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Unilateralism and the History of the Law of the Sea: a Continuing Story?

I. INTRODUCTION

For over long centuries the rules of the law of the sea were primary or nearly exclusively rules of customary law supplemented by treaty law. This still holds true at the present time: custom and treaty remain the two principal sources of this branch of international law. The other official sources of international law mentioned for instance in Article 38 of the Statute of the International Court of Justice [ICJ] – general principles of law, court decisions and doctrine – have certain, but still secondary importance, and it is also valid for the other potential sources – like unilateral act of States – not mentioned in this Article of the Statute.[1] It must be recognized that the development and the practice of states make it necessary to reconsider some traditional concepts of international sources especially in the area of the Arctic.

Most parts of the seas of the world have been subject to the freedom of the seas doctrine. According to this, States had rights and jurisdiction – by reason of the 'canon-shot' principle - over a narrow three mile strip of the sea surrounding their coastline, while the remainder of it was free to all and belonging to none. It has long been the rule, but with the twentieth century a new era came- amid growing concerns with regard to offshore resources, fish stocks and pollution – and coastal States began to try to extend their control over this no man's land and they have started to compete to maintain presence across the globe on the surface waters and even under the sea. The *mare liberum* of Grotius no longer existed in the formal native way and the oceans became the new area of conflict and instability. [2]

For centuries, the soil and subsoil beneath the oceans were of no interest for international law and the community of States until the discovery of its economic value and the development of technical means to exploit it. It was only during the

Second World War when the coastal States started to claim special or exclusive rights on the ocean floor before their coasts as it is shown in the treaty concluded between Great Britain and Venezuela in 1942 concerning the sub-marine area of the Gulf of Paria.[3]

Soon after in 1945, President of the United States of America, Harry S. Truman, responding in part to pressure from domestic oil interests, declared in the famous Truman Proclamation of 28 September 1945, that the natural resources of the subsoil and seabed of the continental shelf beneath the high seas appertained to the jurisdiction and control of the United States.[4] In other words the United States unilaterally extended its jurisdiction over all natural resources on the continental shelf including the oil, gas and mineral stocks in it. This was the first major challenge to the freedom of the seas doctrine and signaled the unofficial end of it as many other countries followed the practice of the US and claimed more of the sea as their own. In October 1946, Argentina claimed its shelf and the epicontinental sea above it, then Chile and Peru did the same in 1947, and Ecuador in 1950, who asserted sovereign rights over a 200-mile zone, hoping thereby to limit the access of distant-water fishing fleets and to control the depletion of fish stocks in their adjacent seas.

After World War II, Egypt, Ethiopia, Saudi Arabia, Libya, Venezuela and some Eastern European counties, all claimed a 12-mile territorial sea instead of the traditionally 3 mile zone. Soon after, Indonesia and the Philippines both asserted dominion over the waters between their various islands. In 1970, Canada, in order to protect Arctic water from pollution, granted itself the right to regulate navigation in an area extending 100-miles from its shores.[5] The list is not exhausted and of course many examples could be mentioned after 1970.

The history of the law of the sea is widely determined by the unilateral acts of States and not just before the codification works but even after the birth of the first United Nations Convention on the Law of the Sea in 1958. Unilateralism as a source of international law has always been strongly present in the development

of this area of law but concerning the case of the mysterious Arctic its role is even more dominant than in the other oceanic areas.

As it is a special and unique territory totally covered by thick ice cap until the twentieth century, so closed from the economic discoveries and exploitation, is seems to be a new battlefield of interests. Because of its specificities it does not fall automatically under the scope of the same legal regime as the other oceanic territories of the word. The lack of special regulation for this area gave the opportunity to be the subject of sovereignty disputes for almost a hundred years and to obtain a special regime by the unilateral acts of its coastal States. These acts of States have always been inevitably contrary to the existing customs and other international sources of the law of the sea and sometimes the necessity of their birth not only influenced but also modified the long-standing international regulations. In this point of view, the Arctic debate – with numerous unilateral statements of the Arctic States - has had a significant role in the development of the law of the sea.

II. THE ROLE OF UNILATERALISM IN THE SOURCES OF THE LAW OF THE SEA

2.1. The brief history of the regulation of the law of the sea

Seventy percent of the surface of the Earth is covered by sea so the efforts to obtain rights over it are represented by many of the earliest activities of the international community.

In the second century, the Roman law codified the status of all the seas as common but the principle of common use of the sea was rather the basic public policy of the Empire than a generally applicable international regulation. As for the Mediterranean, under the regime of the Roman Empire effective control was exercised over it for the following purposes: to extend the power onto the sea and

to suppress piracy. On one hand, it is quite inconsistent with the principle applied to other sea-covered territories, but on the other hand there were no States in the Mediterranean basin independent of the Empire so there was no need to assert explicit dominion. Nor was there any need to restrict access to living resources since the problems of fishing and depletion of sea resources had not yet emerged.[6] As it is seen, the unilateral State act which overwrites a general rule is has its roots in the Roman times.

After the collapse of the Roman Empire and the ensuing fragmentation of Western Europe into basically insecure small States lead to the appearance of conflicting claims over various parts of the seas by the States to obtain exclusive control over trade routes and fishing grounds so the freedom of the seas doctrine had to face the first real challenge. The unilateral extension of State sovereignty from land to sea continued as an acceptable practice during the Middle Ages with the development of commercial relationships and not only over the Mediterranean area but the Scandinavian and other north States imposed their control over adjacent waters.[7]

Regulating the territory of oceans has its roots in the fifteenth century as in the period of explorations States increasingly competed for trade routes. At that time, two theories of ocean governance was collided head on.

On one side, Spain and Portugal claimed national ownership of vast areas of ocean space including the Gulf of Mexico and the entire Atlantic Ocean, which the Catholic Church declared to be divided between them, so the historical trend of extending State sovereignty over seas was topped by the *Treaty of Tordesillas* approved by Pope Alexander VI in 1493. This treaty was a landmark event in the history of maritime law with its dispositions concerning the ownership of the so called common sea territory. It granted exclusive jurisdiction, navigational rights and trade privileges for both maritime powers beyond a demarcation line between them. The Papal Bull prohibited everyone else, under pain of excommunication, from traveling west of this demarcation line for the purpose of trade or any other reason to the islands or main lands – found or to be

found – without prior permission.[8] As it is seen the common use of seas doctrine failed again by the unilateral statement of two States and since the Pope, the spiritual leader and the *iudex mundi* of the Christian community of States approved the treaty, thus it is legally appropriate.[9] With the advent of the Reformation this general position in the question of the status of the seas was enforced again by the doctrine represented by the Italian Alverico Gentili stated that the sovereign could legitimately treat waters adjacent to his State in the same way he treated his land territory. The genesis of this concept has roots in the need to prevent piracy and other acts that might threaten the security of a sovereign State.[10] As it seen, the unilateralism, in the name of protection of the interest of a State embodied in the safety of the coastal territories, was a generally and legally accepted behavior of the coastal State and later it became a generally accepted custom to preserve a narrow zone along the coastline under coastal State jurisdiction under the title of territorial sea.

On the other hand, the "freedom of the seas" was supported by trading firms like the Dutch East India Company and the Duchman Hugo Grotius' *Mare Liberum* was written to refute the unjustified claims of Spain and Portugal to the high seas and to exclude foreigners therefrom. He defended the freedom of the seas by arguing that the sea cannot be owned, it is not one of those things which is not an article of merchandise thus cannot become private property and that no part of the sea can be considered as territory of any people whatsoever.[11] These thoughts have been present in the policy of States since the ancient Romans with the specific self-contained explication to unilateral extensions when required. This latter position is also reflected in the age of Grotius in the work of William Welwood and John Selden. Welwood in his work - *Abridgment of All Sea Laws* - enforced that the high seas were open to free use of all but he also added the possibility to exclude foreigners from coastal waters because of the fishery stocks as it was in the case of Britain whose sovereign authority had been justified over this era of sea. Selden also maintained that marine resources are susceptible to national appropriation in his work *Mare Clausum* as a reply to Grotius.[12]

These doctrinal exchanges helped to justify unilateral actions of States concerning expansion over sea territories as in the lack of general international regulation - particularly interdictions – only the custom of respect of *mare liberum* principle was there to give a legal frame to State behavior concurring with the actual State policy and interest. Over the next three centuries, the concept of freedom of the seas became almost universally accepted except for the narrow zone along the coastline extending three miles or a range of canon shoot where the coastal State exercised jurisdiction limited by the innocent – not prejudicial to the peace, good order or security of the coastal State – passage of foreign vessels.

From the early seventeenth century up to the end of the nineteenth century the seas were largely subject to a *laissez-faire* regime: beyond the narrow belt of coastal seas – namely the territorial water – , the high seas were open to free and unrestricted use by all. Such regime was also adequate for the two main uses of sea, the navigation and fishing which did not caused problem, since ships were relatively few in number compared with today and fish stocks were thought to be inexhaustible. By the twentieth century this has all changed along with the traditional hegemony of the European States. The developments in technology and an increasing demand for resources have multiplied and intensified the use of the sea and have increased the possible number of conflicts as the States have differing kinds and degrees of interest in the seas.[13] These changes caused a radical development of law of the sea and the birth of a new type of regulation: the Convention.

2.2. The sources of modern law of the sea: treaty law and customary law concerning the sea

The international law of the sea has been seen as the product of the voluntary subscription of States to rules of law, rather than as principles of natural law binding upon States regardless of their will.[14] The modern law of the sea consists

of two major elements: the treaty or conventions of States and still the customary law.

There is a real problem of the treaties: they are binding only for the parties who have ratified them and only as long as they are in force, but the Roman *pacta tertiis nec prosunt nec nocent* rule is valid just as long as the treaty provisions become general State practice and as a custom put pressure on the behavior of non-contracting States, too. The oldest way of influencing customary process has been by unilateral actions of States with special interest in the area.[15] First, States follow their national and egoistic interests and this behavior does not impede, but encourage unilateral actions by another State with the same or different interests, finally a group of States launches the series of concerted actions. Sometimes this procedure end up on a treaty or stay on the level of customary law.

These two sources can coexist and can be applicable side by side in the relation between the same State, only customary norms which are in contradiction to treaties become inapplicable as long as the treaty, and they become applicable again after the treaty has lapsed.[16]

It is beyond doubt that most of the rules of the 1958 conventions were identical with the relevant customary law rules since they were widely accepted by as codifying customary law. This holds true for the sovereign rights of coastal States for exploring and exploiting the continental shelf as well as for the rights of States on high seas.[17] The 1958 conventions were not satisfactory regarding the expectation and the needs of the international community and the international actors continued to form the legal word of the seas and oceans. As the unilateral acts still remained in the scope of the formation of the legal frames of using the sea territory, their relation to the two main sources of international law – treaties and customs – are examined in the following lines.

2.3. Unilateral acts as sources of international law

There is an increasingly pronounced practice on the part of States of performing unilateral political or legal acts, which are often indeterminate, in their foreign relations, and that such acts, based on good faith and on the need to build mutual confidence, appear to be both useful and necessary at a time when international relations are becoming ever more dynamic.

For this reason, the doctrinal conclusion and the establishment of this kind of act in the international legal order need to be legally cleared.

2.3.1. The doctrinal background in the past

Generally, a unilateral act of a State means an unequivocal expression of will which is formulated by a State with the intention of producing legal effects in relation to one or more other States or international organizations, and which is known to that State or international organization.[18]

In the Roman times, unilateral acts had no legal importance and this concept had not changed for long. In the 16th century it was Grotius who first referred to the promise as a source of obligation or exactly the category of perfect promise, a sufficient declaration of will in order to give a genuine right to the addressee to claim its execution.[19] After Grotius it was Jellinek who also supported the concept of *promissorum implendorum obligatio* as he invented the doctrine of "auto-limitation" as the base of international law and of legal effects of treaties as well. According to him, the basis of legal obligations of States was merely their unilateral will to restrain their own freedom of action and not the principle of *pacta sunt servanda* which implies in fact collective will of all parties of a treaty to assume and to carry out a legal obligation. The first one who incorporated unilateral acts of States in his system of international law was the Italian scholar, Anzilotti. He qualified these kinds of acts as manifestations of the will of States in the domain of international relations which produce legal effect in so far as an international order providing them exist. Concerning his thoughts, there are four

types of unilateral acts – notification, recognition, protest and waiver – producing legal effects and he also worked out the basic characteristics of them[20]

Some authors, especially after issuing the 1974 judgments by The Hague Court on Nuclear Test cases, recognize these categories as a genuine kind of acceptance of legal duties in regard to another State, a group of States, or *erga omnes*.[21]

2.3.2. Estimation of legal effects of unilateral acts in the jurisdiction of international courts

The above question appeared in the very first case decided by the Permanent Court of International Justice. In the case of the *Wimbledon* steamer the Court decided that Article 380 of the Treaty of Versailles should have prevented Germany from applying to the Kiel Canal the German national act, the Neutrality Order.[22] This conclusion highlights the possibility for Germany to enforce its national act in principle; the only fact which constitutes a hinder is that the State had previously accepted international obligations in the Treaty of Versailles for the particular area of the Kiel Canal. This case also established a hierarchy between a treaty and an act of State, a unilateral act, which both refers to the same issue of international concern. By the way, the principle of precedence of international law over national law is today enshrined in Article 27 of the 1969 Vienna Convention on the law of the treaties, and this Article is also the source of doubt relating to unilateral State acts as a source of international law.

The first case in which the question of the unilateral acts was in detail discussed is the *South-Easter Greenland case* of 1932 between Denmark and Norway concerning the sovereignty of the above mentioned territory. During the negotiation process the Norwegian Foreign Minister made the so-called *"Ihlen Declaration"* on July 22nd, 1919: declared on behalf of the Norwegian Government that Norway had wished no difficulty in the settlement of the dispute. The Court considered it, beyond all disputes that a reply of this nature given by the Minister for Foreign Affairs on behalf of his Government in response to a

request by the diplomatic representative of a foreign Power, in regard to a question falling within his province, is binding upon the country to which the Minister belongs.[23]

Several decades later the International Court of Justice needed to deal with the same problem in the famous *Nuclear Tests Case* of 1973 - and with the same interpretation in1994 - which serves the doctrinal basic for the legal estimation for the unilateral State acts. Australia and New Zealand had wanted the cessation of atmospheric nuclear tests carried out by France in the South Pacific. During the procedure, the government announced that it had completed its series of tests and had not planned more tests. In this context the ICJ considered the relevance of the statements by different French authorities and stated that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations.

When it is the intention of the State to make a declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State would be required to follow a course of conduct consistent with the declaration.[24] The ICJ also summarized the necessary elements of a legally binding unilateral act: if it is given publicly and with intent to be bound, even though it is not made within the context of international negotiations, the act is binding. Concerning the circumstances, no acceptance of the declaration or even any reply or reaction from other States is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made.[25] It is also a question of interpretation of the act whether it implies an obligation or not, so when a State makes statements by which its freedom of action is to be limited, a restrictive interpretation is called for.[26]

As for the form of a kind of act, the international law imposes no special or strict requirements, not even the written form is required, and so the question of form is not decisive as the ICJ previously declared in the case concerning the *Temple*

of Preah Vihear in 1961.[27] In this particular case the ICJ stated the following "…as is generally the case in international law, which places the principal."[28] The Court further stated in the same case: "... the sole relevant question is whether the language employed in any given declaration does reveal a clear intention ... "[29]

In the case of the French nuclear cases the ICJ also examined the doctrinal background of the acceptance of unilateral acts as sources of international obligations as stating that the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. It highlights that the treaties get their binding characters from the principle of *bona fide* as well, thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created to be respected.

The Word Trade Organization (hereinafter: WTO) examined the question of unilateral acts in 1999. In this case, a dispute settlement panel of the WTO addressed the legal significance of unilateral statements made by U.S. representatives, in connection with a complaint initiated by the European Union claiming that certain U.S. legislation was incompatible with GATT-WTO commitments.[30]

Representative had stated that official U.S. policy was to implement the challenged legislation in a manner consistent with WTO obligations, and had reaffirmed that policy before the panel. In the report of the Panel, the significance of unilateral acts is interpreted as their international legal importance should be done lightly and should be subject to strict conditions.[31] A sovereign State should normally not find itself legally affected on the international plane by the casual statement of any of the numerous representatives speaking on its behalf in today's highly interactive and inter-dependent world, nor by a representation made in the heat of legal argument on behalf of a State but in the case at issue the statements made by the U.S. before this Panel were a reflection of official U.S. policy,

intended to express U.S. understanding of its international obligations as incorporated in domestic U.S. law.

“The statements did not represent a new U.S. policy or undertaking but the bringing of a pre-existing U.S. policy and undertaking made in a domestic setting into an international forum. The statements were solemnly made, in a deliberative manner, for the record, repeated in writing and confirmed in the Panel’s second hearing. There was nothing casual about these statements nor were they made in the heat of argument. There was ample opportunity to retract. Rather than retract, the U.S. even sought to deepen its legal commitment in this respect. We are satisfied that the representatives appearing before us had full powers to make such legal representations and that they were acting within the authority bestowed on them.”[32]

2.4. Treaty and unilateral acts

Until the Congress of Vienna in 1815, bilateral and multilateral treaties had been infrequent and customary international law concerning the sea - like other areas of international law - developed mainly through unilateral practice and acts of States. Then in the second half of the eighteenth century the concept of *mare liberum* was introduced in positive law with the national legislation of coastal states relating to their fisheries, neutrality and customs zones adjacent to their coast.

The majority of unilateral acts fall within the sphere of treaty relations whether it is in connection with the law of the sea or not. Others, however, may be understood to fall outside that sphere and so to require specific rules to govern their operation.[33]

The distinction between unilateral acts and treaties are not always clear, but as a base, a treaty generally does not consist of unilateral undertakings of contracting

States. It consists of the concordance of will of all the parties with the aim to achieve a legal effect in international law. [34] For this reason the principle of *pacta sunt servanda* and that of the *prommisorium implendorum obligatio* is not fully the same.

Some unilateral acts are mostly understood as acceptance of an offer made by another State or any subject of international law, producing finally an agreement, but there are differences.

It is to be also mentioned that there is a distinction between strictly unilateral acts and those declarations which, however, shows some elements of unilateralism, fall within the sphere of the treaty law. These categories are the (a) acts linked to the law of treaties; (b) acts related to the formation of custom; (c) acts which constitute the exercise of a power granted by a provision of a treaty; (d) acts of domestic scope which do not have effects at the international level; (e) acts which form part of a treaty-based relationship, such as offer and acceptance; (f) acts relating to the recognition of the compulsory jurisdiction of the International Court of Justice, in accordance with Article 36 of its Statute; (g) acts which are of treaty origin but which are unilateral in form in relation to third States; and (h) acts performed in connection with proceedings before an international judicial body and acts which may enable a State to invoke an estoppel in a trial. According to legal literatures these acts do not constitute unilateral acts.[35]

2.4. Customary law and unilateral acts

A consideration should be given to acts and conducts which contributes to the formation of international custom. It is well known that the customary process is not complete unless two elements are brought together: the repeated performance of acts known as precedents (the material element or *consuetudo*) and the feeling or belief of subjects of law that the performance of such acts is obligatory because the law requires it – hence the concept of a psychological element, the *opinio juris sive necessitatis*.

Apart from the different doctrinal approaches, the three constitutional elements of unilateral acts are, no doubt, the manifestation of will of a subject of international law, the independence of the will and production of causes, which are imputable to the will and imply no obligation to a third State.

There seems to be no doubt about the importance of unilateral acts of States in the formation of custom. This may be seen in the case of acts related to the law of the sea performed since the eighteenth century which later made possible the codification of international rules on the subject.[36]

The State, through its acts or conduct, can participate in or start on the formation of a customary rule.[37] Notwithstanding the fact that, at first, unilateral acts were in confront with the existing international customs as it was seen in the case of the Truman Proclamation on the sea's biological resources and on the mineral resources of the seabed and the ocean floor in 1945. This event was ultimately the point of departure of a new international custom concerning the law of the sea and it set a direction which was followed by numerous States and by five years from the Proclamations, almost all the Latin American States elaborated unilateral acts to extend their national territory over their continental shelves. [38] Finally, it was in the case of the *North Sea Continental Shelf* when the ICJ recognized the possibility to act that way origin from the Proclamations.[39]

Of course objections can be raised that a municipal legislation of one single State is negligible element of required State practice, but in practice, great powers have more influence than others on the formation of a custom, as their conduct endanger others to act similarly.[40] Those unilateral acts of State which are based on treaty provisions fall within treaty sphere.

As it is seen, recognition - express of tacit - and protest or rejection plays a determining role in the formation of custom. It is worth pointing out that custom, as acknowledged by a part of international doctrine and jurisprudence, has its origins in various acts weather they are the expression of one or more subjects of

international law.[41] Rousseau has already mentioned several treaties which can serve as precedent or constituent element of a custom.[42] The primary importance of such acts is that they constitute evidence of the subjective element – of acceptance or rejection – than in any strictly material function as precedent.

Sometimes the acts – not to mention behavior, attitudes and conduct – of a State in relation to custom may be excluded from the category of strictly unilateral acts, since their effects amount to a kind of tacit international agreement. They are unilateral in form and they may appear to be autonomous, but these acts generally produce effects when they coincide with other acts of a similar nature and so contribute to the formation of a customary rule. It should also be noted, however, that an act forming part of the process of the creation of international custom is not necessarily excluded from the category of strictly unilateral acts if the act, independently of this function as a source of custom, reflects an autonomous substantive unilateral act creating a new juridical relationship and this is the basic condition for a unilateral act.[43]

Acts which constitutes the exercise of a power granted by the provisions of a treaty or by a rule of customary law also needs to be considered, like legal acts of a State concerning territorial questions, delimitation of exclusive economic zone [EEZ] before the regime of the 1982 UNCLOS or the delimitation of territorial waters. These are formal unilateral legal acts of internal origin which may produce effects at international level.[44] The ICJ, in addition, stated in the *Fisheries* case, stated that although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law.[45]

III. Unilateral legal acts developing the regime of the sea

The regime of the seas was ruled by the *freedom of the seas* concept, dating from the 16th century: national rights were extended to a specified belt of water along coastlines, usually three nautical miles, according to the *cannon shot*

rule developed by the Bynkershoek. All waters beyond national boundaries were considered international waters — free to all nations, but belonging to none of them. After the Second World War the gradual exhaustion of land resources in minerals and hydrocarbons, together with the development of technology increased interest of the international community in the sources of wealth of the sea-bed and sub-soil, the "only" problem was the concept of freedom of the seas. The USA, s a pioneer in technology with growing needs in raw materials and hydrocarbons, was the first country to attempt to claim parts of the sea-bed beyond its territorial waters by unilateral declaration. By this act, the USA set off a chain reaction in developing the rules of the law of the sea by unilateral acts. Technological changes of the time and the disturbances that have resulted in environmental and social matters require change in the existing law. It is not a matter of recording old rules, but one of making new ones, and there are no other ways of doing this than by agreement or unilateral action, and when agreement is not forthcoming, then by unilateral action alone.[46]

In the following lines the unilateral acts of States which contributed to the development of the law of the sea will be presented.

3.1. Acquisition of maritime territory by unilateralism in general

Territorial extension over maritime areas issues from the assumed inherent right of Coastal States to expand their jurisdiction to adjacent seas because of the geographical proximity (contiguity). As modern international law of the acquisition of territory generally requires that there shall be an intentional display of power and authority over the territory, by the exercise of jurisdiction and state functions, on a continuous and peaceful base, [47] the extension of rights over the high seas have frequently based on the *historic titles* like *prescription*.[48] For a single unilateral act to develop international law, first, it is necessary to be accepted by other States or at least no objection shall be raised against the new practice. Since the high seas are *res communis*, and as delimitation of sea areas always has an international aspect it cannot depend merely upon the will of a

Coastal State, namely on domestic jurisdiction,[49] in principle there must be a general *acquiescence* or *recognition* from other states and for this reason and for the fact that the extension is generally ordered by means of relatively unpublicized national, municipal norms, there must be an affirmative evidence of this acquiescence of the international community of States.[50]

Recognition may also take the form of a unilateral declaration or may occur in treaty provision as it can be seen in the *Easter Greenland* case whereby bilateral treaties between the two arguing States served as evidence of recognition of sovereignty over the territory in question.[51] Acquiescence has the same effect, but arises from a conduct, negligence, an absence of protest when this might be reasonably expected i.e. in the form of a protest or recognition for example. Acquiescence and recognition are not legal titles for acquisition of territory but they give significance of to the actual control of a territory …"in circumstances when these do not of themselves provide a complete foundation for title in the holder, for example where there are competing acts of possession.[52]

Declared in the Fisheries case, the general toleration of foreign States with regard a State practice served the justification of extension of sovereignty.[53] Like tacit agreement, acquiescence must be strictly interpreted, so it shall be emphasized that the consent of a State differs from its inaction is to ensure that such acquiescence corresponds accurately with the implied intention of the acquiescing State, and to limit the benefits of acquiescence to claims which have been formulated in such a way that the acquiescing State has or ought to have knowledge of them.[54] There is no better justification for the existence of acquiescence than the fact that other States start to act like the previous one, which signifies that the formation of a new custom is on its way to rewrite existing rules ensure the development in regards the changing of circumstances and the word itself as it is a well established principle of international law that customary international law is developed by state practice,[55] which as a matter of fact based on a unilateral action of a pioneer State.

It is to be mentioned that according to legal literature and State practice there is a difference between unilateral acts and acts which constitute the exercise of a power granted by a provision of a treaty for instances declarations establishing exclusive economic zones or, in general, the delimitations of maritime zones are examples of such acts. The act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law, as it is stated in the *Fisheries case*.[56]These acts are linked to a pre-existing international agreement which established previously the conditions and modalities of unilateral acts to produce legal effects, thus they do not create obligations for third States, because they are simply declarative acts. It is the pre-existing norm, which creates rights and obligations; the unilateral act just makes it enter into force.[57]

3.2. Truman Proclamation of 28 September 1945 and the continental shelf

The President of the United States, Harry S. Truman, issued a Presidential Proclamation addressed to the international community informing that the exercise of jurisdiction over the natural resources of the subsoil and seabed of the continental shelf by the coastal nation is reasonable and just, since the continental shelf may be regarded as an extension of the land mass of the coastal nation thus it belongs to the State, not to mention self-protection which ensures to the coastal nation to keep close watch over activities off its shores. The USA adopted a functional zone and declared that the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States are the subject to its jurisdiction and control, but the character as high seas of the waters above it and the right to their free and unimpeded navigation are in no way affected. [58] Where the continental shelf extends to the shores of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles. [59] The Truman Proclamation was expanded upon an executive order from the President, and it was later confirmed and complemented by the adoption of the Outer Continental Shelf Lands Act by the Congress of the United States.[60]

One month later Mexico, a neighbouring State to the United States, which issued a presidential declaration, incorporating its continental shelf into its national territory and within a short time, the principle became widely accepted, but some States deviated from it, too, and extended their zones not only to mineral, but biological sources as well. In addition, several States were not content with mere functional jurisdiction and control in order to exploit its seabed resources and created sovereign zones with the exclusion of freedom of the seas doctrine like Latin-American States and Pakistan.[61]

Because of this great expansion of States, the International Law Commission needed to take measures before greedy States attach each and every part of the sea in the word, so in 1958 five conventions on the law of the sea were adopted including one on the continental shelf which reprised the idea of Truman Proclamation, and legalized the functional use of continental shelf within the same conditions as in the Proclamation.[62]

3.3. Fisheries case and straight base-lines

The concept of territorial sea as a special zone serving protection to coastal States has existed from long in customary law of the sea but the base-line from which the breadth of it posed a problem as Norway neglected the existing custom relating to low-water mark.

The *Fisheries case* was the culmination of a dispute, originating in 1933, over how large an area of water surrounding Norway was Norwegian waters on which Norway thus had exclusive fishing rights and how much was considered as high seas where the United Kingdom could thus fish. On 24 September 1949, the United Kingdom requested that the International Court of Justice determine how far territorial claim of Norway extended to sea, and to award damages in compensation for Norwegian interference with fishing vessels in the disputed waters, stating that the claim of Norway to such an extent of waters was against international law. Norway had not taken, as a matter of fact, the low-watermark

along the coast, with all its indentations and island, as baseline, but instead Norway had appointed certain seaward points along the coast and had connected these points by straight lines thus the four miles zone of sea – instead of the traditional three miles applied by Norway before - between these lines and the coast had been declared territorial waters under the sovereignty of Norway.[63]

The ICJ found that the Norwegian practice applied consistently and uninterruptedly since the delimitation decrees of 1869 and that of 1889 is compatible with international law, as the ICJ found no valid rule of international rule prohibiting the drawing of straight baselines.[64] For a period of more than sixty years the United Kingdom itself in no way contested it.

In any case, the method of straight base-lines was accepted by the ICJ and it has, as a principle, never been drawn into doubt since then, thus the 1958 Convention on the Territorial Sea and the Contiguous Zone codified this rule in Article 4, and later the same appeared in Article 7 of the 1982 Convention.

3.4. Hovering Acts and the contiguous zone

The concept of the contiguous zone did not undergo elaboration until the first decades of the 20th century, although it has its origins in a unilateral British act from the 1700s. By the Hovering Acts, Great Britain intended to ensure her protection against foreign ships engaged in smuggling activities and to hovering within distances up to 24 miles from the shores. At that time, only narrow territorial water was accepted as the elongation of State territory and jurisdiction, so these protective measures were unique attempts to gain more sovereignty over high seas in the name of self-protection. The last time they were enforced against a foreign vessel was in 1850, then they were repealed in 1876 and Great Britain applied again the three-mile rule subject to two exceptions for the doctrine of constructive present and hot pursuit. After this period, Great Britain never claimed any jurisdictional not like those States, who gained confidence from the British example and established unilaterally their own limitations of sea. France, for

instance maintained its three-mile zone for fishery and general police purposes, but also had a six-mile neutrality zone and a 20-mile custom-zone. Several States followed this initiative, mainly in Latin America. For instance, since 1790, the USA asserted national legislation and the right to board and exercise jurisdiction over foreign vessels within 12 miles of the coast in order to enforce customs regulations. In the Tariff Act of 1922, the Congress provided that any vessel, whether bound by the USA or not, may be boarded for examination within 12 miles. At that time, the Act led to diplomatic protest but ended up with negotiations for the prevention of smuggling of alcohol, thus the US extension policy was successful.[65]

Many States denied the need for this kind of extension of jurisdiction, but apart from this fact, by 1930 at The Hague Codification Conference, the exercise of jurisdiction beyond the three mile limit was a question to be discussed. Finally, in 1958, it was codified as a customary rule under the name of contiguous zone which may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured. This newly accepted zone gives the possibility to coastal State to exercise the necessary control to prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea and to punish the infringement of regulations adopted in these fields.[66]

3.5. Evaluation of the exclusive economic zone and limitation of territorial waters

The evaluation of the EEZ and that of the breath of territorial sea met at one point and they ran parallel as several coastal States wished to extend territorial sea in a 200 - mile zone, others only attached to certain rights beyond territorial sea and not absolute sovereignty. as the breath of territorial sea was not determined until 1982, nor the rights inherent to the 200-mile zone, these two categories existed parallel.

Although the question of sovereignty began with the criticism of Grotius concerning the claims of Spain and Portugal, the great debate of the seventeenth century on *mare clausum* or *mare liberum* quickly centered on the much narrower and more practical issue of the extent to which nations might legitimately claim exclusive rights in their neighbouring seas. As it was seen in the British practice which considered sea as the part of "estate regal" like forests.[67] Since then it had been a widely accepted custom that coastal States maintain a zone around their shores to protect themselves; however throughout the seventeenth century, there was no evidence that the canon - shot criterion – as the limit of extension of such zones – was used otherwise than to determine the limits of the peace of the port or the treaty rights of visit and search of foreign shipping within range of warships. In the middle of the eighteenth century the canon-shot rule was already applied in connection with fishing disputes in a case concerning the arrest of Dutch dodgers by Danish frigate because of fishing in Icelandic waters. [68]

The right of the coastal State to a territorial sea with sovereign jurisdiction was codified in 1958, but the outer limit of this exclusive jurisdiction was delimited only in 1982 as a solution of many unilateral and contradictory claims.

At the time of the first two U.N. conferences on the law of the sea in 1958 and 1960, States failed to find a solution. After the Second World War, some Latin American States claimed a 200 mile territorial sea,[69] as the rules for territorial sea provided a certain guarantee that the coastal States could use and protect the ocean areas adjacent to their coast.

The evolution of the law relating to adjacent fishing zones, and eventually the EEZ, is a typical illustration of the cumulative effect of unilateral acts as the ICJ conceded this effect in the Fisheries case.[70] The new régime evolved in less than ten years although for about two decades since the appearance of the concept, it seemed to provoke strong protest, [71] but as the Third U.N. Conference on the Law of the Sea commenced its work, it became very soon clear that the majority of States accepted certain exclusive rights especially with the aim of fishing beyond the general territorial sea. Since at that time debates occurred even on the

limit of territorial sea, as long as no one examined territorial claims carefully, the two different types of claims did not separated. By now, the popularly known 200-mile limit – or as it was also called the patrimonial sea – represents the triumph of individualism over collectivism in international relations.[72]

The origin of the EEZ is strictly related to the concept of territorial sea, continental shelf and fishery rights as there had been a long debate of the extension of territorial sea especially in connection of extent of exclusive rights of the coastal State. There were different approaches concerning the limit of exclusive rights: there were States which wished to extend the territorial sea 200 miles off the shores and there were States which would have been satisfied with a narrow territorial sea but beyond this zone they claimed an additional fishing zone.[73]

The first initial of claiming national sovereignty *without prejudice to navigation* over the seas adjacent to the coast to the extent necessary to protect natural resources was made in 1947 by the President of Chile soon after the Truman Proclamations.[74] Similar regulations were adopted in 1948 by Costa Rica, and two years later in Honduras and El Salvador. This unilateral expansion trend was consolidated in the Declaration of the Maritime Zone adopted in Santiago by Chile, Ecuador and Peru in 1952. Its aim was to proclaim a 200-mile limit. According to these States, the former extent of territorial sea and the custom of contiguous zone are insufficient to permit the conservation, development and use of those resources to which the coastal States are entitled.

Despite the fact that many objections were formed against the Santiago Declaration, it was the idea on which States began to take hold of extending the jurisdiction over waters within the 200-mile limit in order to ensure that marine resources were used under control.[75] It was a trilateral act based on a unilateral act which obliged States to ensure the conservation of natural resources and regulate – and even prevent – any exploitation which might endanger the subsistence and integrity of such resources.

A further step to establish this new regulation was the regulation of the Third Meeting of the Inter-American Council of Jurists which declared the following:

"(1) The extension of three miles to delimit the territorial sea is insufficient and does not constitute a general norm of international law. Therefore, the enlargement of the marine area traditionally as territorial sea is justified.

(2) Each State is competent to establish its territorial waters within reasonable its limits, taking into account geographical, geological and biological factors as well as the economic needs of its populations, and its security and defense. The coastal state enjoys exclusive fishing rights over species regulated to the coast to the country's existence or to the needs of its populations."[76]

This initiation was later considered as the Latin-American practice and it implied the consecration of a total and definitive break with the traditional and codified law of the sea.

Soon after, in 1958 the law of the sea conventions rejected the idea of extending territorial sea in a 200-mile zone and it is to be noted that adoption of fishing regulations do not appear among the powers recognized to the coastal State not even the contiguous zone.

In the 1970s there were still many objections against the concept of exclusive economic zone as it was expressed in the 1974 judgment of the ICJ in *Fisheries Jurisdiction* case stating that it is impossible to render judgment *sub species legis fernandae*, or anticipate the law before the legislator has laid it down. [77] The Court of Arbitration shared the same opinion in the 1977 *Anglo/French Continental Shelf* case.[78]

Apart from that, in the second half of the 1970s when many States unilaterally began to introduce the concept of 200 mile zones in the practice, the doctrinal opinion was that a process of development of the law based on this concept would undoubtedly have been set in motion, leading ultimately to the creation of norm of international customary law. As the practice became widespread, an increasing number of scholars began to assert the emergence of rules of customary law allowing the coastal State to exercise certain rights within their 200-mile zone. In 1970 with the statement of President Nixon, the USA ushered in a new area and

proclaimed its maritime policy with the concept of preferential fishing rights beyond the limit of the territorial sea for a guarantee of freedom of passage for warships and military aircraft through certain straits which would otherwise have been part of the territorial sea. This policy was submitted to the U.N. Sea-bed Commission.[79] The phrase “exclusive economic zone” was introduced for the first time by the representative of Kenya at the annual meeting of the Asian-African Legal Consultative Committee held in Lagos, Nigeria in 1972.[80] Later this year, this Kenyan initiative was formally submitted to the U.N. Sea-bed Committee.[81] This proposal meant to guarantee the freedom of navigation and placed only the mineral and living resources of the 200-mile zone under the jurisdiction of the coastal State and it became the basic document for the Third Law of the Sea Conference concerning the examination of the case of expanding coastal State rights beyond territorial sea.

By the mid-1980s, particular elements of the EEZ have already acquired the status of customary law even in the judgments of the ICJ.[82]

In the 1982 judgment of *Tunisia/Libya* case the establishment of an exclusive economic zone, in which the coastal State exercise sovereign rights over natural resources and jurisdiction with regard to artificial islands, scientific research and marine pollution , was considered to be justified.[83] In the 1984 judgment of *United States/Canada Gulf of Maine Area* case the ICJ dealt with the delimitation problem of the Canadian fisheries zone and the economic zone of the United States the sovereignty expansion beyond territorial sea was also accepted.[84] Moreover, in the 1984 *Libya/Malta* judgment, the ICJ stated that the institution of an exclusive economic zone with its rule on its distance is shown by the practice of States to have become a part of customary law.[85] The Court of Justice of the European Communities also expressed a similar view in the *Crujeiras Tomé* case concerning fishing rights of Spain in the economic zone of France as it stated that fishing, under the 1958 Geneva Convention, has been abrogated by a new international custom that relates to the institution of the exclusive economic zone and as it evolves from the customary law, its expansion

is 200 mile from the baseline.[86] By the time when the Montego Bay Convention on the law of the sea entered into force in 1994, no one could doubt it that it codified a customary rule concerning exclusive economic zone and clearly defined the maximum breath of territorial sea.

Concerning territorial sea, the 1982 conference finally accepted the 12-mile rule as the maximum extent of a territorial sea for the exclusive jurisdiction of the coastal State except for innocent passage. Other zones also served not exclusive but significant interest of States. In 1987 – eight years before the entry into force of the 1982 convention – some 100 States applied the 12 miles rule unilaterally, [87] and not more or less. Concerning the custom of the EEZ, in 1986 a total of 105 States claimed preferential rights in the 200-mile zone; 15 of these States claimed a territorial sea of that size; 21 claimed a fishery zone and 69 claimed an economic zone.[88] It is seen, that as a customary law, the majority of States did not wished to gain exclusive jurisdiction of a zone of 200 miles under the title of territorial water, they only attached to certain economic rights related to the territory.

3.6. AWPPA and special preventive measures for ice-covered regions

The Act elaborated in 1970 makes clear Canada's determination to discharge its responsibilities for the preservation of the Arctic environment without denying access to shipping in the waters of the Canadian archipelago. It aims to preclude the passage of ships threatening pollution of the environment thus commercially-owned ships intending to enter waters of the Canadian Arctic designated by the State as shipping safety zone up to 100 miles offshore[89] are required to meet Canadian design, construction and navigational safety standards. The liability of these ships is limited but does not depend upon proof or fault or negligence. Prime Minister Trudeau emphasized that this regulation was temporarily and was in force as long as international law provides for a satisfactory protection for the region,[90] and this Act was considered as the first step to development which served the protection of environment for the humanity as a whole. [91]

As a legalization of AWPPA and as a response to the need of international protection of the Arctic area, the 1982 U.N. Convention of the Law of the Sea contains special rules for ice covered areas. The Convention contains several dispositions on sea pollution,[92] but Article 234 is the only one which is elaborated especially to Arctic-conditions. The common lack of these provisions is that they authorize coastal States to take preventive measures on foreign ships only in the newly created territory of exclusive economic zone.[93] In addition, the coastal State is entitled to adopt special regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the EEZ, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance.[94] Interpretation in good faith does not allow prohibiting all transport in the area. [95] The problem is if ice melts, and it does not cause the above mentioned hazards to navigation, the special measures have to be deregulated, and only general rules can be applied in order to protection.

IV. The future: further erosion of the freedom of the sea by unilateral acts?

Although UNCLOS has regulated the question of the law of the sea and codified the customary law elaborated since the 1958 conventions and tried to create an up to date regulation for the issue of the sea, but times change, technology develops and the sea-covered areas create new challenges as States will slowly realize that their economic and political interests does not, in the long run, correspond to their jurisdictional areas. It has already seen in the history of the law of the sea how State interests develop new regime, so it is likely that the new challenges will induce unilateral State actions and in the course of time the formation of new customary law as well.

4.1. Area of potential conflicts

In the first line it is the question of fishery. The fight against IUUF[96] rquires further initiatives. The EU played an active role in drawing up the international plan of action to prevent and eliminate IUU-fishing, endorsed by the FAO Council in June 2001. Such initiations, guidelines are concerning deep-sea fishing in the high seas, the studies on the responsibilities of the flag State of fishing vessels, on the use of Vessel Monitoring Systems (VMS) etc. To be effective, all these initiatives require implementation at the regional and at national level. Action in the Regional Fisheries Management Organizations (RFMOs) has emerged to extend the Fish Stocks Agreement[97] to all stocks sometimes preceded consideration by the UN General Assembly and action at the global level by FAO. The main challenge to RFMOs is that States that are not parties (or cooperating nonparties) to them are starting to raise political objections. These States refuse to be bound directly or indirectly by decisions of entities they do not belong to and in which they have difficulty in becoming parties as this would give a standing to their aspiration to quotas. [98]

Pollution and the preservation of the marine environment is a key issue concerning law of the sea. Many conventions ensure the protection of marine environment, but they require the will of States to accept them and to implement them. The question of pollution from land based resources, the pollutions from vessels; form offshore exploration stations are threatening the environment. There is no lack of initiatives to reduce danger but as long there is no global collaboration and specific treatment adapted to certain special circumstances, no effective solution can be given. This problem is strictly related to the challenge caused by *climate change* as the effects in environmental protection are cyclic. The most interesting and most endangered area on Earth is the Arctic. It is melting, which has unpredictable effects on mankind but due to its fragility and its special sensibility to harmful impacts, this area needs to be governed by special regulations, as it is seen that Article 234 of UNCLOS obtained by the Canadian AWPPA is justified to be a legal framework but does

not serve as any effective protection. In general, the UNCLOS contains complex provisions that seek to accommodate the navigational rights and freedoms of all States with the need to ensure effective protection for the environment. Many of these provisions relate to and qualify freedom of navigation in the EEZ.[99] A significant aspect of these provisions is that they are self-adjusting.[100] The obligation of the flag state to apply to its ships "generally accepted" standards,[101] like the right of coastal State to enforce generally accepted international standards regarding operational discharges in the EEZ,[102] evolves with the standards; however, these standards do not ensure enough environmental protection in the vulnerable area of Arctic.

Melting of icecap in the Arctic, new shipping routes will be navigable in the high seas and in the EEZ of polar States, much shorter than the existing ones between the continents, thus the international community shall deal with the question of smuggling of migrants, with the transport of weapons of mass destruction, with the use of ships for purposes of terrorism, with the use of ships by organized crime. It is obvious that security measures shall be restricted in order to take up fight with these threats,[103] not to mention the problems relating to exploitation of Arctic resources as it is proved that 25% of the word's remaining oil and gas location is estimated to be hidden here.[104] Neither the conditions of exploitation nor the environmental impacts already caused by such activities are regulated. Moreover, the future requires efforts at developing governance. The most challenging problem is, as a matter of fact, caused by the huge hydrocarbon stocks lying in the continental shelves of the Arctic which attracts States. The development of initiatives aimed at extending ocean governance is not devoid of risks and may entail conflicts.[105] The international community shall take steps to reduce the risks and help to avoid conflicts.

The road towards developing ocean governance is fraught with potential conflicts. It seems more interesting to indicate some potential conflicts that may hamper the development of new legal instruments and institutions. They are not new –as they have characterized the road towards past developments – but it seems useful not

to forget them. One such conflict, already alluded to, is the one between multilateralism and unilateralism. Unilateral action may be seen a convenient shortcut to affirm certain values, but only multilateral action, with all its difficulties and slowness, can produce the agreed solution that develop governance of the oceans.[106]

4.2. Further steps to resolve or preserve conflicts

UNCLOS is a basic framework for all action concerning the law of the sea and it shall be maintained in such manner. In order to precise certain regulations multilateral cooperative approaches should be preferred over unilateral approaches. While it is true that sometimes unilateral initiatives have triggered the development of new rules as it is seen in the history of the law of the sea, but it shall be mentioned that unilateralism often brings conflicts and tension. As a matter of fact, it must be kept in mind that a global approach is preferable for a global problem and a regional approach is preferable for a regional problem and it is less complicated to avoid unilateral steps by States. It is similarly with approaching global problems regionally – unless the purpose is that of implementing global rules - , as it may amount to a coordinated form of unilateralism jeopardizing the unity of the law of the sea.[107] The European Union, for instance, refuses to react unilaterally to problems.[108] Overlap of competences of institutions should be also avoided and coordination between them enhanced. This does not mean that only treaties and other binding instruments should be considered. Well drafted, nonbinding instruments can have beneficial effects and avoid the slowness of negotiation, entry into force and reaching broad acceptance that sometimes treaties and conventions.

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