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The Contribution of New States to the Development of International Law

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If we view the term international law in a broad sense, including the law of nations, then the history of international law is a very old one, as there was already a law of nations (*ius gentium*) in Roman times. If on the contrary, we view the term in a narrower sense, meaning the law that governs relations between nation-states, then international law is relatively new as it is only a few hundred years old.

Modern international law, as a system of law that governs the relations between states, was born when the modern society of nations came into existence. The 1647 Treaty of Westphalia is usually taken as the moment of the birth of the modern society of nations.

The Treaty of Westphalia is important in the history of modern international law as it is considered the event that laid the basis, or foundation, for a society of nations consisting of nation-states. In addition to ending the thirty year war, the Treaty of Westphalia: (1) confirmed the change in the political map which had occurred because of that war, (2) conclusively ended the efforts to restore the Holy Roman Empire, (3) separated relations between states and the Church and (4) enabled relations to be based on national interests. The Treaty of Westphalia also recognized the independence of the Netherlands, Switzerland, and the small states in Germany. It is for these reasons that the Treaty of Westphalia can be said to have laid the foundation for a new society of nations both in form,
as it was based on nation-states, as well as in substance, as the state and government were separated from the influence of the Church.

It would be wrong to consider the Treaty of Westphalia as an event that ushered in a new era of international relations having no connection with the past. We may, for instance, think that before the Treaty of Westphalia there were no nation-states. However, this is not true. In Europe there were several kingdoms as well as three big nations: Great Britain, France, and Spain. Several nations were also on the periphery of Christian Europe, such as the Scandinavian countries and Russia. It would be more accurate to consider the Treaty of Westphalia as the culmination of a process that started in the Middle Ages with the Reformation and the secularization of society—especially the separation of church and state. Only then can we put the Treaty of Westphalia in its proper historical perspective and avoid drawing the wrong conclusions.

The characteristics which distinguished the new society of nations created by the Treaty of Westphalia from the feudal society of Christian nations in Europe which had existed since the Middle Ages, were: (1) the state constituting a territorial unit, as sovereign territorial entities, each nation-state having sovereignty within the boundaries of its territory, (2) relations between one nation-state and another based on independence and equality, (3) the refusal of the society of independent nation-states to recognize a higher authority—such as an emperor in temporal matters, and the Pope as head of the Church, (4) relations between independent states based on law which in many cases borrowed concepts from Roman Civil Law, (5) nation-states recognizing the existence of international law as a law governing their relations with one another, while at the same time emphasizing the important role states play in the observance of this law, (6) the absence of an international court and international police force to enforce international law, and (7) a change in the perception of law from a doctrine which thought of war in terms of a "just war" waged in defense of Religion, to a doctrine that viewed war as a means of resolving conflict and achieving national ends through force, i.e., war as an instrument of national policy.

The principles laid down in the Treaty of Westphalia, enumerated above, were confirmed in the Treaty of Utrecht. The Treaty of Utrecht was considered a very important docu-
ment since it adopted the concept of a balance of power as a principle of international relations.

The secularization of the authority of the state government and the decline of the influence of the church as a spiritual force providing guidance to states in their relations created the need for a new order to regulate the balance of power and the national interests of the respective nation-state members of the new international society. It is for this reason that Hugo Grotius' concept and system of a law of nations, based on a theory of secularized natural law, came to fill a need that was very much felt at that time.

The success of Hugo Grotius, the author of *De Iure Belli Pacis* (The Law of War and Peace) which was published during the Thirty Year War, was not only due to the intrinsic value of the work but also because his teachings were very much in tune with the demands of the time. As is well known, Grotius based his system of international law on the doctrine of natural law. His doctrine was secularized and freed of the influence of religion and the church. His doctrine was also attractive since it gave an important place to nation-states.

The international community, based on the foundation laid down by the Treaty of Westphalia, gained strength over the years. It proved able to overcome various important political events at the end of the 18th century and during the 19th century. The international community overcame events such as the French and American revolutions, attempts to re-establish the hegemony of the big kingdoms in Europe and attempts to restore the influence of the church.

These attempts, ending with the Congress on Vienna in 1815, and followed by the Holy Alliance between the Kings of Austria, Prussia and Russia, seemed to succeed after the failure of Napoleon's adventures. They proved, however, unable to stop the progress of the modern nation-states during the 19th century.

On the American continent, the attempt by the European kingdoms, which made up the Holy Alliance, to re-establish their hegemony was answered by the Monroe Doctrine. The 19th century was characterized by many wars in Europe, and was considered to be the time when the modern nation-state came to its maturity and reached the pinnacle of its power.

The Hague peace conferences were important events in the development of international law. The first Hague peace
conference of 1899, followed by the second Hague peace conference in 1907, produced many international conventions that were of great importance to the development of international law, especially the laws of war. These international Hague peace conferences also established a permanent Court of Arbitration. The permanent International Court of Arbitration re-established an institution for conflict resolution between nations that was an important factor for stability during the Middle Ages. Arbitration as a means of settling international disputes had lost much of its importance during the 17th, 18th and 19th centuries, a period of growth for new nation-states following the Treaty of Westphalia. The decline of arbitration as a means of settling conflict was a direct consequence of the use of armed force or war as an instrument of national policy. It should be no surprise that during this period many wars occurred in Europe and that arbitration as a means of resolving conflict was almost forgotten.

It is for this reason that the establishment of the Permanent Court of International Arbitration in 1907, and the later establishment of the permanent Court of International Justice in 1921, are important events in the history of international law. This was a sign that the process of developing an international society based on nation-states had matured and that the nation-states had come of age.

An inventory of the characteristics of international society after the Hague conference of 1907 conclusively demonstrates that a great deal of progress has been made since the inception of the system with the Treaty of Westphalia in 1647. Further developments took place after the 1907 Hague peace conference that were important for the development of the international community as a legal community. These included the conclusion of the Briand-Kellog Pact in Paris in 1928, prohibiting the use of war as an instrument of national policy, and the establishment of the League of Nations in 1919 and the United Nations in 1945.

There is no incompatibility between the Briand-Kellog Pact of 1928, outlawing war, and the Covenant of the League of Nations and later the Charter of United Nations of 1945, which all sought to achieve international cooperation and world peace. All had the same objective of promoting international peace and the happiness and well-being of mankind by outlawing war as a source of human conflict and misery.
The approaches used, however, were different. The Briand-Kellog Pact of 1928, which allowed war as an instrument of national policy, used the classical method of inter-state relations that proved to be ineffective. The League of Nations Covenant and the U.N. Charter used structurally different approaches. The use of force and the threat of force were handled in a more sophisticated manner. While prohibiting the use of force as an instrument of national policy, its use for the common good of the international community was allowed in certain cases.

The U.N. Charter, and before that the League of Nations Covenant, introduced international organizations and agencies as subjects of international law. The United Nations Organization and its specialized agencies concerned themselves not only with political matters, but also with economic and social affairs, education and culture, health, labor, as well as other topics. The U.N. system covers all aspects of human life, including monetary and banking matters that were established by the Bretton-Woods agreements.

Besides the institutional developments which occurred in the late 1940's as a consequence of the establishment of the United Nations and its specialized agencies, another development has taken place since the mid-1800's which is no less significant. The history of international law demonstrated that modern international law as a legal system was a cultural legacy of Western Europe, based mainly on Christian ethics.

This situation came to an end when Turkey was accepted as a member of the Concert of Europe in 1856. The process was accelerated by the recognition of Japan as a world power after her victory over Russia in 1905, which was soon followed by the entrance of China, Afghanistan and Iran into international society on a basis of equality. The acceptance of the western legal systems and principles in peoples' everyday lives came with their roughly simultaneous adoption by the codification of civil and commercial law in countries outside Europe which were not colonized by the West, such as Turkey, Japan and China.

In other parts of the world, western legal principles and systems were introduced by other means. The common law system and principles of English law were introduced into the thirteen colonies in Northern America which later developed into a separate American legal system. The Portuguese and
Spanish legal systems and principles introduced into Central and South America became the basis for the national legal systems of countries in Latin America. In other parts of the globe such as Asia and Africa, countries such as Portugal, Spain, Britain, France and Holland introduced western legal systems and principles to their colonies. Although the means of introducing these various legal systems and principles were not the same, the net effect was that the indigenous populations were made familiar with western legal principles and systems. Through these various means and processes, the legal systems and principles which originated in Western Europe became universal.

II.

The Second World War in Europe and Asia between the Allied and Axis powers in the 1940's brought in its wake great changes that were to alter international society beyond recognition. The single most important change caused by the Second World War was the great number of former colonies that became independent nations, radically changing the political map of the world.

These changes were a direct consequence of the political statements and promises made by leaders and statesmen during the war like, for instance, those contained in the Atlantic Charter. In some cases the process of attaining full nationhood was accompanied by violence or a struggle for independence.

The second factor having a major impact was the great advance in technology made during the war, especially in aviation and telecommunication.

A third factor was the increase in population. The effect of population growth accentuated by the rising expectations caused by independence was most urgently felt in matters relating to the resources of the sea. The greater dependence on the sea as a source of wealth, encompassing both living and non-living resources, gave rise to measures by nation-states to secure those resources for the well being of their people.

The impact of post war developments, either of political or technological nature, on international law relating to natural resources was, therefore, most evident in the law of the sea. Therefore, we will now turn our attention to the post-war developments in the international law of the sea.
On September 28, 1945 United States President Harry S. Truman issued a proclamation, which in its operative paragraphs stated:

Now, therefore, I, Harry S. Truman President of the United States of America, do hereby proclaim the following policy of United States of America with respect to the natural resources of the subsoil and seabed of the continental shelf. Having concern for the urgency of conserving and prudently utilizing its natural resources, the Government of the United States regards the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States are appertaining to the United States, subject to its jurisdiction and control. In cases 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. The character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected.¹

This proclamation initiated a new development in the international law of the sea—the continental shelf concept, originally a geological concept. This measure by the President was intended to reserve the natural resources, especially mineral resources such as oil and gas, contained in the continental shelf and its subsoil off the coasts of the United States, for the benefit of the people of United States. It would now be possible for the United States to explore and exploit, in an orderly manner, vast stretches of submarine areas adjacent to the United States, especially off the East coast, covered by a water column of up to a hundred fathoms.

The decision to safeguard America's rights to minerals and oil and gas resources in the continental shelf off its shores was based on the opinion of geologists who concluded that great stretches of the continental shelf contained valuable mineral and hydrocarbon deposits. These conclusions were based on the survey and research of geological structures in the Gulf

of Texas. Similar indications were reportedly found in the Gulf of Mexico. What was new in the continental shelf concept of controlling resources in the seabed and subsoil, as compared to the then existing practice of exclusive jurisdiction over seabed resources, was that the continental shelf doctrine obviated the need for effective occupation. The separation of the control of resources from the requirement of effective occupation and requiring only the proximity of the coast based on the doctrine of natural prolongation was a radical departure from existing norms of international law.

The Truman Proclamation on the Continental Shelf was soon followed by similar proclamations by Mexico, which issued a declaration on October 29, 1945, followed by Panama on March 1, 1946, and Argentina on October 9, 1946 which declared its sovereignty over "the epicontinental sea and the continental shelf." The declarations of Chili in June, 1947, Peru on August 1, 1947, and Costa Rica on July 27, 1948 followed. These subsequent declarations were more far reaching since they claimed sovereignty over the continental shelf and the sea adjacent to the coast up to a distance of 200 miles from the coast. The United Kingdom issued an Order in Council dated November 26, 1948, for the alteration of the boundaries of its dependencies in the Caribbean at the time, the Bahamas and Jamaica.

The continental shelf proclamations also spread to other continents. Saudi Arabia issued a proclamation on policy with respect to the subsoil and sea bed of areas in the Persian Gulf contiguous to the coast of the Kingdom of Saudi Arabia. These measures were later followed by similar measures by the Arab Emirates which at that time were English protectorates.

3. Id. at 6-7, 16-17.
5. These protectorates, and the dates of the measures were: Bahrain (June 5, 1949), Qatar (June 8, 1949), Abu Dhabi (June 10, 1949), Kuwait (June 12, 1949), Dubai (June 14, 1949), Sharjah (June 16, 1949), Ras Al Khaimah (June 17, 1949), Ajman (June 20, 1949) and Umnum Al Qaiwain (June 20, 1949). See Laws and Regulations on the Regime of the High Seas, U.N. Doc. ST/LEG/SER.B/1, vol. 1, (1951); see also MARJORIE B. WHITEMAN, IV DIGEST OF INTERNATIONAL LAW, at 806, 808, Dept. of State Pub. No. 7825 (1965).
From the Middle East the continental shelf, fever spread to Pakistan, which on March 9, 1950, issued a declaration that "the seabed up to a depth of 200 meters pertains to the territory of Pakistan."6 Previously, on June 18, 1949, the Philippines had also extended its jurisdiction over natural resources to include the seabed and subsoil by stating in the Petroleum Act of 1949, that "all oil and gas reserves found in the continental shelf or its analogue in an archipelago belong to the state, inalienably and inperscriptibly."7

From the above description it is clear that the continental shelf doctrine first proclaimed in the Truman Proclamation of 1945 quickly spread to the whole world and established a new concept in international law. Some of these later proclamations went far beyond the original Truman Proclamation since they claimed not only jurisdiction, but went further to claim full sovereignty, not just over the continental shelf, but over the superjacent water column as well.

By comparing the various proclamations on the continental shelf subsequent to the Truman Proclamation of 1945, one notices a wide divergence of state practices on the matter. Although all these measures constituted attempts to extend jurisdiction of the coastal state over adjacent seas to claim the sole right of exploring and exploiting the mineral resources in the seabed and subsoil for the benefit of the coastal state, the proclamations differed widely in scope and extent.

Some proclamations following the Truman Proclamation limited the claim to the right to explore and exploit mineral resources contained in the seabed and subsoil. Other proclamations claimed jurisdiction, and even sovereignty, over the continental shelf itself, including its subsoil, but not including the superjacent waters. A third category extended sovereignty over the continental shelf and the waters above it, and the fourth category extended sovereignty over adjacent seas up to a distance of 200 miles without even making reference to a continental shelf. As the last category can not be properly included in claims based on the continental shelf concept, it will be treated separately later.

Because of subsequent developments, it cannot be denied that the Truman Proclamation of 1945 on the continental shelf had a tremendous impact on the development of the law of the sea, even beyond its original intent. Although perhaps not originally intended, the Truman Proclamation on the Continental Shelf started a process of encroachment on the long-held principle of the freedom of the sea.

A discussion of the Truman Proclamation on the Continental Shelf of 1945 would not be complete without reference to the Truman Proclamation on Fisheries made on the same date. On September 28, 1945 the following proclamation was made by the President of the United States regarding fisheries off the coast of the United States:

Now, therefore, I, Harry S. Truman, President of the United States of America, do hereby proclaim the following policy of the United States in certain areas of the high seas:

In view of the pressing need for conservation and protection of fishery resources, the Government of the United States regards it as proper to establish conservation zones in those areas of the high seas contiguous to the coasts of the United States wherein fishing activities have been or in the future may be develop and maintained on a substantial scale. Where such activities have been or shall hereafter be developed and maintained by its nationals alone, the United States regards it as proper to establish explicitly bounded conservation zones in which fishing activities shall be subject to the regulation and control of the United States. Where such activities have been or shall hereafter be legitimately developed and maintained jointly by nationals of the United States and nationals of other States, explicitly bounded conservation zones may be established under agreements between the United States and such other States; and all fishing activities in such zones shall be subject to regulation and control as provided in such agreements. The right of any state to establish conservation zones off its shores in accordance with the above principles is conceded, provided that corresponding recognition is given to any fishing interests of nationals of the United States which may exist in such areas. The character as high seas of the areas in which such conservation zones are established and the right of their free and unimpeded
navigation are in no way thus affected.\textsuperscript{8}

The Truman Proclamation on Fisheries is clear and self explanatory. Its objectives were much more modest than the Proclamation on the Continental Shelf, which was limited to the conservation of living resources in the seas adjacent to the coast of the United States. Unlike the continental shelf proclamation, the Fisheries Proclamation was not a radical departure of existing international law. In fact, it was a fairly accurate record of living marine resource conservation practice in North America, specifically off the coasts of Canada and the United States.

Measured against the strict application of the absolute freedom of the seas in the classical sense, however, the Truman Proclamation of Fisheries can also be considered a form of encroachment on the classical freedom of the seas concept, which allowed no restriction whatsoever in the freedom of fishing. One of the original freedoms of the seas was the right of people to take fish from the sea as an inexhaustible source of wealth. The right of coastal states to take measures for the conservation of living resources in the seas adjacent to their coast is proof that in modern times, the strict application of the freedom of fishing is no longer possible.

Another interesting development in the international law of the sea after the Second World War were the claims made by some Latin American countries over adjacent seas up to 200 miles from their coast. A declaration by the President of Chili dated June 23, 1947, and a declaration of the President

\textsuperscript{8} The compensation theory has been advanced by a number of people, including Professor Alberto Ulloa, the representative of Peru at the Third Meeting of the Inter-American Council of Jurists, and by the representative of Ecuador in the Conference of Ciudad Trujillo. For a summary of these speeches and a bibliography, see F.V. Garcia-Amador, THE EXPLORATION AND CONSERVATION OF THE RESOURCES OF THE SEA, at 74-75 (1959); see also Speech by Representative of Ecuador in Committee VI (Legal) U.N. GAOR, A. Conf. 13/19, vol. 1, at 159 (1956).

The fact that the compensation theory was not taken lightly by eminent international lawyers is shown by the opinion given by George Scelle when the International Law Commission discussed the draft articles which later became the Draft Convention for the 1958 Geneva Conference on the Law of the Sea [1956] 1 Y.B. Int'l L. Comm'n 170, para. 37 (1956). On the Chile, Ecuador and Peru claim, including the compensation and bioma theories, see MOCHTAR KUSUMA-ATMADJA, MASALAH LEBAR LAUT JENEWI TAHUN 1958 DAN 1960, at 142-44, 151-52.
of Peru dated August 1, 1947, were the first instances of claims by coastal states over adjacent seas extending to a distance of 200 miles from their shores. Although these claims were made subsequent to the 1945 Truman Proclamation on the Continental Shelf, the declarations of the Presidents of Chili and Peru cannot be properly considered as claims based on the continental shelf theory, as these claims did not use the depth criterion of 200 meters, but instead used the distance criterion of 200 miles.

Unlike the other continental shelf claims, the declarations of the Presidents of Chili and Peru, although referred to as claims on the continental shelf, were based not on the existence of the continental shelf in the geological sense, but on a theory of compensation. According to this theory, the lack of a geological continental shelf adjacent to the coast of the two countries required a compensation.9

As can be seen from the opinion of George Scelle during the discussions of the Draft Convention on the Law of the Sea by the International Commission in 1958, the theory of compensation was not taken lightly by experts of international law. However, the claims of Chili and Peru were later strengthened by arguments based on marine biology—the "bioma" theory.

The principles upon which Chili and Peru based their claims consisted of a combination of both geological and biological arguments. These principles were put forward in the Santiago Declaration of August 18, 1952, signed by Chili, Ecuador and Peru. This declaration stated, inter alia:

(I) Owing to the geological and biological factors affecting the existence, conservation and development of the marine fauna and flora of the waters adjacent to the coasts of the declarant countries, the former extent of the territorial sea and contiguous zone is insufficient to permit of the conservation, development and use of those resources to which the coastal countries are entitled.

(II) The Governments of Chili, Ecuador and Peru therefore proclaim as a principle of their international maritime policy that each of them possesses sole sovereignty and ju-
risdiction over the area of sea adjacent to the coast of its own country and extending not less than 200 miles from the said coasts.10

This declaration followed the declarations of Chili on June 23, 1947, and the President of Peru on August 1, 1947, on the continental shelf. All these declarations were based on the eco-system and the bioma concepts. According to spokesmen of these countries, and papers read before international conferences, an eco-system is defined as the total of all non-biotic factors, especially climatological and hydrological factors, making marine life possible. In a marine eco-system, living organisms from the smallest phytoplankton and zooplankton to the most complex mammal (humans) live together in a perfect inter dependent biological chain called a bioma. The Humboldt or Peruvian Current plays an important role as a life giving factor in the biomas of the marine ecosystems covering the territories of Chili, Ecuador and Peru. Because of the close interdependence between life on land and marine resources in the adjacent seas, the protection of the coastal marine resources becomes a matter of life and death for the populations of these countries. The Humboldt Current is situated off the coasts of Chili, Ecuador and Peru and the outer limits of the marine environment containing the biomas are situated at a distance of approximately 200 miles from the shores. This, in short, is the biological basis for the claims of Chili, Ecuador and Peru as contained in the Santiago Declaration mentioned above.

These principles and theories proved to have a big influence on later developments on the law of the sea, especially on the concept of the two-hundred mile wide Exclusive Economic Zone.

Another development in the Law of the Sea, which can be considered a contribution by new states to the development of international law, was the declaration by the Republic of Indonesia on December 13, 1957, regarding Indonesian national waters, which stated:

All waters around, between and connecting the islands or part of the islands constituting the Republic of Indonesia

10. For an analysis of these theories, see MOCHTAR KUSUMA-ATMADJA, MASALAH LEBAR LAUT JENEWA TAHUN 1958 DAN 1960, at 142-44.
without regard of their size or width are integral parts of the territory of the Republic of Indonesia and therefore part of the national waters which are under the sovereignty of the Republic of Indonesia. Passage of foreign vessels through these national waters is guaranteed as long as and insofar as it is not contrary to the sovereignty and security of the Indonesian nation. The determination of the territorial sea measured from straight base lines connecting the outer most point of the islands of the Republic of Indonesia, will be enacted by a law.\textsuperscript{11}

The considerations which led the Indonesian government to issue this declaration on Indonesian national waters were as follows:

\begin{enumerate}
  \item The geography of the Republic of Indonesia as an island state consisting of thousands of islands is unique and requires a special regime;
  \item For the sake of the unity of the Indonesian nation all islands and the seas between them must be considered as one integral entity;
  \item The breadth of the territorial sea as stated by the colonial government in article 1, para. 1, of the Territorial Sea and Maritime Circles Ordinance of 1939 is no longer in keeping with the security and safety interests of the Republic of Indonesia; and
  \item Each sovereign nation has the right and the duty to take measures it considers necessary to protect its safety and security.
\end{enumerate}

The archipelago concept underlying the Indonesian Government Declaration of December 13, 1957, was not an entirely new concept in the public international law of the Sea. It had been proposed in several academic meetings and was even included in the draft articles of the 1930 Hague Conference on Territorial Waters. A more recent statement regarding archipelagic waters was made by Mr. Tolentino in the Sixth Committee of the United Nations in 1956. What was new in the December 13, 1957 declaration by the Indonesian govern-

\textsuperscript{11} Indonesian Government Declaration of December 13, 1959, on Indonesian national waters (author's translation); see SHIGURU ODA, \textsc{International Control of Sea Resources} at 33 (reprinted ed. 1988). For the background history of this declaration, see MICHAEL LEIFER, \textsc{2 International Straits of the World: Malacca, Singapore and Indonesia}, Sijthoff and Noverhoff at 17-23 (1978).
ment was that it was a statement of government policy containing a commitment to enact legislation on the matter at a later date. The law of Indonesian national waters embodying the Indonesian archipelago principle was enacted on February 18, 1960. In the Elucidation to the Act No. 4 of 1960 on Indonesian national waters the reasons for enacting the act embodying the regime of archipelagic waters was stated to be as follows:

(1) The drawing of straight base lines connecting the outer-most islands of the Indonesian archipelago was done to preserve the unity of the nation, its territorial integrity, and safeguard its economic wealth;
(2) The nation is sovereign over all waters lying within the base lines drawn according to paragraph 1, including the seabed and sub-soil and including all natural resources contained therein, as well as the air space above it;
(3) The territorial sea with a width of twelve miles is measured from straight base lines; and
(4) The right of innocent passage of foreign ships through the archipelagic waters is guaranteed as long as such passage is neither contrary to the interests of the coastal state nor endangers its security and public order.

The Act No. 4 of 1960 is very interesting despite its brevity and simplicity. It is the first national application by law of the principle of straight base lines which was recognized in the Anglo-Norwegian Fisheries Case. This case was decided by the International Court of Justice in 1951, and the principle was formally made part of modern international law of the sea in the Geneva Convention of 1958 on the territorial sea and contiguous zone. The chart accompanying Act No. 4 of 1960 contained 200 base points connected by 196 straight base lines with a total length of 8,069.8 nautical miles.

The drawing of straight base lines from point to point, connecting the outer most islands in the Indonesian archipelago, had two consequences: (1) a belt of twelve nautical miles of territorial sea encircled the whole Indonesian archipelago; and (2) the status of the waters lying on the landward or inward side of the straight base lines were transformed from high seas into internal waters. In order that the change in legal status of these waters did not disrupt the passage of foreign vessels enjoyed prior to this act, article 3 explicitly stated that the
internal waters would remain open to the passage of foreign ships.

The enactment of Act No. 4 of 1960 on Indonesian national waters caused immediate reaction, especially by big maritime states. Protests were made by the United Kingdom, France, the Netherlands, Australia, the United States and Japan. To reassure those parties interested in the assured passage through Indonesian waters, the Indonesian government enacted Government Regulation No. 8 in 1962, dealing with the passage of foreign vessels through Indonesian waters. Article 1 of Government Regulation No. 8 states that the right of innocent passage of foreign ships through Indonesian internal waters, which before the enactment of Act. 4 of 1960 were part of the high seas, is guaranteed. Per Article 2 of the act, the term "innocent passage" meant the passage for peaceful purposes from the high seas to an Indonesian port and from an Indonesian port to the high seas, or from one point on the high seas to another point on the high seas, traversing waters forming part of the Indonesian archipelago.

Article 3 states that passage of foreign ships is considered innocent as long as it is not contrary to the security, public order and national interests of Indonesia, and as long as it does not disturb the peace and good order of the Republic of Indonesia. It is suggested that the innocent passage of foreign ships be made through international passage routes recommended in navigational charts. Stopping, anchoring and loitering without any lawful reason within Indonesian waters does not constitute innocent passage according to this regulation. The President has the authority to temporarily suspend the passage of foreign ships through parts of the Indonesian waters if such suspension is considered necessary for the protection of the sovereignty and security of the nation. In addition to the general provisions described above on the passage of foreign ships, Government Regulation No. 8 of 1962 also contains provisions on the passage of special ships, namely (1) research vessels, (2) fishing vessels, and (3) war ships and government ships not engaged in commerce. Prior notification of the Chief of Staff of the Indonesia Navy is required of foreign war ships using the right of innocent passage through Indonesian waters. Foreign submarines engaged in innocent passage must surface and must not navigate submerged.
An interesting feature of Government Regulation No. 8 of 1962 is the provision on specially designated sea lanes. The Chief of Staff of the Navy has the authority to designate sea lanes through which foreign war ships, government ships and fishing vessels may pass. Foreign war ships using these designated sea lanes are not required to give the prior notification generally required in exercising the right of innocent passage through Indonesian waters.

Seven years later Indonesia, together with the Philippines, Fiji and other archipelagic countries, worked very hard to have the concept of archipelagos and the legal regime of archipelagos accepted by the U.N. Seabed Committee during the preparatory stage of the Law of the Sea. These efforts led to the inclusion of several articles on the regime of archipelagos, the draft text and the eventual adoption of one whole section (Part IV) on archipelagos in the 1982 U.N. Convention on the Law of the Sea.

The attempts of coastal states to extend control and jurisdiction over adjacent seas were more successful at the Third U.N. Conference on the Law of the Sea than they were at the First and Second U.N. Conferences on the Law of the Sea in 1958 and 1960. In those earlier conferences, proposals for the 200 mile zone and the archipelago concept were put forward, but were either defeated or withdrawn for lack of support. However, the movement of coastal states to increase their claims over adjacent seas had grown considerably stronger in the early 1960's after the failure of the Second U.N. Conference on the Sea to reach an agreement on the breadth of territorial seas as well as an increase in the number of newly independent states. In the mid-1960's, the situation had developed to such an extent that there seemed to be a real danger of the oceans being carved up by all the claims made by coastal states with long coastlines. It was at this critical juncture that Professor Alfred Pardo, Malta's permanent representative to the United Nations, made a proposal for a U.N. General Assembly resolution to designate an international seabed area, including the mineral resources contained therein, as a common heritage of mankind, to be free from coastal states' competing claims.

The activities of the International Seabed Committee, subsequently established by the U.N. General Assembly, soon became a rallying point for those parties dissatisfied with the state of the international law of the sea. It was, therefore, natu-
ral for the U.N. Seabed Committee to evolve into a preparatory committee for the Third U.N. Conference on the Law of the Sea. This Conference is interesting not only because it gave birth to new concepts, but because agreements were reached on issues not resolved during the First and Second U.N. Conferences on the Sea in Geneva in 1958 and 1960, such as the breadth of territorial seas and the definition of the continental shelf. New concepts, such as the 200 mile exclusive economic zone, the legal regime of archipelagoes, and the right of access to the sea of landlocked countries, were adopted and included in the 1982 Convention. A definition of "geographically disadvantaged states" and a well designed new regime for marine scientific research and the protection of the marine environment were also included. The most controversial, yet least satisfactory, inclusion was the regime on the international seabed area and the exploitation of its resources.

The Third U.N. Conference on the Law of the Sea was an interesting law-creating process. Unlike the First and Second U.N. Geneva Conferences on the Law of the Sea, which were based on the preparatory work of the International Commission, the Third U.N. Conference on the Law of the Sea was a more political process. The rules of procedure of the General Assembly on voting and the taking of decisions was at least sub-ordinated, if not replaced, by special rules of procedure adopted for the conference at the New York Session in 1932. The essential difference was that the process of making decisions by a simple or two-thirds majority was replaced by the law of consensus. Another striking feature marking the deliberations at the U.N. Seabed Committee, and later at the Conference, was the strong refusal to abide by precedents—especially any reference to the 1958 U.N. Conventions on the Law of the Sea. There was a strong feeling, especially among the newly independent states of Africa, that they had no part in this law creating process and hence did not feel bound by it. There was a determined effort to create a new law of the oceans from scratch. Given these difficulties, and the complexity of the problems involved, one will agree that the 1982 U.N. Convention on the Law of the Sea is a great achievement and testimony to what can be achieved through hard work, persistence and the spirit of give and take.
III.

The examples of contributions made by new states to the development of international law cited so far have all been in the realm of the public law of the sea. It would be a mistake, however, to think that no contributions were made in other areas as well. Significant contributions were made to the acceptance of sovereignty over natural resources which was confirmed in UN General Assembly resolution No. 1803 (XVII) of December 14, 1962 on Permanent Sovereignty over Natural Resources.

The late 1950's and early 1960's were the years when new nations, especially those in Asia and Africa, asserted their newly found sovereign rights, particularly over natural resources. I will relate here the experience of Indonesia as an example.

In 1957, the Indonesian government took measures to take over Dutch owned enterprises, including estates. These measures culminated in the enactment of a December, 1958 law on the nationalization of Dutch owned enterprises. The Nationalization Act of December, 1958 was followed by a Government Regulation which laid down the terms of indemnification or compensation. This Act, in its operative paragraph, provided that the owners would be paid compensation or indemnification in an amount based on a percentage of the proceeds of the sale of products from the estates expropriated.

Owners of two Dutch tobacco estates situated in North Sumatera, *De Verenigde Deli Maatscapaijen* (VDM), and *Senembah*, did not accept the compensation offered and proceeded to take the case to court in Bremen, West Germany, the destination to which the tobacco was shipped for auction. The Bremen Court of First Instance refused to examine the case due to the Act of State doctrine. The Bremen court found that it had no jurisdiction or authority to adjudicate the case as the nationalization or expropriation by the Indonesian government was a valid act of a sovereign state irrespective of the compensation paid or promised. The judgment of the lower court was upheld on appeal to the Bremen Court of Appeals. Like the lower court, the Court of Appeals separated the act of expropriation as a sovereign act from the question of compensation. The latter was a separate matter not affecting the validi-
ty of the nationalization or expropriation as an act by a sovereign state.\(^\text{12}\)

The decision of the Bremen courts attracted wide attention in the legal community as it amounted to a reversal of the traditional doctrine of "no expropriation without prompt, adequate and effective compensation." In addition to the many articles written on the subject in law journals, the *Bremen Tobacco Case*, as the case became known, then became a subject of deliberation by the Asian-African Legal Consultative Committee at its third session in Colombo in 1960. After considerable debate, the Asian African Legal Consultative Committee adopted a resolution supporting the new rule on compensation according to local rules and regulation in the case of the nationalization of enterprises done in the course or framework of the economic emancipation of a former colony.\(^\text{13}\) In the debate held on the subject during the Colombo session, the Indonesian delegate advanced the same arguments used before the Bremen courts, which were essentially that the traditional rule of "prompt, effective and adequate compensation" was not valid in cases of expropriation or nationalization by a former colony in an effort to attain economic emancipation. The regaining of control or sovereignty over natural resources cannot be denied to a newly dependent country since sovereignty over its natural resources was a basic and alienable right and a logical consequence of its sovereignty in the political sense. In other words, the idea of independence or political emancipation is meaningless without sovereignty over resources.\(^\text{14}\)

This new theory or doctrine does not deny liability or responsibility to pay indemnification or compensation to the rightful owners of expropriated or nationalized property. It does, however, separate the payment of compensation from the characterization of the validity of the act of nationalization or expropriation. This is in contrast to the traditional doctrine of "prompt, effective and adequate compensation," under which the validity of any expropriation is dependent on the

\(^{12}\) Decision of the *Landesgericht*, Bremen (Apr. 24, 1959) (confirmed on appeal by *Oberlandesgericht*, Bremen (Aug. 21, 1959)).


\(^{14}\) Counterclaim in the *Bremen Tobacco Case*; see the legal opinion of Professors Hans Dölle and Konrad Zweigert.
compensation paid. Newly independent countries find it impossible to regain control or sovereignty over their natural resources under the traditional doctrine as they are not in a position to pay prompt, effective and adequate compensation. In other words, the traditional doctrine on compensation or expropriation would effectively nullify or prevent the right of newly independent countries to exercise sovereignty over their natural resources. They would continue to be economically dependent in spite of their newly won political independence. That was the attitude of newly independent Indonesia in the 1960's with regard to colonial investments made without its consent. The investment law introduced in 1969 completely abandons the above mentioned attitude, providing full protection to new investments made under this law.

The actions of the Indonesian government with regard to estates were followed by lengthy negotiations to change the licensing or concession agreements held by oil companies operating in Indonesia into production sharing contracts based on the new Oil and Gas Act of 1960, which vested national sovereignty over oil and gas resources in the Indonesian government as the custodian of the Indonesian people.

After lengthy negotiations over a period of several years, the oil companies in Indonesia finally accepted the new system of oil and gas production utilizing the Production Sharing contract. The production sharing contract has now been adopted by many other countries, mostly developing nations, to replace the concession or licensing types of oil concessions granted by the colonial powers. The production sharing contract has also been widely accepted by oil companies operating in many countries as it has proved to be a very useful concept to conserve and husband oil and gas resources according to the needs of the nations concerned. It has also proved to be very useful in transferring technology and skills to the local people as a more vigorous enforcement of environmental standards against oil companies.\(^\text{15}\)

It is the author's contention that the contributions made by new states to the development of international law as de-
scribed above are important in making international law more truly universal and, therefore, more acceptable to the present international community as a whole.