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**LL.M IN INTERNATIONAL LAW, TRADE, INVESTMENTS
AND ARBITRATION**



**THE SOUTHEAST PACIFIC COUNTRIES, THE UNITED NATIONS CONVENTION
ON THE LAW OF THE SEA AND THE EXCLUSIVE ECONOMIC ZONE**

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To my Mom and Dad: For their unconditional love and support.

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Summary

On 23rd June, 1947 the Chilean President Gabriel González Videla declared the national sovereignty over the entire continental shelf adjacent to its coast and islands, the soil and subsoil and the superjacent waters to a distance of 200 nautical miles from baselines in order to reserve, protect, preserve and utilize natural resources, giving the starting point of the exclusive economic zone doctrine. Peru and Ecuador, later on, also made statements along the same lines, and, based on these national backgrounds, the three countries signed the Declaration of Santiago on Maritime Zone, on 18th August 1952, by which they proclaimed their sovereignty and exclusive jurisdiction over the sea that bathes the coasts to a minimum distance of 200 nautical miles from the related coasts, including soil and subsoil that relate to it in order to prevent irrational exploitation of the natural resources located in it and so important for the development of their peoples.

Together with this Declaration, several Agreements were signed and a Regional body was created -The Permanent Commission for the South East Pacific- starting a process of regional cooperation and integration, to which Colombia acceded on 1978, that developed the concept of this new maritime space and spread it around the world. The figure created by these countries was finally recognized in the United Nations Convention on the Law of the Sea adopted on 1982, whose figure of the exclusive economic zone was inspired in the principles and institutions created by the South East Pacific Countries.

However, during the Third United Nations Convention on the Law of the Sea, Chile, Colombia, Ecuador and Peru did not share the same view as to the legal nature of the 200 miles zone.. Peru and Ecuador supported a territorial doctrine, which would give an exclusive sovereign position to coastal States over an area of 200 maritime miles, while Chile and Colombia maintained the idea that in this zone, State competences were sovereign but not for all purposes. Even when these different positions never affected the cooperation and friendly relations among these countries, the different approaches with respect to the legal nature of the zone were transferred to the domestic legislation of the States and, until today, can be found in the national legislation of these countries.

To us, being the South East Pacific countries the proponents of the 200 miles doctrine, it seems important that they try to maintain harmony in the concept of this maritime zone. Until today, Chile is the only country who had ratified the Convention.

Introduction:

Chile, Ecuador and Peru created a doctrine that ended up in a substantive change in international law. This doctrine was created and developed within the framework of an effective regional cooperation system, The Permanent Commission for the South East Pacific (PCSP), to which Colombia was incorporated on 1978. Today, this Doctrine of the 200 nautical miles has turned into a maritime space recognized internationally and claimed for more than 100 countries. But the contribution made by the South East Pacific Countries, is obscured by the different positions adopted for these countries during the negotiations on the Third United Nations Conference on the Law of the Sea; by the way in which their domestic legislation deals with the maritime spaces and the fact that only Chile is Party of the United Nations Convention on the Law of the Sea (UNCLOS). These situations have generated a lack of harmony between the domestic laws of these countries, the treaties concluded within the PCSP and the rules adopted by UNCLOS. After almost 15 years of the entry into force of the Convention, I believe that Parties to the System have to harmonize their positions in order to maintain its international influence on the Law of the Sea development and to bring back fully effectiveness of the regional system.

I will first of all start with a study of the doctrine created by the Declaration of Santiago of 1952 and developed by other regional instruments that gave shape to the 200 nautical miles doctrine in order to determine its content.

In the second Chapter I will analyze the participation of Chile, Colombia, Ecuador and Perú in the negotiations of the Third United Nations Conference on the Law of the Sea and in the adoption of the Convention. Also, we will describe and analyze the principles inspiring the Convention, so as the rules settled by it, relevant to our study.

The third Chapter will analyze the relevant legislation of said countries and identify the different variations of the most substantive legislation in a comparative perspective; identifying the lacks of harmony and its consequences. I will try to explain why 3 States out of 4 members of the regional system have not signed or ratified UNCLOS, despite the fact that all of them contributed greatly to the establishment of the doctrine of 200 nautical miles or the Exclusive Economic Zone and finally, we will try to demonstrate that the Exclusive Economic Zone is an adequate institution to protect the sovereign rights of States and to impose duties and protect maritime interests of the different countries, and why it is important that the countries that have not yet ratified the Convention do so.

CHAPTER I: GENESIS OF THE DOCTRINE OF THE EXCLUSIVE ECONOMIC ZONE

1.1 Unilateral Declarations and Positions. Background and Content:

The development of science and the new fishing techniques intensely impacted the resources of the sea. South American coastal States saw as foreign industrial fleets, with their tremendous technology and resources exploited marine resources within the vicinity of its coasts without any kind of control and greatly harming the development of domestic industries. As at that time the extension of the territorial sea was 3 miles from coasts, South American countries were unable to restrict such farms, because beyond the territorial sea, the coastal State had no right to exercise an exclusive control and jurisdiction.

Thus, the necessity of a new regime was inevitable. Clearly the 3 miles extension was useful to protect the interest of coastal States to prevent natural resources located in near their coasts not be exploited for the benefit of their peoples and the protection and preservation of natural resources with which coastal States are blessed.

The first Declaration in this regard was made by the President of United States of America Harry Truman, on September 28th, 1945. The President Truman made two Proclamations: By virtue of the Presidential Proclamation N° 2667 United States of America claimed jurisdiction and sovereignty over the natural resources of the soil and subsoil of the continental shelf under the high seas but contiguous to the coast of United States. In the preamble of this Presidential Proclamation, the President states that: “[...] the continental shelf may be regarded as an extension of the land-mass of the coastal nation and thus naturally appurtenant to it ...”¹ On the same day, by virtue of the Presidential Proclamation N° 2668, United States also declared the protection of certain fisheries developed by that country in certain areas of the high seas, “[...] but only with respect to U.S citizens. Where fishing grounds were shared

¹**PRESIDENTIAL PROCLAMATION N ° 2667**, President Truman’s Proclamation on U.S. Policy Concerning Natural Resources of the Sea Bed [Online] <http://www.imli.org/legal_docs/docs/A61.DOC> {date of Review: 10.11.08}

between U.S nationals and the nationals of other countries, conservation measures would then be implemented by means of agreements involving all the countries concerned.”²

United States claim then: “[...] the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control”³ and “[...] 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 developed and maintained on a substantial scale.”⁴ In any case “[...] 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 [...] affected.”⁵

One month later, Mexico made its own Declaration with respect to the continental shelf claiming “[...] the whole of the continental platform or shelf adjoining its coast line, and to each and all of the natural resources existing there, whether known or unknown” and asserted that the Mexican Government was “[...] taking steps to supervise, utilize and control the closed fisheries zones necessary for the conservation of this source of well-being. The foregoing does not mean that [...] the rights of free navigation on the high seas are affected, as the sole purpose is to conserve these resources for the well being of the nation, the continent and the world.”⁶ As can be notice, both Mexican and American Declaration expressly indicate that the status of the superjacent waters as high seas is not affected by these Declarations.

Later on, in 1944, Argentina made its own Declaration, claiming that pending the issuance of a special law on the subject Argentine continental shelf and the Argentine Epicontinental Sea were transitory zones of mineral reserves. Subsequently, on 1946, Argentina promulgate the Decree N ° 14708, in which preamble one can read: “The submarine platform [...] is closely united to the mainland both in a morphological and a geological sense (and) the waters covering the submarine platform (which) constitute the Epicontinental Sea (are) characterized by extraordinary biological activity [...] both susceptible of industrial utilization”. “[...] it is

²**GARCIA AMADOR, Francisco.** The Origin of the Concept of an Exclusive Economic Zone: Latin American Practice and Legislation **IN:** ORREGO VICUÑA, FRANCISCO (Ed.) The Exclusive Economic Zone: A Latin American Perspective, Colorado: United States, West View Press, 1984 p. 12.

³ **PRESIDENTIAL PROCLAMATION N ° 2667** ob. cit. p. 7

⁴ **PRESIDENTIAL PROCLAMATION N ° 2668** President Truman’s Proclamation on U.S. Policy of the with Respect to Coastal Fisheries in Certain Areas of the High Seas [Online] <http://www.imli.org/legal_docs/docs/A25.DOC> {Date of Review: 23.02.09}

⁵ **PRESIDENTIAL PROCLAMATION N ° 2667** ob. cit. p.7

⁶ **GARCIA AMADOR, Francisco** p.14. ob. cit. p.8

the purpose of the Executive Power to continue [...] its scientific and technical investigations respecting all phases of the exploration and exploitation of the animal, vegetable and mineral wealth [...] contained in the Argentina continental shelf and in the corresponding Epicontinental Sea”⁷. In Article 1 of these Decree is declared that “[...] Argentine Epicontinental Sea and continental shelf are subject to the sovereign power of the nation” and according to Article 2 “[...] for purposes of free navigation, the character of the waters situated in Argentine Epicontinental Sea and above the Argentine continental shelf remains unaffected by the present Declaration”. This Declaration is important, because it was the first one which claims rights over the water underlying the continental shelf. As we can see “[...] the assimilation of the legal status of the waters overlying the continental shelf to that of the shelf was an inevitable consequence”⁸.

Is in this context that the President of Chile, Gabriel González Videla, made in 1947, one of the most visionary declarations ever, giving the starting point to the doctrine of an exclusive economic zone.

1.1.1 Chile:

On June 23rd, 1947, the President of Chile, Gabriel González Videla, made an official Declaration declaring that “The Chilean Government confirms and proclaims national sovereignty over all the continental shelf adjacent to the continental and island coasts of its national territory, whatever may be their depth below the sea, and claims by consequence all the natural resources which exist on the said shelf, both in and under it, known or to be discovered.

The Government of Chile confirms and proclaims its national sovereignty over the seas adjacent to their coasts, whatever may be their depth, and within those limits necessary in order to reserve, protect, preserve and exploit natural resources and wealth of any sort on those seas and in them and under them subjected to surveillance of the Government, especially, hunting and fishing maritime operations, with the aim of preventing that the riches of this order be exploited to the detriment of the inhabitants of Chile and depleted or destroyed

⁷**DECREE N ° 14708, ARGENTINA** [Online] IN: <<http://faolex.fao.org/docs/pdf/arg1224.pdf>> {Date of Review: 23.02.09}

⁸**CONRAD EXTAVOUR, Winston**, The Exclusive Economic Zone: A study of the Evolution and Progressive Development of the International Law of the Seas. Geneva: Switzerland, Institut Universitaire de Hautes Études Internationales, 1981, p. 68.

to the detriment of the country and of the American continent.”⁹ The protection and control was declared over an area of 200 nautical miles from baselines and was also recognized that “The present Declaration of sovereignty is not unaware of the legitimate rights of other States on the basis of reciprocity, nor does it affect the rights of free navigation on the high seas”¹⁰.

1.1.2 Perú:

On August 1st, 1947, by virtue of the Presidential Decree N° 781, the Government of Perú declared that their “[...] national sovereignty and jurisdiction extends to the underwater platform or continental or insular shelf adjacent to the continental and island coasts of the national territory whatever the depth and extension covered by the baseboard”¹¹ and that their “[...] national sovereignty and jurisdiction is also exercised over the sea adjacent to the coasts of the country, irrespective of their depth and the extent necessary to book, protect, conserve and utilize natural resources and wealth of any kind located in or below of the sea”¹² The protection and control was also declared over an area of 200 nautical miles from baselines and was also recognized that “[...] this declaration does not affect the right of free navigation of ships of all nations, under international law”¹³

1.1.3 Ecuador and Colombia

Unlike Chile and Peru, Colombia and Ecuador did not participate in the early process of unilateral Declarations claiming possession of an exclusive zone of 200 nautical miles.

⁹**OFFICIAL DECLARATION, Chile** Official Declaration made by President Gabriel González Videla on June 23rd, 1947 **IN:** Circular N ° 13, Ministry of Foreign Affairs, Chile. November 13th 1954, p.4 : “El Gobierno de Chile confirma y proclama la soberanía nacional sobre todo el zócalo continental adyacente a las costas continentales e insulares del territorio nacional, cualquiera sea la profundidad en que se encuentre, reivindicando, por consiguiente, todas las riquezas naturales que existen sobre dicho zócalo, en él y bajo él, conocidas o por descubrirse. El Gobierno de Chile confirma y proclama la soberanía nacional sobre los mares adyacentes a sus costas, cualquiera que sea su profundidad, en toda la extensión necesaria para reservar, proteger, conservar y aprovechar los recursos y riquezas naturales de cualquier naturaleza que sobre dichos mares y en ellos y bajo ellos se encuentren, sometiendo a la vigilancia del Gobierno, especialmente, las faenas de pesca y caza marítimas, con el objeto de impedir, que las riquezas de este orden sean explotadas en perjuicio de los habitantes de Chile y mermaidas o destruidas en detrimento del país y del Continente Americano.”

¹⁰**OFFICIAL DECLARATION, Chile** ob. cit. p.10: “La presente Declaración de soberanía no desconoce legítimos derechos similares de otros Estados sobre la base de reciprocidad, ni afecta a los derechos de libre navegación sobre la alta mar.”

¹¹**PRESIDENTIAL DECREE N ° 781, Perú** [Online] **IN:** <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/PER_1947_Decree.pdf> { Date of Review: 12.11.08}

¹²**PRESIDENTIAL DECREE N ° 781, Perú** ob.cit.p.10

¹³**PRESIDENTIAL DECREE N ° 781, Perú** ob.cit.p.10

Ecuador claims its sovereignty and jurisdiction over the area of 200 nautical miles by virtue of the Declaration of Santiago of 1952 and Colombia did it on 1978 by virtue of the Law N ° 10, of August 4th and upon its accession to the Declaration of Santiago and to the rest of treaties signed within the Conferences on Exploitation and Conservation of the Maritime Resources of the South Pacific and the PCSP.

In the case of Ecuador, there is also a legislative decree of November 6th, 1950, under which claimed rights over the continental shelf and can be seen as an antecedent to the vindication of maritime space made in the Declaration of Santiago. The decree reads as follows: "The continental shelf or baseboard adjacent to the coasts of Ecuador, and each and every one of the riches that are in it belongs to the State, which will be in charge of the use and control necessary for the preservation of the heritage and for the control and protection of the respective fisheries"¹⁴.

As we can see, the Peruvian and the Chilean Declarations followed the same line, creating a very coherent set of rights and duties over the area and agreeing on the main characteristics: They declared the national sovereignty over the entire continental shelf adjacent to its coast and islands irrespective of their depth, the soil and subsoil and the superjacent waters to a distance of 200 nautical miles from baselines in order to reserve, protect, preserve and utilize natural resources and wealth of any kind.

Unlike the Mexican and American statements, the sovereignty and jurisdiction was claimed not only with respect of the continental shelf and the resources located in it, but also over the water to a distance of 200 nautical miles. Because the continental shelf is on the side of the Pacific Ocean very short, the doctrine of the continental shelf that was developing since the Truman's Declaration of 1945, was not enough to protect the resources located in the immediacy of their coasts. This is why Chile extended the legal status of the continental shelf to the waters located over it, and beyond, up to 200 nautical miles.

The distance of 200 nautical miles, found its origin in the Declaration of Panama, of 1939, adopted in the First Consultative Meeting of the Ministers of Foreign Affairs of the American Republics, by which was declared a 300 mile safety zone which would keep the Americas

¹⁴**RIVADENEIRA, Rubén** *Visión Histórica de la Posición Jurídico Marítima del Ecuador*, Quito: Ecuador, Ministerio de Relaciones Exteriores de Ecuador, 1987, p. 23: "La plataforma continental o zócalo adyacente a las costas ecuatorianas, y todas y cada una de las riquezas que se encuentran en la misma, pertenecen al Estado, el cual tendrá a cargo el aprovechamiento y control necesarios para la conservación de dicho patrimonio y para el control y protección de las zonas pesqueras correspondientes".

neutral during a European conflict. A map accompanied this Declaration and in it “[...] the Chilean coast boundary coincided approximately with the 200-mile limit”¹⁵.

This antecedent was presented to President Gabriel Gonzalez Videla, by private initiative. INDUS, a private fishing enterprise, was having problems “[...] to compete with the factory ships of industrial nations” and was seeking “[...] for arguments that might enable the Chilean government to regulate the utilization of marine resources adjacent”¹⁶ to its coasts.

Based on these national definitions, Chile, Ecuador y Peru held in 1952 the First Conference on Exploitation and Conservation of Marine Resources of the South Pacific, where the concept of the Exclusive Economic Zone was definitively developed and qualified.

1.2 The Permanent Commission for the South East Pacific and The Conference on Exploitation and Conservation of the Maritime Resources of the South Pacific.

By Communication N ° 43/31 sent by the Ambassador of Chile in Lima José Francisco Urrejola, to the Foreign Minister of Chile Fernando Garcia Oldini on January 12th, 1952, the Ambassador referred to some problems which affected the South Pacific countries such as the abusive exploitation of the continental waters and the devastating activities of the whaling foreign industries, recommending “[...] coordinated action by the maritime authorities of the countries affected”, and the convenience of making “[...] an international declaration based on legal principles, referring to new concepts of domain or jurisdiction over inland waters, much more wider than the classic rules of the territorial sea of three miles, already abandoned by all nations.”¹⁷ In this regard states: “[...] indeed, the conditions of modern life have altered so old standards, that is visible the length of three miles set by the international customs and laws of the territorial sea of each country. All countries today tend to extend their power over the seas bordering their coasts in a measure that allows them to not only look to its security and defense policy, but also to protect the riches contained in the soil and submarine subsoil and in

¹⁵ **ARMANET, Pilar** The Economic Interest Underlying the First Declaration on a Maritime Zone IN: ORREGO VICUÑA, FRANCISCO (Ed.) The Exclusive Economic Zone: A Latin American Perspective, Colorado, United States, West View Press, 1984 p. 27

¹⁶ **ARMANET Pilar**, IBID., p.11

¹⁷ **CHILE, Ministry of Foreign Affairs** Official Messages, Note N ° 49/31, January 12th 1952: Sent by the Ambassador of Chile in Lima, Francisco Urrejola to the Chilean Minister of Foreign Affairs Fernando García Oldini. p. 5: “[...] la acción coordinada de las autoridades marítimas de los países afectados [...] una declaración internacional conjunta –basada en principios jurídicos- referente a los nuevos conceptos de dominio o jurisdicción sobre las aguas continentales, mucha {sic} más amplios que las clásicas normas de mar territorial de tres millas, ya abandonadas por todas las naciones”

the waters that constitute their heritage food value; all this without prejudice to the principle of freedom of navigation, that nobody intends to restrict.”¹⁸

For the reasons above mentioned, the Government of Chile sent to Perú and Ecuador a note inviting them to a conference to discuss these highly relevant issues. On August 11th, 1952, the Delegations of Perú, Ecuador and Chile met in the city of Santiago, Chile, at the First Conference on Exploitation and Conservation of Maritime Resources of the South Pacific. In his opening statement, the Foreign Minister of Chile, Fernando García Oldini, referred to the purpose of the meeting, which was “[...] consider the problems associated with the natural production of its seas, and especially to the protection, hunting and industrialization of the whale, primarily related to the food situation, not only of our peoples, but a large part of humanity”, noting the imperative that governments have “[...] to ensure its maintenance and safeguard, taking the necessary steps to ensure that in the ocean area over which extends its sovereignty can be controlled the interference of foreign business interests, that without the farsighted action of our nations, could lead to a steady and gradual extinction of this food value reserve vital to the future of our country.”¹⁹

The intention of the parties participating in the Conference, and its subject was to regulate the problems related to uncontrolled exploitation of marine resources of the sea which bathed their coast, through the adoption of common policies for the protection of the maritime heritage applying the concepts of sovereignty and jurisdiction. Already at the beginning of the Conference, one can see as that the legal figure whose creation was at stake was not territorial

¹⁸**CHILE, Ministry of Foreign Affairs** pp. 5-6 ob. cit. p.12: “[...] en efecto, las condiciones de la vida moderna han alterado en tal proporción las viejas normas, que resulta visible la extensión de las tres millas fijada por las costumbres internacionales y las legislaciones nacionales al mar territorial de cada país. Todos los países tienden hoy a extender su dominio sobre los mares que los bordean en una medida que les permite no sólo atender a su seguridad política y su defensa, sino también proteger las riquezas contenidas en el suelo y subsuelo submarino y en las aguas que constituyen su patrimonio alimenticio; todo esto sin perjuicio del principio de la libertad de navegación, que nadie pretende cohartar” {sic}.

¹⁹**CHILE, Ministry of Foreign Affairs** Record of the inaugural session of the Conference on Exploitation and Conservation of the Maritime Resources of the South Pacific, August 11th 1952, p. 1: “[...] considerar los problemas relacionados con la producción natural de sus mares y, en especial, con la protección, caza e industrialización de la ballena, fundamentalmente ligados a la situación alimenticia, no solo de nuestros pueblos, sino de una gran parte de la humanidad”, “[...] velar por su mantenimiento y salvaguardia, adoptando las medidas necesarias para que en la región oceánica sobre la cual se extiende su soberanía pueda ser controlada la interferencia de intereses comerciales extraños que, sin la acción previsoras de nuestras naciones, podrían provocar una extinción paulatina y constante de esta reserva alimenticia, vital para el futuro de nuestros países”.

sea or an extension of it, but a new maritime area that required regulation and agreement among the parties.

1.2.1 The Declaration on a Maritime Zone or Declaration of Santiago of 1952

The Declaration on a Maritime Zone, signed by Chile, Ecuador and Perú, was the first joint document signed on the issue of sovereignty over the 200 nautical miles. As it is evident from its preamble, the South East Pacific countries understood that it was an obligation to assure their peoples living conditions and adequate economic development through protection and conservation of natural resources in the sea and to prevent that the exploitation of these resources would jeopardize such wealth and affects the livelihoods and economic development of their peoples.

In the dispositive part of the Declaration signatory countries “[...] proclaim as a principle of their international maritime policy, that each of them possesses sole sovereignty and jurisdiction over the area of sea adjacent to the coast of its own country, and extending no less than 200 nautical miles from the said coast”²⁰ including “[...] sole sovereignty and jurisdiction over the sea floor and subsoil thereof.”²¹ The sovereignty and exclusive jurisdiction was to “[...] keep and ensure the natural resources to their respective peoples”²² and to “[...] conserve, develop and use the riches”²³ contained in the ocean. “In the insular territory the 200 mile zone will apply to the contour of the islands or group of islands.”²⁴

The three countries also recognize the necessary limitations to the exercise of sovereignty and jurisdiction by virtue of international law in favor of the innocent and inoffensive passage, through the vindicated zone, by ships of all nations.

²⁰**CHILE, Ministry of Foreign Affairs** Record of the Second Session of the Legal Commission of the Conference on Exploitation and Conservation of the Maritime Resources of the South Pacific, August 12th 1952, p. 3: “[...] proclaman como norma de su política internacional marítima, la soberanía y jurisdicción exclusivas que a cada uno de ellos corresponde sobre el mar que baña las costas de sus respectivos países hasta una distancia mínima de 200 millas marinas.”

²¹**CHILE, Ministry of Foreign Affairs** ob. cit. p.14 “[...] la soberanía y jurisdicción exclusiva sobre el suelo y el subsuelo que a ella corresponde.”

²²**CHILE, Ministry of Foreign Affairs** ob. cit. p. 14 “[...] conservar y asegurar para sus pueblos respectivos las riquezas naturales”.

²³**CHILE, Ministry of Foreign Affairs** ob. cit. p.14 “[...] para la conservación, desarrollo y aprovechamiento de esas riquezas”.

²⁴**CHILE, Ministry of Foreign Affairs** ob. cit. p.14 “[...] proclaman como norma de su política internacional marítima, la soberanía y jurisdicción exclusiva que a cada uno de ellos corresponde sobre el mar que baña las costas de sus respectivos países, hasta una distancia mínima de 200 millas marinas desde las referidas costas.”

The Santiago's Declaration refers, as the unilateral declarations made by Chile and Perú to the exclusive sovereign and jurisdictional rights for purposes mainly related to the conservation, development and exploitation of the riches located in the vindicated areas. It becomes clear that the area claimed was not considered an extension of the territorial sea, but as a new maritime area where the coastal State exercises specific powers for the purposes already identified. The mention of innocent passage actually refers to the freedom of navigation, because the vindicated zone was not understood as territorial sea and the figure of innocent or harmless passage takes place only within the territorial sea of each States. Also, "[...] since the right of innocent passage is an integral element of the legal regime of the territorial sea, it needs not to have been expressly mentioned."²⁵

It is worth a mention that the Declaration of Santiago is important because in it "[...] the essential elements of the EEZ were brought together for the first time". As to the object, "[...] the claim covers all resources – that is, it takes in the living resources in the waters of the zone as well as the renewable and non- renewable resources of the sea bed and the subsoil beneath the zone". As to [...] the nature of the rights claimed the rights are exclusive rights of exploration, conservation, and exploitation or utilization; and as the area covered by the claim: an area of 200 miles of the sea adjacent to the coastal State."²⁶

1.2.2 Supplementary Convention to the Declaration of Sovereignty over the area of 200 miles

Between October 4th and October 8th of 1954, it took place the second meeting of the Permanent Commission of the South Pacific. The meeting ended up in a series of documents and agreements related to the zone of 200 nautical miles which needed to be subject to the approval of the member countries. The Permanent Commission agreed to convene Chile, Ecuador and Perú to the Second Conference on the Exploration and Conservation of Maritime Resources of South Pacific, which was held in the city of Lima, between the 1st and 4th December of that year.

In this Second Conference the Supplementary Convention to the Declaration of Sovereignty over the area of 200 miles was adopted. By this Convention, South Pacific countries reaffirm the proclamation of sovereignty over the zone made under the Declaration of Santiago and

²⁵GARCIA AMADOR, Francisco p.23 ob. cit. p 8

²⁶GARCIA AMADOR, Francisco, p.23 ob. cit. p. 8

commit themselves to proceed by common agreement for the legal defense of the principle of sovereignty over the area and to provide cooperation in case of claims, protests or violation of the zone by third States. They also commit not to conclude agreements which involve a decrease of the sovereignty over the said area.

The importance of this Convention is to reassert the claims of the area of 200 miles and engage the South Pacific countries to work together as a bloc with regard to the defense of this new space to the international community. This new marine space was not indifferent to the great powers, which opposed strongly to it. Hence, it was of absolute importance that the three creators of this new maritime area act together to defend their rights.

We also note that the draft Supplementary Convention to the Declaration of Sovereignty over the area of 200 miles approved by the Permanent Commission of the South Pacific at its second meeting mentioned in Article I that “Chile, Ecuador and Perú will come to common agreement on the legal defense of the principle of sovereignty over the **territorial sea** of 200 miles”²⁷, phrase that in the Second Conference on Exploitation and Conservation of Maritime Resources of the South Pacific was amended to read: “Chile, Ecuador and Perú, come to common agreement on the legal defense of the principle of sovereignty over **maritime zone** until a minimum distance of 200 nautical miles”²⁸. This change is a clear indication that the zone of 200 nautical miles was never understood as an extension of the territorial sea but as a new maritime space with specific competences and different nature than the territorial sea area.

1.2.3 Convention on the Special Maritime Frontier Zone

The Convention on the Special Maritime Zone was also signed during the second meeting of the Conference on Exploitation and Conservations of the Maritime Resources of the South Pacific. Even when it is not specifically oriented towards the 200 nautical miles maritime zone it is important because makes clear that the signatory countries ratified the position towards an exclusive jurisdiction upon said zone. The Convention refers to involuntary violations

²⁷**CHILE, Ministry of Foreign Affairs** Final Record of the Second Meeting of the Permanent Commission of the Conference on Exploitation and Conservations of the Maritime Resources of the South Pacific, October 8th 1954, p. 4: “Chile, Ecuador y Perú procederán de común acuerdo en la defensa jurídica del principio de la soberanía sobre el mar territorial de 200 millas.”

²⁸**CHILE, Ministry of Foreign Affairs** Final Record of the Second Conference on Exploitation and Conservation of the Maritime Resources of the South Pacific, October 8th 1954, p.6: “Chile, Ecuador y Perú, procederán de común acuerdo en la defensa jurídica del principio de la soberanía sobre zona marítima hasta una distancia mínima de 200 millas marinas”

generated along the maritime boundary of the signatory countries by small boats, crewed by seafarers with limited knowledge and nautical tools, and the fact that the sanctions applied in cases such as those generated frictions that affected the spirit of collaboration that should exist between the signatories of the Declaration of Santiago.

To avoid these problems a special zone extending seaward from 12 nautical miles of the coast was established. This zone extended over 10 nautical miles wide to the north and south of the parallel which is the maritime boundary between the countries. Accordingly, the unintended presence of referring boats will not be considered as a violation of the waters of the sea area, without granting rights to hunting or fishing operations within the area. It was also agreed that fishing or hunting within the zone of 12 nautical miles from the coast is reserved exclusively for nationals of each country. So, as distinguishing between the areas in which those infringements would be tolerated and where they would not be so.

1.2.4 Agreement on the Measures of Surveillance and Control in the Maritime Zones of Signatory Countries

The Agreement on Measures of Surveillance and Control in the Maritime Zone of the Signatory Countries is important because it acknowledges general competences appertaining to States on the extended maritime zone of 200 nautical miles. This Agreement states that it is for each signatory country to carry out surveillance and control over the exploitation of the resources of its Maritime Zone through the agencies and means it deems necessary. In addition it requires that ships or aircrafts of the three signatory countries transmit to the designated Authority of every country, as much information as possible about the location of fishing vessels and the course of its sailing. It requires that Consuls of the signatory countries report the preparation, departure, transit, stop, supplying with provisions and other records relating to whaling and fishing expeditions departing or passing through the ports that are accredited and whose destination, either real or apparent, is the South Pacific. Finally, indicates that any person is empowered by the Agreement to denounce before the authorities the presence of maritime vessels engaged in the illegal exploitation of marine resources in the Maritime Zone.

From the different Conventions and Agreements signed by the countries of the South East Pacific, and the Unilateral Declarations of Chile and Perú, we can conclude that the sovereignty and jurisdiction were claimed over the entire continental shelf adjacent to the coasts and islands irrespective of the depth, the soil and subsoil and the superjacent waters to a distance of 200 nautical miles from baselines in order to reserve, protect, preserve and utilize natural resources and wealth of any kind and prevent that an irrational exploitation of natural resources located in that area. The freedom of navigation through the maritime zone of 200 nautical miles was always respected and resulted unmodified by the different Agreements and Declarations. The idea was to prevent threats to the existence, integrity and preservation of wealth to the detriment of people who hold in their seas irreplaceable sources of livelihood and economic resources that are vital.

Also, the mention of 12 nautical miles from the coast, in which the fishing or hunting activities was reserved exclusively for nationals of each country made in the Convention on the Special Maritime Frontier Zone of 1954, is to us a manifestation of the notion that these countries have on the extension of the territorial sea of each one.

CHAPTER II: THE EXCLUSIVE ECONOMIC ZONE AND THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA

2.1 Participation of the South East Pacific countries in the Third United Nations Conference on the Law of the Sea:

2.1.1 Background

2.1.1.1 The Geneva Conventions:

The necessity of an adequate regulation of the seas was already part of the work of the International Law Commission in its early work devoted to the renewal of the Law of the Sea. Accordingly at its first session in 1949 the International Law Commission drew up a provisional list of topics whose codification was considered necessary and feasible. Among the items on that list there were the regimes of the high seas and the regime of the territorial sea. These two subjects were studied during 7 years until 1956, when the final Report was presented with a Draft of Articles concerning the Law of the Sea.

With regard to the territorial sea, the Draft recognized that the sovereignty of a State extended to a belt of adjacent sea to its coast and the airspace over it as well as to the underneath bed and subsoil. The Commission also recognized that the international practice was not uniform with regard to the breadth of the territorial sea, but in any case international law does not permit an extension of the territorial sea beyond the twelve miles.

With regard to the high seas, it was defined as all parts of the sea that are not included in the territorial sea or the internal waters of a State where States have the freedom of navigation; freedom of fishing; freedom to lay submarine cables and pipelines and freedom to overfly. Article 66 of the Draft referred also to the contiguous zone as a zone of the high seas contiguous to the territorial sea, where coastal State may exercise the control necessary to prevent infringement of its customs, fiscal or sanitary regulations within its territory or territorial sea and punish related violations when committed in those spaces.

Finally, the draft referred to the continental shelf recognizing that “[...] the coastal State exercises over the continental shelf sovereign rights for the purpose of exploring and exploiting its natural resources.” And that “[...] the rights of the coastal State over the

continental shelf do not affect the legal status of the superjacent waters as high seas, or that of the airspace above those waters”.²⁹

Giving the importance of the subject, the International Law Commission recommended that “[...] the General Assembly should summon an international conference of plenipotentiaries to examine the Law of the Sea, taking into account not only of the legal but also of the technical, biological, economic and political aspects of the problem, and to embody the results of its work in one or more international conventions or such other instruments as it may deem appropriate.”³⁰

By United Nations Resolution 1105 (XI) of 21st February, 1957, the General Assembly invited all countries to an International Conference of plenipotentiaries to examine the Law of the Sea. This Conference took place in Geneva from 24th February to 27th April of 1958, having as basis the work of the International Law Commission and was attended by 86 States. Product of this Convention 4 conventions were opened to signature: the Convention on the Territorial Sea and the Contiguous Zone; the Convention on the High Seas; the Convention on the Continental Shelf; the Convention on Fishing and Conservation of the Living Resources of the High Seas; and the Optional Protocol of Signature concerning the Compulsory Settlement of Disputes. Chile, Ecuador and Perú signed, and signed only, the Convention on the Continental Shelf because it recognizes to coastal States some rights over the continental shelf as exploration and exploitation. But was not ratified by them because did not recognize the same sovereign rights over the superjacent waters under that continental shelf which remain being understood as high seas.

Nevertheless, Chile, Ecuador, Perú made a statement at the end of the Geneva conference declaring their intention to “[...] seize every opportunity, whether in negotiations with other countries or in future international conferences, in order to establish and expand a more righteous order of the oceans, which will effectively safeguard the special rights recognized to coastal States to protect its economy and livelihood of the people. The lack of international consensus, sufficiently comprehensive and fair, balanced and reasonable to recognize all the rights and interests, and the results obtained here, leave with full force the regional system of

²⁹**INTERNATIONAL LAW COMMISSION** Report of the International Law Commission on the Work of its Eighth Session, July 4th, 1956. Draft of Articles Concerning the Law of the Seas: Articles 68-69 [Online] IN: <<http://www.un.org/law/ilc/index.htm>> {Date of Review: 15.11.08}

³⁰**INTERNATIONAL LAW COMMISSION** Report of the International Law Commission on the Work of its Eighth Session, July 4th 1956. Par. 28, p. 256 [Online] IN: <<http://www.un.org/law/ilc/index.htm>> {Date of Review: 15.11.08}

the South Pacific, which is aimed to protect vital situations for the countries in this region until fair and human solutions are found”³¹

In general the Conventions were in content very similar to the International Law Commission Draft of 1956, being the breadth of the territorial sea and the existence of exclusive fishing rights for coastal States the main subjects in which States could not agree. This unresolved topics were treated in the Second Geneva Conference on the Law of the Sea called by the General Assembly by virtue of the Resolution 1307 (XIII) of 10th December, 1958. Unfortunately, this Second Geneva Conference was also unsuccessful to achieve an agreement on the maximum breadth of the territorial sea and on the establishment of exclusive fisheries zones for coastal States. There where made various proposals but none obtain the necessary two-third majority in plenary.

Ten years passed before the General Assembly called for a new Conference on the Law of the Sea.

On December 17th, 1970, the General Assembly of the United Nations adopted the Resolution 2750 (XXV) by which was decided the convening of a “ [...] Conference on the Law of the Sea which would deal with the establishment of an equitable international regime – including an international machinery- for the area and the resources of the sea bed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction, a precise definition of the area, and a broad range of related issues including those concerning the régimes of the high seas, the continental shelf, the territorial sea,”³² among others.

The first period of session of the Third Conference on the Law of the Sea, took place in New York from December 3rd to December 14th, 1973 and was closed in Montego Bay on December 10th, 1982. In between were celebrated 17 meetings in 12 periods of sessions and in

³¹ **RONCAGLIOLO HIGUERAS, Nicolás** La Comisión Permanente del Pacífico Sur frente al Siglo XXI, Lima: Perú, Fundación Academia Diplomática del Perú, 2000, p. 11 “[...] aprovechar cualquier oportunidad, sea en negociaciones con otros países, sea en futuras conferencias internacionales, a fin de que se establezca y se extienda un régimen del mar más justiciero, que salvaguarde de modo efectivo el reconocido derecho especial de los Estados ribereños para defender su economía y la subsistencia de las poblaciones. La falta de un consenso internacional, lo bastante comprensivo y justo, que reconozca y equilibre razonablemente todos los derechos e intereses, así como los resultados aquí obtenidos, dejan en plena vigencia el sistema regional del Pacífico Sur, que representa la protección de situaciones vitales para los países de esta región mientras no se encuentren soluciones justas y humanas”

³² **RESOLUTION 2750 (XXV) GENERAL ASSEMBLY, UNITED NATIONS** [Online] IN: <<http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/350/15/IMG/NR035015.pdf?OpenElement>> {Date of Review: 15.11.08}

it participated 165 countries and many others non governmental organizations, nations in process of independence, specialized organizations and governmental organizations. During the First Period of session organizational issues where resolved. For the discussion of substantive topics of the Conference, the General Assembly of the United Nations convened by Resolution 3067 (XXVIII) to the second period of sessions of the Conference to be held in Caracas from June 20th to August 29th, 1974. Later we will return to this issue.

2.1.1.2 Latin-American Declarations:

Chile, Ecuador and Perú participated in the elaboration of two Declarations made by Latin American countries in order to define and prepare their position to this new Conference on the Law of the Sea. The first one was the Montevideo Declaration on the Law of the Sea, of 8th May, 1970, adopted by Argentina, Brazil, Chile, Ecuador, El Salvador, Nicaragua, Panamá, Perú and Uruguay. In the preamble of the Declaration the signatory countries recognize that “[...] there exists a geographic, economic and social link between the sea, the land, and its inhabitants, which confers on the coastal peoples legitimate priority in the utilization of the natural resources provided by their marine environment [...] for that reason the limits of national sovereignty and jurisdiction over the sea, its soil and its subsoil, and the conditions for the exploitation of their resources, must take account of the geographical realities of the coastal States and the special needs and economic and social responsibilities of developing States.”³³

Further states “[...] that a number of declarations, resolutions and treaties [...] concluded between Latin American States, embody legal principles which justify the right of States to extend their sovereignty and jurisdiction to the extent necessary to conserve, develop and exploit the natural resources of the maritime area adjacent to their coasts, its soil and its subsoil [...] to a distance of 200 nautical miles from the baseline of the territorial sea”³⁴

³³**DECLARATION OF MONTEVIDEO** [Online] IN:
<<http://www.intfish.net/igifl/docs/docs/1970/decs/montevideo.pdf>> {Date of Review: 20.11.08}

³⁴**DECLARATION OF MONTEVIDEO** [Online] IN:
<<http://www.intfish.net/igifl/docs/docs/1970/decs/montevideo.pdf>> {Date of Review: 20.11.08}

The Declaration declares 6 basic principles of the Law of the Sea:

1. the right of coastal States to avail themselves of the natural resources of the seas adjacent to their coasts and of the soil and subsoil thereof in order to promote the maximum development of their economies and to raise the levels of living of their peoples;
2. the right to establish the limits of their maritime sovereignty and jurisdiction in accordance with their geographical and geological characteristics and with the factors governing the existence of marine resources and the need for their rational utilization;
3. the right to explore, to conserve the living resources of the sea adjacent to their territories, and to establish regulations for fishing and aquatic hunting;
4. the right to explore, conserve and exploit the natural resources of their continental shelves to where the depth of the superjacent waters admits of the exploitation of such resources;
5. the right to explore, conserve and exploit the natural resources of the soil and subsoil of the sea-bed and ocean floor up to the limit within which the State exercises its jurisdiction over the sea;
6. the right to adopt, for the aforementioned purposes, regulatory measures applicable in areas under their maritime sovereignty and jurisdiction, without prejudice to freedom of navigation by ships and overflying by aircraft of any flag.”³⁵

The second step was the Lima Declaration, adopted in Lima on August 1970, three months after the Montevideo Declaration. The Lima Declaration was signed by the same countries which signed the Declaration of Montevideo plus Colombia, Dominican Republic, Guatemala, Honduras and México. Its content was very similar to the Declaration of Montevideo, being the main difference the addition of a provision relating scientific research activities.

These Declarations “[...] already pre-figured the principal elements of the concept of the exclusive economic zone”³⁶, like the extension of the zone: 200 maritime miles from baselines and the purpose of exercise sovereignty and jurisdiction over the area: conserve, develop and exploit the natural resources of the maritime area adjacent to their coasts, its soil and subsoil. Until this stage Chile, Ecuador and Perú expressed a similar position towards the 200 maritime miles zone, or at least that appears, to have been their position, within the Permanent Commission of the South Pacific. We will see that, the lack of harmony started in the second

³⁵ **DECLARATION OF MONTEVIDEO**, [Online] IN: <http://www.intfish.net/igifl/docs/docs/1970/decs/montevideo.pdf> {Date of Review: 20.11.08}

³⁶ **CONRAD EXTAVOUR, Winston**, p. 146, ob. cit. p.9

period of sessions of the Third United Nation Convention on the Law of the Sea, in Caracas, Venezuela.

2.1.2. The Territorial Group and the Group of the 77: Genesis of the different approaches among the South East Pacific countries

The second period of sessions of the Third United Nations Conference on the Law of the Sea was held in Caracas from June 20th to August 29th 1974. The United Nations Conference on the Law of the Sea was organized on the basis of 5 main bodies: The Bureau, composed by the President of the Conference, the Vice-Presidents (30 Vice-presidents were designed, representing different regions) the General Rapporteur, the President; Vice President and General Rapporteur of the Special Commissions and the President of the Drafting committee; a Commission about the Seabed, a Commission about Maritime Areas Subject to National Jurisdiction and High Seas, a Commission about Pollution, Research and Technology Transfer and the Drafting Committee.

Unofficially, the States gathered in groups according to their interests to make concrete proposals to the various commissions and coordinate positions on the topics covered in the main bodies. Three were the main groups: The group formed by Industrialized Countries, the Group of Land-Based producers and exporters of metals (conformed by developed and developing countries) and the group of developing countries or the Group of the 77. Inside the Group of the 77 two main groups can be distinguish with regard to the Exclusive Economic Zone, one who believe that the EZZ should be assimilated as territorial sea to the adequate protection of the coastal States rights (Territorialist Group) and one called “Zonist Group” which intended the new zone as a new maritime space and therefore not forming part of the territorial waters or of the high seas. Ecuador and Perú were part of the first and Chile and Colombia of the second.

2.1.2.1 The territorial Group:

During the second period of sessions of the Conference on the Law of the Sea, held at Caracas from June 20th to August 29th 1974, the President of the Ecuadorian Delegation, Luis Valencia Rodriguez, made a speech (on 8th of July, 1974) before the plenary of the Conference to pointed out the Ecuadorian position: “Ecuador has sovereignty and jurisdiction

over the sea adjacent to their coasts to a distance of 200 nautical miles from baselines.” “[...] Ecuador has proclaimed its sovereignty and jurisdiction over the integrity of the zone and can not be satisfied with a simple statement of recognition of uncertain powers to certain effect, in an area of 200 miles, because it means the risk that it will remove all or severely reduce it.” “[...] Developing coastal States have found that the natural resources that have been placed by nature at its disposal are precisely those that are in the seas that wash their shores, and yet have been exploited by the powers with fishing methods and procedures that have given even the extinction of many species”, “[...] Ecuador will not accept a convention that in some way undermine the integrity of their rights on renewable and nonrenewable resources in the zone of 200 miles and will defend these resources, not only because they belong , but because the country's future is closely linked to its national use”.³⁷

Later on the Negotiations, the delegation of Ecuador considered appropriate to use the term “Territorial Sea” for the area of 200 nautical miles and on July 16th, 1974, submitted a draft article for the area which indicated that: “The sovereignty of the coastal State extends beyond its shores and indoors or Archipelagic waters to an area called territorial sea. Sovereignty also extends to the soil and subsoil of the territorial sea and the airspace concerned. Every coastal State has the right to determine the breadth of its territorial sea to a distance not exceeding 200 nautical miles measured from the applicable baselines.”³⁸ This proposal was accepted by Perú, which considered “[...] that a territorial sea of 200 miles was reasonable”, and that the name given to that area is irrelevant as long as “[...] it is understood that the coastal State exercises

³⁷ **VALENCIA RODRIGUEZ, Luis**. El Ecuador y las 200 millas. Quito: Ecuador Instituto Panamericano de Geografía e Historia, 1977, pp.101-103: “El Ecuador tiene soberanía y jurisdicción sobre el mar adyacente a sus costas hasta la distancia de 200 millas náuticas, a partir de las líneas de base aplicables [...]El Ecuador ha proclamado su soberanía y jurisdicción sobre la integridad de la zona y no puede satisfacerse con el enunciado de un simple reconocimiento de competencias inciertas para determinados efectos, en una zona de 200 millas, pues ello significa el riesgo de que a ésta se la despoje de todo o se la disminuya gravemente [...] los Estados en vías de desarrollo con litoral marítimo han encontrado que los recursos colocados por la naturaleza a su disposición son precisamente aquellos que están en los mares que bañan sus costas y que, sin embargo, han estado siendo explotados por las potencias pesqueras con métodos y procedimientos que han determinado inclusive la extinción de numerosas especies[...] El Ecuador no aceptará una Convención que, de alguna manera, menoscabe la integridad de sus derechos sobre los recursos renovables y no renovables en la zona de 200 millas y defenderá estos recursos, no sólo porque le pertenecen, sino porque el futuro del país está íntimamente ligado a su nacional aprovechamiento.”

³⁸ **VALENCIA RODRIGUEZ, Luis** p.103, **IBID.**, : “La soberanía del Estado ribereño se extiende mas allá de sus costas y sus aguas interiores o archipelágicas a una zona adyacente denominada mar territorial. La soberanía también se extiende al suelo y subsuelo del mar territorial así como al espacio aéreo correspondiente. Todo Estado ribereño tiene el derecho a determinar la anchura de su mar territorial hasta una distancia no mayor de 200 millas náuticas, medidas desde las líneas de base aplicables.”

sovereignty and jurisdiction, notwithstanding the creation of a binary system for navigation, which guarantees freedom of passage”.³⁹

In the Second Session of the Second Committee the Delegate of Perú, Ambassador Arias Schreiber, said that “[...]It was common knowledge that one of the main reasons for the establishment of zones under national jurisdiction up to 200 miles in breadth was to enable coastal States to regulate and control their fisheries”, “[...] the right exercised by the coastal State [...] must be basically the same in both the territorial sea and the economic zone or patrimonial sea.” “[...] Perú had exercised its sovereignty over a 200-mile zone off its coast for almost 30 years” (and) “[...] it was not therefore prepared now to renounce its rights or its achievements”.⁴⁰ As the time passed, these countries strengthened their position declaring that “[...] the only acceptable and economically viable solution for the developing peoples laid in a doctrine of sovereignty over a 200-mile zone, in other words, a 200-mile territorial sea”.⁴¹

As Perú, other countries supported the Ecuadorian project of a 200-mile territorial sea: Brazil, Uruguay, El Salvador, Albania, Guinea, Somalia and Panamá. Other countries as the Congo, Benin, Togo and Ecuadorian Guinea supported the project later on. The project presented on July 16th, 1974 by the Ecuadorian Delegation was the starting point of the Territorial Group, because bring together all countries that consider adequate that the 200 miles zone were considered as territorial sea. The official establishment of the Group was on August 26th 1974, at the end of the Caracas Conference and was integrated originally by Brazil, Benin, Ecuador, El Salvador, Guinea, Congo, Madagascar, Peru, Somalia, Uruguay and Togo. The main objective of the group was to exchange points of view and structure a common strategy for the next periods of sessions, in order to defense and promote the thesis of a Territorial Sea of 200 nautical miles, which lasted until the very end of the United Nation Convention on the Law of the Sea.

³⁹ **VALENCIA RODRIGUEZ, Luis** p.105, IBID, : “[...] que un mar territorial de 200 millas es razonable[...] se entienda que el Estado ribereño ejerce soberanía y jurisdicción, sin perjuicio de la creación de un régimen binario para la navegación, que garantice la libertad de paso”

⁴⁰ **UNITED NATIONS.** Compilation of the Official Records of the Third United Nations Conference on the Law of the Sea IV: Second Committee, **IN:** The Law of the Sea: Master File containing References to Official Documents of the Third United Nations Conference on the Law of the Sea, New York, 1985, p. 230.

⁴¹ **UNITED NATIONS.** p.214 ob. cit. p. 26.

2.1.2.2 The Group of 77:

Chile and Colombia maintained the same concept developed in 1947 and embroiled in the different agreements signed within the Permanent Commission for the South Pacific. Together with other developing countries members of the Group of the 77 presented a Working Paper on the exclusive economic zone in which “[...] Article 2 proposes ‘sovereign rights’ for the purpose of exploring, exploiting, conserving and managing the natural resources, whether renewable or non-renewable, of the water column, the sea-bed and subsoil, as well as with regard to other economic activities, such as the production of energy from the water, currents and winds. The article goes on to claim that the coastal State has ‘jurisdiction’ with respect to regulation, control and preservation of the marine environment including pollution control and abatement and, finally, that the coastal State has ‘exclusive jurisdiction’ over scientific research and the establishment and use of artificial islands, installations, structures and other devices, customs, fiscal, health, public order and immigration.”⁴²

Following the same line, later on, Chile together with Canada, Island, Indonesia, Mauricio, Mexico, Norway and New Zealand submitted a project that proposed a territorial sea of 12 nautical miles and an Exclusive Economic Zone of 188 miles, in which States would have sovereign rights to exploit, explore and conserve the natural resources located in it. Chile believed that this conception balance adequately the interest of the third world developing countries and the greater powers and developed countries, and was compatible with the regional Agreements and the State’s practice. To Chile, the 200-mile zone was a *Sui Generis* zone, different from the high seas but also from the territorial sea in which States have exclusive rights for exploitation, exploration, protection and conservation of natural resources located in the area. This can be seen at the Statement made by Chile upon signature of the Final Act of the Third United Nations Conference on the Law of the Sea in which the delegation of Chile reiterates that the Government of Chile made an important contribution to the elaboration of the 200 mile exclusive economic zone “[...] having been the first to declare such a concept, 35 years ago in 1947, and having subsequently helped to define and earn it international acceptance”. Then indicates that: “[...] the exclusive economic zone has a *sui generis* legal character distinct from that of the territorial sea and the high seas. It is a zone

⁴²NANDAN, N Satya The exclusive Economic Zone, a Historical Perspective IN: FAO Essays in Memory of Jean Carroz: The Law and The Sea, 1987 [ONLINE] < <http://www.fao.org/docrep/s5280T/s5280t0p.htm> > {Date of Review :10.12.09}

under national jurisdiction, over which the coastal State exercises economic sovereignty and in which third States enjoy freedom of navigation and over flight, and the freedoms inherent in international communication.”⁴³ Colombia shared with Chile this point of view of the 200-miles zone.

These two different conceptions on the 200 maritime miles have coexisted along the years, and during the Third United Nations Conference on the Law of the Sea. Nevertheless, they did not affect a close cooperation among Parties of the South East Pacific System, created on the basis of the Declaration of Santiago, to which Colombia has acceded in 1978. The main difference among the postures supported by the countries was the nature of the competences projected to the area of 200 maritime miles. While Ecuador and Perú intended the 200 maritime miles as territorial sea: a projection of their territory, with no restriction but those given by the right of innocent passage; Chile and Colombia understood the zone as a zone in which countries have jurisdiction to certain purposes. In our opinion, it was the strong opposition of the developed countries to accept the exclusive economic zone as a new figure in the Law of the Seas, which led Ecuador and later Perú to toughen its position and to believe that the 200 miles zone as it was developed until then was not enough to protect the interests of the coastal States and that a territorial sea 200 miles zone would grant them a better position. One can also, think that this could be developed as a negotiation technique. As in any negotiating context, States adopted different positions, but through consensus they accommodated and made mutual concessions in order to obtain gains in significant areas and subjects.

Beside this difference on the competences that States should exercise on the area, Chile, Ecuador, Perú and Colombia, acted together in the duty to achieve the recognition of the 200 maritime miles zone and to create the conscience of the existence of this new figure in the Law of the Seas. A proof of this can be found on a letter dated April 28th 1982, sent by these countries to the President of the United Nation Conference on the Law of the Sea. In it one can read: “The Delegations of Chile, Colombia, Ecuador and Perú to the Third Conference on the Law of the Sea wish to point out that the universal recognition of the right of coastal State

⁴³**GOVERNMENT OF CHILE.** Statement Made Upon Signature, and Confirmed Upon Ratification [Online] IN: <http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm> {Date of Review: 11.12.08}

within the 200-mile limit provided for in the draft convention is a fundamental achievement of the countries members of the Permanent Commission for the South Pacific, in accordance with the basic objectives stated in the Santiago Declaration of 1952.” “[...] The Permanent Commission for the South Pacific [...] has the merit of having been the first to denounce the unjust practices existing in the maritime spaces and having proposed appropriate legal solutions, thereby contributing to the development of the new law of the sea”.⁴⁴

After 12 periods of sessions, the United Nations Convention on the Law of the Sea was adopted in 1982 with the favorable vote of 130 States, 17 abstentions and 4 votes against it, in New York, and opened for signature in Montego Bay, Jamaica, on December 10th 1982. 119 delegations signed the Convention. It has been in force since November 16th, 1994 and currently more than 130 States have become parties. It compiles rules concerning the use and utilization of ocean spaces, its soil and subsoil, governs navigation, research, conservation, exploration and exploitation of oceans and their riches, and also contains a chapter on the peaceful settlement of disputes that may arise on application and interpretation of the Convention.

With regard to the 200-mile zone, the figure adopted was designed in a way that it could attract wide support among States. Among Institutions, the exclusive economic zone in which States have exclusive sovereign rights for certain purposes and exclusive jurisdiction on certain activities is one of the key ones. The exclusive economic zone provides a balanced approach to the right claimed, interest and positions of the great powers, as well as developed and developing countries and it gives to all of them adequate legal protection in their mutual relations.

⁴⁴**DOCUMENT A/CONF.62/L.143, UNITED NATIONS.** IN: “The Law of the Sea: Master File containing References to official Documents of the Third United Nations Conference on the Law of the Sea” New York, 1985, p. 249.

2.1.3. Principles adopted by the III United Nations Convention on the Law of the Sea

The Convention is the result of one of the most outstanding diplomatic conferences recorded in the annals of international relations. Major achievements resulted after this negotiating effort. Its principles and rules were adopted with the support of almost all the countries of the world and its provisions have been widely accepted as the adequate rules governing the international Law of the Sea because it represents the progressive development of international law and brings together the rules and customs related to the Law of the Sea. We cannot analyze all the principles and rules set by the Convention, but we will summarize the main ones related to our study:

2.1.3.1 Principles inspiring the Convention:

In its preamble, one can find the principles that inspire the Convention, which are very similar to the principles established in the Charter of the United Nations that rules all international relations:

A. Economic and social importance of the seas: The Convention will “[...]promote economic advancement of all peoples in the world”⁴⁵ and will contribute to the “[...] realization of a just and equitable international economic order which takes into account the interest and needs of mankind as a whole”⁴⁶ The importance of the seas for the development of the developing peoples and the importance of a proper administration of their benefit for all mankind was manifested in all the periods of sessions of the Convention and was rescued as a principle of paramount importance. Oceans have important resources; many of them still undiscovered which must serve to the development of all mankind. One manifestation of this principle is the establishment of the International Seabed Authority, responsible of managing and regulates the use of the seabed in post of all mankind.

B. Protection of the Environment: It aims at “[...] promoting the equitable and efficient utilization of the resources of the sea, the conservation of their living resources, and the study, protection and preservation of the marine environment”⁴⁷. The Convention embodies the

⁴⁵UNITED NATIONS, United Nations Convention on the Law of the Sea, Preamble, par. 7. [Online] IN: <http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm> {Date of Review: 11.11.08}

⁴⁶UNITED NATIONS, Preamble par. 5 ob. cit. p. 30

⁴⁷UNITED NATIONS, Preamble par. 4 ob. cit. p. 30

principle of protection and conservation of the environment, as it can be seen in many of its articles. This constant concern for the care of the marine environment can be seen in many of its articles. At this stage, what is important is to assess to what extent they have become customary principles.

C. Maintenance and strengthened of peace: through the peaceful use of the seas and the oceans, the facilitation of international communications, and the establishment of an adequate dispute settlement system.

D. Justice and equal rights: The Convention is concerned not only to regulate ocean's spaces for the coastal States: it also takes care of landlocked States who may also enjoy the right to have access to the oceans and take advantage of marine resources in accordance with the rules the Convention establishes. The proper dispute settlement system not only supports a peaceful resolution of problems but also is structured around a compulsory system, and provided the establishment of a specialized Tribunal on Law of the Sea, ensuring adequate protection of rights of States in dispute.

E. Certainty: Being the Convention a regulatory body of the oceans accepted by the vast majority of States in the world, produced by the consensus reached during years of negotiations; it provides certainty and security about what are the rules governing the ocean's spaces, the use of their resources and rights and obligations of coastal states and makes the practice of most States is the consistent and uniform.

F. Cooperation and friendly relations among all nations: through the establishment of various institutions such as the International Seabed Authority composed by several organs, the International Tribunal for the Law of the Sea or The Commission on the limits of the Continental Shelf. The Convention establishes rules for global and regional cooperation, and is designed for promoting friendly and cooperative relations among nations. Among the issues that are addressed by this treaty, the transfer of technology from developed countries to developing countries was undoubtedly an important factor in the final conception of a global Convention.

2.1.3.2 Rules Governing Maritime Spaces:

One of the fundamental pillars of the Convention is the agreement on maritime spaces appertaining to a coastal States as well as the regime for common spaces. The Convention is a comprehensive set of rules composing a regime for the maritime spaces. A synthetic view of these situations is as follows:

A. Territorial Sea: “The sovereignty of a coastal State extends, beyond its land territory and internal waters, and in the case of archipelagic States, its archipelagic waters, to an adjacent belt of sea, described as territorial sea. This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil”⁴⁸ ; “[...] every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines.”⁴⁹

The territorial sea, is part of the territory of the coastal State and in it States exercise the same sovereignty and jurisdiction that is exercised in the land territory, thus States has exclusive rights on fisheries, the exploitation of the seabed and its subsoil, the administration of the natural resources; States can regulate the fishing, shipping or immigration activities and so on. The only restriction is to ensure the innocent passage of foreign ships through the territorial sea.

The innocent passage consists of the navigation through the territorial sea of another State by a foreign ship, to traverse that sea without entering internal waters or calling at a roadstead or port facility outside the internal waters, or to go into inland waters or leave them, or call at one of these roadstead or port facilities or leave them. The innocence of the ship is a problem of classification of their conduct (respect for peace, security, order, laws and regulations of the State)⁵⁰ and exists for ships of all States whether or not the domain of maritime spaces. It must be continuous and expeditious, but exceptions are recognized⁵¹. States may temporarily suspend this right for reasons of safety compliance with the requirements of UNCLOS⁵² and adopt laws and regulations relating to that passage.⁵³

⁴⁸ UNITED NATIONS, Article 2 ob. cit. p.30

⁴⁹ UNITED NATIONS, Article 3 ob. cit. p.30

⁵⁰ UNITED NATIONS, Article 19 ob. cit. p.30

⁵¹ UNITED NATIONS, Article 18 N ° 2 ob. cit. p.30

⁵² UNITED NATIONS, Article 25 N ° 3 ob. cit. p.30

⁵³ UNITED NATIONS, Article 21 ob. cit. p.30

B. *Contiguous Zone*: Is a zone contiguous to the territorial sea, in which coastal State may exercise the control necessary to “[...] prevent infringements of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea and punish the infringement of the above laws and regulations committed in its territory or territorial sea. The contiguous zone may not extend beyond the 24 nautical miles from the baselines from which the breadth of the territorial sea is measured”⁵⁴

C. *Continental Shelf*: “The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance [...] The continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the seabed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof [...] In any case; the outer limit of the continental shelf shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured”⁵⁵

The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources [...] if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State.⁵⁶ Every State has the right to lay submarine cables and to construct artificial islands, installations and structures on the continental shelf.

D. *Exclusive Economic Zone*: It correspond to an area beyond and adjacent to the territorial sea. The breadth of this exclusive economic zone cannot exceed 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. The Convention gives no definition of the zone, merely stating what rights, jurisdiction and obligations the coastal State exercises over the area. We will analyze it later in detail.

⁵⁴ UNITED NATIONS, Article 33 ob. cit. p.30

⁵⁵ UNITED NATIONS, Article 76 ob. cit. p.30

⁵⁶ UNITED NATIONS, Article 77 ob. cit. p.30

E. *High Seas*: The high sea is “[...] all parts of the sea that are not included on the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in archipelagic waters of an archipelagic State.”⁵⁷ In it States have freedom of navigation, and over flight, and freedom to lay submarine cables and pipelines, to construct artificial island and other installations, freedom of fishing and freedom of scientific research, subject to the conditions laid down in the Convention⁵⁸ and the duty to prevent piracy, render assistance, cooperate in the prevention of the illicit traffic in narcotic drugs, to name a few. The high sea is reserved for peaceful purposes⁵⁹ and no State may validity purport to subject any part of the high seas to its sovereignty⁶⁰. All States have the same rights and duties in the high seas.

F. *The Area*: The Area “[...] means the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction”⁶¹ , “[...] no State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or natural or juridical person appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognized.”⁶²

The rights and resources located in the Area are vested in mankind as a whole, and should be used for peaceful purposes solely and for its administration there was established the Seabed Authority which is in charge of taking care of everything related to the Area.

G. *Internal Waters*: They consist of waters situated behind the baselines. In the case of bays whose input mouth do not exceed 24 miles wide, or those found to the interior of the baselines of the territorial sea, namely those that go into the land territory or are located within the existence of. They can be sweet or seawater. The State is the absolute owner of these and there is no figure of innocent passage in them.

⁵⁷ UNITED NATIONS, Article 86 ob. cit. p.30

⁵⁸ UNITED NATIONS, Article 87 ob. cit. p.30

⁵⁹ UNITED NATIONS, Article 88 ob. cit. p.30

⁶⁰ UNITED NATIONS, Article 89 ob. cit. p.30

⁶¹ UNITED NATIONS, Article 1 ob. cit. p.30

⁶² UNITED NATIONS, Article 137 ob. cit. p.30

2.1.3.3 Rules Governing the Delimitation of Maritime Spaces:

With regard to the delimitation of maritime spaces, the Convention established three main rules:

A. *Territorial Sea*: Article 2 of the Convention states that the sovereignty of a coastal State extends, beyond its land territory and internal waters, and in the case of archipelagic States, its archipelagic waters, to an adjacent belt of sea, described as territorial sea. Then Article 3 sets the breadth of it up to a limit of 12 nautical miles from the baselines.

Baselines can be of two types: normal baselines and straight baselines. The first is the general rule, and correspond to the low along the coast. The second type is the exception, since it can only be used when the coast have deep holes or notches, or there are islands along the coast in the immediate vicinity, are lines connecting certain points which strokes must follow the general direction of the coast.

The baselines of each State should appear on charts of a scale appropriate to specify their location or lists of geographical coordinates of points in each of which is specifically the geodetic datum, published by the State and deposited with the UN General Secretary.

The delimitation of the territorial sea between States with opposite or adjacent coasts, is contained in article 15. In this case “[...] neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured”. In any case, “[...] provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith.”

B. *Exclusive Economic Zone*: In the case of the exclusive economic zone the extension can not be more than 200 nautical miles from the baselines from which is measure the breadth of the territorial sea. The rule of delimitation in case of States with opposite or adjacent coasts is established in article 74. According to this article “The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution” in case States cannot reach an agreement, the same articles established the manner to achieve it. In any case this rule does not apply

“[...] where there is an agreement in force between the States concerned, questions relating to the delimitation of the exclusive economic zone”

C. The Continental Shelf: The continental shelf is defined as the natural prolongation of the land territory to the continental margin's outer edge, or 200 nautical miles from the coastal state's baseline, whichever is greater. State's continental shelf may exceed 200 nautical miles until the natural prolongation ends. However, it may never exceed 350 nautical miles from the baseline; or it may never exceed 100 nautical miles beyond the 2,500 meter isobaths. In case of States with opposite or adjacent coasts “[...] shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.” In case that States cannot reach an agreement, the same articles established the manner to achieve it. In any case this rule does not apply “[...] where there is an agreement in force between the States concerned, questions relating to the delimitation of the exclusive economic zone”.

UNCLOS contains 3 rules that refer explicit reference to the delimitation of marine areas. Articles 74 and 83 of the United Nations Convention on the Law of the Sea, stipulate that the delimitation should be done by agreement of the States concerned, and this agreement should be carried out taking into account, the international law in order to achieve an equitable result. For its part, the Article 15 of UNCLOS concerning the delimitation of territorial sea, states that in the absence of prior agreement, the delimitation shall use the equidistance method, unless there are historical or other special circumstances, which would make necessary to delimit the territorial sea of another form.

2.1.4 Legal nature of the EEZ according to UNCLOS. Content of the rights attributed to coastal states, duties and third States.

The United Nations Convention on the Law of the Sea regulates the exclusive economic zone in Articles 55 to 73. In those articles there is not an explicit definition of what is meant by exclusive economic zone; nevertheless from its articles is possible to develop a concept of the area. According to Article 55:

a) “*The Exclusive Economic Zone is an area beyond and adjacent the territorial sea*”: From this phrase we draw three conclusions: That the exclusive economic zone is not a part of the

territorial sea, that States does not have the same general sovereignty over the area as they have in the territorial sea and that the legal nature of the exclusive economic zone is not the same as the that of the territorial sea.

b) “[...] *subject to the specific legal regime established in this part*” : Article 31 of the Vienna Convention on the Law of the Treaties states that[...]“a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”⁶³ As the dictionary indicates the common meaning of the word ‘specific’ is “special, distinctive or unique”⁶⁴ or “which is itself of something and what characterizes and distinguishes it from other things”⁶⁵. If we think that these rules were established in an international Conference, which had as purpose to determine and regulate the new Law of the Sea, there is no doubt that when the article refers to a specific legal regime, it refers to the distinctive and unique regime applicable to the exclusive economic zone. This regime is different from those applicable to other maritime areas contained in the Convention; so, the exclusive economic zone is a maritime space independent and different from the others recognized in it, and jointly with its customary legal foundation it is also important to consider the provisions set out in the Convention.

c) “[...] *under which the rights and jurisdiction of the coastal States and the rights and freedoms of other countries are governed by the relevant provisions of this Convention*”.
¿Which are the rights, obligations and freedoms that States have over the area?

2.1.4.1 Rights and Obligations of the Coastal States.

A. Rights:

According to article 56, States have “sovereign rights” over the area for activities which are essential according to its natures: for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds. The sovereign rights over the natural resources (living or not living)

⁶³ **VIENNA CONVENTION ON THE LAW OF THE TREATIES, 1969** [Online] IN: <http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf> {Date of Review: 10.01.09}

⁶⁴ **THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, 4th Edition** [Online] IN: <<http://www.bartleby.com/61/54/S0615400.html>> {Date of Review: 10.01.09}

⁶⁵ **DICCIONARIO DE LA REAL ACADEMIA ESPAÑOLA** [Online] IN: <www.rae.es> {Date of Review: 10.01.09}

located in the said area, or any other economical activity that take place in it, are essential to its regime.

The article also gives us a concrete indication of the geographical extension of the exclusive economic zone, which covers extended areas of the ocean in which the natural resources or the economical activities take place, given that they comprise the waters superjacent to the seabed and the seabed and its soil. Part V of the Convention regulates mainly the fisheries activities that took place in the superjacent waters, because the natural resources located in the bed, the seabed and its soil are regulated in Part VI of the Convention, which deals with the continental shelf. As the International Court of Justice said, in the case of the Delimitation of the Continental Shelf between Libya and Malta, “[...] the 1982 Convention demonstrates (that) the two institutions - continental shelf and exclusive economic zone – are linked together in modern law. Since the rights enjoyed by a State over its continental shelf would also be possessed by it over the sea-bed and subsoil of any exclusive economic zone which it might proclaim [...] there can be a continental shelf where there is no exclusive economic zone (but) there cannot be an exclusive economic zone without a corresponding continental shelf [...] (this explain that) although the institutions of the continental shelf and the exclusive economic zone are different and distinct, the rights which the exclusive economic zone entails over the sea-bed of the zone are defined by reference to the régime laid down for the continental shelf.”⁶⁶

B. Jurisdiction

According to article 56 States also have “jurisdiction” in 3 main areas: the establishment and use of artificial islands, installations and structures; marine scientific research and the protection and preservation of the marine environment. Thus, the coastal State have jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations over the said activities “[...] have exclusive right to construct and to authorize and regulate the construction, operation and use of artificial islands and installations and structures”⁶⁷, “[...] have exclusive jurisdiction over such artificial islands, installations and structures”⁶⁸, have

⁶⁶ **INTERNATIONAL COURT OF JUSTICE** Continental Shelf (Libya Arab Jamahiriya/Malta) Judgment, ICJ Reports 1985, p 33, par. 34 [Online] IN: <www.icj-cij.org> {Date of Review: 17.01.09}

⁶⁷ **UNITED NATIONS**, Article 60 ob. cit. p.30

⁶⁸ **UNITED NATIONS**, Article 60 ob. cit. p.30

jurisdiction “[...] to determine the allowable catch of the living resources in its exclusive economic zone”⁶⁹, the scientific projects over the area, etc.

C. Obligations related to the sui generis nature of the exclusive economic zone:

There are also specific obligations bearing on coastal States according to the Convention. “[...] Coastal States could not simply pursue a policy of inaction with respect to the utilization of the EEZ’s living resources even if it retained its sovereign rights [...] in a world hungry for protein, rational exploitation becomes an obligation.”⁷⁰ Since the exclusive economic zone must be claimed by States, and it does not belong to them as a prolongation of the land territory as the continental shelf does, the State who claims an exclusive economic zone must take advantage of the rights granted by the Convention, and comply with the obligations established by it.

With regard to the protection and preservation of the marine environment, States “[...] shall ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation”⁷¹ and “[...] promote optimum utilization of the living resources of its zone”⁷². States also have the obligation to determine its own capacity for harvest the living resources within its exclusive economic zone⁷³, which means that “[...] each coastal State should take conservation and administrative measures in line with its fisheries policies according to its own evaluation of the appropriate scientific, economic and social factors”⁷⁴ and when this capacity is not enough to harvest the entire allowable catch, shall give other States access to the surplus of the allowable catch through agreements and other arrangements in accordance with the fisheries policy followed by the coastal State. As Hugo Caminos said, “this rule was incorporated into the regime applicable to the Exclusive Economic Zone as a compromise solution worked out between supporters of the territorialist thesis and those who favored freedom of fishing.”⁷⁵

⁶⁹ UNITED NATIONS, Article 61 ob. cit. p.30

⁷⁰ GALINDO, Reynaldo, The Exclusive Economic Zone in the Light of Negotiations of the Third United Nations Conference on the Law of the Sea *IN*: ORREGO VICUÑA, Francisco The Exclusive Economic Zone: A Latin American Perspective, Colorado: United States, Westview Press View, 1984 p. 48

⁷¹ UNITED NATIONS, Article 61 N° 2 ob. cit. p.30

⁷² UNITED NATIONS, Article 62 ob. cit. p.30

⁷³ UNITED NATIONS, Article 62 N° 2 ob. cit. p.30

⁷⁴ CAMINOS, Hugo The Regimes of Fisheries in the Exclusive Economic Zone *IN*: ORREGO VICUÑA, Francisco The Exclusive Economic Zone: A Latin American Perspective, Colorado: United States, Westview Press, 1984 p. 145

⁷⁵ CAMINOS, Hugo p.145 ob. cit. p.39

With regard to the construction of artificial islands, installations and structures the coastal State is responsible for the maintenance of these islands and structures, its safety, or the removal of the abandoned structures, removal that must be done with due care of the environment, the fishing activities or the marine research. Where necessary, the State has the right to establish reasonable safety zones around such artificial islands, installations and structures in which it may take appropriate measures to ensure the safety both of navigation and of the artificial islands, installations and structures, among others. In general these specific obligations on coastal States are a correlative to the sovereign rights they possess and are contained in the Convention. At the same time, the State has exclusive jurisdiction for the construction of artificial islands, and is responsible and obligated to take care of them.

With regard to the exploit of natural resources located in the area, State is responsible for “ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation”⁷⁶ and “to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield”⁷⁷. Article 66 states that “States in whose rivers anadromous stocks originate shall have the primary interest in and responsibility for such stocks [...] (and) shall ensure their conservation by the establishment of appropriate regulatory measures”. With regard to catadromus species “A coastal State in whose waters catadromous species spend the greater part of their life cycle shall have responsibility for the management of these species and shall ensure the ingress and egress of migrating fish. At the same time, the State has sovereign rights to exploit the natural resources located in the area, and is responsible and obligated to maintain those resources and took care of them.

Together with these specific obligations, there is a general obligation contained in Article 56 N° 2 according to which “[...] In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention”. “Since both, the coastal State and other States have rights and duties in the exclusive economic zone the regime under the Convention has had to establish the necessary mechanisms to harmonize the different interests.”⁷⁸ For example, according to Article 60/ 2

⁷⁶ UNITED NATIONS, Article 61 N° 2 ob. cit. p.30

⁷⁷ UNITED NATIONS, Article 61 N° 3 ob. cit. p.30

⁷⁸ **ORREGO VICUÑA, Francisco** La Zona Económica Exclusiva: Régimen y Naturaleza Jurídica en el Derecho Internacional. Santiago: Chile, Editorial Jurídica de Chile, 1991. p. 38. “Desde el momento que tanto el

“[...] any installations or structures which are abandoned or disused shall be removed to ensure safety of navigation” and according to Article 79/5 “[...] when laying submarine cables or pipelines, States shall have due regard to cables or pipelines already in position”. This general obligation, and the different provisions as those named before, reflects the effort to prevent the abuse of law by coastal States. The rights that coastal States have over the area are not absolutes, and there might also be a concurrence with the rights of third States.

D. Other rights and obligations provided for in this Convention:

Since Article 58 par. 3 makes applicable Articles 88 to 115 which deals with the high seas, coastal State have also the freedoms and rights granted in those Articles, so as the obligations, over the 200 nautical miles area, as long as they are not incompatible with the rules set forth in Part V. Thus, the rights of hot pursuit or the right of visit for example are part of these ‘other rights provided in the Convention’ provided in Article 56/3 and the obligation of repress piracy or the illicit traffic of drugs can be considered part of the obligations.

2.1.4.2 Rights and Obligations of Third States:

A. Rights.

According to article 58 all States, whether coastal or land-locked, enjoy three main freedoms in the seas: freedom of navigation, over flight and freedom of laying submarine cables and pipelines. These three freedoms are of the essence of the high seas, what makes the articles 88 to 115 regulating the high seas, as long as these articles are not incompatible with this part, of utmost importance. Clearly, the articles dealing with the freedom of fishing, the freedom of scientific research or the freedom to construct artificial island, installations or structures, are not applicable because in this maritime space those activities are reserved for the coastal State solely. Third States may also seek authorization to pursue activities in the exclusive economic zone of other coastal States, so recognizing that they are not subject to the freedoms of the high seas. We must also mention, that even when this article grants third States the freedom of navigation and over flight and the freedom of laying submarine cables and pipelines, these freedoms are more restrictive in this area than in the high seas. As in the exclusive economic

Estado ribereño como otros Estados tienen derechos y deberes en la Zona Económica Exclusiva, el régimen previsto en la Convención ha debido establecer los mecanismos necesarios para armonizar estos diferentes intereses”.

zone the coastal State have certain sovereign rights and jurisdiction over some activities, there may be cases in which freedoms are limited by the rights that coastal States have over the area. Thus the freedom of navigation of a ship transporting highly pollutant goods or toxic waste will be probably affected and thus restricted by the rules that coastal States may have in the accomplishment of the obligation to take care of the environment and the right to conserve the living resources located in the area.

Article 58 also refers to other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with other provisions of this Convention.

Beside these rights common to all States, according to articles 69 and 70, land locked States and geographically disadvantaged States have the right to participate, on an equitable basis and under a previous agreement, in the exploitation of an appropriate part of the surplus of the living resources subject to arrangements with the coastal State or coastal States of its region.

B. Obligations

Article 58 contains two general obligations. The first one states that: “In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State.” The second one refers to the obligation that third States have to “[...] comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part”.

As we can notice both, coastal and third States have “[...] competences that coexist in the exclusive economic zone. Those of the coastal states relate primarily to the exploitation of resources, while those of other states relate to navigation, transport and communication”⁷⁹. This is why the Convention establishes as a mutual obligation that in the exercising of its rights and performance of its duties under this Convention in the exclusive economic zone, both, coastal and third States shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.

But also, coastal State is who has the exclusive sovereign rights in the economical activities that took place in the 200 miles zone, meaning that can promulgate norms dealing with the

⁷⁹ GALINDO, Reynaldo ob. cit. p.39

economical exploitation, exploration or conservation that can affect the freedoms of communication granted to third States.

C. The same observation made before with regard to the ‘other rights and obligations’ contained in Article 58/2 is valid here. Thus third States have also the duty to render assistance or cooperate in the repression of piracy, or illicit traffic of drugs or the rights of visit and hot pursuit.

With regard to the legal nature of the exclusive economic zone, the figure of the residual rights is also important. If one understand that the zone is an extension of the territorial sea, then the competences non assign to States by the Convention will be considered as appertaining the coastal State, and vice versa, if the zone is understand as appertaining the high seas, with recognized exceptions in favor of coastal States, then it is the community of States to which the rights will be attributed. The solution is contained in Article 59 of the Convention according to which: “In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States; the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole”. This means, that when a conflict arises, the rights are not attribute automatically to coastal or third States, but resolved on the basis of equity, in the light of the relevant circumstances and taking into account the interest involved. As Ambassador Castañeda said, the question of residual rights of States “[...] would not arise if the zone had been characterized, either as territorial sea or high seas [...] Precisely because the zone was defined as a Sui Generis zone, which was neither territorial sea nor high seas, it was indispensable to rely on a some guidelines or criterion to settle disputes that might arrive out of concurrent uses of the sea within the exclusive economic zone”.⁸⁰

Thus, the exclusive economic zone contained in the Convention is an area of 200 maritime miles measured from the baselines and located beyond and adjacent to the territorial sea, in which coastal States have exclusive sovereign rights to explore, exploit, conserve and manage

⁸⁰ **CASTAÑEDA, Jorge** Negotiations on the Exclusive Economic Zone at the Third United Nations Conference on the Law of the Sea, Essays in honor of Judge Lachs, Netherlands: The Hague, Martinus Nijhoff, 1984, p. 615.

the living and non living resources located in the waters superjacent to the sea bed and of the seabed and its soil and to other economic activities within the area and jurisdiction for the establishment and use of artificial islands, installations and structures; marine scientific research and the protection and preservation of the marine environment. Third States have over the area the right of navigation, over flight and to lay submarine cables and pipelines subject to the limitations imposed by the coastal State in the matters that has jurisdiction and sovereignty. Both the coastal and the third States have the obligation to have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of the Convention. The rules applicable to the high seas are also applicable to the exclusive economic zone, as long as they are compatible with its rules.

The legal regime of the exclusive economic zone is different from those of the territorial sea and the high seas. The zone incorporates characteristics of both regimes. The exclusive economic zone is a maritime space with its own nature, as Article 55 makes it clear. It is not of the territorial sea, and from the study of the relevant articles we conclude that is not part of the high seas either. The reference to the high seas in the exclusive economic zone regime may be explained by the fact that several of its rules are fully compatible with the area, as the repression of piracy, or of the traffic of illicit substances or slaves, which also are applicable to other maritime areas for they constitute institutions that form part of general customary law. Also, States still enjoy some of the high-seas freedoms, as the freedom of navigation and over flight over the area of 200 miles, what renders articles devoted to the high seas important elements to interpret the provisions of Part V. We conclude that the exclusive economic zone is a maritime space, different and independent of any other maritime space and as such owning its own legal nature as a maritime space with its own regime.

**CHAPTER III: DOMESTIC LEGISLATION OF THE SOUTH EAST PACIFIC
COUNTRIES: ISSUES OF HARMONIZATION WITH UNCLOS AND POSSIBLE
SOLUTIONS.**

3.1 The Exclusive Economic Zone according to national legislations

3.1.1 *Chile*: The Chilean Constitution does not expressly refer to the maritime spaces of the Republic. It is the Civil Code that does it in Articles 593 and 596. In this Code, maritime spaces are dealt with in a general manner. This Civil Code was amended by virtue of Law 18.565 of October 13th, 1986, to harmonize the internal legislations with the international rules approved by the Convention on 1982. Before the amendment the maritime spaces regulated on the Civil Code were in accordance with the old Law of the Sea, recognizing a territorial sea of 1 marine league; a special zone of 4 leagues in which the Chilean State has jurisdiction in subjects of security and law; and a high seas.

According to Article 593 of the Chilean Civil Code, Chile has a territorial sea of 12 nautical miles measured from the baselines, which is national domain and part of the Chilean territory. Chile also have a contiguous zone of 24 nautical miles measured from baselines, in which have jurisdiction to prevent infringements of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea and punish the infringement of the above laws and regulations committed in its territory or territorial sea.

With regard to the exclusive economic zone and the continental shelf, Article 596 states that “The adjacent sea extending up to 200 nautical miles from the baselines from which the breadth of the territorial sea is measured and beyond the latter shall be designated the exclusive economic zone. In that zone, the State shall have sovereign rights for the purpose of exploring, exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed, and of the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone. The State shall have exclusive sovereign rights over the continental shelf for the purpose of conserving, exploring and exploiting its natural resources. Moreover, the State shall have all other jurisdiction and rights provided for in international law with regard to the exclusive economic zone and the continental shelf adjacent.”⁸¹ Thus, Chile has explicitly claimed an exclusive

⁸¹ **CIVIL CODE, Chile** [Online] IN: <<http://www.bcn.cl/leyes/pdf/actualizado/172986.pdf>> {Date of Review: 20.01.09} Article 596: “El mar adyacente que se extiende hasta las doscientas millas marinas contadas desde las

economic zone and along with it, recognizes in its sea all maritime spaces existing according the Convention – Internal waters, Territorial sea, Contiguous Zone, Exclusive Economic Zone and Continental Shelf.

The exclusive economic zone has been developed and enshrined in Chilean domestic law as it appears in the Convention. This is apparent not only by reading of Article 596, but of its internal rules that regulate aspects of the said area. Thus, The General Law of Fisheries and Aquiculture N ° 18892, of 1989, declares that: “To the provisions of this Law, shall be subject the preservation of hydrobiological resources and all extracting fishing activity, aquaculture, researching and sportive, which takes place in the inland waters, internal waters, territorial sea or exclusive economic zone of the Republic and in areas adjacent to the latter in which exists or may come to exist national jurisdiction in accordance with the laws and international treaties.”⁸² Thus, regulates the preservation of hydro biological resources, and all fishing, extracting, aquaculture, research and sportive activities, as well as the activities of processing, storage and transport and commercialization of the hydro biological resources, in application of the sovereign rights that Chile has over the natural resources, living or not living, located in their sea.

In the Law for the Protection of Cetaceans N° 20.293, of 2008, consequently with general law of the Sea and the Convention regarding the preservation and conservation of natural living resources within its maritime spaces, it is declared under Article 1 “[...] all maritime areas of national jurisdiction and sovereignty, as a zone free of cetacean hunting”, prohibiting in Article 2 “to hunt, capture, harass, take, possess, transport, land, produce, or perform any transformation process, so as the commercialization and storage of any cetacean species that lives or rides the maritime areas of national sovereignty and jurisdiction”, this Law also

líneas de base a partir de las cuales se mide la anchura del mar territorial, y más allá de este último, se denomina zona económica exclusiva. En ella el Estado ejerce derechos de soberanía para explorar, explotar, conservar y administrar los recursos naturales vivos y no vivos de las aguas suprayacentes al lecho, del lecho y el subsuelo del mar, y para desarrollar cualesquiera otras actividades con miras a la exploración y explotación económica de esa zona. El Estado ejerce derechos de soberanía exclusivos sobre la plataforma continental para los fines de la conservación, exploración y explotación de sus recursos naturales. Además, al Estado le corresponde toda otra jurisdicción y derechos previstos en el Derecho Internacional respecto de la zona económica exclusiva y de la plataforma continental.”

⁸²**LAW N ° 18.892, The General Law Of Fisheries and Aquiculture.** [Online] IN: <<http://www.subpesca.cl/transparencia/pdf/organica/DFLNro5.pdf>> {Date of Review:24.01.09} Article 1:“A las disposiciones de esta Ley quedará sometida la preservación de los recursos hidrobiológicos, y toda actividad pesquera extractiva, de acuicultura, de investigación y deportiva, que se realice en aguas terrestres, aguas interiores, mar territorial o zona económica exclusiva de la República y en las áreas adyacentes a esta última sobre las que exista o pueda llegar a existir jurisdicción nacional de acuerdo con las leyes y tratados internacionales.”

establishes sanctions in case of infringement of it, rehabilitations center for the damages cetacean, competent authority to seek for the compliance of this Law.

The Statutory Law of the General Directorate for the Maritime Territory and Merchant Marine, which defines de general competences on marine affairs of this Agency, states in Article 6 that for the purposes of the Law it “[...] shall be considered as jurisdiction of the Directorate the sea that bathes the coast of the Republic to a distance of twelve miles (four maritime leagues) measured from the low tide baseline, or the extension of the territorial sea established by international agreements to which the Government of Chile is a Party if it exceeds the distance indicated hereto.”⁸³ According to the existing maritime zone of 200 nautical miles, the Law of Navigation D.L 2.222 was adopted in 1978.⁸⁴ It is the legal body that regulates all activities related to navigation and marine pollution control in the maritime zone of national jurisdiction, matters that are consequently subject to the jurisdiction of the General Directorate, applied in accordance with international law. It covers navigation, ship status and property, pilotage, merchant transport, pollution and liability, etc. Until now, it has not been considered incompatible either with the participation in the Permanent Commission for the South East Pacific Agreements or in UNCLOS.

With regard to maritime research activities, The Regulation of Control of the Marine Scientific and/ or Technological Research in the Maritime Zone under National Jurisdiction, DS N ° 711 of 1975, states in Article 1 that “according to the laws in force, Chile exercises jurisdiction and control over a sea area of up to 200 miles, including its waters, the continental shelf adjacent to its land, its soil and subsoil”⁸⁵ . The Law, regulates “[...] the marine scientific and technological research carried out for foreign individuals or legal entities in the maritime zone under national jurisdiction, coordinating and proposing the participation of

⁸³ **DFL N ° 292. STATUTORY LAW OF THE GENERAL DIRECTORATE FOR THE MARITIME TERRITORY AND MERCHANT MARINE.** [Online] IN: <<http://www.bcn.cl/leyes/pdf/actualizado/5333.pdf>> {Date of Review: 25.01.09} “[...] se considerará como jurisdicción de la Dirección el mar que baña las costas de la República hasta una distancia de doce millas (cuatro leguas marinas) medidas desde la línea de la más baja marea, o la extensión de mar territorial que se fije en acuerdos internacionales a los que se adhiera el Gobierno de Chile si es superior a la aquí señalada...”

⁸⁴ **DL N ° 2.222, LAW OF NAVIGATION.** [Online] IN: <<http://www.bcn.cl/leyes/pdf/actualizado/6855.pdf>> {Date of Review: 20.01.09}

⁸⁵ **DS 711. REGULATION OF CONTROL OF THE MARINE SCIENTIFIC AND/OR TECHNOLOGICAL RESEARCH IN THE MARINE ZONE UNDER NATIONAL JURISDICTION.** [Online] IN: <<http://www.directemar.cl/reglamar/publica-es/tm/tm-031.pdf>> {Date of Review: 10.02.09} Article 1 “[...] de acuerdo a las disposiciones legales vigentes, Chile ejerce jurisdicción y control sobre una zona marítima de hasta 200 millas, incluidas sus aguas, la plataforma continental adyacente a su territorio, su suelo y subsuelo.”

Chilean personnel in such investigations [...] Scientific and technological research in the maritime zone under national jurisdiction to 200 miles, can run only with the permission and involvement of the Government of Chile.”⁸⁶. In line with the rules of the Convention, Chilean Law regulates the marine and technologic scientific research in the waters under national jurisdiction, activities which are not exclusively reserved to its nationals. Foreign researchers are subject to an authorization procedure, which is enforced according to requirements set forth by the Ministry of Foreign Affairs and the Marine Authority, taking into account UNCLOS.

At the regional level, Chile is Party, among others, to the Convention to Protect the Marine Environment and the Coastal Zone, adopted in the framework of the Permanent Commission for the South East Pacific in 1981. The scope of this Convention is “the maritime area and the coastal zone of the South East Pacific up to 200 miles in the maritime zone of sovereignty and jurisdiction of the Contracting Parties and beyond this zone, the high seas up to a distance where pollution occurring therein can affect the maritime zone.”⁸⁷.

Since 1947, when President Gabriel Gonzáles Videla, made the historical Declaration on the Maritime Zone, Chile has been inclined towards a maritime zone which corresponds the current exclusive economic zone. The domestic legislation and regional treaties signed in the framework of the Permanent Commission for the South East Pacific, and other treaties, have been adopted along this view. The exclusive economic zone “[...] did not spring forth lie the legendary Aphrodite born fully formed, but evolved through a long and slow gestation period”, and this explain why the same area is called with different names within Chilean domestic legislation. The name Exclusive Economic Zone was only developed during the 70s, long after the conclusion of the regional agreements and the Presidential Declaration, by the African and Asian States members of the Asian African Legal Consultative Committee, being later adopted by the United Nations Convention on the Law of the Sea. The important thing is that the content of the ‘maritime area’ contained in the Presidential Declaration and in the

⁸⁶ **DS N ° 711**, ob. cit. p.47 Article 2: “[...] las investigaciones científicas y tecnológicas marinas que efectúen personas naturales o jurídicas extranjeras en la zona marítima de jurisdicción nacional, coordinando y proponiendo la participación de personal chileno en dichas investigaciones.” Article 3 “[...] la investigación científico-tecnológica en la zona marítima de jurisdicción nacional hasta 200 millas, sólo puede ejecutarse con permiso y participación del Gobierno de Chile.”

⁸⁷ **CONVENTION TO PROTECT THE MARINE ENVIRONMENT AND THE COASTAL ZONE** [Online] IN: <<http://cpps-int.org/plandeaccion/enero%202009/libro%20convenios.pdf>> {Date of Review: 15.02.09} Article 1 “El ámbito de aplicación del presente Protocolo comprende el área del Pacífico Sudeste, dentro de la Zona Marítima de soberanía y jurisdicción, hasta las 200 millas de las Altas Partes Contratantes, así como las aguas interiores hasta el límite de las aguas dulces.”

regional agreements and the ‘exclusive economic zone’ contained in the Civil Code and several other national laws, are compatible between them and with the United Nations Convention on the Law of the Sea. Chile ratified the United Nations Convention on the Law of the Sea on June 23rd, 1997 and, accordingly, further legislation has been subject to the test of compatibility with the Convention.

3.1.2 Colombia: The Political Constitution of Colombia establishes in Article 101 that “In accordance with international law or with the Colombian laws when international norms are lacking, the subsoil, the territorial sea, the contiguous zone, the continental shelf, the exclusive economic zone, the air space, the segment of the geostationary orbit, the electromagnetic spectrum and the space where it acts, are also part of Colombia.”⁸⁸. It can be noticed that Colombia has claimed expressly an exclusive economic zone, together with other maritime spaces recognized by the Convention. A definition of the maritime spaces claimed by Colombia can be found in Law N° 10 of 1978, covering the territorial sea, exclusive economic zone and continental shelf. According to its Article 1 “The territorial sea of the Colombian Nation, over which it exercises full sovereignty, extends beyond its continental and insular territory and its internal waters, until a breadth of 12 nautical miles or 22 kilometers 224 meters. The national sovereignty extends equally to the space over the territorial sea, and to its soil and subsoil.”⁸⁹ With regard to the exclusive economic zone, Article 7 states that adjacent to the territorial sea there is an exclusive economic zone “whose outer limit reaches to 200 nautical miles measured from the baselines from which the breadth of the territorial sea is measured”⁹⁰; Article 8 develops the competences that coastal State has over it as follows: “In the zone established by the previous article, the Colombian Nation will exercise sovereign rights to explore, exploit, conserve and manage the natural living and non living resources of

⁸⁸ **COLOMBIA, Political Constitution.** [Online] **IN:** <www.banrep.gov.co/regimen/resoluciones/cp91.pdf> {Date of Review : 16.02.09} Article 101 “También son parte de Colombia, el subsuelo, el mar territorial, la zona contigua, la plataforma continental, la zona económica exclusiva, el espacio aéreo, el segmento de la órbita geostacionaria, el espectro electromagnético y el espacio donde actúa, de conformidad con el Derecho Internacional o con las leyes colombianas a falta de normas internacionales.

⁸⁹ **LAW N ° 10.** [Online] **IN:** <www.armada.mil.co/index.php?idcategoria=17896#> {Date of Review: 12.02.09} Article 1: “El mar territorial de la Nación colombiana, sobre el cual ejerce plena soberanía, se extiende, más allá de su territorio continental e insular y de sus aguas interiores hasta una anchura de 12 millas náuticas o de 22 kilómetros 224 metros. La soberanía nacional se extiende igualmente al espacio situado sobre el mar territorial, así como al lecho y al subsuelo de este mar.”

⁹⁰ **LAW N ° 10,** ob. cit. p.49 Article 7: “Establécese, adyacente al mar territorial, una zona económica exclusiva cuyo límite exterior llegará a 200 millas náuticas medidas desde las líneas de base desde donde se mide la anchura del mar territorial.”

the soil, the subsoil and the superjacent waters; it will also exercise exclusive jurisdiction on scientific investigation and the preservation of the marine environment.”⁹¹

It is worth noticing that Colombia follows very closely the wording of future UNCLOS regarding the exclusive economic zone. Accordingly, its domestic legislation refers to the competences that as a coastal State will have in the exclusive economic zone, in harmony with the internationally recognized norms. To name a few, the Decree N° 2.324, of 1984 by which Colombia reorganized the General Maritime and Port Directorate as the institution in charge of all activities related to the navigation in Colombian waters, and also, of other activities that may take place in jurisdictional waters of Colombia such as the construction of artificial structures to be placed in the sea, scientific research, maritime pollution, etc. Article 2 of this Law states that the General Maritime and Port Directorate exercises jurisdiction until the outer limit of the exclusive economic zone, including [...] territorial sea, contiguous zone, exclusive economic zone, soil and marine subsoil...⁹². Thus, in case of navigation under the territorial sea, the General Directorate is competent as it is part of the Colombian territory where the Government is sovereign to oversee the activities taking place there. But, it also exercises competences with regard to other activities, such as the authorization of marine scientific research activities, preservation and conservation of the marine environment, along the terms established by the Convention. Consequently, Law N ° 658 of 2001, by which the maritime and fluvial activity of pilotage is regulated as a public service in maritime and fluvial areas under the jurisdiction of the Maritime National Authority, defines “Maritime Activities” in Article 2 are those activities “[...] that are conducted in Colombian jurisdictional maritime waters including [...] the territorial sea, the contiguous zone, the exclusive economic zone, the continental shelf, the superjacent waters...”⁹³

The National Code of Renewable Natural Resources and Protection to the Environment, Decree N ° 2811, of 1974, establishes that the environment is considered as common heritage

⁹¹ **LAW N ° 10. IBID.** Article 8: “En la zona establecida por el artículo anterior, la Nación colombiana ejercerá derechos de soberanía para efectos de la exploración, explotación, conservación y administración de los recursos naturales vivos y no vivos del lecho y del subsuelo y de las aguas suprayacentes; así mismo, ejercerá jurisdicción exclusiva para la investigación científica y para la preservación del medio marino.”

⁹² **DECREE N ° 2.324, by which Colombia reorganized the General Maritime and Port Directorate** [Online] **IN:** <<http://www.lexbase.biz/lexbase/normas/decretos/1984/D2324de1984.htm>> {Date: 13.02.09} Article 2: “La Dirección General Marítima y Portuaria ejerce su jurisdicción hasta el límite exterior de la zona económica exclusiva [...] mar territorial, zona contigua, zona económica exclusiva, lecho y subsuelo marinos, aguas suprayacentes...”

⁹³ **DECREE N ° 2.324 IBID.** Article 2.3 “[...] Que se efectúan en las aguas marítimas jurisdiccionales colombianas incluyendo [...] mar territorial, zona contigua, zona económica exclusiva, plataforma continental (lecho y subsuelo marinos), aguas suprayacentes...”

of mankind and as such the State has the duty to participate in its preservation and development. Article 5 states that “The present Code governs in all the national territory, the territorial sea with its soil subsoil and airspace, the continental shelf and the exclusive economic zone or other maritime spaces in which the State exercises jurisdiction according to international law”⁹⁴ Again, the internal law of Colombia, expressly refers to the exclusive economic zone, regulating activities over which the coastal State has competence to protect natural resources in the area, like the area itself.

Colombia, is also member of the Permanent Commission for the South Pacific, and is Party of the regional agreements adopted in its framework, and is Party in several international treaties such as the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (Rome, 1988) and the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf. Colombia believes that these agreements are in harmony with the Convention.

We may conclude that Colombia supports an exclusive economic zone as it is shown by its domestic legislation, in a sense that compatibility with UNCLOS is essential. Nevertheless, it must be taken into account that Colombia is not Party to the Convention yet.

3.1.3 Ecuador: Article 4 of the Ecuadorian Constitution approved in 2008, states that “The territory of Ecuador constitutes a historical and geographical unity of natural, social and cultural dimensions, inherited from our ancestors and ancestral peoples. This territory comprises the continental and maritime space, adjacent islands, the territorial sea, the Archipiélago de Galapagos, the soil, the continental shelf, the subsoil and the superjacent continental, islander and maritime extended space. Its limits are determined by the treaties in force. The territory of Ecuador is inalienable, irreducible and inviolable [...] The State will exercise rights over segments of the geostationary orbit, the maritime spaces and Antarctica.”⁹⁵

⁹⁴ **DECREE N ° 2.811, THE NATIONAL CODE OF RENEWABLE NATURAL RESOURCES AND PROTECTION TO THE ENVIRONMENT.** [Online] IN: <<http://www.ideam.gov.co/legal/decretos/1970/d2811-1974.htm>> {Date of Review: 12.02.09} “El presente Código rige en todo el territorio nacional, el mar territorial con su suelo, subsuelo y espacio aéreo, la plataforma continental y la zona económica o demás espacios marítimos en los cuales el país ejerza jurisdicción de acuerdo con el derecho internacional ”

⁹⁵ **POLITICAL CONSTITUTION, ECUADOR. 2008** [Online] IN: <<http://pdba.georgetown.edu/Constitutions/Ecuador/ecuador08.html>> {Date of Review: 18.02.09}

This new Constitution was preceded by the 1998 Constitution which stated in its Article 2 that “The Ecuadorian Territory is inalienable and irreducible. It comprises the Real Audience of Quito, with the modifications introduced by the valid treaties, the adjacent island and the Archipiélago de Galápagos, the territorial sea, the subsoil and the respective superjacent maritime spaces.”⁹⁶

On the other hand, the Civil Code of Ecuador is the legal source of the definition of “territorial sea” which according its Article 628 has the following characteristics: “The adjacent sea, to a distance of 200 nautical miles measured from the low-water mark, at the most salient points of the continental Ecuadorian coast and the outer-most islands of the Colón Archipelago, according to the baseline to be indicated by Executive Decree, shall constitute the territorial sea and be part of the national domain. The adjacent sea between the baseline referred to in the preceding paragraph and the low-water mark shall constitute internal waters and be part of the national domain. If maritime police and defense zones more extensive than those specified in the preceding paragraphs are determined under relevant international treaties, the provisions of such treaties shall prevail. The different zones of the territorial sea that shall be subject to the régime of free maritime navigation or of innocent passage for foreign ships shall be established by Executive Decree. The bed and subsoil of the adjacent sea also form part of the public domain.”⁹⁷

Another mention to an extended territorial sea of 200 nautical miles can be found in the Code of Maritime Police, of August 20th, 1960. According to this Code, the Maritime Police is responsible to oversee the right and safe navigation through jurisdictional waters, keep order, morality and safety of the passengers and crew of the ships in jurisdictional waters, protect human life at sea, neutralize illegal activities at sea, preserve the marine environment, etc. In short, they play the role of the police in the jurisdictional waters of Ecuador. According to Article 18 “The jurisdiction of the Maritime Police comprises in addition to the territorial sea, the continental shelf and beaches of the sea, whose extension is determined or described in Title III of the Book II of the Civil Code, all internal waters of gulfs, bays, inlets, straits and

⁹⁶**POLITICAL CONSTITUTION, ECUADOR. 1998** [Online] IN: <<http://www.ecuanex.net.ec/constitucion/titulo01.html>> {Date of Review: 12.02.09} Article 2: “El territorio ecuatoriano es inalienable e irreductible. Comprende el de la Real Audiencia de Quito con las modificaciones introducidas por los tratados válidos, las islas adyacentes, el Archipiélago de Galápagos, el mar territorial, el subsuelo y el espacio suprayacente respectivo.”

⁹⁷**ECUADOR, Civil Code** [Online] IN: <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/ECU_1970_Code.pdf> {Date of Review: 12.02.09}

channels of the Republic, whether in the continental provinces, or in the adjacent islands, in the Archipelago of Colón or Galapagos”⁹⁸ According to this Article, the extension of the territorial sea is determined for the Civil Code which we already know defines a territorial sea of 200 nautical miles. Also, from the reading of this law, one may conclude that the entire 200 nautical miles zone is treated as a territorial sea because of the competences allocated to the Maritime Police. Functions attributed hereto are proper of a territorial sea, in which there is full sovereignty and jurisdiction. Nevertheless, rules embodied in this Code seem to be enforced in such a way so as not to ignore general law of the sea as reflected in UNCLOS. In other laws, like the Hydrocarbons Law, of 1978⁹⁹ or the Regulation for the granting of permission to foreign ships for visiting the territorial sea and the Galapagos Island, of 1980;¹⁰⁰ there are also references to the territorial sea, which must be understood as the defined in the Civil Code of the Republic, with an extension of 200 nautical miles.

Ecuador’s domestic law is clearly not inspired by the concept of an exclusive economic zone, and the preferred approach is that of territorial sea which an extension of 200 nautical miles. Although it appears incompatible with the general rules reflected in UNCLOS, in practice, there have been no difficulties in the adoption of a flexible approach within the regional level of the Permanent Commission for the South East Pacific, and to become Party to other international treaties such as the Inter American Convention for the Protection and Preservation of marine turtles in which Article 3 states that the Convention applies to the territory of the States party and over the maritime areas in which each one of the Parties “[...] exercise sovereignty, sovereign rights or jurisdiction over the living marine resources in

⁹⁸**ECUADOR, Code of maritime Police** [Online] IN: <http://www.dirnea.org/data/leyes_y_reglamentos/LeyesMarítimasPDF/CÓDIGODEPOLICÍAMARÍTIMA.pdf> {Date of Review:12.02.09} Article 18 “La jurisdicción de Policía Marítima alcanza, además del mar territorial, de la plataforma o zócalo continental y de las playas del mar, cuya extensión se determina o indica en el Título III del Libro II del Código Civil, a todas las aguas interiores de los golfos, bahías, ensenadas, estrechos y canales de la República, ya se trate de las provincias continentales, ya de las islas adyacentes, ya del Archipiélago de Colón o de Galápagos”

⁹⁹ **DS N ° 2967, Hydrocarburos Law** [Online] IN: <<http://www.natlaw.com/interam/ec/eg/st>> {Date of Review: 11.02.09} Article 1 “Los yacimientos de hidrocarburos y sustancias que los acompañan, en cualquier estado físico en que se encuentren situados en el territorio nacional, incluyendo las zonas cubiertas por las aguas del mar territorial, pertenecen al patrimonio inalienable e imprescriptible del Estado”.

¹⁰⁰ **REGULATION FOR THE GRANTING OF PERMISSION TO FOREIGN SHIPS FOR VISITING THE TERRITORIAL SEA AND THE GALAPAGOS ISLAND** [Online] IN: <http://www.dirnea.org/data/leyes_y_reglamentos/Regl.%20Leyes%20Mar%C3%ADtimas%20PDF/REGLAMENNT%20PAR%20LA%20CONCESI%C3%93N%20DE%20PERMISOS%20A%20NAVES%20EXTRANJERAS%20P.pdf> {Date of Review: 13.02.09} Article 1 “Toda nave extranjera que desee visitar con fines turísticos, culturales, de investigación científica o de cualesquiera otra naturaleza, el Mar Territorial sus costas o islas, deberá obtener la correspondiente autorización escrita del Ministerio de Defensa Nacional.”

accordance with international law, as reflected in the United Nation Convention on the Law of the Sea”¹⁰¹.

3.1.4 Perú: The Peruvian Constitution of 1993 establishes in its Article 54 that “the territory of the State is inalienable and inviolable. It includes the soil, the subsoil, the maritime dominion and the superjacent airspace.

The maritime dominion of the State includes the sea adjacent to its coasts, as well as the bed and subsoil thereof, up to the distance of two hundred nautical miles measured from the baselines determined by the law. In its maritime dominion, Perú exercises sovereignty and jurisdiction, without prejudice to the freedoms of international communication, in accordance with the law and the treaties ratified by the State.

The State exercises sovereignty and jurisdiction on the airspace over its territory and its adjacent sea up to the limit of two hundred miles, without prejudice to the freedoms of international communication, in conformity with the law and the treaties ratified by the State.”

¹⁰²

The Peruvian Constitution does not contemplate an idea of a territorial sea, a contiguous zone or an exclusive economic zone but, rather the term “maritime domain” or “maritime dominion”. Its meaning is not quite clear as Peruvian authors and politicians point up. To some specialists Perú has claimed a true Territorial Sea of 200 nautical miles. Others consider that the Maritime Domain is a sui generis figure totally compatible with the maritime zones recognized by the Convention.¹⁰³

¹⁰¹**INTERAMERICAN CONVENTION FOR THE PROTECTION AND PRESERVATION OF MARINE TURTLES** [Online] **IN:** <<http://www.seaturtle.org/iac/english.pdf>> {Date of Review: 14.02.09} Article 3 “[...] respecto a los cuales cada una de las Partes ejerce soberanía, derechos de soberanía o jurisdicción sobre los recursos marinos vivos, de acuerdo con el derecho internacional, tal como se refleja en la Convención de las Naciones Unidas sobre el Derecho del Mar.”

¹⁰²**PERU, Political Constitution** [Online] **IN:** <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/PER_1993_Constitution.pdf> {Date of Review: 12.02.09} “El territorio del Estado es inalienable e inviolable. El territorio del Estado es inalienable e inviolable. Comprende el suelo, el subsuelo, el dominio marítimo, y el espacio aéreo que los cubre.

El dominio marítimo del Estado comprende el mar adyacente a sus costas, así como su lecho y subsuelo, hasta la distancia de doscientas millas marinas medidas desde las líneas de base que establece la ley.

En su dominio marítimo, el Estado ejerce soberanía y jurisdicción, sin perjuicio de las libertades de comunicación internacional, de acuerdo con la ley y con los tratados ratificados por el Estado.

El Estado ejerce soberanía y jurisdicción sobre el espacio aéreo que cubre su territorio y el mar adyacente hasta el límite de las doscientas millas, sin perjuicio de las libertades de comunicación internacional, de conformidad con la ley y con los tratados ratificados por el Estado.”

¹⁰³ See **BAKULA, Juan Miguel** El Dominio Marítimo del Perú, Lima: Perú, Fundación M. J Bustamante De La Fuente, 1985, pp. 135-137; **FERRERO COSTA, Eduardo** El Perú, la Convención y el Derecho del Mar hoy, **IN:** El Derecho del Mar, Academia Diplomática del Perú, Lima, Perú, 1984, pp. 79-92.

The Law against the Traffic of Illicit Drugs (Legislative Decree N° 824) also refers to a territorial sea, establishing in Article 8 that “The Peruvian Navy, according to its constitutional mission to protect and defend national sovereignty, **within the jurisdiction of 200 miles of the Territorial Sea**, in the National Coastal Ports, and in ports of rivers and lakes existing in the coca-growing areas of the country, may intercept national or foreign ships in order to establish their identity and destination.”¹⁰⁴

In the Law of Surveillance and Control of maritime, fluvial and lake activities, Law N° 26.620 of 1996, Peru regulates the “[...] aspects of control and surveillance in charge of the Maritime Authority with regard to the activities carried out in the maritime, river and lake fields within the territory of the Republic”¹⁰⁵, defining the “maritime territory of the Republic” in Article 2 as “The sea adjacent to its coasts, and its bed, until the distance of 200 nautical miles, in accordance with the Peruvian Constitution.”¹⁰⁶ Also, the competences of the Maritime Authority over the area of 200 miles, are alike those exercised by the State in its territorial sea. In the Regulation of the Law of Surveillance and Control of the Maritime, fluvial and lake activities (Supreme Decree 028DE, of 2001) Article 010501 number 8 and 34 states that competences of the General Directorate of Captaincy and Guard Coasts exercises “the maritime police in ports along the coast and in the maritime domain until 200 miles, as well as in navigable rivers and lakes” and “grant navigation permissions to foreign ships that require to operate in the maritime domain, navigable rivers and lakes.”¹⁰⁷ These functions are typical of the territorial sea, due to the navigation control that the Authority has to enforce. The same

¹⁰⁴**DL N ° 824, LAW AGAINST THE TRAFFIC OF ILLICIT DRUGS** [Online] IN: <www.devida.gob.pe/documentacion/D.L.824.doc> {Date of Review : 15.02.09} Artículo 8: “La Marina de Guerra del Perú, en observación de su misión constitucional de resguardar la defensa y las soberanía nacional, dentro de la jurisdicción de las 200 millas de Mar Territorial, en los Puertos del Litoral Nacional así como en los Puertos fluviales y lacustres existentes en las zonas cocalleras del país, podrá interceptar las embarcaciones nacionales o extranjeras a efecto de establecer su identificación y destino final.”

¹⁰⁵**LAW N ° 26.620, LAW OF THE SURVEILLANCE AND CONTROL OF MARITIME, FLUVIAL AND LAKE ACTIVITIES** [Online] IN: <http://www.conam.gob.pe/documentos/N_legislacion_amb/Sector%20Defensa/Ley%20de%20Control%20y%20Vigilancia%20de%20las%20actividades%20mar%C3%ADtimas.doc> {Date of Review: 10.02.09} Article 1 “La presente Ley regula los aspectos de control y vigilancia a cargo de la Autoridad Marítima respecto de las actividades que se desarrollan en los ámbitos marítimo, fluvial y lacustre del territorio de la República.”

¹⁰⁶**LAW N ° 26.620, IBID** Article 2 “El mar adyacente a sus costas, así como su lecho, hasta la distancia de 200 millas marinas, conforme lo establece la Constitución Política del Perú, los ríos y lagos navegables.”

¹⁰⁷**DS N ° 028DE, REGULATION OF THE LAW OF SURVEILLANCE AND CONTROL OF THE MARITIME, FLUVIAL AND LAKE ACTIVITIES** [Online] IN: <http://www.conam.gob.pe/documentos/N_legislacion_amb/Sector%20Defensa/Aprueban%20Reglamento%20de%20la%20Ley%20de%20Control%20y%20Vigilancia%20de%20las%20Actividades%20Mar%C3%ADtimas.doc> {Date of Review: 10.02.09} Article A010501, N ° 8-34 “ [...] función de la Dirección General de la Capitanías y Guardacostas ejercer la Policía Marítima en los puertos, en el litoral y en el dominio marítimo hasta las 200 millas, así como en ríos y lagos navegables”; “Otogar permisos de navegación a las naves extranjeras que requieran operar en el dominio marítimo, ríos y lagos navegables”

happens with the approach towards navigation in the exclusive economic zone where third States enjoy freedom of navigation, which must be exercised in full compliance with the competences of the coastal State in respect of its sovereign rights and jurisdiction. The “maritime domain” concept poses many questions to this respect.

In Peru’s legal system, there are also laws which do not refer to the “maritime domain” as a pure territorial sea, and which appear to follow a more harmonious view the norms of the Convention. That is the case of General Fisheries Law, Decree N° 25.977 of 1992, regulating fishing activities and the use, exploitation, conservation of resources located in Peruvian waters. It sets up in Article 2 that “all the hydrobiological resources located in the jurisdictional waters of Peru are national patrimony”, and “the State [...] ensure the protection and preservation of the environment, requiring that the necessary measures are taken to prevent, reduce and control the damages and risks of pollution” and that “the laws adopted by the State to ensure the conservation and rational exploitation of **aquatic resources in territorial waters may apply beyond 200 nautical miles to those straddling resources that migrate to adjacent waters**”¹⁰⁸. The General Law on Waters, Law Decree N° 17.752 of 1969, declares of national property all waters, including those of “the sea which extend until 200 miles.”¹⁰⁹ This wording goes along with the concept of the exclusive economic zone and its exclusive sovereign rights regime appertaining to the coastal State. The concept of the maritime domain is also included in Supreme Decree 47 – 2007 approving the “Charter of the Exterior South Limit of the Peruvian Maritime Domain” and in Law N° 28.621, that approved the Baselines of the Maritime Domain of Peru based upon Article 54 of the Political Constitution of Peru which establishes that the maritime domain of the State includes the sea adjacent to its coasts, so as the bead and the subsoil, up to a distance of 200 nautical miles measured from the baselines established by law.¹¹⁰

¹⁰⁸**DL N ° 25.977, GENERAL FISHERIES LAW** [Online] IN: <http://www.mundoazul.org/descargas/pnp/ley_general_pesca2.pdf> {Date of Review: 12.02.09} Article 2 “Son patrimonio de la Nación los recursos hidrobiológicos contenidos en las aguas jurisdiccionales del Perú...”; Article 6 “El Estado, dentro del marco regulador de la actividad pesquera, vela por la protección y preservación del medio ambiente, exigiendo que se adopten las medidas necesarias para prevenir, reducir y controlar los daños o riesgos de contaminación...”; Article 7 “Las normas adoptadas por el Estado para asegurar la conservación y racional explotación de los recursos hidrobiológicos en aguas jurisdiccionales podrán aplicarse más allá de las 200 millas marinas a aquellos recurso multizonales que migran hacia aguas adyacentes...”

¹⁰⁹**DL N ° 17.752, GENERAL LAW ON WATERS** [Online] IN: <http://www.inrena.gob.pe/irh/blegal/dley/dley_17752.pdf> {Date of Review: 10.02.09} Article 4: “[...] las del mar que se extiende hasta las doscientas millas...”

¹¹⁰**DS 047-2007-RE AND LAW N ° 28.621** [Online] IN: <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/per_2007_decree.pdf> and

As Peru does not apply an exclusive economic zone, the scope of the maritime domain compared to this zone is worth examining. In this study we assume that the maritime domain is closer to a territorial sea than to the exclusive economic zone regime. Nevertheless, some laws and domestic regulations with respect to the maritime zone concerning scientific research and other matters, use a broader language that could be considered as fully compatible with UNCLOS.

3.2 Harmonization between domestic legislations, regional treaties and UNCLOS

3.2.1 Need of Harmonization:

The process of harmonization can be defined as “[...] the process by which a State aligns its laws and regulations with applicable international law contained in an applicable international agreement or that finds its source in custom”¹¹¹. Thus, harmonization will always require legislative activity from States in order to identify and modify the laws incompatible with the international rule applicable, which in our case is the United Nations Convention of the Law of the Sea.

As we have already said, the regional treaties signed in the framework of the Permanent Commission of the South East Pacific are compatible with the Convention, thus the South East Pacific countries do not have the need to modify these Agreements in order to make them compatible with UNCLOS.

In the case of Chile and Colombia, their domestic legislations, as we saw above, contemplate territorial seas of 12 nautical miles in which States exercises fully sovereignty and jurisdiction, and exclusive economic zones in which the exclusive sovereign rights and jurisdiction are to be enforced. The way that State competences over the different maritime spaces are developed in their national laws is indicative of the degree of consistency with the standards internationally recognized and set out in UNCLOS. When Chile ratified the United Nations Convention, it had already adapted the Civil Code to refer to a 200 nautical miles of

<http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/per_2005_law_baselines.pdf> {Date of Review: 10.02.09} “Que el artículo 54 de la Constitución Política del Perú establece que el dominio marítimo del Estado comprende el mar adyacente a sus costas, así como su lecho y subsuelo hasta la distancia de 200 millas marinas medidas desde las líneas de base que establece la ley.”

¹¹¹ CAMINOS, HUGO, “Harmonization of pre-existing 200 mile claims in the Latin American region with the United Nations Convention on the Law of the Sea and its Exclusive Economic Zone”, IN: Interamerican Law Review, Vol. 30, 1998. Miami: United States, p.10.

the exclusive economic zone. Colombia has not ratified the Convention yet, and with respect to the exclusive economic zone, it was already part of the internal legislation.

In the case of Ecuador and Peru the situation could look differently. In these cases, there is a lack of clarity between the maritime spaces recognized by their domestic legislations and the Permanent Commission for the South East Pacific regional treaties to which they are Parties, what may have an impact in a future participation in the United Nations Convention. In order to become Parties to the Convention, these countries must undertake a process of harmonization to give coherence to the various instruments governing their maritime areas while complying with existing international law.

In the case of Perú, this process may not necessarily involve the need to modify the Political Constitution because the “Maritime Domain” or “Maritime Dominion” can be understood either as a full territorial sea or as a zone in which all the characteristics of the territorial sea are excepting the freedom of communications subject to the internal laws. In both cases, the participation in the Convention will make necessary to amend their internal laws that define the various competences in the maritime sphere.

According to Article 310 of the Convention, States can make “[...] *declaration or statements, however phrased or named, with a view, inter alia, to the harmonization of national laws and regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effect of the provisions of this Convention in their application to that state Party*”. Thus, Perú can maintain its term maritime dominion as long as is defined and apply internally in a way compatible with the Convention. The maritime dominion can be understood as applicable to the whole maritime space of Perú which makes it appear as analogous to the territorial sea, while the United Nations Convention aims at differentiating the maritime spaces, with different degrees of sovereignty and jurisdiction.

The reason why Perú has not yet adhered to the United Nations Convention is uncertain. The participation of Perú during the Third United Nations Conference on the Law of the Sea was of high importance, contributing to the international recognition of this new maritime space.

Perú was part of the territorial group during the negotiations, showing some distance with the evolution of the concept of 200 nautical miles supported by Chile and Colombia, also members of the South East Pacific System. Nevertheless, Perú did not reject the basic

principles and institutions adopted by the United Nations Convention, and according to Ambassador Arias Schreiber, who was one of the Presidents of the Peruvian Delegation during the Third United Nations Conference on the Law of the Sea, Perú did not sign the Convention because the Government, instead of following the reports issued by the Plenipotentiaries, initiated a public debate in different fora to achieve consensus that finally was impossible to attain. Then, the Delegation was instructed not to sign the Convention.¹¹² In any case, we believe that Perú could adhere to the United Nations Convention and that it has only to amend its domestic legislation to make it harmonic with the internationally recognized rules.

The case of Ecuador shows that there are limits to its ability to harmonize domestic norms in order to accede to the United Nations Convention. Thus, the necessity of an amendment to the domestic laws seems necessary. Article 4 of the Ecuadorian Constitution states that “The territory of Ecuador [...] comprises the continental and maritime space, adjacent islands, the territorial sea, the Archipelago of Galápagos, the soil, the continental shelf, the subsoil and the superjacent continental, islander and maritime extended space. Its limits are determined by the treaties in force. The territory of Ecuador is inalienable, irreducible and inviolable [...] The State will exercise rights over segments of the geostationary orbit, the maritime spaces and Antarctica.”¹¹³

To us, this new precept does not solve the problem of what is the maritime territory recognized by Ecuador; instead of using internationally recognized terms, it refers to the maritime spaces in a way that is not so clear seen externally. There is the enunciation of the parts of the Ecuadorian territory, but not its definition. One cannot assume that when the precept indicates that the continental and maritime spaces are part of the territory of Ecuador, it only refers to the maritime space of 12 nautical miles measured from the baselines and known as territorial sea, even if according to the Convention it is an effective part of the States territory. The same occurs when an Article refers to the superjacent maritime space as belonging to Ecuador: What are the superjacent maritime spaces? Reading the Article, we believe that Ecuador refers to the maritime space superjacent to the continental shelf, soil, subsoil. Beyond the 12 nautical miles, the maritime space will not have to be considered part

¹¹² **ARIAS SCHREIBER, Alfonso** La Tercera Conferencia sobre el Derecho del Mar y la Participación de Perú. [Online] **IN:** <www.contexto.org/pdfs/3ra_conf_derechos_mar.pdf> {Date of Review: 10.02.09} p.20

¹¹³ **POLITICAL CONSTITUTION, ECUADOR. 2008** [Online] **IN:** <<http://pdba.georgetown.edu/Constitutions/Ecuador/ecuador08.html>> {Date of Review: 18.02.09}

of the State territory, at least as comprising the extension of the soil, subsoil and continental shelf of Ecuador from baselines. If we turn the view into the Ecuadorian domestic legislation in order to interpret the Constitutional precept, we will find that its Civil Code still defines the territorial sea as “the adjacent sea, to a distance of 200 nautical miles measured from the low-water mark, at the most salient points of the continental Ecuadorian coast and the outer-most islands of the Colón Archipelago, according to the baseline to be indicated by Executive Decree”, and that other relevant rules also refer to the zone as if was territorial sea. Because the rule of 12 nautical miles extension of the territorial sea is not only a rule included in UNCLOS but a rule of customary international law, and thus, binding all States whereas Party or non to the Convention; a declaration or statement, made by Ecuador in accordance with Article 310 of the Convention, in order to clarify the meaning of these laws, and to harmonize them ‘territorial sea’ with UNCLOS, is not possible as long as the internal laws of Ecuador refer to a territorial sea of 200 nautical miles.

We believe that the reason why Ecuador has not adhered to UNCLOS yet and has not modified its internal laws in order to adequate them to the international norms it might be because political leaders and the population itself, support a territorial sea of Ecuador which covers 200 nautical miles, exposing that the Convention is prejudicial to the interest of these countries because it will reduce or affect the territorial sovereignty. Thus, in the press one can read “*Ecuador faces a new dilemma between signing UNCLOS, with which will lost 188 miles of territorial sea, or be part of a project that, in the future may benefit from the exploitation of at least seven major minerals found in the continental shelf, located around the Galapagos*”¹¹⁴ or “*The team composed by Diego Sánchez Delgado, mentor of the Movement of Social Transformation and Integration, MITS, 151 list, presented his government program (in which) proposes to protect and defend national sovereignty against any imperial or transnational imposition and defend the 200 miles of territorial sea*”¹¹⁵

We notice too that by Executive Decree N ° 2980 of July 19th, 2002, Ecuador created the National Commission on Law of the Sea that has as objective to convince the population of the benefits and UNCLOS and to promote the adhesion of Ecuador to it. Even when we

¹¹⁴**EL MERCURIO DE ECUADOR**, 18-06-2007 [Online] IN: <http://www.elmercurio.com.ec/web/titulares.php?seccion=LPdYzLB&codigo=ls7Bn8AIM1&nuevo_mes=06&nuevo_ano=2007&dias=18¬icias=2007-06-18> {Date of Review: 22.02.09}

¹¹⁵**EL MERCURIO DE ECUADOR**, 10-02-2009 [Online] IN: <http://www.elmercurio.com.ec/web/titulares.php?seccion=xJoURMC&codigo=ZdXrC5rd7Q&nuevo_mes=02&nuevo_ano=2009&dias=10¬icias=2009-02-10> {Date of Review: 22.02-09}

believe that the creation of an institution like this is of utmost importance, it is also true that after 7 years Ecuador not only remains non party to the Convention, but also possesses domestic legislation that seems incompatible with some of its provisions. The Constitution recently put in force reiterates the traditional position regarding maritime spaces.

3.2.2 Problems with regard to the Regional System

In the regional cooperation scenario, we notice that despite the existing lack of harmony among domestic legislations with regard to maritime spaces, cooperation activities have not been affected in a substantial way. Along the years, member countries have signed several agreements by which the protection of the natural resources of the sea, scientific research and regional cooperation in functional areas, has been going on for years. Nevertheless, it is also true that the lack of harmony among the different domestic legislations of the South East Pacific Countries has been transferred to the System of the Permanent Commission for the South East Pacific. This situation can be seen in three different domains:

i) Agreements signed within the Permanent Commission for the South East Pacific. After reading these instruments one may conclude that, even when they were adopted after the signature of UNCLOS and when the concept of exclusive economic zone was widely recognized, State parties to the Permanent Commission prefer the use of the terms of a “Maritime Zone” or “Jurisdictional Maritime Zone of 200 miles” to name some examples. Thus, in the Galapagos Agreement signed in year 2000, the zones under national jurisdiction were defined as follows: “[...] those subject to the rights of sovereignty and jurisdiction of the coastal States until a limit of 200 nautical miles, measured from baselines, including the jurisdictional zones belonging to the insular territories located beyond the limits of the continental maritime zones”¹¹⁶. This situation is explained by the fact that since the area is differently regulated in the domestic legislation of the States members, in order to avoid problems in the field of regional cooperation it was preferable to use a broader term to refer to the area of 200 nautical miles.

¹¹⁶ **GALAPAGOS AGREEMENT, 2000** [Online] IN: < <http://www.cpps-int.org/spanish/tratadosyconvenios/tratadosregionales/acuerdodegalapagos.htm> > {Date of Review: 23.02.09} “Zonas bajo jurisdicción nacional”, las sometidas a los derechos de soberanía y jurisdicción de los Estados ribereños hasta el límite de 200 millas marinas, medidas desde las líneas de base, incluyendo las zonas jurisdiccionales pertenecientes a los territorios insulares situados más allá del límite de las zonas marítimas continentales.

ii) Application and interpretation of the Agreements. The lack of harmony can also cause problems with regard to the application of agreements to maritime spaces that have not only different denominations but also different extensions in the domestic sphere of the State parties. For example, in the Agreement on Economic Complementation for the Establishment of an Enlarged Economic Space between Chile and Ecuador (1994)¹¹⁷, whose Article 27 deals with mutual access to services in the maritime and land transport sector, is indicated that the respective Maritime Authorities are responsible for supervising the transparency in the services offered in the sector. One could raise the question concerning the impact of the different views on the extension of the territorial sea in Chile and Ecuador on the determination of the scope of the respective Maritime Authorities powers. The question is rather theoretical because in practice, this provision is about accession to the service market and not about the geographical scope of the competence of said Authorities.

iii) The third problems relates to the credibility of the South East Pacific System and its influence on the international community. In the joint statements made by State members of the System one can read that the Presidents “[...] express their satisfaction [...] for the consolidation and universal recognition of the thesis of the 200 miles and the effective coordination of their maritime policies, that has generated an effective regional legal system”¹¹⁸; that the Ministers of Foreign Affairs of these countries reiterate the determination of the States members of the System “[...] to conserve and ensure the resources of the sea that bathe their coasts, [...] granting their peoples the necessary subsistence conditions [...] reaffirming the exclusive sovereignty and jurisdiction, that for those effects and without prejudice of the international community, proclaimed in the Santiago Declaration and that correspond to their countries over the sea that bathe their coasts until a distance of 200 nautical miles [...] in conformity with international law”¹¹⁹; that “the Ministers of Foreign

¹¹⁷ **AGREEMENT FOR ECONOMIC COMPLEMENTATION FOR THE ESTABLISHMENT OF AN ENLARGED ECONOMIC SPACE BETWEEN CHILE AND ECUADOR, 1994** IN: <<http://www.direcon.cl/documentos/Texto%20Acuerdo%20ACE%20Chile%20Ecuador.pdf>> {Date of Review: 23.02.09}

¹¹⁸ **DECLARATION OF THE PRESIDENTS OF THE MEMBER STATES OF THE PCSP, 2000** [Online] IN: <<http://www.cpps-int.org/spanish/tratadosyconvenios/declaracionesministeriales/DECLARACION%20DE%20PANAMA%2018%20%20NOVIEMBRE%202000.pdf>> {Date of Review: 23.02.09} Expresan su satisfacción por [...] la consolidación y reconocimiento universal de la tesis de las 200 millas y la efectiva coordinación de sus políticas marítimas, que se ha concretado en un efectivo sistema jurídico regional”

¹¹⁹ **DECLARATION OF VIÑA DEL MAR, 1984.** [Online] IN: <<http://www.cpps-int.org/spanish/tratadosyconvenios/declaracionesministeriales/DECLARACION%20DE%20VINA%20DEL%20>

Affairs are pleased to take note that the purposes and principles embodied in the Declaration of Santiago, of August 18th, 1952, have been precursors of the policy aiming at the decolonization of the seas and the reformulation of the Law of the Sea, with a view to establishing a legal order equitable and fair, that takes into account particularly the interests of developing countries. [...] They confirm with satisfaction that the social and economic dimension of the new Law of the Sea is precisely one of the great contributions of the countries of the South East Pacific System to the International Community, as the universal acceptance of the modern doctrine of the 200 miles whose incorporation has been assured in the Draft Convention on the Law of the Sea”¹²⁰, etc.

However, a deeper look into the System may show inconsistencies because each of the domestic legislation gives to the zone a different meaning and a different name, and 3 out of 4 States members of the System of the South East Pacific are not yet Parties to UNCLOS: So, the different meaning involved in the recognition of the 200 nautical miles created by them in the Santiago Declaration of 1952, is something to take into account. This background could play against the influence of the System, making third countries to ask questions like these: if the 200 nautical miles declared by the Santiago Declaration of 1952 and the exclusive economic zone recognized by UNCLOS are the same figure, why Perú, Ecuador and Colombia are still non Parties to the Convention? Or they are not the same in legal and practical terms? Why during the negotiations and after the Convention was adopted, States parties to the Permanent Commission maintained different approaches regarding the legal nature of the zone? The lack of coordination and communication among Latin American countries tarnishes the great contribution that these countries have made to the development of the new law of the sea, leaving uncertainty about what was the South East Pacific countries

MAR%2010%20FEBRERO%201984.pdf> {Date of Review: 23.02.09} [...] de conservar y asegurar los recursos del mar que baña sus costas [...], de garantizar a sus pueblos las necesarias condiciones de subsistencia [...] reafirman la soberanía y jurisdicción exclusiva que, para tales efectos y sin perjuicio de la comunidad internacional, proclamaron en la Declaración de Santiago y que corresponde a sus países sobre el mar que baña sus costas, hasta la distancia de 200 millas marinas [...] conforme al Derecho Internacional”

¹²⁰ **DECLARATION OF CALI, 1981** [Online] IN: < <http://www.cpps-int.org/spanish/tratadosyconvenios/declaracionesministeriales/DECLARACION%20DE%20CALI%2024%20ENERO%201981.pdf>> {Date of Review:23.02.09} “Los Cancilleres registran complacidos que los propósitos y principios enunciados en la Declaración de Santiago, del 18 de agosto de 1952, han sido precursores de la política tendiente a la descolonización de los mares y a la reformulación del Derecho del Mar, con miras al establecimiento de un orden jurídico equitativo y justo, que tenga en cuenta particularmente los intereses de los países en vías de desarrollo [...] Comprueban con satisfacción que la dimensión social y económica del nuevo Derecho del Mar es justamente uno de los grandes aportes de los países del Sistema del Pacífico Sur a la Comunidad Internacional, así como la aceptación universal de la moderna doctrina de las 200 millas cuya incorporación ha quedado asegurada en el proyecto de Convención sobre el Derecho del Mar.”

actually claim. Being the South East Pacific countries the proponents of the 200 miles doctrine it seems important to notice that they have tried to maintain harmony in the concept of the maritime zone they claim and support.

3.2.3 Adequate Protection of State Rights:

The United Nations and its Institutions is, since the end of the Second World War, the most universal and convoking forum to develop multilateral relations. The United Nations Convention on the Law of the Sea is a proof of this, since is the result of an appropriate balance between the interests of countries of all sizes, cultures and ideologies. Thus, UNCLOS is not only a set of rules, principles, institution and procedures that govern the law of the sea, but the result of a universal consensus that serves to the purpose of maintaining peace, security and friendly relations among the countries of the world. However, for the System to work is necessary the participation of many States as is possible in order to give support to such an important legal body.

Also, the fact that Perú, Ecuador and Colombia remain non Parties to the Convention has raised the question of the possible tensions with the international community, or with States parties to UNCLOS. There is also the assumption that due to this situation, they had lost the leadership that said countries enjoyed for years, in particular in the case of Perú and Ecuador. Another question is if non parties to UNCLOS are deprived of rights and benefits which are assigned to all State parties to the Convention. Colombia, Ecuador and Perú cannot participate in the institutions established under the Convention and to contribute to the decision making process or studies conducted therein. At the same time, they deprive themselves of the possibility to raise issues or concerns of the States Parties with regard to the Law of the Sea.

The Convention not only contains general rules applicable to oceanic affairs, but also adequate dispute resolution systems: “The Convention on the Law of the Sea establishes an overall system based on the primacy of procedures leading to a compulsory or binding settlement issued by an international tribunal”¹²¹. This means that States can try to find a solution by conciliation, exchange of views and other non compulsory systems, before having recourse to a tribunal, specialized judges, and the procedural guarantees provided by the

¹²¹ **INFANTE CAFFI, Maria Teresa** The Settlement of Disputes Regarding the Law of the Sea and its Bearing on the Legal Nature of the Exclusive Economic Zone IN: ORREGO VICUÑA, Francisco The Exclusive Economic Zone: A Latin American Perspective, Colorado: United States, Westview Press, 1984, pp.161

system. There is also one fundamental point that may affect Perú, Ecuador and Colombia, which is Article 59 of UNCLOS, which expressly refers to situations where the Convention does not attribute exclusive rights or jurisdiction to the coastal State or to other States within the exclusive economic zone. This situation may arise due to the hypothetical existence of concurrent competences within the exclusive economic zone, between the coastal State and third States. As we have seen before, this kind of rights and obligations are not per se attributed to the coastal State or any other State. This element is part of the sui generis character of the zone, where the concept of residual rights is essential to interpret its substance and nature. It is not possible to assert a priori that the residual rights appertain to one country, or to another one. Dispute settlement clauses referred to this regime are indicative of the nature of residual rights, as the Convention subjects said disputes to settlements on the basis of equity, in the light of all the relevant circumstances and taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole. If a dispute of this kind arises and Perú, Ecuador and Colombia are non Parties of the Convention, there will be a problem as to the applicable law between the coastal State and third States.

This thesis assumes that the fact of the exclusion causes harm to them, especially to developing States that have no special legal, political or economic power to enforce their rights.

-3.2.4 The Exclusive Economic Zone and non-Party States to UNCLOS

Even when States are not Parties to UNCLOS, this does not mean that they cannot be bound by some of its principles and rules, not only rights but also obligations. . We may identify some situations that create obligations and grant rights to States.

The first situation we identify, as professor Churchill indicates¹²² is the fact that under Article 18 of the Vienna Convention on the Law of Treaties “A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification acceptance or approval, until it shall have made its intention clear not to become a party to the treaty.”¹²³ To us, before

¹²² **CHURCHILL AND LOWE** The Law of the Sea, 3rd Edition, Juris Publishing, Manchester University Press, Manchester: United Kingdom, 1999, p. 22.

¹²³ **VIENNA CONVENTION ON THE LAW OF THE TREATIES, 1969** [Online] IN: <http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf> {Date of Review: 11.03.09}

becoming Parties to UNCLOS, those States who intent to regulate their fisheries regime, fall under the obligation to do so in a way compatible with the Convention or at least non contradicting it. This is the case of Colombia, which as we already know, signed but not ratified the Convention and has passed legislation in accordance to its rules which indicating by its acts that this treaty has a supreme value on maritime matters. .

Also, the Convention reflects pre-existing customary international law and States non Party to UNCLOS are bound by these customary rules even when they have not become Party to the Convention, and this rules grant them certain rights or may impose obligations. For example, a customary rule in the exclusive economic zone is the maximum breadth of the exclusive economic zone, of 200 nautical miles measured from baselines. Since the concept of an exclusive economic zone started its development in international law the maximum breadth was 200 nautical miles, and this rule has been respected by States claims through more than 50 years as certain judgments of the International Court of Justice notice it. Thus in the Nicaragua vs. Honduras case decided in 2007, the Court, referring to the delimitation of the maritime boundary indicated that “[...] it should also be noted in this regard that in no case may the line be interpreted as extending more than 200 nautical miles from the baselines from which the breadth of the territorial sea is measured”¹²⁴.

Another customary rule that can be mentioned is the one dealing with the delimitation of exclusive economic zones between States with opposite or adjacent coasts. In this case, States can chose any method for the delimitation of theirs exclusive economic zones, and in absence of agreements, the delimitation shall be done applying principles as referred to in article 38 of the ICJ Statute in order to achieve an equitable solution. As a technical matter, in practice this equitable solution is achieved by the preliminary drawing of an equidistance line which is readjusted by the existence of special circumstances. This method has been use in many cases by the International Court of Justice as in the Greenland/Jan Mayen Case in which the Court indicated that: “Prima facie, a median line delimitation between opposite coasts results in general in an equitable solution, particularly if the coasts in question are nearly parallel. When, as in the present case, delimitation is required between opposite coasts which

¹²⁴ **INTERNATIONAL COURT OF JUSTICE** Case concerning territorial and maritime dispute between Nicaragua and Honduras in the Caribbean Sea. [Online] IN: <<http://www.icj-cij.org/docket/files/120/14075.pdf>> {Date of Review: 10.03.2009} par. 309

are insufficiently far apart for both to enjoy the full 200-mile extension of continental shelf and other rights over maritime spaces recognized by international law, the median line will be equidistant also from the two 200-mile limits [...] (and) the application of that method to delimitations between opposite coasts produces, in most geographical circumstances, an equitable result. There are however situations - and the present case is one such - in which the relationship between the length of the relevant coasts and the maritime areas generated by them by application of the equidistance method, is so disproportionate that it has been found necessary to take this circumstance into account in order to ensure an equitable solution".¹²⁵ This method is contained in the first part of Articles 74 and 83 of the Convention dealing with the delimitation of exclusive economic zones and continental shelf's, respectively.

A third situation that can be identified is the fact that the Convention leaves many themes to be developed by States under specific circumstances or that require the cooperation of States and their agreement. One of these themes is the fisheries regime of the so-called straddling fish stocks and highly migratory fish stocks. They are defined as those species that spend part of their life cycle in two or more jurisdictions, many of them migrating from the exclusive economic zones through the high seas and vice versa. In this regard perhaps the most important instrument is the 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 fish stock and Highly Migratory Fish Stocks of 1995, which establishes principles for the conservation of such species, and provides guidelines for their management based on the precautionary approach and the best available scientific information. The Agreement states in Article 8 that coastal States and States fishing on the high seas shall, in accordance with the Convention, pursue cooperation in relation to this species directly or through regional or sub regional fisheries management organizations. Precisely because these species go from the exclusive economic zones of States to the high seas and vice versa, coastal States and third States must work together in the conservation and management of said species. The problem that has been raised by States who do not participate in this Agreement, is the nature and scope of the relationship between the sovereign rights and jurisdiction appertaining to the coastal State and rights of third States in

¹²⁵ **INTERNATIONAL COURT OF JUSTICE** Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993, Par 64-65 [Online] [IN: <http://www.icj-cij.org/docket/files/78/6743.pdf>](http://www.icj-cij.org/docket/files/78/6743.pdf) {Date of Review:10.03.09}

the high seas, the degree of compatibility between the two of them and the exclusive character of the EEZ.

On the other hand, since this Agreement [...] is a stand-alone agreement, in the sense that a State can become party to it without becoming party to UNCLOS and vice versa¹²⁶ a door is open for non Party States, in order to participate in the regulation of this matter. And in fact, the South East Pacific Countries, including non-Party to UNCLOS, participated in the development of this Agreement by submitting documents on the elements they believed an international agreement on the conservation and management of straddling fish stocks and highly migratory fish stocks on the high seas, should contain (A/CONF.164/L. 16 JULY 1993). In these proposals, it was said that “[...] the draft agreement is the culmination of the efforts of the countries members of the Permanent Commission of the South East Pacific to protect fish stocks within and beyond their respective jurisdictional zones. Since the beginning of the 1980s successive ministerial declarations by the PCSP member countries have expressed concern at the absence of measures regulating fishing on the high seas adjacent to the 200 nautical miles zone.”¹²⁷

In general, in every global or regional conference or meeting dealing with fisheries and related to the exclusive economic zones, the question of the participation of non Party States to UNCLOS, has not been a special problem. This has been the case in current negotiations of an Agreement on Fisheries in the South Pacific, and the Technical Consultations to draft a legally-binding instrument on port State measures to prevent, deter and eliminate illegal, unreported and unregulated fishing, conducted by FAO. As we have already mentioned, the most significant case of non Party States becoming full members of an agreement inspired on UNCLOS is the United Nations Fish Stocks agreement adopted in 1995.. These agreements – if they enter into force - may be indirect ways to apply the Convention, since they all regulate issues that are related to the main institutions of the law of the sea and also raise the question of compatibilities between the regimes contained therein.

¹²⁶ **FREESTONE, David** A Decade of the Law of the Sea Convention: Is it a Success? *IN*: George Washington International Law Review. Washington D.C: United States vol. 39, , 2007, p 517

¹²⁷ **LEVY, Jean Pierre, GUNNAR Schram** The United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks. Selected Documents. The Hague: Netherland, Martinus Nijhoff Publishers pp.187

The 1995 Agreement promotes international cooperation through the establishment of regional bodies where non-Party States can participate providing a frame in which they can harmonize their maritime policies and legislations with State Parties. Countries like Perú, Ecuador and Colombia, even when they are non-Parties to UNCLOS can participate in regional bodies or arrangements. In fact, the Permanent Commission for the South East Pacific, plays a role to this respect and encourages the participation of member countries in international negotiations guided by UNCLOS principles and rules, not only on fisheries. The 1995 Agreement, in its Article 17 contains a general obligation for States which are non members or participants in regional or sub regional fisheries organizations or arrangements and who are not discharged from the obligation to cooperate, in accordance with the Convention and the Agreement, in the conservation and managements of relevant straddling and highly migratory fish stocks. As it can be noticed, coastal States and fishing States may be subject to obligations under this Agreement even if they have not become Parties to UNCLOS.

Other means by which non-Party States to UNCLOS can indirectly participate in the development of the Law of the Sea and the application of the Convention in matters related to their exclusive economic zones, is through negotiations within the framework of the Food and Agriculture Organization (FAO). This Organization of the United Nations system participates in the work of elaboration of instruments and codes which deal with fisheries, as part of the mission in the food area. Thus, the FAO Code of Conduct for Responsible Fisheries adopted in October of 1995, provided international standards for responsible fishing practices. Goals of this Code is to ensure the conservation and adequate management of the marine fisheries, attracting the participation of all States who can either approve or invoke the Code, which formally is a non binding instrument open to Parties and non-Parties to UNCLOS:

As we have briefly referred to, non-Party States to the Convention can also be bound by its principles and are called to participate in different meetings and conferences by which the Convention is developed and applied. Hopefully, with the years and the support of States practice and opinion *iuris* most rules enshrined in the Convention have become customary rules or have served as the basis for discussing the development of further regimes which may be applied by Parties and non-Parties. The Convention on the Law of the Sea is a remarkable achievement of the international community of States, providing “[...] robust, comprehensive

and viable legal regime”¹²⁸ for the oceans. “After twenty five years since the finalization of the text and more than a decade since it came into force, it has 153¹²⁹ parties. This is not universal membership, but is close”¹³⁰ and Colombia, Ecuador and Perú should be a part of it. Opportunities to create new figures in international law and to participate in the development of it, especially for small size countries such as Chile, Colombia, Perú and Ecuador are not many. The concept of 200 nautical miles originated with their active creativity is today very important for all countries in the world, especially for developing countries. On the other hand, the circumstance that a great part of fishing activities take place within the exclusive economic zone, the recognition of exclusive economic rights of coastal States over an extended zone has had a special significance for developing countries. On the one hand, there is an increase of new sources of food supplies and employment, while on the on the other hand, coastal States assume responsibilities regarding marine management and public policies. This is why we believe that it is so important that the South East Pacific Countries harmonize their internal legislations along the lines of the Convention and international agreed rules, and work together for the achievement of same goals that changed the law of the sea 60 years ago.

Conclusions:

1. The Chilean Presidential Declaration of 1947, followed by the Peruvian Supreme Decree 781 of the same year, were the first instruments that referred to the basic elements of what is now called the exclusive economic zone. Precedents that inspired the Declaration since 1945, as those of the United States, Mexico and Argentina, were also central in this trend. The Declaration of Santiago of 1952 is the first multilateral agreement aimed at creating a new maritime zone in contemporary times. This means, that the countries of the South East Pacific were the pioneers in the creation and development of a zone of 200 miles.
2. Instruments signed within the Permanent Commission of the South East Pacific, are compatibles with the United Nations Convention on the Law of the Sea.

¹²⁸ **FREESTONE, David** p.541 op. cit. p. 67

¹²⁹ 157 according to latest data in UN records

¹³⁰ **FREESTONE, David** p.541 op. cit. p. 67

3. The exclusive economic zone recognized by the Convention is a new maritime space, with its own legal nature. Neither is territorial sea nor high seas. Nevertheless, the zone incorporates characteristics of both regimes with the consequence that coastal and third States may have residual concurrent competences. This is a proof of its different legal nature.
4. Chile has a domestic legislation harmonic with the United Nations Convention on the Law of the Sea, through its laws the 200 miles zone is developed as it was understood in the Convention.
5. Colombia has a domestic legislation harmonic with the United Nations Convention on the Law of the Sea, although is not Party of the Convention.
6. Ecuador has a domestic legislation which follows more closely the approach of a territorial sea with an extension of 200 nautical miles. The accession to UNCLOS will make necessary a revision and amendment of its domestic legislation.
7. Perú does not apply an exclusive economic zone, but a Maritime Domain. This maritime domain is closer to a territorial sea than to the exclusive economic zone regime, and an accession to UNCLOS will make also necessary amendments of some of its domestic laws.
8. The lack of harmony among the domestic legislation of the members of the Permanent Commission for the South East Pacific lessens the influence and credibility of the Regional System, which may also be jeopardized by the different approaches followed by its members.
9. Without prejudice to these differences, in practice, the four countries have had no problem to work together in the framework of the Permanent Commission for the South East Pacific and to participate in other international organizations, as well as to become parties to different treaties.
10. As long as Perú y Ecuador remains non-Parties to UNCLOS, they will be deprived of a clear framework under which to conduct negotiations with third States as it is the case of the ongoing negotiations with South Pacific countries regarding high seas species.
11. Nevertheless there are some doors open to their participation in multilateral settings, as we saw in the case of the Agreement on Straddling Fishing Stocks and Highly Migratory Fish Stocks.
12. The lack of harmony among their internal rules and even the differences in the names given to each maritime zone of 200 miles, sometimes render more difficult the

cooperation among CPPS member States, but those factors have not hindered the opportunities to participate in technical and scientific programs and to negotiate functional agreements on several issues.

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