3

Oceans

A Fighting Chance

On June 19, 2023, national delegates from nearly 200 countries gathered under the soaring rotunda of the UN's General Assembly Hall in New York City to approve, by consensus, a landmark agreement for the conservation and sustainable use of marine life.[1] Commonly known as the "High Seas Treaty" or the "Biodiversity Beyond National Jurisdiction (BBNJ) Agreement," the treaty represents the culmination of over a decade of multilateral negotiations.[2] At its heart is an ambitious framework for establishing large marine protected areas in the high seas – a critical step toward achieving the United Nations' goal of effectively conserving and managing 30 percent of the earth's oceans by 2030.[3]

This diplomatic breakthrough arrived not a moment too soon. As UN Secretary-General António Guterres reminded the assembled delegates, marine species in the twenty-first century face a harrowing number of existential threats, including warming oceans, shifting weather patterns, ocean acidification, and the disruption of coastal ecosystems. To make matters worse, human population growth and the rise of modern industrial fishing technologies have generated

[1] Agreement Under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Maritime Biological Diversity of Areas Beyond National Jurisdiction, 19 June 2023, A/CONF.232/2023/4*; see generally 'An Historic Achievement: Treaty of the High Seas Is Adopted', European Commission Directorate-General for Maritime Affairs and Fisheries, 19 June 2023, https://oceans-and-fisheries.ec.europa.eu/news/historic-achievement-treaty-high-seas-adopted-2023-06-19_en.

[2] 'An Historic Achievement'.

[3] 'An Historic Achievement'; see also 'Kunming-Montreal Global Biodiversity Framework', CBD/COP/15/L.25, 15 December 2022, www.cbd.int/doc/c/e6d3/cd1d/daf663719a03902a9b116c34/cop-15-l-25-en.pdf (establishing the 30 percent goal).

https://doi.org/10.1017/9781009304993.004 Published online by Cambridge University Press

overfishing on an unprecedented scale, with over a third of global fish stocks subject to unsustainable harvesting.[4]

While acknowledging the daunting challenges ahead, Guterres praised the delegates for having "pumped new life and hope to give the ocean a fighting chance":

> By acting to counter threats to our planet that go beyond national boundaries, you are demonstrating that global threats deserve global action.
>
> That countries can come together, in unity, for the common good.
>
> That the spirit of multilateral cooperation that infuses this chamber is alive and well.[5]

In celebrating the "spirit of multilateral cooperation" that produced the High Seas Treaty, however, the Secretary-General glossed over an important point: international cooperation in this case was not merely good policy, it was also a legal obligation. For decades leading up to the High Seas Treaty, international courts and tribunals had affirmed that the law of the sea required states to cooperate with one another to ensure the conservation and sustainable use of marine resources.[6] Aided by the UN International Law Commission (ILC), states had also codified this requirement to cooperate in a multilateral convention with near-universal membership.[7] Thus, by working together to develop the High Seas Treaty, members of the General Assembly were not writing on a blank slate; rather, they were taking steps to fulfill a longstanding legal obligation to cooperate for the conservation and management of oceanic resources.

International law did not always require states to cooperate in this way. Prior to the middle of the twentieth century, the conventional wisdom among international lawyers was that states were free to use and exploit oceanic resources however they wished, without regard to the rights or

[4] 'Secretary-General's Remarks at the Intergov. Conference on an Int'l Legally Binding Instrument Under the Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction', 19 June 2023, www.un.org/sg/en/content/sg/statement/2023-06-19/secretary-generals-remarks-the-intergov-conference-intl-legally-binding-instrument-under-the-un-convention-the-law-of-the-sea-the-conservation-and-sustainable-use-of.

[5] Ibid.

[6] See, e.g., Fisheries Jurisdiction Case (Fed. Rep. Germ./Iceland), Merits, 1974 ICJ Rep. 175 (25 July); Fisheries Jurisdiction Case (UK/Iceland), Merits, 1974 ICJ Rep. 3 (25 July); North Sea Continental Shelf Cases (Fed. Rep. Germ./Den; Fed. Rep. Germ./Neth.), Merits, 1969 ICJ Rep. 3 (20 February).

[7] UN Convention on the Law of the Sea art. 125(1), UN Doc. A/CONF. 62/122 (1982) [hereinafter UNCLOS].

https://doi.org/10.1017/9781009304993.004 Published online by Cambridge University Press

interests of other states or the natural environment. The rise of mandatory cooperation during the twentieth century therefore marked a sharp break with centuries of precedent – a startling revolution in the law of the sea. As the law of the sea is one of the oldest and most important fields of international law, the historical developments recounted in this chapter serve as a bellwether for mandatory cooperation's emergence in international law more generally.

The Battle of the Books

On February 25, 1603, a violent episode in the Straits of Singapore sent shock waves around the world, rattling the capitols of Europe. In a stunning challenge to Portuguese naval supremacy in the Far East, three Dutch ships ambushed a massive Portuguese treasure ship, the *Santa Catarina*, capturing a cargo worth 3.5 million guilders – "more than 60 percent of the average annual expenditures of the English government at the time."[8] When the *Santa Catarina* eventually reached Amsterdam, the local admiralty board declared the seizure "good prize" and sent the ship with its lavish cargo of gold, silks, and spices to auction for the benefit of the Dutch East India Company.[9]

Seeking to bolster the legal case for the *Santa Catarina*'s capture, the Dutch East India Company enlisted Hugo Grotius to prepare a supportive legal opinion. Just twenty-one years old at the time, Grotius had already achieved fame as "the Miracle of Holland" for his formidable intellect, dazzling erudition, and literary flair.[10] Applying these prodigious talents to the Dutch East India Company's legal defense, Grotius argued that the laws of war permitted the *Santa Catarina*'s seizure in response to Portugal's illegal efforts to prevent Dutch ships from transiting through the East Indies.[11] Grotius asserted that Portugal could not claim exclusive dominion over the seas surrounding the Straits of Singapore because the sea, by its nature and according to the custom of nations, was not amenable to possession.[12] The ocean was not subject to possession in the same manner as land, because its constant motion

[8] Oona A. Hathaway and Scott J. Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (New York: Simon & Schuster, 2017), pp. 3–4, 6.
[9] Verdict of the Amsterdam Admiralty Board Sept. 9, 1604, in Hugo Grotius, *Commentary on the Law of Prize and Booty* (Martine Julia van Ittersum ed., 1603), pp. 306–309.
[10] Hathaway and Shapiro, *The Internationalists*, pp. 6–8.
[11] Grotius, *Commentary on the Law of Prize and Booty*, ch. XII.
[12] Ibid.

https://doi.org/10.1017/9781009304993.004 Published online by Cambridge University Press

prevented states from demarcating clear maritime boundaries.[13] Moreover, the abundant and apparently inexhaustible character of oceanic resources meant that no state could justly exclude others from sharing in the oceans' bounty.[14] To prevent any nation from sailing and fishing on the sea, when those activities pose no threat to the state's own interests, would reflect a "brainsick covetousness" incompatible with natural law and state practice since antiquity, Grotius claimed.[15] The sea therefore constituted a global commons (*res communis*) outside the scope of national jurisdiction and immune from claims to national appropriation. Portugal's defiance of these principles amounted to a just cause of war.

In 1609, Grotius published a slim pamphlet advancing these arguments against national appropriation of the seas under the title *Mare Liberum* (*The Free Sea*).[16] The pamphlet sparked a political firestorm. The Vatican placed *Mare Liberum* on its list of banned books, perceiving the tract (accurately) as an assault on the Papal Bull of Pope Alexander VI, which had partitioned the globe into two spheres – one for Portuguese expansion to the east and the other for Spanish conquest to the west.[17] Iberian scholars rushed to defend their nations' claims to dominion over the high seas.[18] British publicists also sparred with Grotius, seeking to defend their crown's claims to exclusive dominion over the English Channel and the North Sea.[19] As clashes between Grotius's supporters and opponents dragged on over the course of the seventeenth century, the debate came to be known as "the battle of the books" (*la bataille des livres*).[20]

Among those who opposed Grotius's vision of the free sea, his most influential and forceful critic was John Selden, the great English lawyer

[13] Ibid.
[14] Ibid.
[15] Ibid.
[16] Hugo Grotius, *The Free Sea* (Indianapolis: Liberty Fund, David Armitage ed., Richard Hakluyt transl., 2004) (1609).
[17] David Armitage, 'Introduction', in Grotius, *The Free Sea*, p. xvii; Donald R. Rothwell and Tim Stephens, *The International Law of the Sea* (Oxford: Hart Publishing, 2010), p. 2. Portugal and Spain incorporated this division of the earth in the 1494 Treaty of Tordesillas.
[18] Justo Seraphim de Freitas, *Do Justo Império Asiático dos Portugueses (De Justo Imperio Luistanorum Asiatico)* (1625); Juan Solózarno Pereira, *De Indiarum Jure* (1629).
[19] See, e.g., John Selden, *Mare Clausum* (London: Kembe & Thomas, G. H. Gent transl. 1663); 'William Welwod's Critique', in Grotius, *The Free Sea*, p. 62.
[20] Tullio Scovazzi, *The Origin of the Theory of Sovereignty of the Sea, in Law of the Sea, From Grotius to the International Tribunal for the Law of the Sea: Liber Americorum Judge Hugo Caminos* (Lilian del Castillo ed., Brill Nijhoff, 2015), pp. 48–49.

https://doi.org/10.1017/9781009304993.004 Published online by Cambridge University Press

whom John Milton hailed as "the chief of learned men reputed in this land."[21] In a provocatively titled 1636 treatise, *Mare Clausum* (*The Closed Sea*), Selden dismantled Grotius's historical and empirical claims. He argued persuasively that maritime powers since antiquity had often claimed certain maritime zones as their exclusive possession, including the seas surrounding the British Isles.[22] He also observed that some maritime resources, such as coastal fisheries and gems and pearls in the seabed, were clearly finite and exhaustible. Accordingly, he argued that states could justifiably claim dominion over regions of the sea where such resources were located.[23]

Under pressure from his critics, Grotius eventually conceded that states could acquire sovereign rights over certain maritime zones, such as bays and straits, where they had established effective control through a sustained naval presence.[24] By the eighteenth century, this principle of possession through effective control produced the "cannon shot rule" whereby coastal states were allowed to claim sovereign rights over a "territorial sea" extending three miles from their shore.[25] Beyond this three-mile zone, however, Grotius's free sea became the undisputed customary norm. Although Selden arguably advanced the stronger argument from historical practice, Grotius's vision of the high seas as a global commons held greater appeal for subsequent generations who viewed blue water as the indispensable gateway to international commerce and domestic prosperity.[26]

The Tragedy of the Free Sea

Given the sharp divisions between Grotius and Selden, it is easy to overlook that their dueling accounts of the law of the sea shared a basic assumption about the juridical character of state rights and powers. Both accounts assumed that a state may exercise its rights and powers under the law of the sea however it liked, without regard to the competing rights

[21] Ofer Haivry, *John Selden and the Western Political Tradition* (Cambridge: Cambridge University Press, 2017), p. 1.
[22] Selden, *Mare Clausum*.
[23] Ibid. bk. I, ch. 22.
[24] Hugo Grotius, *On the Law of War and Peace* (Indianapolis: Liberty Fund, Richard Tuck ed., 2005) (1626), 2.3.8.
[25] Tullio Treves, 'Historical Development of the Law of the Sea', in Donald R. Rockwell, Alex G. Oude Elferink, Karen N. Scott and Tim Stephens (eds.), *The Oxford Handbook of the Law of the Sea* (Oxford: Oxford University Press, 2017), pp. 1, 5.
[26] Ibid. p. 62.

https://doi.org/10.1017/9781009304993.004 Published online by Cambridge University Press

or interests of foreign states, indigenous peoples, and the global environment. According to Selden, a state that established dominion over a closed sea could exclude foreign vessels from fishing or traversing its waters for any reason or no reason at all. Treating the sea as a global commons, as Grotius advocated, invited unilateralism of a different kind: all states were free to exploit oceanic resources to their hearts' content – even if this endangered fish stocks, jeopardized fragile ecosystems, and undermined other peoples' economic and humanitarian interests. Although Grotius and Selden disagreed about the extent to which states could assert proprietary interests over the sea, they both assumed that if states held any rights and powers under the law of the sea, then the exercise of those rights and powers would be left to the states' absolute discretion. For Grotius, Selden, and their contemporaries, this prerogative to exercise rights and powers unilaterally defined what it meant to be sovereign.[27] Conceptualizing sovereign rights and powers in this manner facilitated European colonialism by empowering the great naval powers of the day to travel, fish, and dominate international commerce without regard to local needs elsewhere in the world.

The drawbacks of this unilateralist model of state sovereignty came into sharper relief over time as states confronted a dynamic that the twentieth-century ecologist Garrett Hardin famously described as "the tragedy of the commons."[28] Hardin's key insight was that in a world with an expanding human population and finite natural resources, resources held in common will inevitably trend toward depletion as individuals pursue their own rational self-interest.[29] "Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons," Hardin lamented. "Freedom in a commons brings ruin to all."[30]

By the end of the nineteenth century, the tragedy of the commons had begun to take a serious toll on global fisheries, prompting some national authorities to reconsider their commitment to the Grotian free sea. An early case involved a dispute between Canada and the United States over resources in the Bering Sea. Hundreds of miles east of Anchorage lie the Pribilof Islands, an inhospitable cluster of volcanic outcroppings which the

[27] Cf. Lassa Oppenheim, *International Law* (New York: Longmans, Green & Co., 8th ed. 1955) vol. I, pp. 118–119 ("Sovereignty in the strict and narrowest sense of the term implies . . . independence all round, within and without the borders of the country.").
[28] Garrett Hardin, 'The Tragedy of the Commons' (1968) 162 *Science* 1243.
[29] Ibid. p. 1244.
[30] Ibid.

https://doi.org/10.1017/9781009304993.004 Published online by Cambridge University Press

United States acquired from Russia when it purchased Alaska in 1867.[31] The Pribilof Islands are noteworthy as the breeding ground of the North Pacific fur seal, the largest fur seal group in the world.[32] Throughout the nineteenth and early twentieth centuries, the fur seal's sleek brown coat was highly prized as a decorative element in aristocratic fashion, adorning the "jackets of Gilded Age heiresses" in the United States and "Belle Epoque aristocrats" in Europe, as well as appearing "draped over elegant shoulders in cities like Melbourne, Cape Town, or Canton."[33] During the summer mating season, North Pacific fur seals congregated on the islands' rocky shores. Hunters on shore could cull uncoupled males from the herd without materially impacting the population's overall birth rates.[34] As soon as the seals began their southward winter migration in search of warmer havens, however, they entered the high seas – a global commons where tragedy awaited. By the 1880s, a fleet of eighteen British Columbian schooners shadowed fur seals along their migration route, using shotguns and explosives to decimate the herd, driving the North Pacific fur seal to the edge of extinction.

The United States responded to this threat aggressively, in the process testing the limits of its authority under international law. In 1881, the US Treasury Department declared the entire Bering Sea a *mare clausum* over which the United States claimed exclusive dominion. American revenue cutters then began seizing Canadian schooners outside the three-mile territorial sea though inside the Bering Sea.[35] Relations between the two countries grew increasingly fractious, with the Canadian press and sealing industry calling on the powerful Royal Navy to intervene to protect its fishing rights under international law.[36]

Seeking to defuse escalating tensions, the United Kingdom (representing Canada) and the United States submitted the North Pacific fur seal dispute to international arbitration. The arbitrators who gathered at the Quai d'Orsay in Paris to resolve the dispute reflected the high political

[31] M. I. H. Macallister, 'Seals, Empires and Mass Politics: The 1893 Fur Seal Arbitration' (2020) 42 *Int'l Hist. Rev*. 1192, 1994–1995.

[32] James Thomas Gay, *American Fur Seal Diplomacy: The Alaskan Fur Seal Controversy* (New York: Peter Lang, 1987), p. 3.

[33] Macallister, *Seals, Empires and Mass Politics*, pp. 1192–1193.

[34] Ibid.

[35] Macallister, *Seals, Empires and Mass Politics*, p. 1195; Gerald O. Williams, *The Bering Fur Seal Dispute: A Monograph on the Maritime History of Alaska* (Eugene: Alaska Maritime Publications, 1984), pp. 15–16.

[36] Russell Duane, 'The Decision of the Behring Sea Arbitrators' (1893) *Am. L. Reg.* 901, 901; Macallister, *Seals, Empires, and Mass Politics*, p. 1198.

https://doi.org/10.1017/9781009304993.004 Published online by Cambridge University Press

stakes: they included the newly elected Prime Minister of Canada Sir John Thompson, British Judge Lord Hannen, US Supreme Court Justice John Marshall Harlan, and Alabama Senator John Morgan.[37] The legal issues essentially boiled down to a single core question: did international law authorize the United States to regulate sealing outside its three-mile territorial sea?[38] Under the prevailing Grotian consensus, the answer to this question was clear: centuries of state practice and *opinio juris* dictated that waters beyond the territorial sea constituted a *res communis* that was not susceptible to state appropriation or regulation. The tribunal therefore concluded that the United States "has not any right of protection or property in the fur-seals frequenting the islands of the United States in [the] Behring Sea, when such seals are found outside the ordinary three-mile limit."[39] Under international law, British Columbian sealers were free to pursue their rational self-interest by hunting the endangered North Pacific fur seals in the Bering Sea whenever and however they wished.

Ecological disaster was averted only by a second feature of the parties' *compromis*: anticipating that the United States' argument for a *mare clausum* would fail, the parties also empowered the arbitral tribunal to establish binding regulations to promote sustainable sealing practices.[40] Here the arbitration proved its value. The arbitrators prohibited both states from killing or capturing North Pacific fur seals in waters located within sixty miles of the Pribilof Islands, where female fur seals sought food for their young. They also outlawed hunting on the high seas anywhere in the Pacific Ocean, including the Bering Sea, during the early summer when the fur seal herd migrated to their island rookeries.[41] Within the seasons and maritime zones where fur seal hunting was permitted, the arbitrators' regulations authorized hunting only by licensed sailing vessels,[42] and they prohibited sealers from deploying nets, fire arms, or explosives.[43] By accepting and implementing these regulations in a spirit of

[37] Macallister, *Seals, Empires, and Mass Politics*, p. 1202.
[38] Award between the United States and the United Kingdom relating to the rights of jurisdiction of United States in the Bering Sea and the preservation of fur seal (Great Britain v. United States), Moore's International Arbitrations (15 Aug 1893), 28 R.I.A.A. 263, 267 (listing five questions presented in the *compromis*).
[39] Ibid. p. 269. The panel decided this point by a vote of 5–2, with the two American panelists dissenting. Ibid.
[40] Ibid. pp. 269–270.
[41] Ibid. p. 270 (arts. 1–2).
[42] Ibid. (arts. 3–4).
[43] Ibid. (art. 6). Indigenous peoples were exempted from these requirements. Ibid. (art. 8).

https://doi.org/10.1017/9781009304993.004 Published online by Cambridge University Press

cooperation, the parties prevented the North Pacific fur seal from being hunted out of existence.

Significantly, the parties to the *North Pacific Fur Seal Case* averted disaster not by relying on the international law of the sea, but instead by voluntarily embracing bilateral regulatory cooperation. Consistent with Hardin's theory of the tragedy of the commons, Grotius's free sea led the two states to the brink of ecological catastrophe and the near-collapse of their sealing industries. This outcome was the predictable consequence of treating wildlife in the Bering Sea as a *res communis* subject to unilateral state exploitation. Had the British Columbian fleet continued to hunt fur seals indiscriminately along their migration routes through the Bering Sea, as they were entitled to do under international law, the North Pacific fur seal might well have gone extinct. Only by setting aside the rights granted to them under international law and voluntarily submitting to binding arbitration were the parties able to chart a course toward sustainable management of the North Pacific fur seal population.

The Tide Turns

Following the *North Pacific Fur Seals Case*, an American commentator confidently declared:

> [T]his is probably the last occasion in the history of the world upon which any nation will claim to be the exclusive owner of any portion of the open sea . . . It is safe to assume that the ancient doctrine that the high seas are susceptible of ownership . . . has now passed away, and that this decision will stand as an insurmountable barrier to its ever being revived. It is the last mile-stone in the progress of international law from the medieval idea of marine property to the modern theory that the high seas are free.[44]

This prediction could not have been more wrong.

On September 28, 1945, US President Harry Truman issued two proclamations that shattered the Grotian consensus. The first proclamation claimed the natural resources of the seabed and subsoil of the continental shelf alongside the United States' coastline as being subject to the United States' exclusive territorial jurisdiction and control.[45] The second proclamation asserted regulatory jurisdiction, but not an

[44] Duane, *The Decision of the Bering Sea Arbitrators*, p. 909.

[45] Proclamation No. 2667, Policy of the United States with Respect to the Natural Resources of the Subsoil and Seabed of the Continental Shelf, 10 Fed. Reg. 12, 303 (29 Sept. 1945), reproduced in (1946) 40 AJIL Supp. 45.

https://doi.org/10.1017/9781009304993.004 Published online by Cambridge University Press

exclusive proprietary interest, over certain living resources located in waters above the claimed continental shelf.[46] These unilateral measures catalyzed a global chain reaction, prompting other coastal states to issue their own proclamations asserting sovereign rights to maritime resources beyond their territorial seas. In 1947, Chile and Peru each claimed sovereignty not only over the seabed and subsoil of their appurtenant continental shelf, but also over the super-adjacent waters and associated living resources out to 200 miles beyond their coastlines.[47] Other states followed suit. The Truman proclamations thus set in motion a cascade of unilateral state actions and reactions that collectively unsettled the Grotian consensus regarding the sea's legal status as a global commons.

This dramatic shift in state practice and *opinio juris* was motivated, at least in part, by sustainability concerns similar to those that spurred the United States a half-century earlier to declare the Bering Sea a *mare clausum*. The United States feared that without immediate regulatory intervention, Japanese fishing fleets would destroy salmon fisheries in the Pacific Northwest.[48] Chile and Peru likewise hoped to protect dwindling whale pods along their coasts from predatory foreign fleets.[49] By the 1940s these concerns were widely shared by coastal states. However, the uncoordinated issuance of unilateral proclamations established a patchwork of inconsistent national standards that sat uncomfortably with the customary international law of the sea.[50]

The United Nations responded to this jural discord by organizing an international initiative to codify the law of the sea. In 1958, the ILC convened a Conference on the Law of the Sea that produced a set of treaties, known collectively as the Geneva Conventions on the Law of the Seas (GCLS).[51] The GCLS formulated new legal standards for the territorial sea and contiguous zone, the high seas, fishing and conservation of the

[46] Proclamation No. 2668, The Policy of the United States with Respect to Coastal Fisheries in Certain Areas of the High Seas, 10 Fed. Reg. 12304 (28 Sept. 1945).

[47] Treves, *Historical Development of the Law of the Seas*, p. 11.

[48] Burke, *New International Law of Fisheries*, p. 6.

[49] Francisco Orrego Vicuña, *The Changing International Law of High Seas Fisheries* (Cambridge: Cambridge University Press, 1999), p. 37.

[50] Hersch Lauterpacht, 'Sovereignty Over Submarine Areas' (1950) 27 BYBIL 376, 382 (identifying inconsistencies among these national proclamations).

[51] The GLCS consisted of four conventions and an optional protocol: the Convention on the Territorial Sea and the Contiguous Zone, 29 April1958, 15 UST 1606, 516 UNTS 206; the Convention on the High Seas, 29 April 1958, 13 UST 2312, 450 UNTS 82; the Convention on Fishing and Conservation of the Living Resources of the High Seas, 29 April 1958, 17 UST 138, 559 UNTS 286 [hereinafter CHS]; the Convention on the Continental Shelf, 29 April1958, 15 UST 471, 499 UNTS 312 [hereinafter CCS]; and the Optional Protocol of

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living resources of the high seas, and the continental shelf.[52] Some important coastal states declined to join the GCLS, however, raising questions about whether the Conventions' provisions had sufficient support in state practice and *opinio juris* to reflect customary international law.[53]

Two years later, the ILC convened a second Conference on the Law of the Sea at the request of the UN General Assembly. The Conference considered a variety of topics that were not addressed in the GCLS, including the breadth of the territorial sea and the limits of state regulatory jurisdiction over coastal fisheries. The Conference was widely perceived as a failure when the two resolutions adopted at its conclusion left a host of key issues unresolved.[54]

Cod Wars

At this crucial transitional moment, a controversy arose in the North Atlantic that profoundly shaped the subsequent development of the international law of the sea. Upon gaining independence from Denmark in 1944, Iceland sought to wrest control of its surrounding waters from predatory foreign fleets that had wreaked havoc on its fisheries.[55] This initiative was a matter of supreme importance to the newly independent state, because fishing constituted the lion's share of the country's exports.[56] Iceland's aspiration to establish sovereignty over its coastal fisheries resonated with the concurrent efforts of formerly colonized peoples elsewhere in the world to achieve national self-determination, economic development, and sovereignty over their natural resources.[57] However, when Iceland

Signature concerning the Compulsory Settlement of Disputes, 450 UNTS 169, *opened for signature* 29 April 1958, entered into force on 30 September 1962.

[52] Rothwell and Stephens, *The International Law of the Sea*, pp. 6–9.

[53] For example, Canada signed, but did not ratify, three of the four conventions. Donald R. Rothwell, 'The Canadian-U.S. Northwest Passage Dispute: A Reassessment' (1993) 26 *Cornell Int'l L.J.* 331, 341 & n.43; see also North Sea Continental Shelf (F.R.G./Den & F.R.G./Neth.), 1969 ICJ Rep. 4, 45 (20 February) (holding that the GCLS provisions relating to continental shelf delimitation did not yet qualify as customary international law).

[54] Rothwell and Stephens, *The International Law of the Sea*, pp. 9–10.

[55] Burke, *New International Law of Fisheries*, p. 9.

[56] Kevin Bilms, 'The Cod Wars and Lessons for Maritime Counterinsurgency' (2023) 149 *US Naval Inst. Proc.*, www.usni.org/magazines/proceedings/2023/february/cod-wars-and-lessons-maritime-counterinsurgency (observing that by the 1970s, "the fishing industry represented 80–90 percent of Iceland's export earnings").

[57] See UN GA Res. 1515 (XV), 15 December 1960, para. 5 ("[T]he sovereign right of every State to dispose of its wealth and its natural resources should be respected in conformity with the rights and duties of States under international law."); UN GA Res. 1803 (XVII),

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followed the lead of other established states in claiming a twelve-mile territorial sea, it encountered stiff opposition from the Federal Republic of Germany (West Germany) and the United Kingdom, which had fished in Icelandic waters for generations.[58]

In 1972, Iceland declared its intent to extend its national fishery zone out to fifty nautical miles.[59] British and German fishers initially ignored Iceland's claim and continued fishing. However, Iceland had developed a device that enabled its coast guard to sever the nets of foreign trawlers. Iceland used this invention to spectacular effect, destroying the nets of sixty-nine British and fifteen West German vessels. In response, the British Royal Navy sent frigates to protect its fishing fleet by ramming and occasionally training live fire on Icelandic coast guard vessels. The ensuing violent confrontations between Iceland and its foreign adversaries, which caused substantial property damage and injuries to sailors and fishers on both sides, came to be known as the Cod Wars.[60]

As the conflict over the Icelandic fisheries escalated, the United Kingdom and West Germany each initiated proceedings before the ICJ. Iceland refused to participate, arguing that its decision to claim exclusive fishing rights out to fifty miles was a purely domestic matter over which the ICJ lacked jurisdiction.[61] The ICJ disagreed[62] and proceeded to render judgment on the merits in July 1974.[63]

The Court opened its merits judgment by emphasizing that "[t]he delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law."[64] The Court acknowledged that the treaties that emerged from the 1958 and 1960 Conferences on the Law of the Sea left the breadth

14 December 1962, pmbl. (recognizing "the inalienable right of all States freely to dispose of their natural wealth and resources in accordance with their national interests").

58 Bilms, 'The Cod Wars'; Mark Kurlansky, *Cod: A Biography of the Fish that Changed the World* (New York: Penguin Group, 1997), pp. 148, 152–153.

59 Fisheries Jurisdiction Case (UK/Iceland), Merits, 1974 ICJ Rep. 3 (25 July), pp. 13–14, para. 27 [hereinafter Fisheries-UK].

60 Jónsson, *Friends in Conflict*, pp. 134–138; Guðmundur J. Guðmundsson, 'The Cod and the Cold War' (2006) 31 *Scand. J. Hist*. 97.

61 Fisheries-UK, p. 8, para. 14.

62 Fisheries Jurisdiction Case (UK/Iceland), Jurisdiction, 1973 ICJ Rep. 49, 66 (2 February) (finding jurisdiction over the dispute).

63 Fisheries-UK; Fisheries Jurisdiction (Fed. Rep. Germ./Iceland), Merits, 1974 ICJ Rep. 175 (25 July). As the two judgments are substantially identical, for economy's sake subsequent citations are to the UK judgment only.

64 Fisheries-UK, p. 22, para. 49 (quoting the Fisheries Case (UK/Norway), 1951 ICJ Rep. 116, 132 (18 December)).

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of a coastal state's fishery jurisdiction unsettled.[65] The Court therefore rejected Iceland's position that international law recognized the right to a fifty-mile exclusive fishery zone.[66] However, the Court also concluded that a "general consensus" among states at the 1960 Conference had "crystallized as customary law" the principle that a coastal state enjoys "preferential rights of fishing in adjacent waters" whenever it has established "special dependence on its coastal fisheries."[67] Given Iceland's extraordinary economic dependence on its coastal fisheries and the evident need to limit catch levels in order to preserve the fisheries from depletion, the Court agreed that Iceland was entitled to claim such preferential fishing rights.[68]

Had the ICJ followed the classical unilateralist model of state sovereignty, its characterization of Iceland's fishing rights as "preferential" might have been fatal to the competing claims of the United Kingdom and West Germany. The Court could have construed Iceland's preferential rights as trumps that categorically superseded the competing claims of the United Kingdom and West Germany. Under this approach, Iceland would have been within its rights to exclude British and German fishers from its adjacent waters.

The ICJ, however, adopted a radically different approach. It rejected Iceland's assertion that the priority accorded to its fishing rights under customary international law meant that it was "free, unilaterally, and according to its own uncontrolled discretion, to determine the extent of [its] rights" vis-à-vis other states.[69] Preferential rights did not operate as trumps, the Court explained: characterizing a "coastal State's rights as preferential implies a certain priority, but cannot imply the extinction of the concurrent rights of other States."[70] Instead, "in order to reach an equitable solution of the present dispute it is necessary that the preferential fishing rights of Iceland, as a State specially dependent on coastal fisheries, be reconciled with the traditional fishing rights of the Applicant[s]."[71]

How, then, should these conflicting rights be reconciled? The ICJ explained that Iceland must "take into account and pay regard to the

[65] Ibid. pp. 22–23, paras. 51–52.
[66] Ibid. p. 29, para. 68 (holding that "Iceland's extension of its exclusive fishery jurisdiction beyond 12 miles is not opposable to the United Kingdom").
[67] Ibid. p. 23, para. 52.
[68] Ibid. p. 27, para. 60. The United Kingdom conceded this point. Ibid. p. 24, para. 54.
[69] Ibid. p. 27, para. 62.
[70] Ibid. pp. 27–28, para. 62.
[71] Ibid. p. 30, para. 69; see also ibid. p. 30, para. 70 (explaining that the negotiation should seek to reconcile the states' rights "in as equitable a manner as possible").

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position of [the United Kingdom and West Germany]," in recognition of their "economic dependence on the same fishing grounds."[72] Iceland should then seek to "bring[] about an equitable apportionment of the available fishing stocks based on the facts of the particular situation," according special weight to its own preferential rights, but also taking into account the need for conservation and "the interests of other States which have established fishing rights in the area."[73]

Far from leaving fishery management to Iceland's absolute discretion, the Court emphasized that the states concerned must cooperate with one another to determine how Iceland's preferential rights can be best reconciled with other states' historically established rights. In particular, the parties must "keep under review the fishery resources in the disputed waters" and "examine together, in the light of scientific and other available information, the measures required for the conservation and development, and equitable exploitation, of those resources."[74] Following this consultation and exchange of information, Iceland's preferential rights "are to be implemented by agreement between the States concerned, either bilateral or multilateral, and, in case of disagreement, through the means for the peaceful settlement of disputes provided for in Article 33 of the Charter of the United Nations."[75] In other words, Iceland and its rivals must pursue "negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."[76] The Court explained that this obligation "flows from the very nature of the respective rights of the Parties" – their concurrent rights to a common resource.[77] The Court therefore directed the parties to enter negotiations for the purpose of determining an equitable apportionment of the available fishing stocks.[78]

Significantly, the ICJ was quick to acknowledge that its approach to the Icelandic fisheries dispute represented a major departure from the classical model of sovereign unilateralism, as reflected in cases like *North Pacific Fur Seals*. The Court defended its equitable approach, however, as a modernizing improvement to the law of the sea that was worth

[72] Ibid.
[73] Ibid. p. 33, para. 78.
[74] Ibid. p. 31, para. 72.
[75] Ibid. p. 27, para. 57.
[76] UN Charter art. 33.
[77] Fisheries-UK, p. 32, para. 75.
[78] Ibid. ("[T]o direct them to negotiate is . . . a proper exercise of the judicial function in this case."); see also ibid. p. 32, para. 74 ("It is implicit in the concept of preferential rights that negotiations are required in order to define or delimit the extent of those rights.").

https://doi.org/10.1017/9781009304993.004 Published online by Cambridge University Press

celebrating: "It is one of the advances in maritime international law . . . that the former laissez-faire treatment of the living resources of the sea in the high seas has been replaced by a recognition of a duty to have due regard to the rights of other States and the needs of conservation for the benefit of all."[79]

According to the Court, the law of the sea had entered a new era in which mandatory cooperation based on equitable principles had replaced state unilateralism as the governing legal framework for reconciling states' rights to oceanic resources.

Delimiting Maritime Boundaries

The Cod Wars were not the only international dispute during this period that gave the ICJ an opportunity to affirm mandatory cooperation in the law of the sea. Several years before the *Fisheries Cases*, a controversy between Denmark, the Netherlands, and West Germany led the Court to affirm that mandatory cooperation also applied to maritime boundary delimitation.[80]

At stake in the case were national claims to resources in the seabed and continental shelf beneath the North Sea.[81] During the first Conference on the Law of the Sea, the international community had endeavored to clarify the legal standards that governed such claims. The 1958 Convention on the Law of the Continental Shelf, part of the original GLCS, permitted coastal states to claim exclusive sovereign rights over their adjacent continental shelf.[82] States with opposite or adjacent coastlines were to determine the boundaries between their continental shelf claims by agreement.[83] Barring "special circumstances," boundaries between states' territorial jurisdiction were to be determined by the principle of equidistance.[84] For states with coastlines on opposite sides of a continental shelf, boundaries should ordinarily track "the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured."[85] States with adjacent coastlines should determine equidistance by reference to "the nearest points of

[79] Ibid. p. 31, para. 72.
[80] North Sea Continental Shelf Case (FRG/Den., FRG/Neth.), 1969 ICJ Rep. 3 (20 February).
[81] Wolfgang Friedmann, 'The North Sea Continental Shelf Cases: A Critique' (1970) 64 AJIL 229, 229.
[82] Convention on the Continental Shelf art. 2.
[83] Ibid. art. 6(1)–(2).
[84] Ibid.
[85] Ibid. art. 6(1).

https://doi.org/10.1017/9781009304993.004 Published online by Cambridge University Press

the baselines from which the breadth of the territorial sea of each State is measured."[86]

Had Denmark, the Netherlands, and West Germany all been parties to the Convention on the Law of the Continental Shelf, the ICJ's task in the *North Sea Continental Shelf Case* would have been a relatively straightforward exercise in maritime cartography. What made the case more challenging from a legal perspective was that West Germany had not joined the Convention and disputed the equidistance principle's applicability to nonparties.[87] The Court agreed with West Germany's assessment that the Convention's equidistance principle was "a purely conventional rule,"[88] which "did not embody or crystallize any pre-existing or emergent rule of customary law."[89] Accordingly, the Court had to determine what customary norms, if any, operated in the Convention's shadows as default rules for maritime boundary delimitation.

Falling back on "basic legal notions which . . . have from the beginning reflected the opinio juris in the matter of delimitation," the Court concluded that customary international law required the parties to resolve their dispute through "agreement . . . in accordance with equitable principles."[90] The Court took pains to emphasize that equitable principles did not invite recourse to principles of "abstract justice,"[91] nor did it require that coastal states receive an equal or "just and equitable share" of the resources within a continental shelf.[92] For example, countries with a short coastline would not necessarily be entitled to claim the same share of a continental shelf as states with much longer coastlines.[93] Instead, references to "equitable principles" in this context should be understood as

> a rule of law which itself requires the application of equitable principles in accordance with the ideas which have always underlain the development of the legal régime of the continental shelf in this field, namely:

[86] Ibid. art. 6(2).
[87] North Sea Continental Shelf Case, p. 20, para. 15.
[88] Ibid. p. 45, para. 81.
[89] Ibid. p. 41, para. 69.
[90] Ibid. p. 46, para. 85; see also North Sea Continental Shelf Cases, 1969 ICJ Rep. at 139–140, para. 38 (Ammoun, J., dissenting) (observing that equity is a general principle of law common to all of "the great legal systems of the modern world"). The Court concluded that equitable principles also apply to unsettled land borders. Case Concerning the Frontier Dispute (Burk. Faso/Mali), 1986 ICJ Rep. 554, 633 paras. 149–150 (December 22) (citing North Sea Continental Shelf).
[91] North Sea Continental Shelf Case, p. 46, para. 85.
[92] Ibid. p. 22, para. 19.
[93] Ibid. pp. 49–50, para. 91.

https://doi.org/10.1017/9781009304993.004 Published online by Cambridge University Press

(a) the parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it; [and]
(b) the parties are under an obligation to act in such a way that, in the particular case, and taking all the circumstances into account, equitable principles are applied, – for this purpose the equidistance method can be used, but other methods exist and may be employed, alone or in combination, according to the areas involved.[94]

The ICJ characterized these requirements of mandatory cooperation as "merely a special application of a principle which underlies all international relations" – namely, the general obligation to resolve international disputes peacefully in a spirit of mutual respect and accommodation, rather than through unilateral fiat and coercion.[95] The Court therefore directed the parties to resume negotiations for the purpose of determining to what extent equitable principles would support departing from the equidistance principle to account for West Germany's exceptionally concave coastline relative to its neighbors, Denmark and the Netherlands.[96]

In sum, the *North Sea Continental Shelf Case* and the *Fisheries Jurisdiction Cases* affirm that the international law of the sea requires states to cooperate with one another to resolve disputes over maritime resources in accordance with equitable principles. In *North Sea Continental Shelf*, the Court held that the states must cooperate to resolve an unsettled question regarding the apportionment of national jurisdiction. Should any of the parties impose their preferred solution to the boundary dispute unilaterally, such action would violate the principle of sovereign equality.[97] Mandatory cooperation also applied in the *Fisheries Jurisdiction Cases* because Iceland and the United Kingdom held

[94] Ibid. p. 47, para. 85.
[95] Ibid. p. 47, para. 86.
[96] Ibid. p. 50, para. 91; p. 53, para. 101.
[97] For the same reason, international tribunals have recognized that a state may not decide a dispute over an unsettled land border unilaterally. *See* Arbitration Between the Republic of Croatia and the Republic of Slovenia, PCA Case No. 2012-04, Final Award, p. 108, para. 334 (29 June 2017) (describing mutual state consent as "the fundamental principle applicable to the establishment of land boundaries between sovereign States").

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concurrent rights to the same resources. In each of these settings, the Court recognized that the only way to harmonize the respective rights of the litigants, while respecting their authority and formal equality as sovereign states, was to direct them to resolve their disputes through negotiation based on equitable principles. With the principle of sovereign equality on the line, directing the parties to negotiate was "a proper exercise of the judicial function," the Court concluded.[98]

Codifying Mandatory Cooperation

Although mandatory cooperation makes brief appearances in the GLCS,[99] it achieves its fullest expression in UNCLOS. With well over 300 articles and nine annexes, this sprawling codex addresses almost every topic imaginable on the law of the sea. Some have characterized UNCLOS as a "synthesis" of Grotius's *mare liberum* and Selden's *mare clausum*[100] because it guarantees universal freedoms on the high seas while also expanding national jurisdiction by, among other things, extending the territorial sea to twelve miles and expanding national jurisdiction over fisheries via a 200-nautical-mile exclusive economic zone.[101] At a more fundamental level, however, UNCLOS breaks sharply with the classical model of state sovereignty exemplified in the writings of both Grotius and Selden by imposing obligations of mandatory cooperation within every maritime zone beyond the territorial sea.

Requirements to cooperate under UNCLOS can be grouped into three general categories.[102] First, whenever states hold concurrent rights or powers over maritime resources, UNCLOS requires them to cooperate in the management of those resources. For example, mandatory cooperation applies when fishing stocks straddle national jurisdictions or migrate from

[98] Fisheries-UK, p. 32, para. 75. The ICJ has also held that international cooperation is mandatory when a coastal state sets the outer boundaries of its maritime jurisdiction relative to the high seas and deep-sea floor. Fisheries Case (U.K./Nor.), Judgment, 1951 ICJ Rep. 116 (December 18).

[99] E.g., CHS, art. 3 (requiring mandatory cooperation between coastal states and land-locked states for access to the sea), art. 14 (mandatory cooperation to suppress piracy), art. 25 (requiring cooperation to prevent and suppress pollution).

[100] Helen Thornton, 'John Selden's Response to Hugo Grotius: The Argument for the Closed Seas' (2006) 18 *Int'l J. Mar. Hist.* 105, 127.

[101] UNCLOS art. 3 (territorial sea), art. 57 (exclusive economic zone).

[102] Many other provisions of the Convention reflect equitable compromises between coastal and transit states, such as the provisions governing "innocent passage" through territorial seas and archipelagic sea lanes (arts. 17–26, 52–54) and "transit passage" through international straits (arts. 37–44).

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one jurisdiction to another: the states concerned must work together to establish measures necessary to conserve and develop these stocks in order to promote sustainability and optimal utilization.[103] UNCLOS entitles landlocked and geographically disadvantaged states to fish in coastal states' otherwise exclusive economic zones, but the "terms and modalities" for these activities are to be established through negotiated agreement with coastal states on an equitable basis.[104] States that border an enclosed or semi-enclosed sea are required to coordinate their management, conservation, exploration, and exploitation of the sea's living resources; coordinate protection and preservation of the marine environment; and establish joint research programs for these purposes.[105] Likewise, states that use straits and those that border straits must cooperate with one another to maintain navigational and safety aids and prevent and control pollution.[106] These measures are designed to ensure that states exercise their sovereign rights and powers under the law of the sea in a manner that reflects due regard for other states' rights and powers.

Most remarkably, mandatory cooperation applies to states even on the high seas. According to the equitable model enshrined in UNCLOS, a state's right to navigate and fish on the high seas must be exercised always "with due regard to the interests of other States in the exercise of the freedom of the high seas."[107] Far from enjoying an absolute right that may be exercised unilaterally, as was the case under Grotius's free sea, UNCLOS requires states to cooperate with one another to establish and implement regulatory measures necessary for the conservation and management of living resources in the high seas.[108] This broad obligation to cooperate entails specific requirements to exchange relevant scientific information and data on fish stocks, consult and negotiate with one another, and, "as

[103] Ibid. arts. 63–67; see also Agreement on the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks art. 8, 2167 UNTS 3 (1995) (reaffirming states' obligations cooperate in relation to straddling fish stocks and highly migratory fish stocks).

[104] UNCLOS arts. 69–70. But see James L. Kateka, 'Landlocked and Geographically Disadvantaged States', in David Joseph Attard et al. (eds.) (2014) 1 *IMLI Manual Int'l Mar. L.* 431, 441 ("The right to share in the living resources of the [exclusive economic zone] is indeterminate. It is subject once again to the whims of the coastal State concerned. For most [landlocked states] the rights in the [exclusive economic zone] and the freedom of the high seas remain unreal and impractical.").

[105] UNCLOS art. 123.

[106] Ibid. art. 43.

[107] Ibid. art. 87.

[108] Ibid. arts. 117–118.

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appropriate, cooperate to establish subregional or regional fisheries organizations" for the purpose of promoting prudent conservation and management of living resources in the high seas.[109] In each of these respects, UNCLOS demands that states exercise their rights on the high seas in an equitable manner that reflects due regard for the equal rights of other sovereign states.

Second, UNCLOS reinforces the ICJ's judgment in the *North Continental Shelf Case* by confirming that mandatory cooperation governs maritime boundary delimitation. States with opposite or adjacent coasts must set jurisdictional boundaries for the continental shelf and their respective exclusive economic zones "by agreement on the basis of international law . . . in order to achieve an equitable solution."[110] If states struggle to reach agreement on maritime boundaries through bilateral consultation and negotiation, they must seek third-party dispute resolution.[111] Pending a final resolution, states-parties are obligated to proceed "in a spirit of understanding and cooperation," making "every effort to enter into provisional agreements of a practical nature," while taking care to avoid actions that would "jeopardize or hamper the reaching of the final agreement."[112] UNCLOS thus prohibits states from violating the principle of sovereign equality by dictating the scope of their maritime jurisdiction vis-à-vis other states unilaterally.[113]

Third, UNCLOS mandates cooperation in settings where oceanic resources are committed to the collective stewardship of the international community as a whole. This category is exemplified most clearly in the convention's articles governing the use and exploitation of resources from the seabed and ocean floor beneath the high seas.[114] To underscore the contribution that these articles make to the law of the sea, some additional historical context might be helpful.

Over a decade before UNCLOS arrived on the scene, Maltese Ambassador Arvid Pardo brought a novel proposal to the UN General Assembly: he urged the international community to reserve the seabed and ocean floor beneath the high seas with their valuable deposits of

[109] Ibid. arts. 118–119.
[110] Ibid. arts. 74(1), 83(1).
[111] Ibid. arts. 74(2), 83(2).
[112] Ibid. arts. 74(3), 83(3).
[113] Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), Judgment, 2021 ICJ Rep. 206, 227 para. 49 (12 October) ("Maritime delimitation cannot be effected unilaterally by either of the States concerned.").
[114] Ibid. arts. 133–191.

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cobalt, copper, lithium manganese, and zinc[115] as a "common heritage of mankind" outside national jurisdiction.[116] This common heritage concept bore a superficial resemblance to Grotius's *res communis*, but Pardo actually had in mind something fundamentally different. Rather than expose the resources of the deep seabed and ocean floor to unilateral exploitation by individual states, Pardo argued that these resources should be exempted from national appropriation. He proposed that the international community establish an international agency to assume exclusive jurisdiction over deep sea resources "as a trustee for all countries," using profits generated from the area "primarily to promote the development of poor countries."[117] Pardo's ambitious vision, in other words, called for using the resources of the deep sea to level the economic playing field between developed and less-developed states, thus mitigating persistent global inequities that can be traced, at least in part, to international law's colonialist legacy.

The General Assembly endorsed Pardo's proposal unanimously in 1970, designating the seabed and ocean floor beyond the limits of national jurisdiction as a "common heritage of mankind" to be "exploited for the benefits of mankind as a whole, and taking into particular consideration the interests and needs of the developing countries."[118] Through UNCLOS, the international community further codified this principle and established an institutional framework to operationalize Pardo's vision.[119] UNCLOS proclaims

[115] IUCN, 'Issues in Brief: Deep-Sea Mining', https://iucn.org/resources/issues-brief/deep-sea-mining.

[116] Note Verbale Dated 17 August 1967 from the Permanent Mission of Malta to the United Nations Addressed to the Secretary General, A/6695, 18 August 1967, para. 3, https://documents-dds-ny.un.org/doc/UNDOC/GEN/N67/192/09/PDF/N6719209.pdf?OpenElement [hereinafter Pardo Proposal]; see generally Arvid Pardo, 'Before and After' (1983) 46 *L. & Contemp. Probs.* 95. For excellent introductions to the concept of common heritage resources, see Jutta Brunnée, 'Common Areas, Common Heritage, and Common Concern', in Daniel Bodansky, Jutta Brunnée, and Ellen Hey (eds.), *The Oxford Handbook of International Environmental Law* (Oxford: Oxford University Press, 2007), p. 550; and Dinah Shelton, 'Common Concern of Humanity' (2009) 32 *Envt'l Pol'y & L.* 83.

[117] Pardo Proposal, paras. 3–4.

[118] UN GA Res. 2749 (XXV); *see also* UN GA Res. 2574 D (XXIV) (declaring a moratorium on exploitation of the seabed pending the establishment of "an international regime including appropriate international machinery").

[119] Pardo was deeply disappointed, however, that UNCLOS's extensions of the continental shelf and exclusive economic zone significantly reduced the resources reserved as the common heritage of mankind. Jean Buttigieg, 'Arvid Pardo-A Diplomat with a Mission' (2016) 12 *Symposia Melitensia* 13, 27 (noting Pardo's complaint that under UNCLOS "the common heritage of mankind had been whittled to 'a few fish and a little seaweed'");

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the deep seabed and ocean floor and their associated resources "the common heritage of mankind" and affirms that they are "vested in mankind as a whole," rather than states individually.[120] It then establishes an international organization – the International Seabed Authority – to regulate and manage the resources as a steward or fiduciary of humanity.[121] The convention directs the Authority to "provide for the equitable sharing of financial and other economic benefit derived from activities in the Area," while "taking into particular consideration the interests and needs of developing States and of peoples who have not attained full independence or other self-governing status."[122] In carrying out these responsibilities, the Authority bears obligations to cooperate with interested states by collecting and carrying out relevant scientific research; to consult, negotiate with, and give due regard to the rights and interests of states that might be effected by its activities; to adopt regulations for protection of human life and the marine environment; and to promote international cooperation for economic development and trade, with special attention to the needs of developing states.[123]

The Authority thus facilitates international cooperation for collective management of the common heritage resources of the deep seabed and ocean floor. When a state harvests resources from the deep sea floor, other members of the international community are entitled under UNCLOS to an equitable share of the proceeds as administered by the Authority.[124] The United States and a handful of other developed states have resisted these features of the Convention, expressing reluctance to relinquish their freedom to act unilaterally.[125] However, with the deep seabed and ocean floor having already been unanimously recognized by the UN General Assembly as a common heritage of humanity, it seems clear that under customary

Pardo, *Before and After*, p. 104 (observing that "despite its many merits, [UNCLOS] is fundamentally flawed: inequality between states is increased . . . and the concept of common heritage of mankind is ineffectively implemented").

120 UNCLOS arts. 136, 137(2).

121 Ibid. arts. 140(1), 156.

122 Ibid. art. 140.

123 Ibid. arts. 142, 143, 145–146, 150; *see also* Agreement Relating to the Implementation of Part XI of the UN Convention on the Law of the Sea of 10 December 1982, UN GAOR, 48th Sess., Agenda Item 36, UN Doc. A/RES/48/263 (1994), reprinted in 33 ILM 1309 (1994) (outlining procedures for implementation of the Authority's activities).

124 See UNCLOS art. 140 (providing that such "[a]ctivities in the [seabed and ocean floor below the high seas] shall . . . be carried out for the benefit of mankind as a whole" and distributed according to the principles of "equitable sharing" and non-discrimination).

125 See Brunnée, *Common Areas, Common Heritage, and Common Concern*, p. 563 (noting that "the very countries most likely to" exploit the deep seabed "have consistently resisted the application of the concept").

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international law, states – including those, like the United States, that have yet to join UNCLOS – are no longer entitled to use or exploit the resources of the deep seabed and ocean floor unilaterally. Mandatory cooperation has become the universally binding legal norm.

The New Law of the Sea

Perhaps more than any other field, the law of the sea exemplifies international law's transition from the unilateral model to the equitable model of state sovereignty. Consistent with the equitable model, UNCLOS reflects a thorough-going commitment to mandatory cooperation as a strategy for reconciling concurrent state rights, addressing unsettled boundary disputes, and managing common resources for the benefit of humanity as a whole. These features of the new law of the sea have only become further cemented through subsequent developments in international legal practice.

Recognizing mandatory cooperation's importance to the success of the new law of the sea, in 1995 states concluded an additional agreement that further clarified how requirements to cooperate applied to the conservation and sustainable exploitation of jurisdiction-straddling and highly migratory fish stocks.[126] Among other things, states-parties to the 1995 agreement committed to collect data necessary to facilitate effective fishery management,[127] consult with one another "in good faith and without delay,"[128] and "make every effort to agree on compatible conservation and management measures within a reasonable period of time."[129] Should agreement on conservation and management measures prove elusive, states-parties agreed that any one of them could take the resulting dispute to mandatory dispute resolution.[130] States-parties also pledged to cooperate with one another "to enhance the ability of developing States, in particular the least-developed among them and small island developing States, to conserve and manage straddling fish stocks and highly migratory fish stocks" and "to participate in high seas fisheries for such stocks."[131]

[126] Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling and Highly Migratory Fish Stocks, A/Conf.164/37, 8 September 1995.
[127] Ibid. art. 14.
[128] Ibid. art. 8(2).
[129] Ibid. art. 7(3).
[130] Ibid. arts. 7(4), 27.
[131] Ibid. art. 25.

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Since the *North Sea Continental Shelf Case* and the *Fisheries Jurisdiction Cases*, the ICJ has continued to affirm that mandatory cooperation applies to the law of the sea.[132] Indeed, the Court has characterized mandatory cooperation as the "fundamental norm" of international maritime delimitation.[133]

International arbitral tribunals have also made important contributions to clarifying the requirements associated with mandatory cooperation in the law of the sea.[134] A prominent example is the *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*.[135] At issue in the arbitration was Mauritius's objection to the United Kingdom unilateral declaration of a marine protected area (MPA) around the Chagos Archipelago. Mauritius argued that the proposed MPA did not reflect due regard for its legal rights as a coastal state, as required under the customary international law of the sea.[136] The arbitral panel agreed. It explained that the United Kingdom's obligation to give due regard to Mauritius' rights "does not impose a uniform obligation to avoid impairment of Mauritius' rights, nor does it uniformly permit the United Kingdom to proceed as it wishes, merely noting such rights."[137] Neither of those approaches was compatible with the principle of sovereign equality because each would uphold one state's rights while effectively extinguishing the other's rights. Respect for the equal sovereignty of both states required a more equitable, collaborative approach. The tribunal explained that the parties must take into consideration the equities involved for both sides, including the "importance [of Mauritius's rights], the extent of the anticipated impairment, the nature and importance of the activities contemplated by the United Kingdom, and the availability of alternative approaches."[138] With these considerations in mind, the two states must endeavor to reconcile their respective rights through

[132] E.g., Maritime Delimitation in the Area Between Greenland and Jan Mayen Case (Den. v. Nor.), 1993 ICJ Rep. 59, para. 48 (June 14); Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can./US), Judgment, 1984 ICJ Rep. 246, 299, para. 112 (12 October) [hereinafter Gulf of Maine]; Continental Shelf (Tunis./Libya), 1982 ICJ Rep. 18, 59, para. 70 (24 February).

[133] Gulf of Maine, pp. 299–300, paras. 111–113.

[134] See, e.g., South China Sea Arbitration, PCA Case No. 2013-19, Award, paras. 741–742 (12 July 2016); Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC), Advisory Opinion of 2 April 2015, ITLOS Rep. 2015, para. 219; Arctic Sunrise Arbitration, Case No. 2014-02, paras. 228, 230 (Perm. Ct. Arb. 2015).

[135] Chagos Marine Protected Area Arbitration (Mauritius/U.K.), Case No. 2011-03, Award, para. 534 (Perm. Ct. Arb. 2015).

[136] Ibid. paras. 7–8.

[137] Ibid. para. 519.

[138] Ibid.

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negotiation in a spirit of mutual accommodation. The United Kingdom's failure to pursue such cooperation with Mauritius in good faith before imposing the MPA violated this customary requirement of the law of the sea.[139] By proceeding unilaterally over Mauritius's objections, the United Kingdom continued to treat Mauritius, its former colony, as a political subordinate rather than as an equal sovereign.

Challenges and Opportunities

As of the date of this writing, over one hundred states have signed the new High Seas Treaty,[140] reaffirming their commitment to mandatory cooperation[141] and offering a ray of hope for marine biodiversity at a moment of great peril.[142] Yet, for every positive development like the High Seas Treaty, skeptics can point to other areas where mandatory cooperation has disappointed. For example, Arctic states have yet to resolve longstanding disputes over the Arctic Sea and the abundant resources within its continental shelf.[143] Demanding special treatment based on historical practice, China has declined to cooperate with other states to establish by agreement maritime boundaries for the South China Sea based on equitable principles,[144] and it has refused to recognize a related arbitral award from the International Tribunal for the Law of the Sea.[145] States with large fishing industries often oppose reasonable

[139] Ibid. paras. 520–536; see also Julia Gaunce, 'On the Interpretation of the General Duty of "Due Regard"' (2018) 32 *Ocean Y.B.* 27 (explaining that the due regard requirement under the law of the sea obligates states to pursue "an objectively positive interaction with another [state]'s interests and with those of the international community").

[140] Agreement Under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction, UN Treaty Collection, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-10&chapter=21&clang=_en#EndDec (listing 107 states-parties).

[141] High Seas Treaty arts. 7–8.

[142] Ibid. arts. 17–26.

[143] Tania Röttger and Theocharis N. Grigoriadis, 'Arctic Conflicts & Russian Foreign Policy' (2021) 50 *Ga. J. Int'l & Compar. L.* 1.

[144] Evan J. Criddle and Evan Fox-Decent, 'Mandatory Multilateralism' (2019) 113 AJIL 272, 314–317.

[145] See South China Sea (Phil. v. China), PCA Case No. 2013-19, Award, paras. 471–477 (12 July 2016) (concluding that various maritime features claimed by China were insufficient to support rights to maritime zones under international law); Ministry of Foreign Affairs, Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines, 12 July 2016,

https://doi.org/10.1017/9781009304993.004 Published online by Cambridge University Press

limits on commercial fishing, favoring their immediate economic interests over the claims of environmental conservation and international and intergenerational equity.[146] Some critics lament, therefore, that mandatory cooperation naively "assumes a degree of good will and a spirit of accommodation that is not always available among highly competitive entities."[147]

However, even when states shirk their obligations of mandatory cooperation, they cannot fully escape them. For all its diplomatic and military bluster, China has not succeeded in convincing most other states, much less international courts and tribunals, to accept the legality of its unilateral claims to sovereignty over nearly all of the South China Sea.[148] Arctic states recognize that their contested jurisdictional claims will not achieve general international recognition until they resolve their remaining disputes through agreement or third-party dispute resolution.[149] Meanwhile, scientific cooperation has persuaded many states of the need to take aggressive collective action to prevent a massive decline in overexploited fish stocks. States that might have resisted scaling back their fishing industries a generation ago now recognize that international regulatory cooperation offers the only realistic path to restore declining fisheries for the benefit of present and future generations. While much work must still be done, the good news is that many fish stocks that were approaching depletion only a few decades ago are starting to bounce back through concerted international cooperation.[150] Whether this progress can be sustained in an era of accelerating climate change and explosive population growth is an open question. If there is hope for the oceans and the human communities that depend upon them, it lies in national authorities embracing the spirit of mandatory cooperation.

www.fmprc.gov.cn/eng/wjdt_665385/2649_665393/201607/t20160712_679470.html (declaring the arbitral award "null and void" with "no binding force").

146 E.g., Antoaneta Roussi and Louise Guillot, 'Fishy Business: EU Flashes Green Money to Support Indian Ocean Tuna Grab', Politico, 8 May 2023.

147 Vicuña, *The Changing International Law of High Seas Fisheries*, p. 45.

148 South China Sea Arbitration, PCA Case No. 2013-19, Award, paras. 771–777 (12 July 2016).

149 Röttger and Grigoriadis, 'Arctic Conflicts & Russian Foreign Policy', pp. 30–39 (discussing options for peaceful dispute resolution).

150 Hannah Ritchie and Max Roser, 'Fish and Overfishing', Our World in Data, October 2021, https://ourworldindata.org/fish-and-overfishing.

https://doi.org/10.1017/9781009304993.004 Published online by Cambridge University Press