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DAVID ATTARD

THE EXCLUSIVE ECONOMIC ZONE IN INTERNATIONAL LAW

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DAVID JOSEPH ATTARD

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Preface

THE primary purpose of this study is to present a concise study of the exclusive economic zone as developed at the Third United Nations Conference on the Law of the Sea and through State practice. Particular emphasis is given to its basic character, its constitutive elements relating to the coastal State's competence within the zone, and its relationship with other aspects of the law of the sea, such as the high seas and the continental shelf. The secondary purpose is to examine the process through which the exclusive economic zone entered the realm of customary international law and the role of the aforesaid United Nations Conference in that process.

The exclusive economic zone is undergoing a rapid and dynamic evolution. Consequently, the author was constrained to consider relevant developments occurring only up to 25 May 1985.

D.J.A.

Salt Room,
Pembroke College,
Oxford,
25 May 1985

Editor's Preface

IT is difficult to exaggerate the significance of the exclusive economic zone both as a component of the modern law of the sea and in political and material terms. In spite of the heat generated by the subject-matter, the resources of the sea-bed 'beyond the limits of national jurisdiction' are not yet practically available for exploitation. It is therefore the zones of sea-bed and the water column adjacent to coastal States which will continue to provide the major focus of interest both in the short and long runs.

The importance of the exclusive economic zone has been evident for some time, but has not been adequately reflected in the literature of the law. Dr Attard's balanced and comprehensive treatment is thus particularly welcome. Both the text and the careful documentation are remarkable in according a proper role not only to the work of the Third United Nations Conference on the Law of the Sea but also to the practice of States and the pertinent aspects of the customary law.

IAN BROWNLIE

All Souls College,
Oxford
4 April 1986

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THROUGHOUT the course of my research on this study, I had the privilege to work under two international lawyers who held the title of Chichele Professor of Public International Law at All Souls College. I initiated my work under the late Professor D. P. O'Connell, QC, who guided me through my early days at the University of Oxford. To him I owe a debt of thankfulness for his interest in my work and his support. After his untimely passing away, Professor I. Brownlie,QC, the current holder of the Chichele Chair, accepted to act as my supervisor. I am sincerely grateful to him for his constant guidance, encouragement, and inspiring suggestions. I would also like to express my thanks to the staff of Pembroke College, particularly the late Sir Geoffrey Arthur, Mr D. D. Prentice, and Dr N. Mann for their valuable counsel and support.

My stay and studies at the University of Oxford would not have been possible without a scholarship awarded to me by the British Council and the support of its former Representative in Malta, Mr H. Salmon. Furthermore, I have to express my appreciation to the staff, at all levels, of the following institutions for their assistance over the years: Bodleian Library, Codrington Library, Food and Agriculture Organization, Institute of Advanced Legal Studies, International Court of Justice, International Maritime Organization, Pembroke College Library, United States Geographer's Office, and the University of Malta Library.

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The Historical Background and Development of the Exclusive Economic Zone Concept

1. INTRODUCTION

AFTER World War II, a growing number of States put forward claims to extend their authority, for a number of purposes (particularly resource-control), over vast marine areas off their coasts. The introduction of the exclusive economic zone[1] concept, in the early seventies, was a consequence of this practice and of an attempt to reconcile it with the interests of the international community, such as freedom of navigation. In practical terms, the EEZ represents an endeavour to solve the classic *mare clausum/mare* dilemma.

The Third United Nations Conference on the Law of the Sea[2] provided an ideal forum wherein most States could participate in the development of the EEZ concept. Its elaboration in the Conference's texts and the consensus evolved at the Conference stimulated States to establish, away from the Conference table, EEZs in a manner which they felt was consistent with the accepted trends at the Conference, whilst deferring controversial issues. This general practice, largely in conformity with certain provisions of the said texts, has transformed the EEZ concept into customary law and is reflected in a number of provisions found in the 1982 United Nations Convention on the Law of the Sea.[3]

In this chapter it is proposed to trace the developments, between 1945 and the beginning of the UNCLOS III, which led to the introduction of the EEZ concept. The role of UNCLOS III in the development and elaboration of the EEZ will be examined in Chapter 2.

2. THE TRUMAN PROCLAMATIONS

In 1945 the growing realization of the importance of offshore resources led the United States to assert control over an area which was previously con-

[1] Hereafter referred to as the EEZ.
[2] Hereafter referred to as UNCLOS III.
[3] Hereafter referred to as CLOS.

sidered to be international.[4] Prior to 1945, the division of the sea into the territorial sea and the high seas, with an overlapping contiguous zone, had been accepted. Ironically, it was the United States, one of the staunchest supporters of the 3-n.m. territorial sea doctrine, that opened an era of extensive maritime claims.[5] President Truman issued two proclamations, the catalytic effect of which was not due solely to the United States' political weight but also to the rapid developments in the exploitation techniques of the sea-bed and fisheries. Through the Proclamation with Respect to the Natural Resources of the Subsoil and Sea-bed of the Continental Shelf, the United States claimed the natural resources of the subsoil and sea-bed of the shelf 'beneath the high seas but contiguous to' its coasts, to be 'subject to its jurisdiction and control'.[6] While no outer shelf boundary was specified, an accompanying White House release indicated a 100-fathom isobath (200 metres) as determinative of the limit,[7] a move clearly intended to prevent other States from approaching closer to the coasts of the United States for the purpose of exploiting submarine mineral resources.

Through the Proclamation with Respect to Coastal Fisheries in Certain Areas of the High Seas, the United States proposed the establishment of fishery-conservation zones in waters contiguous to its coast but beyond the 3-n.m. territorial sea. These zones were to be regulated and controlled by the United States where fishing was carried out by nationals, and by joint State management where nationals of other countries were also engaged in fishing activities. The Proclamations emphasized that the character as high seas of the waters above the shelf or the area in which conservation zones are established 'and the right to their free and unimpeded navigation are in no way thus affected . . .'.

It is noteworthy that the second Proclamation was never applied. Nevertheless, the introduction of these Proclamations marked a turning-point in the law of the sea by encouraging other States to establish extensive maritime claims.[8] They afforded the plausible grounds for enlarging States' offshore control. However, whilst the Proclamations were carefully drafted to balance the rights of concerned States within the high-seas regime, the same cannot be said for most of the bolder initiatives they provoked.

The United Kingdom advanced claims to submarine areas off its dependent territories by extending their boundaries to include the continental shelf contiguous to their coasts. By the Petroleum Act of 1945, for example, the Bahamas legislature obliged foreign companies, which obtained leases and

[4] Bingham, 40 *AJIL* (1946), pp. 173–7.
[5] Briggs, *The Law of Nations* (1953), pp. 377–9.
[6] See also Australia: Shelf Proclamation (1953).
[7] 13 *Dept. of State Bull.* (1945), p. 484.
[8] Scelle remarked in 1955: 'Il paraît impossible de nier la virulence de la germination de la semence américaine de 1945.' 59 *RGDIP* (1955), p. 9.

licences for oil exploration off its coast, to acquire its nationality and to submit to its jurisdiction.[9] The Act was followed by an Order in Council,[10] which extended the boundaries of the Bahamas so as to include the shelf extending beneath the sea contiguous to its shore. Provision was made for this extension not to affect the high-seas character of the waters above. In 1949, British-protected Arab States issued claims declaring the solum, beneath the high seas adjacent to their territorial sea, to be subject to their jurisdiction and control.[11] Disclaimer was made of any intent to affect the high-seas character of the superjacent waters or to interfere with navigation, fishing, or pearling.

3. EARLY LATIN AMERICAN CLAIMS

(A) UNILATERAL CLAIMS

In contrast with the Truman Proclamations, most Latin American States revived the earliest formulations of the 'doctrine of the continental shelf', and claimed sovereignty over the shelf and the waters above. Indeed, the first introduction of the shelf concept in international-law discussions was based on the theory that the waters above the shelf were of the utmost importance to fisheries.[12] This relationship was formulated as early as 1916 by Captain Storni, who had emphasized the shelf's importance to fisheries in the 'Argentinian Sea' and the need for adequate controls.[13]

In 1918 de Buen, the Spanish oceanographer, maintained that the continental shelf should belong to the coastal State, because it is a continuation of it 'and the land has an even greater influence on it than the sea'. Arguing from the fact that: 'the sedentary species are, so to speak, domiciled there—species that support the local fishing industry on which the greater part of the activities of the coastal population depends', he proposed the extending of the territorial sea to include the whole continental shelf.[14]

Professor J. L. Suárez of Argentina, in the same year, stressed further the scientific and economic aspects of this theory. In a series of lectures in São Paulo, he urged the extension of the territorial sea on the grounds that: 'trade requires it and, above all, fishing, whaling and sealing, as the life cycle of the most valuable species gravitates between the territorial sea and the open sea,

[9] Vallat, 23 *BYIL* (1946), pp. 333–8.

[10] *Alteration of Boundaries*, Order in Council No. 2574 (1948).

[11] Bahrain: Proclamation (1949); Kuwait: Proclamation (1949); Qatar: Proclamation (1949); Saudi Arabia: Royal Pronouncement (1949); UAE—Abu Dhabi: Proclamation (1949); Ajman: Proclamation (1949); Dubai: Proclamation (1949); Ras al-Khaimah: Proclamation (1949); and Sharjah: Proclamation (1949). See El-Hakim (1979), pp. 31 ff.

[12] Mouton, *The Continental Shelf* (1952), p. 46.

[13] *Intereses argentinos en el mar* (1916), p. 38.

[14] Azcárraga, *Plataforma submarina* (1952), p. 157; Green, *CLP* (1951), p. 57.

which are separated from each other only by an imaginary man-made barrier but constitute by their nature and form a single continuous whole.'[15] This trend of thought was maintained on subsequent occasions. Thus, for example, de Magalhaes in his comments on Schucking's 1926 Report on Territorial Waters, proposed a 12-n.m. territorial sea, in view of the studies by Admiral d'Eca regarding the presence of species found in the shelf's superjacent waters.[16]

These formulations of the shelf theory served as a basis for the early Latin American claims to an epicontinental sea, thereby discarding the approach which differentiated between living and non-living resources. The Mexican Executive, in its proposed 1945 amendment to the Constitution, Article 27, held that: 'direct dominion over the continental shelf and the submarine terraces belongs to the nation ... the waters of the seas over the continental shelf and submarine terraces are also the property of the nation ...'.[17] In 1946, Argentina issued Decree No. 14,708 Concerning National Sovereignty over the Epicontinental Sea and the Continental Shelf, which described the waters over the shelf—the epicontinental sea—as: 'transitory zones of mineral reserves ... characterized by extraordinary biological activity, owing to the influence of the sunlight, which stimulates plant life (as exemplified in algae, mosses etc.) and the life of innumerable species of animals, both susceptible of industrial utilization'.[18] Then, in an obvious misconstruction of the Truman Proclamations, Argentina declared that:

> whereas ... the governments of the United States and of Mexico have issued declarations asserting the sovereignty of each of the two countries over the respective peripheral epicontinental seas and continental shelves ... it is hereby declared that the Argentina Epicontinental Sea and Continental Shelf are subject to the sovereign power of the Nation ...

The Declaration did, however, specify that the 'character' of the waters in question would remain unaffected for the purpose of 'free navigation'.

Panama in its 1946 Constitution proclaimed State ownership over both the territorial sea and the shelf. However, Decree 449 (1946) proclaimed 'national jurisdiction for the purpose of fishing in general' over its territorial sea and the superjacent waters of the shelf. All fisheries, which it considered a 'national product' within these limits, were subjected to the provisions of national legislation. The Congress of Nicaragua on 1 May 1947 adopted a

[15] El mar territorial y las industrias marítimas, *Diplomacia universitaria americana* (1918), p. 172.

[16] Committee of Experts for the Progressive Codification of International Law (Doc. C 44 M 21. (1926), V, p. 14).

[17] García Amador, *Resources* (1959), p. 71.

[18] Decree No. 1386 (1944) declared to be temporary zones of mineral reserves 'the coasts of oceans and the Argentinian epicontinental sea', that is, the waters superjacent to the continental shelf and the sea-bed and subsoil thereof.