

## Chapter 2: The Continental Shelf Prior to UNCLOS III

### A. Introduction

This Chapter covers the evolution of the concept of the continental shelf until the 1958 Convention. In 1945, President Truman claimed for the United States of America the continental shelf adjacent to its land territory. Many coastal states followed the United States' example, and claiming for sovereignty over the continental shelf did not escape the notice of either the academic community as well as the international community. An intense period of analysis, reflection and discussion ensued. How was the new concept to be understood? How did it affect other more established uses and freedoms of the seas?

### B. The Legal Status and Uses of the Seabed beyond the Territorial Sea Prior to 1945

Long before 1945, coastal states had already established a juridical relationship with the resources of the seabed and subsoil beyond the territorial sea as well as to the physical seabed. There were two types of state practice: the first being sedentary fisheries; the second being mining and tunnelling.

A well-known example of sedentary fisheries is the pearl fisheries of Ceylon which were under legislation from 1811.<sup>58</sup> The 1811 law did not specify a distance; but in 1925, a new ordinance on pearl fishing was passed which authorized the delineation of waters between three (3) and 100 fathom lines.

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<sup>58</sup> O'Connell, *The International Law of the Sea*, at p. 451. O'Connell referred to the Chanks Ordinance of 1891, as amended in 1929 from the Legislative Enactments of Ceylon, Vol. IV, cap. 168. See also Katin, *The Legal Status of the Continental Shelf as Determined by the Conventions Adopted at the 1958 United Nations Conference of the Law of the Sea: An Analytical Study of an Instance of International Law Making*, at p. 15.

Other countries also enacted pearl fishery laws prior to 1945, including Venezuela and Panama.<sup>59</sup> These laws covered more than merely territorial waters. In the case of Panama, for example, the area legislated for covered 120 miles.<sup>60</sup> Another type of sedentary fishery is the sponge fisheries that extended 17 miles from the Tunisian coast into the Bay of Tunis.<sup>61</sup> In accordance with the Fisheries Convention of 1939, France, in the Bay of Ganville, established oyster fisheries that extended beyond the three-mile limit.<sup>62</sup>

Besides fisheries, mineral wealth also motivated to claim rights over the seabed and subsoil of the high seas. Interest in mining was stimulated by developments in science and engineering.<sup>63</sup> For example, the Cornwall Submarines Act of 1858 (United Kingdom) claimed the right, on behalf of the United Kingdom, to drive mines and to build tunnels into the subsoil even beyond the three-mile limits of territorial sea.<sup>64</sup> Other states that undertook similar mining activities, principally for coal, included Australia, Canada, Chile and Japan.<sup>65</sup>

The exploitation of the seabed beyond the territorial sea provoked much doctrinal discussion as to their legality. The discussions focused on the nature of the seabed: was it *res communis* or *res nullius*; could resources be appropriated or not?<sup>66</sup> The background to this debate was customary international law, which at that time understood the area beyond the territorial sea, including the seabed, to be high seas.

Some who advocated proprietary or sovereign rights for sedentary fisheries insisted these differed from regular fishing in the high seas because the fishery resources were attached to the seabed, and thus formed a part of it.<sup>67</sup> Other governments based the justification of the practice on

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<sup>59</sup> Katin, *ibid.*, at p. 18.

<sup>60</sup> *Ibid.*

<sup>61</sup> O'Connell, *supra* note 58, at p. 452.

<sup>62</sup> *Ibid.*

<sup>63</sup> Higgins/Colombos, *The International Law of the Sea*, at p. 54; see also Katin, *supra* note 58, at p. 20.

<sup>64</sup> Higgins/Colombos, *ibid.*, at p. 55.

<sup>65</sup> Katin, *supra* note 58, at p. 21.

<sup>66</sup> O'Connell, *supra* note 58, at pp. 449 to 450.

<sup>67</sup> *Ibid.*, at p. 453.

“long usage” since they established sedentary fisheries even before the advent of the three-mile territorial sea limit.<sup>68</sup>

With respect to mining, others considered the seabed *res nullius* meaning that individual titles could be acquired.<sup>69</sup> Others hold the view that the seabed was *res communis* and the applicable regime would either be similar to the high seas regime where anybody may partake of the resources or else would be a complete ban.<sup>70</sup>

Other publicists, however, thought the discussion on the legal nature of the seabed and subsoil of the high seas merely academic or theoretical.<sup>71</sup> Smith, for example, pointed out that the legal interest of coastal states in the seabed and subsoil of the high seas was driven primarily by the particular uses or products that they might subsequently be able to exploit.<sup>72</sup> There was no question of establishing rights over the entire seabed and/or subsoil as such a move would have been seen as interference in the freedom of navigation.<sup>73</sup>

Churchill and Lowe confirm the rather academic nature of the debate.<sup>74</sup> They observe that the practice of states over sedentary fisheries and mining beyond the limits of the territorial sea did not elicit major opposition from other states since freedom of navigation and of high seas fishing were not compromised.

Several attempts to codify the law of the sea were undertaken by societies and/or publicists of international law. These took into account the debate concerning the status and nature of the seabed beyond the territorial sea.<sup>75</sup> The most important attempt at codification prior to 1945

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<sup>68</sup> *Ibid.*, at pp. 452 to 453.

<sup>69</sup> *Ibid.*, at p. 457.

<sup>70</sup> *Ibid.*, at p. 458.

<sup>71</sup> Smith, *The Law and Custom of the Sea*, at p. 61.

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*, at p. 62.

<sup>74</sup> Churchill/Lowe, *The law of the sea*, 3<sup>rd</sup> edition, 1999

<sup>75</sup> For example, the Report of the Rapporteur of the Sub-Committee on Territorial Waters enumerated the following codification projects of societies and publicists: Institut de Droit international, Draft of 1894, Oppenheim in the *Annuaire de l'Institut de Droit international* 1913, *Project of Captain Storny (International Law Association)*, Report of Dr. Darnday to the 25<sup>th</sup> Conference of the International Law Association, American Institute of International Law Draft Convention submitted to the American Institute of International Law at

was under the auspices of the League of Nations. The Assembly of the League of Nations, with a view towards the drawing up of an international convention, adopted a Resolution on 22 September 1924, in which it instructed its Council to convene a Committee of Experts.<sup>76</sup> The Resolution mandated the Committee of Experts to:

- a. prepare a provisional list of the subjects of international law the regulation of which by international agreement would seem to be most desirable and realisable at the present moment; and
- b. after communication of the list by the Secretariat to the governments of states, whether Members of the League or not, for their opinion, examine the replies received; and
- c. report to the Council on the questions which are sufficiently ripe and on the procedure which might be followed with a view to preparing eventually for conferences for their solution.<sup>77</sup>

The continental shelf was not discussed in the context as it is understood and practiced now. The Committee considered what limits to the territorial sea it should recommend in order to accommodate the interests of those states wanting the abundant fisheries of the shallow area known as the continental shelf. According to the Report of the Sub-Committee of Territorial Waters:

It was observed that at a certain distance from the coast – a distance which varied to some extent – the bottom of the sea is marked by a sort of great step, almost always abrupt, which divides it into two quite distinct regions. The region extending from this step to the coast-line has been called the ‘continental shelf’. The other much vaster, which extend beyond this step, is the abysmal region; the rare species of fish found in the region are generally inedible. On the other hand, those which inhabit the continental shelf are for the most part edible.<sup>78</sup>

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Lima, Peru on 20 December 1924, 20 A.J.I.L (1926) Special Number, at pp. 75 to 76.

<sup>76</sup> Resolution adopted by the Fifth Assembly of the League of Nations dated 22 September 1924, printed in full in: 20 A.J.I.L (1926) Special Number, at pp. 2 to 3.

<sup>77</sup> *Ibid.*, at p. 3.

<sup>78</sup> Report of the Rapporteur of the Sub-Committee on Territorial Waters, 20 A.J.I.L. (1926), at p. 126.

The problem, however, was that the continental shelf differed for each coastal state. It was therefore difficult to convince coastal states to accept what was essentially an arbitrary limit.<sup>79</sup> The idea of uniform limits applicable to all coastal states had its advantages and was already considered by many to be an attractive solution. In particular, it facilitated attempts at codification.

The Rapporteur, in order to arrive at a compromise, recommended two types of limits to the territorial sea: in the first type, a fixed limit would be imposed; and in the second, a flexible line would be drawn depending on the uses or purposes of the coastal state.

The work of the Committee of Experts, having been severely hampered by World Wars I and II, did not amount to a codification of the law of the sea. The Committee likewise lacked the insights of subsequent ocean science and technology; insights that were critical in later bolstering the United States claim to a large area of ocean floor, its argument being that it represented a submerged continuation of its land territory.

### C. The 1945 Truman Proclamation and Other Unilateral State Declarations

On 26 February 1942, just three years before the Truman Proclamation, the United Kingdom and Venezuela entered into a treaty covering the submarine areas of the Gulf of Paria. According to a scholar, although the term “continental shelf” was not used, this treaty could be regarded as the first treaty on the continental shelf because of “reference to off-shore installation for the drilling of petroleum and provisions assuring freedom of navigation”.<sup>80</sup>

However, it was the U.S. Proclamation of 1945, now popularly referred to as the Truman Proclamation that gave birth to the modern concept of the continental shelf.<sup>81</sup> The United States declared the natural resources

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<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.* at p. 23.

<sup>81</sup> U.S. Proclamation No. 2667, “Policies of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, 28 September 1945, 10 Fed. Reg. 12303, reprinted in full in: Lay/Churchill/Nordquist (eds.), *New Directions in the Law of the Sea*, Documents – Vol. 1, 1973, at pp. 106 to 107.

of the seabed and subsoil of the continental shelf that, although technically high seas nevertheless lay contiguous to the United States coasts, to be under its jurisdiction and control. In its preamble, the proclamation stated that the rationale followed was basically one of recognizing the growing United States need for new sources of petroleum and other minerals and the discovery, attested to by experts, that such resources were to be found along the continental shelf, beyond the submerged areas of the three-mile territorial sea limits. According to this proclamation, the appropriation of such submerged areas was only “reasonable and just” since:

- a. the responsibility for utilizing, conserving and protecting resources found in these area lies with the coastal state
- b. the submerged part of the continental shelf contiguous to the coastal state may be considered the submerged land mass of the territory of the coastal state; and finally,
- c. because the coastal state is entitled under international law to protect itself and its territory or areas which are necessary for its integrity as a sovereign state.<sup>82</sup>

The proclamation set the extent of the continental shelf as the 100-fathom line. A scholar commented on its vagueness, observing that the exact width of this area within the 100-fathom line was uncertain, and thus, that the boundary of the shelf was also undetermined.<sup>83</sup> Nevertheless, the 100-fathom line of the proclamation was well within what could properly be considered to be continental shelf, or the inner core of the continental margin of the United States of America.<sup>84</sup>

The issuance of the 1945 Truman Proclamation had been linked to post-World War II social and economic needs. When President Truman proclaimed the sovereignty of the United States over its continental shelf, the “war-weary” world was impatient to recover from its ravages and hungry for resources. There existed a strong drive to “find new deposits of petroleum and natural gas and minerals, lying in the sea-bed and the ocean floor and its subsoil, to guard against a threatened shortage resulting from the depletion of world stocks during the Second World

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<sup>82</sup> *Ibid.*, at p. 106.

<sup>83</sup> Colombos, *The International Law of the Sea*, 3<sup>rd</sup> revised edition, 1954.

<sup>84</sup> Symonds/Eldholm/Mascle/Moore, *Characteristics of Continental Margins*, in: Cook/Carleton (eds.), *Continental Shelf Limits: The Scientific and Legal Interface*, 2000, at p. 26.

War and to avoid dependence on imported supplies of these strategic raw materials”.<sup>85</sup>

Interestingly, the development of the concept was driven not only by international but also by domestic politics in the United States.<sup>86</sup> At that time, there were several states in the United States federation that exercised jurisdiction of seabed activities beyond the then 3 mile-limit of the territorial waters of the United States. In fact, this conflict between federal government and state was not settled by the Truman Proclamation. Several of these cases were subsequently attained to the United States Supreme Court. Three states – California, Louisiana and Texas<sup>87</sup> – attempted to exercise jurisdiction in the territorial sea and beyond. In the Louisiana and Texas cases, the United States Supreme Court held that,

If as we held in California’s case (that) the three mile belt is in the domain of the Nation rather than that of separate states, it follows *a fortiori* that the ocean beyond that limit also is. The ocean seaward of the marginal belt is perhaps even more directly related to the national defense, the conduct of foreign affairs, and the world commerce than is the marginal sea.<sup>88</sup>

The challenge posed by these states before the United States Supreme Court spurred on the United States federal government to reiterate and strengthen its position, which was that the issue was international and not domestic.

Many countries did not and could not react immediately to the radical Truman Proclamation. They did not immediately realize how it would affect their own interests. The first President of UNCLOS III noted that “(i)n 1945 the nations of the world were too enfeebled by six years of war or too pre-occupied with the pressing problem of repairing the

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<sup>85</sup> Amerasinghe, *The Third United Nations Conference on the Law of the Sea* (1974), in: UNITAR (United Nations Institute for Training and Research), UN and the Sea, UNITAR News, Vol. 6, (1974), No. 1, 2-7, reproduced in: Nordquist (ed.), *United Nations Convention on the Law of the Sea 1982. A Commentary*, Vol. 1, at p. 1.

<sup>86</sup> See Katin, *supra* note 58, at pp. 26 to 30; Shalowitz, *Shore and Sea Boundaries*, Vol. 1, 1962.

<sup>87</sup> *U.S. v. California*, 332 U.S. 19 (1947), *U.S. v. Louisiana*, 339 U.S. 699 (1950), *U.S. v. Texas*, 339 U.S. 707 (1950).

<sup>88</sup> *U.S. v. Louisiana*, *ibid.*, at p. 705, as quoted in: Shalowitz, *supra* note 86, at p. 11.

havoc of war or too dependent on the United States to challenge the doctrine or reveal its flaws”.<sup>89</sup>

The economic and security benefits of the continental shelf concept in the Truman Proclamation subsequently outweighed the ambiguities that went with it. Soon other coastal states followed suit claiming vast areas of water and seabed in the name of sovereignty and national economic needs. From the various ways in which coastal states made their claims to the continental shelf, two general juridical definitions emerged: the first type similar to the United States Truman Proclamation was based on geological contiguity; the second was based wholly upon adjacency or contiguity to the territorial sea, regardless of the existence of a natural or geological shelf.

On 28 May 1949, the Kingdom of Saudi Arabia, for example, issued a royal pronouncement on the subsoil and seabed areas of the Persian Gulf outside of its territorial sea. One scholar observed that the royal decree was “obviously inspired by the Truman Proclamation” but that it was a “broader assertion” of rights since the Persian Gulf did not have a continental shelf.<sup>90</sup> The decree thus latched on to the concept of contiguity and not to that of geological continental shelf.<sup>91</sup> Another country along the Persian Gulf, Kuwait, also issued a proclamation claiming the seabed and subsoil that lay beneath the high seas of the Persian Gulf contiguous to its territorial sea.<sup>92</sup> In 1952, in the Santiago Declaration, Chile, Ecuador and Peru asserted that,<sup>93</sup> “all countries which had no continental shelf ... claimed sole jurisdiction and sovereignty over the area of sea extending 200 nautical miles from their coast

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<sup>89</sup> Amerasinghe, *supra* note 85, p. 1.

<sup>90</sup> Young, *Saudi Arabian Offshore Legislation*, 43 A.J.I.L. (1949) 530, at p. 531.

<sup>91</sup> *Ibid.*, at p. 532.

<sup>92</sup> Kuwait Proclamation by the Rules of Kuwait of 12 June 1949, in: Office for Ocean Affairs and the Law of the Sea, *The Law of the Sea National Legislation on the Continental Shelf*, 1989, at p. 150.

<sup>93</sup> Peru had earlier issued a Presidential Decree No. 781 concerning Submerged Continental or Insular Shelf of 1 August 1947. The 1952 Declaration carried the same content as the P.D. No. 781. In 1952, Peru also issued Petroleum Law No. 11780 of 12 March 1952 referring to the continental shelf as the “zone lying between the western limit of the coastal zone and an imaginary line drawn seaward at a constant distance of 200 miles from the low-water line along the continental coast”. *Ibid.*, at pp. 218 to 219.

including sovereignty and jurisdiction over the sea floor and subsoil thereof”.<sup>94</sup>

Israel also issued the Submarine Areas Law of 10 February 1953<sup>95</sup> laying claim to the sea floor and subsoil adjacent to its shores of Israel but outside of its territorial sea up to extent of exploitability. In 1955, Iran passed legislation declaring sovereignty over the “seabed and subsoil of the submarine areas which are contiguous to the continental shelf”.<sup>96</sup>

The Act of 27 July 1956 of Venezuela Concerning the Territorial Sea, Continental Shelf, Fishery Protection and Airspace was unusual. Unlike other declarations, it included a proviso that “channels, depressions or irregularities in the sea-bed of the continental shelf shall not constitute a break in the continuity of that shelf, and banks which by position or natural conditions are related to the continental shelf”.<sup>97</sup>

Many of the unilateral declarations emphasized the legal character or status of the high seas.<sup>98</sup>

The speed with which many states claimed a juridical continental shelf facilitated the concept’s rapid acceptance by the international community. Only thirteen (13) years after the Truman Proclamation, the concept of the continental shelf had become so established and accepted that during the United Nations Conference on the Law of the Sea (hereinafter “UNCLOS I”), it merited a whole convention for itself – the 1958 Convention on the Continental Shelf.

#### **D. Codification Work and the 1958 United Nations Convention on the Continental Shelf**

The codification work of the Committee of Experts, under the auspices of the League of Nations, was interrupted during World War II. No convention on the law of the sea was produced as a result of the Committee’s work. Two years after the founding of the United Nations, the United Nations General Assembly, in Resolution 174 dated 21 Novem-

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<sup>94</sup> Amerasinghe, *supra* note 85, p. 2.

<sup>95</sup> Israel Submarine Areas Law of 10 February 1953, *supra* note 92, at p. 144.

<sup>96</sup> Katin, *supra* note 58, at p. 32.

<sup>97</sup> Venezuela Act of 27 July 1956 Concerning the Territorial Sea, Continental Shelf, Fishery Protection and Airspace, *supra* note 92, at p. 284.

<sup>98</sup> Iraq, Israel, Kuwait, Peru.

ber 1947, created the ILC to continue the codification work of the Committee of Experts.<sup>99</sup> The following subsection will deal with the work of the ILC during the 1950s, which resulted in the convening of UNCLOS I by the United Nations General Assembly.

### 1. International Law Commission

The ILC provisionally selected 14 priority topics.<sup>100</sup> Out of these, it selected three topics to be tackled first, namely, the law of treaties, arbitral procedure and the regime of the high seas.<sup>101</sup>

Initially, the continental shelf remained a sub-topic of the regime of the high seas.<sup>102</sup> However, departing radically from the marginal treatment of the continental shelf by its predecessor, the ILC viewed the codification of the concept of the continental shelf as being extremely important for economic and social reasons.<sup>103</sup> Noting the numerous unilateral declarations and proclamations made by many states, the ILC agreed that rights over the continental shelf should be recognized under international law, even those of states that had no geological continental shelf.<sup>104</sup>

In the beginning, the ILC could not agree on a definition of the continental shelf. Its First Report referred to the concept as an area of the “seabed and subsoil of the submarine areas situated outside [its] territorial waters” and as such limited in scope, unless “the depth of the waters permitted exploitation”.<sup>105</sup>

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<sup>99</sup> U.N. General Assembly, Official Records, 4<sup>th</sup> Sess., Supp. No. 10 (A/925), 24 June 1949.

<sup>100</sup> Report of the International Law Commission Covering its First Session, April 12-June 9, 1949, U.N. General Assembly, Official Records, 4<sup>th</sup> Sess., Supp. No. 10 (A/925), 24 June 1949, reprinted in: 44 A.J.I.L. Supplement of Documents No. 1, (1950), 1-21, at p. 6.

<sup>101</sup> *Ibid.*, at p. 7.

<sup>102</sup> Report of the International Law Commission Covering its Second Session, June 5-July 29, 1950, U.N. General Assembly, Official Records, 5<sup>th</sup> Sess., Supp. No. 12 (A/1316), reprinted in: 44 A.J.I.L. Supplement of Documents No. 4, (1950), 105-148, at p. 148.

<sup>103</sup> *Ibid.*

<sup>104</sup> *Ibid.*

<sup>105</sup> *Ibid.*

During the third session of the ILC in 1951,<sup>106</sup> the Rapporteur of the Regime of High Seas submitted the first draft articles concerning the continental shelf (1951 Draft). Article 1 of the 1951 Draft provided that

[t]he ‘continental shelf’ refers to the sea bed and subsoil of the submarine areas contiguous to the coast, but outside the area of territorial waters, where the depth of the superjacent waters admits of the exploitation of the natural resources of the sea bed and subsoil.<sup>107</sup>

The ILC emphasized that the term “continental shelf” was not used in its geological sense. Such would not be justified in that case of areas beyond the geological continental shelf but where the “depth of the sea would nevertheless permit exploitation of the subsoil in the same way as if there were a continental shelf”.<sup>108</sup> Hence, the term “continental shelf” did not only mean continental shelf in the geological sense but also included other types of submarine areas including submarine areas of islands.<sup>109</sup>

With respect to depth, the ILC considered a limit of up to 200 metres but decided against it because “technical developments in the future might make it possible to exploit resources of the seabed at a depth of over 200 metres”.<sup>110</sup>

The 1951 formulation received criticism from governments<sup>111</sup> and was changed in 1953 to read as follows:

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<sup>106</sup> Report of the International Law Commission Covering the Third Session May 16-July 27, 1951, U.N. General Assembly, Official Records, 6<sup>th</sup> Sess., Supp. No. 9, Doc. A/1858, reprinted in: 45 A.J.I.L. Supplement of Documents, No. 4, (1951), 103-147 at p. 139.

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.*, at pp. 139 to 140.

<sup>109</sup> *Ibid.*, at p. 140.

<sup>110</sup> *Ibid.*

<sup>111</sup> The following governments submitted observations regarding the 1951 Draft: Belgium, Brazil, Chile, Denmark, Ecuador, Egypt, France, Iceland, Israel, The Netherlands, Norway, the Philippines, Sweden, Syria, the Union of South Africa, the United Kingdom of Great Britain and Northern Ireland, the United States of America, and Yugoslavia. Report of the International Law Commission Covering the Work of its Fifth Session June 1-August 14, 1953, U.N. General Assembly, Official Records, 8<sup>th</sup> Sess., Supp. No. 9 (A/2456), reprinted in: 48 A.J.I.L. Supplement of Documents No. 1, (1954), 1-72, at p. 27.

The term continental shelf refers to the sea bed and subsoil of the submarine areas contiguous to the coast, but outside the territorial sea to a depth of 200 metres.<sup>112</sup>

The ILC defended the change by taking the view that the 200 metre limit was where the geological continental shelf usually came to an end and that the technology at that time was capable of exploiting the shelf up to this depth.<sup>113</sup> States without a geological continental shelf, according to the ILC, could still claim rights over submarine areas up to the same limit of 200 metres.<sup>114</sup>

The limit of 200 metres was considered arbitrary by many. In 1956 the ILC elected to leave such decisions to the coastal states. They were to decide which limit was best for them: a limit of 200 metres or a limit beyond 200 metres up to the depths where exploitation was possible.<sup>115</sup>

## 2. The First United Nations Conference on the Law of the Sea

After ten (10) years of work, the ILC submitted its report on the inter-related issues of the uses of the sea and its maritime zones to the United Nations General Assembly in 1957. The UN General Assembly then passed UNGA Resolution No. 1105 (XI), requesting the Secretary-General of the United Nations to prepare and convene a conference dedicated to the law of the sea, a conference which became popularly known as UNCLOS I.<sup>116</sup>

Despite its analysis of the interrelatedness of ocean issues, the ILC did not submit a comprehensive draft convention, but instead, submitted several draft conventions covering a range of topics. Based on the draft conventions, UNCLOS I adopted four conventions: the Convention on

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<sup>112</sup> *Ibid.*

<sup>113</sup> ILC Report 1951, *supra* note 106, at p. 30.

<sup>114</sup> *Ibid.*, at pp. 30 to 31.

<sup>115</sup> Katin, *supra* note 58, at p. 66.

<sup>116</sup> U.N.G.A. Resolution 1105 (XI), General Assembly of the United Nations Convening the Conference, 658<sup>th</sup> Plenary Meeting, 21 February 1957, reprinted in: *United Nations Conference on the Law of the Sea*, Official Records, Vol. II, Plenary Meetings, A/CONF.13/38, Geneva, 24-27 April 1958, at p. XI.

the Territorial Sea and Contiguous Zone,<sup>117</sup> the Convention on the High Seas,<sup>118</sup> the Convention on Fishing and Conservation of the Living Resources of the High Seas<sup>119</sup> and the Convention on the Continental Shelf (hereinafter the “1958 Convention”).<sup>120</sup>

### 3. The 1958 Convention on the Continental Shelf

The ILC definition of and limits to the juridical continental shelf were principally retained in Article 1 of the 1958 Convention which provides that:

the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; and also to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.

It may be recalled that in 1956 the ILC combined the 1951 and 1953 proposed limits of 200 metres or beyond down to the depths where exploitation remained possible.<sup>121</sup> The ILC proposed these combined limits in its Draft Articles on the Continental Shelf submitted for consideration at UNCLOS I; this combination was carried to the final convention.<sup>122</sup>

In addition to establish a definition and limits, the 1958 Convention also clarified the nature of the right of a coastal state over its continental shelf. In paragraphs 2 and 3 of Article 2, the rights of a coastal state over its continental shelf are exclusive and do not depend on occupation, effective or notional, or on any explicit proclamation.

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<sup>117</sup> Adopted 29 April 1958, entry into force 10 September 1964, United Nations, *Treaty Series*, Vol. 516, p. 205.

<sup>118</sup> Adopted 29 April 1958, entry into force 30 September 1962, United Nations, *Treaty Series*, Vol. 450, p. 11.

<sup>119</sup> Adopted 29 April 1958, entry into force 20 March 1966, United Nations, *Treaty Series*, Vol. 559, p. 285.

<sup>120</sup> Adopted 29 April 1958, entry into force 10 June 1964, United Nations, *Treaty Series*, Vol. 499, p. 311.

<sup>121</sup> Katin, *supra* note 58, at p. 66.

<sup>122</sup> *Ibid.*

The exploitability factor as one of the limits of the continental shelf was both a strength and weakness of the 1958 Convention. It afforded flexibility to states who might one day acquire technology to exploit the continental shelf beyond 200 metres.<sup>123</sup> However, it also meant that there were actually no real limits to the juridical or legal continental shelf. The exploitability factor was criticized, in particular as regards the delimitation of overlapping shelves.<sup>124</sup>

The 1958 Convention was ratified by 58 states. It remains valid for very few of them as most member states then ratified the 1982 Convention which between states parties, prevails over the Geneva Conventions on the Law of the Sea of 29 April 1958.<sup>125</sup>

### E. Views of Experts

In its early stages the concept of the continental shelf attracted the attention of many experts in public international law. Although it was not the only central issue in the law of the sea between 1945 and the 1960s, it was the newest compared concepts employed in relation to other maritime zones (with the exception of the exclusive economic zone which was introduced only during UNCLOS III). It attracted attention not only because it was a new concept, however, but also because it involved a radical shift in the zoning of maritime areas. Moreover, since the juridical continental shelf was supposed to sit on the seabed of the high seas, it thus stood to affect a very traditional and fundamental principle of the law of the sea: the freedom of the seas. This section discusses the various issues concerning the continental shelf subsequently raised by experts.

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<sup>123</sup> *Ibid.*

<sup>124</sup> Mouton, *The Continental Shelf*, 1952.

<sup>125</sup> Article 31, paragraph 1, Convention. The 1958 Continental Shelf Convention remains valid for the following states that have not ratified nor acceded to the Convention: Belarus, Cambodia, Colombia, Dominican Republic, Israel, Lesotho, Malawi, Switzerland, Thailand, United States of America and Venezuela. However, some of these states, the United States, in particular, consider the Convention as containing customary international law of the sea.

### 1. Impact on the Freedom of Navigation

Colombos argued that were structures to be erected in the continental shelf for oil exploration or exploitation purposes, such structures would definitely affect navigation in the high seas.<sup>126</sup> He noted that although many of the unilateral state declarations on or claims to the continental shelf were qualified with guarantees to respect and to protect the freedom of navigation, and thus could be considered in accordance with international law, such qualifications were nevertheless of dubious worth.<sup>127</sup> He concluded that, “[i]t may therefore be doubted whether the right to unilateral occupation of the bed of the sea over extended areas can be regarded as established in international law, in any case where such occupation entails the setting up upon the high seas of installations inconsistent with the common right of free navigation”.<sup>128</sup>

Smith found nothing objectionable about the 1945 Truman Proclamation or the other unilateral state declarations, describing them as “nothing more than the assertion of a legitimate interest”.<sup>129</sup> His view was qualified, however, by the proviso that such claims would be asserted only when “they can be implemented by effective occupation”.<sup>130</sup> His position therefore was different from the “notional” concept of the continental shelf in that it did not require occupation or usage of the continental shelf by the coastal state in order to be valid. He was even of the opinion that the same rights to the continental shelf could be extended to “shallow” beds that were not strictly speaking part of the continental shelf.

### 2. The Continental Shelf as “Instant Custom”

The many unilateral state declarations prompted one famous expert to assert as early as 1950 that the concept of the continental shelf had de-

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<sup>126</sup> Colombos, *supra* note 83, at pp. 58 to 59; Colombos, *The International Law of the Sea*, 4<sup>th</sup> revised edition, 1959, at pp. 63 to 64. He took the same position in later editions of the book.

<sup>127</sup> Colombos, *The International Law of the Sea*, 5<sup>th</sup> revised edition, 1962, at p. 71.

<sup>128</sup> *Ibid.*

<sup>129</sup> Smith, *The Law and Custom of the Sea*, 3<sup>rd</sup> edition, at p. 83.

<sup>130</sup> *Ibid.*

veloped into customary international law. Lauterpacht derived his view of the continental shelf as “instant” custom not only from the increasing number of unilateral state declarations, but also and especially because of the practice of two maritime states: the United States of America and the United Kingdom.<sup>131</sup> He further noted the absence of protests from other states.<sup>132</sup>

Oda, however, disagreed with Lauterpacht’s view that the continental shelf had become “instant” custom. Indeed, he thought it misplaced. He argued that “(t)he question here is not one of customary law concerned but what basic legal order is to be applied to the submarine area”.<sup>133</sup> The fact that many unilateral declarations elicited no protest from other states perhaps only meant, according to Oda, that these “claims did not directly infringe upon the interests of other states at the time.”<sup>134</sup> He writes, “(t)he legal doctrine that any area limited by certain natural conditions is capable of being acquired, either by a single proclamation or by a repetition of proclamations, is a dubious attempt to leave the law to geologists”.<sup>135</sup>

O’Connell concludes that many major developments in the law of the sea were the results of unilateral state actions. The continental shelf is not the only concept to emerge from unilateral state actions. The concepts of exclusive economic zone and fishery zone can also traced back to unilateral state actions. O’Connell reminds us that no legal concept develops out of thin air. He draws also attention to the behind-the-scenes diplomacy that the United States engaged in to ensure that its unilateral state proclamation on the continental shelf would enjoy the support of many states.<sup>136</sup>

MacDougal and Burke observe that “events have already largely precluded any other system of allocation”.<sup>137</sup> After the 1945 Truman Declaration, many other states followed and made unilateral declarations

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<sup>131</sup> Lauterpacht, *Sovereignty over Submarine Areas*, 27 B.Y.B.I.L. (1950), at pp. 376 and 394.

<sup>132</sup> *Ibid.*

<sup>133</sup> Oda, *International Control of Sea Resources*, Reprint with a new introduction, 1989, at p. 153.

<sup>134</sup> *Ibid.*

<sup>135</sup> *Ibid.*

<sup>136</sup> O’Connell, *supra* note 58, at pp. 31 to 32.

<sup>137</sup> MacDougal/Burke, *supra* note 9, at p. 634.

claiming the exclusive right to benefit from the resources of the continental shelf. Not only was there an absence of protest from other coastal states as other experts have observed, but other coastal states then likewise proceeded to make known their own claims of exclusive competence over the continental shelf adjacent to their territories. The notion that exclusive state control of the continental shelf had attained considerable acceptance and stability and therefore that it should not, indeed could not, be further modified, was a notion successfully employed by broad-margin states during the negotiations at UNCLOS III.

### 3. Conceptual Ambiguities

Oda decries the lack of critical and significant discussion among international lawyers on the legal nature and status of the concept of the continental shelf.<sup>138</sup> He observes that when the concept of continental shelf emerged, there was nothing in international law to prevent states from making laws for the exploitation of natural resources.<sup>139</sup> From this he follows that the “right of any state to engage in the exploitation of resources in the submarine areas needs no new doctrinal justification”.<sup>140</sup>

He disagrees with the view of some experts that the continental shelf was “*ipso jure* subject to the jurisdiction of the coastal state within the ambit of positive international law”.<sup>141</sup> The latter argument is based on a geological understanding of the continental shelf as linked to the land-mass of the coastal state. However, Oda argues that the concept of the continental shelf simply did not exist in positive law prior to 1945.<sup>142</sup> The “*ipso jure*” argument of the continental shelf, therefore, does not make legal sense to him.

Oda also criticizes the “*res nullius*” argument of the continental shelf. According to this argument, the continental shelf is an area potentially

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<sup>138</sup> Oda, *supra* note 133, at p. 150.

<sup>139</sup> *Ibid.*

<sup>140</sup> *Ibid.*

<sup>141</sup> *Ibid.*, at p. 152.

<sup>142</sup> *Ibid.*

subject to possession.<sup>143</sup> He points out, however, that the *res nullius* concept required that the coastal state taking possession or occupation of an area of the continental shelf had to do so effectively.<sup>144</sup> Effective occupation, however, was not possible for those states that lacked the necessary corresponding technology. The concept of “notional occupation” was therefore introduced. But according to Oda, even this concept, still presumed the prior existence of the continental shelf, which was untenable.<sup>145</sup>

However, as pointed out earlier, the ILC, the body that prepared the draft of the 1958 Convention employed the concept of “notional occupation”. Both the ILC and the numerous states that responded to the queries of the ILC regarding the proper legal status or nature of the continental shelf did not realize the conceptual inconsistencies, as Oda pointed out; or they clearly understood that they were breaking with the traditional framework of the law of the sea. The second possibility seems to have been the correct answer given that in UNCLOS III the international community adopted the concept of the continental shelf as not only notional but even as an inherent right of coastal states.

## F. Concluding Remarks

After the 1958 Convention, acceptance of the concept of the continental shelf as law was longer in doubt. Its incubation period as a legal concept was very short. Many of the factors that contributed to its development were political and economic.

Despite all the different contributory factors that led to its swift acceptance by the international community, the concept itself remained ambiguous. There was no uniform state practice in terms of its definition or its limits. The lack of clearly defined outer limits to the continental shelf under Article 1 of the 1958 Convention was understood by some to be evidence of the concept’s flexibility. However, it also created uncertainties.

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<sup>143</sup> *Ibid.*

<sup>144</sup> *Ibid.*

<sup>145</sup> *Ibid.*



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