R.P. ANAND
(editor)

LAW OF THE SEA
CARACAS AND BEYOND

DEVELOPMENTS IN INTERNATIONAL LAW

3

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CARACAS AND BEYOND

edited by

RAM PRAKASH ANAND

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PREFACE

This book essentially contains the papers presented at the Seminar held in December 1976 in the International Legal Studies Division of the School of International Studies, Jawaharlal Nehru University, New Delhi. However, the papers have been revised to cover later developments. Although the Third United Nations Conference is going on and the law that may finally emerge is still uncertain, there is little doubt that there is already apparent a sea change in the traditional law of the sea. Old dogmas have come to be discarded and new practices amongst states have led to emergence of new usages and customs. It is to take stock of these changes and to understand the recent developments in the law of the sea that the present all-India Seminar was organised. Since the sea has various facets to be studied—geography, marine geology, marine biology, marine science, apart from its military uses, politics and economics—we invited scholars from various fields in order to make it, as far as possible, a multi-disciplinary approach to the study of the new emerging law of the sea.

I am deeply obliged to Professor B.D. Nag Chaudhuri, former Vice-Chancellor of Jawaharlal Nehru University, for his kind help, encouragement and active participation in the Seminar. I am also indebted to my friends and colleagues in the Division of International Law, Dr Rahmatullah Khan and Dr V.S. Mani, for all their support and help in organising the Seminar and later in editing the papers. My heartfelt thanks are also due to the various contributors who readily responded to our request to write their papers and later revise them for publication.

Ram Prakash Anand

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EDITOR'S INTRODUCTION

Ever since Arvid Pardo, Malta's representative to the United Nations, startled much of the international community with his unique proposal that the UN declare the seabed and ocean floor "underlying the seas beyond the limits of present national jurisdiction" to be "the common heritage of mankind," and not "subject of national appropriation in any manner whatsoever," the nations of the world are busy in attempting to build on a largely outdated and outmoded existing oceanic law a regime to govern the ever-increasing uses of the oceans and their resources.[1] In a very comprehensive, well-documented and forthright speech before the First Committee of the General Assembly on 1 November 1967, Pardo referred to the rapid technological progress made by a few advanced countries which had made it possible to exploit the tremendous resources, far greater than the resources known to exist on dry land, of the sea-bed and of the ocean floor. The area, he pointed out, was also, of vital and increasing strategic importance and technology permitted its effective exploitation for military and economic purposes. Some countries might be tempted, he apprehended, "to use their technical competence to achieve near-unbreakable world dominance through predominant control over the seabed and the ocean floor." Indeed, the process had already started, he informed the committee, "and will lead to a competitive scramble for sovereign rights over the land underlying the seas and oceans, surpassing in magnitude and in its implication last century's scramble for territory in Asia and Africa."[2] In order to avoid the situation from becoming grave leading to sharply

[1] See *Note Verbale* dated 17 August 1967, from Permanent Mission of Malta to the UN to the Secretary General Doc. No. A/6695, *UN General Assembly, Official Records,* 22nd Session, Agenda item 92, Annexes (1967), p. 1.

[2] *UN General Assembly Official Records,* 22nd Session, First Committee, 1515th Meeting, 1 November 1967, p. 12.

increasing tensions, he suggested that "claims to sovereignty over the seabed and ocean floor beyond present national jurisdiction ... should be frozen until a clear definition of the continental shelf is formulated," and this "common heritage of mankind" should be used for peaceful purposes and its resources " exploited primarily in the interests of mankind, with particular regard to the needs of the poor countries."[3] The establishment of an effective international regime over the seabed and the ocean floor beyond a clearly defined national jurisdiction, he felt, was the only alternative by which the international community could avoid the escalating tensions that would be inevitable if the present situation was allowed to continue.[4]

Pardo's essentially internationalist approach was heralded by many as an idea whose time had come, and provided the impetus for convening, in 1973, of the Third United Nations Conference on the Law of the Sea, which has been described as "one of the most significant negotiations in diplomatic history."[5] But, despite three years of detailed and comprehensive discussions in the General Assembly's Seabed Committee (1968-70), three years of preparation for the conference (1971-73), and seven long and tiring sessions of the conference until May 1978, the countries are far from having achieved an agreement. The complexity of the problems overwhelmed the 2000 delegates of 137 governments who met for ten weeks in the summer (20 June-29 August) of 1974 in Caracas, Venezuela, for the first substantive session. The same has proved true of the six sessions held since then. The official goal of these long series of discussions is to prepare a single treaty which is both "comprehensive" and "widely accepted." It has been correctly pointed out, however, that "defining success in such terms virtually ensures that the third law of the sea conference will 'fail' to carry out its official goal." With twenty-five agenda items (embracing sixty-three categories of major and controversial issues), and such a large number of participants with widely conflicting interests and numerous pressure groups, "a

[3] Ibid., 1516th Meeting, 1 November 1967, p. 2.
[4] Ibid., p. 1.
[5] Henry A. Kissinger, "The Law of the Sea: A Test of International Cooperation," Speech of 8 April 1976 before the Foreign Policy Association in New York, p. 3.

detailed treaty could not be widely accepted and a widely accepted treaty could not be comprehensive."[6]

The accelerating forces of modern international society have brought to forefront the overwhelming problem of establishing new regulations for the watery two-thirds of the earth. While all governments acknowledge that the peace of the world and mankind's very future are at stake, the powerful competing interests at work and attempts to solve all the technical problems of the future, real or imaginary, have led to almost insurmountable whirlpool of details and difficulties. Although we urgently need a global regime of rules and procedures for the peaceful development of our planet's last frontier, one result of the present debate and controversy has been a plethora of widening claims and counter-claims for jurisdiction and control of vast areas of the oceans. The situation about the law of the sea has become as fluid as its waters. There are no effective regulations today against unilateral extensions of national controls seaward, or for sensible conservation of fisheries, or against use of the oceans as the world's greatest garbage dump. While the new conference has yet to provide the necessary agreement on various issues, the old law has already lost much of its validity and respectability and is giving place to new emerging law. Recent changes in international society have already led to new practices amongst states, and new usages and customs are emerging. While nobody can be sure about the legal validity or value of these practices, and the details of the law that will ultimately emerge are uncertain, what is certain is that the old outmoded law has been cast aside and almost thrown into the void. New law is taking the place of old dogmas. It is to discuss these changes and to understand the trends in the development of new law at the Third UN Conference of the Law of the Sea that the present seminar was organized.

It is important to note that while at the First UN Conference on the Law of the Sea in 1958, the negotiations began with a single negotiating text prepared beforehand by the International Law Commission, there was no negotiating text at the Third

[6] Ann R. Hollick, "The Third UN Conference on the Law of the Sea: Caracas Review," in Ryan C Amacher and Richard James Sweeney, ed., *The Law of the Sea: U.S. Interests and Alternatives* (Washington, D.C., 1976), p. 123.

UN Conference in Caracas. Although general discussions on various aspects of the law of the sea had been going on for a number of years at the General Assembly's Seabed Committee and the Assembly had passed in 1970 a resolution unanimously declaring certain general "Principles Governing the Seabed and the Ocean Floor, and the Subsoil Thereof beyond the Limits of National Jurisdiction" (Res. 2749(XXV)), at Caracas numerous countries submitted various proposals on different aspects of the law of the sea making the confusion worse confounded. It was only during the second substantive session held in Geneva in April-May 1975, that the Chairmen of the Three Main Committees of the conference were requested to prepare a Single Negotiating Text (SNT) on the basis of the proposals submitted by different delegations and taking into account the formal and informal discussions held until then. The three Committee Chairmen reduced a wide variety of differing proposals into one three-part Informal Single Negotiating Text.[7] Although it was not really a negotiated text or accepted compromise, it was supposed to and did reflect an emerging trend and the possible direction in which a compromise might be found. In the light of further negotiations the SNT was revised at the fourth Session of the conference in 1976, and the three Committee Chairmen prepared the Revised Single Negotiating Text (RSNT).[8] This, in turn, was further revised at the sixth session in 1977 in the form of an Informal Composite Negotiating Text (ICNT).[9] Although, as we have said, these texts are not negotiated texts or final agreements, several countries have started changing their national laws in the light of consensus that seems to be emerging from these texts, especially in regard to coastal maritime jurisdictions. This trend in state practice has led to what we have described as erosion of traditional international law.

Winds of Change in Law of the Sea

Convinced that international law is a living discipline evolving

[7] UN Doc. A/CONF.62/WP. 8, Pts. I, II and III.
[8] UN Doc. A/CONF.62/WP. 8, Rev. 1, Pts. I, II and III.
[9] See A/CONF. 62/WP. 10, 15 July 1977 and A/CONF. 62/WP. 10/Add. 1, 22 July 1977.

continuously in the light of new situations, we started the seminar with a general review of the "winds of change in the law of the sea."

It is all too well known that for more than three centuries and a half all the law on and about the sea was summed up in what is known as "freedom of the seas." Ever since a young Dutch Jurist, Hugo Grotius, published a treatise (in 1609) appealing "to the civilized world for complete freedom of the high seas for the innocent use and mutual benefit of all," the doctrine has held its sway. Although the doctrine did not go unchallenged and the controversy continued for over 200 years, the concept of the freedom of the seas gradually won widespread acceptance as being in the common interest of all nations. Grotius argued with simple and disarming logic. "The sea is common to all," he said, "because it is so limitless that it cannot become a possession of any one, and because it is adapted for the use of all, whether we consider it from the point of view of navigation or of fisheries."[10] Since then, however, we have learned that the sea can be occupied and its resources can be exhausted. With the steady increase in ocean uses, especially commerce, in the nineteenth century, freedom of the seas also came to be qualified by the concept of "reasonable use," implying basically respect for the rights of others. But apart from a narrow belt of territorial waters within coastal state jurisdiction and a few minor "rules of the road" that came to be developed, the whole watery five-sevenths of the globe remained an area of "no-law," free for all to exploit as they wished until almost the close of the nineteenth century.

It was only in the twentieth century with its discoveries of important resources and a sharp rise in all ocean uses generally that the accepted norms of behaviour and unlimited freedom of states came to be found inadequate and their validity began to be eroded rapidly. Customary law, dependent on slow incremental growth, could no longer move fast enough to provide acceptable solutions to new problems. The coastal states, finding their fisheries resources near their shore increasingly threatened by larger and better-equipped ships of distant-water

[10] Hugo Grotius, *Mare Liberum or The Freedom of the Seas,* translated by Ralph Van Deman Magoffin and edited by James Brown Scott (New York, 1916), p. 28.

fishing states, sought to protect them by extending their national authority in waters adjacent to their coast and beyond. The most contentious issue of the period between 1920 and 1960 was the limit of the territorial sea as it pertained to jurisdiction over coastal fisheries. States like the United Kingdom and Japan, which had the need and capability for distant-water fishing, were pitted against other states which professed a need but lacked the capability. This issue was also linked to the issue of freedom of passage through territorial waters and straits used for international navigation since such passage was seen to be threatened by the extension of coastal state jurisdiction over fisheries. It is common knowledge that the League codification conference which met at the Hague in 1930 failed to resolve the issue of territorial waters and coastal state jurisdiction over fisheries.

After the Second World War, the traditional uses of the sea multiplied and conflicts between wider claims of coastal states seeking to protect their economic interests over different distances out to sea on the one hand, and attempt by major maritime Powers to maintain the *status quo* on the other, increased.

But in a very real sense the modern era in the political and legal history of oceans began with the discovery of oil prior to the end of the Second World War under the continental shelf of the United States. This led to wide-ranging claims by coastal states for the exclusive appropriation of the continental shelf resources. In order to reconcile these claims and settle the controversies, the United Nations sponsored two conferences in 1958 and 1960. Four conventions were concluded in 1958 which, on the whole, reasserted the traditional freedoms of the sea and accepted the coastal statets' sovereign jurisdiction over their continental shelves and gave them sole rights over resources on or below the seabed to a depth of 200 metres—or to whatever depth permitted exploitation. Although coastal states were permitted to extend maritime zones and adopt fish conservation measures over adjacent waters, no agreement could be reached about the extent of territorial waters or fisheries jurisdiction, and agreement on the definition of continental shelf was vague and uncertain. The 1958 treaties, in short, codified what had been accepted and left unsettled what had not, including where the high seas began, and none of them was adequate to cope with the

conflicts that the technological advances of the 1960's brought in their wake. Fishing metamorphosed from the small sailboats of yesteryears to factory ships harvesting fish stocks aided by sonar and helicopter. Oil was discovered in seabed areas beyond 200 metres in depth, and new machinery was built to tap it. So was equipment to retrieve the manganese nodules —lumps varying in size from golf balls to footballs—that are scattered in ocean bottoms at depths ranging from 5,000 to 10,000 metres and contain enough copper, nickel, manganese and cobalt to supply the world's needs for generations. In fact, in some respects the 1958 Conventions were outmoded almost by the time they were written. In 1960, the Second UN Conference on the Law of Sea tried but again failed to establish a universal agreement on the width of the territorial sea.

It is also significant to note that the 1958 Conventions were never generally accepted by all nations. Since then, with the emancipation and active participation of numerous Asian and African States, international society has become more or less universal and the geography of international law has changed. Although some of these newly independent countries participated in the first two UN Conferences on the Law of the Sea in 1958 and 1960, they were not strong enough as a group to influence the decisions at these Conferences. It has been noted that "the dominant characteristic of the 1958 and 1960 Conferences was the primacy of the East-West confrontation and the near complete duplication of the structure of the General Assembly politics on ocean issues."[11] The 1958 Conventions codifying traditional law are generally criticised by the newly independent countries as inimical to their interests. They want to change and overhaul the old maritime law which was developed by a few powerful states in a very different age under very different circumstances. In place of the old freedom of the seas and *laissez faire* in the oceans, they want to develop a new, more balanced and equitable regime. Moreover. they want to be equal partners in sharing the new-found riches of the sea and deep seabed and hope that a new legal regime for the sea might help them in augmenting their meagre economic resources.

[11] See Edward Miles, Editorial "Introduction" to a special issue on "Restructuring Ocean Regimes: Conference on the Law of the Sea ," *International Organization,* (Spring 1977), p. 153.

Thus we find that in recent years the accelerating pace of technological, economic, social, and political changes have radically altered man's relation to the sea. Compared to 44 countries in the 1930 conference, and 86 and 88 participants in 1958 and 1960 conferences respectively, participation in the Third UN Conference on the Law of the Sea became almost universal with 137 countries (though 149 were invited) participating in the 1974 Caracas Session which number increased to 156 at the New York Session in 1976. It has also been noted that the alignments of the UN Seabed Committee from 1968-73 and in Third Law of the Sea Conference itself are no longer those of the General Assembly but resemble the alignments of UNCTAD more and more with North-South confrontation becoming prominent and dominating all other issues.[12] In other words, the major confrontation in the conference has been and is between the developed states, seeking to maximise their benefits from the sea and the new found seabed resources on the basis of their advanced technology, and the developing countries who want to modify and change the old traditional law which has not served them well and to develop new equitable law for the exploitation of the seabed resources so that they are equal partners in the new bounty.

In face of all these changes and developments, the effort to frame a modern law of the sea before competition bursts out of control has become a race against time. In the meanwhile, however, the march of new claims goes on. Between 1964 when Pardo spoke out, and 1973, when the Third UN Conference on Law of the Sea formally opened, the speed and frequency with which the nations asserted unilateral claims in the sea were almost dazzling. Thus, it has been pointed out that "during that period no less than 81 states asserted over 230 new jurisdictional claims of varying degrees of importance."[13] These included wider exclusive fishing zones ranging between 18 and 200 miles, to 200 mile territorial seas and wide pollution control zones. In that short space of time, Arvid Pardo's "common heritage" is said to have shrunk to 65 per cent of ocean space. The remaining 35 per cent—claimed by coastal

[12] Ibid.

[13] John Temple Swing, "Who will own the oceans?" *Foreign Affairs* (1976), p. 5.