

# The Origins of the 'Ocean Enclosure' Movement

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## Introduction

The end of the Second World War marked the decline of global colonial rule leading to a rise of newly independent states. This is significant as such states formed a large voice that impacted upon the United Nations Convention covering international maritime law. At the same time, the rise in global population and increase demand for fish led to a growth in awareness of the oceans as a bank of rich mineral and fish resources. In this respect, the Truman Proclamations of 1945 on the concepts of continental shelf and conservation of fisheries were early signposts of forthcoming changes. The Proclamations sparked off a global movement towards 'ocean enclosure'.

The United Nations played a central and important role in orchestrating the formulation, development and implementation of a mammoth treaty incorporating customary international law that would be acceptable to all levels of the global community i.e. land-locked, coastal and maritime states. Despite dramatic political, economic and social changes occurring in the world, the treaty was achieved and came into force as the UN Law of the Sea Convention 1982 (LOSC 1982) on 16 November 1994.

This paper examines the complex issues and causes that led to the 'ocean enclosure movement' by highlighting significant events and consequences. It also highlights some of the important outstanding issues and postulates possible outcomes that could lead to further enclosure of the ocean.

## Truman's Proclamations of 1945

On 28 September 1945 the United States of America (US) President Harry S. Truman made

two Proclamations. The first Proclamation asserted the effective control and utilisation of offshore resources in the continental shelf and the second established a conservation zone for fishery.<sup>1</sup> The Proclamations paved the way for the concepts of exclusive fishery zone (EFZ) and continental shelf to be generally accepted into customary international law and signalled the spread the 'ocean enclosure movement'.

The issuance of Proclamations may have been a consequence of the considerable technological advancements made by the US in offshore oil exploration and exploitation in the continental shelf, and the concerns over fishing rights beyond the territorial sea.<sup>2</sup> Possibly, the rationale for the Proclamations was expedited by the discovery of petroleum resources beyond the territorial water in the Gulf of Paria, which led to the signing of an agreement between the United Kingdom (UK) and Venezuela in February 1942. This could have been the catalyst for the US to act urgently in anticipation of possible threats of foreign offshore exploitation close to its coast.<sup>3</sup>

Two significant concepts arose from the Proclamations. One was the concept of natural prolongation in that the territorial sea is linked to the continental shelf as it is seen as 'an extension of land-mass of the coastal nation'.<sup>4</sup> This is based upon geomorphological arguments. The other is the concept of 'equitable principle' which is used in negotiations for delimitation of boundary with adjacent neighbours.<sup>5</sup>

Following the US Proclamations, Mexico, Argentina (1946) and Chile (1947) made similar claims with the latter two countries extending their sovereignty beyond the territorial sea.<sup>6</sup> By

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1958, similar seabed claims were made by nearly 20 states.<sup>7</sup> The far-reaching effects of the Proclamations became more apparent in the late 1950s and 1960s with rapid development in offshore knowledge and technology to explore and exploit seabed resources and also the rise in number of newly independent coastal states resulting from decolonialisation. Furthermore, the concept of continental shelf was endorsed and accepted as international law by the International Court of Justice (ICJ) through its decision in the North Sea Continental shelf case, 1969.<sup>8</sup>

In the area of fishery, the Proclamation introduced the concept of conservation zones, which eventually evolved into exclusive fishery zone (EFZ) and exclusive economic zone (EEZ). The establishment of fishery conservation zones evoked controversy and strong protest from Great Britain as it was seen as an encroachment on the freedom of fishing and navigation. This conflict of ideology signalled the commencement of international negotiations between coastal and maritime states that ensued for several decades.

Besides the contribution of the two maritime concepts of extending control and jurisdiction, the Truman Proclamations could also be seen as the first movement towards 'ocean enclosure'.

### Conservation of Fisheries

Between 1955 to 1965 the world's fish catch almost doubled reaching exploitation level,<sup>9</sup> especially in coastal waters. The increased demand for fish and overfishing could be attributed to a growing world population and also advancement in fishing techniques like the use of trawl nets, purse seines and drift nets.<sup>10</sup> At the same time, extensive coastal development and marine pollution caused the destruction of fish habitats such as seagrass and gravel seabeds, which ultimately affected the breeding grounds and migratory patterns of fish.

With the depletion of coastal fish stocks, fishing activities have been forced further offshore beyond national waters. As a result this has led to the development of offshore fishing fleets by deep water fishing nations

(DWFNs) like Japan, South Korea, Russia and Taiwan. Confronted with increasing number of offshore fishing fleets, coastal states have vehemently lobbied for the sustainable development of fisheries. This has led to the declaration of 200 nm exclusive fisheries zones (EFZ) or exclusive economic zones (EEZ) along their coasts to protect the local fishing industry and conserve fish stocks. The declaration of EFZ/EEZ could be viewed in terms of restricting the access to straddling and highly migratory fish stocks by neighbouring states.

Recognising that fishing is a transboundary issue, international conferences and treaties have focused on the need to establish conservation zones in order to achieve sustainable development of fisheries, for example, the International Conference on Overfishing (London, 1946) and the Declaration of Cancun on Responsible Fishing (1992).<sup>11</sup> More recently at the Rio Conference on Environment and Development in 1992, bilateral and multilateral cooperation at various levels to ensure management of high seas fishing was one of the seven programs approved under Chapter 17 of Agenda 21 which concerns marine living resources and environment.<sup>12</sup> However, balancing conservation and growing demand has become increasingly more difficult as there is lack of information in the exact stock level of the different species of fish and their migration patterns. The problem is further compounded by the confrontation between coastal states and DWFNs operating at the fringe of the EFZ/EEZ.

As international discussions and negotiations on sustainable development of fishing proceed at a slow pace, concern about the depletion of fish stocks could force coastal states to unilaterally extend their EFZ beyond the present 200 nm limit resulting in further ocean enclosure.

### Continental shelf and expanding offshore exploitation

The rapid rise in industrialisation around the globe has put pressure on the limited land resources. As a result, states are forced offshore in search of natural resources such as oil, gas and polymetallic minerals. Taking the cue from the Truman Proclamation on the continental shelf, coastal states began extending their claims

further offshore beyond their territorial seas. The importance of oil to industrialised countries became apparent during the Middle East oil embargo in the 1970s. Hence, the search for offshore oil became a major activity and the continental shelf became a critical issue for many coastal states. The reported discovery of new potential offshore oil and gas resources on the continental shelf in the Yellow Sea (10 billion barrels) and South China Sea (25 billion cubic metres)<sup>13</sup> fuelled the claims of sovereignty and sovereign rights in offshore islands, like the Spratly Islands.

Besides oil, seabed exploration and exploitation have also been extended to the search for polymetallic nodules from the depths of the ocean floor. The perceived potential of this source has contributed to its growing importance in the claim for the continental shelf, especially in the wake of increased knowledge, innovation, technology and development of advanced capabilities like drilling techniques for offshore exploitation and exploration. The scarcity of land based resources has caused the move from industrialised countries wanting guaranteed access to seabed resources.

The dynamics and riches of the ocean are seen as alternative sources of energy, which have not been fully exploited. But their importance will grow as land oil reserves slowly dwindle. A possible effect of more offshore installations would be increased claims and restrictions around these locations.

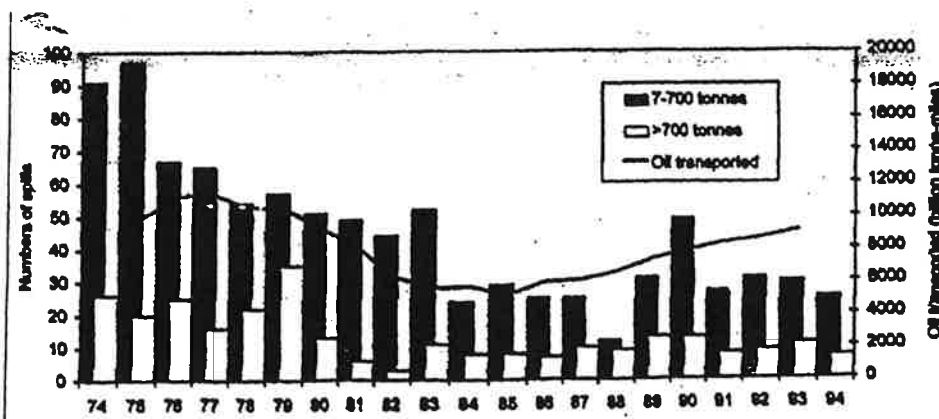
It is evident from the number of cases pertaining to continental shelf heard by the ICJ in the last few decades that the concept and principle of delimitation has been reinforced and accepted as international law. Similarly, the 'equitable principles' derived from the Truman Proclamation on continental shelf have been encapsulated in customary international law in cases such as North Sea Continental Shelf (1969) and Tunisia/Libya (1982).

However, the criterion for delimitation of the outer boundary has evolved since the Truman Proclamation. In simple terms, it has moved from geomorphologically to geographically based, i.e., from depth to distance. This is significant because coastal states can now claim a limit of 200 nm continental shelf even though the depth of water suddenly decreases to 4000 metres at a distance of 100 metres from its baseline. Hence, this criterion allows coastal states to further encroach into the high seas.

**Protection of the Marine Environment**

Coastal states are concerned with higher risk of marine pollution as a result of increasing volume of shipping traffic, especially in restricted waters like the Malacca Straits.<sup>14</sup> The problem is further aggravated by the introduction of very large crude carriers (VLCCs) where any major accident would be catastrophic, for example, the Exxon Valdez incident. The fear is substantiated by a study that revealed a close correlation between the amount of oil transported and the number of accidents<sup>15</sup> as shown in Figure 1 below:

Figure 1: Oil Transport vs Number Of Spills



Source: from *Ocean Orbit*

However, the concern is not confined to oil tankers as coastal states like Indonesia, Malaysia and Singapore have also objected to transportation of other hazardous goods such as plutonium as in the case of 'Akatsuki Maru' through the Malacca and Singapore Straits in 1992.<sup>16</sup> Rising concerns over the marine environment and the need for protection has led to coastal states adopting measures such as the Basel Convention and mandatory reporting schemes to control and monitor navigation within their waters. In the case of the Basel Convention consent for the transport of hazardous cargo through the waters of the coastal state must be obtained prior to its movement. With regard to the implementation of mandatory reporting systems ships are required to report to the vessel traffic systems centre before entry into a designated area such as the Malacca and Singapore Straits. This form of control arising from the need to protect the marine environment is considered a legal form of ocean enclosure, which does not directly affect the right of innocent or transit passage which still exists. From this example, coastal states will continue to find creative solutions within the legal framework to protect their maritime interests and concerns.

### Security Zone

The varying claims of the breadth of territorial seas and regimes prompted the UN and also a joint initiative by the US and Soviet Union<sup>17</sup> in 1966 'to seek commitment from other nations to participate in a new global treaty on the law of the sea'.<sup>18</sup> The primary objective of the US/Soviet joint initiative was to ensure that the limit of the territorial limit did not exceed 12nm and also to guarantee freedom of navigation in straits used for international shipping that coincided with the territorial seas of coastal states. However, the UN Assembly establishment of the Third United Nations Conference on the Law of the Sea (UNCLOS III) in 1973 superseded the joint initiative.

The approach adopted by coastal states for addressing security concerns varies widely depending upon factors such as physical geography. For example, Indonesia has almost 14,000 islands scattered across a distance of 1,900 kilometres. This forces it to enact laws of

an archipelagic state on 18 February 1960 arguing that the Indonesian archipelago forms a single political, social, cultural, legal and defence and security entity.<sup>19</sup>

The perception of sea threat also differs considerably among states. For example, the declaration of military security zones by North Korea (50 nm in August 1977), France in the southwest Pacific (12 nm in 1995)<sup>20</sup> and the Peoples' Republic of China in the Taiwan Straits (July 1995 to March 1996).<sup>21</sup> Therefore depending upon the level of threat changes to security zones could occur. The probability is that these limits will continue to move outwards due to the use of longer-range projectiles as seen during the Falkland War in 1982 and more recently the Gulf War in 1991. On the other hand, if confidence and security building measures (CSBMs) are more widely accepted, then there is every possibility that security zones could be reduced or removed. In this regard, the UN could play an instrumental and active role in preventing further enclosure of the oceans by facilitating forums at regional and international levels to allay security concerns.

### United Nations Work Towards a Global Maritime Treaty

The Truman Proclamations of 1945 had a significant impact on States' claims and practices of jurisdiction and control over their territorial seas, continental shelf and EEZ. Against this backdrop, the United Nations played a pivotal role in establishing governmental organisations like the International Maritime Consultative Organisation (now known as International Maritime Organisation) and the International Law Commission (ILC) to initiate work to regulate maritime safety practices and also to codify the law of the sea, respectively.

### United Nations Conference on the Law of the Sea, 1958 (UNCLOS I)

On 6 December 1949, the UN General Assembly advised the ILC to include the regime of territorial sea in its work and this was subsequently further extended to include technical, biological, economic and political factors.<sup>22</sup> The US assisted in the preparation of

73 articles of basic proposals for consideration by ILC. This was used as the draft proposal for UNCLOS I convened in 1958. A total of 86 states attended the Conference and adopted 4 conventions.<sup>23</sup>

Although the Conference failed to agree on the breadth of the territorial sea and coastal state fishing rights beyond the territorial sea,<sup>24</sup> some of the important achievements of the conference were the codification into customary international laws of the following:<sup>25</sup>

- use of depth-cum-exploitability criteria for delineating the limits of the continental shelf i.e. 200 metre depth;
- establishment of territorial sea and contiguous zone not exceeding 12 nm;
- criteria for drawing normal and straight baselines; and
- establishment of a regime on the right of innocent passage in territorial sea.

#### **United Nations Conference on the Law of the Sea, 1960 (UNCLOS II)**

UNCLOS II was convened in 1960 to specifically resolve the outstanding issues of the breadth of territorial sea and fishing rights arising from the previous Conference. The outcome of UNCLOS II was inconclusive due largely to the varying widths of territorial sea claims.<sup>26</sup> The extension of the territorial sea limit could be attributed to the concern of coastal states wanting a larger area for surveillance and security.<sup>27</sup> In addition, the newly independent coastal states (NICS) felt that they were not obliged to comply with the conventions from UNCLOS I, as they had not been involved in the negotiations. This, of course, caused concern to the maritime states with large commercial and naval fleets that depended upon the principles of freedom of navigation for their operations.

The status quo of UNCLOS II flagged the changes in the composition of the maritime community with a significant rise in the number of NICS. But more importantly, the status quo reflected the concern and will of coastal states to extend their maritime jurisdiction for reasons of seabed resources and security (referred to as 'creeping jurisdiction').

#### **United Nations Conference on the Law of the Sea, 1968 (UNCLOS III)**

In 1967, his Excellency Arvid Pardo, the Ambassador of Malta recommended to the United Nations (UN) General Assembly that the seabed resources (except fisheries) in high sea should be managed by a UN agency. As a result the UN established a Sea-Bed Committee to study the recommendation. In addition, a Committee to Study the Peaceful Uses of the Sea-Bed and Ocean Floor Beyond National Jurisdiction was also established. The membership grew from 35 to more than 90, which reflected the growing international interest in maritime affairs. Based on the Committee's proposals, the UN General Assembly decided 'common heritage of mankind' and other principles should be integrated and a treaty drafted. Hence UNCLOS III was convened in 1973.<sup>28</sup>

UNCLOS III was significant in many ways. It was the first codification of integrated international maritime law. A unique 'package deal' method was developed and adopted, advocating that compromises had to be made to achieve consensus due to the diverse interest groups at the conference. A dispute settlement system has been incorporated to aid possible problems either in interpretation or delimitation of boundaries.

More importantly, it established the breadth of territorial seas to be 12 nm, introduced concepts of transit passage through straits used for international navigation, and emphasised freedom of navigation in EEZ and continental shelf without unjustifiable interference. Several new regimes were also introduced like Archipelagic States, comprehensive environmental laws and the 200 nm EEZ, including regulated fishing rights of coastal states. It also re-defined the outer boundary of the continental shelf based on horizontal distance rather than depth.

To some extent, UNCLOS III provided a foundation for the code of conduct and limits of maritime claims for coastal and maritime states, including guaranteed access by disadvantaged and landlocked states. However, this does not signify the end the movement

ocean enclosure as political, economic and social scenarios will change with time. It does signify that these are the rules by which the general global community has agreed to abide to ensure peaceful co-existence among the different users. The Convention was ratified by the 60<sup>th</sup> Member State and came into force on 16 November 1994. A total of 155 states signed the LOSC 1982 on the closing day for signature reflecting its international status.

### Beyond LOSC 1982

It has been estimated that at present more than 40 per cent of ocean space is under the jurisdiction of coastal states.<sup>29</sup> The work of the UN has not ended with the ratification of the LOSC 1982. On the contrary, there are a number of issues in LOSC 1982 that need to be resolved or clarified.

An important issue for clarification is the application of straight baselines in non-deeply indented coastlines like China. In this case, straight baselines have been drawn to offshore islands that depart from the general direction of the coastline and are outside the 12 nm territorial limit. The consequences are that the limits of China's territorial sea, EEZ and continental shelf are correspondingly pushed out. At the same time, the waters behind the baseline are automatically designated to be internal waters, prohibiting right of innocent passage.<sup>30</sup>

The second issue that needs to be addressed is the mechanism to ensure compliance with the provisions of LOSC 1982 and the enforcement body. So far, the LOSC 1982 only requires the deposition of a copy of chart or list of coordinates with the Secretary-General of the UN.

In order to ensure conformance and prevent illegal movement of ocean enclosure, these issues need to be urgently addressed to prevent unilateral interpretation and proliferation of a well-intended integrated international maritime law. The UN could partake in this area by providing advice or ensuring that member states respect and comply with the provisions of LOSC 1982, which was negotiated in a spirit of compromise.

### Conclusion

The Truman Proclamations were the revolutionary factor in changing international maritime law and initiating the 'ocean enclosure movement'. The innovative concepts of linking the territorial sea to the continental shelf, the establishment of conservation zone for fishery, and the use of 'equitable principles' for delineation of boundaries with neighbour states have been refined many times since their issuance in 1945.

The UN and its members and other international bodies should be applauded for their efforts and contributions to the three Conferences on the Law of the Sea. The final achievement has been the LOSC 1982, which is a testimony of the scale and effort involved. The LOSC 1982 should not only be viewed in the perspective of 'ocean enclosure', but also as a means to ensuring peaceful co-existence and use by the maritime communities. After all 155 states had signed the LOSC 1982 at the closing day for signature, making it a truly international treaty.

The LOSC 1982 has only been in force since November 1984. It has the effect of limiting possible future ocean enclosure but bilateral, regional and international trust are also required. In this respect, it is important that CSBMs and mechanisms be actively promoted and forums be initiated for better understanding of the LOSC 1982 and allaying some of the concerns especially on the issue of security. Considerations of national security and sovereignty remain powerful forces influencing countries to extend their jurisdiction at sea.

In areas where there are conflicting claims of seabed resource or concerns on conservation of fisheries, joint development programs could be initiated. The UN's role does not end with the ratification of LOSC 1982. On the contrary, the UN's role could possibly be extended to help in facilitating bilateral and multilateral co-operation, including addressing some concerns about differing interpretations of the provisions in LOSC 1982. The dispute settlement provisions of LOSC 1982 will become important in this regard, particularly the

establishment of the international Law of the Sea Tribunal to deal with maritime disputes.

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## ENDNOTES

- <sup>1</sup> S. P. Jagota, *Maritime Boundary*, Martinus Nijhoff Publishers, 1985, p. 5.
- <sup>2</sup> Arnd Bernaerts, *Bernaerts' Guide to the Law of the Sea, The 1982 United Nations Convention*, Fairplay Publications, 1988, p. 3.
- <sup>3</sup> During WWII the rivalry between the US and Soviet Union was becoming clearer. In this respect, the US could have been concerned with a possible Soviet expansion into neighbouring countries.
- <sup>4</sup> Bernaerts, op. cit., p 6.
- <sup>5</sup> ibid, p. 6.
- <sup>6</sup> ibid, p. 3.
- <sup>7</sup> ibid, p. 4.
- <sup>8</sup> Jagota, op. cit., pp. 127-139.
- <sup>9</sup> Bernaerts, op. cit., p. 5.
- <sup>10</sup> Deb Menasveta, 'Fisheries Management in the EEZ of SE Asia before and after Rio and prospects for regional cooperation', *Sustainable Development of Coastal and Ocean areas in Southeast Asia: Post-Rio Perspectives*, eds K.L. Koh, et al., National University of Singapore, 1995, pp. 102-108.
- <sup>11</sup> For the protection of highly migratory species and straddling stocks.
- <sup>12</sup> Menasveta, op. cit. pp. 98-99.
- <sup>13</sup> Ji Guoxing, *Maritime Jurisdiction in the three China Seas: Options for Equitable Settlement, UN Convention on the Law of the Sea and East Asia*, eds D. Kim et al., Institute of East and West Studies, Yonsei University, 1996, pp. 90 and 104.
- <sup>14</sup> Mochtar Kusuma Atmadja, *Overcoming Navigational Hazards and Marine Pollution in the Straits of Malacca and Singapore, the exercise of rights and duties of littoral states*, Centre for Archipelagic Law and Development Studies, Bandung, 1995, p. 9.

<sup>15</sup>*The MIMA Bulletin*, vol. 2, no. 1/95, p. 32.

<sup>16</sup>Donald R. Rothwell, UNCLOS as an instrument of maritime confidence building measures in East Asia, *UN Convention on the Law of the Sea and East Asia*, eds D. Kim et al., Institute of East and West Studies, Yonsei University, 1996, p. 27.

<sup>17</sup>William L. Schachte, Jr, Foreign Policy and Ocean affairs: Political and Military Implications of the New Law of the Sea, *Global Ocean Politics*, p. 33 (elaborated further in paragraph on 'Defence and Security' in this paper).

<sup>18</sup>Schachte, op. cit., p. 33.

<sup>19</sup>Vivian L. Forbes, *Indonesia's Maritime Boundaries*, A Malaysian Institute of Maritime Affairs Monograph, 1995, pp. 6-13.

<sup>20</sup>Robert W. Smith, Global Maritime Claims: The Current Status, *Global Ocean Politics – Major Issues and Areas*, Institute of East-West Studies, Yonsei University, 1989, eds D. Kim et al., p. 23.

<sup>21</sup>*A Directive from Premier Lien Chan*, [www.roc-taiwan.org.uk/infor/news/dire.html](http://www.roc-taiwan.org.uk/infor/news/dire.html).

<sup>22</sup>Initiated on 21 February 1957.

<sup>23</sup>Four Conventions were drafted on the territorial sea and contiguous zone, high seas, continental shelf and fishing and conservation of the living resources of high seas. The latter was ratified by only 35 states as the principles of conservation stipulated by the convention were adopted from other conventions on fisheries.

<sup>24</sup>Jagota, op. cit., pp. 20-22. (By 1958, 21 nations claimed 3 nm territorial sea, 17 claimed 4 to 6 nm, 13 claimed 12 nm and 9 claimed beyond the 12 nm up to the continental shelf).

<sup>25</sup>ibid. p. 22. (as recommended by the ILC).

<sup>26</sup>Although it should be pointed out that there was a rise in the number of claims for a 12 nm limit.

<sup>27</sup>Bernaerts, op. cit., p. 4.

<sup>28</sup>It should be noted that this Convention took a decade of discussions and negotiations.

<sup>29</sup>Bernaerts, op. cit., p. 12.

<sup>30</sup>Although it may be argued that if the strait has been used historically or is the only safe passage then navigation should be permitted – LOSC III (Article 8).



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