed discussion, see M Hop-Thompson, above n.129, 58.

232 Third United Nations Conference on the Law of the Sea, Informal Composite Negotiating Text, Revision 3, UN Doc A/CONF.62/WP.10/Rev.3, arts. 76-77.

233 Part VI of the LOSC (arts. 76-85) deals with the continental shelf.

234 See LOSC, art. 76

235 Whether the benefit sharing formula is in practice beneficial to developing States is an important question worth further investigation.

236 LOSC, art. 82(4). This provision clearly indicates that the CS beyond the 200 nm is considered “semi-international area”.

geography played a much greater role than legal, political, and economic ideology.<sup>237</sup>

65. The utilization of the deep seabed (the Area) and its resources, particularly manganese nodules,<sup>238</sup> represents the crux of the intensity of the North-South debate in the law of the sea. Essentially, the utilization aspect of the CHM consists of two main elements as outlined in the Declaration of Principles and subsequent UNGA resolutions: ensuring that the exploitation of resources benefits “mankind as a whole” and granting preferential right (treatment) to developing States to address their historical disadvantaged position. The developed States acknowledged these basic components of the CHM principle, but certain issues remained heated points of contention between developed and developing States. The major disagreements that stood out during the negotiations at UNCLOS III were threefold. The first controversy related to the modalities by which the developing States could benefit from the deep seabed mining—different understanding of “benefit” for developing States. The developing States maintained that the core notion of the benefit of mankind implies that the emerging deep seabed regime must ensure that “all States had actual and direct equal benefit from the use of the seabed”.<sup>239</sup> As such, developing States advocated for recognition of both *de facto* equal participation in sea-bed activities and preferential rights in the distribution of the benefits derived from such activities.<sup>240</sup> The former claim rejected any monopoly in seabed activities and demanded a right to be given effective equal opportunities with respect to the utilization of the resources of the seabed; and this in turn entailed a duty on developed States to transfer or give access to the relevant technology so that developing States could participate in deep seabed activities in equal footing with the former States.<sup>241</sup> The latter claim requires consideration of the special circumstances of developing States in designing the revenue sharing formula, i.e., revenue sharing arrangements should be designed in such a manner as to reduce economic disparities between developing and developed States. In effect, they demanded to receive a

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237 A detailed discussion of the development of the continental shelf regime is beyond the scope of this article.

238 Manganese nodules are composed of several valuable minerals, including, *inter alia*, copper, nickel, cobalt, and manganese.

239 R Wolfrum, *The Principle of the Common Heritage of Mankind* (Max-Planck Institute, 1983), 322.

240 *Ibid.*

241 *Ibid.*, 323.

larger share of revenues than other technologically less advanced developed States. On the other hand, the developed States, particularly the US, while accepting that revenues be shared with developing States, maintained that such revenues be regarded as part of *development aid* and denied any other right of developing States to the seabed activities.<sup>242</sup> As such, developed States not only adopted a narrow understanding of the “benefits” that would accrue to developing States—limiting it to revenue sharing—but also regarded such revenue sharing as a *charity* to, rather than a right of, the latter States.

66. The second highly controversial issue unearthed during the negotiations related to the type of measures to protect land-based mineral producer developing States. The developing States advocated for measures that would effectively protect land-based mining States from “*any adverse effects* on their economies or on their earnings resulting from a reduction in the price of an affected mineral, or in the volume of that mineral exported, to the extent that such reductions are caused by activities in the Area”.<sup>243</sup> Developing States, *inter alia*, proposed limits to mining activities as an effective measure and Article 150 of the ICNT stipulated complex economic formula to implement such control of production. The earlier Revised Informal Single Negotiating Text required a “substantial decline/significant share” test<sup>244</sup> as a means of defining and limiting “adverse effects”, but the ICNT removed such stringent tests. As such, production and price controls would be imposed upon a showing of “any adverse effects” whatsoever resulting to the economy of a developing State producer, without any need to show that mineral exports of a

242 Draft United Nations Convention on the International Seabed Area, working paper submitted by the United States, UN Doc A/AC.138/25; International regime: Working paper presented by the United Kingdom, UN Doc A/AC.138/26; Proposals concerning the establishment of a regime for the exploration and exploitation of the seabed: submitted by France, UN Doc A/AC. 138/27.

243 See Informal Composite Negotiating Text and its revisions (July 1977), art. 150 ([www.legal.un.org/diplomaticconferences/1973\\_los/vol8.shtml](http://www.legal.un.org/diplomaticconferences/1973_los/vol8.shtml)), visited July 2022. Emphasis added.

244 Article 9 (4) of the version stipulated that activities in the Area shall be undertaken in such a manner as to: “[p]rotect against the adverse economic effects of a *substantial decline in the mineral export earnings* of developing countries for whom export revenues from minerals or raw materials also under exploitation in the *Area represent a significant share of their gross domestic product or foreign exchange earnings*, when such decline is caused by activities in the Area [...]” (emphasis added). See Revised Informal Single Negotiating Text, UN Doc A/CONF. 62/WP.8/Rev. 1/Parts I, II, III, May 1976 ([www.legal.un.org/diplomaticconferences/1973\\_los/vol5.shtml](http://www.legal.un.org/diplomaticconferences/1973_los/vol5.shtml)), visited July 2022.

developing State producer represented a “significant share” of gross domestic product or foreign exchange earnings would risk a “substantial” decline as a result of deep seabed mining.<sup>245</sup> While developing States viewed this lower threshold approach as an effective measure to protect their interests, the developed States strongly opposed it as “unnecessarily and unjustifiably overly protective of developing State mineral producers” and rejected it as unacceptable.<sup>246</sup>

67. The third hotly contested disagreement focused on the nature, powers, and functions of the envisioned international machinery. The developed States proposed that the power of the authority be limited to the granting of licenses to deep seabed miners and supervision of the deep seabed activities to ensure that such activities were conducted in accordance with the new regime.<sup>247</sup> They also wanted the authority to be structured in such a manner to permit the developed States, as owners of the technology to exploit the resources, to exercise a dominant role.<sup>248</sup> Developing States rejected such proposals arguing that a regime based on licenses or concessions would not be equitable as it would give undue advantage to, and serve only the interests of, the technologically advanced States and private enterprises.<sup>249</sup> Developing States firmly advocated for a strong authority with wide-ranging powers, including the power to directly engage in mineral exploration and exploitation activities. For example, the Draft Ocean Space Treaty prepared by Malta,<sup>250</sup> and the two draft treaties on the law of the sea prepared by Tanzania<sup>251</sup> and thirteen Latin American States<sup>252</sup> advocated that only the Authority, instead of States and private enterprises, should carry out deep seabed mining activities.

245 TM Beuttler, *The Composite Text and Nodule Mining: Over Regulation as a Threat to the Common Heritage of Mankind*, 1 *Hastings International and Comparative LR* (1977), 167, 175.

246 *Ibid.*, 178-180.

247 R Branco, *Rational Development of Sea-Bed Resources: Issues and Conflicts*, 1 *Ocean Management* (1973), 41, 47.

248 RP Anand, *Studies in International Law and History: An Asian Perspective* (2004), 186.

249 *Ibid.*

250 *Draft Ocean Space Treaty: Working paper submitted by Malta*, UN Doc A/AC.138/53 (1971).

251 *Draft Statute for an International Seabed Authority*, submitted by Tanzania, UN Doc A/AC.138/33 (1971).

252 *Draft Proposal submitted by thirteen Latin American States jointly*, UN Doc A/AC.138/49 (1971).

68. These contentious issues were extensively dealt with throughout different stages of the negotiations. Developing States, acting through the G-77, maintained a solid and unified position with respect to the utilization of the resources of the deep seabed. They stood firm and cohesive throughout the UNCLOS III negotiations defending their positions. Compromise proposals were put forward and revised several times via informal negotiating texts (SNT, RSNT, ICNT, RICNT, and Draft Convention); and after such prolonged negotiations, the final text of Part XI of the LOSC<sup>253</sup> largely reflected the views of developing States. The LOSC reaffirmed that the Area and its resources are the CHM, and amendments of the principle and derogations therefrom is forbidden.<sup>254</sup> Any claim or exercise of sovereignty or sovereign rights over any parts of the Area and its resources as well as its appropriation are prohibited<sup>255</sup>; instead, all rights in the resources of the Area are vested “in mankind as a whole”.<sup>256</sup> A strong ISA has been established, composed of different organs (Assembly, Council, Secretariat, and Enterprise), with extensive powers, privileges and immunities to regulate activities in the Area.<sup>257</sup> The Enterprise, as an operational wing of the Authority, has been mandated to undertake direct exploitation of the resources alone or in association with States parties or public and private enterprises.<sup>258</sup> The Enterprise is also entitled to several privileges, including rights to receive reserved mining sites, as well as funds and technology necessary to carry out its functions.<sup>259</sup> Although deep seabed mining has not been reserved entirely to the Authority, as proposed by several developing States during the negotiations, undertaking deep seabed activities has latently become dependent upon the permission of the Authority and this effectively removes the traditional vertical freedom of the sea.

69. The LOSC further recognizes the demands of developing States to preferential treatment in benefit sharing and *de facto* equal participation in deep

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253 All efforts to arrive at a consensus having failed, due to the objection of the US and a few developed States, the LOSC was adopted by a vote of 130 in favor, 4 against, and 17 abstentions. The US, Israel, Turkey, and Venezuela voted against; the Soviet group and Western European States abstained. Those that voted in favor were a bulk of developing States and East European States.

254 LOSC, arts. 136 & 311(6).

255 *Ibid.*, art. 137 (1)

256 *Ibid.*, arts. 136 & 137.

257 *Ibid.*, arts. 156 -158 & 176-183.

258 *Ibid.*, arts. 153(2) & 170.

259 *Ibid.*, arts. 173(2(b)) & 144; Annex III to the LOSC, arts. 3(2), 5, & 9; Annex IV to the LOSC, arts. 11 & 13.

seabed activities. Article 140 of the LOSC provides the general rule on revenue sharing, recognizing not only developing States but also “peoples who have not attained full independence or other self-governing status” as beneficiaries of a preferential treatment in benefit sharing arrangements.<sup>260</sup> Although the LOSC neither defines “mankind”<sup>261</sup> nor recognizes non-self-governing peoples as subjects *per se*, it makes clear that the latter’s interests would be taken into account in the revenue sharing of deep sea-bed mining. The LOSC imposes the duty of designing “appropriate mechanisms” on the ISA to ensure “the equitable sharing of financial and other economic benefits derived from activities in the Area”.<sup>262</sup> However, it remains unclear how the interests of non-self-governing peoples would be protected in practice as they are not represented in the ISA. The LOSC also retained the complex economic formula designed to protect developing States dependent on land-based mining.<sup>263</sup> Regarding *de facto* participation, 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 needs 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.

70. This in turn entails, *among others*, the Authority: to give “special consideration” for these category of States in granting of opportunities for activities in the Area,<sup>264</sup> including priority access to “reserved areas”<sup>265</sup>; to take measures to promote and encourage the transfer to developing States of technology and scientific knowledge.<sup>266</sup> To this end, the Authority is required to initiate and promote programmes for the transfer of technology to developing States

260 *Ibid.*, arts. 160 (2(f&k)) and 162(2(o)) provide similar recognitions.

261 The use of the term “mankind” rather than “all States” as the beneficiary of the Area provokes a question as to whether “mankind” constitutes a new subject of international law. In this respect, Tanaka observes that “mankind” is a trans-temporal concept that includes both the current and future generations. See Y Tanaka, *Protection of Community Interest in International Law: The Case of the Law of the Sea*, 15 *Max Planck YUNL* (2011), 329, 339.

262 LOSC, arts. 140(2) & 160 (2(f & k)).

263 *Ibid.*, arts. 150 & 151.

264 *Ibid.*, art. 152.

265 Annex III to the LOSC, art. 8.

266 LOSC, art. 144.

including, *inter alia*, facilitating access to relevant technology “under fair and reasonable terms and conditions”.<sup>267</sup> The LOSC also safeguards developing States in the decision-making of the ISA: the decision-making procedures of the ISA not only prohibit veto but further outline that developed States in concert cannot pass important decisions without the favorable vote of certain developing States.<sup>268</sup>

71. In conclusion, the intense debate concerning the utilization of the resources of the Area reflected both ideological and substantive conflicts of interest between developed and Third World States more than any other issue in law of the sea negotiations. Adopting a unified position throughout the UNCLOS III, Third World States managed to incorporate the concept of the CHM to the body of codified law. Such internationalization of the Area represents a radical innovation of Third World States, one that breaks the traditional sovereignty and freedom-based approaches of the law of the sea. This was considered a great achievement of the struggles and concerted actions of Third World States over the tedious negotiations. Nevertheless, such achievements of Third World States were not long-lasting.

### *III.C.iii.a. Reversal of achievement: the 1994 Implementation Agreement*

72. The US and other advanced States, such as the UK, Italy, West Germany, and France, refused to sign the LOSC and they continued to treat deep seabed mining as a freedom of the high seas.<sup>269</sup> These States, along with the Soviet Union and Japan, enacted unilateral legislations to license their nationals to mine the deep seabed mineral resources in the interim period (between the adoption of the LOSC and its entry into force).<sup>270</sup> Rejecting such unilateral moves by developed States, the G-77 States adopted a resolution that called for a moratorium of interim-period seabed mining. The Resolution declared that “any unilateral measures, legislation, or agreement restricted to a limited number of States on seabed mining are unlawful and violate well-established

267 Regarding transfer of technology to developing States by a sea-bed mining operator, see Annex III to the LOSC, art. 5(3(e)).

268 See LOSC, arts. 159 (7-9) & 161(8).

269 See DL Larson, *The Reagan Administration and the Law of the Sea*, 11(3) ODIL (1982), 297.

270 RP Anand, *The Convention on Law of the Sea and the United States*, 24 Indian JIL (1984), 179.

and imperative rules of international law”.<sup>271</sup> Yet, this Third World “confrontation” did not stop the unilateral actions of the technologically advanced States.

73. In an aim to achieve universal participation in the LOSC by addressing the objections of developed States (particularly the US), a series of informal consultations, under the auspice of the UN Secretary-General, were conducted on the controversial issues since 1990. These informal consultations resulted in the adoption of the 1994 Implementation Agreement to Part XI of the LOSC.<sup>272</sup> The application of the Agreement has been “imposed” on State parties to the LOSC in the sense that any instrument of ratification or accession to the LOSC after the adoption of the Agreement automatically “represent consent to be bound by the Agreement”.<sup>273</sup> States which had already ratified the LOSC shall also “be deemed to have consented to be bound by the Agreement” twelve months after its adoption unless they notified otherwise.<sup>274</sup>

74. The Agreement reversed most of the provisions of the LOSC that were considered protective of the interests of developing States and such reversal is justified by Article 2 which stipulates that the “provisions of the Agreement shall prevail” in the event of any inconsistency with the LOSC. The main changes introduced by the Agreement include, *inter alia*, that: i) a US seat in the Council is guaranteed<sup>275</sup>; ii) a few developed States acting in concert can block decisions in the Council<sup>276</sup>; iii) the provision of the LOSC dealing with the power of the ISA to limit production from the seabed to protect the interests of developing land-based producer States was removed. In its place, restrictions on subsidization of seabed mining based on the rules of GATT, and grant of economic assistance to adversely affected developing States were

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271 See Resolution of the G-77 States, The question of unilateral legislation on sea-bed mining, UN A/CONF. 62/94 (19 October 1979). See also a discussion of a similar statement issued by G-77 in Oxman, *The Third United Nations Conference on the Law of the Sea: The Seventh Session* (1978), 73(1) AJIL (1979), 32.

272 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 4 August 1995, 2167 UNTS 3, entered into force 11 December 2001.

273 *Ibid.*, art. 4(1).

274 *Ibid.*, art. 5(1).

275 *Ibid.*, Annex, section 3, para.15.

276 *Ibid.*, Annex, section 3, particularly paras.5.



introduced<sup>277</sup>; iv) provisions of the LOSC compelling the transfer of seabed mining technology to developing States are removed<sup>278</sup>; v) the Enterprise is restructured, removing its privileges and subjecting it to the same requirements as other commercial enterprises—eliminating the requirement that the State parties to the LOSC finances its mining activities or provide it technology, and requiring that it operates through joint ventures with commercial enterprises<sup>279</sup>; and vi) future amendments to the regime cannot be adopted over US objections.<sup>280</sup> Ultimately, power played the decisive role to turn around the general agreements incorporated under the LOSC to a completely different regime.

75. Thus, after the adoption of the Implementing Agreement, the concept of CHM “has lost its original meaning and substance when it symbolized the interests, needs, hopes, and aspirations of a large number of developing States and non-self-governing peoples”.<sup>281</sup> The changes introduced by the Agreement make resoundingly clear that the Area will not be utilized in the interests of mankind with particular regard to the needs of developing States as initially articulated; rather it will be exploited on commercial terms regardless of the needs and interests of the weaker members of the international community.<sup>282</sup> Critics observe that the current deep seabed regime “cater substantially to a few extractive interests”: it facilitates the grab of the ocean floor by a few mining corporations and their sponsoring States while paying “lip service” to developing States in the name of benefit sharing.<sup>283</sup> Indeed, the Area remains a battle ground for several issues of procedural justice (i.e., role of developing States in the institutional framework) and distributive justice. These contemporary issues require a separate critical inquiry.

#### IV. Conclusion

76. This article demonstrates how the international law of the sea was developed and applied vis-à-vis Third World States and peoples, and progressively

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277 *Ibid.*, Annex, sections 6 & 7.

278 *Ibid.*, Annex, section 5.

279 *Ibid.*, Annex, section 2, particularly paras.2, 3, 4 & 5.

280 *Ibid.*, Annex, section 4. For a detailed discussion of all these changes, see RP Anand, above n.248, 195.

281 RP Anand, above n.248, 196.

282 *Ibid.*, 196. A detailed study on the legislative and enforcement jurisdiction of the ISA is beyond the scope this article.

283 S Ranganathan, *Ocean Floor Grab: International Law and the Making of an Extractive Imaginary*, 30(2) *EJIL* (2019), 573, 599.

evolved to accommodate and embrace the latter's rights and interests. Additionally, this historical review analyzes the struggles of the Third World States to influence the evolutions of the law of the sea in their favor. Röling's characterization of international law reflects (captures) the core features of the law of the sea: "In [international] law is *hidden the element of power and the element of interest* [. . .]. Law has the inclination to serve primarily the interests of *the powerful* [and . . .] *prosperous nations*".<sup>284</sup> The international law of the sea is no exception to this rule. Throughout history, the rules and principles of the law of the sea were conceptualized by and designed to promote the interests of the powerful and technologically advanced maritime States. Maritime power and Papal grant were the main rules of the law of the sea in the early periods until the 17<sup>th</sup> century. The doctrine of the freedom of the seas, which was the hallmark of the traditional law of the sea, ultimately took form as a typical Eurocentric law devised and developed at a particular period of history to serve colonial endeavors, economic needs, and other interests of the powerful Western States. The freedom of the seas doctrine has survived into the postcolonial world as a restraint on other imaginative and historical political possibilities, of moving across the different surfaces of the oceans, horizontally and vertically, without staging and capturing.<sup>285</sup>

77. Nonetheless, although Third World States and peoples were not part of the creation of the traditional law of the sea, they have refused to exist within its periphery and have actualized their route to becoming equal partners in its evolution. Third World States, both through unilateral and concerted actions and actively engaging in authoring the law itself, have continuously challenged the traditional law and played a significant role in its progressive evolution. The UNCLOS III negotiations, which were dubbed as an anti-colonial theatre, clearly reflected the Third World States' "revolt against the West" in the context of the law of the sea. In addressing numerous conflicting interests, the debates over various issues were highly polarized along North-South lines. The postcolonial States advocated for a considerable extension to their claims of sovereignty and jurisdiction over the sea as well as a strong international machinery to regulate the exploration and exploitation of the resources of the Area. The efforts of postcolonial States represent an attempt to achieve a redistribution of power and jurisdictions over large areas of ocean space, thus

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284 BVA Röling, *International Law in an Expanding World* (Amsterdam, 1960), 15 (emphasis added).

285 S Esmeir, above n.77, 89.

securing an equitable share of its resources. These attempts to pluralize international law gave the Third World States the opportunity to develop identities and transnational solidarity—acting as a unit through the G-77— independent of the views and interests of their previous colonial rulers.<sup>286</sup> Through such solidarity, although the Conference’s procedural rules, affirmation of the gentlemen’s agreement, posed a significant limit, Third World States mounted substantive and determined opposition to the inherited Eurocentric rules and assumptions of the traditional law of the sea by initiating and persistently pursuing new concepts/principles. As a result, several elements of the LOSC including, *inter alia*, the doctrines of archipelagic States and waters, the EEZ, and the CHM reflect the articulated positions of the Third World States.

78. However, despite the efforts of Third World States to reorient the law of the sea in a manner which may sufficiently address their interests, the protections that contemporary international law offers to Third World States remain fragile in many areas, including in areas (concepts) of their own articulation. Particularly, the drastic revision of most provisions of part XI of the LOSC—which were considered protective of the interests of the numerically majority Third World States—reflects the perpetuation of the inherent colonial features embedded within the law of the sea: that it continues to be an instrument to serve the interests of a few powerful maritime States. As such, the law of the sea remains plagued by its formative contradiction as it struggles to recognize and accommodate the rights and interests of Third World States and peoples. But again, the evolution of the law of the sea vis-à-vis the Third World States and peoples is largely an unfinished and ongoing process, and the struggles of Third World States with respect to several existing and emerging issues of the law of the sea continues unabated. Thus, while this historical review serves as a foundation, additional research is required to explore the limits and possibilities of the contemporary law of the sea in addressing emerging systemic challenges of the law of the sea (i.e., the material, epistemic, and ocean justice and geopolitical dynamics) that affect the rights and interests of Third World States and peoples.

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286 DP Fidler, above n.17, 48.