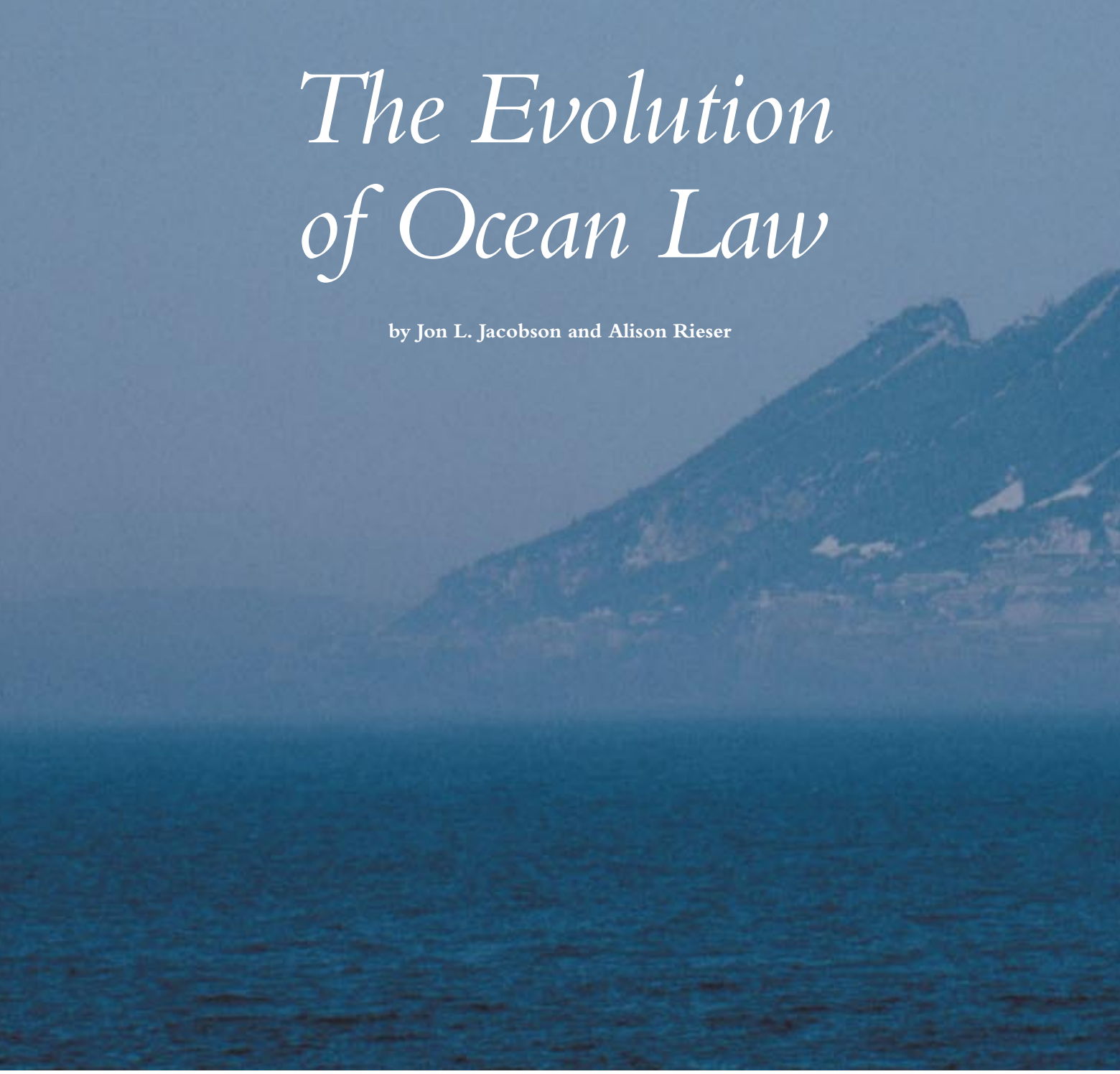
The Evolution of Ocean Law

by Jon L. Jacobson and Alison Rieser



Who owns the oceans? A quick glance at most maps of the world suggests that no one does. The oceans usually are depicted as an uninterrupted wash of pale blue, seemingly representing free seas subject to no nation's sovereignty or jurisdiction.

But this picture is inaccurate: it disregards the centuries-old political and legal struggles that have divided the oceans. To understand those tensions and the evolving international law of the sea, imagine instead an animated historical map of the world oceans in which one year whizzes by every four seconds.

In the early 17th century the waters appear calm, the seas a swath of undivided blue, while other colors battle for dominance over the continents. For the first 20 minutes (300 years), the oceanic parts of the map do not change much: only thin lines of fluttering color along the shores indicate national claims to the seas. When the map hits the mid-20th century, the waters suddenly explode in a fireworks display, starting at the coasts and expanding seaward. About two minutes later nearly 40 percent of the initial blue expanse is covered with many hues representing coastal nations. This final configuration reflects the oceans as they stand today.

The journey to establish this modern ocean geography has not been smooth sailing. Naval powers and coastal nations have fought to protect their watery domains and all the resources they contain—mineral and living, military and economic. Now, after decades of diplomacy, many

In fits and starts, the international law of the sea has evolved to keep pace with the world's changing political, economic and environmental concerns

NARROW STRAITS, such as the outlet of the Mediterranean Sea near Gibraltar (*above*), contain important shipping lanes. But commerce was not the prime concern of the U.S. and the Soviet Union in the 1960s, when both opposed the extension of coastal nations' territorial seas into such choke points: these superpowers worried about interference with the navigation of their submarines.

JONATHAN BLAIR *Corbis*

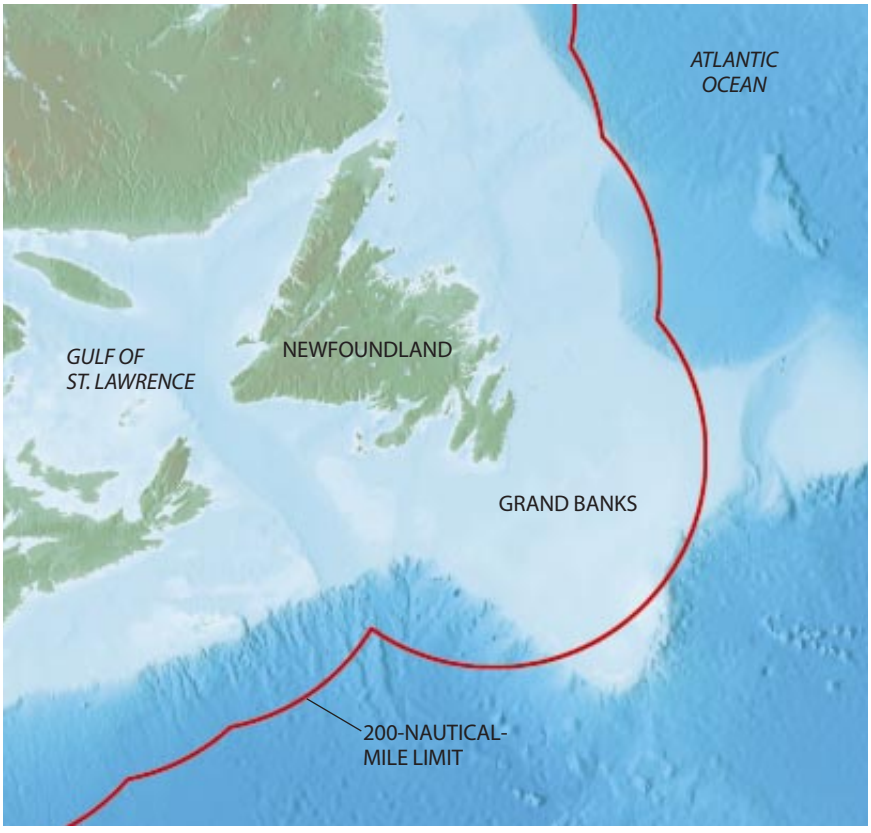
nations have adopted an international law of the sea that outlines their rights and responsibilities regarding the use and management of the oceans. But whether agreement at the conference table means that cooperation will truly reign at sea remains an open question.

Free Seas

Scholars frequently mark the start of the era of free seas—the opening 20 minutes of running time on the imaginary animated map—with the 1609 publication of *Mare Liberum,* or "Free Seas." Written by Dutch jurist Hugo Grotius, the document supported the right of the Dutch East India Company to send its ships through seas claimed by Portugal. Grotius argued that the ocean was too wild to be occupied by nations and that its limitless resources made ownership absurd.

Although *Mare Liberum* itself did not necessarily spawn the age of free seas, its arguments were generally embraced by European nations that were pursuing profit and colonization throughout newly discovered regions. By the mid-17th century it was common practice for maritime nations to use the open ocean freely for the passage of vessels and for fishing.

The only widely recognized exception to the rule of free seas relates to the "territorial sea," a narrow offshore belt of national authority bordering the coast. By the 18th century the maximum breadth of this territorial sea, long subject to dispute, began to settle on a value of three nautical miles (around five kilometers). Although this measure has often been attributed to the distance that a land-based cannon could supposedly fire a ball, it is



GRAND BANKS off Newfoundland, Canada, have historically provided rich fishing grounds. Although these fisheries are now largely depleted, the parts of these shallows that lie just beyond the limit of Canada's exclusive fishing zone (*red line on map*) once attracted distant-water fishing vessels from many countries.

probably based on the length of the English league.

Within the territorial sea, each coastal country had nearly complete authority over the waters and seabed—including living and mineral resources—and the airspace above. Foreign vessels on the surface were allowed the right of innocent passage—that is, movement that does not threaten the peace and security of coastal nations. Beyond these territorial seas, surface vessels and submarines were free to navigate the "high seas." Ships from all countries were also allowed to fish these blue waters. By the early 20th century even the newfangled flying machines were accorded the right to fly over this vast, unbounded area.

The 200-Mile Club

The era of the free seas survived three centuries and two world wars. Although the U.S. emerged from World War II as a global naval power with a consequent interest in preserving the broadest range of liberty on the seas, just weeks after the end of the war, America triggered a revolution in international law that led to the serious erosion of freedom of the seas.

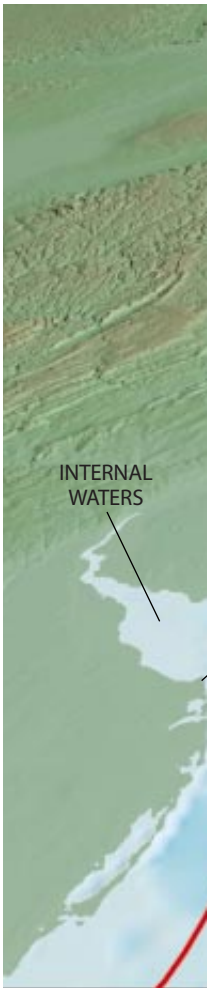
In September 1945 President Harry Truman issued two proclamations pertaining to the oceans off U.S. coasts. One addressed the management of national fisheries beyond the territorial sea and the other, often referred to as *the* Truman Proclamation, claimed exclusive U.S. jurisdiction and control over the natural resources of the continental shelves adjacent to U.S. coasts—areas that, in many places, extended far beyond the outer limit of the three-mile territorial sea. This assertion of national authority was illegal, but it was quickly approved and emulated by the international community. The proclamation thus created a doctrine of customary international law that recognized the exclusive right of coastal nations to control and extract the natural resources of the continental shelves off their shores.

Although it championed the traditional freedoms of navigation, the Truman Proclamation initiated a reaction that eventually turned the old Grotian order into a shambles. Many factors fueled this historic overthrow. Perhaps the most important was the suspicion and resentment raised by technologically rich nations, including the Soviet Union and Japan, that used their distant-water fishing fleets to harvest fish from the high seas just offshore from many foreign lands. To protect their coastal fisheries, several countries extended their territorial seas to 12 nautical miles.

Others carried this trend of expansion much farther. In 1947 Chile and Peru each asserted national control over the resources of the ocean and the seabed out to 200 nautical miles from their coasts. And in 1952 Ecuador joined its southern neighbors and claimed its own 200-mile-wide zone. Despite protest from various seafaring nations and those with distant-water fishing fleets, the so-called 200-mile club gradually added to its membership, first from Latin America and then from Africa.

In the midst of growing confusion over the state of international ocean law, the United Nations convened the first two conferences on the "Law of the Sea" in Geneva. The first one, conducted in 1958, adopted four conventions designed to codify and establish a set of principles and rules for sharing the oceans of the world.

The package of conventions painted a rather traditional view of marine geography, with the waters divided into high seas, territorial seas and a contiguous zone—extending beyond the territorial sea for no more than 12 miles—within which coastal countries could exercise limited jurisdiction for customs control and other defensive actions. But the countries recognized a new continental shelf doctrine.



The delegations were unable, however, to agree on a rule establishing the maximum outer limit of the territorial sea. (A second conference, held in 1960, also failed to reach a consensus on this issue.) Certainly none of the 1958 Geneva conventions on ocean law endorsed anything as extreme as the 200-mile claims asserted by a growing number of coastal nations. Instead countries attending the conference agreed to promote cooperation between coastal countries and distant-water fishing nations in the conservation and management of fisheries. Unfortunately, none of the most important distant-water fishing nations chose to join this

particular convention, preferring instead to enjoy the customary freedom to fish the high seas.

The Seabed Question

Despite the Geneva accords, national expansion into the seas continued apace. By the mid-1960s this trend became so alarming to the two main naval powers of the day, the U.S. and the Soviet Union, that these cold war adversaries began to plot together to hold back the expansionist tide. The U.S. and Soviet Union feared creeping jurisdiction—the prospect that nations making claims over fish and other natural resources might also try to interfere with navigation and overflight in broad areas. The U.S. was especially concerned that the extension of territorial seas would inhibit the passage of its ballistic-missile nuclear submarines—the main cold war deterrent to nuclear exchange with the U.S.S.R.—through such vital choke points as the straits of Gibraltar and Hormuz. The establishment of territorial seas even 12 miles wide would cause these and other straits to be blanketed by coastal waters in which, under traditional rules, submarines would be required to surface.

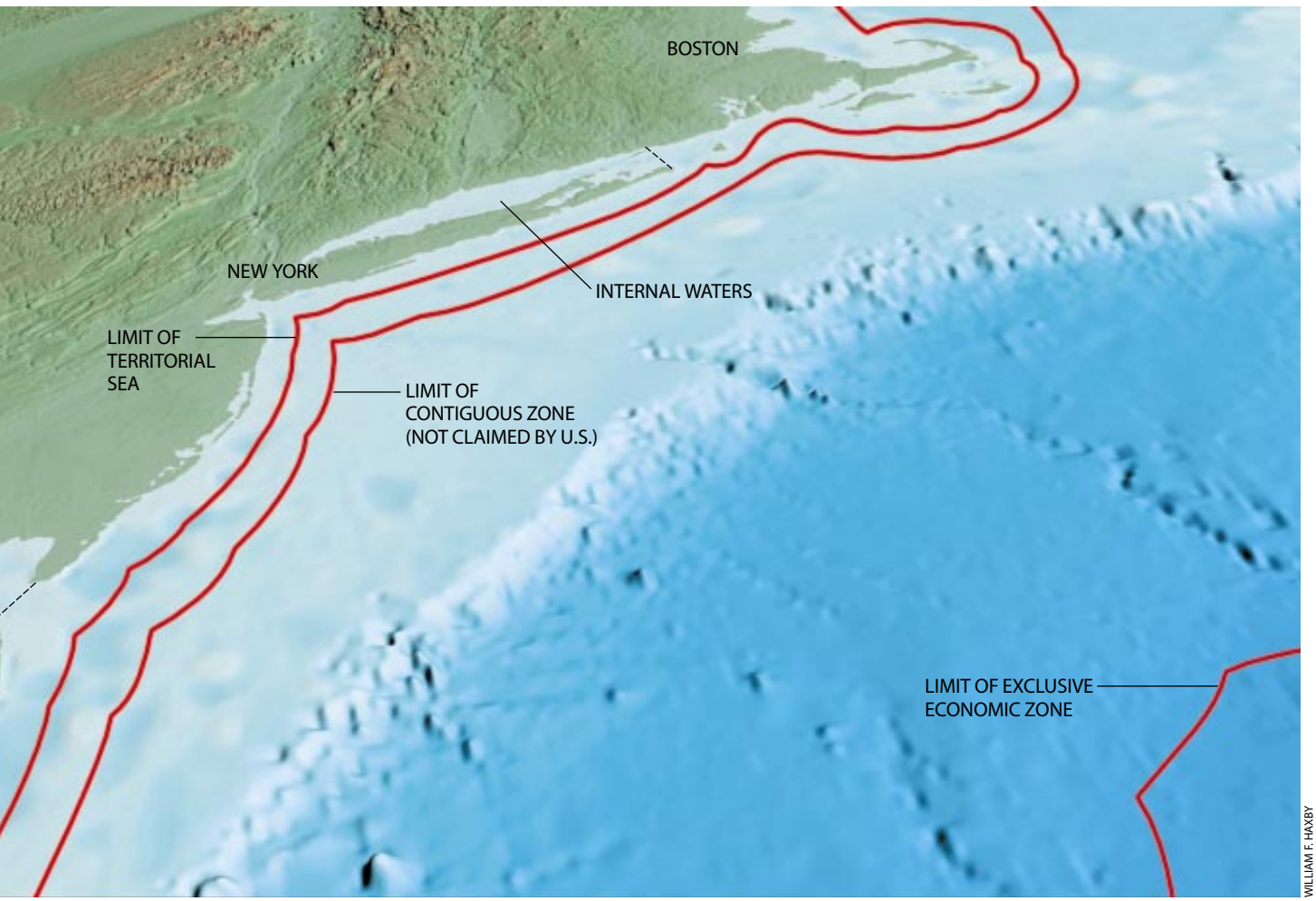
While the superpowers plotted, Ambassador Arvid Pardo of Malta addressed the delegates at the 1967 annual meeting of the U.N. General Assembly. He reminded the gathered members that recent investigations had shown that vast areas of the deep seabed—most beyond national jurisdiction—were literally paved with nodules containing valuable minerals, such as nickel, copper and manganese. Pardo urged the assembly to declare the deep ocean floor the "common heritage of mankind" and to see that its mineral wealth was distributed preferentially to the poorer countries of the global community. The General Assembly responded by adopting resolutions embodying Pardo's noble vision and calling for a new U.N. conference on the Law of the Sea.

The diplomats were charged to develop the concept of common heritage and to create a scheme for mining the seabed. But by the time the conference convened in New York City for its first session in 1973, its agenda had expanded to include nearly every conceivable use of the ocean, including fishing, navigation, protection of the marine environment and freedom of scientific research.

The New Map

The Third U.N. Conference on the Law of the Sea (dubbed UNCLOS III) was the most ambitious lawmaking endeavor ever undertaken by the interna-

OFFSHORE WATERS are divided by the 1982 United Nations Convention on the Law of the Sea into a territorial sea (which stretches 12 nautical miles from the coast), a contiguous zone (out to 24 miles) and an exclusive economic zone (to 200 miles). The convention also equated the minimum legal boundary of the continental shelf with the limit of the exclusive economic zone. Yet the physical continental shelf rarely extends that far, as can be seen in this map of the seafloor off the northeast coast of the U.S.



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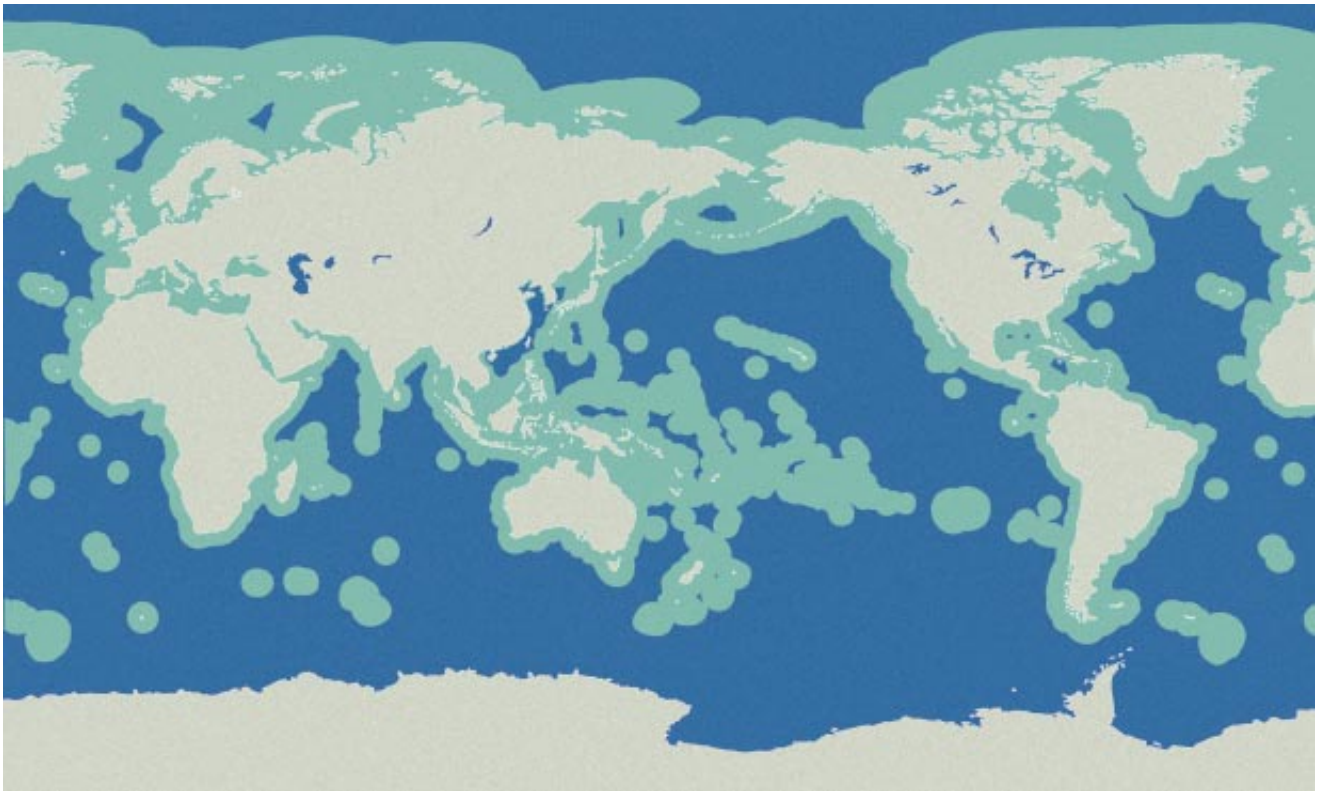

LAURIE GRACE

NATIONAL GOVERNANCE ZONES surround every landmass on the earth except Antarctica. Most coastal nations claim the waters and seabed that lie within this area as their exclusive economic zone, within which they maintain exclusive control over the management of fisheries and other resources. Some nations claim these waters as fishing zones or as territorial seas.

tional community. In a series of sessions that spanned nearly a decade, diplomats juggled and balanced the multitude of interweaving and highly politicized maritime concerns of more than 150 nations. The major naval powers and those countries with distant-water fishing fleets vied with coastal nations, and potential seabed miners argued with developing countries over control of the seafloor. In the end, UNCLOS III generated a complex constitution that regulated all human activities on, over and under the 70 percent of the planet that is covered by seawater.

The resulting treaty—the 1982 U.N. Convention on the Law of the Sea—endorsed the authority of coastal nations to govern an array of maritime activities within an area up to 200 nautical miles from their shores. In their territorial seas, which were to extend no farther than 12 nautical miles from the coast, these nations would retain their traditional sovereignty over all activities and resources but allow the right of innocent passage for foreign ships. In addition, the convention established exclusive economic zones (EEZs) that extend beyond the territorial sea to the 200-mile limit. Within their EEZs, coastal nations would now have exclusive control over the management of fisheries and other resources, subject to international duties of conservation and of sharing "surplus" fish. These nations would also have extensive rights and jurisdiction concerning such activities as marine scientific research and the construction and operation of artificial islands.

The contiguous zone, first recognized in the 1958 Geneva conventions, was extended to 24 nautical miles from shore. Within this zone, which overlaps the EEZ for 12 miles beyond the territorial sea, a coastal nation is allowed to enforce its laws on customs, immigration, sanitation and fiscal matters.

The 1982 treaty also expanded the boundaries of the legal continental shelf. Coastal nations would now have the right to exploit the natural resources of the seabed and subsoil as far out as 200 miles—or even beyond, to the edge of the entire shelf, slope and rise of the physical continental margin. This right holds even when that margin extends beyond 200 nautical miles, as it does in several parts of the world.

The establishment of EEZs and the expanded definition of "continental shelf" constituted a major victory for the developing countries that formed the 200-mile club after World War II. The final impetus for global acceptance of the 200-mile zone, however, came not from UNCLOS III but from the U.S. Congress. In 1976 it established a 200-mile exclusive fishing zone for the U.S., causing a cascade of similar claims around the world. By the time the convention was adopted in 1982, the 200-mile concept had become customary international law.

The interests of the naval and maritime powers did not get subsumed in this process of national enclosure of the seas. These countries successfully negotiated for freedom of navigation and overflight within all EEZs. Moreover, the 1982 convention established a set of rules that would permit submarines to pass submerged through narrow straits, even those in which the waters consist only of territorial seas. Although the convention authorized island nations to designate the sea spaces within their island groups as "archipelagic waters," it granted foreign vessels and aircraft the freedom to navigate through them.

The convention also included many complex provisions on the marine environment. It expanded the rights of port nations and other coastal countries to

guard against an influx of contaminants, and it declared that all countries would be responsible for protecting the marine environment from pollution, including that originating from sources on land.

In the end the 1982 U.N. Convention on the Law of the Sea was adopted in the General Assembly by a vote of 130 to 4 (with 17 abstentions), a stunning and unprecedented achievement for the community of nations.

U.S. Balks

Although the delegations had agreed on the treaty as a package deal, the U.S. objected to the provisions on mining the deep seabed. The delegates' attempt to actualize Ambassador Pardo's grand vision for sharing the common heritage of mankind had created a legal quagmire so controversial and massively complex that in 1982 the U.S. rejected the entire treaty.

The U.S. and other mining nations would have undoubtedly preferred that the convention establish a simple registry system that would limit overlapping mining operations. Part of the proceeds from mining the areas of the seabed that lie beyond national jurisdiction could then be deposited in a special fund to be distributed to the poorest countries of the world. Instead the 1982 convention established the International Seabed Authority, headquartered in Jamaica, to which mining nations would apply for a lease. Miners would have to pay substantial up-front fees and royalties to the special fund and provide the technology and financing for the International Seabed Authority to mine an economically similar site in parallel. American free-marketeers strongly objected to this scheme.

Instead of signing the Convention on the Law of the Sea, President Ronald Reagan declared that those parts of the treaty concerning traditional uses of the ocean—including rights of navigation and fishing—were consistent with the customary law and practice of nations. And in 1983 he issued a presidential proclamation that established a 200-mile EEZ within which the U.S. would exercise all the rights and responsibilities recognized in the convention and other international customary law. The U.S. could thus arguably take advantage of the legal protections that the treaty afforded without endorsing the convention. (In 1988 the U.S. extended its territorial sea from three to 12 miles.)

Because the U.S. opposed the seabed-mining provisions, it appeared for a time that the convention might never be ratified by the 60 countries needed to turn it into law. But by 1994 the U.N. secretary general had worked out a separate agreement on deep-seabed mining, effectively replacing the mining provisions that had so offended the U.S. delegates. President Bill Clinton subsequently sent the convention and the mining agreement to the Senate, where they currently remain awaiting approval. By that time, enough countries had ratified the convention to allow it to enter into force, at least for participating nations, in late 1994.

Fishery Storms

During the 1980s, while diplomatic attention was focused on the international control of deep-seabed minerals, a storm was gathering over the management of a much more significant marine resource: fisheries. Distant-water fishing fleets had responded to their exclusion from EEZs by perfecting techniques that would allow them to exploit the prized species that roam the high seas, where freedom to fish is still the rule.

Other fishing fleets opted to take advantage of places around the globe where valuable fish inhabited rich, productive waters just outside the 200-mile limit, such as parts of the Grand Banks off Newfoundland, Canada. They also homed in on coastal stocks of fish that swam through so-called doughnut holes, areas that are surrounded by but not part of EEZs.

Coastal nations whose stocks of fish were most vulnerable to these accidents of marine geography agreed that stronger international regulations were necessary. When discussions at the 1992 Earth Summit in Rio de Janeiro failed to resolve the issue, the U.N. General Assembly convened a new round of discussions to improve the management of high-seas fishing.

In March 1995, when the fish talks seemed stalled, a Canadian patrol boat arrested a Spanish trawler on the high seas for exceeding the internationally established quotas for the Grand Banks. This bold act signaled that at least one prominent coastal nation was willing to take the law into its own hands to protect the fish, even though the violation occurred outside the Canadian 200-mile limit and the forceful response threatened to undermine years of maritime diplomacy. Within a few months, the U.N. had adopted a new agreement on international fisheries to strengthen the standards by which nations collectively manage fishing on the high seas. That agreement, not yet in effect, calls for more careful setting of quotas for fish landings. Further, it allows coastal nations to inspect any vessel fishing on the high seas to ensure that it adheres to international regulations.

The effectiveness of this new agreement, and of the Law of the Sea in general, will depend on the willingness of many nations to be bound to its principles. We hope their commitment to international cooperation proves strong enough, even with few penalties and no high-seas police to enforce the rules. SA

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Further Reading

ORDERING THE OCEANS: THE MAKING OF THE LAW OF THE SEA. Clyde Sanger. University of Toronto Press, 1986.

THE NEW LAW OF THE SEA. Edited by Christopher C. Joyner. Special double issue of *Ocean Development & International Law,* Vol. 27, pages 1–179; January–June 1996.

THE INTERNATIONAL LAW OF THE SEA. E. D. Brown. Dartmouth Publishing, 1994.

INTERNATIONAL FISHERIES LAW, OVERFISHING AND MARINE BIODIVERSITY. Alison Rieser in *Georgetown International Environmental Law Review,* Vol. 9, No. 2, pages 251–279; Winter 1997.

COASTAL OCEAN LAW. Third edition. Joseph Kalo, Richard Hildreth, Alison Rieser, Donna Christie and Jon L. Jacobson. West Publishing, 1998.