Development of the Law of the Sea

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1. Learning Outcomes

Learning Outcomes for this Module.

On completion of this module you will have:

- an understanding of the origins of the law of the sea
- an awareness of key phases in the development of the law of the sea
- an understanding of the background against which the 1982 United Nations Convention on the Law of the Sea was negotiated
- an appreciation for the ongoing process of developing the law of the sea

2. Looking to the past

In this topic, we're going to look at the development of the law of the sea, before getting into the provisions of the Law of the Sea Convention itself.

An understanding of the development of the law of the sea is important, because of an inherent complexity that exists in the law of the sea. That complexity is in part because the law of the sea covers a huge area of regulation—Seventy percent of the earth's surface is covered by water, and a huge range of human activities takes place in this vast area of ocean. These activities include fishing, where we draw a substantial proportion of the world's protein for over a billion people directly from the sea. But it also provides the medium for transportation for much of the world's goods—over 95 percent of Australia's trade by volume travels by sea, and you can imagine the disruption to the economy of Australia were this trade to be disrupted for any length of time.

Read

In addition, the sea provides an important area of regulation in terms of criminal activity where we try to respond to people moving goods or people or guns around unlawfully and to try to prevent unlawful action at sea. But the complexity is not just a feature of the reach of the law of the sea. Rather the complexity is also drawn from the fact that it has been a huge undertaking in order to assemble the present law. For over 2000 years, people have been arguing about the content of the law of the sea, and those arguments are by no means complete. The development of the law of the sea is therefore important to understand what we currently have and we need to go back into time to see exactly what changes have occurred, how concepts have emerged and why these are relevant to today.

Let's go back in time.

3. Ancient world to the 15th century

Both the Greeks and the Romans in the ancient world were concerned with the law of the sea. The Greeks of the Island of Rhodes, in addition to building a large statue, which today gives us the word 'colossal' for its name 'Colossus', developed a system of rules for dealing with the carriage of goods by sea.

The Laws of Rhodia, as they came to be known, continue to exert limited influence on these equivalent laws today. The Romans formed the view that the Mediterranean Sea was subject to their jurisdiction and that Roman ships carried their nationality and Roman law with them wherever they might be. Rules were enunciated to facilitate trade across the Roman world by sea, and these rules too exert a limited impact upon modern law.

However, the development of what today we can recognise as the law of the sea really has its beginnings in the 15th century and can be charted across three distinct periods:

- The first period, beginning in the 15th century and moving into the 16th, influenced by European voyages of exploration;
- the second, from the 16th century through to the 19th century, influenced by the expansion in maritime trade and insurance; and
- the third period, from the 19th century to the present day, in which various attempts were made by the international community to codify key elements of the law of the sea.

The first period of the law of the sea marks a period of Spanish and Portuguese domination of the world's oceans. But it's important to understand exactly why this happened and why it is influential to the development of the law of the sea.

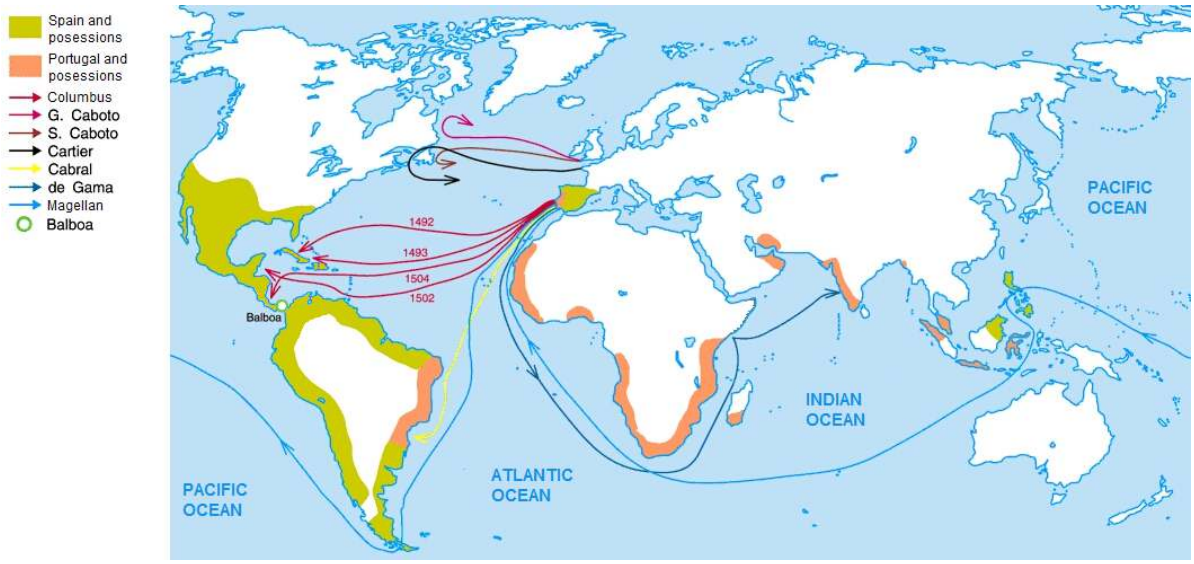
For hundreds of years before the 15th century, spices and other goods were moved from the Far East by land along the Silk Road, from China and the Far East right through to Europe. The spices that were brought by this transportation were particularly valuable as they were used to preserve meats which couldn't be refrigerated back in these times. Meats could be kept for many weeks longer than they might otherwise be because they'd go rotten in ordinary conditions. This valuable spice trade was interrupted in 1453 with the fall of Constantinople to the Turks. This interruption made access to the goods from the Far East far more difficult and the spice trade was severely curtailed. As a result, the prices of spices went through the roof and in some countries, they were almost unobtainable.

One response to this restriction of trade were efforts in Spain and Portugal to find an alternative to the Silk Road: by sea. The Portuguese, at the inspiration of Prince Henry the Navigator, thought that India could be reached by journeying down the African coast. In 1487, Bartholomew Diaz reached the Cape of Good Hope and thereby reached the Indian Ocean.

In 1498, Vasco da Gama was able to reach India, and this began a huge explosion of trade benefitting Portugal. The Portuguese were able to reach huge rewards by the opening of new routes to the Far East and began to build a sizeable territorial empire whereupon they could reap these huge rewards.

The Spanish developed a very different approach. They thought that by sailing west they would be able to reach China and India. At the inspiration of Christopher Columbus, they set out in 1492 to test this theory. They didn't reach India and China but instead reached the Americas. While not the source of spices, the Spanish found even greater wealth in the form of the gold and silver of the Aztec and Inca empires.

Map: Spanish and Portuguese Voyages of Exploration



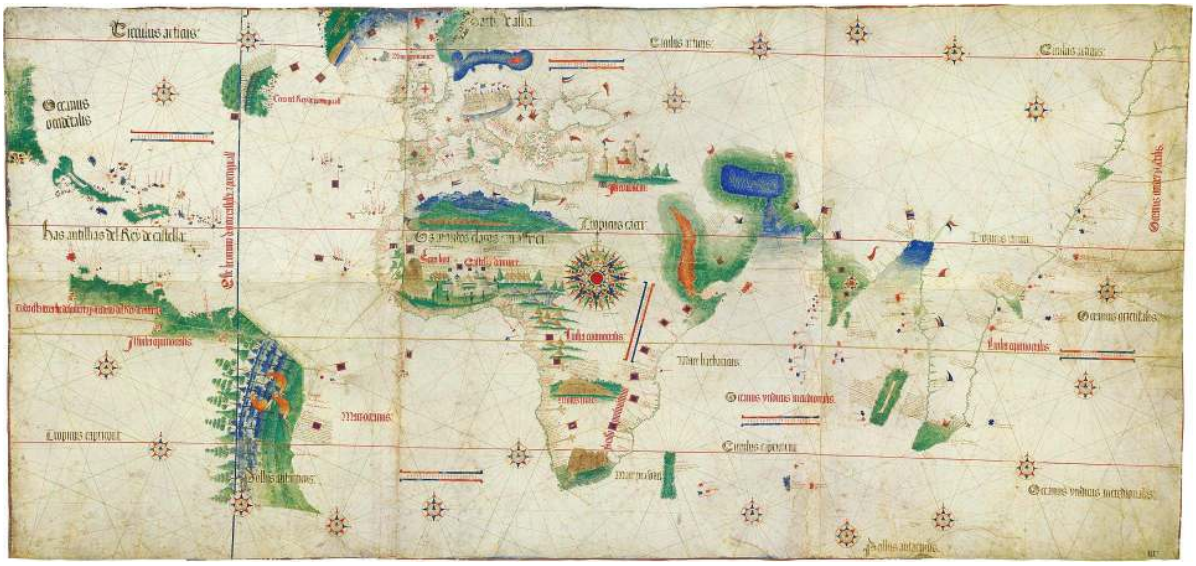
Universalis, "Age Of Discovery" [CC BY-SA]

4. Spanish and Portuguese expansion

This chapter explains the context in which nations began to assert dominium over areas of the ocean as well as land, leading ultimately to the classic theoretical debate between 'open seas' and 'closed seas'.

4.1. Pope Alexander and the Inter-caetera of 1493

In the course of only a few years, Spain and Portugal became the richest States in Europe. Having found this great wealth, Spain and Portugal were equally bound and determined to ensure they retained it because other European powers, including the English, the French and the Dutch, were eager to get a piece of the action. The Dutch, in particular, were eager to do so, as they had fought a long and difficult war of independence from Hapsburg Spain and wanted the opportunity to develop their commercial interests abroad at the expense of Spain and Portugal. At this time Spain and Portugal were deeply Catholic countries. They decided, in order to preserve their discoveries and keep them from other European powers, to refer matters to the Pope and have the Pope guarantee their monopoly over their new discoveries. Pope Alexander VI was asked to divide the world between Spain and Portugal and prohibit the entry into their possessions of other European powers. In 1493, Pope Alexander obliged by saying all the regions not under the jurisdiction of a Christian monarch were now to be divided between Spain and Portugal. The Pope drew a line 483 kilometres west of the Azores, and allocating all the new lands to the east to Portugal and all the new lands to the west to Spain.



By anonymous Portuguese (1502) - Biblioteca Estense Universitaria, Modena, Italy, Public Domain, https://commons.wikimedia.org/w/index.php?curid=26117950

4.2. The Treaty of Tordesillas of 1494

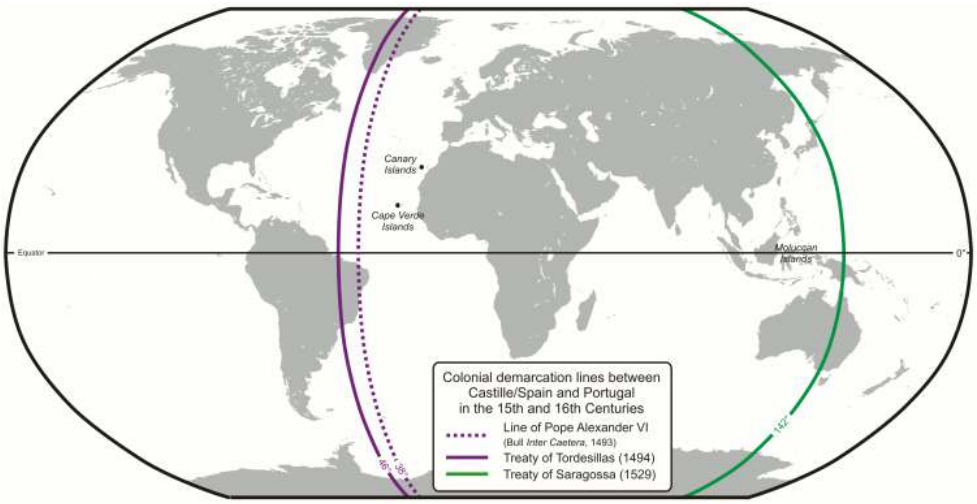
As it turned out, the line had to be moved and relatively soon—the Portuguese had also sailed west and had found not the Caribbean, where Columbus landed, but rather Brazil, where they were determined to establish a presence. A new line needed to reflect the reality of these Portuguese discoveries, and so the line was moved to 1770 kilometres west of the Cape Verde Islands. This allowed a larger portion of Brazil to fall under Portuguese jurisdiction.

The lines of demarcation | Wikimedia Commons

The division of the world in this way has consequences that are still with us today. The States of Central and South America were largely colonised by Spain because they fell in the areas to the west of the line. Today these States largely speak the Spanish language. The only exception in the Americas to this is Brazil, which being on the Portuguese side of the line, speaks Portuguese today, having been colonised by Portugal.

4.3. The Treaty of Zaragoza of 1529

The efforts to divide the world were by no means finished. You can appreciate drawing a line down the middle of the Atlantic is only going to be half the story. The world is round and you'll need to draw a line somewhere down the other side. To the Spanish and Portuguese at the beginning of the 16th century, this was by no means certain, and it wasn't until the journey of Magellan's crew (because Magellan didn't survive the journey himself), that the world's first circumnavigation occurred and there was direct confirmation that the world was round. With this in mind, the Portuguese and the Spanish needed to complete the task and draw another line through the western Pacific. This was accomplished by the Treaty of Zaragoza in 1529, which completed the task and ensured that the world was divided into two.



By Lencer - Own work, CC BY-SA 3.0, Link

As it turned out, this line was placed incorrectly, because the Philippines, which had been reached by the Spanish and colonised by them, had ended up on the Portuguese side of the line. This perhaps reflects the limited understanding of geography and poor ability to calculate longitude that the individuals had at this time. At the same time, the East Indies, in what became modern-day Indonesia, initially fell under Portuguese jurisdiction.

5. Formation of the Dutch East India Company

This extraordinary carve-up of the planet between the Spanish and Portuguese had other consequences too. The Spanish were particularly eager to restrict trade to their colonies and forbade any vessel that was not under the Spanish flag from visiting any port that they controlled. This meant that all of the ports in the Caribbean and in much of South America were Spanish, and therefore no one had any business to visit these areas. The Spanish sought to extend this to say that the Caribbean Sea was an area where other vessels were not free to navigate. The Portuguese followed suit and indicated that the Indian Ocean was an area not subject to anybody else's control and therefore other vessels were unwelcome.

The response from the other powers was very quick. The Dutch particularly were concerned about this attempt to exclude and they sought to attack the Portuguese in their possessions in Brazil. They also attacked them in the East Indies, establishing the Dutch East India Company. This brought the Dutch and the Portuguese into direct conflict and they fought a war in which the Dutch were largely successful, hence Indonesia, prior to its independence, spent most of its time as a Dutch possession.

The Dutch were concerned about the legality of what they had done. They, therefore, sought a legal opinion to justify their actions. The opinion was sought from a Dutch lawyer named Huigh de Groot (he's known to history more readily as Hugo Grotius). Grotius is popularly known as the father of modern international law. He wrote a number of key treatises that set out some fundamental concepts of public international law and his opinions on the law of the sea were subsequently published as a book under the title 'Mare Liberum' (or 'The Freedom of the Seas').

Portrait of Hugo Grotius by Michiel Jansz. van Mierevelt, 1631 (Public Domain)

In Mare Liberum, Grotius made two arguments to refute the attempts of Spain and Portugal to close off large areas of the ocean to the ingress of the Dutch. The most important argument was that the ocean, by its nature, was incapable of such enclosure or any form of State sovereignty. This could be seen in comparing the oceans to an area of land. If a State claimed an area of land they could send an army or settlers to secure control of that area. If that control was contested through the occupation of another army, their own army could defend the territory and reassert that State sovereignty. On the other hand, the ocean doesn't allow this type of response.

To claim an area of sea would require occupation and defence and yet to do this on a permanent basis was practically impossible. In fact, it's practically impossible to do even today. Eventually, your ships and the people you posted out at sea would have to go home, so permanent occupation would be impossible. As such you could never permanently take over the ocean and make it subject to your sovereignty in the way that you could with land, and this, it followed, meant that the seas were an area of freedom that anyone could move about. Grotius also argued that to claim the ocean was inconsistent with the laws of nature and by its very nature the sea ought not to be susceptible to any form of claim.

6. The impact of Grotius

Grotius' work has had a profound impact on the law of the sea and more generally on public international law. His concept of freedom of the seas is still with us in a modified form today. The idea that a ship should be able to navigate freely from one part of the world's ocean to another underlies international trade at sea, and without the freedom of the seas, this would be impossible. So we owe Grotius a lot in terms of the development of international law and the manner in which it is applied within our modern world.

John Selden: portrait by an unknown artist (Public Domain)

Not all of Grotius' views, however, were readily accepted. The English jurist John Selden wrote a rebuttal to Mare Liberum called 'Mare Clausum' where he disputed the very nature of Grotius' claims that the seas were free. He did so trying to justify the old English notion that the North Sea and the waters around the British Isles had some form of special status and this special status meant that they were subject to English law. His views, however, were not retained, even by the English. They ultimately took the view, as the Royal Navy grew, that it was better to have the freedom of the seas giving access to British ships and shipping than to close off an area of the North Sea, but potentially be closed out of others' areas. In this way, Selden's views were soon abandoned and apart from the fact that he wrote a famous rebuttal of Mare Liberum, his work is largely forgotten.

The writings of Grotius and Selden marked the end to the first phase in the development of the law of the sea. The concepts the Grotius outlined in his work came to be used by others and how they were developed is what we'll look at in the next section of this topic.

6.1. Activity: Your Turn

Activity

Mare Liberum & Mare Clausum

Drag the Mare Liberum or Mare Clausum box onto the appropriate statement

Mare Liberum | Mare Clausum

The ocean cannot be closed off to others	Hugo Grotius
Nations have historically imposed passage fees over certain parts of the Mediterranean	Open Seas
The ocean cannot be settled on a permanent basis	The ocean cannot be subject to State sovereignty
Waters such as the North Sea have a special status and are subject to English law	The laws of nature dictate that the ocean should be open
British claims to sovereignty over the waters adjacent to the British Isles	Anyone should be free to move about the ocean
Closed Seas	John Selden

Check

7. The second phase: commercial interests

In the years following Grotius and Selden, there was much development in the law of the sea.

This is in part due to the increasing use of ships and shipping in trade. Trade had previously, through the Middle Ages, largely been by land or in small coastal vessels. But with the opening of the Americas and the routes between Europe and Asia, there was much greater use of ships and shipping in trade. There was also the emergence of the concept of the territorial sea. This was also developed by a Dutch lawyer, although this time by the name of Cornelius Bynkershoek, about 100 years after Grotius. Bynkershoek applied what was called the 'cannon shot' rule, and he worked on the basis that there could be an exception to Grotius' freedom of the seas with respect to the one area of sea a coastal State could actually dominate.

A State could—if it set up cannons along the shore—dominate and control an area of sea. If ships came to contest that control, they could be fired upon. It was an area where the terrestrial could dominate the maritime and therefore was an area of sea that could be subject to State sovereignty. Bynkershoek's cannon shot rule was then applied for about the next 100 to 150 years before it eventually hardened into distances of between three and four nautical miles, depending on how far States thought their cannons could shoot.

Another factor at this time is the dominance of British maritime trade. Through the 18th century and certainly into the 19th century, the Royal Navy and British maritime trade both grew tremendously and became the largest in their respective fields in the world. The dominance of British maritime trade had an impact on the law of the sea, because it meant that vessels—if they weren't flying the British flag—would be travelling to ports that may be British ports, but almost certainly would be using British marine insurance products in order to safeguard the ship and its cargo from economic loss in the event that the ship was lost.

If you used British marine insurance, then your ship would have to comply with British safety standards and would have to apply rules of navigation. Accordingly, British practices had a profound effect on the way ships went to sea. Although the British controlled half of the world maritime trade, their standards were eventually adopted by virtually every State, largely through the passive use of marine insurance and the dominance of British trade and British naval protection of that trade to ensure that these standards were met.

7.1. Activity Your Turn

Activity

Question: In 1945, Wyndham Walker wrote an article entitled “Territorial Waters: The Cannon Shot Rule”.

Check

<> Embed

Using the results of your search, find the full text of the article and save a copy to read. What journal does the article appear in?

Check

<> Embed

Activity

Recall the rules for AGLC referencing. Now look through the article until you find the first sentence of Part II of the article. Assume you wanted to directly quote this sentence, how would you correctly write a footnote citation to go with this quote?

Check

The article provides a useful account of early State practice regarding the territorial sea. Read the article and summarise it in your own words. Then provide a list of five (5) key points (each point should be only one sentence) in the box below.

Check

8. The 19th and 20th centuries: codification

The end of the 19th century marks the commencement of the third and final phase in the development of the law of the sea. International trade by sea had exploded through the 19th century and by the beginning of the 20th, there was a need to try to clarify exactly what rules applied. The rules that were being used were rules of custom, and being custom, they weren't written, and consequently, there were disagreements as to exactly how they might work in any given circumstance. An effort to try to bring people together was going to be necessary to resolve these problems and to see how these rules ought to be applied.

The 1930 Hague Codification Conference had a number of very modest objectives. It sought to codify rules relating to the territorial sea; to finally indicate what its extent would be. The old 'cannon shot' rule had fallen out of favour, but States adopted different distances. The British, French and Americans thought three nautical miles was an appropriate distance for the territorial sea to be measured. On the other hand, the Scandinavians, who had long been proud of their prowess with making bronze cannons, had been using four nautical miles for well over 100 years. The Russians, who one might say boasted they had the biggest cannons of all, had even in Czarist times, adopted a 12-nautical-mile territorial sea, which was disputed among States. There was also an effort to try to clarify exactly what jurisdiction a State enjoyed in its territorial sea and to what extent others might navigate through it. However, none of these matters could be agreed upon, and after a month of argument at the Hague, the conference was abandoned, with only the promise of a follow up-conference scheduled for 1940. However, this follow up conference itself did not take place, because the Second World War intervened, and it wasn't till after the Second World War that the United Nations moved to try to deal once more with questions of the law of the sea.

9. The United Nations and the First UN Conference on the Law of the Sea, 1958

The United Nations decided to hold a major conference, much in the style of the 1930 conference, but with some important differences. Prior to the conference it wanted draft conventions to be able to be the focus of discussion. To accomplish this, it charged the International Law Commission with the task of drafting a Law of the Sea Convention. The International Law Commission is an organ of the United Nations and it's made up of over 50 lawyers—all from individually different countries and all the leading international lawyers of their generation. The ILC, as it's more commonly known, is often given tasks by the UN General Assembly or other organs of the UN, with a view to framing international law and providing draft documents that States can then focus upon. It did this with the law of the sea, but ultimately could not reach a single convention. Rather, it drafted four separate conventions for consideration by the international community.

The drafts were negotiated between 1948 and 1956 and four draft conventions were presented to the First UN Conference on the Law of the Sea, or UNCLOS I, in Geneva in 1958. Geneva was chosen to host the conference because it's long been a centre for international negotiations and has a strong UN presence, although ironically, Geneva is in Switzerland and Switzerland is a landlocked State, so the appropriateness of a location in a landlocked State to negotiate the law of the sea is open to some question. The conference adopted four conventions and did so relatively quickly.

These were:

- the Convention on the Territorial Sea and Contiguous Zone;
- the Convention on the High Seas;
- the Convention on the Continental Shelf and;
- the Convention on Fishing and Conservation of the Living Resources of the High Seas.

One of the motivations for the conference had been to resolve the width of the territorial sea, and unfortunately, there was still no consensus on this issue. Even in 1958, States could not agree whether three nautical miles or as wide as 12 nautical miles ought to be used, and so a Second UN Conference on the Law of the Sea was organised in 1960, again in Geneva.

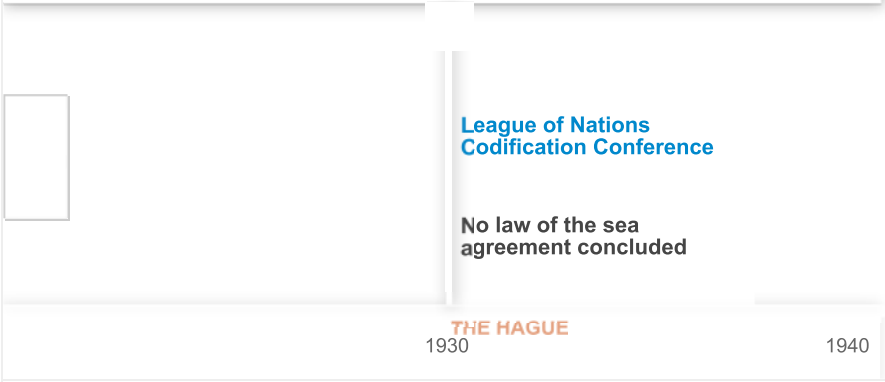
10. The second UN Conference on the Law of the Sea 1960

The Second UN Conference on the Law of the Sea was convened to discuss only two issues, and this time without the preparation of the International Law Commission to help the States resolve them. The two issues were the limits of the territorial sea and fisheries limits. Unfortunately, this conference was like the conference in 1930 at the Hague. It failed to resolve these issues. A formulae which was designed to be a compromise between the maritime States who wanted a very narrow territorial sea—which would not interfere with maritime navigation—and those States who wanted a broad territorial sea, the compromise provision between them was six nautical miles of territorial sea and six nautical miles beyond that of fisheries zone. This was presented to the conference by the United States and Canada, but unfortunately for those concerned in advocating this proposal, it failed to pass by one vote and the conference broke up without a result.

The failure of the Second UN Conference on the Law of the Sea to reach a result, and the disappointing take-up of the four Geneva Conventions on the Law of the Sea that had been concluded in 1958, marks a turning point for the law of the sea, and marks a change in the approach of States.

1930

League of Nations Codification Conference



11. The failure of UNCLOS II

Video Transcript (PDF)

In hindsight, the failure of the 6+6 formulae was probably a blessing in disguise because the four conventions themselves were proving somewhat disappointing. The disappointment is largely a feature of what had happened in the international community since 1958. Since that time a large number of States, particularly in Africa and Asia, had become independent. This period of decolonisation saw the greatest rush of States to independence in the history of the world, and these States had been particularly concerned about a number of issues which related to the Law of the Sea.

Principal among these was foreign ownership of resources. These States were concerned to secure resources which they felt that their former colonial masters had reserved to themselves, and these States typically wanted to use these resources to fund development. They were therefore unhappy at the idea of a territorial sea that was narrow and determined that the law of the sea should reflect their aspirations to be able to bring the resources of the sea under national control. These States did not like the four conventions and sought to bring about a new change. The change that they sought was given voice in a famous speech to the UN General Assembly by the Maltese Ambassador to the UN, Arvid Pardo, in 1965.

Pardo gave an impassioned plea on the part of developing States about the necessity to revisit the law of the sea, to reject the four conventions and to ensure that the resources of the ocean beyond national jurisdiction were made part of the common heritage of mankind. Pardo's speech saw the international community moved to create a new international convention on the law of the sea.

Further information

Speech by the Maltese Ambassador to the United Nations on 1 November 1967, 22nd session of the General Assembly (First Committee, 1515th meeting)

12. The third UN Conference on the Law of the Sea, 1973-1982

After half a decade of preparatory work, Pardo's efforts yielded the Third UN Conference on the Law of the Sea—far and away the largest international conference ever held on a single thematic issue in international law in history to that time. The conference began its discussions in 1973 and the delegates probably were better off not knowing that the effort to conclude a convention on the law of the sea would not be completed until December 1982.

One reason they took so long was because of the broad and lofty nature of their intention. The convention they were negotiating was designed to be a constitution for the world's oceans. It was designed to settle all matters in relation to the law of the sea. This was a very very ambitious thing to undertake, and it took the delegates many years to get around to be able to accomplish it. Even then, a number of issues were not effectively discussed, because States, rather than to continue to debate endlessly, sought to leave things unclear, so a consensus could be reached, rather than a complete resolution. A number of aspects of the negotiation of the Law of the Sea Convention are worth noting.

First of all the Convention was intended to be a package deal. In international law, it is usually possible, if a State does not like a particular provision in a large international agreement, to be able to lodge what is called a reservation. A reservation means that that particular provision will not operate with respect to a State. Rather than undermine the coherence of the Law of the Sea Convention, it forbids any such reservations to be made. States were being obliged to accept a package deal. It was all or nothing, and that States would have to accept the good with the bad. With this, the negotiations engaged in what can only be described as trading backwards and forwards between States on particular issues, knowing that all would be obliged to accept the entire settlement. However, such horse-trading did not sit well with the idea of keeping close records of what the negotiations entailed, and so the Law of the Sea Convention—remarkably for such a large and complicated document—has very little in the way of meaningful records.

The paper records of the Conference amount to 17 volumes, which sounds like a lot, but the vast bulk of these either contain bland statements by States as to their broad positions and aspirations or various draft documents that have been tabled and then were put to one side. There's very little in the way of constructive engagement with particular issues, and the "travaux preparatoires" of the Convention, as the records are more formally called, give little assistance in helping to define concepts within the Law of the Sea Convention.

The almost decade of negotiations that made up UNCLOS III finally came to a conclusion on the 10th of December 1982 in the Jamaican town of Montego Bay. At that time, the United Nations Convention on the Law of the Sea was finally concluded. It was famously described by the last President of UNCLOS III, Tommy Koh of Singapore, as being a 'constitution for the world's oceans', because it was designed to try to deal with all issues affecting the oceans in one single coherent document. In practice, it doesn't do that, but it makes a pretty good attempt at it and certainly tries to cover those issues which are important and have been fundamentally argued about by States for hundreds of years.

13. The 1982 United nations Convention on the Law of the Sea

The Convention itself is huge. It contains some 320 articles and nine annexes, and at the time of writing, has over 160 State parties, and this number has been slowly rising over the past few years. The Convention deals with a range of concepts. It finally settles the width of the territorial sea, which proved unsurprisingly to be an issue of little moment when compared with the other things the Convention was dealing with. For your interest, the distance they finally came up with was 12 nautical miles.

The reason the width of the territorial sea ceased to be a problem was that the Convention deals comprehensively with issues in and around freedom of navigation and describes the circumstances in which vessels of one State may sail through the territorial sea of another State. The Convention also creates some remarkable regimes, most notably, the Exclusive Economic Zone. This gives a coastal State primacy over economic activity in its waters out to a distance to a maximum of 200 nautical miles.

You can see why the territorial sea ceased to be such a thing of such great moment. It also provides a regime for the continental shelf, which can extend out even further. But the Convention does more. It, for the first time, tried to deal with marine environmental protection in a global and comprehensive way, albeit that it does so as a framework convention, doing little more than setting down broad principles by which the environment ought to be protected, but acting as a structure in which other agreements can fit and can be developed.

The Convention also provides for a revolutionary mechanism for compulsory dispute resolution. States within the international legal system don't typically go to court when they have a dispute. The Law of the Sea Convention tries to encourage third-party dispute resolution where both sides are eager to resolve their problems. But even if one side does not, they can still in most cases be forced to court to ensure that disagreements between them don't become a lasting sore in respect of their relationships.

The Convention also provides for those areas beyond national jurisdiction. It creates a regime for the deep seabed—those areas beyond a State's continental shelf. The deep seabed is part of the common heritage of mankind—a concept first flagged by Arvid Pardo, and essentially an area where if this deep seabed was to be exploited, all people would be direct beneficiaries of such exploitation, rather than those who have the technology in order to be able to facilitate such exploitation.

The deep seabed is overseen by the International Seabed Authority—one of three specialist bodies established under the Law of the Sea Convention (the others are the International Tribunal for the Law of the Sea, or ITLOS, and the Commission on the Limits of the Continental Shelf. The International Seabed Authority is located in Kingston, Jamaica, in part out of the recognition that the final session of UNCLOS III was held in Montego Bay in Jamaica. We'll come back and look at the content of the Law of the Sea Convention in much greater detail in the 'Law of the Sea' subject. This is just a taster to give you some idea as to what is to come.

14. Part IX of the Convention

The travails though of the Convention were not over. Having taken many years to be negotiated, the Convention itself faced a threat of its entry into force. The Convention was designed to only come into force once a large block of States had agreed to support it. This number was set at 60, which out of an international community of around 200 States, you can appreciate is a pretty sizeable percentage.

The entry into force was to be one calendar year after the sixtieth ratification, but when that sixtieth ratification occurred in 1993, there was a problem. The sixtieth State, Guyana, was typical of those States who had become parties to the Convention. It was a developing State, and with the sixtieth ratification, it was worth noting that only one developed State—and that was Iceland—had become a party to the Law of the Sea Convention. The reason for this was a fundamental disagreement about Part IX of the Convention, which deals with the deep seabed. A number of developed States, led by the United States of America, had deep reservations about the decision-making procedures that would be used to decide who could exploit the deep seabed.

These reservations were in expectation that the deep seabed would be the next great bonanza for humanity—that people would want to exploit the deep seabed and could become very wealthy from doing so. Because the deep seabed was part of the common heritage of mankind, decision-making prevented a single group of States being able to decide when exploitation could take place. But the developed States still thought there was too much say from the developing States in how the deep seabed would be exploited. Accordingly, they did not become parties to the Law of the Sea Convention, and the Convention ran the risk of not operating properly when it came into force in 1994, simply because the range of States who were parties to it was very narrow.

The problem was resolved through some very spirited and difficult negotiations through 1994. These led to the adoption of the Part IX implementation Agreement. This is essentially an additional international convention that replaces Part IX of the Law of the Sea Convention, without the necessity of formally amending the Law of the Sea Convention itself. It was a near-run thing though.

The Implementation Agreement was delivered to the floor of the General Assembly, and it was understood that if a single State voted against it, the deal to use the Implementation Agreement would be off, although a number of States in the General Assembly abstained, none voted against the Implementation Agreement, and it's now considered part of the fabric of the Law of the Sea Convention, a separate but integral part of the Convention itself. If you have a copy of the Convention, it's worth remembering you should also make sure you have a copy of the Part IX Implementation Agreement. This is because the Part IX in the original Convention is effectively superseded, and you don't want to look at provisions which now are no longer operative.

15. Ongoing Development of the Law of the Sea: the 1995 UN Fish Stocks Agreement

The Convention has faced a number of challenges since its adoption and entry into force. The most notable related to difficulties dealing with fisheries and we'll come back to this topic in the Law of the Sea course and also International Fisheries Law. In brief, the UN has come together to add to the Law of the Sea Convention with what is commonly called the "UN Fish Stocks Agreement", or UNFSA, which deals with straddling fish stocks and highly migratory species. UNFSA is designed to provide additional provisions to those contained within the Law of the Sea Convention—to give the Convention greater richness.

This kind of change is likely to be repeated again and again in the future, and it seems to represent the model for how the Convention will be changed. Indeed, negotiations are currently underway for an implementing agreement regarding biodiversity in areas beyond national jurisdiction (BBNJ). Amendment of the Law of the Sea Convention provisions directly is virtually impossible, and the use of additional agreements is likely to be the way the Convention is added to or even changed into the future.

That brings us to the end of our unit on the development of the law of the sea and it's the end of a 2000-year journey, which to be frank still isn't finished. There will still be developments in the law of the sea into the future, and a lot of work is going into new areas where the Convention doesn't apply. Things like marine protected areas beyond national jurisdiction, which you'll hear a bit about it later in the course.

16. Check your understanding

Activity

Which of the following are important features of the 1982 United Nations Convention on the Law of the Sea? (mark all that apply)

- [ ] Establishes a 200 nautical mile exclusive economic zone
- [ ] Establishes a framework for marine environmental protection
- [ ] Settles the legal nature of the territorial sea
- [ ] Settles the width of the territorial sea at 12 nautical miles
- [ ] Provides detailed regulation of marine plastic pollution
- [ ] Provides for a 12 nautical mile fishing zone
- [ ] Prohibits mining of the deep sea bed
- [ ] Sets total allowable catches for high seas fisheries
- [ ] Declares the deep sea bed to be the common heritage of mankind
- [ ] Is described as a ‘constitution for the world’s oceans’
- [ ] Restricts States to a 24 nautical mile continental shelf

Check