

10-1-1998

Keynote Address: Harmonization of Pre-Existing 200-Mile Claims in the Latin American Region with the United Nations Convention on the Law of the Sea and Its Exclusive Economic Zone

Hugo Caminos

Follow this and additional works at: <http://repository.law.miami.edu/umialr>



Part of the [Law of the Sea Commons](#)

Recommended Citation

Hugo Caminos, *Keynote Address: Harmonization of Pre-Existing 200-Mile Claims in the Latin American Region with the United Nations Convention on the Law of the Sea and Its Exclusive Economic Zone*, 30 U. Miami Inter-Am. L. Rev. 9 (2015)
Available at: <http://repository.law.miami.edu/umialr/vol30/iss1/3>

This Article is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Inter-American Law Review by an authorized administrator of Institutional Repository. For more information, please contact library@law.miami.edu.

KEYNOTE ADDRESS

HARMONIZATION OF PRE-EXISTING 200-MILE CLAIMS IN THE LATIN AMERICAN REGION WITH THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA AND ITS EXCLUSIVE ECONOMIC ZONE

HUGO CAMINOS*

I.	INTRODUCTION	10
II.	DEVELOPMENT OF HARMONIZATION IN THE INTERNATIONAL LAW OF THE SEA.....	10
III.	STATES PARTIES AND THE FULFILLMENT OF THEIR OBLIGATIONS UNDER THE CONVENTION	16
IV.	THE LATIN AMERICAN STATES, THE CONVENTION, AND THE EXCLUSIVE ECONOMIC ZONE	18
V.	CONFLICT BETWEEN COASTAL STATES AND OTHER STATES.....	23
VI.	CONCLUSION	29

* Professor, University of Miami School of Law; Judge, International Tribunal for the Law of the Sea. The views expressed herein are those of the author and may not in any way be attributed to the Tribunal.

I. INTRODUCTION

The United Nations Convention on the Law of the Sea (Convention or UNCLOS) established a 200-mile exclusive economic zone.¹ Historically, State territoriality and varying interpretations of international law have caused a lack of uniformity of pre-existing 200-mile claims in the Latin American region with UNCLOS.² This result is related to the wider issue of compliance by States with their treaty obligations or their obligations under customary international law. Recent trends demonstrate that harmonization³ of domestic law with international law will be a reality in the near future.

What is the meaning of harmonization in this context? Harmonization of national legislation has been defined as the process by which a State aligns its laws and regulations with applicable international law contained in an applicable international agreement or that finds its source in custom.⁴ This international harmonization was the objective of the Convention negotiations.

II. DEVELOPMENT OF HARMONIZATION IN THE INTERNATIONAL LAW OF THE SEA

The Convention constitutes a comprehensive reformation of the public international law of the sea, both in form and in substance. It was not, however, written on a clean slate. Rather, it was heavily influenced by prior developments, including not only earlier international efforts at codification but also national claims to certain waters and legislation as to treatment of those

1. United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, U.N. Doc. A/CONF.62/122 (1982) (entered into force Nov. 16, 1994), Part V, 21 I.L.M. 1261, 1281 [hereinafter UNCLOS].

2. See UNCLOS, *supra* note 1; see also 5 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 225 (Shabati Rosenne & Louis B. Sohn eds., 1989) (discussing UNCLOS) [hereinafter UNCLOS COMM.].

3. In European Community law, the term "harmonization of laws" is used as an alternative to "approximation of laws," both being used as translations of *rapprochement* and *Angeleichung*. DAVID M. WALKER, *THE OXFORD COMPANION TO LAW* 555 (1980). In English, the term "approximation" goes further than harmonization or coordination but falls short of unification. *Id.*

4. Annick de Marffy-Mantuano, *Harmonisation du Droit Interne et du Droit International de la Mer: Quel Droit Applicable?*, 5 ESPACES ET RESSOURCES MARITIMES 41 (1991).

waters. Where national laws influenced the Convention, there would inevitably be inconsistencies in terminology, substance, or both.

These kinds of inconsistencies were particularly evident with respect to the 200-mile exclusive economic zone. While the concept of the zone originated in Latin America, it was manifested in different ways in different laws and instruments. Some called it a "maritime zone" (*zona marítima*). Others called it a "territorial sea." Still others proposed the term "patrimonial sea." Each viewed the balance of rights and duties differently, basing their domestic law and interpreting international law from their respective territorial or patrimonial viewpoint. The validity of these differing interpretations, however, is now limited by the Convention.

Article 309 of the Convention prohibits reservations or exceptions to the Convention.⁵ Article 310 of the Convention provides that the prohibition on reservations or exceptions does not preclude a State, when signing, ratifying or acceding to the Convention,

from making declarations or statements, however phrased or named, with a view, *inter alia*, to the harmonization of its laws and regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effects of the provisions of this Convention in their application to that State.⁶

In other words, States may make reservations, but only when doing so has the effect of harmonizing domestic law with the legal intent of the Convention. In this connection it should be recalled that the Vienna Convention on the Law of Treaties defines a reservation as "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that state."⁷

5. UNCLOS, *supra* note 1, 21 I.L.M. at 1327; see also 5 UNCLOS COMM., *supra* note 2, at 212.

6. UNCLOS, *supra* note 1, 21 I.L.M. at 1327; see also 5 UNCLOS COMM., *supra* note 2, at 224.

7. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 2(1)(d), 1155 U.N.T.S. 331, 333 (1980) [hereinafter Vienna Convention].

Writing about the Ninth Session of the Third United Nations Conference on the Law of the Sea, Bernard H. Oxman explains why prohibition of reservations to the Convention was in the interest of all states participating in the Conference including maritime powers: "A major maritime power could hardly be expected to agree to permitting reservations, for example, in derogation of basic navigational freedoms such as the right of transit passage through straits."⁸ He observes that "this conservative approach to the question of reservations emerged together with a liberal view regarding declarations or statements that are not properly regarded as true reservations under international law."⁹ Thus, as provided in Article 310, reservations are permitted provided that they "do not purport to exclude or modify the legal effect of the provisions of this Convention in their application to that State Party."¹⁰

The question of harmonization of national laws was first raised by the Philippines at the Third United Nations Conference on the Law of the Sea during the Caracas session in 1974.¹¹ A Philippine proposal at that session excluded historic waters held by any State as its territorial sea from the application of the maximum limit (twelve miles) for the breadth of the territorial sea.¹² But it went even further by declaring that a State that, prior to the approval of the Convention, had already established a territorial sea with a breadth greater than the twelve-mile limit provided in the Convention should not be subject to the legal effects of the limitation.¹³ Ecuador made similar proposals regarding the "exclusive economic zone."¹⁴

The purpose of these proposals was to allow claims for a territorial sea extending beyond twelve miles to co-exist with the regime of the exclusive economic zone. The difficulty here lies in the effects of divergent domestic laws and interpretations of international law.

8. Bernard H. Oxman, *The Third United Nations Conference on the Law of the Sea: the Ninth Session (1980)* 75 AM. J. INT'L L. 211, 247 (1981).

9. *Id.* at 248.

10. UNCLOS, *supra* note 1, 21 I.L.M. at 1327.

11. 5 UNCLOS COMM., *supra* note 2, at 225.

12. *Id.*

13. *Id.*

14. *Id.*

Originally, however, the intention of these proposals was more restricted. The idea was that those Latin American States claiming a 200-mile territorial sea could keep the terminology used in their national laws, provided they declared that, pending legislation to adjust the terminology in their laws, they would apply those laws to waters within the 12-200-mile limitation in a manner fully in conformity with the requirements of the Convention. An initiative of this kind—only covering harmonization in terminology—could perhaps have been accepted by the Third United Nations Conference on the Law of the Sea, but the informal proposals went beyond the question of terminology. Ultimately, none of these proposals was adopted by the Third United Nations Conference on the Law of the Sea.

Today the maximum twelve-mile territorial sea, claimed by 120 States, is part of customary law. As commentator Tullio Treves affirms, after analyzing State international practice: “[I]t seems difficult for us to escape from the conclusion that territorial seas exceeding twelve miles, on the condition that coastal States claim rights corresponding to those provided by international law in the territorial sea, are in violation of international law.”¹⁵

The legal intent of the clause “harmonization of its laws and regulations with the provisions of the Convention” in article 310 was for parties to comply with international law despite the letter, intent and effect of their respective domestic law. As one commentary has suggested:

The expression, . . . taken in the context. . . which led to taking the proposals of the Philippines and Ecuador as the point of departure, seems to suggest that the thrust of the article is not so much toward national legislation in the abstract. . . as it is toward the application of national legislation in light of the obligations undertaken by participation in the Convention. . . . Such an approach would match the generally high level of abstraction characteristic of many of the relevant provisions of the Convention.¹⁶

15. Tullio Treves, *Codification du Droit International et Pratique des Etats dans le Droit de la Mer*, 223 RECUEIL DES COURS, ACADEMIE DE DROIT INT'L 74 (1990). For a list of the 120 States claiming twelve-mile territorial seas, see J. ASHLEY ROACH & ROBERT W. SMITH, *UNITED STATES RESPONSES TO EXCESSIVE MARITIME CLAIMS* 149-50 (2d ed. 1996).

16. 5 UNCLOS COMM., *supra* note 2, at 227.

Evidence of this construction is demonstrated where Australia objected to a declaration of the Philippines, which asserted that the Convention shall not affect its sovereign rights.¹⁷ Australia claimed that Philippines did "not consider that it [was] obliged to harmonize its laws with the provisions of the Convention."¹⁸ The Philippines responded with a new declaration stating that its Government "intends to harmonize its domestic legislation with the provisions of the Convention" and expressing the wishes of the Government of the Philippines "to assure the Australian Government and the States parties to the Convention that the Philippines will abide by the provisions of said Convention."¹⁹

As of today there are 124 Parties to the Convention, and 44 of them have made declarations under article 310.²⁰ A number of these declarations, for example, those dealing with the prior consent or notification for the passage of warships through the territorial sea, have been objected to by other States in their declarations, on grounds of incompatibility with the provisions of the Convention. Some States make a general objection to those declarations or statements excluding or modifying the legal effect of the provisions of the Convention. For example, the declaration made by Tunisia under article 310 makes an express reference to the question of harmonization. Tunisia declared,

that its legislation currently in force does not conflict with the provisions of this Convention. However, laws and regulations will be adopted as soon as possible in order to ensure closer harmony between the provisions of the Convention and the requirements for completing Tunisian legislation in the maritime sphere.²¹

17. DIVISION FOR OCEAN AFFAIRS AND THE LAW OF THE SEA OFFICE OF LEGAL AFFAIRS, UNITED NATIONS, THE LAW OF THE SEA: DECLARATIONS AND STATEMENTS WITH RESPECT TO THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA AND TO THE AGREEMENT RELATING TO THE IMPLEMENTATION OF PART XI OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA OF 10 DECEMBER 1982 at 40, 47, 55 (1997) [hereinafter DECL. & STATEMENTS].

18. *Id.* at 47.

19. *Id.* at 55.

20. *Status of the United Nations Convention on the Law of the Sea*, 36 L. OF THE SEA BULL. 1 (1989).

21. DECL. & STATEMENTS, *supra* note 17, at 44.

The declaration rightly distinguished between existing legislation—which is deemed not to be in conflict with the Convention, a concept close to that of compatibility—and the adoption of complementary laws and regulations “to ensure closer harmony” with the Convention.²² Harmonization requires legislative action by States in order to align their domestic legislation with the norms of the Convention.

In fact, one has to agree that “[o]n close examination some of these declarations and views are expressed in the nature of reservations and of objections to reservations or would be so if they were made on the occasion of the State’s becoming bound by the Convention.”²³ The truth is that, “[t]he legal effect of these declarations and statements, or of objections to them is not clear.”²⁴ This ambiguity might be the reason why the United Nations General Assembly, since 1993, has been appealing to States to harmonize their national legislation with the provisions of the Convention.

The successive resolutions of the General Assembly reveal an increasing uneasiness concerning declarations and statements under article 310. For example, one of the preambular paragraphs of the first of these resolutions emphasizes “the need for States to ensure consistent application of the Convention, as well as the need for harmonization of national legislation with the provisions of the Convention.”²⁵ Operative paragraph 9 “[c]alls upon States to observe the provisions of the Convention when enacting their national legislation.”²⁶ Operative paragraph 8 of the resolution, adopted in 1994, “[c]alls upon States to harmonize their national legislation with the provisions of the Convention and to ensure consistent application of those provisions.”²⁷ The same wording is found in operative paragraph 2 of the resolution adopted in 1995.²⁸

22. *Id.*

23. 5 UNCLOS COMM., *supra* note 2, at 227-28.

24. *Id.* at 228 n.7.

25. U.N. GAOR, U.N. Doc. A/RES/48/28 (1994), available in 25 L. OF THE SEA BULL. 50 (1994).

26. *Id.* at 52.

27. U.N. GAOR, U.N. Doc. A/RES/49/28 (1994), available in 30 L. OF THE SEA BULL. 38 (1996).

28. U.N. GAOR, U.N. Doc. A/RES/50/23 (1995), available in 30 L. OF THE SEA BULL. 42 (1996).

Furthermore, the 1995 resolution not only touches upon the question of harmonization but also calls upon States to ensure the consistent application of the provisions of the Convention "and to ensure also that any declarations or statements that they have made or make when signing, ratifying or acceding are in conformity with the Convention."²⁹

Finally, in its 1997 resolution, the General Assembly goes even further. Not only does it reiterate in its operative paragraph 2 the request made in the 1996 resolution, but it also "calls upon States. . .to withdraw any of their declarations or statements that are not in conformity" with the Convention.³⁰ These resolutions leave no doubt of the Convention's intent to harmonize domestic and international Law of the Sea.

III. STATES PARTIES AND THE FULFILLMENT OF THEIR OBLIGATIONS UNDER THE CONVENTION

Article 300 provides that "States Parties shall fulfill in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right."³¹

This provision complements articles 26 and 27 of the Vienna Convention on the Law of Treaties.³² While Article 26 endorses the norm *pacta sunt servanda*,³³ Article 22 codifies a fundamental rule of international law, that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."³⁴ Treaty obligations are obligations of the State, "and the failure of an organ of the state, such as a Parliament or a court, to give effect to the international obligations of the state cannot be invoked by it as a justification for failure to meet its international obligations."³⁵ Citing

29. U.N. GAOR, U.N. Doc. A/RES/51/34 (1996), available in 33 L. OF THE SEA BULL. 74 (1997).

30. U.N. GAOR, U.N. Doc. A/RES/52/26 (1997), available in 36 L. OF THE SEA BULL. 30 (1998).

31. UNCLOS, *supra* note 1, 21 I.L.M. at 1326.

32. Vienna Convention, *supra* note 7, 1155 U.N.T.S. at 339.

33. *Id.* art. 26, 1155 U.N.T.S. at 339.

34. *Id.* art. 27(1), 1155 U.N.T.S. at 339.

35. 1 OPPENHEIM'S INTERNATIONAL LAW 85 (9th ed. 1992).

distinguished publicists, international law commentator Ian Brownlie concludes:

Arising from the nature of treaty obligations and from customary law, there is a general duty to bring internal law into conformity with obligations under international law. However, in general a failure to bring about such conformity is not in itself a direct breach of international law, and a breach arises only when the state concerned fails to observe its obligations on a specific occasion.³⁶

We can agree with the validity of Brownlie's statement "in general;" however, in my view, where the characteristics of the legal instrument involved so require, States party to a treaty are under the obligation to harmonize their legislation with its provisions. In this respect we may recall that the Permanent Court of International Justice regarded as "self evident" the principle that "a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfillment of the obligations undertaken."³⁷ These obligations are not confined to treaty law. As Treves has pointed out, both treaty law and customary law hold that no state can invoke domestic law for the purpose of avoiding international law.³⁸

The Convention, which has been properly described as "a Constitution for the Oceans," is one of those legal instruments requiring harmonization of the national laws of States Parties to its provisions. This is particularly true with regard to the regime of the exclusive economic zone, a new legal concept that emerged from the negotiations at the Third United Nations Conference on the Law of the Sea. This regime is one of the pillars of the Convention, and is now part of general international law. The International Court of Justice declared in 1985 that in its view it is "incontestable that. . .the exclusive economic zone, with its rule

36. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 36 (4th ed. 1990).

37. Advisory Opinion No. 10, *Exchange of Greek and Turkish Populations*, 1925 P.C.I.J. (ser. B) No. 10, at 20.

38. Tullio Treves, *Discussion of Barbara Kwiatkowska & ETTY R. AGOES, Archipelagic Waters: An Assessment of National Legislation*, in *LAW OF THE SEA AT THE CROSSROADS: THE CONTINUING SEARCH FOR A UNIVERSALLY ACCEPTED REGIME* 152, 161 (Rudiger Wolfrum ed., 1990).

on entitlement by reason of distance, is shown by the practice of States to have become a part of customary law. . . ."³⁹

Although the exclusive economic zone has become part of general customary law, it is unclear whether the exclusive economic zone regime as promulgated by the detailed rules of Part V of UNCLOS binds non-parties.⁴⁰

In fact, State practice, as developed by national laws proclaiming 200-mile exclusive economic zones (ninety-one States) or fisheries zones (nineteen States), is almost confined first to sovereign rights for exploring, exploiting, conserving and managing the natural resources of the zone; and secondly to jurisdiction over artificial islands, marine scientific research and the protection of the marine environment. This conforms exactly to the stipulation in article 56, paragraph 1, of the Convention.⁴¹ Notwithstanding the differences in these laws regarding the applicable regime to the categories of rights, in respect of the basic concept of the zone, "there is at the level of national legislations a consensus that can be qualified, without fear of exaggeration, as absolute."⁴² As such there is an international assent to the Convention and its true intent.

IV. THE LATIN AMERICAN STATES, THE CONVENTION, AND THE EXCLUSIVE ECONOMIC ZONE

Of the twenty Latin American States, thirteen are Parties to the Convention and seven have not yet become Parties. The Latin American States Parties to the Convention are Argentina, Bolivia, Brazil, Chile, Costa Rica, Cuba, Guatemala, Haiti, Honduras, Mexico, Panama, Paraguay and Uruguay.⁴³ Non-

39. Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v. Malta), 1985 I.C.J. 13, 33 (June 3).

40. 1 OPPENHEIM'S INTERNATIONAL LAW, *supra* note 35, at 789.

41. Article 56(1) states that "[i]n the exclusive economic zone, the coastal state has: (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources. . . (b) jurisdiction . . . with regard to . . .(iii) the protection and preservation of the marine environment. UNCLOS, *supra* note 1, 21 I.L.M. at 1280.

42. Francisco Orrego Vicuña, *State Practice and National Legislation Relating to the Exclusive Economic Zone, the Continental Shelf and Straits Used for International Navigation: Basic Trends*, in LAW OF THE SEA AT THE CROSSROADS: THE CONTINUING SEARCH FOR A UNIVERSALLY ACCEPTED REGIME 351, 353 (Rudiger Wolfrum ed., 1990).

43. *Status of the United Nations Convention on the Law of the Sea*, *supra* note 20.

Parties are Colombia, Dominican Republic, Ecuador, El Salvador, Nicaragua, Peru and Venezuela.⁴⁴

When the Third United Nations Conference initiated its sessions, an important group of Latin American countries laid claims to 200-mile territorial seas. During negotiations at the Conference, twenty-three States claiming territorial seas exceeding twelve miles constituted the territorialist group, most of which also belonged to the larger group of coastal States. Sixteen of those countries were African, six Latin American and one Asian.⁴⁵ Of this group, sixteen States have become Parties to the Convention.⁴⁶

The countries that continue to have legislation claiming a territorial sea of 200 miles are: Congo, Ecuador, El Salvador, Liberia, Libya, Nicaragua, Panama, Peru, Sierra Leone and Somalia.⁴⁷ Sierra Leone and Somalia, both Parties to the Convention, have not yet harmonized at least the terminology of their domestic laws with the Convention.⁴⁸

However, some of the Latin American States in this list seem to be reexamining their ocean policies. Two of them, El Salvador and Nicaragua, are signatories to the Convention although they have not yet ratified it.⁴⁹ Panama ratified the Convention on July 1, 1996, and is engaged in the process of harmonizing its legislation with the Convention's provisions.⁵⁰ In its declaration under article 310 Panama stated that "in the exercise of its sovereign and territorial rights and in compliance with its duties, it will act in a manner compatible with the provisions of the Convention. . . ."⁵¹

44. *Id.*

45. ROACH & SMITH, *supra* note 15, at 153-61.

46. The members of this group were: *Benin, *Brazil, *Cape Verde, Congo, *Democratic Yemen, Ecuador, El Salvador, *Equatorial Guinea, Gabon, *Guinea, *Guinea-Bissau, Libyan Arab Jamahiriya, Madagascar, *Mauritania, *Mozambique, *Panama, Peru, *Sao Tome and Principe, *Senegal, *Sierra Leone, *Somalia, *Togo, and *Uruguay. Other States claiming breadths exceeding twelve miles are: Angola (twenty miles), *Cameroon (fifty miles), *Nigeria (thirty miles), Syrian Arab Republic (thirty-five miles) and *Togo (thirty miles) (States marked with an asterisk are Parties to the UNCLOS). *Id.*

47. *Id.*

48. *Id.*

49. *Status of the United Nations Convention on the Law of the Sea, supra* note 20.

50. *Id.*

51. See DECL. & STATEMENTS, *supra* note 17, at 39.

The *U.N. Study of the Practice of States at the Time of Entry into Force of UNCLOS (U.N. Study of State Practice)* observes that some States are departing from their traditional territorialist approach.⁵² For example, in El Salvador,

[s]uccessive Salvadorean Constitutions have referred to the sovereignty over adjacent maritime areas, generally following a territorialist approach, albeit admitting the distinction between the territorial sea and other areas. Since the signature of the Convention, however, the distinction between the territorial sea and the exclusive economic zone has become paramount and the traditional territorialist approach has been de-emphasized in practice.⁵³

This *U.N. Study of State Practice* also reports a change in the de facto laws of Nicaragua.⁵⁴ Nicaragua claims a 200-mile "adjacent" sea with all the characteristics of a territorial sea, allowing for innocent passage in the forms and conditions determined by its laws and treaties.⁵⁵ However, as the study points out, "the signing of the Convention and the political developments that have taken place in that country have greatly mitigated the territorialist approach in practice."⁵⁶ In fact, when signing the Convention, Nicaragua declared "that such adjustments of its domestic law as may be required in order to harmonize it with the Convention will follow from the process of constitutional change initiated by the revolutionary State of Nicaragua. . . ."⁵⁷

In fact, Nicaragua may be moving closer to ratifying UNCLOS. A seminar held in Managua in 1995 under the auspices of the Ministry for Foreign Affairs to discuss the pros and cons of ratifying the Convention shows that the Government is giving serious consideration to becoming a Party to the Convention.⁵⁸ Although no formal conclusion was adopted, in his

52. DIVISION FOR OCEAN AFFAIRS AND THE LAW OF THE SEA OFFICE OF LEGAL AFFAIRS, UNITED NATIONS, PRACTICE OF STATES AT THE TIME OF ENTRY INTO FORCE OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (1994) [hereinafter U.N. STUDY OF STATE PRACTICE].

53. *Id.* at 170-71.

54. *Id.* at 171.

55. *Id.*

56. *Id.*

57. DECL. & STATEMENTS, *supra* note 17, at 14.

58. La Convención de las Naciones Unidas sobre el Derecho del Mar y la Política

closing remarks the Secretary General of the Ministry mentioned the reasons why ratification could be in the interest of his country.⁵⁹

Three Latin American States that are non-Parties to the Convention, Colombia,⁶⁰ Dominican Republic⁶¹ and Venezuela,⁶² have enacted legislation establishing a twelve-mile territorial sea and a 200-mile exclusive economic zone. Ecuador and Peru remain the only territorialist countries in Latin America that have so far given no indication of their intention to change the ocean policies that they adopted several decades ago.⁶³ That only two countries remain unwilling to change their ocean policies represents a noticeable decline of the territorialist approach in the region.

I shall only add one comment concerning the Peruvian situation. In a speech made by Ambassador Arias-Schreiber during the 1992 Conference of the Law of the Sea Institute, the Ambassador explained why Peru still refrains from acceding to the Convention. He stated that although it is generally believed that

the only reason is the difference . . . between, on the one hand, the unitarian regime of full sovereignty . . . in the Peruvian Constitution from the coast to 200 miles and, on the other hand, the duality of a territorial sea with a maximum limit of 12 miles and an Exclusive Economic Zone from that distance up to 200 miles, where the coastal state is entitled to exercise

Maritima de Nicaragua was held in Managua, November 27-28, 1995. See ACTAS DE SEMINARIO, LA CONVENCION SOBRE EL DERECHO DEL MAR Y LA POLITICA MARTIMA DE NICARAGUA (1996).

59. *Id.*

60. Act No. 10 of Aug. 1978, establishing rules concerning the Territorial Sea, the Exclusive Economic Zone, and the Continental Shelf, available in THE LAW OF THE SEA: NATIONAL LEGISLATION ON THE EXCLUSIVE ECONOMIC ZONE 51 (1993).

61. Act No. 186 of Sept. 13, 1967 on the Territorial Sea, Contiguous Zones, Exclusive Economic Zone and the Continental Shelf as amended by Act No. 573 of Apr. 1, 1977, available in THE LAW OF THE SEA: NATIONAL LEGISLATION ON THE EXCLUSIVE ECONOMIC ZONE 76 (1993).

62. Act Establishing an Exclusive Economic Zone Along the Coasts of the Mainland and Islands of July 26, 1978, available in THE LAW OF THE SEA: NATIONAL LEGISLATION ON THE EXCLUSIVE ECONOMIC ZONE 396 (1993).

63. Although both Ecuador and Peru are members of the Permanent Commission for the South Pacific, the Commission is not representative of a territorialist position of the Pacific countries. Peru's claim for a 200-mile territorial sea dates back to its Supreme Decree of August 1, 1947. ROACH & SMITH, *supra* note 15, at 156. Ecuador enacted its Decree Law No. 1542 on November 11, 1966. *Id.*

sovereign rights and jurisdiction for specific, though very important purposes. . . . [T]he difficulty in question appears more nominal than substantial, and it might be overcome through a formula that would [not change] the Constitution and relevant laws of Peru, provided that they would be applied in a manner compatible with the norms of the [Convention].⁶⁴

In principle, one may agree with the view that to accede to the Convention would not require Peru to embark on the process of amending its Constitution. However, it seems that domestic legislation would be necessary in order to define the term "maritime domain," used in the Peruvian Constitution when dealing with the 200-mile adjacent sea, in conformity with the Convention.

The laws enacted, both by State Parties and non-Parties to the Convention in the region, define the general characteristics of the exclusive economic zone and the sovereign rights and jurisdiction of the coastal States in the zone. They keep silent, however, on the duties of coastal States stipulated in Part V of the Convention.⁶⁵

In addition, as has been pointed out, some coastal States in the Region

have shown a tendency to interpret the meaning of some provisions of the Convention or to fill its gaps in such a manner as to reinforce their control over the zone, in particular in matters with respect to which the relevant provisions of the Convention are too general or ambiguous.⁶⁶

This is a matter of concern for the maritime states which fear that this kind of domestic law may upset the complex balance embodied in Part V and that such laws could be invoked by coastal States to increase their rights and jurisdiction in the zone.

64. Alfonso Arias-Schreiber, *Peru and the Revision of the 1982 Convention on the Law of the Sea* in *THE LAW OF THE SEA: NEW WORLDS, NEW DISCOVERIES* 445 (Edward L. Miles & Tullio Treves eds., 1993).

65. Part V of the UNCLOS deals with the exclusive economic zone. UNCLOS, *supra* note 1, 21 I.L.M. at 1280-84.

66. Felipe H. Paolillo, *The Exclusive Economic Zone in Latin American Practice and Legislation*, 26 *OCEAN DEV. & INT'L L.* 105, 107 (1995).

The declarations that have caused particular concern to the maritime powers are those touching upon specific aspects of the regime of the zone, such as those concerning its legal status, residual rights, military activities, installations and structures. As a result of these different forms in the domestic laws and in the interpretative declarations under article 310, there is a lack of uniformity in the region, especially with regard to certain rights and jurisdiction in the exclusive economic zone.

Noticeably, the current trend shows a clear decline of the territorialist approach in the region. In fact, countries like Argentina, Brazil and Uruguay, which had in the past, albeit with important qualifications, denominated their 200-mile zones in territorial terms, are now Parties to the Convention. They have, with the exception of Uruguay, explicitly incorporated the concept of exclusive economic zone in their laws. The "rolling back" or clarification of their previous claims in their legislation by these States may have an impact on the development of a uniform legal regime for the oceans in Latin America.

V. CONFLICT BETWEEN COASTAL STATES AND OTHER STATES

Well before ratifying the Convention, Argentina repealed its law extending its sovereignty to the seas contiguous to the Argentine territory up to 200 miles.⁶⁷ The new Act, in general, follows the line of the Convention but omits any reference to the rights of other States in the zone. In reference to installations and structures, Article 9 of the Act provides that Argentina "shall retain the exclusive right to construct, authorize and regulate the construction, operation and use of all kinds of installations and structures, over which it shall have exclusive jurisdiction, with respect also to matters relating to its fiscal, customs, sanitary and immigrations laws and regulations."⁶⁸ This provision touches upon a potential area of conflict between coastal States and other States. Dealing with this conflict would go beyond the limits of this paper. For our purposes it will suffice to say that some coastal States maintain—as Argentina does—that Part V of UNCLOS confers upon them "the exclusive right to construct and

67. See Act No. 23.968 of Aug. 14, 1991, available in *THE LAW OF THE SEA: NATIONAL LEGISLATION ON THE EXCLUSIVE ECONOMIC ZONE* 17 (1993).

68. *Id.* art. 9, *THE LAW OF THE SEA: NATIONAL LEGISLATION ON THE EXCLUSIVE ECONOMIC ZONE* at 18.

to authorize and regulate the construction, operation and use" of artificial islands, installations and structures.⁶⁹ Other States, on the contrary, hold the view that the exclusive right applies to artificial islands and, with respect to installations and structures, it only applies to those "for the purposes provided for in article 56 and other economic purposes" and to those "which may interfere with the exercise of the rights of the coastal State in the zone."⁷⁰

The position of Argentina on this question is not unique. As the *U.N. Study of State Practice* concludes,

[i]t would appear. . . that in Latin America and the Caribbean, as elsewhere in the world, there is a trend to extend coastal State jurisdiction on this point by not exactly following the distinction made in article 60. . . among various types of man-made islands and structures. . . . Such [a]n approach would bring under coastal State jurisdiction all kinds of devices placed in the exclusive economic zone, including those for military purposes.⁷¹

Furthermore, in its declaration under article 310, when ratifying the Convention, Argentina referred to other points related to the exclusive economic zone: (a) the question of conservation measures concerning living resources of the same stock or stocks of associated species occurring both within the zone and in an area of the high seas adjacent thereto; (b) the need to regulate sea transit of vessels carrying highly radioactive substances; and (c) the need to supplement and reinforce measures to prevent, control and minimize the effects of pollution of the sea by noxious and potentially dangerous substances and highly active radioactive substances.⁷²

Similar to Argentina, Brazil (a Party to the Convention) also adopted legislation "rolling back" its claim of a 200-mile

69. *Id.*

70. 2 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 570 (Shabati Rosenne & Louis B. Sohn eds., 1989).

71. U.N. STUDY OF STATE PRACTICE, *supra* note 52, at 181-82.

72. For the complete text of the Argentine declaration, see *Declarations and Statements*, *supra* note 17, at 19-21. The Netherlands objected in its declaration under article 310 upon ratification to any restriction of the freedom of navigation of nuclear powered ships or ships carrying nuclear or hazardous waste in the exclusive economic zone. *Id.* at 35.

territorial sea in its Decree-Law of March 25, 1970.⁷³ Although in dealing with the exclusive economic zone the new Brazilian legislation is along the lines of the Convention, it also claims the exclusive right to regulate "the construction, operation and use of all kinds of installations and structures. . . ."⁷⁴ Furthermore, it states that military exercises may only be carried out by other States with the consent of the Brazilian Government.⁷⁵ Both points have been subject to objections by other States.⁷⁶

Because we are dealing with harmonization of laws it is worth observing that Brazil, in its declaration under article 310 upon signature of the Convention in 1982, stated that it "understands that the regime which is applied in practice in maritime areas adjacent to the coast of Brazil is compatible with the provisions of the Convention."⁷⁷ However, in 1993, as noted above, Brazil adopted Law No. 8617, which revoked the 1970 Decree Law establishing a 200-mile territorial sea.⁷⁸

Italy, another coastal State party to UNCLOS, has taken an approach different from that of Brazil. Upon depositing its instrument of ratification in 1995, Italy made an opposite interpretative declaration, stating that

the rights and jurisdiction of the coastal State in such [an exclusive economic] zone do not include the right to obtain notification of military exercises or manoeuvres or to authorize them. Moreover, the right of the coastal State to build and to authorize the construction, the operation and the use of installations and structures in the exclusive economic zone and on the continental shelf is limited only to the

73. See Act Concerning the Territorial Sea, the Contiguous Zone, the Exclusive Economic Zone and the Continental Shelf, Brazil Act No. 8617 of Jan. 4, 1993, available in THE LAW OF THE SEA: NATIONAL LEGISLATION ON THE EXCLUSIVE ECONOMIC ZONE 38 (1993) [hereinafter Brazil Law No. 8617]; Brazil: Decree Law Extending Territorial Sea to 200 Miles [Mar. 25, 1970], 10 I.L.M. 1224 (1971).

74. DECL. & STATEMENTS, *supra* note 17, at 22; see also Brazil Law No. 8617, *supra* note 73, art. 8.

75. DECL. & STATEMENTS, *supra* note 17, at 22.

76. Germany objected to Brazil's interpretation on installations and structures. *Id.* at 29. The Netherlands objected to Brazil's interpretation of both installations and structures and military exercises. *Id.* at 35.

77. *Id.* at 4.

78. Brazil Law No. 8617, *supra* note 73.

categories of such installations and structures as listed in article 60 of the Convention.⁷⁹

Uruguay, a member of the territorialist group during the Third United Nations Conference on the Law of the Sea negotiations, ratified the Convention on December 10, 1992.⁸⁰ In 1969 by Executive Decree, Uruguay had extended its sovereignty to a territorial sea of 200 miles and applied the regime of innocent passage in the twelve miles adjacent to its coast.⁸¹ The provisions of the Decree "shall not affect the freedoms of navigation and overflight" beyond that distance.⁸²

Upon signature of the Convention in 1982, Uruguay made a declaration under article 310 in which it stated, *inter alia*, that

[t]he provisions of the Convention concerning the territorial sea and the exclusive economic zone are compatible with the main purposes and principles underlying Uruguayan legislation in respect of Uruguay's sovereignty and jurisdiction over the sea adjacent to its coast and over its bed and subsoil up to a limit of 200 miles.⁸³

The full text of the declaration was confirmed at the time of ratification in 1994.

Commenting on this declaration, Felipe Paolillo explains that the peculiarity of the Uruguayan territorial sea—its not affecting freedom of navigation and overflight—may have prompted his country "to make its declaration, which could be intended to stress the compatibility of its particular territorialist claim with the provisions of Part V."⁸⁴ However, he concludes that because Uruguay had ratified the Convention, "the provisions of Part V will prevail over its national legislation."⁸⁵

79. DECL. & STATEMENTS, *supra* note 17, at 12.

80. *Status of the United Nations Convention on the Law of the Sea*, *supra* note 20, at 3.

81. See OFFICE FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, UNITED NATIONS, THE LAW OF THE SEA NATIONAL CLAIMS TO MARITIME JURISDICTION 138 (1992) (citing D.604/969, Decree of the Executive of Dec. 3, 1969).

82. *Id.*

83. DECL. & STATEMENTS, *supra* note 17, at 44.

84. Paolillo, *supra* note 66, at 109.

85. *Id.*

In other points of its declaration, Uruguay states its interpretation of some fundamental aspects of the legal status of the exclusive economic zone. According to the declaration, the zone is a “*sui generis* zone of national jurisdiction different from the territorial sea and . . . it is not part of the high seas.”⁸⁶ On the question of residual rights and obligations in the zone, Uruguay’s interpretation is that

[r]egulation of the uses and activities not provided for expressly in the Convention . . . relating to the rights of sovereignty and to the jurisdiction of the coastal State . . . falls within the competence of that State, provided that such regulation does not prevent enjoyment of the freedom of international communication which is recognized to other States.⁸⁷

The Uruguayan declaration also states that the enjoyment of the freedoms of communication in the exclusive economic zone “excludes any non-peaceful use without the consent of the coastal State—for instance, military exercises or other activities which may affect the rights or interests of that State. . . .”⁸⁸ On the question of installations and structures, the terms of Uruguay’s declaration are more explicit than those in the Brazilian law and declaration. Uruguay’s declaration states that the Convention “does not empower any State to build, operate or utilize installations or structures in the exclusive economic zone of another State, neither those referred to in the Convention nor any other kind, without the consent of the coastal State.”⁸⁹

Chile provides another example of a non-territorialist Party. According to the *U.N. Study of State Practice*, Chile has “never been a part of the ‘territorialist’ group. . . .”⁹⁰ The position of Chile is quite clear. In 1986 it amended the Civil Code with regard to maritime spaces, adopting a twelve-mile territorial sea and a 200-mile exclusive economic zone.⁹¹

86. *Id.*

87. DECL. & STATEMENTS, *supra* note 17, at 44. This interpretation on the residual rights in the exclusive economic zone was objected to by Germany, Italy, and the Netherlands. *Id.* at 29, 31, 36.

88. *Id.* at 45.

89. *Id.*

90. U.N. STUDY OF STATE PRACTICE, *supra* note 52, at 170.

91. Chile Law No. 18,565 amending the civil Code with regards to maritime space, Oct. 13, 1986, available in THE LAW OF THE SEA: NATIONAL LEGISLATION ON THE

In 1996, Chile became a Party to the Convention.⁹² In its declaration under article 310 made upon ratification, Chile reiterated the declaration made when signing the Convention "as regards the *sui generis* legal character and the definition of the exclusive economic zone."⁹³ In that declaration Chile stated that the legal character of the zone is

distinct from that of the territorial sea and the high seas. It is a zone under national jurisdiction, over which the coastal State exercises economic sovereignty and in which third States enjoy freedom of navigation and overflight and the freedoms inherent in international communication. The Convention defines it as a maritime space under the jurisdiction of the coastal State, bound to the latter's territorial sovereignty and actual territory, on terms similar to those governing other maritime spaces, namely the territorial sea and the continental shelf.⁹⁴

Regarding the experience of Haiti, Paolillo has observed that the territorial sea and the exclusive economic zone "seem to have merged" in the national law of Haiti.⁹⁵ In this context, Paolillo notes Haiti's 1977 declaration establishing the boundary of the territorial waters of the Republic of Haiti at twelve nautical miles and that of its economic zone at 200 nautical miles.⁹⁶ This document places administration of the exclusive economic zone within the jurisdiction of Haiti, reaffirms Haiti's sovereignty over its waters and declares Haiti's jurisdiction over the air space above its territory.⁹⁷ However, two days after it was made, the Declaration was superseded by a Presidential Decree.⁹⁸ This

EXCLUSIVE ECONOMIC ZONE 50 (1993).

92. *Status of the United Nations Convention on the Law of the Sea*, *supra* note 20 at 5.

93. *The Declaration of Chile upon ratification on 7 June 1996*, 35 L. OF THE SEA BULL. 9, 9-11 (1997).

94. For the Declaration of Chile upon signature see *Declarations and Statements*, *supra* note 17, at 6.

95. Paolillo, *supra* note 66, at 110.

96. Declaration by the Haitian government of 6 April 1977 establishing the boundary of the territorial waters of the republic of Haiti at 12 nautical miles and that of its Economic Zone at 200 nautical miles, *available in* THE LAW OF THE SEA: NATIONAL LEGISLATION ON THE EXCLUSIVE ECONOMIC ZONE 128 (1993)

97. *Id.*

98. Presidential Declaration Concerning the Breadth of the Territorial Sea and of the Exclusive Economic Zone, Apr. 6, 1977, *cited in* Lawrence Juda, *The Exclusive Economic Zone: Compatibility of National Claims and the UN Convention on the Law of*

Presidential Decree makes a clear distinction between sovereignty and sovereign rights and jurisdiction in the territorial sea and in the exclusive economic zone of Haiti, respectively. Thus, it rolls back to a twelve-mile territorial sea and a 200-mile exclusive economic zone. Haiti ratified the Convention on July 31, 1996.⁹⁹

VI. CONCLUSION

Notwithstanding the varied forms in their legislation, most of the Latin American States have gone a long way towards harmonization of their national laws with the Convention. To a certain extent, lack of uniformity may be attributed to the fact that some of these laws were adopted in the 1970s, borrowing the language of various informal texts prepared at that time during negotiations in the Third United Nations Conference on the Law of the Sea. Universality in the region will of course be achieved when all these countries become Parties to the Convention, and this may be achieved in a not too distant future.

A significant step in this direction was the ratification of the Convention by some former territorialist States and the adoption of new legislation by Argentina and Brazil repealing their pre-existing claims, in both cases through laws adopted by their democratically elected Congresses, not by executive decree.

Some of the national laws and declarations under article 310 that met with objections deal with certain issues in the Convention that may be open to different interpretations. On this problem of interpretation, Paolillo states: "It should not be surprising, then, that coastal States tend to respond to the questions that the Convention left unanswered or with respect to which participants at the Conference were forced to resort to 'constructive ambiguity', by developing a practice that better meets their national interests."¹⁰⁰ As Tullio Treves rightly observes, these various differences "evidence the strength of the tendencies to take away matters from the 'grey zone' of article 59,

the Sea, 16 OCEAN DEV. & INT'L L. 1, 4 (1986).

99. *Status of the United Nations Convention on the Law of the Sea*, *supra* note 20 at 4.

100. Paolillo, *supra* note 66, at 107-08.

either by means of interpretation of the Convention or by intervening in the practice.¹⁰¹ Article 59 states that

where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.¹⁰²

But, in fact, the Convention did not leave these questions unanswered. Its response to these delicate issues is found in the self-contained system for the settlement of disputes concerning interpretation or application of the Convention, included in Part XV. Disputes between State Parties involving conflicting interpretations of the Convention—as those regarding the rights of coastal States and other States in the exclusive economic zone—can be settled in conformity with the Convention and other rules of international law not incompatible with the Convention. This is one of the reasons that makes it essential, in order to enhance the rule of law in the oceans, that the Convention, with its machinery for the peaceful settlement of disputes, be universally accepted.

101. Treves, *supra* note 15, at 217.

102. UNCLOS, *supra* note 1, art. 59, 21 I.L.M. at 1280.