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THE CODIFYING CONFERENCE AS AN INSTRUMENT OF INTERNATIONAL LAW-MAKING: FROM THE "OLD" LAW OF THE SEA TO THE "NEW"*

Edward McWhinney**

I. INTRODUCTION

The Third United Nations Conference on the Law of the Sea was launched by a United Nations General Assembly Resolution of December 1970.¹ In its trials and tribulations since that time, this latest international legal codifying conference may remind us of the mythical Labors of Sisyphus. Four years of preparatory work in committee stage culminated in a marathon series of conference sessions at Caracas in mid-1974, extending over 10 weeks and attended by some 5,000 delegates and observers from 148 states. When the Caracas sessions ended without being able to produce any agreement, the Conference was then adjourned to Geneva in the spring of 1975, where an eight-week series of conference sessions again ended without an agreement. The Conference has now been adjourned to New York for the spring of 1976, with promise of still another round of negotiations after that. With a positive achievement record such as this, the Third United Nations Conference on the Law of the Sea has invited occasional critical comment as to the swollen numbers of official delegates, observers, and supporting functionaries, and has raised questions as to specialist professional expertise, or at least as to the degree of serious commitment to the postulated objective of a timely codification of the Law of the Sea. Typical of this tendency to denigrate the Third Law of the Sea Conference and its standing armies of political representatives and officials is the appraisal of a well-established North American daily newspaper, normally noted for the sobriety of its political assessments and appraisals. The newspaper was moved to describe the Conference as "float[ing] from spa to shining spa,"² and compared it to that "oldest established permanent floating crap game in New

* The following article derives from a paper prepared for the World Congress on Philosophy of Law and Social Philosophy held at St. Louis, Missouri, in August 1975.

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1. G.A.Res. 2750(c), 25 U.N. GAOR Supp. 28, at 26, U.N. Doc. A/8097 (1970).

2. Editorial, *On to Calcutta*, Wall St. J., Aug. 29, 1974, at 8, col. 1.

York,"³ musically memorialized in Broadway's "Guys and Dolls."

The dispassionate scientific observer is aware that the United Nations Organization, its specialized agencies, and its specialized conferences are subject, no less than national governments, to Parkinson's Law on proliferating bureaucracy. The really serious question must be: to what extent has the patent failure of the Third United Nations Conference on the Law of the Sea been caused by difficulties of a temporary or casual nature, involving discernible faults in the Conference planning, preparation, and organization; and to what extent, by contrast, the failure goes to philosophical or policy conflicts inherent in the subject matter of the Conference, involving too heavy a burden of balancing or reconciling the conflicting national interests involved.

II. THE PROCEDURAL (ADJECTIVAL) LAW DEFECTS OF THE THIRD UNITED NATIONS CONFERENCE

A comparison of the planning, preparation, and organization of the Third Law of the Sea Conference with earlier international codifying efforts in the same general field is instructive. The First United Nations Conference on the Law of the Sea, meeting in Geneva in 1958, gave rise to four separate, though interrelated, multi-lateral conventions,⁴ all of which received the stipulated number of ratifications and so became law within eight years of the completion of the 1958 Geneva sessions. The Second United Nations Conference on the Law of the Sea, held at Geneva in 1960, was concerned, in essence, with settling important unfinished business from the 1958 Conference, mainly the breadth of the territorial sea and fishery limits. The 1960 Conference did in fact secure majority votes for two proposals, but these votes fell short of the necessary two-thirds majority and so failed to become law. The more important proposal, which sought to establish a uniform breadth for the territorial sea, fell short of the required two-thirds majority by one vote.

One important procedural or organizational difference between

3. Letter to the Editor from John R. Stevenson, chairman of the U.S. delegation to the Caracas Conference, Wall St. J., Aug. 29, 1974, at 12, col. 4. In this letter, Ambassador Stevenson strenuously objects to the Wall Street Journal's derogatory characterization of the Third United Nations conference.

4. Convention on the Territorial Sea and the Contiguous Zone, *done* April 29, 1958, [1964] 2 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205 (effective Sept. 10, 1964); Convention on the High Seas, *done* April 29, 1958, [1962] 2 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82 (effective Sept. 30, 1962); Convention on Fishing and Conservation of the Living Resources of the High Seas, *done* April 29, 1958, [1966] 1 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 285 (effective Mar. 20, 1966); Convention on the Continental Shelf, *done* April 29, 1958, [1964] 1 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311 (effective June 10, 1964).

the First United Nations Conference in 1958 and the Second Conference in 1960 (a difference which applies in greater degree to the unfinished Third Conference of 1974 and 1975) is that the 1958 Conference followed the long-established "classical" route to legal codification. The formal Conference began with an agreed basic text of draft articles, formulated by an expert committee or commission capable of claiming authoritative status in its own right. The text formed the principal agenda of debate and discussion at the Conference itself. The 1958 Conference began with a set of 73 draft articles, which were the result of seven years of detailed work by the International Law Commission (I.L.C.). The influence of the scientific-legal expertise of the I.L.C., resulting from the high intellectual prestige and consummate technical drafting skills of its members, is apparent in the final texts of the four conventions adopted by the 1958 Conference.⁵ By contrast, in the interim period between the 1958 Conference and the 1960 Conference, the I.L.C. was not called upon for advice, perhaps due to the time factor. In any event, the I.L.C. had made no specific proposals on any of the several major questions carried over to the resumed 1960 discussions. There was therefore no single expert text before the 1960 Conference, but only various proposals submitted by the different governments.

In the case of the Third Conference, even though the range of subjects to be canvassed was essentially as broad or broader than in 1958, there was again no basic text but only a mass of disparate materials prepared by various working groups and delegations. These materials were highlighted by a six-volume report from a United Nations committee, the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction. This latter collection, far from adhering to the I.L.C. and general "classical" drafting formula of presenting a single draft text as a basis for debate and discussion, adopted the novel drafting variant of attempting to overcome the major disagreements that patently existed on so many points by presenting the alternative, often conflicting, proposals side by side, hundreds in all. The problem was compounded not merely by having a profusion of different texts on the same subject, but also by the sheer quantity of materials involved. This condition was itself a product, in some part, of the marked increase in the number of governments participating in

5. See generally Stone, *On the Vocation of the International Law Commission*, 57 COLUM. L. REV. 16 (1957).

the Third Conference, in comparison to the First Conference in 1958. The number of participating countries increased arithmetically from 86 to 148, with the added handicap that the new arrivals were not always the best prepared nor the most succinct or relevant in their contributions to the Conference debates.

There were, then, very evident faults in the operational procedures of the Third United Nations Conference on the Law of the Sea in 1974 and 1975: the failure to begin with one agreed expert text; the failure to make sure that the drafting committee actually appointed by the Conference would be fully representative of all the major states, politically and intellectually authoritative in terms of membership, and armed with effective powers to guide and develop Conference thinking;⁶ and the failure to achieve general satisfaction as to voting principles (going beyond the Gentleman's Agreement as to the need to exhaust the "consensus" process in the first instance),⁷ which could ensure that a conference charged with developing a codifying treaty as its end product really would produce new rules capable of achieving general acceptance and not simply another exercise in "soft law."⁸ These self-inflicted wounds undoubtedly rendered more difficult the tasks of the Third United Nations Conference and contributed, in measure, to its eventual practical

6. The drafting committee of the Third United Nations Law of the Sea Conference suffered from a number of in-built disabilities that seriously weakened its potential political authority and influence. Its membership was unusually large and unwieldy—23 members in all—yet it was not especially representative in terms of political power. Only two of the Permanent Members of the Security Council—the United States and the Soviet Union—were members of the drafting committee, and there was no officially francophone state. Beyond that, the committee could neither seize itself of matters of its own volition, modify the essentials of documents submitted to it, reopen the debate in depth on any questions, nor initiate its own texts. It existed simply for the purposes of referral by the plenary Conference and its three committees, and thus was reduced, from the beginning, to a purely mechanical and necessarily subordinate role. See generally Vignes, *Organisation et règlement intérieur de la III e Conférence sur le droit de la mer*, 91 REVUE DU DROIT PUBLIC 337 (1975).

7. United Nations, Rules of Procedure for the Third U.N. Conference on the Law of the Sea, rule 39 (Required majority) & appendix (Declaration incorporating the "Gentleman's Agreement"), U.N. Doc. A/CONF.62/30/Rev.1, at 9 & 17, 13 INT'L LEGAL MAT'LS 1199, 1205 & 1209 (1974) (adopted at the Caracas session, June 27, 1974). See generally Vignes, *Will the Third Conference on the Law of the Sea work according to the Consensus Rule?*, 69 AM. J. INT'L L. 119 (1975); Lacharrière, *Consensus et Nations Unies*, 1968 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 9; Bastid, *Observations sur la pratique du consensus*, MULTITUDO LEGUM JUS UNUM: Festschrift für Wilhelm Wengler 11 (1973); Jenks, *Unanimity, the Veto, Weighed Voting, Special and Simplified Majorities and Consensus as Modes of Decision in International Law*, CAMBRIDGE ESSAYS IN INTERNATIONAL LAW: ESSAYS IN HONOUR OF LORD MCNAIR 488 (1965).

8. Vignes, *supra* note 6, at 364 (citing Jean Dupuy).

breakdown and inability to produce agreement at either its 1974 or 1975 extended sessions.

III. INTERNATIONAL LEGAL CODIFICATION VERSUS INTERNATIONAL LAW-MAKING

It is impossible to avoid the conclusion, however, that even with the best of procedural rules, having profited from the years of accumulated technical experience of the old League of Nations and legal codifying conferences of the United Nations itself, the Third United Nations Conference on the Law of the Sea would still have had enormous political difficulties in overcoming the important substantive differences among the 148 participating countries that were inherent in the subject matter forming the official Agenda of the Conference. This raises the further fundamental question of whether the term Conference on the Law of the Sea was not in itself a misnomer. While no doubt an unintentional one, it had important practical consequences for the arriving at agreed new international rules to govern the regime of the seas, the sea-bed, and marine resources generally. Legal codification is more than mere mechanical collecting and restating of pre-existing legal rules; it involves a creative element in which new legal principles are formulated and interpolated in the interstices of the old. It remains, however, a limited, technical operation involving certain canons of personal self-restraint on the part of the drafters involved. A mandate for legal codification is certainly not a license for a general exercise in law-making that acknowledges no political constraints in terms of past legal doctrine. The general law-making conference that has a positive mandate to construct and elaborate new law, and is not merely limited to legal codification, has its place, of course. But its roles and missions are fundamentally different from those of the legal codifying conference; otherwise, the term legal codification no longer has a precise connotation.⁹

Once the limits of the four multilateral conventions produced by the 1958 United Nations Conference on the Law of the Sea are transcended, we are into issues of sheer political choice, and not codification or restatement of existing legal doctrine. By this token, the 1960 Conference on the Law of the Sea could certainly, as a technical matter, have codified the existing international law as to

9. See Stone, *supra* note 5; Jennings, *The Progressive Development of International Law and its Codification*, 24 BRIT. Y.B. INT'L L. 301 (1947); C. DE VISSCHER, THÉORIES ET RÉALITÉS EN DROIT INTERNATIONAL PUBLIC 177 (1953).

the width of the territorial sea. Indeed, as a technical, scientific-legal matter, that would have been easy to do in 1960. But the delegates to the 1960 Conference (or at least a minority among them sufficient to impede the achievement of a two-thirds majority) simply did not like the existing customary international law rule and chose to block all attempts to codify that rule in permanent statutory (treaty) form. The problem in 1960 was a political one, not a legal one. It is impossible to avoid the conclusion that the problem in both 1974 and 1975 was not in finding and concretizing the existing rules of the Law of the Sea, but in mobilizing sufficient political support and political enthusiasm behind those already existing rules. In the absence of a legally effective consensus as to new international law rules, the old rules on normal principles of legal interpretation remain in force and subject to progressive, generic extension through individual initiatives on the part of individual states in ways not in themselves incompatible with existing international law.

Instead of Law of the Sea as the official agenda for the Third Conference, one might have spoken, more properly, of Regime of the Sea,¹⁰ thus taking away the vicarious legal prestige otherwise attached to the political act of remaking the old law in the image of a claimed new majority in the World Community.

IV. THE SUBSTANTIVE DILEMMAS OF THE THIRD UNITED NATIONS CONFERENCE: THE "OLD" LAW OF THE SEA

Next let us examine the main conflicting interests present in that recently renewed political exercise entrusted to the Third United Nations Conference on the Law of the Sea.

The existing (or old) Law of the Sea is essentially the product of long-observed practice of states, concretized over more than three centuries into the rules of customary international law¹¹ and codified, in quite substantial measure, in the four Geneva conventions of 1958. The existing Law of the Sea, as customary international law, or at least a codification of that customary law, undoubtedly

10. See generally M. McDUGAL & W. BURKE, *THE PUBLIC LAW OF THE OCEANS: A CONTEMPORARY INTERNATIONAL LAW OF THE SEA* (1962).

11. The literature on the classical Law of the Sea is legion, for example that standard, well-respected text, C. COLOMBOS, *THE INTERNATIONAL LAW OF THE SEA* (4th rev. ed. 1959). For an imaginative contemporary text see R. DUPUY, *THE LAW OF THE SEA: CURRENT PROBLEMS* (1974).

reflects the interests and aspirations of the politically dominant states throughout that same time period. These were the states formed on the rise of commerce and thriving on the development of international trade and intercourse without the unnecessary fetters and restrictions which stemmed from archaic legal rules and prescriptions. In contrast to the *mare clausum* of the Papally-sanctioned Spanish-Portuguese imperial maritime hegemony, the *mare liberum* of Grotius and of Europe after the Treaty of Westphalia was not moved by a narrow spirit of national particularism or accompanying selfish desires to lock up the sea and its resources into a series of closed national compartments. Instead, the "modern" (post-Treaty of Westphalia) world of the emergent nation-state developed, to an extent which can only be described as surprising, a sense of mutuality and reciprocity of interest on the part of all the then active participants in the World Community. This mutuality involved the maximization of the interests of all states and the necessary cutting down, in consequence, of overly particularistic special claims and assertions of individual states. In the full spirit of the phrase used by the United Nations General Assembly as the postulated objective of a new regime of the seas, the sea-bed, and marine resources generally, the post-Westphalia new nation-states, in opting so resolutely for a *mare liberum*, accepted the seas and marine resources as the "common heritage of all mankind."¹²

V. CONTEMPORARY CHALLENGES TO MARE LIBERUM

A phenomenon of our own times is that, after more than three centuries of *mare liberum*, we are now seeing the emergence of a new species of *mare clausum*, not merely through uninhibited national claims as put forward in international arenas like the United Nations Law of the Sea Conferences, but also through concrete state practice as asserted in unilateral state actions trenching upon the classical freedom of the seas and the free availability of its resources to all comers.¹³ Such unilateral state actions have been either ineffectively protested by other states or else not protested at all, since other states are looking, in their turn, to their own possibilities of unilateral action in a sort of general *quid pro quo*. Sometimes these unilateral state actions are directed to what would seem to be protection of genuinely comprehensive World Community interests, to

12. G.A. Res. 2749, 25 U.N. GAOR Supp. 28, at 24, U.N. Doc. A/8097 (1970).

13. Friedman, *Selden Redivivus: Towards a Partition of the Seas?*, 65 AM. J. INT'L L. 757 (1971).

protection of the natural environment or of increasingly scarce natural resources against abuses of the classical freedoms of the sea. These abuses are by nation-states whose own activities would certainly qualify, under internal, municipal law principles, as examples or case studies in *abus de droit* and so would be subject to social control through law. Examples of this category of national self-help might be individual nation-state action of a preventive or control nature, in default of effective international or multi-state action; against marine pollution or damage to the shoreline and environment of the littoral state; or individual nation-state action directed to protection of recognized national fishing grounds, outside national territorial waters as classically defined, against depletion or exhaustion by reckless over-fishing on the part of other states.

A further category of unilateral state action might prove, on examination, to be mixed in character: partly in furtherance of genuinely comprehensive World Community interests in default of effective World Community action, and partly designed to advance national special interests. A final category of unilateral state actions, going beyond the ambit of classical international law (regrettably, this latter category seems all too prevalent today), would be the pursuit of narrow national interests, usually of an economic character, at the expense of all other members of the World Community, and under the guise of protection and furtherance of World Community interests. For example, the proclamation of vast so-called pollution control zones in the high seas, going well beyond the necessities of any immediately foreseeable cases; the declaration of extensive fishing monopoly zones, again extending far out into the high seas as classically defined; the attempt to control innocent passage through traditionally recognized international straits and waterways, through the devices of extending the national territorial sea or developing novel theories (for example, the so-called Archipelago doctrine) which can be no stretch of the imagination be regarded as analogical extensions of existing classical international law doctrine. These can be no legitimate exercises in international law-making in the absence of firm international treaties that can achieve general acceptance.

VI. *THE NON-ROLE OF THE SUPER-POWERS IN DEVELOPING A NEW REGIME OF THE SEA*

Perhaps part of the blame for the anarchy caused by individual national claims and pretensions that trench upon classical

international law-based doctrines of *mare liberum* must lie with the super-powers. Recognizing the constructive leadership supplied by the Soviet Union and the United States in leading the way to the achievement and concretization of the new norms and rules of international law in areas such as the banning of atmospheric nuclear tests, the control of nuclear proliferation, and the demilitarization of the moon and of outer space generally,¹⁴ one is entitled to ask why the two bloc leaders, granted the existence of so many evident points of agreement and harmony between them as to present and future development of the Law of the Sea, the sea-bed, and marine resources generally, could not have devised between them a model treaty or treaties in this area. Such a treaty might have proceeded on the same principles of mutuality and reciprocity of interest that characterized their negotiations in the area of disarmament, and then could have been opened up to general signature and ratification by other lesser or secondary powers. The answer must be that the two super-powers gave too much priority to their own special (bipolar) peace-keeping interests, forgetting that with the achievement of coexistence and big-power détente any treaties in this area would tend to be largely historical legal footnotes to substantive accords already reached in other political (non-legal) arenas. When the two super-powers finally turned to the regime of the seas, it was, one might suggest, already too late. The claims of the economically underprivileged and technologically underdeveloped countries for a special national economic zone beyond the limits of the territorial sea as customarily defined and established to date were greeted perhaps too diffidently, and certainly too dilatorily, by the super-powers. All these claims for a special national economic zone have now been happily absorbed by the Chinese Communist government and integrated, with wit and also some literary elegance, into its campaign against the two super-powers' more traditionally-based positions on the Law of the Sea. What the Chinese now call the "Soviet Revisionist Principle of the Freedom of the Seas" is linked by the Chinese to what they style as a joint Soviet-U.S. claim to a "super-powers' Maritime Hegemonism." The lesson of the Sibylline books is to accept the possible when it is still timely—a lesson which Sir Gerald Fitzmaurice drives home with

14. For a further development of this thesis see E. McWHINNEY, "PEACEFUL COEXISTENCE" AND SOVIET-WESTERN INTERNATIONAL LAW (1964); E. McWHINNEY, INTERNATIONAL LAW AND WORLD REVOLUTION (1967); E. McWHINNEY, CONFLIT IDÉOLOGIQUE ET ORDRE PUBLIC MONDIAL (1970).

regard to the ultimate failure of the 1958 Law of the Sea Conference to stabilize the breadth of the territorial sea where relatively modest limits, not incompatible with classical international law rules, were still capable of being successfully maintained and concretized in permanent, multilateral treaty form.¹⁵

VII. THE MAIN POLITICAL CONFLICTS OF THE THIRD UNITED NATIONS CONFERENCE

A. The Four Geneva Conventions of 1958

The starting point for identification and analysis of the main areas of political conflict at the Third United Nations Conference on the Law of the Sea must lie in a consideration of the four multilateral conventions adopted at the First United Nations Conference held in Geneva in 1958: the Convention on the Territorial Sea and the Contiguous Zone,¹⁶ the Convention on the High Seas,¹⁷ the Convention on Fishing and Conservation of the Living Resources of the High Seas,¹⁸ and the Convention on the Continental Shelf.¹⁹

While the principle of the freedom of the high seas (defined, by way of extensity, in the 1958 Convention on the High Seas, Article 2, to comprise freedom of navigation, freedom of fishing, freedom to lay submarine cables and pipelines, and freedom to fly over the high seas²⁰) is basic to the concept of *mare liberum*, it has historically included a special exception in favor of the territorial sea which, up to the time of the First United Nations Conference in 1958, was always considered to be (with some minor, historically-sanctioned variations in favor of individual nation-states) three marine miles from the low-water line along the coast. The chance at the 1958 Geneva Conference to codify formally the three-mile limit to the territorial sea in treaty form was missed for political reasons. The resultant opportunity to compromise politically on a six-mile or even a twelve-mile limit as a still reasonable balance between the traditional *mare liberum* position and the emerging economic par-

15. Fitzmaurice, *The future of Public International Law and of the International Legal System in the circumstances of today*, INSTITUT DE DROIT INTERNATIONAL, LIVRE DU CENTENAIRE 1873-1973: EVOLUTION ET PERSPECTIVES DU DROIT INTERNATIONAL (1973).

16. [1964] 2 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205 (effective Sept. 10, 1964).

17. [1962] 2 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82 (effective Sept. 30, 1962).

18. [1966] 1 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 285 (effective Mar. 20, 1966).

19. [1964] 1 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311 (effective June 10, 1964).

20. [1962] 2 U.S.T. 2312, 2314, T.I.A.S. No. 5200, 450 U.N.T.S. 82, 84 (effective Sept. 30, 1962).

ticularist claims of various nation-states was also lost, though by the narrowest of margins. The 1958 Convention on the Territorial Sea and the Contiguous Zone reflects this political impasse for, while predicated upon the existence of the principle of a territorial sea, it nowhere defines the limits of that sea.²¹ The issue of defining the width of the territorial sea remained, therefore, one of the prime responsibilities of the Third United Nations Conference on the Law of the Sea and the special charge of its Committee II, which was concerned with the limits of national jurisdiction.

B. The Territorial Sea, its Limits, and the "Patrimonial Sea"

The main difference between the political climate of the First and Second United Nations Conferences on the Law of the Sea and that of the Third Conference was that by the mid-1970's, modest political compromises relating to the traditional three-mile limit were no longer possible. This was because of the plethora of special national claims, trenching upon the erstwhile freedoms of the high seas, that had developed over the intervening decade and a half. By far, the more important of these infringements on the classical freedoms of the high seas related to the development and expansion of the concept of the contiguous zone. As late as the 1920's, this zone was no more than a limited, embryonic notion of a special area, immediately beyond the three-mile territorial sea, in which police and customs-revenue control measures could be applied by the littoral state. In the 1958 Convention on the Territorial Sea and Contiguous Zone, it is expressly stipulated in Article 24(2) that the contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured (that is, the low-water line along the coast).²² By the mid-1970's, a considerable number of states, especially those having extensive fishing and marine resources located very close to their coastlines and limited natural resources in other areas, had already asserted extensive claims to national sovereignty over coastal waters and their marine resources. These claims extended beyond the traditional three-mile territorial sea, and even beyond a six-mile or twelve-mile sea, and often extended as far out as 200 miles from the low-water line along the coast. Some support for such unilateral extensions of

21. See [1964] 2 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205 (effective Sept. 10, 1964).

22. [1964] 2 U.S.T. 1606, 1612, T.I.A.S. No. 5639, 516 U.N.T.S. 205, 220 (effective Sept. 10, 1964).

sovereignty, especially in the case of "one-crop" countries, could perhaps be derived from international institutions as respectable and presumably (at that time) as politically detached as the World Court.²³ But these newer claims obviously ran into direct conflict with the interests of the great maritime trading states having or using merchant shipping fleets; with those of the two super-powers (the Soviet Union and the United States) with their large naval fleets; and, indeed, with those of the few, unfortunate states having no identifiable marine or related resources located close to their coasts and therefore having nothing much to trade off or bargain against any carving up of the coastal waters and their resources. These latter states, for the most part, leaned firmly toward the traditional rules of a three-mile (or at least limited) territorial sea, with, at the most, restricted police-control authority extending immediately beyond the territorial sea. Where even modest extension of the territorial sea would result in straits that were clearly international straits (subject, as such, to the right of innocent passage by ships of all countries) falling under national jurisdiction, the great maritime states also pressed firmly for the maintenance and preservation of the historically "international" character of such waterways. They equally resisted the Archipelago doctrine, under which all the waters between islands forming part of one national territory (Indonesia and the Philippines, for example) are national in character and so fall under national sovereignty and control. It is suggested that, with respect to straits and archipelagos, a new political compromise that would guarantee the right of innocent passage or freedom of navigation through designated sea-lanes might eventually reconcile the conflicting interests in this area. Similarly, the idea of a twelve-mile territorial sea plus a 200-mile "economic" zone (the so-called "patrimonial sea"²⁴ in which the coastal state would have exclusive fishing rights) is being advanced as a reasonable basis for contemporary novation or rewriting of the classical international law-based three-mile territorial sea concept.

The established states, and particularly the two super-powers, tend to find that the existing classical international law rules correspond very well to their own national self-interest and to the political accommodations inevitably made within their own national political community to produce the external consensus reflected in

23. See, e.g., *Anglo-Norwegian Fisheries Case*, [1951] I.C.J. 116.

24. R. DUPUY, *supra* note 11, at 40.

their own national foreign policy at any time. For example, the practical compromise evidently made within both the Soviet Union and the United States between national fishing interests and national defense interests will be augmented by the political trade-offs that the contemporary nationalist proponents of *mare clausum* are able to offer in other cognate areas—the continental shelf, for example, and the development of the economic resources of the sea-bed and the ocean floor.

C. The Continental Shelf, the Sea-Bed and the Ocean Floor, and their Resources

The 1958 Convention on the Continental Shelf, responding to the rapid development of assertedly customary international law-based claims to an exclusive national right to exploit the mineral resources of the continental shelf beyond the national territorial sea (stemming from President Truman's Proclamation of 1945²⁵), formally recorded and codified the sovereign rights of the coastal state to explore and exploit the natural resources of the continental shelf. The continental shelf itself was defined in the 1958 Convention, disjunctively, as referring:

to 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 areas²⁶

The first part of the 1958 definition clearly provides firm and objectively verifiable criteria for legally limiting the political assertion of national claims. The second part of the definition, however, based on mining engineering knowledge of the time, has clearly been outstripped by rapidly developing science and technology which has made its *exploitability* criterion a progressively expanding standard, licensing an ever-expanding national development and utilization of the economic and mineral resources of the sea-bed. While the connotation of the term continental shelf does not include the ocean floor beyond the continental shelf itself, no part of the continental shelf would be potentially excluded from national exploitation. The technological capacity of the state outside whose terri-

25. Presidential Proclamation 2667, Sept. 28, 1945, 10 Fed. Reg. 12303, 59 Stat. 884 (1945).

26. Convention on the Continental Shelf, done April 29, 1958, art. 1 [1964] 1 U.S.T. 471, 473, T.I.A.S. No. 5578, 499 U.N.T.S. 311, 312 (effective June 10, 1964).

torial sea the continental shelf extends alone defines and determines the spatial limits to the exercise of its sovereign rights over the continental shelf.²⁷ This is clear as a matter of legal logic, based on the strict interpretation of the terms of the 1958 Convention, and so no question can arise of any political barter or exchange of those rights as payment for a recognition of current nationalist pretensions to the patrimonial sea.

On the other hand, the legal situation of the ocean floor beyond the limits of the continental shelf is not so clear. It is not dealt with in the 1958 Convention on the Continental Shelf²⁸ and it may be argued that since that Convention concedes to the coastal state sovereign rights of exploitation over the natural resources of the continental shelf, it must, by implication, deny any rights beyond the continental shelf's limits. On the other hand, the more normal interpretation would seem to be that, in the absence of a treaty rule, the pre-existing customary international law rules govern. Thus, the ocean floor is open to all comers, on an equal basis, in terms of their capacity to explore it and to develop and exploit its natural resources. It would be, of course, only a formal, juridical equality, since only a handful of the technologically most advanced, post-industrial states are in any position, in the foreseeable future, to take up an option to explore and usefully develop the ocean floor beyond the limits of the continental shelf.

It is this fact, perhaps more than any other, which both explains the political intransigence of certain Third World countries, especially the leaders of the so-called Group of 77, and gives a certain air of unreality to their contributions to the debates in the committee in the Third United Nations Conference on the Law of the Sea specially charged with examining the status of the sea-bed beyond national jurisdiction. Certainly United Nations General Assembly Resolution 2749²⁹ (Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction) adopted in December 1970, postulates that the resources of these areas are the "common heri-

27. Compare Goldie, *Where is the Continental Shelf's Outer Boundary?*, 1 J. MAR. L. & COM. 461 (1970).

28. See [1964] 1 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311 (in force June 10, 1964). The Convention addresses itself mainly to the legal status of the continental shelf *per se*.

29. G.A. Res. 2749, 25 U.N. GAOR Supp. 28, at 24, U.N. Doc. A/8097 (1970).

tage of mankind." United Nations General Assembly Resolution 2574³⁰ (the so-called Moratorium Resolution) adopted in the previous year, purports to put these areas and their resources beyond the pale of national jurisdiction, "pending the establishment of [an] international regime"³¹ in the area. These are brave assertions, but they suffer from the political vice inherent in all United Nations General Assembly resolutions, especially since the marked increase in United Nations membership with the accession of Third World countries; they are not generally accepted as authoritative, binding sources of international law, except so far as they may have been affirmatively and independently accepted by all main states.³² In the absence of any authoritative new rule in this area, the major post-industrial states which have the technological capacity to develop and exploit the resources of the ocean floor will no doubt see fit to exercise their undoubted right of proceeding in accord with both the capabilities and the demands of their national technologies. When the Group of 77 contend, therefore, for an International Sea-Bed Authority that alone shall have plenary powers to control and direct sea-bed and ocean floor activities, there is a certain element of baying at the moon involved in the argumentation. The proposed International Sea-Bed Authority will need the active aid and encouragement of the technologically advanced states if it is ever to become effective, since it can obviously have no sanctions, in and of itself, to inhibit and restrain those technologically developed countries from going ahead of their own accord with their own national plans for exploitation of the resources in the ocean floor. The obvious political compromise solution is one which preserves the principle of an international authority, but which would make its function a regulatory one, rather than one seeking to impose direct administration and control. The basis for political give-and-take is there, assuming a certain degree of rationality and common-sense. The technologically developed states, for example, after their own experiences with the energy crisis and the rise in oil prices of recent years, can see merits in the coordination of even their own

30. G.A. Res. 2574 (D), 24 U.N. GAOR Supp. 30, at 10, U.N. Doc. A/7834 (1969).

31. *Id.* at 11.

32. On the issue of the normative law-making quality of United Nations General Assembly resolutions, see Johnson, *The Effect of Resolutions of the General Assembly of the United Nations*, 32 BRIT. Y.B. INT'L L. 98 (1955-56); R. HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* (1963); C. PARRY, *THE SOURCES AND EVIDENCES OF INTERNATIONAL LAW* (1965); LUKASHUK, *I STOCHNIKI MEZH DUNARODNOGO PRAVA* 81 *et seq.* (1966).

plans for development of the ocean floor resources, in terms of the economic implications of sea-bed mineral production upon production from land-based mineral sources and upon the world pricing system generally. By and large, however, the technologically advanced states would seem to have much to gain by conceding the principle of an international control authority in return for a more conscious modesty, on the part of the less developed countries, in their pretensions as to nationalist extensions of the territorial sea and the so-called patrimonial sea.

D. Preservation of the Marine Environment

A third committee of the Third United Nations Conference has been concerned with issues of the preservation of the marine environment and related questions of scientific research. While the argument for a broad control authority (including preventive or anticipatory control) on the part of the coastal states in zones adjacent to their coasts³³ is clear, it must be recognized that the balance of World Community interests in this area which recently favored ecological interests has tilted a little in the other direction under the impact of the recent world energy crisis. Yet as to no other aspect of the Third United Nations Conference's official agenda does the congruence of the interests of the different nation-state participants seem more clear. So that here, at least, the problems seem secondary problems of an essentially lower-level technical character that can safely be left to the professional negotiators without the need for the same dramatic political interventions directed towards effectuating ultimate political compromises that we can see in regard to the issues of the limits of the territorial sea, the existence of the so-called patrimonial sea, and the utilization of the resources of the sea-bed and ocean floor beyond national jurisdiction. The common interest of mankind in the protection of the natural environment is at least far more self-evident than the postulated common interests in other areas. Therefore, consensus on new principles of international law here, or even on the imaginative restatement (codification) of the "old" principles, should not be too difficult, and need not necessarily wait upon political agreement upon new principles to govern the other areas to which we have referred.

33. Etudes des mesures internationales les plus aptes à prévenir la pollution des milieux maritimes (Andrassy, rapporteur), 1 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 547 *et seq.* (1969), 2 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 255 *et seq.* (1969).

VIII. AFTERMATH TO THE FAILURE OF THE CARACAS AND GENEVA SESSIONS OF THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA

In the absence of firm new international treaty rules that can achieve at least general, if not universal, acceptance by states, the older, classical, customary international law rules remain in force. As such, these older, classical, customary international law rules are capable of progressive generic extension in ways not incompatible with general international law, so as to meet new problem-situations (for example, the radical new possibilities thrown up by rapidly developing science and technology).³⁴ In a World Community where a plethora of mini-states, with a vocality often quite unrelated to power or technological capacity, may block achievement of new codifying treaties that will preserve the essence of *mare liberum* against intransigent national demands for *mare clausum*, it may be a salutary reminder to note that, on the basis of existing classical international law rules and their analogical extension on traditional law-making bases, the technologically advanced states probably have sufficient legal authority to go ahead of their own accord with plans for the development and utilization of the economic resources of the continental shelf and the sea-bed and ocean floor. And, they would certainly seem to have full legal authority to resist any closing off of erstwhile international straits and other international waterways to the innocent passage of vessels of their own and other states. To say this is not to contend that the technologically advanced states should opt politically so to act, eschewing thereby the patient skills of compromise normally applied to the attempt to achieve any major international law-making, multilateral convention. But the objectives of some of the states participating in the Third United Nations Law of the Sea Conference quite transcend the limits of legal codification as that term is normally understood. It should be recognized frankly and openly that the international exercise held in 1974 and 1975, first in Caracas, then at Geneva, now at New York (and presumably at an even later date, elsewhere), is a highly political exercise and only secondarily a legal one, and that the international lawyer's specialized talents are necessarily ancillary in such an exercise to the more overtly political skills of diplomatic barter and exchange. For the international lawyer, great open-ended inter-

34. See McWhinney, *Changing Science and Technology and International Law*, 6 IND. L. REV. 172 (1972).

national gatherings like the Third United Nations Law of the Sea Conference call for the exercise of a certain degree of intellectual modesty and prudent professional self-restraint. Such gatherings further call for a recognition of the limitations of one's own highly specialized legal training and legal expertise in formulating the political panaceas that are far better achieved, if at all, by more overtly and avowedly political methods; to use Max Weber's phrase, by political *honoratiore*s (professional Foreign Office diplomats and the like) and not by jurists as such.

The latest, 117-page "negotiating text" with its many sections relating to fisheries, navigation, sovereignty, pollution, and offshore resources, which was salvaged from the wreckage of the 1975 Geneva sessions of the Third Law of the Sea Conference,³⁵ certainly by no stretch of the imagination compares with the agreed-upon, basic legal text and draft legal articles which were supplied by the expert International Law Commission to the 1958 Geneva Law of the Sea Conference and which so facilitated a successful conclusion to the 1958 Conference. But the "negotiating text" which is expressly stipulated by the President of the Conference as being "informal in character . . . not prejudic[ing] the position of any delegation . . . serv[ing] as a procedural device and only provid[ing] a basis for negotiation,"³⁶ does constitute something of a political reprieve for the Third Law of the Sea Conference. Its present delegates have at least one more chance to try to develop a genuinely inclusive regime of the sea which would restrict current excessively particularistic national claims, whether on the part of the two super-powers or of the developing countries, and simultaneously open up the sea and its resources to the new international science and technology on a basis that will provide the widest possible world community participation in and sharing of its riches.

35. United Nations Third Conference on the Law of the Sea: Informal Single Negotiating Text, U.N. Doc. A/CONF.62/WP.8/pt. 1, 14 INT'L LEGAL MAT'LS 682 (1975).

36. Note by the President of the Conference, *id.*