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THE SURGE OF SEA LAW

Seymour W. Wurfel
Principal Investigator

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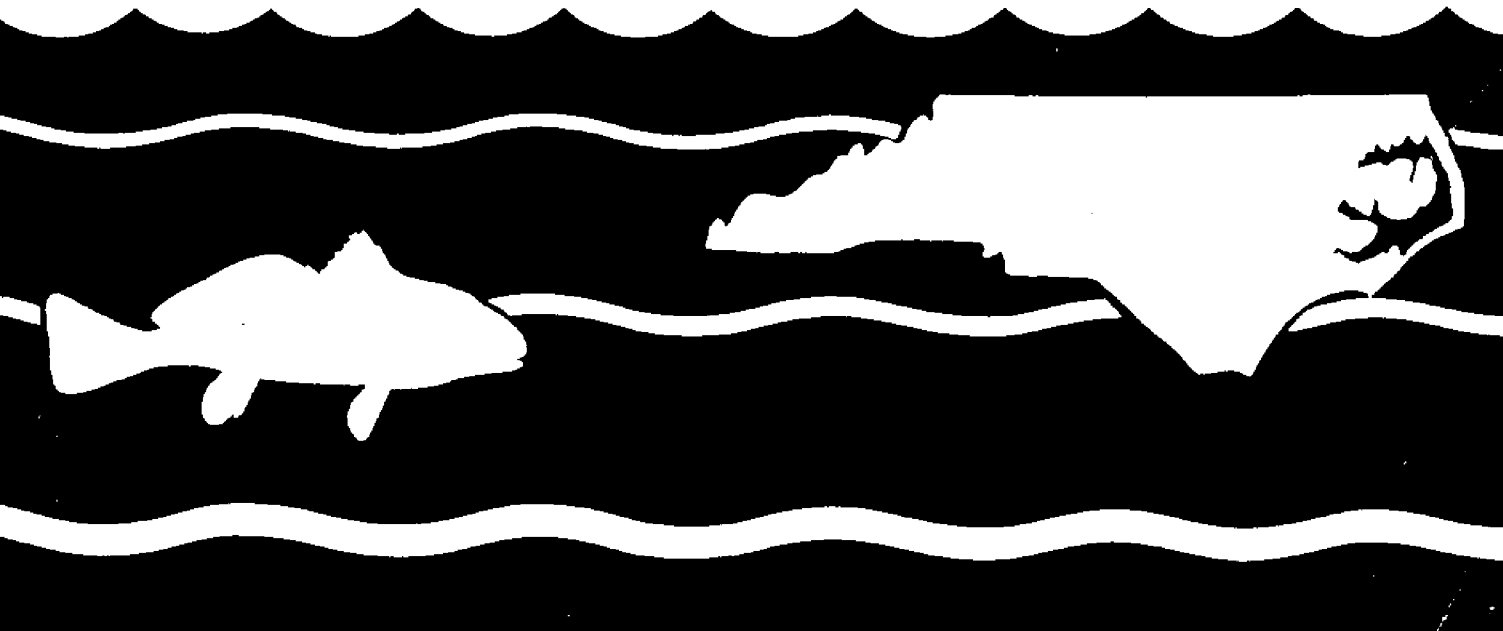

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THE SURGE OF SEA LAW

by
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SEA GRANT PUBLICATION UNC-SG-73-01 MARCH, 1973

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INTRODUCTION

The year 1972 proved to be one of some disappointment in the area of strengthening legal controls of the environment. The initial product of the Stockholm Conference was meager though perhaps some necessary preliminaries were there accomplished by the international community.

Also on the international scene, the United Nations deemed it advisable to postpone from 1973 to early 1974 the convening of the long sought, and much needed, definitive Conference on the Law of the Sea. Hopefully, this change will prove to be not just delay, but a wise application of the adage "to make haste slowly."

Domestically, the United States Supreme Court, in a four to three decision, dismissed the case of Sierra Club v. Morton, 405 U.S. 727 (1972, holding that the plaintiff club was without standing to sue. The Sierra Club sought to enjoin the United States Forest Service from permitting Walt Disney Enterprises to construct a ski and amusement facility in Mineral King Valley in Sierra National Park in California, to attract 14,000 tourists a day. The majority held that since the Sierra Club did not allege that the challenged action would cause it "injury in fact" that it could not litigate the issue. A minority opinion advocated "a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be dispoiled. . . . This suit would therefore be more properly labeled as Mineral King v. Morton." It could be that this minority view would one day become the majority opinion of the Court.

However, this is no time for the marine conservationist to become discouraged. 1972 may have been a period of low tide, but on October 28, President Nixon signed into law the Coastal Zone Management Act of 1972 (P.L. 9Z-583). This significant federal ligislation should give impetus to coastal states in increasing numbers to adopt coastal zone management legislation establishing state regimes eligible to receive federal grants to implement and supplement state efforts to conserve marine resources. This program will be administered by the National Oceanic and Atmospheric Administration (NOAA) in the Department of Commerce. Congressional appropriations of funds for the Coastal Zone Management Act and the Sea Grant program will be a matter of continuing concern.

The present situations calls for a concerted effort by statesmen, legislators, marine scientists, lawyers and individual members of the public to establish an effective and integrated marine resources conservation mechanism, both internationally and nationally.

The purpose of this Sea Grant legal research publication is to make readily available in a single volume a representative condensation of current thinking, practices and aspirations in the law of the sea. The recent surge of sea law has engulfed not only the layman but the marine scientist as well. It is hoped this symposium will afford to all concerned citizens, who are not in the small band of sea law experts, the opportunity to add a legal dimension to their own professional and civic efforts to conserve marine resources.

These Sea Law papers were researched and written by students of International Law at the School of Law of the University of North Carolina in the 1972

fall semester. The Table of Contents indicates the wide scope of their inquiry. They follow in the footsteps of the members of the 1971 International Law class who authored the 1972 Sea Grant publication, titled, "attitudes Regarding a Law of the Sea Convention to Establish an International Seabed Regime."

The capable assistance of Jan Samet and Robert Fuerst participants in the 1971 program, as student editor and assistant editor, respectively, and of an editorial board consisting of Charles Alexander, Howard Boney, Buzz Dahl, James Hugenschmidt, and John Morgan, members of the class, merits special recognition.

Dr. John Lyman, Director of the North Carolina Sea Grant Program, since its inception in 1970, has consistently maintained a discerning interest in the legal segment of his broad research endeavors. His belief that marine resources solutions should be achieved by interdisciplinary effort is expressed through the medium of this publication.

This work is a result of research sponsored by NOAA Office of Sea Grant, Department of Commerce, and the State of North Carolina, Department of Administration.

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CONTENTS

Page

INTRODUCTION
Seymour W. Wurfel..... i

A BRIEF HISTORICAL SURVEY OF FREEDOM OF THE SEAS
Page Dees..... 1

CRISIS IN THE SOUTH PACIFIC: TUNABOAT SEIZURES
Jack W. Abel..... 18

JURISDICTION IN NATIONAL WATERS
Lynn Allison..... 29

THE BLOCKADE "EXCEPTION" TO TERRITORIAL WATER JURISDICTION
Douglas M. Martin..... 43

THE ANTARCTIC TREATY: A STEPPING STONE TO THE DEVELOPMENT OF AN INTERNATIONAL SEABED REGIME
William E. Rabil, Jr. 51

TOWARD AN AGREEMENT ON THE EXTERNAL DELIMITATION OF THE TERRITORIAL SEA
Thomas R. Suher..... 59

THE ATTITUDE OF DEVELOPING COUNTRIES TOWARD INTERNATIONAL AGREEMENTS ON ENVIRONMENTAL CONTROL OF THE OCEAN
A. Wilder Wadford, Jr. 68

THE INTERNATIONAL SEABED REGIME: PROPOSALS AND PROSPECTS FOR REALIZATION
Albert M. Neal, Jr. 75

THE MARINE ENVIRONMENT AND TOXIC SUBSTANCES
Bryan W. Pittman..... 82

THE DISPOSAL OF RADIOACTIVE WASTES INTO THE SEA: SOME INTERNATIONAL LEGAL CONSIDERATIONS
Geoffrey Alan Planer..... 98

THE LAW OF MARITIME OIL SPILLS
John Pendergrass.....108

LEGAL ACTION TO CURB POLLUTION OF THE SEA
Keith Hennessee.....119

INTERNATIONAL CONSERVATION OF MARINE MAMMALS
Bill Raney.....129

OFFSHORE OIL DRILLING: A COMPARISON OF STATE LAWS
John M. Geil.....138

Page

INTERNATIONAL PROTECTION OF MARINE LIFE FROM THE EFFECTS OF POLLUTION DUE TO LAND-RELATED ACTIVITIES
Robert L. Mullinax.....147

ATTITUDES OF DISTANT FISHING NATIONS TO THE CONSERVATION OF FISHERY RESOURCES
Anderson Haynes.....155

AFRICAN ATTITUDES TOWARD THE LAW OF THE SEA
Paul Carruth, Jr. 166

COOPERATION BETWEEN CANADA AND THE UNITED STATES OF AMERICA IN THE CONSERVATION OF THE LIVING RESOURCES OF THE SEAS
Noel Allen.....178

COLOMBIA'S VIEW OF MARITIME LEGAL PROBLEMS
George Wood.....191

FRENCH LAW AND THE POLICY TOWARD POLLUTION IN THE MEDITERRANEAN
W. Vance Brown, II.....198

ISRAEL'S VIEW OF HER MARITIME LEGAL PROBLEMS
Michael A. Jacobs.....204

THE JAPANESE LEGAL APPROACH TO MARINE POLLUTION
C. Edward Alexander.....209

THE PEOPLE'S REPUBLIC OF CHINA'S VIEW OF CONTEMPORARY MARITIME LEGAL PROBLEMS
James Hugenschmidt.....214

PRIMARY ELEMENTS INFLUENCING THE DEVELOPMENT OF THE LEGAL REGIME OF SOVIET TERRITORIAL WATERS
Elmo Zumwalt III.....223

THE APPLICATION OF THE JONES ACT TO FOREIGN SEAMEN AND FOREIGN FLAG OPERATIONS
R. L. Moore.....230

ACTIONS FOR PERSONAL INJURY AND WRONGFUL DEATH IN MARITIME SURROUNDINGS
John Morgan.....236

A BRIEF HISTORICAL SURVEY

OF FREEDOM OF THE SEAS

Page Dees

I. INTRODUCTION

Since man first became aware of his surroundings, he has looked upon the sea as a mystic being. As man progressed and came to think in terms of rules to regulate his society, he drew up laws which clearly indicated that the seas were incapable of possession by anyone; they were free and open to all mankind.

As society developed, trade developed; and, there was a practical reason for adhering to the doctrine of freedom of the seas. The sea became the great highway of communication and commerce, and the doctrine became inextricably bound up with maritime commercial customs and laws.

The Law Merchant probably has the pre-eminent place in the Roman Law contribution to the common law. The lex mercatoria contained rules of the Roman (Civil) law which continued as practices of the Mediterranean merchants, as well as customs dating back to the Babylonians and Phoenicians. This Law Merchant and its concomitant customs of the sea, therefore, became the jus gentium of merchants under the Roman sway and ultimately governed all commerce.[1] For example, it was completely received in England where it became part of the common law (and was so noted by Coke and Blackstone). Sir Frederick Pollock commented on the close relationship of the Law Merchant and International Law: "There was considerable resemblance, now almost forgotten, between the law of nations and another cosmopolitan body of secular custom, the Law Merchant, in the manner of their promulgation and acceptance. Law Merchant has been so thoroughly assimilated by the national laws of all civilized countries that, as regards its separate existence, it may be said to have perished by the completeness of its own victory."[2]

Growing trade and the necessity for free commercial intercourse meant that the seas had to be free and safe. While the basic principle of free high seas not subject to any national law was still the rule, the seas must not be allowed to become areas of anarchy or crime.[3]

Ironically, it was this policing of the sea to insure free trade that was later used by many of the maritime powers as a basis for their claims to sovereignty over large portions of the open seas.

This paper will trace briefly the freedom of the seas doctrine--today, perhaps the most universally accepted of any principle of international law--from its earliest indications in the first ancient laws of which we have records, through its restrictions in the Middle Ages, to its most systematic expression by Grotius.

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[1] Holdsworth, Development of the Law Merchant, in 1 Select Essays in Anglo-American Legal History 289 (1907); Re, The Roman Contribution to the Common Law, 29 Fordham L. Rev. 447 (1960).

[2] Pollock, Sources of International Law, 2 Colum. L. Rev. 511 (1902).

[3] H. Smith, The Law and the Custom of the Sea 50 (2d ed. 1950). [hereinafter cited as Law and Custom].

II. ANCIENT AND PRE-JUSTINIAN ROMAN SEA LAW

Although we know that maritime trade was carried on extensively by the Egyptians and later by the Phoenicians, none of their laws or rules have survived in recorded form.[4] Egyptian frescoes portray large vessels, obviously meant for ocean use; and Herodotus in Book IV of the Persian Wars tells of Egyptian ships with Phoenician sailors circumnavigating Africa.[5]

In early Hellenic history, the perhaps mythical Minos claimed the title of lord of the sea on the strength of his success in ridding the seas of pirates. Thus, Hellenic maritime history starts with Mare Clausum.[6]

We know that the ancient Greeks were a great naval power and were noted for their navigation and commercial activities; yet, there is no record of a code of naval law. The Athenians did, however, encourage navigation and trade through procedures for dealing with contracts and controversies between merchants and mariners.[7] This law was, for the most part, customary.[8]

The people of Rhodes apparently were the earliest people who created a systematic code of maritime law. Sometime around the third or second century B. C. this code was drawn up. It was so comprehensive and authoritative that it was widely accepted throughout the Mediterranean; and its principles, known as the Rhodian Sea Law, lasted for a thousand years.[9] Unfortunately, all that survives of this famous code in its exact form is that part preserved in one title of Justinian's Digest, de Jactu, the law of jettison and salvage (Dig. 14.2.)[10] It is worth noting that when an adequate and simple method has been found for solving common problems, it will survive. These laws of jettison and salvage came down through the centuries and their basic principles remained in modern European maritime law up to very recent times.[11]

It is believed that the Romans adopted the Rhodian Code about 55-51 B. C., and that the compilation called the Rhodian Sea Law was made in the Later Roman Empire.[12] The lack of a Roman maritime code at this period can probably be attributed to the fact that the Romans held commercial pursuits in contempt; therefore, they were content to adopt the Rhodian model. Even so, we find some brief but astute comments on maritime affairs in the works of famous Roman jurists, as for example, Ulpain. (second century A. D.).[13] It was Ulpian who wrote that the sea is open to everybody by nature (mare quod nature omnibus potet).[14]

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[4] R. Wormser, The Story of the Law 496 (1962). [hereinafter cited as Wormser, Story].

[5] Sanborn, Comparative Law and the Maritime Law, 16 Brooklyn L. Rev. 160 (1949). [hereinafter cited as Sanborn, Comparative Law].

[6] 1 T. Walker, A History of the Law of Nations 41, 165 (1899). And note that this "keeping" of the seas free from piracy is a recurring theme, from earliest times on through the Middle Ages, asserted to justify the mare clausum concept. [hereinafter cited as Walker, A History].

[7] 3 J. Kent, Commentaries on American Law 3 (14th ed. 1896). [hereinafter cited as Kent's Commentaries].

[8] Sanborn, Comparative Law at 161.

[9] C. J. Colombos, The International Law of the Sea 26 (2nd ed. 1954) [hereinafter cited as Colombos, International Law]; Kent's Commentaries at 4; Sanborn, at 161-162.

[10] Kent's Commentaries at 4.

[11] P. Vinogradoff, 2 Collected Papers, Jurisprudence 207 (1928); Wormser, Story at 498.

[12] Sanborn, Comparative Law at 161, 162.

[13] Kent's Commentaries at 5-7.

[14] 1 L. Oppenheim, International Law 582 (Lauterpacht 8th ed. 1955). [hereinafter cited as Oppenheim, International]

Preceding Justinian's great work by almost a hundred years is a code which has come down to us more or less intact; viz., the Code of Theodosius II., the Eastern Roman Emperor, published in 438. Nothing in the code deals per se with freedom of the seas, but Book 7, Title 16--Custody of Seacoasts and Highways--touches upon freedom to enter shores and harbors in the interest of free trade.[15]

III. ROMAN SEA LAW AND THE CORPUS JURIS CIVILIS

When the Byzantine Emperor Justinian ascended to the throne in 527, one of his first acts was to set in motion the collection and codification of Roman Law. What he and his commissioners wrought, the Corpus Juris Civilis, has earned eternal fame.[16]

Although Roman Law is generally private law, the Corpus Juris contains a good deal of Roman Public Law in the Code; and even though the Corpus Juris has practically nothing to do with International Law,[17] we find in the Institutes and the Digest an expression of the Roman view of man's relation to the sea.

> Institutes 2.1.1.: Things common to mankind by the law of nature, are the air, running water, the sea, and consequently, the shores of the sea; no man, therefore, is prohibited from approaching any part of the seashore, whilst he abstains from damaging farms, monuments, edifices, &c which are not in common as the sea is.[18]

> Institutes 2.1.5.: The use of the seashore, as well as of the sea, is also public by the law of nations; and therefore any person may erect a cottage upon it, to which he may resort to dry his nets, and haul them from the water; for the shores are not understood to be property in any man, but are compared to the sea itself, and to the sand or ground which is under the sea.[19] (emphasis added)

In addition to the salvage law (Dig. 14.2) mentioned previously, we find a few other references in the Digest to sea law. An example is Digest 1, 8, 4: "Rights of fishing in the sea belong to all men.[20] This was especially stated by Antoninus." The Emperor Antoninus is also quoted in Digest 14.2: "I am master of the earth, but the law is mistress of the sea."

As noted above, however, Roman Public Law does not play a large part in the Corpus Juris, and this branch of Roman Law is confined to the political and legal history of the ancient Roman Empire. Through other sources, we have some knowledge of ancient Rome's municipal law touching international relations--so-called "external" municipal law. And, we find that Rome went beyond this and could be said to have participated to a limited extent in the formation of real International Law. This is seen primarily in treaties Rome concluded with foreign nations. Three times, in 509, 306 and 279 B. C., Rome entered into compacts with Carthage which were designed to establish reciprocal spheres of influence, in particular as regards maritime commerce. In these treaties, Rome agreed to her exclusion from important waters.[21]

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[15] The Theodosian Code and Novels (1952 C. Pharr transl.).
[16] A. Nussbaum, A Concise History of the Law of Nations 10 (1954); Wormser, Story at 147-148. [hereinafter cited as Nussbaum, Concise History].
[17] Nussbaum, Significance of Roman Law in the History of International Law, 100 U. of Pa. L. Rev. 678 (1951-). [hereinafter cited as Nussbaum, Significance].
[18] T. Cooper, Institutes of Justinian with Notes 67 (1812).
[19] Id. at 68.
[20] W. Hunter, Roman Law 310 (4th ed. 1903).
[21] Nussbaum, Concise History at 10-12: Nussbaum, Significance at 100.

IV. TRANSITION

International Law as a law between sovereign and equal states did not exist during antiquity and the greater part of the Middle Ages. It is a product of the Christian era and came into being during the age of discovery in the late fifteenth and early sixteenth centuries. But, as discussed above, its embryonic beginnings are found far back in history in the ancient customs of peoples as regards their external affairs[22] and, in particular, maritime commerce. World trade which had fallen with the destruction of the Roman Empire began to develop anew, beginning about the eight century. Sea trade flourished and brought in its wake the need for rules. This need was satisfied by many collections of maritime laws or codes.[23] The most important of these were the following:

1. The Basilika, a seventh century Byzantine code, regulated commerce of the Levant. This code contained positive, not customary, law and depended on the Emperor for its authority.
2. Tabula Amalfitana, an eleventh century code, governed the maritime trade of the free republic of Amalfi in Italy. Its authority was acknowledged by all the Italian states.[25] The code laid down the rule: "Whenever custom speaks, all law is silent;" i. e., custom would prevail over the Civil Law.[26]
3. Pisa, Venice and Genoa had codes in the early Middle Ages. The long-time maritime rules of Pisa and Genoa were not reduced to writing until the 1100's or later and Venice's Capitulare nauticum dates from 1255. By the thirteenth century, Pisa had a maritime court; and its codes, particularly, the Constitutum usus Pisani were influential from Sardinia and Corsica to Marseilles. Genoa's influence was dominant along the eastern shores of the Mediterranean.[27] These three trading republics raised the crucial issue of freedom of the seas. Venice claimed exclusive navigation and fishing rights in the Adriatic Sea, and Pisa and Genoa claimed the same rights in the Ligurian Sea.[28] As a result of these claims and the attendant trade rivalry of the Italian trading states, freedom of the seas was lost in the Mediterranean between the eleventh and sixteenth centuries.[29] A few wxamples will suffice to show the effects of these mare clausum claims. In 1274, Pope Gregory X gave judgment in favor of Venice on complaint against her by Ancona as to tribute levied in the Adriatic.[30] Pope Julius II made a treaty with Venice to secure for "subjects of the Church" the right of free navigation in the Adriatic, and in 1478-79 the Emperor Frederick III was forced to ask the Venetian Doge for permission to ship corn from Apulia through the Gulf. The claims of Venice were at all times based upon a Papal grant given them for their services in ridding the Adriatic of pirates.[31]
4. Code or Rolls of Oleron, a twelfth-thirteenth century code of maritime laws, governed the sea law of the trading island of that name in the Bay of Biscay. The code borrowed heavily from Rhodian Sea Law. These rules were adopted

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[22] Oppenheim, International Law at 72.
[23] Id. at 80.
[24] Colombos, International Law at 27.
[25] Kent's Commentaries at 8-9.
[26] Sanborn, Comparative Law at 166.
[27] Calisse, Italy During the Renascence, in General Survey of Continental Legal History 166-67 (1968); Sanborn, Comparative Law at 166.
[28] Nussbaum, Concise History at 23.
[29] Colombos, International Law at 41.
[30] Walker, A History at 92.
[31] Id. at 163-164.

by England, Normandy, Brittany, the Low Countries and Spain. In England, several portions of the Rolls of Oleron were included in the Black Books of the Admiralty.[32]

5. Laws of Wisby were compiled on the Island of Gothland in the Baltic Sea in the late thirteenth century. A large portion of this code was a reissue of the Rolls of Oleron.[33] Wisby was the center of trade in the northern Baltic region until its destruction by the Danes in 1361;[34] and until that time, its code was the maritime law of the Baltic nations north of the Rhine.[35]
6. Consolato del Mare of Barcelona, widely known as the Sea Code of Barcelona, was a detailed and extensive collection made most probably in the mid-fourteenth century, although there were sea consuls at Barcelona as early as 1279 whose job it was to settle maritime disputes. The first printed edition appeared in 1494. The code itself was a compilation in the Catalan language of custom and usage of merchants and seamen, in effect, a common law of the sea. It was so well received that it was accepted by all the trading areas of the Mediterranean northern seaboard and was widely applied for perhaps five centuries.[36] The part of the Consolato concerned with prize law, and specifically the protection of neutral property on the high seas, gained it widespread fame. The simple rule, "Confiscate the goods of your enemy, respect the property of your friend",[37] was a persuasive one in the Middle Ages maritime wars; and even in the eighteenth century, it was accepted as the common law of nations.[38]
7. The Hanseatic League began with the loose union of a number of Baltic towns (c. 1260) and grew to seventy to eighty cities over a century. Lubeck was the leader of this trading union whose object was to acquire trading privileges in foreign states, to provide for mutual defense against sea piracy, and to secure freedom of commerce and navigation. The League was not a confederation or a federation, but was rather a loose association. Its high period was in the fourteenth and fifteenth centuries, and its influence was enormous.[39] The high point of the League's position legally came in the Treaty of Utrecht in 1474, which gave the Hanse towns great trading privileges in England. The League had, however, passed its peak of power by this time and was declining. By the reign of Queen Elizabeth I, it lost all its broad privileges in England.[40] The League produced a code in the early seventeenth century that added to its former ordinances.[41] This was based on the Sea Laws of Wisby, which in turn was based on the Rolls of Oleron.[42] It did, however, differ from the usual practice of compiling customary law in that it contained legislative rules.[43] The code was published under the title

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[32]Colombos, International Law at 27-29: Kent's Commentaries at 11; Nussbaum, Concise History at 29-30; Sanborn, Comparative Law at 116; Wormser, Story at 497.
[33]Colombos, International Law at 28; Kent's Commentaries at 12.
[34]Wormser, Story at 497.
[35]Kent's Commentaries at 12.
[36]Colombos, International Law at 30-31; Kent's Commentaries at 9-10; Sanborn, Comparative Law at 167; Walker, A History at 116; Wormser, Story at 497.
[37]Walker, A History at 136.
[38]Nussbaum, Concise History at 30.
[39]Nussbaum, Concise History at 33-34; Oppenheim at 80; Walker, A History at 117.
[40]Id. at 35.
[41]Colombos, International Law at 28; Kent's Commentaries at 13.
[42]Wormser, Story at 497.
[43]Id. at 498.

of Jus Hanseaticum Maritimum in 1667;[44] but, as noted above, the League was in decline.

So, it seems that at the dawn of International Law, quite late in the Middle Ages, most maritime nations were claiming sovereignty over parts of the open seas.[45] The claims of Venice, Genoa and Pisa have been discussed above. In addition, both Sweden and Denmark claimed the Baltic as their sea, with Denmark later claiming all the northern sea as far as Iceland and Greenland.[46] England claimed the Narrow Seas, the North Sea and the Atlantic from the North Cape to Cape Finisterre;[47] but, as early as the thirteenth century, English sovereigns had claimed wide areas of the sea surrounding the British Isles.[48] These claims to the sea were more or less successfully maintained and accepted by other nations for several hundreds of years. The reason for this state of affairs lay primarily in the policing of the seas against piracy so that trade might be carried on unhampered.[49] This asserted dominion was not a hollow pretension. It denoted absolute proprietorship with all that it entailed: the power to prohibit navigation, to exact tolls, either to prohibit all fishing or to issue fishing licenses, to forbid hostilities, to demand a salute, to demand that a foreign ship strike its flag.[50]

The boldest claims to sovereignty over the seas were those of Spain and Portugal. By Papal Bulls in 1493, the Borgia Pope Alexander VI conferred on those nations the "whole undiscovered regions of the world." For this purpose, an imaginary line was drawn, from Pole to Pole, one hundred leagues west of the Azores and the Cape Verde Islands. Portugal was to have all rights to the east of the line, and Spain, all rights to the west of the line.[51] These Bulls not only granted title to all new land, but also prohibited all sea commerce except that licensed by Spain or Portugal.[52] These claims to ocean lordship given in the Bulls were based on the claim of the Pope as Lord of the Isles of the Ocean, a claim first put forward by Pope Hadrian IV in the twelfth century.[53]

Until Spain and Portugal made their far-ranging claims, there had not been any widespread condemnation of these pretensions to ocean sovereignty; but the Portuguese and Spanish claims, and the resultant restraints on trade, sparked a reaction. Queen Elizabeth was the first to assert clearly the principle of freedom of the seas. Early in her reign, she protested against the Spanish (as successors of the Portuguese) exclusion of foreigners from the East Indian trade and declared this to be contrary to the Law of Nations.[54] When, in 1580, the Spanish Ambassador Mendoza protested the voyages to the Pacific by Sir Francis

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[44] Kent's Commentaries at 13.

[45] J. Brierly, The Law of Nations 304-305, (6th ed. 1963) [hereinafter cited as Brierly, Law]; Oppenheim, International at 583.

[46] Id. at 304; Colombos, International Law at 41; Oppenheim, International at 583; Smith, Law and Custom at 43; Walker, A History at 162.

[47] Oppenheim, International at 583; Walker, A History at 162.

[48] Smith, Law and Custom at 43.

[49] Brierly, Law at 305; Oppenheim, International at 583; Smith. Law and Custom at 44; Walker, A History at 163.

[50] Brierly, Law at 305; Colombos, International Law at 40,44; Oppenheim at 583-584; Walker, A History at 163-164, 167-170.

[51] G. Hackworth, 2 Digest of International Law at 653-654 (1941); M. Whiteman, 4 Digest of International Law 501 (1965). [hereinafter cited as Whiteman, Digest].

[52] Smith, Law and Custom at 44.

[53] Walker, A History at 93.

[54] Smith, Law and Custom at 44; Walker, A History at 166.

Drake, Elizabeth replied: "The use of the Sea and Ayre is common to all. Neither can any title to the Ocean belong to any people, or private man; for as much as neither Nature, nor regard of the publike use, permitteth any possession thereof."[55] The Queen was, in actuality, reasserting the ancient law of freedom of the seas. The reasons she gave and the phrases she used are typical of the Roman law.[56] It should be noted that English practices were not always consistent with their espousal of the doctrine of freedom of the seas. As an example, English warships for many years required a salute from vessels in the English Channel.[57] The Dutch, and later the French, joined the controversy and declared for freedom of the seas for the same reason--trade.[58]

The stage was set for that greatest proponent of freedom of the seas--Hugo Grotius. But there were two outstanding writers before him whose germinal ideas Grotius nurtured into a systematic doctrine.

V. TWO PRECURSORS OF GROTIUS

1. Francisco de Vitoria (c. 1480 - 1546).[59]

Vitoria, a pre-eminent legal and political thinker, was a Dominican and Professor of Theology at the University of Salamanca. It was in that latter capacity that his wide interests and cosmopolitan training and views were evidenced in a series of lectures or Relectiones. A collection of thirteen of these lectures was published in 1557, well after his death. The two most important lectures from the viewpoint of International law are Relectio V., DeIndis (The Indiens recently discovered) and Relectio VI., DeJure Belli (The Law of War), both given in 1532. In particular, section three of DeIndis is considered to be the basis of Vitoria's anticipation of and lasting contribution to the law of nations. The part pertinent to the subject under consideration in this paper deals with freedom of trade:

> The Spaniards have the right of journeying to and remaining in the lands of the Barbarians, provided it be without injury to the Barbarians and this right the Barbarians may not deny them. . . It is lawful for the Spaniards to trade with the Barbarians, provided it be without injury to the country, whether by exporting goods which the Barbarians lack, or exporting goods or silver or other objects in which they abound. Their princes may not hinder their subjects from carrying on trade with the Spaniards, nor may Spanish princes prohibit commerce with them. . . because it is an apparent rule of the jus gentium that foreigners may carry on trade, provided they do no hurt to citizens. (DeIndis, Sec. III., nos. 1-3)

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[55] Colombos, International Law at 42-43; Oppenheim at 584; Smith, Law and Custom at 44; Walker, A History at 161.

[56] Nussbaum, Significance at 678.

[57] Whiteman, Digest at 501.

[58] Oppenheim, International at 584; Smith, Law and Custom at 45; Walker, A History at 166.

[59] The material on Vitoria is based on the following sources: Nussbaum, Concise History at 79-84; J. B. Scott, 1 Law, the State, and the International Community 310 (1939). [hereinafter cited as Scott, 1 International Law]; J. B. Scott, 2 Law, the State and the International Community 274 (1939). [hereinafter cited as Scott, 2 International Law] J. B. Scott, Spanish Origins of International Law: Francisco de Vitoria and His Law of Nations (1934). [hereinafter cited as Scott, Vitoria]; Walker, A History at 214-230.

Vitoria's claim as an early internationalist rests on his use of the phrase inter omnes gentes (among all people) instead of the phrase inter omnes homines (among all men) as used in the Institutes to describe those bound by the jus gentium. Some writers[60] maintain that Vitoria meant, by this usage, the law both of individuals as composing humanity and individuals socially organized into states. The argument is made that Vitoria uses the word gentes and nationes synonymously. Other writers,[61] while disputing these claims based on word games, acquiesce in the view that Vitoria was an anticipator of International Law. Gentili and Grotius both adopted the general idea that trade among peoples of various states must be permitted; and in the later natural law, this became the principle of "freedom of commerce." Grotius used Vitoria's basic axiom of freedom to travel and trade as the major premise of his Mare Liberum (Freedom of the Seas).

2. Alberico Gentili (1552 - 1608).[62]

Gentili, the Italian lawyer 'emigre' and Oxford Professor of Civil Law, should probably be called the "father" of International Law, the title usually given to Grotius. Gentili is the first to write of international law in modern terms. He treated contemporary subjects to derive tentative rules from existing conditions, a positivistic approach. Perhaps his greatest gift to International Law was to secularize it; he totally undermined the theological dogmas and did away with the religious concepts and clerical reasoning that has characterized works on the law of nations before his day. The theologians were told: "Let the theologians keep silent about a matter which is outside of their province (silete theologi in maunere alieno)" DeJure Belli I xii.

Although Gentili wrote prolifically, his fame rests primarily on three works: DeLegationibus of 1585 (On Embassies), DeJuri Belli Libri Tres 1598 (Three Books on the Law of War), Hispanicoe Advocationis Libri Duo 1613 (Two Books on the Pleas of a Spanish Advocate).

Gentili made quite clear his strong views in favor of freedom of the seas and freedom of trade. First, his views on the sea:

> I shall now speak about the sea. This is by nature open to all men and its use is common to all, like that of the air. It cannot therefore be shut off by any one . . . But although we say that the use of all these things is common to everyone, yet this opinion also is said to be accepted, that the possession of them may be acquired and that the possessors may prevent others from using them. That accordingly the Venetians could prohibit others from entering their part of the sea, not because the Venetians had become lords of the sea, which cannot fall under the control of any one, but because they were the possessors of that portion of it. But I cannot admit that view, which by vain circumlocution violates the law of nature, for if the sea has been opened to all by nature, it ought to be closed to no one. To close it is usurpation (sic.) . . . The Venetians possess jurisdiction . . . over that part of the sea . . . Things which are common to all so far as their use is concerned are the property of no one; their juris-

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[60] Scott, 1 International Law at 316-317; Scott, Vitoria at 139-141.

[61] Nussbaum, Concise History at 80-82.

[62] The material on Gentili is based on the following sources: Nussbaum, Concise History at 94-101; Gentili, 2 DeJure Belli Libri Tres (1933 ed. J. Rolfe transl. 1612 ed.) [hereinafter cited as Gentili, DeJure Belli]; Scott, 1 International Law at 363-386; Walker, A History at 249-276; Wormser, Story at 504-506.

> diction and protection belong to the sovereign . . . Furthermore, what is in the sea belongs to all . . . However, there is jurisdiction even over the deep . . . But there is also a magistracy at sea. Such a magistracy belongs to the law of nations and its jurisdiction also . . . very many things are put in the hands of the sovereign on the sea . . . The sovereign himself will bring war upon himself, if he refuses the sea to others . . .(DeJure Belli I., xix.)[63]

Second, his views on freedom of travel and trade:

> So far as ports and commerce are concerned, the accusation of the Megarians seemed just, as well as their complaint that it was contrary to the law of nations for them to be forbidden all intercourse and commerce and kept from the harbours of the Athenians . . . Indeed, one who takes away such privileges inflicts a wound on human society . . . For commerce is in accordance with the law of nations, and a law is not changed by opposition to it . . . I believe that it is a common characteristic of all uncivilized peoples to drive away strangers. But commerce cannot be said to be prohibited, as soon as one phase of it is prohibited . . . But if . . . there is interference with commerce, it is justifiable to make war. (DeJure Belli., xix.)[64] "Commerce with infidels is not forbidden; the law of God does not bid us withdraw from the world, and the law of man commands commerce among all men . . ." (DeJure Belli, III., xix.)[65]

Finally, in Pleas of A Spanish Advocate, Book 1, Gentili dealt with questions of public maritime law, particularly the law of neutrality. Here, too, he advocated freedom of the seas, but added restrictions. He not only reserved to the coastal sovereign the exclusive power (dominium) over coastal waters but extended those "coastal waters" outwards one hundred miles. And he granted to the sovereign a vague "jurisdiction" as distinct from dominium over the high seas,[66] as he had earlier done in DeJure Belli.[67] In spite of these weaknesses, which are probably functions of the age in which he wrote, Gentili's conception of jus gentium, the Law of Nations, was a signal contribution. A comparison of his work with the work of Grotius will show that he not only prepared the way for Grotius, but that Grotius himself was well aware of the obligation he owed Gentili.

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[63] Gentili, DeJure Belli, at 90-92.
[64] Id. at 88-90.
[65] Id. at 401.
[66] Nussbaum, Concise History at 98-99.
[67] Gentili, DeJure Belli at 92.

VI. GROTIUS AND FREEDOM OF THE SEAS[68]

Hugo Grotius (1583-1645), the Dutch prodigy and Juris Doctor, overshadows all other writers on International Law and is accorded the title "Father of International Law." His fame rests primarily on two epoch-making worls: Mare Liberum (Free Seas) published anonymously in 1609, and DeJure Belli ac Pacis (On the Law of War and Peace) published in 1625.

If Grotius had written no other work than Mare Liberum, his fame would have been insured, and justly so. This tract grew out of the conflicts aroused by the Spanish and Portuguese claims to dominion over the seas. As discussed above, the Spanish claimed the Pacific Ocean and the Gulf of Mexico; and Portugal claimed the Atlantic, south of Morocco, and the Indian Ocean. Both nations sought to exclude all foreigners from navigating these waters or doing any trading therein. The Dutch East India Company actively resisted these claims; and, in 1602, when the Netherlands were at war with Spain, a ship of that company captured a Portuguese ship in the Straits of Malacca. (Portugal was then under Spanish domination.) The ship and its cargo was taken to Holland and sold. The Dutch East India Company consulted the young Grotius on this most important matter of prize, and he prepared a treatise in 1604-1605 which was, in effect, a lawyer's brief. This larger treatise, DeJure Praedae (On the Law of Prize), was not discovered until 1864; but Grotius had published a part of it anonymously in 1609 under the title Mare Liberum. That part, chapter twelve of the DeJure Praedae, can stand alone as a brilliant and definitive exposition of the freedom of the seas. The Mare Liberum was not just a philosophical and theoretical discourse. It grew out of real needs and an actual case, as its subtitle clearly indicated: "The Right Which Belongs to the Dutch to Take Part in the East Indian Trade."

This paper cannot encompass all of that remarkable work, but the selections below should suffice to give the tone and flavor of Grotius's views on freedom of the seas and freedom of trade:

a. I shall base my argument on the following most specific and unimpeachable axiom of the law of nations, called a primary rule or first principle, the spirit of which is self-evident and immutable, to wit: Every nation is free to travel to every other nation, and to trade with it. Mare Liberum c. i. p. 7[69]

b. (N)o one is sovereign of a thing which he himself has never possessed, and which no one else has ever held in his name . . . (N)atural reason itself, the precise words of the law, and the interpretation of the more learned men all show clearly that the act of discovery is sufficient to give a clear title of sovereignty only when it is accompanied by actual possession . . . (D)iscovery per se gives no legal rights over things unless before the alleged discovery they were res nullis. Id. c. ii at 11, 12, 13.

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[68]The material on Grotius is based on the following sources: 1 Grotius, DeJure Praedae (1950 ed. G. Williams transl. 1604 ed); Grotius, Freedom of the Seas (1916 ed. R. Magoffin transl. 1633 ed) [hereinafter cited as Mare Liberum]; Grotius, Rights of War and Peace (1901 A. C. Campbell transl.); Nussbaum, Concise History at 102-114; Scott, 1 International Law at 521-545; Walker, A History at 278-337; Wormser, Story at 507-509.

[69]Note the use of words almost identical to Vitoria's. See p. 14.

c. (As regards the partition made by Pope Alexander VI.), even if the Pope had intended and had had the power to make such a gift, still it would not have made the Portuguese sovereigns of those places. For, it is not a donation that makes a sovereign, it is the consequent delivery of a thing and the subsequent possession thereof. Id. c. iii., at 15.

d. (I)n the . . . Law of Nations, the sea is called indifferently the property of no one (res. nullis), or a common possession (res communis), or public property (res publica). . . (T)hings which are called 'public' are, according to the Laws of the Law of Nations, the common property of all, and the private property of none. The air belongs to this class of things for two reasons. First, it is not susceptible of occupation; and second, its common use is destined for all men. For the same reasons, the sea is common to all, because it is so limitless that it cannot become a possession of any one, and because it is adapted for the use of all, whether we consider it from the point of view of navigation or of fisheries . . . (Although common or public things) are with reason said to be res nullis, so far as private ownership is concerned, still they differ very much from those things which, though also res nullis, have not been marked out for common use, such for example as wild animals, fish and birds. For if any one seizes those things and assumes possession of them, they can become objects of private ownership, but the things in the former category . . . are forever exempt from such private ownership on account of their susceptibility to universal use . . . Therefore the sea can in no way become the private property of any one, because nature not only allows but enjoins its common use . . . The following qualification, however, must be made. If any part of these things is by nature susceptible of occupation (emphasis added) it may become the property of the one who occupies it only so far as such occupation does not affect its common use . . . The nature of the sea differs from the shore, because the sea, except for a very restricted space, can neither easily be built upon, nor inclosed . . . Nevertheless, if any small portion of the sea can be thus occupied, the occupation is recognized . . . Now, the same principle which applies to navigation applies also to fishing, namely, that it remains free and open to all . . . (I)t would be an intolerable outrage for any one to snatch away, even if he could do so, from public use a large area of the sea . . . Therefore the sea is one of those things which is not an article of merchandise, and which cannot become private property. Hence, it follows, to speak strictly, that no part of the sea can be considered as the territory of any people whatsoever . . . We recognize, however, that certain peoples have agreed that pirates captured in (a given part) of the sea should come under the jurisdiction of (a given)

state, and further that certain . . . limits of distinct jurisdiction have been apportioned on the sea . . .(T)his agreement does bind (the parties) to it, but it has no binding force on other nations, nor does it make the delimited area of the sea the private property of any one . . . (N)either a nation nor an individual can establish any right of private ownership over the sea itself (except inlets of the sea), inasmuch as its occupation is not permissible either by nature or on grounds of public utility . . . (I)t is universally admitted that navigation on the sea is open to any one, even if permission is not obtained from any ruler. Id. c. v., at 22, 28-37.

e. (I)t is repugnant to the law of nature . . . for anyone to have as his own private property either the sea or its use. Id. c. vi., at 46.

f. . . .(I)t is impossible to acquire by . . . prescription things which cannot become property, that is, which are not susceptible of possession . . . All of which is true with respect to the sea and its use . . . And it is a universal law that the sea and its use is common to all . . . (A)n exclusive right of navigation and a right prohibiting others from navigation is no more to be acquired by custom than by prescription. Id. c. vii., at 47, 52, 56.

g. By the law of nations the principle was introduced that the opportunity to engage in trade, of which no one can be deprived, should be free to all men . . . freedom of trade is based on a primitive right of nations which has a natural and permanent cause and so that right cannot be destroyed . . . except by the consent of all nations. Id. c. viii., 61, 63, 64.

In 1625, Grotius published in Paris his epoch-making book DeJure Belli ac Pacis Libri Tres. This work is probably the single most important germinal book in the literature of International Law. In this work, he expounded at length the ideas he had set forth in his earlier little masterpiece, Mare Liberum. He re-emphasized his strong views on freedom of the seas in DeJure Belli ac Pacis in these words:[70] "There is a natural reason also, which renders the sea . . . incapable of being made property: because occupancy can never subsist but in things that can be confined to certain permanent bounds . . . the ocean as it is equal to, or larger than, the earth cannot be confined within the land: so that the ancients said the earth was bounded by the sea like a girdle surrounding it, nor can any imaginable division of it have been originally framed. For as the greatest part of it was unknown, it was impossible that nations far removed from each other could agree upon the bounds to be assigned to different parts. Whatever, therefore, was common property of all, and after a general division of all other things, retained its original state, could not be appropriated by division, but by occupancy."[71] He continued:

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[70] Grotius, Rights of War and Peace (1901 A. C. Campbell transl.) [hereinafter cited as Grotius, DeJure Belli].
[71] Id. at 90.

> Among those things, which belong to no one, there are two that may become subjects of occupancy; and those are jurisdiction, or sovereignty, and property . . . The objects over which sovereignty may be exercised are twofold, embracing both persons and things. But this is not the case with property . . . Sovereignty, says Seneca, belongs to princes and property to individuals . . . The sea appears capable of being made a property by the power possessed of the shore on both sides of it; although beyond those limits it may spread to a wide extent . . . But this right of property can never take place where the sea is of such a magnitude as to surpass all comparison with that portion of the land which it washes. And the right which one people or prince possesses may also be shared by a great number of states, among whose respective territories the sea flows . . . Instances may be found of treaties by which one nation binds itself to another not to navigate particular seas beyond certain bounds . . . Now the instances alluded to do not prove actual occupancy of the sea or the right of navigation . . . both individuals and nations may grant as a matter of favor or compact, not only what they have a competent right to dispose of, but that which is the common right of all men as well as of themselves.[72]

Grotius borrowed heavily from the earlier Spaniards, particularly Vazquez and Vitoria, and Gentili. And though there was little that was novel in his system or its arrangement, he is counted greater than his predecessors, because he took their scattered concepts, secularized them where needed, built upon them, and wove them into our first tapestry of International Law.

Strong words bring strong reaction, and it was not long in coming. The most important of these works defending maritime sovereignty against the bold attack of Grotius was that of the Englishman John Selden who answered Grotius with Mare Clausum (Closed Sea) in 1618 (printed in 1635).[73] The strong opposition to Grotius's thesis delayed his total victory for about two centuries. During that time progress was made toward freedom of navigation; and by the later seventeenth century and throughout the eighteenth century, practically all prominent writers in International Law took up the case of freedom of the open sea.[74]

VII. TWO POST-GROTIANS

1. Cornelius van Bynkershoek (1673 - 1743)[75]

This Dutch early "positivist" became one of the great ornaments of International Law. In an early work, DeDominio Maris of 1703 (Dominion of the Seas),

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[72] Id. at 103.

[73] Selden put forth a two-part thesis: (1) "that the sea, by the law of nature or nations, is not common to all men, but capable of private dominion or property as well as the land" and (2) "that the King of Great Britain is lord of the sea flowing about, as an inseparable and perpetual appendant of the British Empire."

[74] Oppenheim, International at 585-586.

[75] The material on Bynkershoek is based on: C. Bynkershoek, 2 Quaestionum Juris Publici Libri Duo (1930 ed T. Frank transl. 1737 ed) [hereinafter cited as Bynkershoek, Public Law Questions]; Nussbaum, Concise History at 167-172; Wormser, Story at 513-514.

he took the side of Grotius and held that the navigation of the sea was free to all, and that fishing rights on the high seas could not be restricted. It was he who suggested the "cannon-shot" rule as the practical solution to the demarcation of "territorial waters"; viz., the distance of a cannon shot (one marine league or three miles) would be the limit of off-coast territorial waters. His adoption of Grotius's position of freedom of the high seas was not just a matter of his philosophical agreement with the theory; to Bynkershoek's positivistic mind, the facts led inescapably to that position.

In his main work published in 1737, Questionum Juris Publici, he re-emphasizes his stand on freedom of the seas:

> . . . the question of who holds dominion of the sea: for if any sea is under the dominion and rule of a sovereign, he has the right to impose the law there, and others are obliged to obey the laws . . . Accordingly, if any sovereign commands that respect be shown his ships and strongholds on seas that belong to him, it must be shown; if, however, he gives such a command on seas that are not his, he can be disregarded with impunity . . . I have expressed my opinion in . . . DeDominio Maris . . . (in which) I made a distinction between the sea that is near land and the outer sea; to the former I assigned as much as could be controlled from land, as for instance by the range of a cannon; what the sovereign cannot thus control from land I called the outer sea. I assigned the proximate sea to the dominion of the sovereign who ruled the land, whereas I denied all sovereignty over the outer sea, except in so far as it is occupied (emphasis added) and held in possession (emphasis added) . . . Hence I drew the conclusion that at present no outer sea is under the dominion of any sovereign since none of it is in possession of any. Book II. c. xii., at 253.

Bynkershoek concerned himself with maritime neutrality, an issue crucial to the Dutch. He objected to the rule adopted by his countrymen after the Treaty of Westphalia (which ended the 'Thirty Years' War in 1648): the rule of "free ships, free goods" meant that enemy goods, except for contraband, must not be captured on neutral ships, although neutral goods on enemy ships could be taken. This rule particularly suited the Dutch as they had the largest commercial fleet in the world, and wished to strengthen their neutral position. Bynkershoek's objections to this rule, which had become the heart of Dutch diplomacy, were based on a broad rather than a narrow nationalistic view; he maintained that Dutch treaties, while binding on the signatory parties, could not change the rules of universal maritime law. He discussed prize law and decided that the ownership of a ship or goods passed to the captor when he obtained possession of the booty.[76]

Although it appears that Bynkershoek's primary aim was to raise problems and clarify rules rather than to produce a complete code, his influence has been tremendous and lasting. This is probably because his work is free from all theological theorizing and is judicially straightforward, clearly presented, and almost modern. Even that bastion of deference to precedent, the United States Supreme Court, paid him homage as "a very great authority"[77] and "a jurist of great reputation."[78]

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[76] Bynkershoek, Public Law Questions at 86-89.
[77] Ware V. Hylton, 3 Dall. 262 (1796).
[78] The Schooner Exchange V. McFadden 7 Cranch 144 (1812).

2. Emmerich deVattel (1714 - 1767)[79]

This Swiss diplomat "naturalist", while not contributing anything particularly novel to International Law, gave to it a great systematic collection. This treatise cum textbook, LaDroit des Gens (Law of Nations), published in 1758, is based on the principles of the laws of nature. Vattel, however, had a practical mind; so his work was written with a view to the practical application of these "laws." Although he was a pre utilitarian who professed the creed of the "greatest good for the greatest number", his utilitarianism was grounded in religion and an emphasis on fairness and equity. Since Vattel was not trained in the law, some of his formulas are vague and many of his conclusions are inconsistent. Nevertheless, Vattel's humanitarian, cosmopolitan, and crypto-democratic attitude make his work attractive beyond narrow juristic considerations.

Chapter XXIII., of Vattel's Law of Nations is entitled "Of the Sea", and it stakes out his position clearly in favor of free seas and free navigation, with the only restrictions being placed on contiguous seas:

> The open sea is not of such a nature as to admit the holding posession of it, since no settlement can be formed on it so as to hinder others from passing . . .
>
> (T)he use of the open sea, which consists in navigation and fishing, is innocent and inexhaustible; i. e., he who navigates or fishes in the open sea does no injury to anyone . . . Now, nature does not give to man a right of appropriating to himself things that may be innocently used, and that are inexhaustible . . . For, since those things, while common to all, are sufficient to supply the wants of each, - whoever should, to the exclusion of all other participants, attempt to render himself sole proprietor of them, would unreasonably wrest the bounteous gift of nature from the parties excluded . . . Nature approves the rights of dominion and property which put an end to the primitive manner of living . . . But this reason cannot apply to things which are in themselves inexhaustible. If the free and common use of a thing of this nature was prejudicial or dangerous to a nation, the care of their own safety would authorize them to reduce that thing under their own dominion . . . But this is not the case with the open sea, on which people may sail and fish without the least prejudice to any person . . . No nation, therefore, has a right to take possession of the open sea, or claim the sole use of it, to the exclusion of other nations.
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> The right of navigating and fishing in the open sea being then a right common to all men, the nation that attempts to exclude another from that advantage does her an injury . . .
>
> However as everyone is at liberty to renounce his right, a nation may acquire exclusive rights of navigation and fishing by treaties . . .

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[79]The material on Vattel is based on: Nussbaum, Concise History at 156-167; E. deVattel, Law of Nations, (J. Chitty ed. 1859) [hereinafter cited as Vattel, Law of Nations]; Wormser, Story at 514-515.

> (R)ights of navigation and of fishing, and other rights which may be exercised on the sea . . . cannot be lost for want of use . . . But it may happen that non-usage of the right may assume the nature of a consent . . . The various uses of the sea near the coasts render it very susceptible of property. It furnishes fish, shells, pearls, amber, &c. Now, in all these respects its use is not inexhaustible: Wherefore, the nation, to whom the coasts belong, may appropriate to themselves, and convert to their own profit an advantage which nature has so placed within their reach . . . Who can doubt that the pearl fisheries of Bahrem and Ceylon may lawfully become property?[80]

Vattel was no innovator but his textbook approach, coming at a time when International Law concerns were increasing, gained wide acceptance almost on a par with Grotius; and in the United States, he was a favorite authority.

VIII. FREEDOM OF THE SEAS AND SOME CONTEMPORARY CONCERNS

Although the Grotian ideal of freedom of the open sea met resistance, the issue was joined. There was a steady progress toward the concept until, by the first quarter of the nineteenth century, freedom of the seas was universally recognized. It is neither doubted nor questioned by the contemporary writers of digests and treatises of International Law.

1. What does Oppenheim say?

> The term 'freedom of the open sea' indicates the rule of the Law of Nations that the open sea is not, and can never be, under the sovereignty of any state whatever. Since, therefore, the open sea is not the territory of any state, no state has as a rule a right to exercise its legislation, administration, jurisdiction, or police over parts of the open sea. Since further, the open sea can never be under the sovereignty of any state, no state has a right to acquire parts of the open sea through occupation . . . But although the open sea is not the territory of any state, it is nevertheless an object of the Law of Nations . . . (But to obviate anarchy on the open sea) customary International Law contains some rules which guarantee a certain legal order on the open sea, in spite of the fact that it is not the territory of any state . . .[81]

2. What does Colombos say?

> . . . (T)he open sea is not susceptible of appropriation . . . and no state can obtain such possession of it as would legally be necessary to give rise to a claim of property. The high sea cannot be subject to a right of sovereignty for it . . . constitutes an indispensable element for international trade and

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[80] Vattel, Law of Nations at 204-206.
[81] Oppenheim, International at 589-590.

navigation . . . (N)o given state is entitled to occupy it or proscribe its use to other states.[82]

It should be noted that the arguments advanced for freedom of the seas have always, since the ancients, been based on two different and mutually exclusive legal theories: (1) the sea belongs to no one (res nullis) or (2) the sea belongs to everyone (res communis). This rather metaphysical consideration has a great practical importance in today's world where we are faced with the need to exploit the resources of the seabed and the soil beneath the seabed.

This need has led to a consideration of claims modifying the traditional concept of freedom of the seas. Under the res nullis view, the first occupier would have exclusive rights and control. Young has called this the "snatch and squat" approach, although he is not opposed to the idea.[83] Holland,[84] Oppenheim and Lauterpacht[85] also have taken a modified res nullis approach which holds that occupation gives control. Under their view, occupation can be actual or constructive. They reason by analogy from the ancient rule which allowed occupation of the seabed for sedentary fishing. These writers would allow coastal states to extend their jurisdiction and control to submarine areas appurtenant to their territory. They believe such control and "occupation" is the most effective way to assure development of resources. Further, "the concept of freedom of the high seas as applicable to the waters (above the submarine areas) need be modified only to the extent necessary to permit reasonable exploitation".[86]

I believe this pragmatic approach is fraught with danger to the ocean and thereby to all people. While I agree with Lauterpacht[87] that the freedom of the seas doctrine should not be treated as a rigid dogma too sacred to modify to meet today's needs, I also believe that the "buccaneer" approach is not the modification needed. What is "reasonable" exploitation? And, is each coastal state to decide this for itself?

If the res communis view is followed, the sea and its bed being common and open to all, then it must be protected and preserved for all people. The exceptional cases allowing for occupation of part of the sea for sedentary fishing are rare. If we must look to saving what we now know are not inexhaustible resources, then we need international agreements enforced by an international body. This is the view taken by Professor Colombos[88] in a modified form. I would go further and place the seabed and the soil beneath it under an United Nations force.

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[82] Colombos, International Law at 39-40.

[83] Young, The Legal Status of Submarine Areas Beneath the High Seas, 45 Am. J. Int'l. L. 225 (1951).

[84] Holland, The Juridical Status of the Continental Shelf, 30 Texas L. Rev. 586 (1951-52). [hereinafter cited as Holland, Juridical].

[85] Oppenheim, International at 582; Lauterpacht, Sovereignty over Submarine Areas, 27 Brit. Y. B. Int'l. L. 376 (1950). [hereinafter cited as Lauterpacht, Sovereignty].

[86] Holland, Juridical at 597.

[87] Lauterpacht, Sovereignty at 398.

[88] Colombos, International Law at 56.

CRISIS IN THE SOUTH PACIFIC:

TUNABOAT SEIZURES

Jack W. Abel

Within the discipline of international law, perhaps the one area that has remained beyond the bounds of ready solution is that dealing with the breadth of a coastal nation's territorial waters. Particularly troublesome in this area are the allegations of several Latin-American countries asserting sovereignty and jurisdiction over a two-hundred mile belt of sea adjacent to their coast and the United States' contention that such unilateral assertions are invalid as violative of international law. The particular difficulty of the matter lies in the fact that up until the present, all attempts at codification of an accepted breadth of the territorial sea have failed, with a resultant total lack of uniformity of claims among nations. To illustrate, a 1969 survey promulgated by the Food and Agricultural Organization of the United Nations (FAO) revealed that of ninety-three nations listing the breadth of their territorial waters, forty advocated a twelve mile territorial sea, thirty alleged a three mile limit, fourteen accepted a six mile limit, four asserted a two-hundred mile territorial sea, and five other countries had various claims ranging from four miles to one-hundred and thirty miles.[1] To compound the issue, an additional twenty-six nations alleging a territorial sea of less than twelve miles have claimed exclusive fishing zones projecting up to twelve miles out to sea.[2]

By the twentieth century, it was evident that the tradional "Cannonshot" theory based upon the maxim "Imperium terrae finiri ubi finitur armorum potestas,"[3] asserting that a state has control over the territory that it can command and possess, was not, and could not be, construed as a customary rule of international law. It was in this light that three major conferences to codify the breadth of the territorial sea were convened. The first was the Hague Codification Conference held in 1930, under the auspices of the League of Nations. Here, neither the Preparatory Committee nor the Second Committee which studied and reported upon the findings of the former were able to reach agreement. The Second Committee specifically "refrained from taking a decision on the question whether existing international law recognizes any fixed breadth on the belt of the territorial sea."[4] The second major attempt at the definition and the interpolation of the breadth of the territorial sea was made by the International Law Commission.[5] Here, the Commission inferentially recognized the right of a coastal nation unilaterally to claim sovereignty over a territorial sea of up to twelve miles in breadth.[6] At the same time, however, the Commission declined to advance a specific recommendation upon what it considered the proper breadth of the territorial sea. The Commission did recommend "that the breadth of the territorial sea should be fixed by an international conference."[7] Pursuant to the

[1] Limits and Status of the Territorial Sea, FAO (1959).
[2] Id.
[3] I Quaestioner Juris Publici, (1937).
[4] Publication of the League of Nations, V. Legal Questions.
[5] Established pursuant to the U.N.G.A. Res. 174 (II). This appeared on Nov. 21, 1947.
[6] Report of the International Law Commission, U.N.G.A., 11th Sess., GAOR Supp. No. 9, (U.N. Doc. A/3159) 51 Am. J. Inter'l Law 155.
[7] Id. at 161.

recommendation, the Geneva Conference on the Law of the Sea was convened and met in April and March of 1958. The Conference, like its predecessor, failed to reach any results or consensus with regard to the breadth of a state's territorial waters. The Second Geneva Law of the Sea Conference met in 1960, and again failed to reach an accord. An American proposal advocating a six mile territorial limit coupled with an additional six mile contiguous zone wherein the nationals of the coastal state were to have exclusive fishing rights narrowly went down to defeat, one vote short of the necessary two-thirds required for adoption.

It is in this state of confusion that Chile, Ecuador and Peru, along with eight other Latin-American States (hereinafter referred to as the C-E-P States), laid claim to a two-hundred mile territorial sea. The development of the two-hundred mile territorial claim was precipitated primarily by the United States' unilateral claims as to territorial water extensions and the continental shelf, antagonistic attitudes towards the claims of the Latin-American states, and was later augmented by psychological, political, and economic interests of the C-E-P States. The initial impetus of the C-E-P States' actions were the Truman Proclamations of 1945, i.e. the Continental Shelf Proclamation which made the "natural resources of the subsoil and the seabed 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"[8] and the Truman Fisheries Proclamation which sanctioned the creation of "conservation zones in those areas of the 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."[9] Apparently, Argentina, Chile, and Peru looked upon the proclamations as an outright assertion of United States' sovereignty beyond the territorial sea, and within a year Argentina, relying upon the Truman Proclamations as precedent, issued a presidential decree asserting national sovereignty over the Argentine Continental Shelf and the superadjacent sea.[10] Soon after, on June 23, 1947, the President of Chile issued a declaration of sovereignty over the adjacent continental shelf and sea and alleged a two-hundred mile zone of protection and control.[11] Peru issued a similar decree on August 1, 1947, also asserting sovereignty over the continental shelf and the superadjacent sea with a two-hundred mile zone of protection and control.[12] On July 2, 1948, the United States protested the actions of these three countries[13] alleging substantial differences vis-a-vis the Truman Proclamations (supra) and alleged that the declarations did not conform to international law. In response to the United States' protest, Chile, Ecuador and Peru signed the Declaration of Santiago, formally named the Declaration on the Maritime Zone done at Santiago, Chile, on August 18, 1952,[14] which provided that each of the three nations recognize and defend the sovereignty of each over its coastal waters to a breadth of two-hundred miles. The Declaration also provided that each nation

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[8] Proclamation No. 2667, 3 C.F.R. 67, 68 (1945).

[9] Proclamation No. 2668, 3 C.F.R. 68 (1945).

[10] Presidential Decree No. 14, 708, Oct. 11, 1946 (Argen.), in Boletin Official, Dec. 5, 1946, at 2.

[11] El Mercurio (Santiago, Chile), June 29, 1947.

[12] El Peruano, Aug. 11, 1947, at 1.

[13] Note No. 122 of July 2, 1948, Dep't of State file 825.0145/7-1448. Note No. 1030 of July 2, 1948, Dep't of State file 825.0145/7-248.

[14] in Revista de Derecho International No. 45, 104-5 (1952).

was bound to join in the enforcement of claims against intruders. Finally, in 1970, Brazil, Uruguay, Argentina, Chile, Peru, Ecuador, Panama, Nicaragua and El Salvador signed the Declaration of Montevideo on the Law of the Sea,[15] wherein the signatories asserted that their "sovereignty" or "exclusive jurisdictional rights over the maritime zone adjacent to their coasts, its seabed and subsoil" had been extended to a distance of two-hundred miles measured from the baseline of their territorial sea "because of their special circumstances."[16]

The Governments of the C-E-P States have advanced several legal theories to bolster their assertions that their two-hundred mile limit is valid under international law. The first of these is an evolutionary theory, based on the argument that due to the failures of the 1930 Hague Codification Conference (supra) and the 1958 and 1960 Geneva Conferences on the Law of the Sea (supra), there is no international law principle that prevents a state from determining its own territorial waters. They further allege that since 1946, seventeen other nations have adopted two-hundred mile territorial waters.

The second argument advanced is based upon the holding in the Anglo-Norwegian Fisheries Case[17] which seemingly allows coastal states to make unilateral claims to exclusive fisheries jurisdiction beyond the limits generally accepted by international law if certain economic interests and ancient and customary usages are evidenced. Here, with regard to the claims of Peru specifically, the justification of the assertion is based upon Peru's alleged economic dependence upon the Humboldt Current, located approximately two-hundred miles off the coast of Peru. Peru claims that its economy, dependent upon the fishmeal industry, earning more than 25 per cent of Peru's foreign exchange,[18] would suffer by any limitation on the breadth of the territorial sea. Similarly, any zone less than two-hundred miles would be inadequate to protect the industry from foreign exploitation, and therefore, jurisdiction over the Humboldt Current is vital to the country's economy, thus meeting the tests established under the Anglo-Norwegian Fisheries Case (supra). This theory has been termed the "bioma" or "ecosystems" theory.

A third theory advanced is that Peru's claim to a two-hundred mile territorial sea is an exercise of Peru's inherent rights of self-defense and self-preservation.[19] Phillip C. Jessup commented that "the claim is supported on the strongest possible ground, namely, the national interests in the conservation of the natural resources of the adjacent seas and seabeds, coupled with a general right of self-preservation."[20]

The fourth theory advanced is the "regional law theory" whereunder the claim is argued as valid under Inter-American international law. Here, the contention lies in precedents of regional state practice, among them being the 1939 Declaration of Panama[21] wherein the United States created defense zones around the continents extending at some points up to three-hundred miles out to sea. Peru argues that in this instance, their protection of their economic interests is even more vital than the defense interests the

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[15] El Peruano, May 13, 1970 at 4.

[16] Id.

[17] [1951] I.C.J. 86.

[18] Foreign Agricultural Service, U.S. Dep't. of Agriculture, No. M-204, Peru's Fishmeal Industry 5 (1969).

[19] see generally: E. Garcia Sayan, Notas Sobre La Soberania Maritime Del Peur: Defensa De Las 200 Millas De Mar Peruano Ante Las Recientes Transgressiones (1955).

[20] Jessup, Book Review, 49 Am. J. Inter'l Law 593 (1955).

[21] 5 For. Rel. U.S. 29 (1939).

United States had in 1939, and by that reason, the United States is under a duty to recognize Peru's claim. Peru, in support of the regional law theory, further points out that several other states have extended their jurisdiction outward to two-hundred miles, and therefore, there exists a customary rule of regional international law to which the United States is bound to adhere.

A final theory is one of estoppel based upon the rationale of the North Sea Continental Shelf Case[22] generally holding that some theory of estoppel is recognized in international law in cases of detrimental reliance. Thus, by analogy, when the United States asserted jurisdiction beyond three miles, and when they recognized a broad claim to Mexican fishery jurisdiction, Peru relied upon such actions in the furtherance of their own actions. As such actions have been detrimental to Peru and have caused them injury, the United States should be estopped from denying the validity of their claim.

The United States' assertion of the invalidity of the C-E-P States' claim of a two-hundred mile limit are based upon two legal theories.[23] The United States' first contention is that Peru's assertion of a two-hundred mile territorial sea is in violation of the accepted principle of international law, i.e. freedom of the high seas, as codified in the 1958 Geneva Convention of the Law of the Sea.[24] Furthermore, any law or act that limits the use of the high seas is contrary to, and in violation of, international law. Similarly, the United States alleges that any extension of the breadth of the territorial sea beyond twelve miles is illegal as based on the International Law Commission (supra) and the 1958 Geneva Conventions on the Law of the Sea, wherein there was strong feeling that the breadth of the territorial sea should not extend beyond twelve miles. As a further contention, the United States alleges that there is a customary rule of international law that the breadth of the territorial sea should not extend more than twelve miles founded in the adherence of nearly all the countries in the international community to territorial seas of twelve miles or less.[25] Further, the United States' view is that if all nations were permitted to assert and obtain recognition of all claims to territorial seas, there would be chaos on the seas, endangering the free use of the oceans and the airspace above for the production of food and for transportation.

The C-E-P States' reactions to the United States' protests and actions have gone beyond mere paper assertions of sovereign rights over the claimed territorial sea; by 1955, siezures of American tuna boats had been initiated. During the period from January, 1961, through December, 1971, the C-E-P States have intercepted, boarded, arrested, detained, and subsequently released one-hundred and forty-five United States Flag tuna vessels. During these detentions, over four-hundred and thirty-eight (438) fishing days have been lost, and fines paid to the Latin-American Governments have totaled over $3,543,194.00. The problem today appears to be reaching crisis proportions for the United States, with fifty-three (53) tuna vessels being seized in 1971 alone. Similarly, the fines paid for the release of those fifty-three vessels amounted to $2,504,109.00 with an additional estimated $100,000.00 being incurred by the owners of the ships. To emphasize the current magnitude of the problem, the fifty-three seizures in

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[22] [1969] I.C.J. 1.

[23] see: Phleger, Recent Developments Affecting the Regime of the High Seas, 32 Dep't. of State Bull. 934 (June 6, 1955).

[24] 516 U.N.T.S. 205; T.I.A.S. No. 5639; 52 Am. J. Inter'l Law 834 (1958).

[25] see: note 1, and contents in text, supra.

1971 were well over five times the previous nine year average of ten boats seized per year, and the fines incurred in this one year period were almost thirty times those of the previous nine year average, approximating $84,000.000 each. Ecuador has been the most aggressive among the seizing nations, having escorted into port ninety-eight (98) American tuna vessels in the last ten years. Peru has seized thirty-seven (37) vessels, while the remaining ten seizures have been distributed among Mexico, Panama, Colombia, and El Salvador, seizing respectively 4, 3, 2 and 1 vessels each.[26]

The problem is further magnified by the very nature of Skipjack and Yellowfin Tuna, in that they are both highly migratory species and must be pursued to be caught. In many such cases, American Flag tuna vessels are compelled by economic considerations to invade asserted territorial waters, and in fact, are encouraged by the United States Government to do so by means of passage of the Fishermen's Protective Act[27] providing for reimbursement to the owner for any fine, fee or other charge paid to secure the release of the seized vessel, as well as guarantees to the owner of payment for confiscation, spoilage of fish, and for loss of income occasioned by the seizure. To demonstrate the growing concern of the United States over the seizures, it is noted that the original Act of 1954 provided for reimbursement to the owner of the vessel only in the amount of the "fine" paid to the seizing government. Recognizing the serious damages to the vessel owners and crews, the act was substantially augmented in 1967 to include reimbursement by the government for "the amount of the fine, license fee, registration fee, or any other direct charge actually paid."[28] In addition, the 1968 Amendment established an industry/government insurance program administered by the Secretary of the Interior, which protects against losses occasioned by seizures. The program reimburses the owners for all costs from damage or destruction to the vessel, fishing gear and equipment; from the loss or confiscation of such vessel or equipment; dockage fees or utilities; as well as reimbursement for the market value of the fish caught prior to the seizure which have either spoiled or have been confiscated by the seizing government. Additionally, in the event of a seizure, the insurance program allows the recovery by the owner of a vessel for up to fifty (50%) per cent of the gross income lost as a direct result of the seizure and detention.[29]

Since the implementation of the Act, over $2,342,188.00 have been expended or certified to be paid, well over two-thirds of that amount being paid to Ecuador alone.[30] $1,366,223.00 were paid in 1971, alone, reflecting certifications of claims up to and including September first of that year. Thus, a very high proportion of the losses that have occured because of the seizures are being absorbed by the government, leaving the vessel owners generally well protected against loss. Further, such claims by the tuna boat owners have recently been paid within the relatively short time period of eight to ten months.[31] As such, the Fishermen's Protective Act of 1954 and the 1968 Amendments thereto appear to provide very real protection to the individual tunaboat owner as against loss. Nevertheless, the United States, by the adoption of the Statute has been only able to protect against economic loss to the individual owners and has not curtailed seizures as such.

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[26] Table 1, Data on Seizures, excepted from the records of the American Tunaboat Assoc.

[27] 22 U.S.C. §§1971-1978.

[28] Id. §1973.

[29] see generally: 22 U.S.C.§1977.

[30] Data on Seizures, supra note 26.

[31] Letter from August Felando, General Manager of the American Tunaboat Assoc., Nov. 7, 1972.

The United States, by this action, has intensified the conflict in a number of ways. By the provisions of the Act, the risk of economic loss to the owner of the vessel is no longer a deterrent to an invasion of the territorial seas as asserted by the C-E-P nations. In fact, the guaranteed payment for a substantial portion of the gross income lost by the owner of the vessel undoubtedly encourages sojourns into the disputed waters, and in every sense must be considered a free license for the American fishing vessels' intrusions. Not only has the government encouraged confrontations and seizures by tacit approval of the violation of the alleged territorial waters of the C-E-P States, they have insulted the pride of the Latin-American countries. More importantly, however, the United States, by the promulgation of the Act, has given the C-E-P States a guaranteed source of revenue. Thus, we find a situation whereby the United States has in a very real way given a monetary incentive to the seizing countries. Moreover, the United States seems to be rewarding the C-E-P States each time they seize an American vessel. Realistically, the Fishermen's Protective Act, while offering some form of protection to the owners of the detained vessels, has in actuality intensified the crisis. Such a conclusion is supported by the fact that since the adoption of the 1968 Amendments, the rate of seizures and the amount of the fines have skyrocked. Since 1968, the average number of seizures has more than doubled, and the average amount of fines has increased nearly tenfold.[32]

The Fishermen's Protective Act does contain sanctions against seizing nations. Under the terms of the Act, the Secretary of State may "take such action as he may deem appropriate to make and collect claims against a foreign country for amounts expended by the United States...because of the seizure of a vessel of the United States by such country."[33] The Statute, as amended in 1968, further provides that if the seizing country refuses to make payment within four months of notification of the claim, "The Secretary of State shall withhold, pending such payment, an amount equal to such unpaid claims from any funds programed for the current fiscal year for assistance to the government of such country..."[34] This provision seems to be a paper tiger, and through 1971, the Department of State had not made a single deduction pursuant to terms of the Statute.[35] Seemingly, the unglamorous statement by Rogers C. B. Morton "I will bet you a cow to a racehorse that it would not be cut off"[36] with regard to the proposed sanction has become a prophesy fulfilled. Perhaps the best statement as to the lack of enforcement of any deduction of foreign aid to a seizing country is expressed in the Senate Committee on Interstate and Foreign Commerce's commentary to the 1954 Act stating that:

> Section 5 is for the purpose of letting the Secretary of State know that the Congress expects him eventually to recover from the foreign country and money expended by the United States Government under this Bill because of the seizure of a United States vessel thereby. Once again, however, utmost flexibility

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[32] see note 30, supra.

[33] 22 U.S.C. §1973.

[34] Id.

[35] Telephone Conversation with Mr. Frechette, Peru Desk Officer, Agency for International Development, Dec. 1972.

[36] Hearing Before the Subcommittee on Fisheries and Wildlife of the Committee on Merchant Marine and Fisheries. House of Representatives, 90th Cong., 1st Sess., ser. 90-8, at 16 (June 22, 1967) [hereinafter cited as 1967 Hearings].

in the conduct of foreign affairs is retained by the Executive by instructing the Secretary of State to take only such actions as he may deem appropriate to make and collect such claims, without any specification as to time or other condition.[37]

A recent development concerning the problem of monetary sanctions against the seizing nations is Congress passing House Resolution 7117, subsequently signed into law by the President on October 22, 1972.[38] This Bill was enacted generally to amend the Fishermen's Protective Act of 1967 with a view to expedite the reimbursement of United States vessel owners for charges paid by them for the release of vessels and crews illegally seized by foreign countries. Further, the Bill was enacted to strengthen the provisions of the 1967 Act with particular regard to the collection of claims against such seizing countries. Specifically, the Bill provides for the Secretary of State to require reimbursement from the offending nations, and if there is no satisfaction of the claim, the Secretary is empowered to deduct the amount of the claim from A.I.D. (Agency for International Development) funds programed for such offending country. The Amendment to the Act still provides, however, for Executive discretion as per the actual deduction of the claim from the programed funds, and it is seriously doubted whether any such deduction will ever be made. Apparently, the feeling of the Executive Branch is that any punitive sanctions imposed upon the seizing countries will result in a strong anti-United States reaction by such countries, and that there are other, more important policy considerations that militate against the use of such sanctions.

Interestingly enough, it appears that the C-E-P States are using both American vessels and American trained men to carry out the seizures. The matter was succinctly stated by Congressman Tom Pelly of Washington State to the members of Congress in March of 1967. In his address, the Congressman stated: "To make matters worse, United States Naval vessels supplied to our neighbors in South America under our military assistance program have been those used in making these illegal seizures."[39] More specifically, "According to affidavits ...Ecuador recently received gifts of modern warships from the United States. In addition, the Ecuadorian crew who participated in seizures of these two tuna clippers [M/V Ronnie S. and M/V Determined] in February, 1967, had just completed a six month training tour in the United States."[40] Indeed, during the period from June, 1959, to mid 1967, ninety-seven (97) United States Naval vessels had been supplied to Latin-America.[41] Further, the United States prior to 1969 had refused to cut off such supplies to Latin-America for reasons that are deemed "classified material." This policy was evidenced by the following exchange between Mr. John D. Dingell, then Chairman of the Investigation Committee and Mr. M. R. Barnebey, Country Director for Ecuador and Peru Affairs:

Mr. Dingell: "You have indicated to these people [the C-E-P States] that there will be no more of that kind of vessel provided to them until we resolve the problem?"

Mr. Barnebey: "What you suggested, Mr. Chairman, we certainly considered also."

Mr. Dingell: "What was the result?"

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[37] Report No. 2214, of the Senate Committee on Interstate and Foreign Commerce, Aug. 4, 1954, at 3,4.
[38] Public Law 92-569.
[39] Cong. Rec. at H3193, March 22, 1967.
[40] Testimony of August Felando before the 1967 Committee, supra note 36, at 42.
[41] 1967 Hearings, supra note 36, at 65-67.

Mr. Barnebey: "It runs into the very same objections that a threat to cut off military and economic assistance across the board would have."

(Classified Material deleted)[42]

The United States did, however, finally retrench from this position, and in 1969, invoked the Foreign Military Sales Act[43] to forbid the sale of military goods or services to any nation that seized United States vessels while in international waters. The Act, which was first enforced in 1971, provided for the suspension of all military sales for a one year period following any seizure, to those countries which had seized United States fishing vessels.

The question now to be considered is whether the United States, by either its actions or inactions, has recognized the C-E-P Nations' claims of sovereignty over the territorial sea extending outward to two-hundred miles. It appears beyond dispute that the United States has refused de jure recognition of the claim. This refusal of recognition has been steadfastly adhered to by the United States, which has continually denounced the claim as a violation of international law, i.e. a violation of the freedom of the high seas. The United States has protested all claims of sovereignty extending beyond a twelve mile territorial sea, and as early as 1948 had sent formal notes of protest to Argentina, Chile, and Peru in response to such nations' assertions of sovereignty over a two-hundred mile expanse of sea.[44] Similar protestations were made at the 1958 and 1960 Geneva Conventions on the Law of the Sea. Today, it is standard practice that "a protest is lodged with the country in which the seizure took place" in every case where the United States has made a payment under the provisions of the Fishermen's Protective Act.[45]

Given the fact that the United States has refused de jure recognition of the claims, the problem becomes whether or not the United States has given de facto recognition of the C-E-P claims. The question, more specifically put is, has the United States acted in a manner consistent with its denial of the validity of the claim of the C-E-P Nations? If the answer is in the affirmative, we need not advance any further in the analysis, as there has been no recognition or acceptance of the claim. If the answer is in the negative, however, we must pursue the inconsistencies and determine whether they are of such magnitude and character that we can say that there has been either expressly or impliedly a de facto recognition of the claim cognizable in international law.

The analysis must first begin with the monetary reimbursements being made to those owners whose boats have been seized and who were compelled to pay a fine to secure the release of the vessel and the crew. In such cases, we have a situation wherein the United States Government is, in effect, making an indirect payment to the seizing government, with the owner of the seized vessel being merely an intermediary through whom the funds pass. The fact being that the payments to the vessel owners are in actuality payments to the seizing state, the question is raised as to whether the reimbursement program is a form of tacit approval of the seizures, and if so, does such approval amount to an implied recognition of the disputed zone?

To answer the second part, if there does exist, in fact, an approval of the seizures, the question will have to be answered in the affirmative: specifically, if the United States approved of the seizures, this approval would amount

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[42] Supra note 36, at 67.

[43] 22 U.S.C. §§2751-2753, at 2753(B).

[44] Supra note 13.

[45] 1967 Hearings, Statement by Ernest Kerley, Ass't, Legal Advisor for Inter'l. Claims, supra note 36, at 68.

to an implied recognition of the claim. This result is based upon the simple analysis that if the United States implieldy approved of the seizures, such approval would be tantamount to an approval of the exercise of sovereignty over the portion of the seas wherein the vessel was seized. To complete the syllogism, we have the result that the United States would thereby approve sovereignty, and by this rationale, the claims of the C-E-P States would be valid.

As to the first part of the question, the answer is much more difficult, having the added factor of the uncertainty of the exact United States foreign policy as applied to the Latin-American States. In this instance, the United States has opted for a policy advocating a negotiated settlement and a refusal to take any direct sanctions against the nations that have seized American Flag vessels. Here, in the absence of formal protest and of any overriding foreign policy considerations, such refusal would certainly be considered an acceptance of the C-E-P States' claim of sovereignty over the disputed sea. In this regard, however, the United States has consistently protested all seizures. Also, the fact that they have refused to take either economic or military sanctions against the seizing countries does not deny the validity of efforts at inducing a negotiated settlement or any other action amounting to a denial of sovereignty. Even if we could conclude here that a refusal of the United States to employ direct sanctions would amount to an implied approval of the Latin-American claims, the United States has passed legislation which does provide for economic sanctions against the seizing states. The fact that they are discretionary and have not been enforced as of this date would not derogate from their effectiveness in refuting any claim of implied approval. The intention is clearly one of evidencing disapproval of the actions of the C-E-P States. The Fishermen's Protective Act, the amendments thereto, and the Foreign Military Sales Act evidence a disapproval of any attempt of the exercise of sovereignty by the coastal state in the disputed zone; and thus, the conclusion which must be reached is that the United States, in fact, has given no tacit approval of the seizures, and, accordingly, no implied recognition of the alleged two-hundred mile territorial sea can be supported.

The United States' policy with regard to the purchase of fishing licenses by the vessel owners raises a similar question as to any tacit approval possibly given by the United States of the two-hundred mile territorial sea. At the time of the Declaration of Santiago in 1952,[46] and for several years thereafter, the United States adopted the position that fisherman venturing into the disputed zone should not purchase fishing licenses from the C-E-P Countries unless they were going to fish within twelve miles of the shore. The rationale and policy underlying this position was that the application for licenses, and the payment therfor, even under formal protest, could be construed as a recognition of sovereignty of the coastal states over a two-hundred mile zone.

The United States policy today is one whereby "the United States does not oppose the purchase of a fishing license, but at the same time does not approve of such a purchase."[47] Given the current United States position, the question that arises is whether the United States, by not discouraging the purchase of the license, is impliedly recognizing the sovereignty of the claiming state over the disputed waters? To answer this question, the analysis must first turn upon the individual, and ask whether or not the purchase of the license by the individual is a de facto recognition of the sovereignty of the licensing state over that area of the sea which the license purports to encompass? The answer is clearly yes, and such a conclusion is mandatory in view of the principle that once an individual seeks the protections and benefits offered to him by that state, he is under a reciprocal duty to abide by the rules and regula-

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[46] Supra note 14 and accompanying text.
[47] Supra note 35.

tions of that state. Here, the act of purchasing a license to fish in the waters of the coastal state is equivalent to the granting to the individual, by the licensing state, all the protections and benefits that the state is bound to give to its own nationals, and as such, the individual recipient of those benefits is under a duty to recognize the sovereignty of that state. This duty to recognize might further be based upon: first, a theory of waiver, whereby the individual will be deemed to have waived any objection to the exercise of sovereignty by his acceptance of the terms under which the licence was issued; or further, by some form of estoppel, under which the purchaser would be deemed to have accepted the license on the condition that he agreed to submit to the jurisdiction of the licensing state, and therefore is estopped from denying that such state did not in fact possess sovereignty over that area of the sea as contemplated under the license.

Having answered the question of whether the individual has given de facto recognition to the claims of sovereignty by the licensing state in the affirmative, we can now turn to the matter of whether the failure to discourage the purchase of fishing licenses by the United States Government may be considered an implied recognition of the claims of the C-E-P Nations. Given that in international law the actions of the individual may often be imputed to the state, arguably, the marked shift in United States policy from one of forbidding the purchase of fishing licenses to a policy of not opposing the purchase thereof can be taken as an approval of the action of the individual. Should there be such an approval of the actions of its citizens, albeit only tacit, the individual may be deemed to be speaking for the state by his actions, and hence his conduct will be imputed to the state itself. Thus, the syllogism reads: An individual who purchases a fishing license is deemed to have impliedly recognized the sovereignty of the licensing state in such matters. The conduct of the individual, where it is tacitly approved by his government is imputed to the state itself. Therefore, either under a theory of waiver, estoppel, or a theory where an individual, when he seeks the protection and benefits of a state is under a duty to abide by the rules and regulations of that state, is deemed to have recognized the sovereignty of the licensing state in such matters.

If the issue were limited to the purchase of the license, the clear answer is that there was undoubtedly a de facto recognition of the claim by the United States. Unfortunately, the issue is not so easily resolved, nor is it as free from extraneous factors as we may desire. One additional consideration is that of the shift of United States' policy in this area. As such, the policy reflects an intention on the part of the United States to allow the individual owners to protect themselves from any potential and very real injury that may be occasioned by a seizure. The policy of the United States in this area, I do not believe, could be construed as an intention to recognize the claims of the C-E-P States. Also, the policy of the United States is one of passivity, neither militating for nor crusading against the purchase of the license. In this light, and given the gravity of the problem, international law would probably not impose an implied recognition of the claim on the basis of the United States' view of not opposing the purchase of a license. In this area of great sensitivity, some overt act on the part of the United States evidencing positive intent to recognize the two-hundred mile limit, as alleged, would be required as a condition precedent to finding implied recognition by the United States.

The current dispute over the proper breadth of the territorial sea is without doubt a controversy which has had, and will continue to have, extensive effects throughout the international community. The controversy has had considerable impact upon the American tuna fishing industry and, à fortiori, on the American economy. This dispute has become particularly sensitive in the area of United States foreign relations. The problem has been intensified by a violent

upsurge in the number of American Flag tuna vessels seized while in disputed waters and the dramatic increase in the cost to the United States to recover the vessels once they have been detained. To date the problem has failed to be resolved, and the prospects for settlement in the near future seem remote. Further, any attempts at a legal settlement or solution to the problem seem similarly destined to fail. The legal issues of whether there has or has not been a de facto recognition of a particular claim, or whether there is or is not a recognized customary rule of international law which defines the breadth of a country's territorial waters vis-a vis the world community, are merely extraneous issues either to support or to condemn a particular claim. The real issues, and the ones that must be grappled with before any solution can be found, are not legal, but are the economic, political, and psychological considerations that operate within the nation itself. It is only when individual nations negotiate openly and take into consideration the particular needs and values of each other that dispute settlement becomes possible.

JURISDICTION IN NATIONAL WATERS

Lynn Allison

Two of the oldest forms of contact between nations are war and trade. For thousands of years, ships have been involved in both, and a large body of internationally recognized customs and law has grown up concerning the ships and the waters upon which they sail.

The purpose of this paper is to review and discuss this body of customs as it relates to a coastal state's jurisdiction over foreign ships in its internal and territorial waters and to consider applications of these customs to recent situations that have arisen.

The proper width of the territorial sea will not be discussed here. Several international conferences have met and wrangled over the question without reaching an agreement; the states of the world consequently continue to assert whatever limit they prefer, ranging from three miles to two hundred. This paper will avoid that controversy and deal only with what powers a state has within its territorial waters once it decides their extent.

1. Internal Waters

The internal waters of a nation are those which lie landward of the baseline from which the territorial sea is measured.[1] The classification includes ports, rivers, harbors, roadsteads, and lakes. Internal waters are considered a part of the state's territory, and the state is therefore sovereign over them.[2] However, nations have a peacetime obligation to keep their commercial ports open to international traffic. Military ports may, of course, be closed to all ships.[3]

The Geneva Convention of 1958 on the territorial sea left the rules and regulations governing internal waters to the individual states. The delegates to the conference thus acknowledged a nation's sovereignty over these waters and merely noted that such sovereignty should be exercised in accord with principles of international law.[4]

It is generally recognized that a foreign ship, by entering the internal waters of a state, falls with all persons aboard her under the jurisdiction and control of the local authorities in many situations. Government ships have some immunities from jurisdiction which private vessels do not possess.

Some writers hold that the coastal state's jurisdiction over non-military

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[1] T. Thommen, Legal Status of Government Merchant Ships in International Law 3 (1962). [hereinafter cited as Thommen, Legal Status].

[2] Thommen, Legal Status, at 51.

[3] C. Colombos, The International Law of the Sea 160 [hereinafter cited as Colombos, International Law].

[4] Convention on the Territorial Sea and the Contiguous Zone, Geneva, 1958, 516 U.N.T.S. 205, T.I.A.S. No. 5639 [hereinafter cited as Geneva Convention 1958].

ships and persons in the port does not extend to matters involving only the internal order of the ship. Other writers are of the opinion that the coastal state's jurisdiction is absolute, and its exercise in matters concerning only the ship's internal order is forgone as a matter of courtesy or comity.[5] Either way, it is left to the flag state to deal with any problems which may arise aboard ship. Some commercial and consular treaties contain a non-jurisdiction clause applying to matters concerning the internal order of ships.[6] This, incidentally, would run counter to the theory of absolute sovereignty of the coastal state over its internal waters.

But even those states not claiming jurisdiction over affairs of internal order of a foreign ship in port will often assume jurisdiction if any of three conditions are fulfilled: (1) if the peace or order of the port is disturbed; (2) if strangers to the vessel are involved; or (3) if the local authorities are appealed to.[7]

In any such case, and in other matters concerning a merchant ship and her actions and the persons aboard her, the coastal state has numerous powers. The state's jurisdiction may be divided for discussion into three classes: criminal, civil, and administrative.

Internal waters are considered part of the coastal state's territory for purposes of criminal law. As noted above, matters concerning the internal order of the ship are generally left to the flag nation. Petty crimes are often similarly treated.[8] Some nations claim concurrent jurisdiction over their ships in a foreign port in criminal cases, but in the absence of a convention to the contrary between the countries, or a waiver by local officials, local jurisdiction will generally prevail over flag state jurisdiction.[9]

A serious crime aboard a merchant ship, either because of its gravity or the fact that it disturbs the peace and good order of the port, almost always falls under the jurisdiction of the local authorities[10] whether or not the master of the ship has asked for their assistance. The local officials have authority to arrest the criminal. They are expected to carry out the arrest according to the law of the land and to notify the consul of the flag state if this is customary. To make the arrest the authorities may board the ship, as well as take whatever coercive steps may be necessary, within reason, to restore the tranquillity of the port.[11]

However, even in instances of serious crimes the coastal state, which has the better claim, may waive jurisdiction in favor of the flag state if the flag state claims concurrent jurisdiction. Some cases of this type have occurred.[12]

Local officials may also assume jurisdiction if an offense is committed aboard ship involving a stranger to the vessel or a national of the coastal state. This holds true whether or not the national of the coastal state is a member of the foreign crew, and even if the peace and order of the port were not disturbed.[13]

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[5] Thommen, Legal Status, at 49.
[6] Id. at 50.
[7] Id.
[8] Id. at 51.
[9] Colombos, International Law, at 296, 298-299.
[10] Wildenhus's Case, 120 U.S. 1 (1887).
[11] Thommen, Legal Status, at 51.
[12] United States v. Flores, 289 U.S. 137 (1933).
[13] Thommen, Legal Status, at 54.

Occasionally a fugitive from justice in the coastal state seeks asylum aboard a merchant ship of another country. In absence of a convention to the contrary, the master of the ship may not under international law grant asylum to such a fugitive. Surrender of the fugitive, should he make his way aboard, must be made to authorized persons of the coastal state who have an arrest warrant. The local officials have this jurisdiction over their own nationals and over aliens who have broken the law of the coastal state. Even if the fugitive is a passenger aboard the ship, having boarded elsewhere and having no intention of going ashore, he is within the territorial jurisdiction of the coastal state and must be handed over to the authorities upon legal demand.[14]

In the event of the commission of a crime on the high seas and the subsequent entry of the ship into a port not its own, one writer has determined that "(o)n the whole question there is a weighty and preponderant opinion in favor of the rule that jurisdiction in respect of crimes committed on board merchant vessels on the high seas is primarily in the Courts of the flag state of the vessel, but such jurisdiction is not exclusive and that the State whose national is accused of a crime on board a foreign ship is competent to try him when he is within its jurisdiction, although such jurisdiction is not generally exercised."[15]

Should a person belonging to the ship desert, the shore authorities may assist in his recovery, although they have no obligation to do so unless there is a convention between the nations covering that situation. The request for assistance usually must come from the flag state's counsul, who will pay any expenses in curred by the local officials in apprehending the deserter.[16]

A foreign merchant ship in international waters is subject to the coastal state's jurisdiction in civil as well as criminal matters. Again, affairs affecting only the internal order or economy of the ship are usually left to the flag state. It is up to the local authorities to decide whether to intervene. In some cases, such as a seaman's employment, coastal state jurisdiction is considered to be concurrent with that of the flag state. If persons not of the vessel are involved, the local officials will often take jurisdiction; but who takes jurisdiction is heavily dependent on the law of the particular coastal state.[17]

In a maritime claims case a municiple court has the power to detain (arrest) a foreign merchant ship according to its own law and international convention.[18] If a plaintiff has brought suit against the ship or its owner, the ship may be attached as security for the claim, and may be sold if the plaintiff's suit is successful and no other payment is arranged. In "civil law" countries suit may be brought <u>in personam</u>, but the ship may still be attached pending judgment.[19] Proceedings against a shipowner may be brought even though neither the vessel nor her activities gave rise to the proceedings.[20] Article 3 of the International Convention relating to the Arrest of Seagoing Ships, Brussels 1952, "gives the plaintiff the right of arresting either the particular ship in respect of which the maritime claim arose or any other ship in the same ownership, except where the claim is in regard to title, ownership, possession, employment earnings or the mortgage or hypothecation of the ship where only the particular ship can be arrested."[21]

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[14] <u>Id</u>. at 56.
[15] Colombos, International Law, at 282.
[16] Id. at 303.
[17] Thommen, Legal Status, at 56 and 57.
[18] Colombos, International Law at 295.
[19] Thommen, Legal Status at 76-77, and 79.
[20] Colombos, International Law, at 295.
[21] Thommen, Legal Status, at 61.

A foreign merchant ship also falls under the administrative jurisdiction of a coastal state. Administrative jurisdiction is distinguished from criminal and civil jurisdiction in that it is the exercise of executive rather than judicial power. The coastal state lays down regulations for the order of the port and the safety and well-being of the nation. Any reasonable exercise of administrative power is allowed under international law, provided that all ships and persons are treated equally. Administrative rules concern such matters as sanitation, navigation, customs and fiscal regulations, and other matters relating to the good order of the port.[22]

Sanitary regulations have the object of preventing the spread of communicable diseases. One effort in this area was the International Sanitary Convention of Paris, 1926, which was adhered to by a large number of states. It unified provisions of various countries relating to precautions to be taken against serious diseases such as the plague, typhus, and smallpox. Under this Convention the captain and ship's physician must answer all questions put to them by the port's sanitary authorities regarding the health of the ship during its voyage. Ships may be classified as infected or healthy, and there are provisions for the isolation of persons and goods.[23]

Collisions or other incidents of navigation in internal waters fall under the jurisdiction of the local authorities. The person in charge of the offending ship, if blame is fixed, is liable to prosecution.[24] In the Soviet Union, all collisions and accidents in internal or territorial waters must be reported to the harbormaster and investigated by the local authorities.[25]

Other actions by a ship in port are also under coastal state control. For example, the state may prohibit and fine discharges of oil or other polluting substances into its internal waters.[26] It may also regulate the use of radio equipment by foreign merchantmen, which the Soviet Union has done since 1928.[27]

Under customs and fiscal regulations of many nations state a suspect ship may be boarded and searched, or a person upon her searched, and either one detained if found to have violated any such regulation.[28] This is true in the United States, where within the customs area a ship is liable to detention or forfeiture, the illegal goods to seizure, and the persons aboard to arrest if found in violation of customs regulations.

In Britain a ship is liable to forfeiture if found to be constructed or adapted to conceal goods or if the cargo has been jettisoned or destroyed to prevent seizure. The Soviet Union's customs officials may inspect any merchant vessel in port at any time.[29]

A sampling of India's administrative regulations provides some idea of the extent of the coastal state's control over its ports. India has regulations concerning the safety of shipping and the conservation of ports, and for the protection of buoys, beacons, and moorings. Any ship may be boarded on suspicion of having violated a regulation. Pilotage by Indian pilots is compulsory. A harbor official must be aboard any ship over 200 tons entering a port moving from one place to another within the port or leaving the port. Fees for services such as pilotage, mooring, etc. must be paid; if payment is refused, the ship may be detained and eventually sold. The captain of a ship within a port must

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[22] Id. at 62-65.
[23] Id. at 64-65.
[24] Id. at 55-56.
[25] Id. at 67.
[26] Colombos, International Law, at 391.
[27] Thommen, Legal Status, at 67.
[28] Id. at 63.
[29] Id. at 64.

place up to three-fourths of his crew at the disposal of the port authority to prevent or extenguish a fire in the port.[30]

Administrative requirements are restricted when a vessel enters port in distress due to weather or some other necessity, in which case she is "not subject to the local regulations of the port with regard to any incapacity.... duties or taxes in force at that port."[31] However, the need must be urgent; the ship or cargo or the lives of the crew must be in danger. In case of a shipwreck off its coast, the state is expected to aid the vessel in every way possible and to notify the flag state's consul of the situation and render him all assistance.[32]

A coastal state has the power to determine the circumstances of right of access to its ports, except in distress. It also has control over the departure of and conditions aboard emigrant ships.[33]

All of the above jurisdictions and regulations apply to privately owned ships. A warship in port presents a different situation, since "(f)oreign warships and other government ships assimilated to the position of warships enjoy several jurisdictional immunities while lying within or passing through the waters of a coastal state."[34] There are also special restrictions on warships.

The 1958 Geneva Convention on the High Seas defines a warship as "a ship belonging to the naval forces of a state and bearing the external marks distinguishing warships of its nationality, under the command of an officer duly commissioned by the government...and manned by a crew who are under regular naval discipline."[35] Ships fitting this description apparently have no legal right of entry into a foreign port, except in distress. A coastal state may close all or some of its ports to warships of all or some particular nations, so long as notice of these actions is given.[36]

But in time of peace a nation's ports are usually open to warships of other nations. A nation may (and normally does) require advance notice of a warhsip's proposed visit; sometimes the consent of local authorities is required as well. The number of warships from a single country in a single port and the duration of their stay are factors regulated by the receiving state.[37] These regulations generally do not apply to warships entering in distress or to warships carrying heads of state or envoys accredited to the coastal state.[38]

Warships, like other ships, must observe port regulations as to good order in the port, casting anchor, sanitation and quarantine, customs, and other administrative rules. Violation of these rules may result in the warship's expulsion from port. Warships are likewise expected to observe local law, but they are immune from legal process and police action:[39] "When the entry of foreign warships has been either expressly or impliedly allowed by the territorial State, its jurisdiction is waived...They cannot be seized or interfered with in any manner by judicial proceeding; if any offenses occur, the offended State must

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[30] Id. at 64 and 65.
[31] Colombos, International Law, at 303.
[32] Id. at 304.
[33] Thommen, Legal Status, at 63 and 67.
[34] Id. at 3.
[35] Convention on the High Seas, Geneva, 1958, 450 U.N.T.S. 82, T.I.A.S. No. 5200, Art. 8:2.
[36] Colombos, International Law, at 239.
[37] Thommen, Legal Status, at 4 and 5.
[38] Colombos, International Law, at 239.
[39] Thommen, Legal Status, at 6.

appeal directly to the country to which the vessel belongs."[40]

The permission of the commander is required before a local official may board a warship. The commander of the ship and the flag state have complete jurisdiction over the ship and her crew, and hence over any crime committed aboard her, though in some cases this jurisdiction is waived.[41] A crime committed by one member of the crew upon another is under the ship's jurisdiction unless the commander waives it. If a crime is committed on board a warship by a stranger to her, the commander may, if he wishes, hand the criminal over to the local officials, but cannot be made to. In the unlikely event that a national of the coastal state commits a crime against another national of the coastal state aboard the ship, the commander is obliged to surrender the culprit. If any incident aboard the ship disturbs the peace of the port, the ship may be ordered or even forced to leave.[42]

The commander of a warship has no right to receive aboard ship fugitives charged with non-political crimes. The local officials cannot pursue the criminal aboard. They must request his surrender, and surrender is usually granted,[43] but the commander may refuse, and the fugitive may not be forcibly removed by the local authorities.[44]

There is some custom in favor of a warship's competence to grant asylum to a political offender.[45] If a warship grants asylum to a political offender there is no obligation to surrender him as long as he is kept harmless, and the ship may not be expelled from port for granting him refuge.[46]

If a crewman or officer deserts a warship, the ship's officers may not go ashore to arrest him, since this would be a violation of the port state's sovereignty. They must ask the local authorities to capture the deserter. If they succeed in doing so, they usually (but in the absence of an agreement, are not required to) turn him back to the ship, or to the flag state's consul if the ship has left.[47]

Some countries permit warships in their harbors to receive ship's nationals aboard for their own safety, as in a situation of civil strife or natural catastrophe in the coastal state. Persons desiring to be so admitted usually make the request through their consul. In extreme cases warships will also receive nationals of other countries.[48]

While the commander has jurisdiction aboard ship, the status of ships' personnel ashore is open to dispute. The general consensus seems to be that officers or crew ashore on official business are not under the jurisdiction of the coastal state; but if they are ashore for any other purpose, territorial jurisdiction applies. Usually cases of minor infringements of local law, and sometimes in more serious cases as well, the local authorities will hand the offenders back to the ship, although they have no obligation to do so.[49] Local tribunals have jurisdiction in relations between ship's personnel and persons not of the ship.[50]

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[40] Colombos, International Law, at 241.
[41] Thommen, Legal Status, at 5.
[42] Colombos, International Law, at 299-250.
[43] Id. at 235.
[44] Thommen, Legal Status, at 5.
[45] Id. at 6.
[46] Colombos, International Law, at 254.
[47] Id. at 252.
[48] Id. at 258-259.
[49] Id. at 251.
[50] Thommen, Legal Status, at 6.

Ships owned by the government but used for non-commercial purposes, such as those serving police, customs, port authorities, and other governmental departments, are like warships immune from local jurisdiction.[51] These public vessels are considered the property of their state. Should civil process be brought against a public vessel, the courts of another state will not make the sovereign a party against his will, nor seize his property. A declaration of ownership by a foreign power is binding on the court, but if the sovereign's interest in the vessel is indirect, he must produce in court satisfactory evidence of the claim of interest.[52]

Cable ships, ships carrying out scientific or meteorological investigation or projects, mail ships, and hospital ships are not immune because they are not exclusively carrying out functions of a government nature. The few ships that are exclusively mail packets are protected under the 1958 Geneva Convention on the High Seas, and hospital ships have immunities under the Geneva Convention of 1949 (for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea).[53]

Whether the peculiar immunity from jurisdiction enjoyed by war and public ships extends to all government ships is unclear. A current debate is over whether ships owned or operated by a government but used for commercial purposes should have the immunities of a government ship extended to it. Case law, the practice of various nations, and recent writings of several publicists are challenging the old view that any government ship is immune from jurisdiction. The view being substituted is that a government merchant ship should be treated the same as a private merchant ship.[54]

The courts of some nations will assume jurisdiction over foreign government-owned or operated merchant ships, but some of these are unwilling to order their seizure for attachment or execution relating to a claim. A few countries, however, will execute upon a foreign government's merchant ships in acts of a private law nature. Among these are Belgium, Greece, Switzerland, France, and Italy.[55]

Confusion arises, however, when the activities of a ship mix commercial and governmental functions. "The difficulty of distinguishing government ships engaged in commercial activities from other government ships (apart from military ships) seems to lend support and force to the argument that the only logical alternative to absolute immunity is the complete abolition of the immunity of all non-military ships with certain exemptions and safeguards."[56] There would seem to be no rule of international law forcing the extention of traditional government ship immunities to government merchant ships.[57]

Indeed, under the Geneva Convention of 1958 on the territorial sea and in previous conventions such as the Brussels Convention of 1926, it seems that government merchant ships have been assimilated to the legal status of private merchant ships.[58] The 1958 Geneva Convention, in Article 21, makes "government ships operated for commercial purposes" subject to the same rules as merchant ships.[59] Mexico and most of the communist nations have ratified the Convention with reservations to less-than-immune status for government ships,[60] so it cannot be

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[51] Geneva Convention, 1958 Art. 22.
[52] Colombos, International Law, at 244.
[53] Thommen, Legal Status, at 159.
[54] Id. at 9.
[55] Id. at 114.
[56] Id. at 47.
[57] Id. at 48.
[58] Id. at 142.
[59] Geneva Convention, 1958 Art. 21.
[60] Thommen, Legal Status, at 39 and 43-46.

assumed that the matter is settled.

Further problems follow from the unfortunate failure of international conventions to state a clear test to distinguish between government merchant ships and other government ships.[61]

2. Territorial Waters

Territorial waters are those waters lying around a state, extending to a definite distance from the state, and the width of which at present is being determined by the states themselves, with wide variation. Whatever the distance, it is measured from the low-water baseline usually running along the shore of a state, though sometimes taking in outlying rocks or islands.

The 1958 Geneva Convention on territorial waters declares a nation sovereign over its territorial sea,[62] subject to the right of innocent passage.[63] France, Cuba, Great Britain, Bulgaria, and the United States treat ships in internal and territorial waters the same way, except for innocent passage. A coastal state will usually take jurisdiction over a criminal incident aboard a foreign ship in its territorial waters under the same conditions that evoke jurisdiction in internal waters: if the peace or order of the coastal state is disturbed, if a stranger to the vessel is involved, or if the captain appeals to the local authorities.[64] To these the Geneva Convention adds that a coastal state may act upon a foreign ship to suppress illegal traffic in narcotic drugs.[65]

A coastal country exercises police, customs and revenue functions in its territorial sea. It may restrict fishing within its waters, establish defense zones in them, and require ships within them to show their flag. The state may limit or exclude warships (innocent passage for warships is disputed) and forbid naval maneuvers or gunnery practice. A state may restrict pilotage to its own nationals, fix navigation regulations applying to all ships, and establish regulations for the protection of navigation aids such as lights and buoys, pipes, and cables.[66]

A state "has an absolute right to enforce its customs and revenue laws within its territorial waters."[67] Police functions primarily involve sanitation and quarantine regulations and are likewise absolutely enforceable.[68] A coastal nation also governs the use of its territorial waters for fishing purposes. Current practices include free fishing on the basis of reciprocity with other countries, permitting foreigners to fish but giving special privileges to nationals, and excluding foreigners altogether.[69]

A coastal state may require the display of the ship's flag while she is in territorial waters, but this is seldom enforced except in case of an emergency such as threatened or actual war. In peace or war time a state may forbid navigation in "defensive sea zones" of its territorial waters for security purposes.[70]

The Soviet Union generally follows these guidelines but occasionally oversteps them. All ships in Soviet waters must observe administrative regulations, comply with navigation and other regulations, show their flag on request, avoid closed zones, and immediately report an entry in distress. No fishing, hunting,

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[61] Id. at 143.
[62] Geneva Convention 1958, Art. 1.
[63] Id. Articles 14-18.
[64] Thommen at 68-69.
[65] Geneva Convention 1958, Art. 19:d.
[66] Colombos, International Law, at 120-121.
[67] Id. at 124.
[68] Id.
[69] Id. at 134.
[70] Id. at 150-151.

research, or hydorgraphy work is permitted in territorial waters; violation is a criminal offense. By Soviet law officials may stop and inspect (including ship's documents), or even detain and bring to port, a merchant ship which is in violation of a statute. They may remove and detain persons who have committed crimes in the USSR's territory, including the territorial sea. The Soviet Union will usually refrain from exercising jurisdiction if the crime does not violate security or public order.[71]

Communist China permits access only to designated ports, and even merchant ships must notify the authorities of their intention to enter territorial or internal waters. Chinese pilotage into port is compulsory. No shore leave is allowed to the crew, no pictures may be taken, and no use of radio transmitters is permitted. Coastal trade is reserved to Chinese ships. The People's Republic also assumes civil jurisdiction over incidents in the territorial sea and has established fishing zones.[72]

One great jurisdictional difference between internal and territorial waters is the right of innocent passage through territorial seas, an old and widely-recognized custom. The Geneva Convention defines passage as "navigation through the territorial sea for the purpose of traversing that sea without entering internal waters, or of proceeding to internal waters, or of making for the high seas from internal waters," (Art. 14:2), and includes "stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by force majeur or by distress." (Art. 14:3) "Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal state." (Art. 14:4)[73]

The passage of fishing boats is permitted as long as there is no violation of the fishery rules of the coastal state. The state may not levy tolls or dues upon innocently passing ships other than fees for services rendered to the ship.[74]

A ship in the course of innocent passage does not fall under the civil jurisdiction of the coastal state and may not be stopped or diverted to port so that the state may bring it under its civil jurisdiction. Arrest of and execution upon the ship may not be performed except to pay for services rendered to the ship itself. A ship lying in the territorial sea without necessity, however, loses its exempt status; and for purposes of civil proceedings a ship crossing territorial waters to the high seas from internal waters is treated as if it were still in internal waters.[75]

If a foreign merchant ship is suspected of violating the laws of a coastal state within territorial waters, official crafts may pursue it and bring it back to port for trial; this is the doctrine of hot pursuit. Pursuit must be continuous and may be prosecuted even on the high seas (if continuous and commenced in national waters), until capture or until the ship enters the territorial waters of another state.[76]

Territorial gulfs and bays are under the same rules as normal territorial waters, but if they form part of an international searoute, even warships must be permitted innocent passage through them.[77]

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[71] Butler, The Legal Regime of Russian Territorial Waters, 62 Am. J. Int. L. 63-64, 70 (1968).
[72] Cheng, Communist China and the Law of the Sea, 63 Am. J. Int. L. 62-63, 65, 68.
[73] Geneva Convention 1958, Art. 14.
[74] Colombos, International Law, at 121-123; Geneva Convention 1958, Arts. 14:5, 18.
[75] Id. Art. 20.
[76] Thommen, Legal Status, at 75.
[77] Colombos, International Law, at 174.

There is some dispute as to whether warships have the same right of innocent passage that non-military ships do. In peace time, however, "states normally allow warships to exercise this right."[78] The Geneva Convention assimilates warships to merchant ships status for the purpose of innocent passage; it is stated as a right for both.[79]

In the territorial sea as well as in internal waters, warships are immune to legal process, but are liable to expulsion for disregard of a request to comply with local regulations pertaining to passage.[80]

Straits are important to navigation and must be free to transit. "Every major convention on the law of the territorial sea since the 1930 Convention at the Hague has recognized the right of innocent passage through straits connecting two parts of the high seas."[81] A state possessing both shores of a strait leading to an inland sea bordered by a different state may not deny access to the sea by foreign ships. These ships have the right to communicate with the countries of the inland sea. Even if the strait is so narrow that its waters are the territorial possession of one state, the strait must be left open.

Straits may be neutralized by an international agreement prohibiting fortifications and military defense works; the Straits of Magellan have been so neutralized since 1881.[82]

Warships also have the right of innocent passage through international straits in time of peace.[83]

A state of war makes a few additions to the above general rules. Entry into ports should be maintained during wartime if possible, but a state will usually put restrictions on the number of ships including merchant ships in a port at one time and the length of their stay.[84]

Generally speaking, a neutral country may exclude belligerent ships from its internal waters or limit their entry to selected ports. Their stay in port and in territorial waters is strictly limited. A warship of a belligerent which is in a neutral port at the outbreak of war will be asked to leave; if the ship is unable to leave, it and its crew are interned. If a belligerent ship refuses to leave a neutral port, the neutral may incapacitate the ship for the duration of the war. There are fewer restrictions on warships which have entered a neutral port in distress or because of weather, or on missions of religious, scientific, or philanthropic nature.[85]

In wartime a neutral has the right to immunity from belligerent actions. A belligerent may not lawfully seize a prize ship in the territorial waters of a neutral state, but in court the seizure may be declared valid if the neutral state itself fails to protest the violation of its waters. A valid protest by the neutral state will usually result in the release of the prize, even though the violation may have been unintentional.[86]

A neutral may allow its pilots to be employed by belligerents and may let belligerent vessels and prizes pass through its waters without losing its neu-

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[78] Thommen, Legal Status, at 7.
[79] Geneva Convention 1958, Arts. 14, 22.
[80] Thommen, Legal Status, at 7.
[81] Eckert, The Straits of Tiran: Innocent Passage or an Endless War?, 22 U. Miami L. Rev. 880 (1968), [hereinafter cited as Eckert, Straits of Tiran].
[82] Colombos, International Law, at 175 and 181.
[83] The Corfu Channel Case (Merits) (1949) I. C. J. Rep. 4
[84] Colombos, International Law, at 160.
[85] Id. at 610-611 and 623.
[86] Id. at 544-545.

trality. It may also receive belligerent vessels and prizes in distress and allow necessary repairs and replenishing of food and fuel stores sufficient to carry the ship to the nearest friendly port, but further assistance might compromise the nation's neutral standing. If a prize does not leave a neutral port promptly, the neutral must release it and intern the prize crew. A neutral cannot allow a belligerent to set up prize courts in its territory or to use its territorial waters to lie in wait for enemy ships.[87]

A belligerent may convert its merchant ships to warships in its own ports or territorial waters, in those of an ally, or in ports or waters elsewhere under its military occupation. It is a violation of international law to convert a ship to a warship in a neutral port or territorial waters. "A merchant vessel, by attaching herself to a warship or by acting under her orders, may be treated by a neutral Power as being subject to the restrictions applicable to warships."[88]

3. Two Cases

A. The Straits of Tiran. Soon after the creation of Israel as a state in 1948 war broke out between her and the neighboring Arab states. Active hostilities were ended between Israel and Egypt by the Egyptian-Israeli General Armistice signed at Rhodes, February 24, 1949.[89] Hostilities ended, but not the state of war; armistices "are in no wise to be compared with peace...because the condition of war remains between belligerents and neutrals, on all points beyond the mere cessation of hostilities..."[90] Technically a state of war still existed.

Israel occupied the port town of Elath on the Gulf of Aqabe, following a Jordanian occupation, before she signed an armistice with Jordan. Elath is Israel's only outlet on the Gulf. Egypt considered the occupation illegal.

After the 1956 war the Rhodes armistice was put back into effect. In May of 1967 Nasser, who controlled the Straits of Tiran leading to the Gulf, took measures against Israeli shipping;[91] Israel considered this a warlike act because "(v)isit, search, and seizure is a belligerent act, not a peace-time regulatory right."[92] Israel retaliated in June of that year with the Six-Day War.

Israel desires the use of the Gulf and the Straits; the United Arab Republic and other Arab nations wish to deny her that use. If Israel withdraws from Sinai, which she almost certainly would have to do in any peace settlement in the Middle East, her only outlet on the Gulf would be Elath. Should her occupation of that town be held illegal she has no argument; if it is legal she has several.

In 1957 the U. N. Secretary-General stated before the General Assembly that the Gulf of Aqaba was of sufficient international importance to justify "innocent passage" in the Gulf and the Straits of Tiran. Soon afterwards Saudi Arabia claimed, on rather weak grounds, "historic bay" status for the Gulf, which, if the claim is true, would mean that Saudi Arabia could bar entrance to anyone she pleased.

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[87] Id. at 608-609, 613, 620.
[88] Id. at 475-477.
[89] Eckert, Straits of Tiran, at 874.
[90] II Oppenheim, International Law 546.
[91] Eckert, Straits of Tiran, at 874.
[92] Id. at 882.

In San Salvadore v. Nicaragua, a "historic bay" case, Fonseca Bay was held by the International Court of the Central American Republics to be a historic bay because all of the states bordering upon it "had given it such a character for several hundred years."[93] If Israel's claim to Elath is good, she was a border state at the time of the claim and did not agree on that status for the Gulf: she could not be legally excluded this way.

Even were the Gulf an "inland sea" Israel would have the right of passage, since a state possessing both shores of a strait leading to an inland sea belonging to different states may not deny foreign ships access to it.[94]

The doctrine of innocent passage through territorial waters would protect Israel's interests if the Arab nations should claim the entire Gulf as territorial waters of another state.[95]

It would appear that if Israel can confirm her claim to Elath she has a claim to passage through the Straits of Tiran and the Gulf of Aqaba. But considering the situation in the area, it is doubtful that a legal decision would settle the issue. Many other problems must be dealt with first.

B. The Canadian Archipelago. After the discovery of oil on Alaska's North Slope, the oil companies' search for the most economical way to transport the oil south led to the traversing of the Northwest Passage by the tanker-icebreaker S. S. Manhattan, reported in the New York Times on September 15, 1969.

Canada was immediately concerned about the danger of massive oil spills and of interference with recent resource development, mineral exploitation, and scientific data accumulation projects just beginning to open the Canadian north. Legislators have proposed declaring all waters within the great North American Archipelago to be internal waters, thus denying the right of innocent passage through them. A system of straight baselines would have to be used to encircle this area and make the waters internal. A considerable amount of sea would be involved.[96]

A possible basis for a Canadian claim to internalize the Archipelago waters is the Anglo-Norwegian Fisheries Case of 1951. In this case the International Court heard the United Kingdom's complaint against the use by Norway of a system of 47 straight baselines connecting rocks and islands of the skjaergaard (rock rampart) surrounding her coast, as the baseline of her territorial sea. Though Norway thus extended her territorial sea up to nineteen miles from her coast in places, the Court ruled the straight baselines use valid in the Norwegian case for three reasons: (1) the baselines did not depart appreciably from the general direction of the coast; (2) the sea area inside the lines was so closely linked to the land that they are considered internal waters; (3) there were peculiar economic interests shown by long usage.[97]

Some support comes from the Geneva Convention, which allows for straight baselines on the criteria used by the Court in the Fisheries case. The Convention relegates economic interests to secondary status and emphasizes that the baselines must not depart appreciable from the general direction of the coastline.[98]

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[93] Id. at 879-880.

[94] Colombos, International Law, at 175.

[95] Geneva Convention 1958, Art. 16:4

[96] Reinhard, International Law: Implications of the Opening of the Northwest Passage, 74 Dick, L. Rev. 678-679 (1970), [hereinafter cited as Reinhard, Implications].

[97] Anglo-Norwegian Fisheries Case, 1951 I. C. J. 116, 133.

[98] Geneva Convention 1958, Art 4:1, 2, 4.

Of the three criteria used in the Fisheries case, when applied to Canada, the economic one fails, unless Canada pleads that she is now in the process of extablishing economic interests, being unable to before. The Geneva Convention would help her here, having made economic matters secondary, but Canada's claim would probably fail under the Convention's "following the direction of the coast" provision.[99] Using the convention would be risky, but not having ratified it, Canada is not bound by it.[100]

Another danger to Canada's successful exclusion of oil tankers by the "internal waters" declaration would possibly be the Convention provision in Article 5:2 that where straight baselines enclose former territorial sea, innocent passage must be maintained. But this might be no threat since a single voyage, the S. S. Manhattan's, scarcely makes the Northwest Passage a customary sea route.

The passage of two straits is involved in the Passage. If these connected territorial water and high seas, under international law they would have to be kept open to sea traffic. If the waters were made internal, however, this would not apply.[101]

Contemplation of this route of action has been rendered somewhat academic by Canadian action since the idea was suggested. In 1970 Canada extended her territorial waters to twelve miles, authorized fishing zone establishment beyond that, and declared an anti-pollution zone of up to a hundred miles from the Arctic coast, with penalties and civil liabilities for intentional and unintentional violation. She authorized wide regulation and inspections of vessels in order to prevent pollution and asserted the right to prescribe the construction of vessels used in the area. She also declined compulsory jurisdiction by the International Court of Justice. The United States protested the entire move.[102]

One writer, while acknowledging that "(n)eeded change in the law has often been achieved only by the initiative of interested states,"[103] points out that previous unilateral assertions forming the law of such a contiguous zone did not greatly interfere with important interests of other state. He laments that Canada did not justify her action in terms of a threat to the environment being a threat to its security, or as a sovereign act under the "sector principle," or because of the archipelago. Nor did she refer to the Geneva Convention, or announce the measures as temporary pending new international legislation, or announce them as protecting the common community interest in the seas. Invoking any or all of these, the writer feels, might have left Canada in a tenable position, but at present she would seem to be in violation of international law.[104]

Canada should backtrack to put herself on more solid legal ground. Pollution prevention is a noble and more and more necessary object. Champion of the ecological interests of the community of nations would be an admirable, if difficult, position to hold; and Canada, a well-regarded and fairly neutral nation, would seem to be a good candidate for the job.

Comments

The law of the sea relating to foreign ships of all types in a state's national waters is an important legal area. Discrepancies among the practices

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[99] Reinhard, Implications, at 670 and 688.

[100] Id. at 685.

[101] Id. at 686-687.

[102] Henkin, Arctic Anti-Pollution: Does Canada Make--or Break--International Law?, 65 Am. J. Int. L. 131-132 (1971).

[103] Id. at 132.

[104] Id. at 132-135.

of different countires constitute points of friction, the removal of which would be a step toward establishing friendship in the international realm.

A further movement toward international harmony will be accomplished when the disagreement over the breadth of the territorial sea is resolved. This, unfortunately, does not seem likely in the near future. Several international conferences have failed to settle the matter and more extensive unilateral claims are being made by some states, who may prove less willing to relinquish what they for a time possessed.

Sea ecology, discussed in the Canada case above, is a third problem of increasing urgency and one which must attract greater attention from legal scholars and national lawmakers over the next few years. It is a fairly amorphous field which humankind cannot afford to leave that way. It is a fairly safe prediction that intensive development will occur over the next few years in the ecology of the sea.

THE BLOCKADE "EXCEPTION" TO TERRITORIAL WATER JURISDICTION

Douglas M. Martin

Basic to the notion of national sovereignty is the concept of a state's exclusive control over the geographical area which it occupies and, from at least the age of the Greeks, political powers have sought to extend this assertion of jurisdictional control to the waters adjacent to their land mass. While the extent of the so-called "territorial sea" has ranged from the "cannon shot" three nautical miles to the two hundred mile claims of modern South American governments and beyond, it has long been settled that the adjacent state does have the right to a general hegemony in the waters which border its own coast. The international law of naval blockade is, in a way, a somewhat curious exception to this doctrine. More so even than wartime land intrusion, the proper application of the blockade technique permits the "preemption" of the adjacent state's right of jurisdiction. In contrast to the general common law of property which allows a police power "taking" without compensation so long as not too much is taken, in the case of the naval blockade legality only attaches when the preemption is virtually complete.

This paper will center on the historical development of the naval blockade, its place within the common law, its use as an instrument of warfare and diplomacy, and its relevance to modern international law. It should be emphasized that the law of prize and of naval commerce in general are not within the scope of this writing. Likewise, the law of contraband, even more directly applicable, will be dealt with only where necessary to the understanding of blockade principles. "In the law of blockade interest centres on the ship herself, and the fate of the cargo is merely accessory."[1]

The early historical origins of the naval blockade are difficult to locate with any precision. Like many of the accounterments of war it was in its early days simply another tactic that a nation could employ to weaken the enemy and it seems clear that it was first thought of only in this limited strategic sense. During combat with an opposing nation nothing could be more natural than to seek to eliminate the enemy's supply sources, by whatever means might be possible. A. Maurice Low stated in 1916 that the "right of a nation at war to close the ports of its enemy so as to prevent him from securing food or military supplies is as old as war itself."[2] There is evidence of support for his statement in the history of the Greeks and the Romans, both of whom made extensive use of naval power in establishing their respectives regimes.[3]

As a legal concept, the doctrine of blockade grew out of the already established law of contraband. It seems fair to say that within the genus "contraband" there gradually developed the species "blockade". This was the view of Grotius and in fact "it was not until the Napoleonic wars that we find breach of blockade treated as a distinct offence in itself."[4] An early case which prompted judicial

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[1] H. Smith, The Law and Custom of the Sea 145 (3rd ed. 1959).

[2] A. Low, The Law of Blockade 3 (1916).

[3] Id. at 3.

[4] H. Smith, supra note 1 at 138 n.2.

comment on the emerging ideas of blockades as part of the law of nations was The Maria,[5] decided November 20, 1805. During the Napoleonic conflict, Great Britain had established a blockade of the Weser and Elba rivers. Significantly it extended to both neutral and non-neutral ports, thus precipitating complaints on the part of the traders whose cargo was aboard the seized vessel. While the claimants prevailed as a result of the Court's finding of prior specific permission for the commerce for the commerce involved, the opinion of Sir W. Scott holds that there would otherwise have been no right of neutral passage through the blockade. In so holding Scott applied the doctrine of continuous voyage to the naval blockade situation.[6] Perhaps the most pertinent part of the opinion of the court in terms of our study of the conceptual development of the blockade doctrine, though, is what is not said. Never once does Scott find it necessary to justify the right to impose a blockade (or the right to extend it to neutral shipping). At this early period in judicial comment on the subject, the established right seems surprisingly settled and beyond dispute.

> "...it is my duty to apply to those operations of blockade, the principles that belong to that branch of the law of nations generally, and by which only such measures can be maintained. The principles themselves cannot differ; although it will undoubtedly be the disposition of the Court to alleviate the situations of those towns as much as possible, by attending to any distinctions that can be advanced in their favour, not inconsistent with the sound construction of the general principles of law."[7] (emphasis added)

From the time of the Napoleonic wars on, the concept of the naval blockade continued to develop. Originally it was applied only to specific ports and was often combined with land seige, but the nineteenth century produced the extension of the tactic to long coastlines as blockades began to take on more of the attributes of general economic warfare.[8]

As warfare, diplomacy, and litigation continued, there developed a body of common law dealing with the naval blockade. As in other areas of the law, rules and policies became settled and accepted long before they were reduced to written statutes and treaties. Understandably, it was the Anglo-American prize courts that produced most of the formative case law, although the somewhat different Franch views were not without their effect.[9]

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[5] 165 Eng. Rep. 901 (Adm. 1805).

[6] The doctrine of continuous voyage has been important to the laws of maritime commerce relating not only to blockade but to other enforced or attempted restrictions on trade such as contraband. The central principle of the doctrine is that one may not be permitted to do indirectly what he is prohibited from doing directly --dolus non purgatur circuitu. In its application it has caused great disagreement among the naval powers involved, since siezure is legal under the doctrine even though the ship involved is headed toward a non-blockaded port. See L. H. Woolsey, Early Cases on the Doctrine of Continuous Voyage, 4 Am. J. Int'l. L. 823 (1910).

[7] The Maria, 165 Eng. Rep. 902 (Adm. 1805).

[8] H. Smith, supra note 1, at 138-9.

[9] 3 Encyclopaedia Britannica 790 (1968).

Blockade was judicially defined in 1799 as "a sort of circumvallation round a place, by which all foreign connexion and correspondence is, as far as human force can effect it, to be entirely cut off."[10] A more recent difinition refers to the principle of "the complete prohibition of all communication, whether inwards, or outwards, with the whole or a defined portion of the enemy's coastline."[11]

Decisions have held that the "right" to institute a blockade must be strictly construed since it invariably infringes on the freedom of the seas and the normal operation of naval commerce.[12] From this and other rationales, there has developed several important standards which a blockade must meet in order to have the sanction of international law. First, it must be established by and with the authority of a belligerent state or later adopted and ratified by the state. Second, and of critical importance, is the matter of effectiveness. It is universally agreed that a blockade must in fact exist, that it must be maintained with a force adequate to prevent the ingress and egress of vessels from the area under consideration, and that a blockade by "notice" alone (a "paper blockade") is of no effect and is indeed itself a violation of international law.[13] The statement of the Supreme Court of the United States in the case of The Peterhoff[14] is typical:

> It must be premised that no paper or constructive blockade is allowed by international law. When such blockades have been attempted by other nations, the United States have ever protested against them and denied their validity. Their illegality is now confessed on all hands.

It has been common to assess the effectiveness of a blockade in terms of the danger to ships attempting to breach it. Both English cases[15] and American cases[16] have illustrated that no general rule or standard other than this can be promulgated. The American case of the Olinde Rodrigues speaks in terms of practical effectiveness and admits that there is no rule of law for the determination of the particular force necessary in order to render the blockade valid.[17] One crusier is enough if it meets the subjective test above.

A third requirement of the legal blockade is that it not bar access to neutral ports or coasts. This point has with little doubt caused more argument and disagreement among nations than any other aspect of the law of blockade warfare.[18] The central problem, of course, is that the practical effect of obedience to this regulation is great damage to the overall strategic objective. It does no good to close the enemy ports if they can obtain the goods they require from a nearby "neutral" nation. The ease with which this provision is circumvented is illustrated by the remarks of L. A. Atherley-Jones before the English Grotius Society during the year 1915. In this paper he points out that the "interests of neutral commerce impose serious limitations upon the power of a belligerent to prevent the access of commodities to his enemy." The justification for England naval action soon follows:

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[10] The Vrouw Judith, 165 Eng. Rep. 131 (Adm. 1799).
[11] H. Smith, supra note 1, at 138.
[12] The Henrick and Maria, 165 Eng. Rep. 129 (Adm. 1799).
[13] A. Polson, Supplementary Essays, Law of Blockade in Principles of the Law of Nations 53 (1853).
[14] 5 Wallace 50 (1866).
[15] The Nancy, 12 Eng. Rep. 22 (P.C. 1809). cf. Naylor v. Taylor, 12 Eng. Rep. 1132 (P.C. 1828).
[16] The Olinde Rodrigues, 174 U.S. 510 (1898).
[17] Id. at 510.
[18] Again, the doctrine of continuous voyage is important. See n. 6 supra.

> ...if we have strained or even violated the rules of contraband and blockade sanctioned by the law of nations we can find ample justification in the fact that Germany initiated a form of warfare in spreading automatic contact mines over the liberum mare, unprecedented in warfare between civilised nations, repudiated and condemned at The Hague Convention, and calculated to deprive the inhabitants of this country of the means of subsistance."[19]

It is perhaps an understandable fact that war is often seen by its participants as productive of its own justifications for military and strategic actions. When we remember the inherent right to national self-defense, it is easier to appreciate how some of the "rules" of international law get pushed aside during the heat of battle. Whether or not such conduct in regard to blockades can be retrospectively justified, it is important to remember that statements such as the one by Atherley-Jones often tend to omit discussion of the adverse effects on the nautral nations which come as a direct result of the hard-nosed attitude toward the belligerent. The American Civil War produced the most striking example of such an injury to a neutral. The arguably extralegal blockade imposed by the Union caused severe damage to the English cotton industry and to its employees.[20]

Other common law requirements of the naval blockade are that it be continuously maintained (subject to brief periods of harsh weather), that it be applied to precise geographical areas, and that it be impartially enforced. The last has been made subject to the blockading power's right to grant special permission to certain ships or missions to pass through the blockade.

Before ships may be siezed or fired upon, they must have some notice of the existence of the blockade.[21] This rule has involved numerous interpretations and disputes, mostly centering on the acceptability of constructive notice or presumptive notice as opposed to actual (and by some authorities recorded) notification. The better common law view is that notification to the port or to the government will serve as sufficient legal notice provided the departing vessel had time to receive such information.

The right to impose a blockade has been defended by various legal justifications and theories, the most important of which are necessity, seige warfare, occupation (the comparison of the blockaded portion of the sea to the occupation of vacant land), and the theory that during war nations who penetrate the blockaded area commit a breach of their neutrality.[22] The generally accepted penalty for breach of a blockade is the seizure and condemnation of both the ship and the cargo. The right to take direct military action against the ship attempting to run the blockade does not seem to be established at common law.

There were two pre-World War I "codification" attempts relating to the law of naval blockades: The Declaration of Paris in 1856 and the Declaration of London in 1909. The former was the product of the Congress of Paris and was precipitated by the Crimean War experience.[23] The instrument, which commentator Earl Willis Crecraft has called "the brightest spot in nineteenth century naval

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[19] L. Atherley-Jones, The Military Effects of Attacks On Commerce, in 1 Problems of the War 92-4 (1916) (Transactions of The Grotius Society).
[20] A. Low, supra note 2, at 4.
[21] VII Hackworth, Digest of International Law 117 (1943).
[22] Sir John MacDonell, Some Notes on Blockade in 1 Problems of the War 94 (1916).
[23] E. Crecraft, Freedom of the Seas 15 (1935).

diplomacy", contained four agreements.[24] Privateering was abolished, protection was granted to ships with neutral flags and to neutral goods aboard enemy ships, and it was established that a blockade, in order to be binding, must be effective[25] The latter is, of course, a straight codification of the common law, although the language leaves some uncertainty as to the proper test for effectiveness. The French version requires the blockade to be "maintenus par une force suffisante pour interdire reellement l'acces du littoral do l'ennemi." (emphasis added) while the English translation reads "maintained by a force sufficient really to prevent access to the coast of the enemy."[26] (emphasis added). H. A. Smith of the University of London suggests that "prevent" may not be a precise rendering of the French "interdire" and that the reader should not be misled into thinking that a blockade is ineffective unless blockade-running is rendered impossible.[27]

The Declaration of London was adopted by the London Naval Conference on February 26, 1909 and set forth rules to be applied by the International Prize Courts established by the Second Hague Conference. "Subject to some differences upon points of detail the main principles of the law of blockade were generally agreed by the end of the nineteenth century, and in the unratified Declaration of London the British view was accepted upon many of the points which had previously been controversial."[28] By far the most ambitious sections of the London Declaration were Articles One and Nineteen -- the articles dealing with the doctrine of continuous voyage. These two sections hold respectively, that a "blockade must not extend beyond the ports and coasts belonging to or occupied by the enemy" and "whatever may be the ulterior destination of a vessel or of her cargo, she cannot be captured for breach of blockade, if at the moment she is on her way to a non-blockaded port."[29] The Declaration also contained provisions requiring a formal declaration of blockade and notification to neutral governments and local authorities.[30] While attempts at formal ratification of the Declaration of London were disappointing, it was generally assumed that the stated principles were more or less accepted by all belligerents at the commencement of the First World War. Crecraft says that it was "clearly international law in 1914."[31]

Repudiation, by action and statement, was not long in coming. The British announced that they would not adhere to the provisions of Article 19 as of March 30, 1916. The French made a similar statement on April 12 of the same year. Although the British later accepted continuous voyage restrictions in July, in practice they engaged in overt violation. The Allies, for example, regularly seized ships bound for Holland, even though these ships were carrying non-contraband goods.[32] The 1917 German proclamation of unrestricted submarine warfare

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[24] Id. at 15.
[25] H. Smith, supra note 1, at 139.
[26] 1 Policy of the United States Toward Maritime Commerce in War 381 n. 2 (1934).
[27] H. Smith, supra note 1, at 140.
[28] Id., at 139.
[29] 1 Policy of the United States Toward Maritime Commerce in War 524-532 (1934).
[30] Id., at 525-526.
[31] E. Crecraft, supra note 23, at 91.
[32] Id., at 91.

was but another encouragement to move away from the written laws and toward the concept of total stoppage of the enemy's maritime trade. The British justified their action as part of the right of reprisal, a term which one author said "in effect...leaves each belligerent free to discard at his own discretion such legal restraints as may seem to him to impede the achievement of victory."[33] On both sides there was such total disregard for the principles expressed by the Declarations of Paris and London that it can be questioned whether they were still authoritative statements of international law. The best grounds for an affirmative answer is that even in the violation, nations did still feel some need to explain and justify their actions.[34]

The Second World War was the great demise of the general use of blockade warfare. Russia proclaimed a blockade of the coast of Finland in late 1939, but the war with Finland ended before it could be tested in any significant way. This is the only recorded use of the blockade per se.[35] The change in the technology of warfare is naturally central to the modern lack of use of the wartime blockade. As early as 1916, W. E. Hume-Williams had noted the effect of the submarine on the traditional common law "rules" of the blockade:

> Imagine the joy of a belligerent at finding an enemy fleet obligingly remaining stationary off his coast. It would be a mere race between aeroplane and submarine as to which should first complete the work of destruction.[36]

In addition to such prevention of the naval blockade, it is obvious that now there are methods of transportation which can be employed to circumvent an attempted blockade. The Berlin airlift immediately comes to mind as an example. To be sure there were attempts to cut off supply sources during World War II, but they involved the tactics of rationing (to neutral nations in close geographical proximity to the enemy), embargos, bunker control, and blacklisting. The immense power of the major combatants enabled them to engage in these actions -- actions which by indirection accomplished what was once the result of the naval blockade.

That the institution of the blockade is not dead, however, can be illustrated by its two very significant uses within the space of the last decade. It may be asserted that these incidents represent a new application of the technique which this author chooses to style "blockade diplomacy".

At least as early as the nineteenth century, there had been talk of the so-called "pacific blockade" -- a coercive measure short of war in order to bring about a certain result in the "recipient" nation.[37] By traditional difinitions, of course, such an action would not be a legal blockade:

> ...for the right of blockade exists only in wartime and is accorded only to belligerents. Under international law, a nation at war 'closes' its insurrectionary ports and 'blockades' the ports of an enemy nation.[38]

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[33] H. Smith, supra note 1, at 165.

[34] In terms of effectiveness, the best World War I example is the Allied blockade of the enemy coasts of the Adriatic, effected by a naval barricade of the Straits of Otranto.

[35] H. Smith, supra note 1, at 144.

[36] W. Hume-Williams, International Law and the Blockade 7 (1916).

[37] H. Smith, supra note 1, at 144 n.8.

[38] S. Bernath, Squall Across the Atlantic 19 (1970).

The above quotation is addressed to the action of the Union during the American Civil War, holding in question the "blockade" of the Southern ports. Might we not say that a foriori we must question the legality of a peacetime blockade against another country? It is with this question in mind that we look at the two modern examples.

The presence of Soviet-made ballistic missils on the island nation of Cuba came to the attention of President John Kennedy in mid-October of 1962. It was the collective decision of the leaders of the administration that immediate action should be taken to have them removed. The Presidential advisors were, at least in the early days of the crisis, divided between those who favored an immediate military strike and those who favored the use of a quarantine or blockade.[39]

> Secretary [of Defense Robert S.] McNamara...became the blockade's strongest advocate. He argued that it was limited pressure, which could be increased as the circumstances warranted. Further, it was dramatic and forceful pressure, which would be understood yet, most importantly, still leave us in control of events.[40]

The success of the blockade of Cuba in terms of the strategic objective involved is common knowledge. But with the possible exception of "necessity and self-defense" it was pointedly without justification by traditional standards of international law. Not only was the United States not at war with Cuba, but there had also been no overt belligerent action by either side.[41] In examination of the historical records of this crisis, it is clear that what the "blockade" sought to achieve was not so much the interdiction of further supplies, but the removal of the missile sites then under construction. Far from prohibiting "ingress and egress" the United States strongly desired the egress of loaded Soviet ships. In short, the "blockade" of Cuba was not primarily military, but military only in the larger context of international politics, power plays, and diplomacy. The "legal" justifications were confined to self-defense and hemispheric security.

A blockade of a different sort was imposed by President Nixon on North Vietnam in May of 1972. Here a better case can be made for a traditional justification since a state of limited war, although undeclared, clearly existed. The blockade, effected by naval and air power and by the use of mines, was accompanied by notice to all nations concerned and contained a "grace" provision of three daylight periods. The asserted objective was the curtailment of supplies to the belligerent forces of North Vietnam and the associated National Liberation Front. However, while the point is certainly open to question, it would seem that in this case, as in the cuban missile crisis, the real purpose is diplomacy.

It was generally assumed that the contingency plan calling for the blockade would not be strategically decisive:

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[39] R. Kennedy, Thirteen Days 33-46 (1st ed. 1969). Students of the Cuban missile crisis and of executive decision making and crisis diplomacy in general are fortunate to have this first-hand memoir. It must be pointed out, however, that some critics feel that the manuscript was colored by the author's personal feelings and otherwise lacks objectivity.

[40] Id., at 34.

[41] It can be argued, of course, that in this day of "push-button" warfare, the establishment of the sites was a sufficient overt act.

> ...the mining or blockade of North Vietnamese ports [had] remained a possibility, but most of [President Nixon's] advisers considered it too risky and too ineffectual. Past CIA studies had concluded that cargo could be diverted to rail lines, roads, or an airlift, at a high cost in manpower...Even the sea routes might be kept open by enemy use of small vessels to unload freighters in unmined waters.[42]

The one-half year that has elapsed since the blockade was imposed would seem to support this prediction. It is this author's opinion that the Nixon blockade was first and foremost a diplomatic gesture. It illustrated that the United States had no intention of defaulting in Southeast Asia and that even as our programs of phased withdrawal and Vietnamization continued, we were prepared to take "decisive military action" in support of the government of South Vietnam. In a year when hostilities might be formally ended, it was thought critical to have this position firmly established.

We are led to the conclusion that the traditional common law doctrine of blockade has lost most of its relevancy to international law. Modern technology has made it impractical if not impossible to maintain territorial water shore blockades of the enemy coastline. "Blockades" maintained at a distance are almost certain to contain elements which are outside the accepted scope and are the product not of law but of brute power. Likewise long-distance blockades cannot realistically be maintained without a curtailment of the rights of neutrals. In a sense, blockades depend on having enough power so as to be able to disregard some of the "rules" of the game. The remnant of the doctrine which has survived in the post-war era is highly charged with both power and diplomacy -- a signal, a means of expression and, though a part of national policy, a policy in a different context and vocabulary than in the 19th century. When "blockades" are instituted in the future, this author believes that they will follow the modern style of the Cuban and Vietnamese case, with all their overtones and repercussions throughout the international diplomatic community. The preemption of the blockaded state's territorial waters as a simple military tactic is sure to fall quickly into the background.

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[42]Time, May 22, 1972, at 11.

THE ANTARCTIC TREATY: A STEPPING STONE TO THE DEVELOPMENT OF AN INTERNATIONAL SEABED REGIME

William E. Rabil, Jr.

The Pre-1959 Setting in Antarctica

Since before the date of the first landing on the Antarctic mainland by United States sealing Captain John Davis on February 7, 1821, records and charts of the ice bound land mass and its surrounding islands have been kept. As the number of exploratory, scientific, and economically oriented expeditions increased, the number of national claims also grew, and despite the fact that Antarctica, in the words of Professor Richard Bidler, "is the coldest, windiest, driest, highest, most remote, and most barren and lifeless of all continents," disputes over and duplication of claims began to arise.[1] In 1948 the United States attempted to temper any possible conflict by proposing a conference on the problem, but the response of the seven nations invited was completely against relinquishment of their immediate international claims and the talks never materialized.[2]

The "turning point" in Antarctica's organization came with the success of the International Geophysical Year, which ran from July, 1957, to December, 1958. The IGY not only accumulated a great deal of data concerning the South Polar region, but it also aroused so much scientific interests in the area that permanent settlements were established there by twelve of the participating nations.[3] With the progress of this new effort, the suggestions that a sounder legal environment was necessary for the further development of Antarctica matured into overwhelming needs. Responding to this call, the United States announced, as it had in 1948, that it would hold an Antarctic Treaty Conference in Washington, D.C. for the twelve nations continuing their activities on the continent, setting talks to begin on October 15, 1959. With the desire for concilliation ripe, the Conference envolved the current Antarctic Treaty, which was signed by all twelve participants on December 1, 1959, and became effective on June 23, 1961.[4]

Provisions of the Antarctic Treaty

Multilateral by nature, the Antarctic Treaty seeks to assure the aims enunciated in its preamble, namely that Antarctica "forever...be used exclusively for peaceful purposes...," that "substantial contributions to scientific knowledge..." result, and that "the continuance of international harmony in Antarctica will further the principles and purposes embodied in the Charter of the

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[1] Bidler, Control of Criminal Conduct in Antarctica, 52 Va. L. Rev. 231, 233 (1966). [hereinafter cited as Bidler, Control of ...]

[2] Hayton, The Antarctic Settlement of 1959, Am. J. Int'l. L. 348, 349-52 (1960). See 19 Dept. of State Bulletin 301 (1948). Approached were Argentina, Australia, Chile, France, New Zealand, Norway, and the United Kingdom. Problems also arose from the fact that the Soviet Union was not asked to participate. [hereinafter cited as Hayton, The Antarctic Settlement.]

[3] Argentina, Australia, Balgium, Chile, France, Japan, New Zealand, Norway, South Africa, the Soviet Union, the United Kingdom, and the United States.

[4] Bidler, Control of Criminal Conduct in Antarctica, at 234-36. See also Hanession, The Antarctic Treaty 1959, 9 Int'l & Comp. L.Q. 436, 455-66 (1960).

United Nations." Within Articles I, II, and III, the concepts of scientific freedom and cooperation for peaceful, non-military purposes are reiterated and emphasized. Article IV, called the "freezing" or "sterilizing" provision,[5] certifies the rights of all signatory states to every previous claim or basis of claim they might have and renounces any attempt to strengthen or enlarge a present or potential claim. Following this status quo declaration, Article V prohibits all nuclear explosions or radio-active disposals in Antarctica, and Article VI geographically defines the area over which the Treaty's provisions are to have jurisdiction. The most significant plateau in the agreement was reached in Article VII which expressed the novel "unlimited inspection principle,"[6] allowing all designated observers of a Contracting Party complete freedom of access at any time to all areas of the Antarctic. As a corollary to its predecessor, Article VIII states,

> ...Observers designated...scientific personnel exchanged... and members of the staffs accompanying any such persons shall be subject only to the jurisdiction of the Contracting Party of which they are nationals in respect of all acts or ommissions occurring while they are in Antarctica for the purpose of exercising their functions.[7]

Articles IX through XIV provide for modification of the present text of the Treaty, settlement of disputes surrounding it, and the procedure for accession to it by any other Member State of the United Nations. Most significant of these remaining five provisions is Article XI which imposes the obligation on all signatory states to resolve any disagreement by "negotiation, inquiry, mediation, concilliation, arbitration, judicial settlement, or other peaceful means of their choice."[8] A conflict not so resolved may be submitted to the International Court of Justice, but failure of the court to decide the matter will not relieve the parties' responsibility to continue in the various peaceful channels of settlement.

Today, the Treaty continues in force and effect, with no major contests or arguments marring the designs set forth in its preamble. It stands as a significant attainment in the ever continuing efforts for world peace and reconcilliation.

The Background of the 1973 Law of the Sea Conference

Early in the twentieth century it appeared that the classical Grotius - Selden dispute over a free sea or a closed sea had finally reached an acceptable degree of "dualism" whereby,

> "...the coastal state was to have soverignty over a belt of territorial waters, subject to the general right of innocent passage, and the high seas outside that maritime belt were to be res communes, not subject to acquisition by title of sovereignty, but subject to an international regime which was spelt out in terms of the so-called freedoms to be enjoyed by the flags of all nations..."[9]

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[5]Hayton, The Antarctic Settlement at 359.
[6]Id. at 360.
[7]Article VIII (1).
[8]Article XI (1).
[9] Jennings, A Changing International Law of the Sea, 31 Camb. L. J. 32, 32 (1972). [hereinafter cited as Jennings, A Changing International Law of the Sea.]

However, again today, the law of the sea is in a state of turmoil. Underlying the present crisis are the factors of the increasing number of sea-bordering nations unilaterally extending their maritime jurisdiction and the many technological advances making possible more extensive uses of the ocean and the seabed. To cope adequately with these present problems and future ones that will undoubtedly occur, the need arises to devise newer, more acceptable principles by which the law of the sea may efficiently regulate continuing international expansion.[10]

Since World War II, two attempts have been made to modernize the classical format of the law of the sea. However, neither the 1958 nor the 1960 United Nations Conference on the Law of the Sea attained their goals; rather, they succeeded only in codifying the classical view. Admittedly, the 1958 Geneva Conference produced four worthwhile treaties — The Convention of the High Seas, The Convention on Fishing and Conservation of Living Resources of the High Seas, the Convention of the Territorial Sea and Contiguous Zones, and the Convention on the Continental Shelf. Also, the 1960 Geneva Conference contributed some basic rules to prevent ocean pollution. Yet, no agreements were reached on the pressing issues of the limit of coastal state jurisdiction and the right of an individual state to extend it seaward. The problem of injury to seacoast resources because of a foreign state's activities beyond the traditional twelve mile jurisdictional limit was not addressed. Newly expressed thoughts on the need for an international legal regime for the sea beyond national jurisdiction were not considered. Moreover, the Conferences left the world hanging with only an ambiguous difinition of the Continental Shelf.[11]

These evident voids in the original Law of the Sea Conventions soon became major sources of international strain. Nonetheless, it was not until 1968 that progress toward alleviation was made. In that year Maltese Ambassador to the United Nations Arvid Pardo finally stirred sufficient momentum in the General Assembly to cause that body to create a forty-two state "Committee on the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction" to consider matters on the law of the sea that Pardo himself had been ennunciating since the mid-1960's. The Ambassador's suggestions basically called for:

> (1) Adoption of the concept of common Heritage of mankind to govern the legal regulation of the seabed beyond national jurisdiction. As a consequence of the adoption of this concept, this area should not be appropriated by any state, should be reserved exclusively for peaceful purposes, and should be exploited primarily in the interests of mankind with special regard to the needs of poor countries; and
>
> (2) That exploration, use and exploitation of the seabed beyond national jurisdiction should be conducted in a manner consistent with the principles and purposes of the United Nations Charter and without causing serious impairment of the marine environment.[12]

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[10]Stevenson, Who is to Control the Oceans: U.S. Policy and the 1973 Law of the Sea Conference, 6 Int'l Law. 465, 465-68 (1972). [hereinafter cited as Stevenson, Who is to Control the Oceans.]

[11]Jessup, The United Nations Conference on the Law of the Sea, 59 Col. L. Rev. 234 (1959). See also
Butte, The Law of the Sea - Breakers Ahead, 6 Int'l. Law. 237, 237-39 (1972). [hereinafter cited as Butte, The Law of the Sea].

The committee's investigations on these and other more specific proposals led to recommendations to the General Assembly on December 17, 1970, a resolution was passed in the United Nations recognizing "an area of the seabed and the ocean floor and the subsoil thereof, beyond the limits of national jurisdiction..."[13] and, in a complementing action, the General Assembly,

> ...decided to convene in 1973... 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 seabed and the ocean floor and the subsoil thereof, beyond the limits of national jurisdiction.[14]

The Thrust of the Proposals before the U.N. Committee

Even before its December 17, 1970, action, the U. S. had submitted a "Draft United Nations Convention on the International Seabed Area" to the United Nations Committee. In addition to proposals for use of the sea, the United States draft's greatest concern was over the manner in which nations could best oversee such use. The United States "working paper" proposed the establishment of an International Seabed Resources Authority and a division of ocean space into three zones. As summarized by Professor W. L. Butte, this protion consists of,

> (1) A 'national' zone to end at the 200 meter isobath (or the twelve mile territorial sea, whichever is broader);
>
> (2) A 'trusteeship' zone administered by the coastal state, with revenue to be shared between the coastal state and the International Seabed Resources Authority, to extend from the end of the 'national' zone to a line drawn where the angle of decline of the continental slope reached a certain number of degrees, this number to be agreed on; and
>
> (3) the deep seabed itself, to be administered by the International Seabed Resources Authority.[15]

Besides the United States Draft, several other proposals are now under consideration by the United Nations Committee, now expanded to include eighty-six countries. In particular contrast to the United States document is the British Convention which suggests having just one international regime to govern the entire area beyond immediate national jurisdiction. The British Seabed Authority would block off the ocean floor and assign sections to various states by competitive bidding, giving the states a free reign over their use, though responsible to the international agency.[16]

The majority of other proposals offered to the United Nations Committee also contain proposals for an international seabed authority. No doubt this will be the major and, very likely, the sorest topic of discussion of the 1973 Conference. Not only is there division as to the structure of such a regime, as evidenced above, but there is also dissent as to the powers it should have.

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[12]Pardo, Development of Ocean Space - An International Delemma, 31 La. L. Rev. 45, 57-58 (1970).
[13]Resolution 2749 (XXV) 17 December 1970.
[14]Resolution 2750 (XXV), c, 17 December 1970.
[15]Butte, The Law of the Sea at 244.
[16]Id., at 246.

The developed countries are of the opinion that the seabed authority should be simply an administrative body, whereas the developing nations, which hold the majority of votes in the United Nations, desire it to have the power to engage directly in tapping of seabed resources and in distributing them to the poorer nations.[17] The difficulties in compromise appear paramount, and the settlement of this conflict may well determine not only the outcome of the remainder of the conference but also the degree of esteem in which the Treaty will ultimately be held by the international community.

Apparent Similarities in the Two Backgrounds

Comparisons are evident between the problems solved in the Antarctic by the 1959 Treaty and the needs now present to develop a more comprehensive law of the sea. In each instance, the development of interest in making claims to portions of the southern ice cap and to areas beneath the high seas came gradually and only as a result of nationalistic desires to bring as much territory as possible under a nation's own flag. A recognition that there was a need for an international convention to govern in each area followed the realization of the necessity to displace pointed disputes between two or more nations over the extent of each other's claims and operations in the same region, by a common desire to avoid conflict and chaos and the belief that cooperation and sharing were better courses to follow. Once concern and responsibility overcame stubborness and reluctance, a spirit of unity began to grow among all involved.

Possibly the acceptance of the concept of the "common heritage" of all nations over international resources was the catalyst in both transformations. Certainly, with respect to the Antarctic Treaty, the moratorium on future claims promotes the policy of scientific cooperation.[18] The United Nations, too, displayed its reliance on this principle when it passed its December 17, 1970, resolutions recognizing an international deep seabed and calling for a new conference on the law of the sea. If the participants in such a conference retain this ideal intact, the achievement of a high degree of unification, international respect, and common benefit would be much more likely, and the resultant agreement could be both as lasting and meaningful for the seabed as was the case for Antarctica.

The Applicability of the Antarctic Treaty in Formulating a Convention on the Law of the Sea.

While there exist comparative features between Antarctica and the deep seabed, there also exist distinctions which cannot be disregarded in the testing of any analogies made concerning them. Several international legal scholars have criticized the value of the Antarctic Treaty as a possible model for any other administrative convention. Prior to the Treaty's enactment, Professor H. J. Taubenfeld expressed the desire that the Antarctic claimants not be content with only "limited functional arrangements" and should go beyond their immediate needs to "experiment with a more unified, international governmental approach which might, while favorable conditions last, be installed successfully."[19] Agreeing with these opinions during a review of the success of the Treaty after

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[17] Stevenson, Who is to Control the Oceans at 475.

[18] Knight, The Draft United Nations Conventions on the International Seabed Area: Background, Description, and Some Preliminary Thoughts, 8 San Diego L. Rev. 459, 492-6 (1971).

a decade of operation, Professor J. M. Marcoux conceded "an important new legal bond exists,"[20] but found that it rests on so unstable a foundation that any quiver in the present equilibrium could overturn it. Both Taubenfeld and Marcoux believe that only because the area remains uninhabited, unimportant strategically, and unproductive economically has respect for the Treaty and order in Antarctica been maintained.[21] For Marcoux, in particular, "once valuable Antarctic resources are found in a quantity suitable for economic exploration, an international scramble for jurisdiction appears a foregone conclusion."[22]

Although it would be difficult competently to refute these criticisms, one must still question whether Taubenfeld and Marcoux have not become caught up in judging the Antarctic Treaty solely from the standpoint of academic theory and have ignored the inherent international realities supporting the Treaty's provisions. True, the Antarctic Treaty contains much ambiguity in its wording and has not anticipated the effects from any discovery that would undermine existing harmony. Yet, has any modern convention ever been free of such defects, and has any modern treaty ever received such compliance? The affirmative answer demanded by the former question and the negative answer required by the latter lead one again back to the belief that there does exist within the Antarctic Treaty some valuable substance that should be considered by the drafters of a new Law of the Sea Convention.

The realization that the provisions of the Antarctic Treaty have merit in their designs and that they adequately manage all activities presently conducted within the region should not be minimized. Although no overseeing international machinery was devised to ensure the ulitmate permanence of the Treaty, in such a still unknown land, the looser bonds established by the Antarctic Treaty, supported by the mutual respect of all participants for each other's rights, have excellently fulfilled the necessities arising there. By restraining all national claims in the area until larger banks of information have been accumulated about the continent, the parties to the agreement have ascertained that the future development of Antarctica, and their participation in it, will be with concrete knowledge and not due to steps taken out of hypothetical conjecture.[23]

The one strong rebuttal to the benefit of this loosely tied arrangement as a mold for future international arrangements, especially as to the law of the sea, was made by Professor R. Y. Jennings. In seeking a means to develop a law of the sea operable in a twentieth century and stressing the need for creating "quasi-territorial jurisdiction and control for an international institution,"[24] Jennings found no usefulness in the Antarctic framework because it too closely adhered to the classic "nationality principle" of state privilege and immunity and did not strive for a dynamic international solution. Jennings felt the activities in the sea could never be as restricted as those in Antarctica, and that only through the efforts of a permanent, regulatory international agency would the functional security of a new law of the sea be assured.[25]

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[19] Jessup & H. Taubenfeld, Controls for Outer Space and the Antarctic Analogy, 190 (1959). [hereinafter cited as Jessup and Taubenfeld, The Antarctic Analogy].
[20] Marcoux, Natural Resource Jurisdiction on the Antarctic Continental Margin, 52 Va. J. Int'l. 374, 379-380 (1971). [hereinafter cited as Marcoux, Antarctic Continental Margin].
[21] P. Jessup & H. Taubenfeld, The Antarctic Analogy at 190.
[22] Marcoux, Antarctic Continental Margin at 379.
[23] N. Padelford, Public Policy for the Seas, 265-74 (1970).
[24] Jennings, A Changing International Law of the Sea at 40.
[25] Id. at 37-40.

As with other critics, there is some logic in Jennings' beliefs, for the participants to the Antarctic Treaty intentionally avoided sacrificing any of their sovereignty in drafting the agreement and by nature a loose arrangement may be less stable than a precisely defined one. Still, his complete denunciation of the value of the Antarctic Treaty wrongfully ignores the reasons for its current viability and the wise policy features it employs. Of course, because so many more divergent interests must be satisfied by a seabed conference, the particular design of the Antarctic Treaty may not be sufficient. In fact, the formation of a supra-national administrative body for controling oceanic activities appears mandatory. Even so, the character of the Antarctic bonds and the spirit underlying their continuance should by considered, for despite external looseness, they possess flexable strength and inspire confidence.

Any realistic consideration of the criticisms of the Antarctic pact cannot overlook the fact that the defects highlighted are actually no different from those inherent in any multilateral treaty. In this context the unexplored seabed, with its great mystery and unlimited potential, is similar to the untamed South Polar region. Comprehensive provisions emphasizing legal duties and providing for all forecast possibilities are valuable elements in a treaty, but they do not of themselves make a convention meaningful. Ultimately, the parties' actual intent to abide by and adhere to a treaty's articles is the decisive factor in assessing an agreement's worth.

Why critics of the Antarctic Treaty appear more concerned about what is not written rather than what is expressed and practiced is difficult to say. However, in so doing, these analysts miss the treaty's most overwhelming strength, a provision that has been instrumental in its long continued success — the privilege of unilateral inspection by one participant of another's operations. Not only is this right extremely significant in solidifying the parties involved, but it also works to make any other means of supervision inconsequential for the purposes of this treaty. There is no reason why such a feature could not be tailored to fit the needs of a new convention on the law of the sea. This would not require the dismissing of all thoughts of an international regime, or the imposing of an inflexible status quo, or the giving of complete discretion to every nation. Rather, all that is necessary would be for the convention to consider the possibility that an authoritative tribunal may not be the best solution and that a body of a more custodial than executive nature would be of greater value. Of course, the implementation of any such plan would require supreme international trust and a minimization of political squabbles, steps that may be very difficult to accomplish. Nonetheless, however great the improbabilities, the Antarctic background serves to diminish them somewhat.

Conclusion

Thinking practically, one may not find the terms of the Antarctic Treaty sufficiently malleable to solve the conflicts presented by international activities in the sea. Numerous problems surround the setting up of a custodial authority. In particular, the matters of who shall be allowed to mine resources and who shall receive what is recovered are crucial issues that must be pre-determined. A possible solution, and one comparable to the Antarctic Treaty, would be to enact rules for the use of the seabed which the international seabed regime would oversee but would not be in charge of enforcing. To implement such a program, the conference would need first to divide the high seas and the nations of the world into sectors and limit the actual use of the seabed in any particular region to only those coastal or land-locked states also within that region. Next, the Conference would need to agree to specific procedures for the exploring and developing of the seabed, including a requirement of notification prior to the beginning of any project

and an enumeration of all approved methods for extraction from the seabed. Within each section, the Conference would need to make further delineations for such a custodial system to be effective, and two possible formats appear workable. One possibility would be to place a maximum ceiling upon the amount of resources any one country could take from its seabed in any one year. The second suggestion would be for the Conference to devise graduated rate tables, revisable periodically, based on the needs of each country. Under this plan, there would be no restrictions on the amount of seabed exploitation by any one nation; however, with regard to the amount extracted and the needs of the country, the graduated schedule would require the country to give a percentage of the resources mined or income derived from it to a special regional authority for dispersement as necessary among its member nations. The opportunity for interregional exchanges could also be provided for under the graduated scale concept. Along with the custodial and regional programs, a provision for unilateral inspection by any member of the pact of the maritime activities of any other member could be inserted. Moreover, every country could bind itself to utilizing only peaceful means for the settlement of any disputes and could consent to submit persistent controversies to the International Court of Justice. Thus, without any sacrifice in efficiency, the duties of the International Seabed Regime could be confined solely to ensure that the convention's rules for oceanic activity are respected, that the development and dispersal of regional resources are made in the manner agreed upon, and that unilateral inspection be permitted. Under such a plan, if the nations in each sector cooperate with each other and the sectors concur among themselves, the possibilities of an achievement similar to that of the Antarctic Treaty would very much exist.

While such a plan is purely speculative, one hopes in any event that the optimism and mutual respect stemming from the Antarctic Treaty can be preserved. With its success viewable as both a foundation to build on and a goal to strive for, this 1959 agreement can form the beginning of a new era in international negotiations. The potential exists for a successful Law of the Sea Conference. All that is necessary is for every nation to manifest a strong dedication to direct its individual efforts toward achieving common benefits and to wholeheartedly maintain a high regard for the rights of other states. What the participants to the Antarctic Treaty accomplished in 1959 stands as a challenge. How national representatives to a Conference respond is what the world will wait to see.

TOWARD AN AGREEMENT ON THE EXTERNAL DELIMITATION OF THE TERRITORIAL SEA

Thomas R. Suher

Very few problems of international law have been characterized by the intensity of discussion and abundance of opinion as has the concept of the territorial sea. Yet no multilateral agreement has ever been reached on the breadth of the territorial sea, and disputes and conflicting perceptions as to what the limit[1] should be are more conspicuous than ever. In the fall of 1973, a conference on the law of the sea is to convene pursuant to General Assembly resolution 2750[2], and one of the paramount concerns will be an agreement on the breadth of the territorial sea.

The exigency of reaching such an agreement cannot be overstated. On a long run basis, the solutions to the ominous population problems of our overcrowded world and the related problem of providing food for generations to come substantially lie in our ability to exploit, successfully and prudently, the vast resources of the sea.[3] To expedite the development of these vital resources we will need the co-operation of all states of the world; discord resulting from the territorial waters dispute precludes such essential community effort. Perhaps the short run risks engendered by failure of accord on the territorial seas question are even more threatening. Egyptian closing of the Straits of Tiran, claiming sovereignty over their territorial waters, precipitating a full scale conflict; the seizure of the Pueblo in North Korean territorial waters; and Ecudorian and Peruvian seizures of U.S. fishing vessels under the claim of a 200 mile territorial sea manifest the harmful tension a lack of agreement can induce.

There are many variables involved in the dispute as to how wide the territorial sea should be. The primary sources of disagreement are economic concerns including fisheries control, natural resources preservation, freedom of transportation, and security concerns including naval mobility, coastal protection, and neutrality. It is the conflicting views concerning these factors asserted by many nations which must be accommodated if an agreement on delimitation is ever to be achieved. The discussion here will be devoted to an analysis and evaluation of these factors, the respective views held by states concerning them, possible methods of resolving these conflicting attitudes, and the prospects for a lasting accord.

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[1] This paper will deal with the external delimitation of the teritorial sea and not the coastal boundary although that problem has similarly generated considerable debate. Anglo-Norwegian Fisheries Case, I.C.J. 116(1951) and Articles 3 and 4 of the Geneva Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. 1610 [hereinafter cited as Geneva Convention on Territorial Sea, 15 U.S.T.]

[2] G.A. Res. 2750. (Dec. 17, 1970).

[3] The oceans contain 90% of the possible food materials of our world; there are one billion tons of fish produced a year but only thirty million are cought. McDougal and Burke, The Community Interest in a Narrow Territorial Sea, 45 Cornell L. Quart. 180 (1960). [hereinafter cited as McDougal].

Before embarking on this analysis, it behooves us to consider the present international atmosphere toward the problems of the territorial sea which pervades all aspects of the issue. The general atmosphere is not conducive to agreement; "If there exists a dominant theme which can be said to characterize the period between 1971 and 1972 it must be the dramatic trend away from international solutions to problems of ocean resource development and towards nationalistic solutions."[4] At the basis of this unfortunate trend is the ascendant nationalism of the developing nations, particularly those in South America, vigorously advocating a widening of the territorial sea in conflict with the developed Western nations who embrace freedom of the seas for commercial purposes and maximum naval mobility and, consequently, prefer a narrow territorial sea with less than exclusive sovereignty. Exacerbating this tension has been Soviet bloc and Arab world insistence on exclusive sovereignty over a twelve mile width. These nations have used the territorial sea issue as a political ploy to court favor with the developing nations and to weaken Western naval power by curtailing naval mobility. However, it is the feeling of this writer that, despite these negative tendencies, chances of agreement are not remote since, in reality, an international agreement is the most expeditious means by which the various states may realize their nationalistic goals.

Turning to the economic factors involved in the delimitation of the territorial sea, we find the proponents of a wide territorial sea stressing their economic plight as a basis for advocating a broad territorial sea. Included in this group are the South American nations, many of whom now support a 200 mile territorial sea with absolute sovereigty and jurisdiction over it, and the Sub-Saharan African and Asian states which favor a twelve mile breadth subject to exclusive sovereignty.[5]

Primary among these economic concerns are preferential fishing rights in coastal waters and the conservation of the fishing resources found there. It is argued that fishing is indispensable to these nations for the subsistence of their population and to the economic welfare of their countries by spurring industrial development and raising the standard of living. These states also feel that the exploration and exploitation of the non-living resources of the sea, particularly minerals, will be advantageous to their economic development. To realize and ensure these goals, these states advocate a wide territorial sea entailing the right of exclusive sovereignty. This extension is founded on the fear that these resources will be depleted if foreign nations are allowed to fish off their coasts or that they will be endangered by contamination or pollution resulting from other activities carried on by foreign states near their coasts. The wide claims are supported by contentions that the geographical, geological and biological characteristics of their seas and the intimate relationship between the resources of these seas and the well-being of the coastal state itself, especially in light of their acute economic deprivations and expanding populations, require a broad territorial sea.[6]

In addition to these most conspicuous contentions in favor of a wide territorial sea, other arguments are advanced. Latin American nations embrace the idea that since time immemorial fishermen of

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[4]Knight, Law of the Sea Negotiations 1971-1972 — from Internationalism to Nationalism, 9 San D. L. Rev. 3 (1972)

[5]FAO Table in 10 I.L.M. 1258 (1971) - statistical data set forth on the present position of states on the limit of the territorial sea are taken from the FAO table.

[6]Declaration of Latin American Countries on the Law of the Sea at Lima (August, 1970), Declaration of Montevideo (May, 1970) found in and commented on in Santa-Pinter, Latin American Countries Facing the Problem of Territorial Waters, 8 San D. L. Rev. 606 (1971). [hereinafter cited as Santa-Pinter].

these nations have derived their livelihood from these coastal waters, and any derogation of this custom through either overfishing leading to a depletion of fishing stocks near the coasts or through superior competition from more sophisticated fishing fleets is to be prevented. A more convincing defense of a wide territorial sea is based on the right of innocent passage[7] which permits the free flow of commerce through territorial waters so that the unimpeded transportation of commercial goods will be virtually assured. A final economic argument in support of a wide territorial belt rests on the idea that we are not effectively utilizing and exploiting all the resources of the seas, especially in the southern hemisphere which is 80 per cent ocean and furnishes only a minority proportion of the world's fish catch. It is felt by some that the reason for this is that most fishing resources are common property and that sole ownership and management of fisheries by the coastal state could regulate exploitation in such a manner as to achieve the desired maximum yield.[8]

The arguments favoring a narrow territorial sea, marshalled in the name of economic benefit and optimum use of fishing resources, are just as copious and perhaps a bit more forward looking. Foremost among these contentions is that a wide territorial sea, even one of only twelve miles, would not improve most national fishing industries and would, in fact, substantially damage the fishing resources of many coastal states over the long run. As coastal nations exclude other states from their coastal fishing grounds, reciprocal action will be taken, and if the source of fish is depleted by poor conservation planning or fish migration out of those coastal waters, the fishermen of those nations will be excluded from the best areas.[9] Moreover, as the greater part of the seas remain open to uncontrolled fishing and the high seas adjacent to territorial waters are heavily fished, the fish inside the coastal boundary will tend to migrate for more even distribution. Combined with the consequences of the afore-mentioned reciprocal exclusivity, the effects on a nation's fishing industry could be devastating.

Another strong argument for a narrow territorial sea entails the notion that a broad limit precludes the co-operation necessary for real progress in exploiting the fishing resources of the seas. "Historical experience . . . confirms that cooperative effort and coordinated restaint offer more promise of greatest advantage for all participants than do rigidly conceived, exclusive compartmentalization of sharable resources".[10] First, the underdeveloped states facing the most serious food shortage generally lack the capital and sophisticated techniques to carry out effective exploitation of the fishing resources in their adjacent waters and, as a result, marine resources in such areas may be wasted if development is left solely to the adjacent state. Second, a wide territorial belt, particularly one which did not coincide with migration patterns, open only to nationals of the coastal state, would complicate the difficult task of establishing a meaningful conservation program which would require extensive studies of the abundance and productivity of fish stocks.[11] As with the exploitation problem, progress is slow when dependent solely on the initiative and skills of individual states which lack capable personnel and investment capital for sophisticated equipment.

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[7] The right of innocent passage is found in the Geneva Convention on the Territorial Sea 15 U.S.T. 1610.

[8] McDougal at 196.

[9] Territorial Seas — 3000 Year Old Question, 36 J. Air Law & Com 98 (1970); [hereinafter cited as Territorial Seas].

[10] McDougal at 173.

[11] Id. at 183.

Therefore, it is contended that, as regards fisheries, both the general interests of all nations of the world and the specific interests of the underdeveloped states will be harmed by a wide territorial sea subject to exclusive sovereignty for the short run benefit of a few. Furthermore, the legal rights and obligations which are inherent in full territorial claims have only a tenuous relationship to the fisheries question. The solutions to the latter problem would better be served by the use of contiguous zones or exclusive fishing zones based on known patterns of fish migration.[12]

With respect to maritime freedom of transportation and communication, supporters of a narrow territorial sea contend that freedom of movement would be sharply curtailed by an extension of territorial waters since many vessels would seek to avoid contact with the territorial sea for various reasons. This would cause a substantial cost increase in shipping since "the difficulties and uncertainties of navigation and piloting increase geometrically with extensions of the territorial sea".[13]

Finally, concerning the exploitation of mineral and other non-living resources, the 1958 Geneva Convention on the Continental Shelf, which came into force in 1964, provides for the exercise of sovereign rights of exploration and exploitation of the natural resources of the seabed and subsoil beyond the territorial sea to a depth of 200 metres or to where the depth of the waters no longer admits of successful exploitation.[14]

The other major source of dispute which has contributed to the lack of agreement on delimitation concerns the conflicting security interests of the nations of the world. The security problem is probably less susceptible to accommodation. It involves primarily a political confrontation between the great powers concerning their military-political hegemony over various parts of the world and is so interspersed with political considerations that the real security concerns are often overlooked.

Most concerned from a security standpoint with any widening of the territorial sea is the United States which possesses the world's largest navy and relies on the complete flexibility of ocean movement, which only a narrow territorial sea can ensure. For the United States, the stakes involved in increasing the width of the territorial sea to twelve miles subject to the exclusive jurisdiction of the coastal state are enormous. Of the 38 leading straits of the world wherein passage is vital to rapid international movement and transoceanic supply, 35 would fall within the restriction of territorial waters if they were extended to twelve miles.[15] While there is some precedent for the right of innocent passage for warships, it appears to be a limited, somewhat amorphously defined right and is, at any rate, subject to the regulations of the coastal state. In fact, the Soviet view is that there is no generally accepted right of innocent passage for warships and that the previous authorization of the coastal state is necessary for any such passage.[16]

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[12] Territorial Seas at 100.

[13] Arthur Dean, U.S. Representative at 1958 Geneva Law of the Sea Conference found in Bishop, International Law at 595.

[14] Articles one and two of the Geneva Convention on the Continental Shelf, 15 U.S.T. 473 (1964).

[15] Lawrence, Military-Legal Considerations in the Extension of Territorial Seas, 29 Military L Rev. 65 (1965) [hereinafter cited as Lawrence].

[16] Butler, The Legal Regime of Russian Territorial Waters, 62 Am. J. Int'l L 51 (1968) [hereinafter cited as Butler]; the USSR made a reservation to Article 23 of the Geneva Convention on the Territorial Sea and the Contiguous Zone indicating the Soviet view regarding the right of innocent passage for warships.

At any rate, passage of submarines through territorial waters must be on the surface and this requirement substantially curtails submarine agility.[17] In addition, airplanes have no right of innocent passage over territorial waters. Thus, a twelve mile breadth subject to exclusive sovereignty would threaten U.S. world-wide sea and air mobility and serioulsy endanger NATO operations and strategic deployment of U.S. fleets. While Soviet naval mobility would also be sharply restricted by a wide delimitation, it is felt by U.S. military strategists that the Communist bloc, being mainly a neat package of land-connected states, would still be subject to Soviet military hegemony; the Western powers, spread over two hemispheres and connected by oceans and straits, would suffer enormously from a broad delimitation. Hence, vital military and strategic interests are at stake in this delimitation of the territorial sea. The conflicting security interests of the two great powers of the world must be reconciled if any agreement is to be realized.

While of lesser proportions, there are other security concerns, equally contentious, which have an effect on where nations want to draw the external boundary of the territorial sea. Many states claim they need a wide territorial belt for effective customs, sanitary and other police enforcement measures. Perhaps in the light of growing concern with the threat of water pollution and the real possibility that accidents on sea-going vessels or problems associated with the explitation of the seabed might contaminate a state's coasts, this concern takes on considerable importance and militates for a wide territorial sea. However, it appears that such policing or regulatory activities can be carried out without exercising territorial sovereignty and imposing the restrictions inherent in such sovereignty. Modern navigation aids and the use of contiguous zones can be employed to deal effectively with these problems.[18]

Another security concern provoking conflicting attitudes toward delimitation involves the issue of whether a wide territorial sea enhances the defense posture of the coastal state. Those advocating a narrow sea assert that national security and defense is no longer related to the protection of the coast itself due to the development of highly sophisticated weapons and delivery systems which render the territorial sea useless for defense purposes. In fact, it is asserted that a wider territorial sea encorages violations of a coastal state's neutrality by unscrupulous belligerents since the task of patrolling a wide area is so difficult. Such violations of neutral waters, if carried out with impunity, can only enrage the other belligerents and exacerbate the already hostile situation. On the other hand, those supporting a wide territorial sea contend that conventional naval power is still a reality and that a broad delimitation would eliminate the possibility of diplomatic deployment of a large naval fleet near one's coasts by moving these fleets away to a distance of twelve miles where they would have little psychological effect.

While far from exhausting all the factors out of which sources of disagreement and widely divergent attitudes have arisen, it is fair to say that these are the primary areas where conflict of interest has prevented agreement on the breadth of the territorial sea. Any lasting agreement would have to be predicated on a resolution or accommodation of the conflicting attitudes in these most important areas and if accommodation on these major problems was realized, the minor areas of disagreement would probably not deter the consummation of such a

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[17] Article 14, paragraph 6 of the Convention on the Territorial Sea, 15 U.S.T.

[18] Indeed, Article 24 of the Geneva Convention on the Territorial Sea 15 U.S.T. provide for just such policing operations beyond the coastal state's territorial waters.

badly needed accord. We will now look at some devices whose prudent employment might facilitate the essential accommodation and evaluate the limits of their salubrious effects.

One possible device for reconciliation would be the use of contiguous zones. A contiguous zone is generally perceived as a defined area lying outside the belt of territorial waters in what is normally part of the high seas but in which a nation claims less than full sovereign rights. Traditionally, these claims have concerned fishing controls, customs enforcement, and defense interests. The Geneva Convention on the Territorial Sea and the Contiguous Zone manifests general international recognition of their status. However, the Convention limits their use to customs, fiscal, immigration and sanitary regulation and limits the breadth of the zone to a width of twelve miles. Therefore, while serving a useful purpose, their present employment does not foster any solution to the more critical problems of fisheries and security interests and, in addition, their present delimitation of twelve miles is unacceptable to many states.

On the latter point, for instance, the USSR recognizes no contiguous zone in the common understanding of the term and asserts full sovereignty over all their territorial waters out to twelve miles.[19] More significantly, the underdeveloped nations of South America and Africa, buoyed by their ardent nationalistic spirit, perceive the establishment of contiguous zones as a device employed by the powerful maritime nations which diminishes their rights as sovereign, independent states to establish their own limits of territorial jurisdiction off their coasts. This feeling of emerging nations that "no state can arrogate today the representation of the international community and ignore the attribution to the coastal State of the power to fix the limit of its territorial sea"[20] cannot be discounted, for it underlies all their arguments concerning the width of the territorial sea. Finally, because contiguous zones are defined geographically in the same way as territorial waters, that is, without regard to migratory patterns of fish stocks, they are not sufficient to deal with the fisheries resource problems.

However, the concept of a zone where less than full sovereign rights are exercised to take care of the coastal state's interests is sound. It is feasible and, as we have seen, eminently logical to divorce the fisheries question from the territorial sea problem just as the exploitation of mineral rights issue was resolved by the Convention on the Continental Shelf without regard to territorial boundaries. The right to exclusive fishing zones defined according to knowledge of fish stock patterns and the needs of the coastal states would seem to accommodate the interests of all states on the fishing problem, especially if such exclusive fishing zones are established with regard to the needs of international cooperation for optimum long term use of the oceans' vast fishing resources. Indeed, the USSR recognizes the establishment of special fishing zones and the U.S., as will be seen, is leaning in that direction.

With regard to the conflicting attitudes concerning the freedom of the seas for both commercial and military vessels, the right of innocent passage has been looked to historically and is considered presently as a source of accommodation. There is no question that merchant ships have a right to innocent passage through the territorial waters of any state, assuming the passage accords with certain well recognized qualifications.[21] However, this right of innocent passage falls far short of ensuring the vital interests of those states to whom maximum ocean mobility is essential, and a widening of the territorial sea would have profound effects on these vital interests regardless of the right of innocent passage.

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[19] Butler at 71.

[20] Santa-Pinter at 612.

[1] Article 14 of the Convention on the Territorial Sea, 15 U.S.T.

The definition of innocent passage is passage not prejucial to the peace, good order or security of the coastal states and in conformity with the latter's laws and regulations; thereby granting the coastal nation, through subjective interpretation of what is necessary for their security, the power seriously to impede or at least burden passage through its territorial waters. This threat of arrest for violations of coastal regulations or the threat of other navigational hindrances could cause merchant ships to change to longer, more expensive sea routes.

More significant is that the innocent passage of warships in territorial waters is restricted. While Aritcle 23 of the Convention on the Territorial Sea seems to imply a complete right of innocent passage for warships, in practice many nations do not adhere to this rule. Some states, such as the USSR, require previous authorization or advance notification for warship passage. Others can substantially restrict the right by appealing to considerations of security to enact rather restrictive regulations on such passage. Also, as remarked earlier, submarine passage is regulated and there is no international law right of overflight except by treaty or consent.

Finally, it is generally recognized that a state has the right to limit or deny completely during time of war or national emergency innocent passage of both merchant and military vessels through their territorial waters.[22] With respect to the mobility of naval vessels in time of war, a widening of the territorial sea could have devastating effects.

> A peacetime extension of territorial seas with the right of innocent passage would, to a large extent become a wartime extension without such rights. A strait which is now high seas would, if it became the territorial sea of a neutral nation in wartime due to an extension of the breadth of the territorial seas, be closed to any activities which would promote the wartime goals of a belligerent.[23]

Considering that a twelve mile limit would place 116 straits and passages around the world within territorial waters[24] including vitally strategic ocean links, the right of innocent passage is certainly insufficient to ensure the vital interests of many maritime nations necessary for an agreement.

One of the newest possible means of accommodation set forth is the idea of an economic resource zone[25] in which the coastal state, though acceding to a twelve mile limit for the breadth of the territorial sea, would possess exclusive or preferential rights to all resources of the seabed and superjacent waters out to a maximum of 200 miles. The quid pro quo for such an agreement would be freedom of passage through all straits connecting international waters. Such an agreement might be appealing to the developing nations, and while not in the long run interests of anyone since it would deter international co-operation on development of fishery resources, it could be the only immediate basis of agreement in light of the prevailing nationalistic tendencies.

The United States - Canada proposal of a six mile territorial sea plus a six mile contiguous zone, which fell one vote short of adoption at the 1960 Geneva Conference, might be more forward looking in that it separates the problem of

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[22]Article 16 of the Convention on the Territorial Sea, U.S.T.

[23]Lawrence at 86.

[24]Territorial Seas at 73.

[25]9 San D L Rev. 385. (1972)

fisheries control from claims of territorial sovereignty. However, it stands little chance of success because of the increasing number of nations asserting full sovereign rights out to twelve miles[26] and the Latin American nations' demands for a 200 mile territorial sea.

The latest United States proposal, advanced by John R. Stevenson, Legal Advisor to the Department of State and U.S. Representative to the U.N. Committee on the Peaceful Uses of the Sea-Bed, in a draft proposal on the breadth of the territorial sea, concedes the right of full territorial sovereignty out to twelve miles (Article I) and provides for the right of free transit for all vessels, aircraft, and submarines through and over all international straits, although the straits themselves will assume the national character of the coastal states.[27] The proposal also provides for the creation of an international fisheries organization to regulate the exploitation of the resources of the high seas and establishes conservation programs and exchanges of scientific information and other relevant data to ensure that no stock will be overfished. In addition, the proposal allows for the protection of the economic interests of the coastal state beyond twelve miles by giving each state a preference in the waters adjacent to its territorial sea correlated with its capacity to fish and the needs of its population. Most interesting is that the preference accorded to coastal states is based on the migratory nature of the stocks and also permits freedom to fish outside the twelve mile limit to all other nations.

There is only a fair chance for agreement on this proposal as it is written because it falls too far short of satisfying the nationalistic contentions of the Latin American states for a 200 mile territorial sea. Furthermore it diminishes the political leverage of the Communistic bloc and Arab and Asian states by negating the threat, which they could otherwise pose, of closing strategic straits. The proposal is extremely significant, however, because it attempts to separate the problems of economic concerns and security interests from the concept of territorial sovereignty and takes an approach which considers the future use and development of the seas and their resources and, thus, provides the groundwork for a lasting agreement.

Whatever type of accord will be worked out at the forthcoming Law of the Sea Conference on delimitation of the territorial sea, it must be acceptable to all nations if it is to have a truly permanent and fully useful effect. "A solution imposed on the rest by a relative majority which did not take account of existing realities and the interests of different States would not be satisfactory. The principles underlying the demarcation of their various areas and their maximum limits would have to be determined on a universal basis".[28] It is clear that an agreement to which all parties do not adhere or to which they will not feel bound will not substantially ameloriate the present chaotic situation caused in large part by unilateral conduct of nations. To achieve universality of agreement, the final convention must embody or foster the primary interests of all states. That is, each state must find something to its advantage in the convention which will induce it to abandon nationalistic tendencies and agree for its own good.

Specifically, the developing nations must be made to see that their long term interests in productive fishing resources require international co-operation which can be realized only be allowing other nations to fish to some extent in parts of their coastal waters. What is needed, perhaps, to gain this spirit of accommodation on the part of the developing nations is a committment of money and technology, guaranteed by the convention, and made by the wealthier powers,

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[26] According to the FAO Table, 58 of the 112 nations listed now claim full sovereignty over their territorial sea out to at least twelve miles.

[27] 30 I.L.M. 1013 (1971)-U.S. Draft Articles on the Territorial Sea, Straits, and Fisheries Submitted to U.N. Seabed Conference.

[28] 30 I.L.M. 974 (1971)-U.N. Committee on Peaceful Uses of Seabed Completes 1971 Session in Geneva.

particularly those who fish throughout the world, to develop and effectively maintain the coastal fishing resources of underdeveloped nations. The material benefits which would accrue to these wealthier nations in the short run would be very limited, but the advantages to having an accord, and one which embraces the notion of long term international co-operation, cannot be underestimated.

As for the Western powers, they now seem ready to live with a twelve mile limit provided they are guaranteed the unfettered right of passage through and over international straits at all times. Obtaining this concession will be difficult since it is to the strategic advantage of some nations, particularly the Communist states, to forbid such rights of passage. However, the obstinacy of these strategic-minded nations might be diminished if the agreement embraced the fundamental interests of most developing nations, since then there would be no political capital in preventing an agreement. In addition, the more co-operative spirit of the Communist nations displayed recently might indicate that they are now more concerned about their own long term domestic and economic needs than with gaining military and strategic advantages. It is patently clear that these states would benefit tremendously from a more productive and effective use of the vast ocean resources.

There must be provisions made in any agreement for subsequent discussions and new accords, concerned mainly with the problems of administering the basic agreement on a continuing basis so that the vital interests of all states will not be neglected and so that international action will be consistant with future developments and changing circumstances in the exploitation of ocean resources.

THE ATTITUDE OF DEVELOPING COUNTRIES TOWARD INTERNATIONAL AGREEMENTS ON ENVIRONMENTAL CONTROL OF THE OCEAN

A. Wilder Wadford, Jr.

People of all nations possess only one body of ocean water. With this fact everpresent, the law of human nature would seem to demand that the scarcity of that living environment makes necessary precautions to preserve its resources. However, solutions derived from real situations do not follow such simple logic and are compelled to pursue avenues beset by political, economic and legal restraints. The impetus of environmental consciousness may be attributed to the realities of the industrialized nations; however, the solutions offered to cure the unhappy consequences of the Industrial Revolution do not provide a means for redistribution of the benefits. In other words, any implementation of international law aimed at elimination of those realities tends to freeze the gap in socioeconomic development between developed and developing countries. Unfortunately, the wide disparity in the distribution of political power based upon the technological monopoly by developed countries is one of the most persistent effects of the Industrial Revolution.[1] Those "fortunate few" maintain that environmental equilibrium may be achieved through a global application of environmental law regardless of the overwhelmingly unequal apportionment of the benefits and destructive effects caused by industrial nations.[2] Despite the probable fortuitous effects resulting from the adoption of a Seabed Regime Convention or the ecologically sound international law restraining ocean degradation, the attitude of the developing countries may be expected to be apathetic because of their impoverished socioeconomic history.

Emphasis upon the "quality of life" is understandably a luxurious goal in the minds of underdeveloped countries where exists the prevalence of social and economic afflictions such as malnutrition, disease, high infant mortality, high illiteracy levels, endemic unemployment, and severely unbalanced per capita income. The additional factor of the widening economic disparity between developed and developing countries brings the dichotomy into sharper relief.[3] The "pollution of poverty," that which developing countries hold of real significance,

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[1] J. Castro, Environment and Development: The Case of the Developing Countries, in WORLD ECO-CRISIS 238 (D. Kay & E. Skolnikoff eds. 1972). [hereinafter cited as Castro, The Case of the Developing Countries].

[2] Id. at 240.

[3] J. Lee, Environmental Considerations in Development Finance, in WORLD ECO-CRISIS 174 (D. Kay & E. Skolnikoff eds. 1972). [hereinafter cited as Lee, Development Finance].

is the type that can be eliminated through population growth, higher incomes, and modern technologies. Paradoxically, the cures for these ills propagate the malaise of "pollution of affluence."[4] According to developing countries, however, the problem is not one of seeking "ecological balance" but of obtaining the most efficient methods of long term "ecological imbalance." In other words, the problem is not to eliminate man from the eco-system, but to prolong our ability to use the resources as long as possible. The only way to accommodate "ecological balance" would be to thrust man back into the "pre-fire age."[5] It would seem, then, that developing countries would be more likely to make a bid for "conservatism" rather than "conservation."

According to the developed countries, the international environmental policies on the ocean may be ideally implemented in regions untouched by the environmental crisis, but this view is disparagingly received by developing countries as repressive in that it ignores their economic deficiencies.[6] The preservation of the ocean globally would require a "green area reserve" which would indicentally coincide with the waters of the developing countries.[7] As the Ambassador of Brazil to the United States sardonically put it:

> Furthermore, the possibility of a widespread application of developed countries' ecological policy, theoretically conceived to secure the equilibrium of "spaceship earth," may risk transforming the Southern Hemisphere countries into the last healthy weekend areas for the inhabitants of a planet already saturated with the environment created by the Industrial Revolution.[8]

Developing countries, therefore, declare without reserve that there may well be situations where the waters must be dirty to some extent to meet the extenuating pressures and needs within an individual society.[9]

Along the same continuum of thought, developing countries object to environmental policies because developed nations ignore the politics of the situation. Industrial nations advocate a technical approach to the eco-crisis which directly conflicts with the hard-felt notion among developing nations that national identities must remain intact. Joas Augusto de Araiyo Castro, Ambassador to Brazil, again describes the situation:

> It seems reasonable that the preservation of the environment should not exclude the preservation of national sovereignty. Ecological policies should rather be inserted into the framework of national development....
> ... In this regard any ecological policy, globally applied, must not be an instrument to suppress wholly or in part the

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[4] Castro, The Case of the Developing Countries at 248.
[5] M. Almeida, The Confrontation Between Problems of Development and Environment, 586 INTERNATIONAL CONCILIATION 42-43(1972). [hereinafter cited as Almeida, The Confrontation Between Problems of Development and Environment.
[6] Castro, The Case of the Developing Countries at 240.
[7] Id. at 247.
[8] Id. at 247.
[9] O. Schachter, Goals and Strategies for Combating International Pollution, in CONFERENCE ON INTERNATIONAL AND INTERSTATE REGULATION OF WATER POLLUTION 66 (C. O'Malley ed. 1970).

> legitimate right of any country to decide about its own affairs. In reality this point would simply seek to guarantee on an operational level the full exercise of the principle of juridical equality of states.... Sovereignty, in this context, should not be taken as an excuse for isolationism and consequently for escapism in relation to international efforts geared to solving environmental problems.[10]

Moreover, since environmental preservation is only one of the multiple objectives of planning, its priority among the other objectives should be examined in the context of each country's individual urgent social and economic needs. The idea that "blanket" priorities and standards may be imposed upon individual countries is very hard to accept among the impoverished nations.[11]

Perhaps a salient feature of the conflict between developed and underdeveloped countries is the different views that each holds concerning consumption levels. Developing nations accuse developed states of asserting that all the world can never achieve the consumption patterns of the industrialized elite and that developing countries should have no ambition to reach such levels.[12] Such allegations are sometimes emotionally weighty. However, the prevailing argument in the United States would seem to be that the environmental crisis affecting the oceans can be causally traced to population growth and affluence. The more extreme elements among the developing countries reply that it is simplistic to believe that the ecology is disturbed because of overpopulation or overconsumption. They contend that there is abundant evidence that the earth is capable of supporting greater populations at much higher levels of consumption. These factions validly point to the environmental wastes in four major wars in this century between industrial elites and maintain that environmental problems are little more than a misallocation of national priorities.[13] Perhaps the developing countries are pointing a finger in the right direction in this respect; however, other developing nation viewpoints recognize that the capacity of the oceans to support marine life is threatened by the emission of oil, disposal of domestic and agricultural wastes, the exploitation of marine minerals, disposal of radioactive wastes, and disposal of industrial wastes such as nitrogen oxides, phosphates and mercury.[14] Because of the recognition of this threat among the more moderate advocates of the developing world, there is some amenability to global water standards, but within the context of each country's more pressing needs--a slippery approval at best.[15]

Perhaps one of the most severe impediments to international environmental agreements on the ocean is the fear of developing countries that such measures will have negative economic implications. For example, environmental control is regarded as a potential substitute for the use of funds normally destined to become foreign aid. This is an unpredictable consequence due to its political nature; however, there is strong speculation in the United States that the impact on foreign

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[10] Castro, The Case of the Developing Countries at 249.
[11] Founex Report on Development and Environment, 586 INTERNATIONAL CONCILIATION 22(1972).
[12] Castro, The Case of the Developing Countries at 240.
[13] Id. at 243.
[14] Almeida, at 47.
[15] S. Astrom, Prospects for International Cooperation on Curbing Pollution, in CONFERENCE ON INTERNATIONAL AND INTERSTATE REGULATION OF WATER POLLUTION 71 (C. O'Malley ed. 1970). [hereinafter cited as Astrom, Curbing Pollution].

aid to developing countries will probably be a reduction if an extensive set of emission and effluent standards are imposed by international agreement.[16] Even if the amount of aid is not reduced, there is substantial anxiety among underdeveloped nations that much of the aid will be conditioned upon adherence to environmental standards of developed countries.[17] Another negative impact is apprehension that the technology transfer from industrial nations will be burdened with environmental safeguards that may decrease the optimal use of that technology by developing countries.[18] Equally disturbing is that there may be an implied change in terms of trade between developed and developing countries such as increased export prices from developed countries and a decrease in the profitability of foreign investment in developing economies.[19] Moreover, in terms of their own heavy dependence upon exporting natural resources, developing countries anticipate that excessive costs of residuals disposal in developed countries and pressures for more efficient use of resources (such as recycling) will adversely affect their trade.[20] Finally, opposition to environmental measures to protect the oceans is generated by the fear that cost increases for maintenance of environmental controls will necessitate a "neo-protectionism" in developed countries as a means to protect home industries.[21] Undoubtedly one can readily discern that these objections construct formidable obstacles before the progress of environmental controls of the ocean.

On the other hand, many developed countries look upon the opposition of developing countries as impractical (deduced from their own environmental imprudence) because they are attempting to acquire social and economic goals at an accelerated rate while neglecting the social costs of environmental degradation. According to developed nations, one must be prepared to avoid short-term economic prosperity if it results in long term ecological waste.[22] Therefore, the inevitable is that the less endowed stand to gain the maximum output from protection of their environment as it is more costly to repair irretrievable errors in environmental planning.[23] Developing countries would consequently reap greater benefits by not insisting upon unreasonable financial or trading concessions in return for their approval of international procedures and institutions to protect the oceans. Their opposition to such measures, moreover, is directly related to their "general lack of appreciation of the degree to which environmental concern was relevant to developing countries overriding domestic preoccupation with combating poverty through economic development."[24] Furthermore, it is usually recognized that "high rates of economic growth do not by themselves guarantee the easing of urgent social and human problems."[25] On the contrary, many "high growth" nations have been increasingly burdened by rising unemployment, unbalanced income distribution, and social and cultural deterioration.[26] Developed countries contend,

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[16] R. d'Arge and Kneese, Environmental Quality and International Trade, in WORLD ECO-CRISIS 276 (D. Kay & E. Skolnikoff eds. 1972). [hereinafter cited as d'Arge and Kneese, Environmental Quality and International Trade].
[17] Id. at 259.
[18] Id.
[19] Id. at 276.
[20] Id. at 258.
[21] Id. at 259.
[22] J. Lee, Development Finance at 175.
[23] B. Johnson, The United Nation's Institutional Response to Stockholm: A Case Study in the International Politics of Institutional Change, in WORLD ECO-CRISIS 99 (D. Kay & E. Skolnikoff, eds. 1972). [hereinafter cited as Johnson, A Case Study].
[24] Id. at 100.
[25] Founex Report, at 25.
[26] Id. at 11.

therefore, that developing countries need more information concerning the environmental crisis than they currently possess in order to realign their priorities.[27] In other words, the recognition of environmental consequences in developing nations is an essential objective of an integrated approach to the development goal.[28]

Although developed countries acknowledge the developing countries' legitimate fears concerning the economic implications of "neo-protectionism," the industrial nations argue that there may be many advantageous side effects of international environmental agreements to preserve the ocean. For example, the global interest for the environment may generate a greater concern for the elimination of poverty; hence, greater aid may be a base for greater support of projects in the social sectors. Traditionally, aid sources avoided programs with low rates of return, but interest in investment in human resources (education, nutrition, public health, etc.) has been aroused. Another fotuitous collateral result might be that a greater demand for natural resources form developing countries may arise as more industries curtail the more pollutive production of synthetics. As a consequence, natural resource prices may be expected to rise and more trade concessions may be offered. In addition, recycling in industrialized countries will allow much needed natural resources to remain in developing countries.[29] Needless to say, developing nations frown upon these predictions as subjective humanitarian appeals contra to economic facts.

The core of the growing controversy between developed and developing countries remains in the already commonplace animosity between the "have" and "have not" countries. The "have nots" claim that environmental degradation is the rich man's problem and ascribe much of the developing countries' economic and political impoverishment to developed countries' activities within the "have nots'" borders. According to developing nations, the legacies of colonialism and imperialism are despersed social orders largely minus their own leaders; pluralistic societies with unassimilated immigrants; overurbanization caused by non-indigenous economic activities; disruption from the Second World War; hyperbolic nationalism in response to imperial domination; disillusionment in democratic processes to bring economic progress, and economies dependent upon the affluent industrial elite.[30] These conclusions, of course, precipitate questions among the developing world of who is to blame for their impoverished condition and who should bear the burden of cleaning up the oceans?

In response to who should assume the costs of environmental protection, developing countries direct their attention to the identities of the polluters and the capabilities of the polluters to rectify the impaired environment. Developing countries rightly lay culpability on the developed countries for the polluted oceans:

> ...if all pollution generated by the developed countries could be withdrawn from the earth, there would be no pollution of worldwide significance; conversely, if all pollution directly imputable to

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[27] Id. at 25.
[28] Id. at 11.
[29] Id. at 31-32.
[30] E. Woodhouse, Re-Visioning the Future of the Third World: An Ecological Perspective on Development, 25 WORLD POLITICS 23 (1972).

activities in underdeveloped countries could be withdrawn from the world today, all dangers linked to pollution would continue to exist in practically the same densities.[31]

There is no astonishment then to acknowledge that the developing countries are determined that those whose technology has caused the major part of ocean pollution should assume the costs and not expect sympathy from developing nations in the implementation of an international effort to cure the problem.[32] In addition, the major disproportion of economic development and wealth (as demonstrated in the tables below) must be kept in mind in any discussion of the ability of developing countries to contribute to international endeavors to free the ocean of pollution:

The Developed and Underdeveloped Worlds[33]

	Population (thousands)	GDP (millions of dollars)	Average Per Capita GDP (dollars)
Twenty-five underdeveloped countries	861,038	67,238	78
Nine developed countries	306,959	1,047,547	3,143
	Ratios:		
Underdeveloped to developed	2.805	0.064	0.025
Developed to underdeveloped	0.356	15.580	40.295

Source: United Nations statistics reassembled by M. Almeida

In summary, the apparent position of developing countries would be to reject any international ecological policy on the ocean which induces or perpetuates socioeconomic stagnation and can only support a common responsibility for the preservation of the oceans if paralleled by a "common responsibility for development" by the industrial elite.[34] In other words, the increased financial burden resulting from environmental concern should be accompanied by additional development assistance in order to offset the costs of preventing the inefficiencies of ocean development.[35] In this context, underdeveloped countries see the double demands of development and environmental protection as mutually reinforcing rather than in opposition to one another.[36]

Of recent significance are the results of the United Nations Conference on

[31] M. Almeida, at 48.
[32] B. Johnson, A Case Study at 99.
[33] Almeida, at 41.
[34] Castro, The Case of the Developing Countries at 250.
[35] Founex Report at 13.
[36] Astrom, Curbing Pollution at 70.

the Human Environment held in Stockholm during the summer of 1972. Although the Conference adopted twenty-six principles embodied in The Declaration on the Human Environment,[37] the meeting did not become a major turning point in this controversy as hoped because the principles, while apparently agreeable to the majority of the Conference, still retain highly controversial elements. This uncertainty may be demonstrated by this excerpt from a United Nations Association magazine concerning the function of the Conference's newly created body to coordinate international environmental activity:

> To maximize now the links between the new environment "house" and management of the global commons of the oceans and the atmosphere above them, could forestall a new era of fighting over environmental and resource management jurisdictions. Governments are now beginning to plan for the creation of an ocean regime. They must not avoid the issue of the new environment organ's role in the management of the oceans. For if they assume that the house planned by Stockholm should not, or could not, be extended to include ocean resource management, then they may be missing the greatest opportunity since San Francisco for a new start at consolidating the world's frail, diffuse and uncoordinated global institutions.[38]

Additionally, the Conference in reality became another battlefield for the irreconcilable conflict between the developed and developing nations:

> In part, the debate is a philosophical one involving nations--like Sweden and Norway--that are in comparable stages of industrialization but have differing ideas of how pollution control is necessary. But the debate also is pitting the "have-nots" of the world's nations against the "haves." ...Generally speaking, industrialized nations, which account for most of the world's pollution, are looking to the UN Conference to establish an accord for world-wide standards. But developing nations whose need is for more industry to eliminate poverty, say they can scarcely afford to build dirty factories, much less clean ones.[39]

Despite these obstacles, the Conference was another valid attempt toward international agreements to preserve our oceans.

In conclusion, it is significant to note that a paradox of the gravest degree exists when developing countries are the <u>most</u> able to maximize resources in long term development than they are to get immediate relief from impoverishment. With this in mind, developed countries should not reduce funds for development, but <u>should</u> increase expenditures on environmental control of the oceans as in investment in everyone's future. Otherwise, the dialogue between developing and developed nations on this issue may never reach a resolution.

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[37] <u>Declaration on the Human Environment</u>, 9 UN Monthly Chronicle 86-90 (1972).
[38] B. Johnson, The House That Stockholm Built, 8 Vista 50 (1972).
[39] Kessler, Environmental Meeting Struggles With Issue of World-Wide Rules, The Wall Street Journal, June 9, 1972, at 1, col. 1.

THE INTERNATIONAL SEABED REGIME: PROPOSALS AND PROSPECTS FOR REALIZATION

Albert M. Neal, Jr.

FOREWARD

This paper is concerned with the prospective development of an international seabed regime. Basically, it is concerned only with commercial aspects of such, mining obviously being of foremost interest.

In the body, some terms are mentioned the meaning of which will be helpful to the reader. A "coastal state" is any nation having a coast on an international sea. A "landlocked" state is one having no such coast at all. A "shelf-locked" state is one having such a coast, but the continental shelf of which does not border the international sea-bed area but is circumscribed by the continental shelves of other countries.

Man's exploitation of the seas has been basically limited until the present century. Sailing on it and fishing in it have been the two main sea-related activities. However, the twentieth century has seen the advent of great changes for mankind. Technology, slowly developing for thousands of years, blossomed and has been progressing exponentially. New demands for resources unknown to or unused by centuries before have arisen. Incredible numbers of new machines have been developed, demanding raw metals for their making, oil for lubrication, and some form of energy for running. Population, too, has greatly increased. Responsible for this is the fact that populations grow geometrically, and the new technology has produced medicines and treatments resulting in more of the young living past childhood and more of the middle-aged living to be old. The result of the two--new capital technology and burgeoning population--is inevitable. The natural resources of the earth are becoming depleted at a rate that has many scientists predicting doom. But man, either by ignorance or by choice, ignores the possibility of rectifying the problem by limiting the causes--that would be to drop the progress ethic which demands ever-increasing technological advances and to institute worldwide effective birth control. These things would require massive cultural, social, and political reorientation of a scale the present world society feels unable (who in America or other free developed countries dares propose drastic limits on free enterprise?) or unwilling (which developing nation is willing to stop now at its present level and no longer seek the national wealth and standard of living of the resource-hungry developed nations?) to institute. Therefore man is looking today almost frantically for new sources of raw materials. Man is looking at the ocean. Technology has not only created the demand that man go to the sea for its untapped wealths of minerals, but it is giving him the means to get the resources. For example, look at the proliferation of offshore oil drilling, a phenomenon unknown to the nineteenth century. But this activity is confined to the continental shelf.

In the 1970's man is preparing to begin the first true explorations and exploitation of the deep seabed. Two American corporations have already announced their capability to begin mining manganese nodules at depths down to twelve thousand feet (these are Deepsea Ventures, Inc., and the Hughes Tool Company.) The Japanese, Soviets, and French have made similar announcements.[1] This proposed mineral exploitation is new, there is no precedent for it, and it has created problems. Heretofore, there has been little need to be concerned with law affecting the deep seabed; now there is great need. Unless some system of international control is imposed soon on deepsea exploration and exploitation, the possibility of a destructive free-for-all, with the developed nations taking all, is very real. This paper is concerned with such controls and will examine first, proposals for control mechanisms, then second, the problems with these proposals, and third, an assessment of their potential for success.

In 1967, the then representative of Malta to the United Nations, one Pardo, first suggested that the General Assembly examine the seabed question. He proposed that the General Assembly declare the seabed and ocean floor as the "common heritage of mankind" and produce an internationally-binding document.[2] The problem was considered and in 1968, the General Assembly passed a resolution to the effect that exploitation of seabed, ocean floor, and subsoil resources, beyond the limits of national jurisdiction, should be carried out "for the benefit of mankind as a whole, irrespective of the geographical location of states, taking into account the special interests and needs of the developing countries" and that the regime to be established should meet the interests of "humanity as a whole".[3] The next year, in 1969, the General Assembly passed another resolution which gave recognition to the common interest to mankind in the reservation of the seabed and ocean floor for peaceful purposes.[4]

Also in 1969, the General Assembly made its first attempt to show real support of the policy expressed in the 1968 resolution. This was in the form of the Moratorium Resolution of the Seabed Committee[5] and the U. N. General Assembly.[6] Under it nations and persons were bound to refrain from all exploitation of the seabed and ocean floor beyond national jurisdiction, pending the establishment of an international regime. Despite its language, this resolution was not considered binding by most nations, including the United States.[7] The next step came in 1970 when the General Assembly adopted a "Declaration of Principles" by a vote of 108 for, none against, with fourteen abstentions.[8] This declaration stated that the area and its resources were the "common heritage of mankind"; that the area should not be subject to appropriation by States or persons, natural or judicial, and no State should claim sovereign rights over any part thereof, or claim or exercise rights incompatible with the international regime to be established; that all activities regarding the exploration and exploitation of the resources of the area and other related activities should be governed by the international regime to be established; that exploration of the area and exploitation of its resources should be carried out for the benefit of mankind as a whole and should be reserved exclu-

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[1] Auburn, The Deep Seabed Hard Mineral Resources Bill, 9 San Diego L. Rev. 491, at 492 and 497. [hereinafter cited as Auburn, Deep Seabed].
[2] U. N. Doc. A16695 (1967).
[3] G. A. Res. 2 (XXIII) (1968).
[4] G. A. Res. 2602F (XXIV) (1969).
[5] The Seabed Committee was established as a part of the United Nations by the General Assembly.
[6] G. A. Res. 2574D (XXIV) (1969).
[7] Id. Deep Seabed at 493.
[8] G. A. Res. 2749 (XXV) (1970).

sively for peaceful purposes.[9] These principles were those forwarded to the General Assembly as adopted by the Seabed Committee[10] in its August, 1970, meeting.

At this August meeting, the United States presented a "Draft United Nations Convention on the International Seabed Area."[11] The United States declared that the draft ". . .would undertake to establish a comprehensive petroleum and mining code for the seabed beyond a depth of 200 meters; that the draft was a "working paper" and did "not necessarily represent the definitive views of the United States Government."[12]

Relative to other drafts and working papers subsequently submitted, that of the United States is very detailed. It would establish a structure consisting of The International Seabed Resource Authority, an Assembly, a Council, a Tribunal, three Commissions, and a Secretariat.[13] Its basic principles are thus: The international seabed area is declared to be "the common heritage of all mankind."[14] No nation may claim or exercise sovereignty or sovereign rights over any part of that area or its resources; and each party to the treaty agrees not to recognize any such claim or asserted right by any nation.[15] No nation has or may acquire any right, title, or interest in the international seabed area except as provided in the treaty.[16] Only nations or private parties authorized or sponsored by nations may conduct exploration and exploitation activities in the international seabed area,[17] and each party to the treaty must take appropriate measures to ensure that private parties conducting activities under its authority or sponsorship comply with the treaty.[18] A nation is responsible for damages caused by activities it authorizes or sponsors.[19] Any dispute arising out of the interpretation or application of the treaty is settled by a new International Tribunal.[20] As explained by President Nixon earlier in 1970, two sets of machinery are proposed to implement the regime. In one, all party coastal nations would act as trustees for the international community in an international trusteeship zone comprised of the continental margins beyond a depth of two hundred meters off the coast.[21] In the second, the body would authorize and regulate exploration and use of seabed resources beyond the continental margins.[22] The U. S. draft goes on to

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[9] Id.

[10] The Seabed Committee is officially titled "The United Nations Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction"--The former title is the short title.

[11] U. N. Doc. A/AC.138/25 (August, 1970). [hereinafter cited as U. N. Doc. A/AC. 138/25 (1970)].

[12] Stone, The U. S. Draft Convention on the International Seabed Area, 45 Tulane Law Review 527 (1971).

[13] U. N. Doc. A/AC.138/25 (1970).

[14] Id., Article 1, § 1.

[15] Id., Article 2, § 1.

[16] Id., Article 2, § 2.

[17] Id., Article 10.

[18] Id., Article 11, § 1.

[19] Id., Article 11, § 4.

[20] Id., Article 12.

[21] This refers to the continental shelf (which most nations contiguous to it claim jurisdiction over in varying distances) below the 200-meter depth and out to its end.

[22] Presidential Statement on United States Oceans Policy, May 23, 1970; Weekly Comp. Pres. Docs. 677.

propose as general rules: Within the trust zones, the coastal nation grants the exploration and exploitation licenses.[23] Beyond the trust zone, the International Authority is the licensing agency and may grant licenses in that area only to nations or to natural or juridicial parties approved by a sponsoring nation.[24] However, the International Authority is empowered to inspect any licensed (i.e., licensed by itself or by a coastal nation) activity and bring violations before the International Tribunal.[25] Leases in the trust zone issued on or after July 1, 1970, must, on pain of nullity, be converted into licenses under the treaty within five years after the treaty comes into effect.[26]

Later, in December, 1970, the United Nations General Assembly decided that a Law of the Sea Conference was to be convened in 1974.[27] The topics to be considered at this conference are: The Seabed Regime, The Continental Shelf Regime, The Territorial Sea Regime, The Regime of the High Seas, Fishing and Conservation of Living Resources, Scientific Research, and Preservation of the Marine Environment. As one can see, the conference is intended to be quite exhaustive. Three "Subcommittees of the Whole" are set up to do preparatory work for the 1974 conference.[28] Subcommittee I is "to prepare draft treaty articles embodying the international regime--including an international machinery--for the area and the resources of the seabed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction, taking into account the equitable sharing by all States in the benefits to be derived therefrom, bearing in mind the special interests and needs of developing countries, whether coastal or landlocked. . ., economic implications resulting from the exploitation of the resources of the area. . ., as well as the particular needs and problems of landlocked countries. . . ."[29] However, the parent Seabed Committee is charged with deciding "the precise definition of the area of the seabed and the ocean floor beyond the limits of national jurisdiction. . . ."[30]

Subsequent to the United States draft, many other nations have produced drafts and working papers. These include submissals to the United Nations by Tanzania, France, Canada, Japan, Malta, the "Seven Powers,"[31] the "Thirteen Powers,"[32] the United Kingdom, and the USSR. There are areas in which there is somewhat of a common agreement. All agree that, whatever the structure and activities of the international body may be, mankind as a whole is to benefit.[33] In considering the benefit to all men, regard is to be paid to the interests of all nations, whether coastal, landlocked, shelf-locked, developed, or developing.[34] Non-appropriation and no claim or exercise of sovereignty or exercise of

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[23] U. N. Doc., supra note 13, Article 27, § 2.
[24] Id., Appendix B, § 1-2.
[25] Id., Article 19, § 2.
[26] Id., Article 73, § 5.
[27] G. A. Res. 2750 (XXV) (Dec., 1970). [hereinafter cited as G. A. Res. 2750 (1970).].
[28] Id.
[29] Id.
[30] Id.
[31] These are Afghanistan, Austria, Belgium, Hungary, Nepal, the Netherlands, and Singapore--all of which are either land or shelf-locked.
[32] These are Colombia, Guatemala, Chile, Ecuador, El Salvador, Mexico, Panama, Jamaica, Peru, Venezuela, Uruguay, Trinidad, and Tobago.
[33] United Nations. Secretariat. Comparative table of draft treaties, working papers, and draft articles. A/AC.138/L.10 (Jan., 1972).
[34] Id. USSR in A/AC.138/25.

sovereign rights over any of the to-be-designated international seabed area is another area of agreement.[35] Additionally, all agree that the area is to be used for peaceful purposes only.[36] Use of the area is to be conducted by all States without discrimination.[37] Peaceful settlement of any dispute arising in the area or from the agreement is another common goal. Negotiation, arbitration, and mediation are mentioned.[38] Equitable sharing of benefits is a common concern. As the United States draft puts it, "The International Sea-bed Resources Authority shall use revenues it derives from the exploration and exploitation of the mineral resources of the International Sea-bed area for the benefit of all mankind, particularly to promote the economic advancement of developing States Parties to this Convention, irrespective of their geographic location."[39] Most of the various other proposals have to do with the administrative set-up of the international body. By way of example, the United States proposal (with the segments of the overall Authority as listed above) would have a twenty-four State Council which the Assembly would elect. The Council would be comprised thusly: six of the members would be the most industrially advanced Contracting Parties;[40] of the remaining eighteen menbers, at least twelve would be developing countries; in selecting the eighteen, the assembly is to take into account "the need for equitable geographical distribution" and is to ensure that at least two members of the twenty-four are land or shelf-locked countries.[41] Council decisions would require not only a majority of members, but also concurrent majorities in the six-group and the eighteen-group.[42]

Although from the above it would appear that there are major areas in which certain principles are of common acceptance, this author feels that prospects for agreement at the 1974 Conference on an international seabed regime are dim. Initially, unless the preparatory work of the Subcommittee is considered sufficient (whatever that might mean), the entire Conference may be called off.[43] As one scholar has described the slate for the preparatory work, "It is thoroughly untidy and badly arranged, and hardly designed to inspire confidence in the capacity of the Committee to pave the way for a successful Conference in 1974."[44]

For the preparatory work to provide a truly sufficient basis upon which the 1973 Conference can create an international seabed regime, there is going to have to be more agreement among nations as to the organization of that regime and its powers. For example, where will the international seabed be deemed to begin?

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[35] Id., U. S. in A/AC.138/25; USSR in A/Ac.138/43; Japan in A/AC.138/63; Thirteen Powers in A/AC.138/49.

[36] Id.

[37] Id. However, the U. S. says, ". . . without any discrimination, except as otherwise provided in this Convention." Russia says, ". . . without any discrimination whatsoever."

[38] Id.

[39] U. N. Doc. A/AC.138/25 (1970).

[40] This means those Parties which are both developed States, and have the highest gross national products. This is somewhat redundant as the United Nations dividing line between "developed" and "developing" countries is $1,000 per capita G.N.P. U. N. Doc. A/2161 (1952).

[41] U. N. Doc. A/AC.138/25 (1970).

[42] Id.

[43] G. A. Res. 2750 (1970).

[44] E. D. Brown, in The Law of the Sea: A Geneva Conference, edited by L. M. Alexander, University of Rhode Island (Kingston) Jan., 1972.

There is a "Convention on the Continental Shelf" to which the United States and forty-three other nations are parties.[45] It declares, ". . . the term 'continental shelf' is used as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 meters or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the sea areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands."[46] Would the international seabed be beyond this limit? Only forty-three nations signed this Convention. One must remember that the Latin American States claim a two hundred mile off-coast jurisdiction--it is uncertain at present how they feel about the bed beneath it. Indeed, there is conflict with this Convention in the United States itself. The Truman Proclamation[47] of September, 1945, declared that "the Government of the United States regards the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control." This proclamation was made law in the United States when included in the "Outer Continental Shelf Lands Act of 1953."[48] No mileage or depth limit is mentioned.

What the exact function of the Seabed Authority would be is another nebulous area. Would it be a licensing and license-approval agency, an agency that would conduct exploration and exploitation on its own, or some hybrid of the two? The United States has proposed the first.[49] Others have recommended the latter two.[50] The Soviet Union has stated that due to the existence of states "with different economic and social systems and different forms of ownership," it is "completely unrealistic" to "attempt to administer a common ownership of the seabed."[51] Areas such as this have to be agreed upon, for they are fundamental to the very existence of an operative international regime.

What is happening while agreement is yet to be reached? As stated above, the need for new sources of raw materials is becoming critical. United States industry wants to obtain authority to begin exploitation of the seabed. Deep-sea Ventures, Inc., has recommended that the United States establish an interim national claims registry, and that other nations do the same. Such would allow present exploitation licensing.[52] Also, T. S. Arn of the American Mining Congress, in testimony before a Senate subcommittee in September, 1970, recommended that U. S. companies should proceed immediately with deep seabed exploration and exploitation, and that by doing so, customary patterns would be set.[53] This proposal is substantially adopted by the Metcalf Bill proposed in Congress in 1971. This Bill gives the Secretary of the Interior powers to license any American citizen or juridical entity. It also sets up an escrow fund for assistance, as Congress may direct, to developing, reciprocating states (only).[54] As F. M.

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[45] 15 U.S.T. 472 (April 1958).
[46] Id.
[47] Truman Proclamation Number 2667 (Sept., 1945).
[48] 43 U.S.C. §§ 1331-1343 (1964).
[49] Id.
[50] U. N. Doc. A/7622 at 113 (1969).
[51] U. N. Doc. A/C/1/PV. 1602 at 53 (1970).
[52] Id. Note 1 at 495. A proposed "Deep Ocean Floor Resources Act" would provide for U. S. licensing.
[53] Id. at 496.
[54] Id. at 503.

Auburn says, ". . . For the vast majority of states who do not have the technological capabilities or capital to take part in mining, it [the Bill] offers no benefits from the area which the General Assembly holds to be the common heritage of mankind."[55] It appears from this that while the United States might espouse the general principles adopted by the General Assembly on an international level, it is experiencing from within a strong push by industry to deviate from those principles. President Nixon himself opposes halting exploration and exploitation of the seabed beyond a depth of two hundred meters during negotiations and he wants any future regime to respect investments made in the interim period.[56]

If agreement is far away and if investments by presently capable operations become substantial, the "common heritage of mankind" in the international seabed will be an illusion paid lip service by an agreement whose impact is minimal--an altogether too real prospect. Mr. Issraelyan, of Russia, stated, "As misleading as the science fiction fallacy is the prophetic fallacy, which consists in forseeing catastrophic consequences for mankind if the Committee does not agree in the next day, in the next month, or even in the next General Assembly."[57] This is indicative of the characteristic of intransigence those of the Soviet bloc are guilty of when their self-interest is involved. Russia, Bulgaria, Hungary, East Germany, Poland, Rumania, and Czechoslovakia met in April, 1972, and agreed to establish an International Coordinating Center of Maritime Exploration in the Soviet Union. They are planning joint expeditions to select sites for mineral exploration and exploitation in the Atlantic and Indian Oceans.[58] In the light of their opposition to common ownership of the international seabed (a strange stand for purported communists), it appears the Soviets, too, may well be preparing for a new gold rush. Japan, whose industry is presently capable of deep seabed operations, is undoubtedly suffering from internal pressures to do the same.

The present state of disagreement as to vital elements and functions of any international seabed regime being as it is, coupled with the mounting pressures from within the world's major developed nations to go ahead with exploration and exploitation now-both viewed in the context of spiraling demand for new sources of raw materials--lead this author to the conclusion that the deep seabed will soon be a patchwork of major-nation commercial operations, with the prospect of benefit to all men growing dimmer as each day passes. Especially the land-locked countries, whose proposals for representation in any authority have been largely ignored, may well be lost forever in the crush of capable exploiters.

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[55] Id., at 513.
[56] Id., Note 22.
[57] A/C.1/PV. 1800 pp. 54-55.
[58] Recent Developments in the Law of the Seas III: A Synopsis, 9 San Diego L. Rev. 608, at 664.

THE MARINE ENVIRONMENT AND TOXIC SUBSTANCES

(When was the Last Time You Had a Good Swordfish Steak?)

Bryan W. Pittman

INTRODUCTION

Importance of the Seas

It is little wonder that man has so recklessly pursued a path of blind destruction of the oceans. Having inhabited this planet for thousands of years, man with all his science and technology has not yet begun to appreciate the importance of his oceans and seas. Although the seas cover over three-fourths of the earth's surface, man knows more about the moon than he knows about the intricacies of his own water world. There is a dearth of knowledge about the currents of the sea, about the minute workings of phytoplankton, the basis of marine life, or about the interdependencies of the food webs. This lack of knowledge is not important merely from a scientific or technical standpoint, but concerns man's very survival on his planet. The two most pressing areas of importance of the seas, center around the seas as a vital food source and as a supplier and filterer of man's oxygen.

In The Population Bomb, Paul Ehrlich suggests that the population in the underdeveloped countries will increase by 2.6 billion people in the next thirty years.[1] With various parts of the world already facing severe famine, how do we expect to feed these new arrivals? The sea has been a traditional supplier of a great deal of the world's protein need. In fact, it can be noted that "more than half of the world's population depends solely on fish for a supply of essential protein."[2] And man has not really begun to realize the vast potential of the oceans as a food source. With proper management and technology man could insure himself of a lasting food supply. In The Last Resource, Tony Loftas comments that "the Atlantic Ocean alone could probably provide the protein equivalent of 20,000 world grain harvests."[3] However, not only has man either not been able to, or not been willing to, utilize this vital resource, but he is conducting other activities in such a manner as to damage permanently the life-giving potential of his oceans.

It has been estimated that about seventy percent of the earth's oxygen supply is produced by the phytoplankton in the oceans.[4] There is no doubt that the

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[1] P. Ehrlich, The Population Bomb, 56-57 (1968).
[2] G. Taylor, The Doomsday Book, 109 (1970).
[3] T. Loftas, The Last Resource, 15 (1970).
[4] D. Busch and E. Mears, Ocean Pollution: An Examination of the Problem and Appeal for International Cooperation, 7 San D. L. Rev. 574 (1970). [hereinafter cited as Busch and Mears].

ocean flora and fauna play the fundamental role in the basic oxygen-carbon life cycle of the world. The ocean plants absorb carbon dioxide from the air and convert it into vital oxygen. These plants also absorb various pollutants from the air, in essence filtering and purifying our air. There is no doubt that if these life-giving phytoplankton are damaged or destroyed, life as we know it will drastically change or vanish.[5]

Considering our uncompromising needs for food and air, especially in light of our increasing population growth and industrial consumption of oxygen, we are in no position to tinker with the delicate mechanisms of the oceans by continuing to pour millions of tons of deadly pollutants into our oceans or to delay in seeking solutions to the damage we have already done. E. W. Seabrook Hull writes a chilling warning, "The ocean is key to the continuation of life as we know it. It is also the key to survival. The overriding objective of a public ocean policy therefore, whether national or global must be maintenance of the viability of the ecosystem--for without this there are no other considerations."[6]

Introduction to the Problem

Billions of years ago when the earth was in its formative years, the seas began. Over these eons of time life gradually emerged. Through the evolutionary processes life as we know it today developed. Unknown amounts of time and indescernible mechanisms produced our modern marine environment. This environment like our land environment is acutely affected by sudden changes, but even to a greater extent.

> The objects living in the seas, the marine flora and fauna, generally speaking, lack the security consciousness and the capacity for change as shown by organisms living on land--the comfort and relative constancy of the seas; appropriately regarded as one of the great feminine symbols, has protected them. The various parts of themarine ecosystem, moreover, are closely interlocked, no constituent being able to continue without the support of the others. The cycle is complete, from floating plants (phytoplankton) upon which planktonic animals are nourished and which in turn sustain larger fish, which upon death are decomposed by bacteria into nutrients required by the plants. Harm to one link affects the rest of the chain.[7]

For perhaps millions of years man did nothing to disturb this delicate balance of the marine ecosystem. Of course, man used the ocean as an ultimate receptacle of his wastes, but only recently has the quantity and quality of his wastes been sufficient to imperil the marine biota.

> The difference between now and millions of years ago is that man is adding to the concentrations of these materials, as well as introducing new materials like chlorinated hydrocarbons, in

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[5] E. Hull, Toward Public Policy on the Ocean, Impingement of Man on the Ocean, 656 (1971).
[6] Id. at 657.
[7] M. Hardy, International Control of Marine Pollution, 298 (1971). [hereinafter cited as Hardy].

amounts which are significantly altering the chemical compositions of the marine environment. In a number of cases, the 'significant amounts' added by man's activities are doubling the natural concentrations of marine chemicals and introducing new chemicals in concentrations approaching those of naturally occuring chemicals.[8]

Nobody really knows for sure the effects of man's activities on the marine environment. Most of the serious polluting has only recently been done and considering the amount of pollutants now in the earth's realm which have not yet found their way into the oceans, no one can predict the future of the oceans and mankind. We do know there are great concentrations of pollutants in the marine environment, that a great deal more will enter this environment, that considerable chemical changes can occur because of these new influences, and that considerable damage to the oceans has already been perceived. As Jacques Cousteau noted, "We believe that the damage done to the oceans in the last 20 years is somewhere between 30 per cent and 50 per cent, which is a frightening figure...."[9] Man has only recently become aware of the marine pollution problem. It is encouraging that this awareness has taken place before an eco-catastrophe of global dimensions occurred. However, man's reaction to the problem over the next decade will decide the fate of the oceans.

Coverage of the Paper

This paper will attempt to give an overview of some of the more serious problems in the area of marine pollution, focusing on the impact of toxic substances on the marine biota. It will not be a technical, scientific environmental report, nor a detailed analysis of the legal mechanisms used in the prevention of pollution. What it will attempt to do is to identify the scope of the problem as being both national and international in effect; to examine several of the major pollutants, their sources and effects on the marine environment; to look at the existing laws, both national and international; and to offer some suggestions for the amelioration of the problem. It should be noted that throughout the paper suggestions are made and it should be understood that before being able to take effective measures to prevent further marine pollution, man first will have to acquire deeper knowledge about the marine environment and the effect of pollutants on this environment and then overcome the conflicts of national interests and achieve an esprit of international cooperation. The undertaking of and the solution to this problem is a complicated blend of economic, sociological, technical, political, and legal factors.

MARINE POLLUTION AND THE TOXIC SUBSTANCES

National and International in Scope

At the outset it should be observed that marine pollution is both national and international in scope. A sovereign's territory does not end where the land ends. It extends anywhere from the three mile limit which was once a commonly

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[8] O. Schachter and D. Serwer, Marine Pollution Problems and Remedies, 65 Am. J. Int'L L. 87 (1971). [hereinafter cited as Schachter and Serwer].
[9] L. Teclaff, International Law and Protection of the Oceans from Pollution, 40 Fordham L. Rev. 529 (1970). [hereinafter cited as Teclaff].

accepted territorial sea limit to the two hundred mile claim of the Latin American nations. In this territorial sea, a sovereign has complete and exclusive jurisdiction over conditions and activities. Therefore, one could say that any pollution within this territorial area is within the exclusive jurisdiction of the coastal state. Although these areas are small in size when compared with the vastness of the open seas, it is here that the most critical problems arise.

First it has been the trend for populations to center in coastal areas. Industries have often located near the mouths of large rivers where they could more easily dispose of their wastes. Hence, these estuarine, coastal areas have become extremely polluted. Furthermore, these estuarine areas are the most productive areas in the oceans. The great concentrations of marine flora and fauna coupled with the great amount of pollution combine to make this area perhaps the most critical. It is estimated that "over one-half of the 4.5 billion pounds of fishery products harvested annually by the United States fishermen is derived from animals dependent on clean estuarine waters for their existence during all or part of their life cycle."[10] Also, seven of the ten most valuable sea species spend important parts of their lives in estuaries--these being shrimp, salmon, oysters, crabs, clams, menhaden, and flounders."[11] Already over one million square miles of shellfish-producing waters in the United States are unsafe because of pollution and more is being added to that total each year.[12]

As will be noted later, much of this pollution of prime marine habitat is caused by land-based activities such as industrial and domestic waste disposal into rivers and pesticide applications on land. It is beyond dispute that these activities should first be deemed to be problems within national jurisdiction and hence a national problem. Therefore, it is argued that only the agencies of the government of the offending party should and can take steps to alleviate the problem. This concept, as we shall see, may be altered to help solve the marine pollution problem. There is also a trend among coastal states to try to extend their jurisdiction over marine areas to try to protect themselves from other nations' polluting activities. This trend may be beneficial to some extent but it does create conflict with major maritime nations claiming freedom of the high seas which could disrupt international cooperation between nations.

The concern of the previous paragraph was with pollution occurring in the territory and territorial seas of a sovereign which injures only that sovereign. However, because of ocean currents and atmosphere conditions that carry pollutants miles from the source to deposit them in the oceans, because of the movements of certain species of marine life and because of accidents, pollution causing activities occurring within a state may and often do harm the marine interest of other states. Now we enter into the realm of marine pollution as an international problem.[13] As often as this has happened "no international dispute appears to have arisen between two States with regard to damage caused by marine pollution as a result of the disposal of coastal wastes."[14] One can see how pollution at any point in any coastal territory can spread to affect other states' interests making what would seem at first glance a national problem into an international problem affecting two states or all the states. At this stage, there appears to be no answer to this type of pollution problem--one sovereign's land based activity injuring another sovereign's marine interests. However, as will later be de-

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[10] Busch and Mears at 575.
[11] Id.
[12] Id. at 575-76.
[13] Id. at 577.
[14] Hardy at 310.

veloped there are some emerging concepts which may cover this problem.

Thirdly, there is that class of sovereign activity which is within no nation's jurisdiction. This activity is commonly referred to as ocean dumping. Traditionally all nations, especially the major maritime nations, have clung to the concept of the freedom of the high seas. Under this concept states have been free to use the seas as they wish and assume exclusive jurisdiction over the activities of their nationals. However, this right to use the open sea has been severely abused. Great amounts of highly toxic waste substances have been dumped into the open seas under claim of this freedom. Only recently have coastal states begun to decry this practice as harming their marine interests. Unfortunately, there have been no effective recourses open to the complaining nations.

One can see the dilemmas which arise, coastal states claiming exclusive jurisdiction over land-based activities which harm other states leaving the offended state no remedy and states using the high seas as dumping grounds claiming that freedom of the high seas gives them such a right, again leaving an offended state no remedy. A trend has started and hopefully will continue which sees marine pollution as a global problem. "It is a problem which affects the health of the oceans in all parts of the world; it affects all countries; both developed and developing; and all countries contribute to some aspect of the problem. Some marine problems are local, but many have international implications. Particularly if the effects of pollution on the living resources of the seas are considered, very few marine pollution problems can be considered matters of exclusively local interest."[15] Obviously, some problems such as pesticide and exhaust controls are totally within the exclusive jurisdiction of a sovereign, but one must always remember the potential effects of these activities are international and the international community must have some voice in these matters. The hard lines between the concepts of sovereignty with exclusive jurisdiction and freedom of the high seas must be toned down to achieve international cooperation to solve problems which are at the same time national and international in scope.

The Pollutants

The Joint IMCO/FAO/UNESCO/WMO Group of Experts on the Scientific Aspects of Marine Pollution define marine pollution as "introduction by man of substances into the marine environment resulting in such deleterious effects as harm to living resources, hazards to human health, hinderance to marine activities including fishing, impairment of quality for use of seawater and reduction of ameneties."[16] This paper will focus on three major pollutants: oil; heavy metals, with emphasis on mercury; and chlorinated hydrocarbons, with emphasis on DDT. Other aspects of marine pollutants will be noted along with these major offenders. The major sources and effects of these toxic substances will also be analyzed. In general it should be kept in mind that pollutants find their way into the sea in three different ways. First, they end up in the sea because of man's land-based activities which add pollutants to the water flowing into the sea and to the air that interacts with the sea. Second, pollutants enter the sea due to man's use of the surface of the sea in shipping and dumping. Finally, man's exploitation of marine resources especially on the seabed add a quantity of pollutants to the seas.

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[15] Schachter and Serwer at 84.

[16] E.D. Brown, International Law and Marine Pollution, 11 Nat. Res. J. 221 (1971). [hereinafter cited as Brown].

Oil pollution of the marine environment is perhaps the most evident and widely publicized form of pollution. Seemingly every week one can scan the newspapers and spot an oil spill in Louisiana, a collision between super-tankers in North Carolina, or a sailor's account of acres of oil laden water thousands of miles from any land mass. It. is also curious to note that this form of pollution has attracted by far the greatest amount of international legislation.[17] Recent estimates have put the volume of oil pollution from transport activities at around one million metric tons per year and a total from all other human activities at no less than ten times this amount.[18] There is little doubt that oil in some form is dispersed throughout the oceans and seas of the world in amounts and concentrations scientists can only surmise.

Oil pollution occurs as a result of all three of man's activities relating to his use of the seas. First, as a land-based activity countless amounts of oil are released into estuarine areas around loading and unloading docks in the major ports of the world. General sloppiness, lack of proper technique and lack of adequate facilities are the primary reasons for pollution here. One must also consider the amount of oil used by industries which is discharged through the rivers running into the sea and effluent ducts running cut into the sea.

Secondly, as a result of man's navigational and waste disposal uses of the sea, oil is discharged into the ocean through the cleansing and flushing of bilge and ballast water used in the super tankers. This international activity is one of the major aspects of oil pollution which can be easily remedied through tighter legislation and surveillance. A great increase in the number of recreational boating activity is responsible for a great deal of oil pollution in vital estuarine areas. Also in this category one finds the most widely publicized form of oil pollution, accidental spills due to ship collisions. These accidents like the Torrey Canyon wreck off the England-French coast are responsible for massive oil slicks and the destruction these wreak on marine life. Finally, one can see a great deal of oil pollution as a result of the exploitation of oil found beneath the seabed.

In assessing the effects of oil pollution upon the marine environment, it is best to look at the short-term and long-term effects. The short-term effects on the marine life filter feeders such as clams, oysters, scallops, and mussels have been poisoning and direct kills.[19] Fuel oil has been shown to be highly toxic to the lower forms of marine life and to fish as well. Crude oil can ruin the taste of valuable food supplies such as oysters and fish.[20] The effect of oil on sea birds is well known. In the oil slicks created by tanker collisions thousands upon thousands of sea birds have perished. Recreational and aesthetic damage are also attributable to oil pollution.

The short-term effects are of course undesirable, but the long-term effects are far more insidious. The major problem here is lack of knowledge about the long-term effects. Scientists are aware of the toxic effect of oil, but they are unsure as to what this toxic effect may portend for the future. It is surmised that there could be a food chain build up which could have devastating effects on the higher forms of marine life. It is suspected that oil may have some carcinogenic effects on man.[21] It is known that oil pollution can disrupt some food

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[18] Schachter and Sewer at 89.

[19] 1970 Study of Critical Environmental Problems, Man's Impact on the Global Environment, 141 (1970). [hereinafter cited as SCEP].

[20] Schachter and Sewer at 90.

[21] Id.

chains by interfering with the growth of vital links.

> In one of the comparatively few specific studies to have been made, Dr. Paul Galtsoff, a biologist with the United States Fish and Wildlife Service, found that Nitzschia--the diatom food of the oyster--refused to grow where there was even a show of oil on surface water. Edible blue and Dungeness crabs, however, were starved out even before the oysters. Many species, such as flatfish, are repelled and retreat from breeding marshes at the slightest odor of oil.[22]

We have seen the immediate effects of killing mollusks and sea birds. However, the unknown over-all long-range effects such as the disruption of ecosystems so as to induce long-term devastation of marine life from mass destruction of juvenile forms and of food sources of higher species is a possibility man cannot afford merely to conjecture about.[23]

Increasingly more and more amounts of heavy metals are dumped into the marine environment each year. Although such metals as mercury, silver, arsenic, cadmium, chromium, copper, lead, nickel, and zinc occur naturally in the oceans, it is man's industrial and agricultural activities which have recently upset the natural balance of metals in the oceans. It is estimated that the United States alone deposits nearly six hundred tons of mercury into the environment each year.[24] Man continues this indiscriminate pollution with little knowledge of its potential effects on himself.

As mentioned previously, mercury is found naturally in the environment. However, man has seized upon this metal for use in industrial processes and in agricultutal uses, and deposited it as a waste product in marine environments vastly exceeding normal concentrations. Used in the agricultural community as a germicide, fungicide, and slimicide, and in the electrical, chemical, and pharmaceutical industries, mercury usually winds up in a river from agricultural runoff, in a bay expelled through industrial waste ducts, and in the ocean as a result of atmospheric interaction with the ocean. Although highly toxic and lethal, inorganic mercury has little chance of causing direct environmental harm. However, through a process discovered in Sweden whereby certain microbial systems in the bottoms of muds of rivers and bays could convert thought-to-be inert, inorganic mercury residues into active and dangerous methylmercury, mercury pollution has not only become a problem, but a very deadly problem. "By a process of biological magnification only incompletely understood, methylmercury is quickly assimilated by plants and lower marine life and progressively concentrated as it moves up the food chain."[25] Were it not for the widely publicized Minimata Bay outbreak of mercury poisoning, man might still be unaware of the lethal danger lurking on the bottom of his oceans.

As far as direct danger to the fauna of ecosystems, mercury and the heavy metals may pose the most direct and lethal threat. Mercury is a "protoplasmic poison and therefore may be lethal to all forms of living matter."[26] The direct

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[22] R. Campbell and J. Wade, Society and Environment, 89-90 (1972). [hereinafter cited as Campbell and Wade].
[23] SCEP at 141.
[24] D. Silverstein, The Trouble with Mercury, Can Domestic Laws Contain an International Threat?, 5 Cor. Int'l. L. J. 219 (1972). [hereinafter cited as Silverstein].
[25] Id. at 220.
[26] SCEP at 137.

and long-range effects on the marine biota are at this time unknown. Scientists do know that marine plants and animals assimilate mercury and other heavy metal compounds, and passing up the food chain, the concentrations and thus the toxic effects of these metals are greatly magnified. There is little doubt that at some of their more sensitive stages of development many marine animals are highly susceptible to mercury's toxic effects.[27] Direct kills due to heavy metal pollution have been reported in Holland where about one hundred thousand fish and some of the eulitoral mussel population were destroyed by copper sulfate poisoning.[28] However, the major damage to the higher marine species, sea birds, and to man as the ultimate consumer of marine products is in the food-chain concentration build-up. Mercury is the only pollutant known to kill man directly.[29]

As early as 1953 symptoms of mercury poisoning were observed in the fishing villages around Minimata Bay in Japan. "Through 1970 one hundred and twenty one cases of 'Minimata disease' were diagnosed, including forty-six deaths."[30] The villages who lived off the fish and shellfish from Minimate Bay suffered from symptoms such as "blindness, deafness, uncoordination, and intellectual deterioration."[31] It was discovered that the bay had been contaminated with mercury from a nearby acetaldehyde plant and that the marine animals had concentrated the pollutant in their tissues. An alerted world soon discovered mercury concentrations in fish and birds which exceeded safety levels for humans.

In December of 1970, the United States discovered unacceptable amounts of mercury in commercially prepared swordfish and tuna and ordered them withdrawn from the market. It is important to note that these fish are deep sea fish having little contact with areas near the land. Mercury pollution had reached the oceans and become an international problem.[32] Again it is the unknown not the known that presents the gravest concern.

In the Minimata Bay outbreak twenty-three victims were babies born congenitally defective with their parents showing no symptoms of the disease.[33] Here is the greatest threat. Scientists don't know the cumulative and chronic effects on the unborn, the future generations of both marine life and man. What scientists do know is that somehow "methylmercury crosses the placental 'barrier' and achieves a 30 per cent higher concentration in fetal blood cells than those of the mother."[34] Furthermore, the problem is not decreasing. Heavy metals continue to concentrate in the marine environment as a result of industrialization. One must always keep in mind that these new concentrations are not replacing old ones, but are being added to the former ones. The heavy metals do not decompose as do many other forms of pollutants. Therefore, mercury deposited in the oceans today will be there for centuries. Also, added to the problem is that man through other forms of pollution such as sewage and phosphates has created an upsurge in the bacteria which change the less dangerous mercury to the highly dangerous methylmercury.[35] The damage done is irreversible. There is no cure for methyl-

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[27] Id. at 26.
[28] M. Merlini, Heavy Metal Contamination, Impingement of Man on the Ocean, 464-465 (1971).
[29] Silverstein at 220.
[30] Id. at 219-20.
[31] Id. at 219.
[32] Id. at 221.
[33] Id. at 220.
[34] Id. at 223.
[35] Id. at 224.

mercury poisoning. Mercury never decomposes into a totally harmless form and mercury is literally everywhere, in the ecosystems and in our bodies.[36]

Although oil is the most noted pollutant and heavy metals the most lethal pollutant, yet another class of pollutants is thought to pose the greatest danger to the marine environment and man himself. Once thought to be the panacea of many agricultural pest problems and various worldwide diseases, the chlorinated hydrocarbons have adverse effects that far outweigh their benefits.

> "...there is general agreement that the most serious threat to the marine environment is posed by pesticides, particularly the chlorinated hydrocarbon insecticides, and their residues. Pesticides are being used in increasing amounts, and are inherently dangerous to life. They may be easily transported to all parts of the globe, are often long-lasting, and are assimilated into and concentrated in natural food chains including man's. As a result of man's use of pesticides, ecological systems are being upset and certain species are being rendered extinct. There may be subtle effects on man yet to be discovered.[37]

There are five major reasons for the alarm over these pesticides, the most famous of which is DDT, but which also includes DDE, TDE, endrin, aldrin, dieldrin, heptachlor, chlordane, toxaphene, and lindane. First, these chemicals have a long half life, some up to fifteen years. Therefore, pesticides in the marine environment now will remain there, not decomposing to harmless substances, while yet more pesticides are being added to the environment.

Secondly, pesticides have an amazing mobility. "Toxic residues from agricultural areas in Africa have been carried by summer monsoon winds to the Bay of Bengal and by the Northeast Trades across the Atlantic to the Caribbean Sea."[38] Third, these substances are extremely toxic especially to various developmental stages of important marine species. Fourth, and of greatest import to man, these substances are fat soluble and tend to be concentrated in ever increasing amounts as they pass up the food chain. It was found that oysters have amplified "small concentrations of DDT 70,000 times a month."[39] Finally, there seems to be no end to the use of these substances. Developing countries are continuing their use at record pace. The United States has gradually reduced its use of DDT from a peak of one hundred and eighty eight million pounds in the early 1960's. However, the United States still produces these substances in great quantities for export. Although there is no reliavle information on the amount of DDT in the marine environment, it is estimated that "one billion pounds of DDT are circulating through the world's water and air supply."[40]

Pesticides reach the marine environment in two ways. First, residues from agricultural run-off wash into rivers leading into oceans. However, the major cause of marine pollution from pesticides is atmospheric fall-out. One of the most common methods of application of pesticides is aerial spraying. Much of

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[36] Id. at 224-25.
[37] Busch and Mears at 579.
[38] Id. at 581.
[39] Schachter and Sewer at 96.
[40] W. Rogers, The Persistent Problem of Persistent Pesticides, 70 Colum. L. Rev. [hereinafter cited as Rogers].

these chemicals dispensed in this manner are swept by air currents far from their intended place to land in non-target areas, the oceans. Therefore, the sources of pesticide pollution are intentional land-based activity having a necessary and legitimate objective. It is important to note these elements as they play a great role in the difficulties in the solution to the problem of this kind of marine pollution.

The effects of DDT upon the marine environment can be devastating. Beginning at the bottom of the marine ecosystem with the microscopic phytoplankton deleterious effects have been noted. It has been shown that photosynthesis in these organisms at the base of all marine food chains has been impaired by DDT pollution.[41] Various insecticides and herbicides can directly kill plankton, vital food for all sea animals. Crustaceans and mollusks are especially sensitive to DDT pollution. DDT had been shown to harm reproduction, inhibit growth, and directly kill shrimp and crabs. "We can be certain that significant mortalities of juvenile crustaceans are increasing in such contaminated areas. In California the declining production of Dungeness crabs is associated with observed DDT residues in developing larvae."[42]

In lab experiments the insecticide tolerance of young shrimp was "measured in parts per billion instead of the more commonly used standard of parts per million."[43] The juvenile stages of oysters are also greatly susceptible to DDT poisoning with an eighty per cent reduction in growth or reproduction having been shown.[44] It should be noted that DDT's direct effects on these lower forms of marine life are centered on the retardation of growth and lethal toxicity to juvenile stages.

Scientists have not observed directly harmful effects on the adults of these speices. However, these adults store the DDT residues having consumed contaminated lower forms of life passing the DDT residues up the food chain in increasing concentrations. The animals at the top of these food chains are suffering the worst results. Marine fish have been shown to be almost universally contaminated with pesticide residues.[45] Sea birds have been particularly affected. "Deaths of bald eagles, common loon, and prergrine falcons... and sea eagles from coastal localities have been correlated with lethal amounts of DDT in body tissues.[46] DDT has had an insidious effect upon the reproduction of these sea birds. Brown pelican and double-crested cormorants have been unable to reproduce in seriously contaminated areas because the DDT residue renders the shells in their eggs too thin resulting in breakage of the eggs during incubation.[47]

The cumulative effects of DDT residues on man are unknown. Tests have shown nothing conclusive about DDT's effects on man, however, lab tests with animals have shown kidney, liver, and nerve damage. High residues of DDT have been associated with cancer, hypertension, and liver diseases in man.[48] Does DDT cause cancer in man? Are there potential birth defects awaiting the unborn caused by DDT ingestion? These questions are as of yet unanswered. With the millions of tons of DDT being accumulated yearly in the environment, man can ill afford to

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[41] SCEP at 127.
[42] Id. at 129.
[43] R. Carson, Silent Spring, 138 (1962).
[44] Busch and Mears at 586.
[45] SCEP at 127.
[46] Id. at 135.
[47] Id. at 129.
[48] Rogers at 578.

use his world and himself as a guinea pig.

There are countless other pollutants which man dumps and drains into the marine environment. Radioactive materials, industrial chemicals, domestic wastes, products from burning fossil fuels, and solid waste materials all combine to pose a serious threat to marine life. Along with the three major pollutants discussed, all these pollutants create a problem which man must face and solve if he is to survive on this planet. At this stage, it appears man is at least aware of the problem. The following section will show however, that man's existing legal framework, both national and international, is ill-equipped to deal with the marine pollution problem.

THE EXISTING LEGAL FRAMEWORK

National Law

As noted earlier, marine pollution is a national and international problem. With the majority of marine pollution caused as a result of land-based activities occuring within the exclusive jurisdiction of each individual state, it is naturally incumbent on each state to enact legislation protecting the marine environment. A good many of the nations of the world have done so. The United States and the Scandinavian countries have led the national fight against marine pollution with bans on the use of pesticides and the enactment of air and water pollution measures. The United States recently enacted legislation providing for the licensing of dumping of various materials into the ocean. Although these nations have to some extent provided for marine environmental protection, many other countries, especially the underdeveloped countries have not. Lacking the financial ability to undertake environmental research and monitoring and to finance clean-up operation, these countries lag far behind in environmental protection areas. Also, the need to protect agricultural interests and to protect their populations against disease has prevented them from banning pesticides. Furthermore, looking with envy upon the rich industrialized nations of the world, the poorer nations see no reason to restrict their industries by pollution control measures which are expensive and inhibiting.

The role of national marine protective legislation cannot be stressed enough. The crucial grass roots work must take place here. Individual state's research must pave the way to cleansing and protecting the marine biota. Each state must assume primary responsibility for enforcing pollution regulations within its territorial limits since each state does exercise exclusive jurisdiction over this area. If the state does not punish the offender, then no other sanctions are available to prevent further damage. Each state must also take action to prevent its nationals from polluting the open seas and other state's territory. There is a trend among coastal states to try to extend their jurisdiction into the seas beyond their territorial limits. In the enactment of the Arctic Waters Pollution Prevention Act, Canada has attempted to prevent all forms of marine pollution in the Arctic waters adjacent to its coasts whether the pollution arises from shipping activities, land-based activities, or exploration and exploitation. Basing its claim of jurisdiction on the protective principle, not on an assertion of sovereignty, Canada saw the protection of its marine resources and the right to a pollution free environment as natural rights which could be protected even through the offending activity did not take place within its jurisdiction.[49]

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[49] L. Legault, The Freedom of the Seas: A License to Pollute?, 21 U. of Toronto L.J. 219 (1971). [hereinafter cited as Legault].

International Law

Although national action is at the foundation of protecting the marine environment, national action alone will not suffice. Having noted that the problem is international in scope, a combination of national and international law must and is being sought.

> However the future development of international law may provide for the coastal states' special rights and responsibilities with regard to the prevention and control of marine pollution, the threat to the marine environment as a whole cannot be met by national action alone. Even in the limited areas of the sea which are or may be brought under national jurisdiction for pollution control purposes; international cooperation will be a vital requirement, and international law will have to provide some means of ensuring that coastal states discharge their responsibilities.[50]

In looking for international solutions to the marine pollution problem, one must look first to customary international law and then to conventions and treaties. Since realization of the marine pollution problem has been so recent an event, the principles of customary international law have not fully developed in this area. There are two avenues worthy of exploration. The first concerns the problem of pollution on the high seas. As has been explained, on the high seas outside the territorial jurisdiction of any state, a person is free to make whatever use of the seas his own state will allow and the rules of customary international law will allow. The right to dispose of wastes is a right which has endured for so long that it has become entrenched in customary international law. However, there is a trend to limit this right to reasonable use of the ocean as a dumping ground so as not to impair others in the exercise of their rights.[51] A right to dispose of wastes does not mean a right to pollute and destroy valuable marine life used by other nations as food. The problem is one of definition. What constitutes unreasonable use and what materials are so noxious as to constitute unreasonableness? This line of reasoning may cover ocean-based activities but there still remains the greater problem of how the international community can reach land-based activities. The Trail Smelter[52] and Corfu Channel[53] cases may offer some solace in this area. Basing the decisions on the principle sic utere tuo ut non alienum laedas,[54] it was held that an offended state could take international legal action against noxious activities occurring wholly within another state. It is becoming more accepted that a state has an international resposibility to prevent actions occurring within its own territory from harming the marine environment interests of another state. These two lines of reasoning in the customary international law area may be of vital use in the future if allowed to develop in the international tribunals, but for the present, they are generally considered unsatisfactory. It is generally felt that conventions must be relied upon to remedy the marine pollution problem.[55]

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[50] Id. at 220.
[51] See Article 2 of the Geneva Convention on the High Seas (1958).
[52] 3 UNRIAA 1905 (1938).
[53] I.C.J. 4 (1949).
[54] "So use your own as not to injure others.".
[55] L. Teclaff at 532.

As of now there are two major areas of international convention on the protection of the marine environment from toxic substances. The majority of work has been done in the field of oil pollution. The International Convention for the Prevention of Pollution of the Sea by Oil in 1954 and amended in 1962 and 1969 set up a zonal-oriented prohibition against the discharge of oil or oily substances.[56] The original limit of fifty miles was extended to one hundred miles by the 1962 amendment. The 1969 amendment removed the zone concept to prohibit discharge of oil beyond a certain permissible limit in all areas of the sea. Enforcement of these laws is by the flag state of the offending ship except that states can take enforcement action within their territorial seas.[57]

In 1958 the Geneva Convention on the High Seas called on all participating states to draw up regulations to prevent oil spills and other forms of oil pollution.[58] Also included in this convention was a mandate that states cooperate with international organizations in the prevention of pollution resulting from radioactive materials and other harmful agents. Finally, in Brussels in 1969 two more conventions relating to intervention by a coastal state on the high seas to prevent oil pollution and to civil liability for damage resulting from oil pollution were adopted. However, neither convention is in effect at this time. All of these conventions are bona fide efforts to correct the problem of oil pollution. However, they are aimed only at oil pollution with the exception of Article 25 of the Geneva Convention which has been little used. Two major weaknesses besides the limited applicability to oil pollution problems have been cited. First, they are remedial and liability oriented instead of being preventive in nature. Secondly, they are binding only on the contracting parties and then only against their own nationals. There is a need to have someone other than a potential offender to administer remedial actions.[59]

Conspicuous in its absence is any international attempt to regulate the use of the deadly heavy metals and the hazardous chlorinated hydrocarbons. Conspicuous in its absence is any attempt to draw up international pollution standards concerning any of the toxic substances and their use.

However, several international organizations have been created to research the marine pollution problem. A program named Long-Term and Expanded Program of Oceanic Exploration and Research was set up to report on the health of the oceans and to look into a worldwide system of monitoring pollution. The Joint Group of Experts on the Scientific Aspects of Marine Pollution was created to accumulate scientific data on all aspects of marine pollution.[60] The International Oceanographic Commission was set up for a similar purpose. The Intergovernmental Maritime Consultive Organization is responsible for much of the international legislation over oil pollution. Recently concluded was the United Nations Conference on the Human Environment in Stockholm which spoke out against the unregulated use of chlorinated hydrocarbons and heavy metals. Also, a United Nations environmental agency was created which will be responsible for a worldwide monitoring system and research activities. As vital as these monitoring and information creating agencies are there are no international environmental regulatory bodies. All we have are a haphazard string of national pollution standards and regulations. No attempt has been made to set up a uniform set of environmental

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[56] Done April 11, 1962, 12 U.S.T. 2989, T.I.A.S. 4900, 327 U.N.T.S. 3.
[57] Legault at 212.
[58] Done April 29, 1958, 13 V.S.T. 2312, T.I.A.S. 5200.
[59] Legault at 216.
[60] Brown at 239.

standards backed by an international regulatory body with enforcement powers.

A very recent convention in London hopefully will end the dumping of many offensive substances in the sea. The Convention of the Dumping of Wastes at Sea: the convention prohibits the dumping of "high level radioactive waste, biological and chemical warfare agents, crude oil, some pesticides, and durable plastics," plus mercury and cadmium and other substances that do not decompose readily.[61] Other substances like some of the heavy metals can be dumped only with special permits. The individual states are charged with "taking all practical steps to prevent pollution of the sea" by dumping of waste and other hazardous materials into the sea and they are charged with the enforcement of the anti-dumping measures.[62] Obvious weaknesses of the convention are the lack of an international regulatory body to enforce the dumping ban, an escape clause which permits dumping in the case of a national emergency, and the fact that the convention does not touch upon the major source of marine pollution--pollutants which reach the sea from land-based activities.[63]

Suggestions

Although a start has been made, if man is to conquer the problem of marine pollution, he has not really yet begun. Even before concrete suggestions can be made, one must realize that the problem is not exclusively national or exclusively international in scope, it is both. The squabble over who is going to protect whose interests must cease. The problem must be faced with unity and decisiveness. One cannot let national interest stand in the way of the future of mankind, but one must always keep in mind that these national interests do exist.

In considering suggestions to the solution of the problem, it is best to look at short-term and long-term remedies. An overriding consideration is that a complete prohibition of disposing wastes into the oceans is not contemplated. It has been shown that the ocean can assimilate vast amounts of waste materials with no harmful effects. In fact, one must classify this use of the ocean as one of its natural resources. Therefore, in attempting to solve the marine pollution problem, an optimum balance must be struck in which the ocean can be used for a waste receptacle without impairing its other values. Of paramount importance to both short-term and long-term remedies is a need for the furtherance of knowledge about the oceans and the effects of pollutants on the marine environment.

Having established that international cooperation is vital to a solution, three international bodies must be created. A program centered around an international coordinating body must first understand the nature of the marine biota including the effects of ocean and air currents and the interplay of the various food chains. Secondly, scientists must classify each kind of marine pollutant, examining its source, its effects on marine life and man, and possible solutions to each problem. This international body must serve as the nerve center for formulating new knowledge, collecting facts already known, for the evaluation of this knowledge and for the dissemination of this knowledge to the individual nations. Based on this knowledge, a second international body must draw up uniform inter-

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[61] The New York Times, 91 Nations Agree on Convention to Control Dumping in Oceans, New York Times (New York City), at 1 and 14, CXXII, No. 41 (Nov. 14, 1972).
[62] Editorial on Ocean Pollution, The New York Times (New York City), at 4 (November 26, 1972), sec. E, CXXII, No. 41.
[63] Id.

national standards for nations to follow. This body must have the technological know how to set up such standards and must be endowed with the power to enforce compliance with these standards. Thirdly, an agency concerned with monitoring the marine environment must be set up. Working closely with the other two agencies, this monitoring body could supplement the research function of the first agency and be the initial step in the detection and enforcement responsibility of the second agency.

Once these international bodies have been created specific problems can be undertaken. The use of chlorinated hydrocarbons should be greatly curtailed. Less harmful substitutes must be found to be used in agriculture. Use of the more harmful substances would be severely limited to disease prevention uses. Subsidies can be given to the underdeveloped countries agriculturally harmed by the ban on the use of these pesticides. The international bodies can stimulate the research needed for the development of substitutes. Secondly, the use of the toxic heavy metals must be restricted. Unnecessary and indiscriminate use of these substances must be reduced. By the use of effluent for industry, a good deal of the damaging effects of these materials can be reduced. Emphasis on the recovery of those substances already in the environment and the recycling of those substances must be sought. Better port facilities for the loading and unloading of oil must be instituted. Strict regulations concerning the discharge of oil wastes must be implemented. Better methods of cleaning up oil already in the marine environment must be developed. As one can see all these specific measures for individual pollutants require additional technological advancements. As stressed before, the need for more research and the gaining of knowledge is crucial before these individual measures can be taken.

There are three major elements involved in long-term solutions to the marine pollution problem. First the public must be made more aware of the pressing nature of the problem. Often the situation in the first place was created by lack of public education resulting in public apathy. If the people of the world can be made to see how their very existence is threatened, more pressure will be exerted on individual governments and the world community at large to begin the task of cleainig up existing and preventing future marine pollution. Secondly, and connected with this public education suggestion, is a redirection of world thinking. As brought out by R. P. Lowry what is needed is a "radical view of the ecological crises."[64] The situation demands new ideas, new ideologies, new solutions. People will have to stop thinking in traditional terms about property concepts, about the concept of progress and capitalism, about sociological problems and the allocation of resources.

> The situation will continue so long as leaders and citizens insist upon minimizing confrontations, avoiding radical change, and eschewing inconvenience to prevailing life styles. Only a willingness to develop radical perspectives will lead us to raise the correct questions and seek appropriate answers.[65]

Lastly and perhaps the focal problem behind the marine pollution problem is the population explosion. The new mouths to feed, the new bodies to clothe, the new bodies to house have all combined to place exceedingly great demands on our environment. If man does not limit his population, the environment-especially the

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[64] R. Lowry, Toward a Radical View of the Ecology Crises, 1 Environmental Affairs, 350 (1971-72).
[65] Id. at 358.

marine environment-is in danger of complete befoulment. Steps must be taken to prevent the population from reaching the point where the environment is irreversibly damaged.

Conclusion

Paul Ehrlich wrote "The end of the ocean came late in the summer of 1979, and it came even more rapidly than biologists had expected. There had been signs for a decade...."[66] We are now witnessing these signs in the massive fish kills, in the decline in sea bird populations, in the oyster beds being declared unsafe, in the paralyzed limbs of Minimata Bay children. The remedial actions taken by the individual states are beginning to have a beneficial effect. The United Nations Conference on the Human Environment and the recent Convention on the Dumping of Wastes at Sea are encouraging signs of international cooperation required for the eventual solution of the problem. However, man has only begun what is an uphill struggle for his very existence.

> The costs will be high: the advancement in standard of living (creation of wastes) must cease and the philosophy of economic gain through increased per capita consumption will have to be eliminated. Not to live compatibly with this living organism earth is not to live at all, the oceans are our last frontier.[67]

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[66] Campbell and Wade at 269.

[67] D. Hood and C. P. McRoy, Uses of the Ocean, Impingement of Man on the Ocean, 695 (1971).

THE DISPOSAL OF RADIOACTIVE WASTES INTO THE SEA: SOME INTERNATIONAL LEGAL CONSIDERATIONS

Geoffrey Alan Planer

The development and increasing use of nuclear energy for the generation of electric power, and the expanding applications of radioisotopes in research, industry and medicine, are unavoidably associated with the production of growing amounts of unwanted by-products in the form of complex mixtures of radioactive elements. These elements are formed during the fission process, and are appropriately referred to as "fission products." Whether the nuclear reaction takes place under controlled conditions in a power reactor or explosively in an atom bomb, the fission products remain. Most fission products are solids, some are gases, but they all have one common characteristic, radioactivity, (i.e. they have the property of ejecting from their nuclei charged particles.)[1] In ejecting such particles, the nuclei change their identity and become isotopes of different elements, which may or may not be radioactive. The rate at which the charged particles are emitted from the radioactive nuclei, thus causing this change known as "decay," is governed by the natural law of "half-life,"[2] which is of profound significance in considering waste disposal methods and schedules.

Both alpha and beta particles as well as gamma rays can penetrate matter, and in doing so, they ionize the material through which they pass; that is, they knock some of the orbital electrons from the atoms of the material and leave them electrically charged instead of neutral.[3] The ability of these radiations

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[1] The more common of these are high-speed electrons called beta particles and helium nuclei called alpha particles, both of which are usually accompanied by emission of electromagnetic radiation of very short wave length known as gamma-rays.

[2] Saddington and Templeton, in their book Disposal of Radio-active Waste, from which I gleaned most of my introductory explanation of the nature of radioactivity, explain the "half-life" principle as follows: "The half-life value of a radioactive substance is the period of time taken for the activity to decay to half its original value, i.e. for half the atoms originally present to decay. This may vary from a fraction of a second to millions of years, according to the element and the isotopes." K. Saddington and S. L. Templeton, Disposal of Radioactive Waste, 2 (1959). [hereinafter cited as Saddington].

[3] "Alpha particles ionise heavily as they pass through matter, but are not very penetrating and may be stopped by a thick sheet of paper. Beta particles ionise less heavily than alpha particles and are considerably more penetrating, requiring a few tenths of an inch of aluminum to stop them. Gamma-rays, finally, ionise very little and are exceedingly penetrating; in fact they are never completely stopped, though a sufficient thickness of lead can reduce their intensity to an immeasurably small value." Id.

to affect the atoms of the matter through which they pass applies to living matter, including human tissue, which is damaged in the process.[4] It is for this reason that the fission products present a serious problem in terms of their safe disposal. This problem is further compounded by the fact that any material which can conceivably become contaminated, even slightly by exposure to radiation, must also be treated as radioactive and must be disposed of as such.

For example, nuclear energy using plants generate a wide range of trash such as broken glassware, used filters, building rubble, dismantled pipework and gloveboxes, test rigs and combustibles such as paper, wood, fabrics and plastics. Added to these is the accumulated refuse from the growing use of radioisotopes in industry and medicine, which though only mildly contaminated if at all, must be regarded as radioactive for purposes of disposal. The amount of these and other wastes is now piling up in significant quantities in many countries; and it cannot be dismissed in the cursory fashion in which we treat conventional industrial and municipal wastes, for it must be remembered that the one main difference between radioactive and conventional waste is that whatever one does to the former, one merely transforms the radioactivity from one physical or chemical form to another. The radioactivity cannot be destroyed by outside influences but diminishes at its own pace regardless of what is done to it.

The most important consideration in the treatment of such waste is preventing its return to man either directly through contact or indirectly through contamination of the food and water supplies.[5] The earth's environment, of course, contains a small background level of radiation and is capable of absorbing an even greater amount of radioactive material which if diluted and dispersed in the air or the oceans may be reduced to a harmless level. But even with this natural self-cleansing capability (and taking into account the half-life phenomenon which leads to the ultimate dissipation of the radiation property of radioactive substances), the build-up of fission-products and other waste by-products of our nuclear age has far outstripped nature's ability to absorb them, so man must provide for the treatment and disposal of these wastes with a view toward providing for his own safety on earth.

In their presentation before the International Atomic Energy Agency (IAEA), F. N. Browder and P. J. Parsons discussed the basic problems concerning radioactive waste control and disposal:

> It must be controlled strictly to ensure that all

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[4] In Chapter 2 of their book Saddington and Templeton describe the various biological effects of the different radiations upon human tissues, from the immediate and readily observable "burn" damage to the more latent aspects such as the production of cancerous tissue and alteration of genetic characteristics.

[5] Efforts of the scientific community, especially the work of the International Congress of Radiology (1953) and that of the International Commission of Radiology Protection (1954), have led to the adoption of certain agreed-upon standards for the maximum permissible concentrations for the so-called "standard-man." These maximum levels represent the values which are judged, in light of present knowledge, not to be harmful to the individual. Saddington and Templeton give a thorough yet readable presentation of the ICRP standards, which evaluate the effects of such factors as the particular type of decay of the element; the physical half-life, the effects on the various organs and tissues of the human body, and the maximum permissible concentrations in air and water. These ICRP standards are generally recognized as authoritative by the international scientific community.

> of it can be accounted for and that none of it can escape inadvertently and so cause a hazard to the neighboring population. This is not to say that no radioactive wastes can be released to the environment, but rather that the amounts released must cause no hazard to man or his resources and that the radioactive fraction can be absorbed into the environment without danger. Thus in the management of radioactive wastes, safety is of primary and paramount importance, but economy is a very close second consideration. Given a stated production of wastes, only a certain fraction of this can be released to the environment and the remainder has to be treated in such a way that the radioactivity is concentrated and immobilized into comparatively small volumes from where it cannot escape. Thereafter it has to be stored for a long time until most of the radioactivity has decayed....
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> The economic pressure to increase releases and to treat as little of the waste as possible has to be countered by safety considerations which automatically limit the quantities that can be disposed of safely. Ideally, the maximum safety to the population is gained by releasing no radioactivity and retaining 100%, but since this is a physical impossibility, safety considerations follow the general guideline that as little as possible should be released compatible with other necessary operating criteria.[6]

In considering methods of dealing with radioactive wastes, there are two main philosophies which can be applied. The first is to "concentrate and contain" the gas, liquid or solid waste in such a way that it is at all times under complete control. An example of this is the evaporation of highly active liquid solutions to a small bulk and storage in permanent containers, either as a liquor or a resin. The second philosophy is to "dilute and disperse" the radioactive waste in the environment by such methods as controlled discharges directly into rivers which themselves ultimately discharge into the sea.

Though in a few countries, such as the U.S.S.R. and to a more limited degree the U.S.A., this can be accomplished by sealing containers of the waste in deep, isolated mine shafts and other earthen graves, for the majority of atomic energy users, the problem is not se easily solved. In most (especially European) states a combination of geography, geology and population distribution make ground disposal extremely difficult or costly. For them, the capacity of the sea as an environment for the disposal of some types of radioactive wastes has been attractive for many years. Its vast area offers favorable possibilities: the ocean depths provide isolation and its enormous volume ensures dilution. Despite the increasing popularity of the sea as an international outlet for radioactive

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[6] F. N. Browder and P. J. Parsons, Control of Radioactive Waste Disposal, Nuclear L. for a Developing World, 5 Legal Series 231 (1969). [hereinafter cited as Browder].

wastes, regulations and control at the international level are minimal. The Geneva Convention on the High Seas contains only a brief and general statement (Article 25) with regard to radioactive pollution, which exhorts each state to take into account relevant international standards in preventing pollution of the seas from the dumping of radioactive waste.[7] Though only implicitly concerned with radiocative pollution, the 1963 Test Ban Treaty is another important international control since nuclear tests have to date been the largest cause of radioactivity in the sea.[8] In addition, there exists the Brussels Convention of 1962 on the Liability of Operations of Nuclear Ships,[9] which, while not directly concerned with waste disposal methods or standards, is relevant in that the deterrent liability system it establishes for nuclear ship operators in the event of nuclear damage further stimulates the safest possible operation of nuclear ships whose flag states sign the Convention. Thus with the lack of any detailed international agreement setting forth standards with reference to the dumping of radioactive wastes into the high seas, the matter is left largely in the hands of the individual states who use the seas for disposal. Those of the United Kingdom[10] and the United States[11] are perhaps as strict as any existent.

As a minimum, it could be argued that any state, or operator licensed by it, whose waste disposal methods were so unreasonable and unsafe, as judged by the standards of the scientific community, notably the International Commission on Radiological Protection (ICRP) and the IAEA, as to endanger the reasonable uses of the seas made by other states would be guilty of violating the freedom of the seas enjoyed by the international community in general. Harm to life or property resulting from the wrongful activity might then give rise to an international liability on the part of non-complying state(s).[12] This notion is not dissimilar

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[7] Geneva Convention on the High Seas, April 29, 1958 - September 30, 1962, 13 U.S.T. 2312, T.I.A.S. No. 5200.

[8] International Co-operation in Problems Related to the Oceans, IAEA Progress Report (May 28, 1970 para. 31) UN Doc. E/4911. It should be noted that neither France nor China are members of this treaty.

[9] Brussels Convention on Liability of Operators of Nuclear Ships, May 25, 1962. This may be found in Joint Atomic Energy Committee Selected Materials on Atomic Energy Indemnity Legislation 302 (1965). [hereinafter cited as Joint Atomic Energy Comm.].

[10] See tha Atomic Energy Act, 1946; Radioactive Substances Acts, 1948 and 1960; Atomic Energy Authority Act, 1954; Radioactive; and Nuclear Installations Act, 1965.

[11] United States controls exist on both the federal and the state levels. In addition to the Atomic Energy Act of 1954 there are numerous Atomic Energy Commission standards and regulations, a collection of which can be found in National Research Council, Radioactive Waste Disposal into Atlantic and Gulf Coastal Waters: A Report N.R.C. Pub. No. 655 (1959). For treatment of the existing state laws, see Stason, Estep and Pierce, Atoms and the Law (1959).

[12] M. S. McDougal and W. T. Burke, The Public Order of the Oceans: A Contemporary International Law of the Sea, 852-868 (1969).

Query: Could this international responsibility of states inter se be extended to allow an individual, whether national or alien, injured by a state's disposal of radioactive wastes to recover from a respondent state? The notion of freedom from radioactive pollution (which causes sterility and mutation among humans) as a basic human right might not be as far-fetched as it appears at first blush. Such a concept finds support in the hypothesis espoused by Jessup in his Modern Law of Nations (1948) and his Responsibility of States for Injuries to Individuals, 46 Colum. L. Rev. 903 (1946), that individuals have certain basic human rights enforceable in international law. Admittedly, however, this concept of state responsibility and individual rights in the area of atomic pollution is somewhat ethereal and may therefore be confined to the shadows of international legal theory for at least the near future.

to the basic thrust of the 1960 Paris Convention on Third Party Liability, as supplemented by the 1963 Paris Convention,[13] which is restricted in its application to Europe, and the world-wide Vienna Convention of 1963.[14] Both treaties define nuclear damage very broadly, and would therefore cover any damage due to nuclear waste disposal; and both contain similar provisions regarding absolute liability of operators, location of suits brought, time limits for instigating suits, maximum monetary limits of liability, and insurance responsibilities of operators.

It should be noted here that both the Paris and Vienna Convention apply to nuclear installations and storage areas wherever situated within a state. Thus their regulations and limitations are presumably applicable at least as to the contracting states' disposals of radioactive wastes into their national and international rivers. But there are, in addition, general principles of international law which could arguably be applied to all states universally in cases of pollution of rivers by nuclear waste. One such general principle, as set forth by Oppenheim, speaks particularly to a state's use of its national rivers: "A state, in spite of its territorial supremacy, is not allowed to alter the natural conditions of its own territory to the disadvantage of the natural conditions of the territory of a neighboring state."[15] A similar statement adopted by the U.N. Economic Commission for Europe in 1961 might be more appropriately directed toward a state's use of international rivers: "... in accordance with established principles of customary international law no state should pass-on its waters to its neighboring states in such a polluted condition that this water would seriously damage the interest of its neighboring states."[16]

In conjunction with the above mentioned general limitation, there have also been suggestions that riparian states may have the obligation to co-operate in cleaning such pollution as might already exist, and the responsibility for being held liable internationally if they do not engage in effective abatement activities. These issues, plus the related ones of fairly apportioning abatement costs among coriparians and of establishing international bodies with the power of administering and enforcing water quality standards for international drainage basins, have been under study by such groups as the ECE,[17] the International Law Association[18] and the IAEA.[19] (A portion of the IAEA report, which typifies the

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[13]Paris Convention on Third Party Liability in the Field of Nuclear Energy, July 29, 1960 - April 1, 1963 in Joint Atomic Energy Comm. at 255.

[14]Vienna Convention on Minimum International Standards Regarding Civil Liability for Nuclear Damage, May 22, 1963, in Joint Atomic Energy Comm. at 312.

[15]L. Oppenheim, International Law: A Treatise, 1 Peace 290 (1955).

[16]Economic Commission for Europe Conference on Water Pollution Problems in Europe, E/ECE/501, 7 (March, 1961). For a concise statement on the general principles of international law in regard to riparian rights see Dept. of State Memo, April 21, 1958, by L. Griffin, on Legal Aspects of the Use of Systems of International Waters, S. Doc. No. 118, 85th Cong., 2d Sess. (1958); Dealing particularly with pollution problems, see Whiteman, International Law 1040-1050 (1964); Lester, River Pollution in International Law, 57 Am. J. Intl. L. 828 (1963).

[17]Economic Commission for Europe, Tentative Suggestions for the Establishment of International River Pollution Control Bodies in Europe, Annex III, E/ECE/340, 1-3 (March 6, 1959).

[18]Helsinki Conference of the International Law Association Final Report of the Committee on the Uses of the Waters of International Rivers (1966).

[19]Report of an Ad hoc Panel of Experts Disposal of Radioactive Wastes into Fresh Water, 10 IAEA Safety Series 33-36 (1969).

suggestions offered by the three groups, is reprinted in Appendix I of this paper.)

Having briefly discussed the problems presented by the ever-increasing build-up of radioactive wastes and having noted the limited nature and scope of current regulations and disposal methods, it is clear that much legislation must be enacted within the near future to insure the protection of man and his environment.

As it happens, the IAEA is working on a radioactive waste disposal treaty, and the Agency, as well as those of its members who practice disposal into the sea, will surely be influenced by the recommendations of an IAEA Ad hoc Panel which issued a report on this matter several years ago.[20] The panel recommended against the release into the sea of highly radioactive wastes, but suggested that under controlled conditions wastes of low and intermediate activity could be deposited into the sea at designated disposal sites, using ICRP and IAEA standards.

Forthcoming legislation in the area of radioactive waste disposal may emphasize either national or international control. Browder and Parsons[21] predict that future action will continue along its current line of national regulations, with the co-operation of some international monitoring agency to observe all disposals and their effects and make suggestions for future disposals based on the collected data. They suggest that since the control of the use of radioactive materials is usually vested in the central government of a country, the discharge of radioactive wastes should be in that government's hands also. The two experts, however, favor placing control of the waste disposal program in an existing department of public health, calling upon the Atomic Energy Authority only for advice and services when needed. The authors stress the point that it is essential that public confidence be generated and maintained, particularly on matters of environmental safety. Thus, attempts to relax any initially over-restrictive regulations (most initial regulations, because of the limited knowledge concerning sea-currents, marine-life migration, etc., tend to be overly conservative) would meet with a more congenial popular reaction if brought about under the auspices of a public health service or conservation board rather than the Atomic Energy Authority, whose immediate interest in the relaxing of such restrictions makes its opinions inherently suspect.

A second suggestion is that whoever formulates the regulations should set disposal limits for each site individually instead of enacting blanket regulations governing all disposal sites. Browder and Parsons note that, "The use of concentration limits without regard to local conditions has led to the more restrictive forms of legislation that are now being regretted in some countries since they impose an operational and economic burden that hinders the growth of nuclear operations."[22] In addition, the authors suggest that such local regulations should be flexible containing as few figures as possible. They reason that scientific opinion on what is acceptable and what is not is subject not only to argument but also to change. And legislation, though likewise subject to change, always tends to do so slowly, especially where technical data and issues are involved.

Contrasting Browder and Parson's "national control" view, is the opinion of Dr. D. W. Bowett, President of Queens College, Cambridge, supporting international regulation and control.[23] Bowett believes that if states set their own disposal

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[20] The recommendations of the Ad hoc Panel on Radioactive Waste Disposal into the Sea, 5 IAEA Safety Series 77-79 (1961) are reprinted in Appendix II. The recommendations and resolutions of such groups often take on the force of law when concerned states habitually put the proposals into practice, even in the absence of binding treaty obligations.

[21] Browder at 231-239.

[22] Id. at 26.

[23] D. W. Bowett, Nuclear and Thermal Waste Pollution: Some Legal Considerations, Water Pollution as a World Problem, 22-27 (1971).

regulations, there is the risk that some states may fall short of the standards objectively required by the international community and there is also the risk that the cumulative effect of the disposal activities of several states may create a hazard of which they may be completely unaware. Bowett notes that the IMCO Conference to be held in 1973 on marine pollution has the express aim of preparing international conventions. This, maintains Bowett, will be the most opportune time for some international program to be initiated; and while leaving the technical aspects of the regulations to the scientific community, Bowett views certain general provisions of any proposed Convention as essential. First, such a Convention should cover the high seas, territorial waters and hopefully even national waters which ultimately flow into the sea. It should be noted here that Bowett would have this general Convention deal with international rivers or inland waterways like the Great Lakes, which, he feels, could be better handled by agreements between the coriparians.

Secondly, the author stresses the need for a system of continual monitoring, which will necessitate the creation of some international scientific inspectorate. This international agency would have several functions. One of these would be to analyze and assess all of the monitored data; another to deal with the more political question of reviewing state policies and programs. Bowett notes that international organizations "exert a great deal of pressure on states through a process of 'confrontation' in which states are confronted by evidence of non-compliance and required to defend their conduct. This seems exactly the kind of process best suited to the problem of securing compliance with agreed standards on pollution."[24]

A third function of the international organization would be to settle any disputes arising from radioactive pollution. Such disputes would depend upon highly scientific and technical proofs which would require an expert body quite different from, say, the ICJ. The basic problem here, of course, is to get states to place themselves under the compulsory jurisdiction of the international body.

Yet another function of the agency would be a quasi-legislative one. Once the basic Convention is drafted, it might contain broad agreements in principle leaving the details of specific regulations (e.g. packaging methods, types of containers suitable for use, etc.) for final decision by the agency. Also, as time passes and the need for supplementary Protocols or new Conventions becomes apparent, the organization would be instrumental in an advisory and reference capacity and as a convenient forum for initial discussions and drafting sessions.

The ultimate question posed by Bowett is "which international agency ought to assume these various functions of research monitoring, political and scientific review, initiating new or supplementary legislation, and possibly disputes settlement?"[25] There have been several proposals for the creation of a new International Environment Agency[26] which would deal with all of the problems of marine pollution and environmental protection, and such proposals are appealing for obvious reasons of international co-operation, economy of effort, and control, and political esteem.

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[24] Id. at 25.
[25] Id. at 26.
[26] The United Nations Secretariat's Comparative Table of Draft Treaties for the Law of the Sea contains proposals for the formation of the International Ocean Space Institution which would, among other duties, function as international environment agency. See generally, Comparative Table of Draft Treaties, U.N. Doc. A/AC. 138/L.10.

Bowett himslef feels that such a proposal is over ambitious. He would favor some sort of joint agency set-up among GESAMP, IMCO, FAO, UNESCO, WMO, and IAEA which would have a quasi-autonomous status but would be ultimately responsible to all of the organizations. But even this alternative suggestion, though circumventing many international problems of an organizational-administrative nature, may itself find it difficult to overcome the initial inertia of the status quo in international law.

More probably international atomic waste disposal regulations will emerge gradually from the varied sources of traditional international law: the negotiation of bilateral and multilateral treaties; the development of customs evolving from the behavior and national law of states; the passage of resolutions and declarations by international agencies such as the IAEA; the statement of authoritative views by scientific and legal experts; and international adjudication of claims. Given the modern history of the slow development of international law, there is only a slight possibility that these different sources will evolve and coalesce into any sophisticated and flexible international program until the world community is shocked (perhaps by threat of some imminent peril) into realizing the scope and degree of the problem and the urgency for international action.

APPENDIX I

IAEA Ad hoc Panel Report on, Disposal of Radioactive Wastes into Fresh Water, IAEA Safety Series No. 10, 1963, pp. 34-35.

The problem of disposal of radioactive wastes into international fresh waters could be solved by the countries affected by the disposal in one of the following ways:

(a) The establishment of a bilateral or multilateral convention based on the principle that the water passing from one country into another should meet certain specific quality criteria. The task of implementing the convention could be approached either by the states themselves directly, or through a commission set up for the purpose.

(b) The establishment of special bodies for particular drainage basins by bilateral or multilateral conventions possibly consisting of representatives of all the countries concerned which would meet from time to time to lay down conditions governing the discharge of wastes into the international fresh waters by each of these countries. This method would be different from the one proposed under (a) in the sense that whereas (a) envisages a static convention, (b) envisages a dynamic convention which would enable the countries concerned to consider each fresh proposal for waste disposal in the light of the conditions already existing and suggest suitable measures for ensuring radiation safety to the population concerned. The problem of the decisions thus reached could be appraoched in two ways. In the first, the body or bodies constituted to formulate the bilateral or multilateral agreements from time to time could be purely advisory, the actual ratification and implementation of the formulas being left to the governments concerned. Alternatively, these bodies could be empowered not only to arrive at mutually agreed upon disposal criteria, but also to take such control, administrative and enforcement measures as may be necessary to implement the agreement. The creation of such bodies with full executive powers to make and implement decisions which bind participating states and their nationals would involve the assignment of some degree of state authority. It is, however, the opinion of this panel that in view of the rapidly expanding atomic energy programmes in various countries of

the world, such bodies for particular water systems would provide a satisfactory solution to the problem of radioactive-waste disposal into international fresh waters.

Since the chemical balance of a fresh-water system will affect its capacity to accept radioactive wastes, the terms of reference of any such bodies must be broadened to include the general problem of pollution of international fresh waters by the discharge of inorganic and organic material in addition to radioactive wastes.

APPENDIX II

Recommendations of the Ad hoc Panel on Radioactive Waste Disposal into the Sea, IAEA Safety Series No. 5, 1961, pp. 77-79.

The following recommendations are made:

(1) At present, the release into the sea of highly-radioactive wastes from irradiated fuel cannot be recommended as an operational practice.
(2) Wastes of low, and intermediate activity may safely be disposed of into the sea under controlled and specified conditions.
(3) The most recent Recommendations of the International Commission on Radiological Protection should be used as a guide for the assessment of the safety of proposed radioactive-waste disposal into the sea.
(4) Only waste-disposal methods should be considered which limit the radiation dose to that which involves a risk which is not unacceptable to the individual and the population at large. The interpretation is made that one twenty-fifth of the genetic dose to the population as a whole, arising from the peaceful uses of nuclear energy, should be allocated to radiation received from marine sources beyond national control.
(5) All radioactive wastes disposed of into the sea, with the exception of those incidental to the operation of nuclear-powered ships, should be released into designated disposal sites in conformity with conditions specified for the particular site.
(6) Release of radioactive wastes from nuclear-powered ships should be made in such a way that there is no resultant limitation on man's harvest of products from the sea.
(7) Each waste-disposal site should be designated by a responsible national or international authority. This authority should set out conditions of disposal for the site adequate to ensure that no unacceptable degree of hazard to man arises. It should provide for any necessary monitoring of the area to verify that safe conditions are maintained, and should collect all necessary records of disposals to maintain an adequate knowledge of the state of the disposal site.
(8) All authorities setting up disposal sites in the sea should provide to a suitable international authority, information necessary to maintain an adequate register of radioactive waste disposal into the sea.
(9) The International Atomic Energy Agency (IAEA) should maintain this register and should receive:
    (a) Notice of the licensing requirements of all sea-disposal areas set up by national authorities or by international bodies according to agreement by the national authorities. This information should be supplied to the Agency a sufficient time prior to the establishment of any disposal site, to permit transmission to interested parties and the receipt

of any pertinent comments or representations.

(b) Annual reports on the state of such sites, including any change in licensing conditions and information as to the quantity and general nature of disposals in the past year. An itemized report is not necessary, but an estimate of the total activity, and the nature of the more hazardous single disposals, regarding packaging, content, and maximum activity, should be included.

(c) The monitoring programme and all relevant scientific findings.

(10) The IAEA should provide for any necessary standardization of monitoring techniques.

(11) Radioactive wastes disposed of from nuclear-powered ships should be entered in a record maintained on the ship and available for inspection by port authorities. A suitable abstract of the record should be transmitted annually to the authority of the country of the ship's registration for forwarding to the Inter-governmental Maritime Consultative Organization (IMCO) which should work out, jointly with the AIEA, an effective registration and compilation of radioactive-waste disposals from nuclear-powered ships.

(12) All disposals from ships in harbours and national waters should be in conformity with conditions laid down by the local authority. In international waters disposals should be in conformity with conditions specified in the licensing of the vessel or provided by the appropriate international authority, whichever is more restrictive.

(13) The IAEA, in collaboration with other international organizations concerned, should at appropriate intervals review the problems connected with radioactive-waste disposal into the sea.

THE LAW OF MARITIME OIL SPILLS

John Pendergrass

Consider the following fact situation. A new modern "supertanker", heavily laden with a cargo of crude oil, is rapidly proceeding to its destination. Suddenly an intense storm arises and the tanker is tragically run aground on jagged rocks. The rocks rip giant holes in the oil tanks as the waves and the tide eliminate any possibility of rescue. Thousands of gallons of crude oil ooze from the tanks and form an oil slick of five square miles. Buoyed by coastal tides the slick relentlessly surges toward the shore as the coastal inhabitants helplessly watch. Miles and miles of beaches are turned black as thousands of gulls and fish are caught in the thick and musky mixture. The slick is so massive that detergents and straw seemed to add to the damage instead of aiding the clean-up. Planes carring napalm, powdered magnesium, and other incendiary weapons have little success in setting the floating slick afire. Floating booms and other methods of physical collection are difficult because of high seas. For ten more days, the oil is released as the stricken tanker remains stranded in international waters. The abandonment of the wreck by the owners and the indecision of governmental authorities compound the confusion and damage. Finally planes of one of the damaged nations succeed in partially sinking the tanker and stopping the discharge of oil. Unfortunately it is a case of too little, too late. National claims amount to sixteen million dollars, while estimates of private damage run as high as two billion dollars. Further confusion is added to the disaster when one considers that the ship was owned by a subsidiary of an American corporation, that the ship was registered in Liberia, that the ship was manned by an Italian crew, that the ship was chartered for a single voyage by a British corporation, that the salvage contract was awarded to a Dutch Company, and that the ship remained in international waters. At first glance one might expect this situation to appear in a best-selling noval or possibly on the final exam of your favorite law professor. Unfortunately, this is not the case. The situation is the real story of the tanker Torrey Canyon which wrecked off the English coast in March, 1967. Hopefully the Torrey Canyon will serve as a living example that such sea disaster can occur.

Needless to say, this paper is concerned with the problem of oil pollution. More specifically, it deals with oil discharges from ships. The paper consists of three parts — the first is an examination of the problem itself, the second is an examination of existing laws, and the third an attempt to find solutions to the problem of oil pollution.

THE PROBLEM

Oil pollution is a global problem, which calls for an international solution. As the countries of the world become increasingly more developed, the demands for energy are constantly expanding. In the present state of world technology, oil is the principle source of energy. As a result of the irregular distributions of oil

deposits, massive shipping has been required to transport the oil to industrial nations from the relatively undeveloped countries that contain the richest deposits of oil. Recent figures indicate that about 600 billion gallons of oil are produced per year. About sixty per cent of this amount is moved at sea, or about 360 billion gallons. Added importance is given to these figures when one considers that oil constitutes about sixty per cent of all goods transported at sea. All of this 360 billion gallons is loaded and unloaded, and nearly all of it passes through restricted shipping lanes at least once.[1]

The increased demand for oil has greatly influenced the method of shipping and the size of tankers. If one looks at the tankers of the post-World War II era, one finds that very few oil tankers exceeded twenty thousand deadweight tons. As a result of the unsettled Middle East situation, the use of the Suez Canal is continually in doubt. Shipping companies soon found that they could more easily supply the world's energy needs by using larger tankers. This was true even though the tankers would almost always have to sail around Africa to get to their destination. Each new tanker exceeded its predecessor as a class of "super tankers," weighing more than 100,000 deadweight tons, was formed. The Torrey Canyon, at 117,000 deadweight tons, was a member of this class. The construction cost of even larger tankers increases only slightly over the cost of present tankers. Oil imported from the Persian Gulf — the site thought most likely to be the major supplier of foreign crude in the coming years — costs $9.93 per ton in transportation costs when shipped in conventional ships. That cost drops to $7.27 per ton in the supertankers.[2] The Japanese, with their great technical advances and energy needs, are now constructing tankers of 500,000 tons. Not to be outdone, the British have proposed a ship of 1,000,000 deadweight tons.[3] Apparently the British have not learned from the Torrey Canyon experience. The purpose of this historical exercise in the development of tankers should be obvious. As the size of the tankers increase, the capacity to damage as in the Torrey Canyon's situation. is tremendously increased. The new "super" supertankers would also cause additional problems in shipping practices. These will be discussed later.

Since the March, 1967 Torrey Canyon disaster, there has not been another involving "super tankers" dimensions. Yet, the waters of our oceans and seas are turning steadily darker from more and more oil. There are various estimates on the amount of annual oil discharge at sea. Dr. Max Blumer of the Woods Hole Oceanographic Institution estimates that 0.1% of all oil moved at sea is spilled, or about 360 million gallons. Not included in this figure are the discharges from accidents in the extraction of oil from the sea floor, the sloppy use of fuel oil by ships at sea, or the oil introduced into the ocean by sewage wastes.[4] The most recent figure on total annual oil pollution is 100,000,000 tons.[5]

The worst offender is the shipping industry. Basically ships discharge oil in four ways. These are bilge pumping, deballasting, tank flushing, and leaks from accidents. The first activities are not as spectacular as tanker leaks, but their comulative effect is probably more damaging. These three activities involve willful conduct and thus could be prevented by strongly enforced international laws. Bilge pumping is the removal of the oily waste from engine room bilges.

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[1] Coan, Oil Pollution, Sierra Club Bulletin (March, 1971). [hereinafter cited as Coan]

[2] Offshore Superports Urged to Help Meet Energy Crisis, Durham Morning Herald (Durham, North Carolina), November 27, 1972 at 1A. [hereinafter cited as Offshore, Durham Morning Herald].

[3] Coan at 1.

[4] Id.

[5] Policing the Dumpers, Newsweek, November 27, 1972, at 74. [hereinafter cited as Policing].

Deballasting occurs after empty fuel or cargo tanks have been filled with salt water ballast on return voyages. When approaching ports through heavy seas, captains are reluctant to lose stability by pumping out ballast until the sheltered waters (and valuable beaches) of the port are close at hand.[6] The ballast-pumping problem is common to dry-cargo vessels and tankers alike, although more acute with the latter since they often travel empty to loading ports. Tank flushing is simply washing out the residue of the old oil cargo to make clean tanks for new cargo. Some ports have facilities for this activity, but in many cases they are inadequate or non-existent.

As stated earlier, no new tanker leakage has exceeded the disastrous damage of the Torrey Canyon. This does not mean that the potential for such a disaster is not still there. There are presently 4,000 tankers carrying oil cargo around the world. A sudden storm, an inner explosion, a collision, or some other negligent act could send thousands of gallons into the oceans. In the month previous to the date of this paper, this author noted no less than three ship collisions. Perhaps the most important for the purposes of this paper was the collision of two ships off Cape Hatteras, North Carolina. The United States Coast Guard estimates that 20,000 gallons of oil were discharged by the collision. The oil control expert at the Coast Guard Station in Portsmouth, Virginia, indicated that the oil broke off in countless patches and scattered in many directions. To his knowledge, there were no reports of slicks reaching the coast as most of the oil was carried out past the Gulf Stream. Attempts to harvest the oil proved unsuccessful as the two ships remained together and drifted many miles. On the question of liability, there is evidence to show that possibly both parties were negligent. The difficulty of finding fault is the major resson for the lengthy investigative process and an important factor in considering what should be the proper basis for liability. Recent spills off the coast of Florida have forced that state to pass strict oil pollution laws. These laws are presently being tested for their constitutionality in the United States Supreme Court and are discussed more fully, infra. Oil leakages, despite the absence of a willful state of mind, need to be subject to strictly enforced international laws.

Written figures and press reports often fail to dramatize the adverse effects of oil pollution. Until recently, most laymen and responsible officials were simply not aware of the deteriorating condition of the world's oceans. Most of us were laboring under the false concept that our oceans were so massive that they could absorb an unlimited amount of waste. Not too many years ago, the oceans could handle the waste. At present rates of discharge, the oceans cannot keep up. Thor Heyerdal, on his trip across the Atlantic Ocean during the summer of 1970, also reported this ocean-wide pollution.[7] "Clots of oil are polluting the midstream current of the Atlantic Ocean from horizon to horizon .... During the 27 days of sailing so far, oil lamps in varying quantities have been observed uninterruptedly every day .... It is entirely possible that the pollution area spans the entire ocean, from the coast of Africa to the coast of tropical America." Each gallon spilled in the ocean depletes the oxygen in 400,000 gallons of sea water, thus decimating all fish life in the area.[8] The magnitude of the problem becomes apparent when this figure is multiplied by hundreds of thousands of gallons of discharge oil.

Oil pollution results in varried damage. The tarnishing of beaches and recreation areas is probably the most notorious effect of oil pollution. Any attempt to place dollar figures on such damages does not accurately measure the

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[6] Swan, International and National Approaches to Oil Pollution Responsibility: An Emerging Regime for a Global Problem, 50 Ore. L. Rev. 506, 509 (1971).
[7] Coan at 1.
[8] Policing at 74.

injury to man's esthetic values. It should be noted, however, that clean-up of damaged beach areas is expensive, and never seems to be totally effective. Inevitably thousands of marine birds are killed, especially species which live in close association with the sea surface. Auks, a surface dwelling species, have been reduced in the English Channel from 100,000 in 1908 to 200 following the 1967 Torrey Canyon incident.[9] From a monetary viewpoint, the commerical shell-fishing industry is heavily struck by the effects of oil pollution. Most species of shell fish and crabs are not directly killed by oil, but they become so contaminated by the taste of oil that they lose their commercial value. Unfortunately these shellfish seem to pass their contamination on to succeeding crops and thus ruin their value for many years. Studies indicate that ocean fishing has not as yet suffered extensive damage from oil pollution. Since half of the world's catch of fish comes from .1 per cent of the ocean's surface, it is obvious that a large spill in a strategic fishing area could have a disastrous effect.[10] One of the least noted biological effects of oil pollution is the effect on algae and other microscopic organisms. These tiny organisms are a vital part of the food chain of fish and their disappearance would cause unfavorable consequences in the fish population.

How can we fight oil pollution? All possible alternate methods of operation should be considered. There are at least three. First the nations of the world could reduce their energy demands. This possibility is quickly eliminated by considering the present expansive state of the world's economy and the fact that the problem of oil discharge would still exist. The second possibility would be to find a replacement for oil as the major source of the world's energy. Inevitably the world's supply of oil will be exhausted and a new source of energy must be found. At the present time such a replacement does not exist and other solutions must be pursued. A third possibility is to seek new domestic resources of oil instead of having to ship oil halfway around the world. In the United States, this solution is appealing to many people. The domestic oil producers of the United States form a rich and powerful lobby which argues that the United States should not place itself in a position of having to rely on foreign oil to supply its vast energy. Unfortunately, the United States domestic oil resources appear to be limited largely to Alaskan reserves and offshore exploration. Unfortunately, as offshore oil exploration becomes increasingly important, the oceans must face oil pollution from a different source. Blow-outs, such as the one that occurred off the coast of Santa Barbara, California, are potentially dangerous due to their proximity to shore. Shifts in the ocean floor also may result in oil discharges.

As deep-drilling techniques improve, exploration will be extended to depths of 10,000 feet or more and into areas outside of territorial waters. The expansion of drilling into international waters will be the subject of international agreements and controls. At this date, oil from offshore drilling is of minor importance when compared to international shipments of oil. The replacement of foreign oil shipments with offshore reserves does not remove the threat of oil pollution.

EXISTING AGREEMENTS AND TREATIES

Considering the present state of oil pollution and energy needs, legal

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[9] Coan at 1.

[10] Hearings on Testimony by Max Blumer Before the Subcomm. on Air and Water Pollution of Senate Comm. on Public Works (June, 1970).

concepts and arrangements appear to offer the best immediate relief from the problem of oil discharge. A legal solution may emerge from existing pollution agreements is in order.

Following the Torrey Canyon disaster, the United Nations' Inter-Governmental Maritime Consultative Organization (IMCO) convened and prepared two treaties to deal with Torrey Canyon situations. The 1969 Convention in Intervention on the High Seas in Cases of Oil Pollution Casualties would eliminate the confusion and indecision of the Torrey Canyon. The Convention would permit governments to take the measures necessary to prevent, mitigate, or eliminate "a grave and eminent danger" of such pollution if "major harmful consequences" could otherwise follow. Since it is apparently unclear under existing international law what rights a nation has to act against a foreign vessel on the high seas, this Convention is a needed clarification that will allow nations to move rapidly against oil pollution.[11] The only difficulty with this convention is the possible conflict of interpreting the terms "grave and eminent danger" and "major harmful consequences." The terms should be broadly interpreted so as to permit immediate and effective action in any given situation.

The second treaty concerns the more delicate question of civil liability for oil pollution damage. Most parties agreed that the pollution risks of maritime oil transport should be borne by the tanker and oil industries profiting from the shipment of oil rather than innocent parties, their governments, or the environment. The difficult question is what should be the maximum limit of civil liability. The 1969 International Convention on Civil Liability for Oil Pollution Damage became a compromise between France, Germany, The Republic of China, the United States, the United Kingdom, and eleven other signatory nations.

The convention applies to all seagoing vessels which carry crude oil as a cargo. The fact that the ship is registered in, or the owner is a citizen of, a noncontracting state makes no difference as to the owner's liability if the Convention otherwise applies and suit is brought in the courts of a contracting state. Under the convention government agencies, as well as individuals and entities in the private sector, may present claims.[12] The nationality of claimants is not material, but the Convention applies only to pollution damage suffered within the territory or territorial waters of a contracting state and to remedial measures designed "to prevent or minimize such damage."[13] Recoverable losses are determined by the "pollution damages" which is defined as losses or damages outside the ship carrying oil caused by contamination resulting from the escape or discharge of oil.[14]

After much discussion, the representatives chose absolute liability with certain defenses as the scheme for establishing responsibility and the owner as the entity on whom such liability is placed. Defenses to strict liability are acts of God, war, and third parties. To this author these defenses appear too broad and allow escape routes from liability. The principle behind strict liability is that the costs of unavoidable accidents should be borne directly by that enterprise and not by individuals or the governments suffering damage. The possibility of insurance and remedial suits against third parties support the strict liability concept.

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[11] Hearings on Testimony by Coan Before the Sierra Club Subcomm. on Ocean and International Environment, 3 (May 20, 1971). [hereinafter cited as Hearings by Coan Before the Sierra Club].

[12] Civil Liability Convention, 9 International Legal Materials 45. [hereinafter cited as Civil Liability].

[13] Id. at 47.

[14] Id. at 46.

As stated earlier, the limit of liability was a major point of compromise in the Convention. As a result the extremely low limit, $134 per adjusted net ton or $14 million, whichever is less, is the major failure of the Convention.[15] No limitation applies if the incident results from the "actual fault or privity" of the owner. The term "actual fault or privity" of the owner may cause problems of interpretation.

Applying the Civil Liability Convention to the Torrey Canyon will show the inadequacy of the $134 per ton figure. Liability would have been limited to about $8 million when the British and French governments alone originally had claims totalling $16 million. The Torrey Canyon experience does not adequately indicate the possibility of damage from supertankers now being constructed. When the convention's nations met again in 1971, the United States delegation to the negotiations on the supplemental treaty stated that a $30 million limit would be inadequate to compensate fully victims of a major oil pollution incident. Various figures have been suggested for the limit of liability. The United States has proposed a figure of 1 billion francs (67 million dollars).[16] The Center for Law and Social Policy has suggested the figure of 100 million dollars.[17] The Sierra Club is not sure that limits on amount of liability should be retained.[18] Many environmentalists were upset when the United States Delegation to the Convention included two non-governmental members of the oil industry who might seek a lower limit on the total liability.[19] A hundred million dollars would seem to be an adequate figure, but it is doubtful that the insurance industry could cover such amount. It must also be remembered that the signatory nations must accept the figure and such acceptance is considerably in doubt. A supplemental provision of the convention establishes a procedure to ensure that every owner of a ship registered in a contracting state and carrying more than 2,000 tons of bulk oil as cargo shall be responsible to meet his potential liability. This can be achieved by insurance, bank guarantee, or similar devices to insure a source of assets beyond the reach of general creditors.[20]

Jurisdiction under the convention on civil liability allows an action based on pollution damage to be brought in the courts of the contracting states where damage has been sustained or preventative measures undertaken. Direct actions may be brought against the insurer or other person providing financial security for the owner's liability. Reasonable notice must be given to the defendant although personal, in-state service is not required. The rights created by the Civil Liability Convention have a limitations period of three years from the date of damage and in no event longer than six years from the date of the first of a series of occurrences comprising a single incident.[21]

With the exception of the amount of liability, these conventions provide a firm working base. Like all conventions, these are certain limitations. The treaty does not go into effect until sufficient ratification by the governments of the contracting parties. Furthermore, the provisions of the conventions do not effect nations not parties thereto. Although many of the sixteen signing nations are heavy oil producers and shippers, most nations are still not party to

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[15] Hearings by Coan Before the Sierra Club at 4.

[16] Letter from Richard Frank to John Pendergrass, September 28, 1971. Richard Frank is a Fellow of the Center for Law and Social Policy. [hereinafter cited as Letter from R. Frank, September 28, 1971].

[17] Id.

[18] Letter from Julia N. Hillis to John Pendergrass, August 9, 1971. Julia N. Hillis is a member of the Sierra Club.

[19] Letter from R. Frank, September 24, 1971.

[20] Civil Liability at 52.

[21] Id. at 55.

the convention. The confusion over territorial water and contiguous zones is another part of international law which may impart uncertainty to these treaty provisions.

Another concern about the international oil pollution treaty is fear that if ratified by the United States it may abrogate stronger features of domestic law. Inconsistent provisions of federal and state law would be pre-empted by this convention. While a uniform, international system of liability is highly desirable in principle, a convention pre-empting domestic law should provide at least as much protection to our government and citizens as would our own law.[22] A comparison of the United States 1970 Water Quality Improvement Act and the 1969 Convention on Civil Liability for Oil Pollution Damage shows differences, as expected, in the area of limitations of liability. Under the Convention, the amount must be spread around among all claimants, and all further rights are extinguished. The Water Quality Improvement Act's limits, though monetarily similar ($100 per gross ton or 14 million), apply only to United States Government clean-up costs, and private and other claims are not foreclosed or limited by this act.[23] With the full amount available to the Government, private parites are free to pursue other remedies. An international treaty with more adequate levels of compensation could remove this possible conflict.

As indicated earlier, the State of Florida is presently facing a similiar situation with respect to the 1970 Water Quality Improvement Act. Serious oil spills endangered the valuable Florida beaches and forced the legislature to pass new laws. The result was Florida's Oil Spill Prevention and Pollution Control Act of 1970.[24] Enacted shortly after the Federal Act, the Florida law filled several gaps left by the Federal Act. The basic areas of conflict between the two laws are: (1) the absolute liability of the shipowner. (2) the restricted right of the shipowner to limit personal liability for negligently caused damages, and the scope of that right with respect to insurers and securities, and (3) the question of whether a state may exclude from its harbors and waters a vessel whose owner does not post security against possible oil spills.[25] Although the Act was originally effective as of March 15, 1971,[26] a court order was issued on March 19, 1971, temporily restraining its enforcement. An appeal has now reached the Supreme Court, and the constitutional question of whether a state may move beyond the 1970 Water Quality Improvement Act and general maritime law is soon to be decided. Regardless of the outcome in the Supreme Court, the Florida law should help the environment. As a result of the Supreme Court Case, the Congress should be put on notice of the existing gaps in the federal act and thus should try to fill the gaps by amending the Act and exercising federal control along the lines of the state act.[27]

If international agreements succeed in remedying the Torrey Canyon situation, the problem of willful discharges (bilge pumping, deballasting, and tank flushing) remains to be settled. The willfulness of the discharge indicates that the problem is preventable if the appropriate laws are enforced. Previous attempts to solve this problem have failed because of lack of enforcement. The 1954 London International Convention for the Prevention of Pollution of the Sea by Oil is the first attempt to limit oil discharges. The basic provision of the convention was to prohibit the discharge of oil within fifty miles of the coast. (This limit was generally extended to a hundred miles by 1962 Amendments.) Although oil water reporting devices were required on all ships and record books were to be maintained

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[22] Hearings by Coan Before the Sierra Club at 6.

[23] Id. at 6.

[24] Fla. Ann. Laws. # 376 (1971-72). [hereinafter cited as Fla. Ann. Laws #376].

[25] McCoy, Oil Spill and Pollution Control: The Conflict Between State and Maritime Law, 40 Geo. Wash. L. Rev. 105 (1972).

[26] Fla. Ann. Laws. #276.

[27] Id. at 122.

to account for oil discharges, the convention failed to achieve beneficial results. The simple explanation was that enforcement was left to the flag states and that penalties against a violator could be no more than a fine of $2,500.[28] Let us consider the position of the ship captain who needs to discharge some waste as he prepares to enter port. He has two alternatives. First, he can proceed to port and use shore facilities to discharge the waste. Upon arrival he finds that the facilities are non-existent or grossly inadequate. Delays often occur. He may or may not be required to pay a substantial fee for use of the port facilities. On the other hand, the captain may release the oily waste in the ocean waters just outside the port. Chances are the waste will soon be lost among the waste of other ships, thus making it an impossible task to decide which ship discharged what waste. The only nation which can enforce the convention is the flag nation which may be half way around the world and which may simply turn its head. Even if the captain is caught, the maximum fine which may be imposed on the captain is $2,500. This fine would probably be not much more than the charge for use of the port waste facilities. Obviously the captain would take the second alternative and thus end up polluting the oceans.

The 1954 Convention has additional shortcomings. The provisions allow exceptions for discharges made to protect the ship or cargo, to save life, and to get rid of tank-settlement. As formulated, these exceptions were probably justified, but in practical effect the exceptions could easily become unjustified escapes from liability. Another shortcoming of the convention is that it allows unlimited freedom to discharge outside the 100-mile limit. Unlimited dumping in this area would eventually adversely effect marine food chains. As a result of this shortcoming, the 1969 Amendments to the 1954 Oil Pollution Convention sought to extend the general ban on deliberate discharge to all areas of the Sea. Since proper enforcement is still lacking, these amendments appear to be only window dressing.

As of November, 1972, new hope has arisen for the oceans and our environment. The hope comes from a new London Convention which seeks to limit the practice of dumping waste material at sea. After 15 days of tough bargaining by 250 delegates from 79 signatory countries and 12 observing nations, a new convention treaty emerged. The basic thrust of the treaty is to ban the dumping of oil, mercury and cadmium compounds or highly radioactive wastes into the ocean. The signatory nations have pledged themselves "to take all practical steps to prevent the pollution of the sea by the dumping of waste and other material that is liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea."[29] The treaty has been applauded by Russel E. Train, President Nixon's advisor on environmental quality. Mr. Train states "the agreement is a historic step toward the control of global pollution and the United States will continue to lend its full support to efforts at international cooperation to protect the environment." Other delegates called the convention a step in the right direction. This author believes the optimism of the delegates may be justified. First, the 79 signatories in the recent convention composed far larger number of participants than previous conventions and as a result more of the world has taken the pledge. In fact, the only major power unrepresented at the London Convention was China. A second reason for hope is the intangible spirit of the convention. Despite many differences of opinion, the delegates seem to have an attitude that our environment has suffered enough and that it is time for the nations of the world to come together and protect it. From a negative point of view, the agreement may have weaknesses. First

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[28] Hearings by Coan Before the Sierra Club at 10.

[29] Editorial, Durham Morning Hearald, (Durham, North Carolina), November 18, 1972, at 4 A.

there is an escape clause which allows the bans on dumping to be disregarded in "an emergency". This provision is still an improvement over former conventions since it requires consultation with other nations particularly affected before the dumping is carried out. A second uncertainty of the convention is that the operational details, including creation of an international governing body and agreement on enforcement procedures, remain to be worked out. They will be decided next year after the convention takes effect upon ratification by the signatory nations. If truly effective enforcement procedures are implemented, this convention will indeed be an "historic step" toward the control of global pollution. If not, our oceans will continue to grow darker.

Before leaving the area of existing agreements, there are two pieces of recent United States legislation that should be mentioned. Although they were not specially enacted to deal with the problem of oil pollution, the National Environmental Policy Act and the Water Quality Act which was passed just prior to the November elections may have a surprising effect in the fight against oil pollution. The Water Quality Act provides stiff penalties for discharges within the navigable waters of the United States. Since the term "navigable waters" includes the territorial waters, this act should apply to oil discharges within this area and act as a strong deterrent to such discharges. This act also establishes the federal government as the major governing agency over clean-up procedures. The National Environmental Policy Act, commonly referred to as NEPA, became law on January 1, 1970. NEPA is the initial formulation of national goals for the environment. The procedural core of NEPA is the requirement that all federal agencies must prepare environmental impact statements on all matters which might adversely effect the environment. In its two year history, NEPA has been an increasingly effective tool for environmentalists who seek to prohibit the construction of dams and other damaging projects. A new suit filed by three environmental groups against the Commerce Department may attack the construction of the enormous new supertankers in relation to environmental impact statements. The suit seeks to block federal subsidies for supertanker construction, at least until the Commerce Department studies the environmental impact of the big vessels. It is doubtful that such suits under NEPA will actually be able to stop the construction of supertankers, but they will bring attention to the problem and force the industry to employ ecologically sound methods in the construction of such ships.

IMPROVEMENTS

In suggesting possible improvements for the solution of oil discharges, I think it appropriate to begin with a suggestion that the world re-examine its delicate environmental balance. The beginnings of this spirit were present at the London Conference. Oil free oceans should be a concern of all whether producer, shipper, or consumer. A letter from the American Petroleum Institute agreed with this basic contention.

> In its most simplified form, our position can be summarized as follows: we recognize that the control of pollution on the high seas is a subject of legitimate interest in the international arena. We further agree that some form of regulation is necessary to control pollution of this nature. But we are not at all certain what form these regulations should take, nor under whose auspices they should be formulated.

From this statement of the Petroleum Institute and the nature of the problem, it is obvious that no solution to oil discharges would be effective unless it were truly international. As the most international and prestigious of world organizations, the United Nations would appear to offer the best possibility of enforcement. Despite failures in the areas of international politics, the United Nations has often been a center of cooperation in technical and economic areas. With the recent admission of Communist China, the United Nations has become a truly international organization which already has a sizable staff of technical people necessary to enforce international agreements. A strong governing board chosen from the members of the United Nations could be an effective enforcer of oil discharge agreements.

As frequently indicated throughout this paper, no treaty can be effective without proper enforcement. Proper enforcement can occur when it becomes less expensive to obey the treaty provisions than to violate them. Willful violators will be stopped by stiff penalties and better detection procedures. Trying to put specific figures on fines and penalties is a difficult task. Probably the best idea is to set a high maximum fine ($25,00) and then let the governing board assess according to the seriousness of the violation. Detection of willful discharges has always been a problem. A governing board under the United Nations should have greater resources for the detection of violations. A future help in this area could come from efforts to develop reliable methods of "fingerprinting" oil as a way of enforcing laws against ocean oil spills.[30] When the techniques are perfected, scientists say that some international agency might be formed to supply samples of every oil shipment and keep fingerprinting data. This could make it possible to match fingerprints in a spill with those on file, and thus determined the source of the pollution for purposes of legal prosecution. The basis for the fingerprinting of oil is that petroleum from different regions has detectably different chemical composition as a result of different geological environments. Fortunately these minute chemical differences seem to persist in recognizable form even after the oil has been exposed to water, weathering, and other forms of degradation for several months.

As a practical matter, wastes from vessels must be discharged somewhere. Accelerated international efforts to provide the world's ports with adequate facilities for the reception of these wastes should be an immediate goal. Supplemental international standards should establish design, equipment, and operational requirements for ships which would facilitate proper retention of wastes on board and obviate any "practical" necessity for their discharge at sea. Improvements in the handling of Torrey Canyon situations are not as easily advanced. The major concern is that the damaged parties have a full recovery. An increase in the amount of total liability to a hundred million dollars should cover this concern. Other improvements should deal with the prevention of such major accidental spills from large tankers. Some of the savings made by larger ships should be used for safer designs and constructions. International standards on vessel design, construction, equipment, and standards of maneuverability should be set. As the ships become larger, it is essential that there is regulation of navigational safety, such as mandatory sea lanes.

The giant tankers are heading our way whether we want them or not. As indicated earlier, the potential for disastrous accidents is not the only environmental problem caused by the supertankers. The new tankers are so big that they require water depths of a hundred feet, which is about fifty feet more than most eastern United States harbors accomodate. This means that one of several measures must be taken. One is that the harbors be deeply dredged, which is an

[30] Article by Wilford, The New York Times, (New York), April 4, 1971 at 60.

extremely expensive process. A second alternative would be to pipe the oil into port facilities while the ships remain outside the harbor. The possibility for accidents and discharges multiply in the crowded condition of a major harbor. A new suggestion by the maritime administration has called for the construction of two new floating superports.[31] Located outside Delaware Bay and off the Louisiana Coast, these two ports would receive all oil imports for the East and Gulf Coast. This plan, if adequate boom and other physical safeguards were present, might provide the answer to the supertankers' docking problem. If safeguards are lacking, it would be inequitable to endanger these areas by the possibility of massive spills. This problem requires immediate study and governmental attention. Without better information, the superport idea appears to be the best ecological alternative.

CONCLUSION

Oil discharges are an international problem which require an international solution. Although present international agreements are not ideal, they would be more effective if there were proper enforcement. Enforcement should be the duty of a truly international body that has broad resources. Although remedial agreements are still needed, the thrust of future oil pollution "legislation" should be on prevention of oil spills. With effective preventive "legislation", our oceans and coasts will not have to suffer and oil spills may become past history. The Torrey Canyon disaster, as past history, may have been a blessing in diguise in that it alerted the world's population to the need of effectively preventing future spills.

LEGAL ACTION TO CURB POLLUTION OF THE SEA

Keith Hennessee

> Roll on, thou deep and dark blue Ocean--roll!
> Ten thousand fleets sweep over thee in vain;
> Man marks the earth with ruin--his control
> Stops with the shore; upon the watery plain
> The wrecks are all thy deed, nor doth remain
> A shadow of man's ravage, save his own,
> When, for a moment, like a drop of rain,
> He sinks into thy depths with bubbling groan,
> Without a grave, unknelled, uncoffined, and unknown.[1]

It is incredible that in the one hundred and sixty odd years that have passed since Byron wrote the lines quoted above, man has come to the point where he worries not about his power to master the ocean, but to keep it alive; the oceans of the world are now filled with the dhadows of mens' ravages and pessimistic scientists are now predicting that if pollution should continue at the present rate, the world may be in serious danger from a shortage of oxygen within the next one hundred years.[2] This paper will attempt to survey the general problem of pollution of the sea in a legal context in order to get a good idea of the challenge necessary anti-pollution measures present to international law.

Pollution of the sea is not merely a concern of environmentalists; despite the fact that pollution is sometimes referred to as the classic example of an external diseconomy,[3] it is a serious problem for a number of industries, among them, fishing, tourism, recreation, and shipbuilding. An interesting example is that of a chemical company that developed an epoxy paint for the bottoms of ships which could be applied underwater, representing an enormous potential saving in dry-docking costs for maintenance. The firm successfully tested the product and put it on the market, but it was then discovered that the high concentration of pollutant phosphates in the waters off the Florida coast caused the paint to peel off within a short time after application.[4] And this is not to mention the in-

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[1] Byron, Child Harold's Pilgrimage, Canto IV, Verse 179 (c. 1810).
[2] O'Connell, Continental Shelf Oil Disasters: Challenge to International Pollution Control, 55 Corn. L. Rev. 113 (1969).
[3] Kneese & Nobe, The Role of Economic Valuation in Planning for Water Resource Development, 2 Nat. Res. J. 445 (1962).
[4] Personal conversation of the author with Mr. Vance Berry, Sales Representative of the SYLK Corp. (Dec. 1972).

jury to the general public's aesthetic sensibilities and loss of recreational pleasure that results from fouled beaches and floating oil slicks.

SCOPE OF THE PROBLEM

Locus of the Polluting Act

A factor of prime importance is the locus of the polluting act, and it is important to distinguish this locus from the locus at which it is possible to apply preventive measures. Because all rivers eventually find their way to the sea, most of the pollutants dumped in the internal waters of a state get there as well; and what began as a local problem, becomes a state problem, becomes a national problem, and finally an international problem. A similar analysis applies to polluting acts occurring in the territorial waters of a nation, in the contiguous zone, and on the high seas.

Types of Pollution

In considering legal action to curb pollution, it is important to take note of the various types of pollution. Oil is perhaps the most serious problem and it may come from a variety of sources. First, there are the gigantic tankers, some of which now carry up to five hundred thousand tons of crude oil; pollution may result from wrecks, such as that of the Torrey Canyon in 1967,[5] from dumping, or from accidental spillage when a valve is left open. Secondly, serious pollution of the sea may result from offshore oil drilling operations, such as happened in Santa Barbara, California.[6] Third, it is normal practice on seagoing ships to fill empty fuel tanks with sea water as ballast and then to discharge the water back into the sea when it is no longer needed, carrying with it large quantities of residue oil left in the tanks. Fourth, substantial amounts of oil find their way into the bilges of a ship; when the bilges are pumped out, this oil is discharged into the sea.[7] Fifth, aircraft often discharge excess fuel over the sea as a safety precaution prior to landing. Some states, such as New Jersey, have dumped their garbage at sea as a means of disposal. Sewage is regularly discharged into rivers and bays and contributes more to the massive load of pollution which the ocean is expected to swallow. Radioactive wastes are normally dumped at sea. All types of ships, from the bay fisherman's dinghy to the giant passenger liners use the ocean and the bays and rivers which flow into it as their convenient disposal for all types of waste or sewage which they may produce. Finally, there is the serious matter of what to do with obsolete munitions such as nerve gas. The only solution thus far has been to throw it in the ocean (preferably the deep part) and hope nothing happens to it. And lest one should be tempted to forget it, there is the matter of thermal pollution which may cause unpredictable, and certainly harmful, alterations in the ecological balance of the sea.[8]

Identity of the Polluter

This plethora of possible sources of pollution make the problem of stop-

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[5] Newsweek, Apr. 10, 1967, at 51.
[6] New York Times (New York City), Feb. 2, 1969, p. 54, at col. 2.
[7] Nanda, The Torrey Canyon Disaster: Some Legal Aspects, 44 Den. L.J. 400 (1967).
[8] Id. at 402-04.

ping it an almost impossible one. But further complicating the picture is the question of the identity of the responsible actor. It may be a government, or governments, of a nation or nations; it may be an individual; or it may be a national or multi-national corporation. These are significant considerations in formulating a legal approach to the problem.[9]

POSSIBLE TYPES OF ACTION

Having considered the scope of the problem, the analysis turns now to the possible types of legal action available and the difficulties that will be encountered. The most frequently used approach to curb pollution is the penal statute. In the United States this approach is embodied in the Oil Pollution Act of 1961.[10] This act provides penalties for the discharge of oil by ships of American registry in the contiguous zones and territorial waters and for the discharge of oil by any ship within American territorial waters. The Water Pollution Act of 1972[11] stiffens these penalties to a maximum fine of $50,000 per offense. The Oil Pollution Act of 1961[12] was the enacting legislation for the International Convention for the Prevention of Pollution of the Sea by Oil, London, 1954.[13]

In the United Kingdom, discharges of oil are prohibited by all ships within the territorial and inland waters by the Oil in Navigable Waters Act of 1955.[14] Its provisions are similar to the United States Oil Pollution Act of 1961.[15] The Continental Shelf Act of 1964[16] provides penalties in the form of fines for the discharge or escape of oil into the sea as a result of operations to explore or exploit the seas resources in disignated areas. This Act also covers pipelines, and fines may range up to £1,000.[17]

An extremely broad provision is that of Finland, perhaps because of the consciousness of the Finns as a fishing people. Their Act[18] provides penalties for the discharge of waste or any other substance which causes harmful pollution of the sea, or of the Finnish territorial waters, or those of any other nation. The Act applies to all vessels within Finnish territory and to all Finnish vessels wherever they may be and to all exploratory or exploitative activities on the Finnish continental shelf.

It is interesting to note that the United Kingdom places responsibility for enforcement of the penalties in the Board of Trade,[19] whereas the 1972 Act of the United States places responsibility for enforcement in the Environmental Protection Agency.[20] A consistent complaint among American environmentalists has

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[9] Id. at 405.
[10] 33 U.S.C.A. SS 1001 - 1015 (1970).
[11] Pub. L. ____ (Oct. 28, 1972). Senate Conference Report on Water Pollution Control Act of 1972, 93d Cong., 2d Sess. (Comm. Print 1972). Raleigh News and Observer, Nov. 11, 1972, at 3, col. 4.
[12] 33U.S.C.A. SS 1001 - 1015 (1970).
[13] 12 U.S.T. 2989, T.I.A.S. 4900, 37 U.N.T.S. 3.
[14] 3 & 4 Eliz. 2, c. 25.
[15] 33 U.S.C.A. SS 1001 - 1015 (1970).
[16] Statutes 1964, c. 29.
[17] Id. S 5 (2).
[18] Law Concerning the Prevention of Pollution of the Sea, Helsinki, 5 Mar., 1965. Reproduced in United Nations Document A/AC.135/11 at p. 84.
[19] Statutes 1964, c. 29.
[20] Pub. L. ____ (Oct. 28, 1972). Note 11 supra.

been that governmental agencies responsible for enforcement of anti-pollution and conservation laws have been so swayed by industry lobbying and often by industry representatives serving in the agency that enforcement has been lax or non-existent.[21]

A second legal method for curbing pollution is civil lawsuits against the responsible person or firm. The suits may seek either damages to compensate for harm already done, or injunctive relief to abate the pollution. The Water Pollution Act of 1972[22] provides for such actions within the United States, but limits standing to those citizens who can show some actual injury from the pollution. This limitation stems from the United States Supreme Court's holding in Sierra Club v. Morton.[23] The difficulties of proof inherent in water pollution, particularly that occurring in the sea, combined with the limitation of standing to those who can show some direct injury, render this method of curbing pollution of the sea of little use save in the exceptional case like that of the Torrey Canyon or the Santa Barbara disaster where the oil slick traces all the way back. A useful device in this area is to grant standing to the government of the affected nation or state to represent its citizens in the seeking of injunctive relief, or in the recovery of damages, especially where the government has borne most of the cost of cleaning up.

A third avenue of approach to legal control of pollution is through technical regulatory schemes. These may prescribe standards for oil handling equipment, or for the construction of waste control devices in shipbuilding.[24] Another aspect of this method of control is an indirect one in that it would control the navigation of ships from shore stations in order to minimize the possibility of accident or collision, in the same manner that the flights of aircraft are controlled.[25]

Fourth, the polluters themselves have contributed substantially toward ultimate solution of the problem through voluntary agreements to limit pollution and to provide compensation to those injured by it. A good example of such action is found in the Tanker Owners Voluntary Agreement to Limit Oil Pollution (TOVALOP).[26] The TOVALOP recognized that traditional remedies were not always sufficient to provide compensation for costs incurred in cleaning up oil spills; and established liability for clean-up cost incurred by a nation or individuals up to a maximum of $100 per gross ton of the tanker or $10,000,000.00, whichever is less. Furthermore, the tanker responsible for the spill is presumed to have been negligent unless the contrary is shown. But, the coverage is limited to contamination of land, adjoining waters, and structures and does not cover fire or explosion damage, consequential damage, or ecological damage. Tanker owners are required to maintain insurance or other proof of financial responsibility and to avoid any problems of jurisdiction and collection, the International Chamber of Commerce is vested with jurisdiction to arbitrate all disputes.

Fifth, and most significant, are international agreements to curb oil pollution, for no nation acting alone can hope to have much success in curbing pollution of the sea so long as its power is limited to its own ships and its own territorial waters and contiguous zones.

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[21] Metcalf, The Vested Oracles: How Industry Regulates Government, 3 The Washington Monthly 45 (1971).
[22] Pub. L. _____ (Oct. 28, 1972). Note 11 supra.
[23] 405 U.S. _____; 92 S. Ct. 1361 (1972).
[24] See e.g., Pub. L. _____, SS 311 (j) and 312. (Oct. 28, 1972).
[25] Nanda, supra. note 7, at 421.
[26] 8 International Legal Materials 497 (May 1969).

Specific International Agreements

The most significant international anti-pollution measure is the International Convention for the Prevention of Pollution of the Sea by Oil, London, 1954.[27] This convention covers all ships registered in any contracting country except those under 500 tons, tankers under 150 tons, Great Lakes ships, and naval ships. It sets maximum permissible pollution criteria and requires the contracting states to enact enforcing legislation. Tankers are prohibited from discharging any oil except when more than fifty miles from land. Amendments made in 1969[28] require fitting of ships to avoid escape of oil into the bilges area, and for the ships to avoid if possible the carrying of water as ballast in fuel tanks. Exceptions are made for pollution resulting from act necessary to save life at sea and from unavoidable accidents or damage. The convention further requires states to impose penalties adequate in severity to discourage pollution and at least equal to those imposed for similar acts of pollution done within their territorial waters. Jurisdiction of disputes is given to the International Court of Justice unless the parties choose to submit to arbitration.

In addition, various bilateral treaties between nations relating to a specific problem contain anti-pollution provisions. An example is that contained in the 1942 treaty between the United Kingdom and Ireland and Venezuela,[29] relating to the Gulf of Paria, which requires the parties to take all practical measures to prevent the exploitation of any submarine areas claimed or occupied by it in the Gulf from causing the pollution of the territorial waters of the other by oil, mud, or any other fluid or substance liable to contaminate the navigable waters or the foreshore.

Another international agreement of major importance in the fight against pollution is the International Convention on Civil Liability for Oil Pollution Damage, Brussels, 1969.[30] This agreement provides that the owner of a ship at the time of an incident, or where the incident consists of a series of occurrences at the time of the first such occurrence, shall be liable for any pollution damage caused by oil which has excaped or been discharged from the ship as a result of the incident. Exceptions are provided where the escape or discharge is the result of an act of war, an Act of God, an intentional act or omission of a third party, or was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function. Joint and several liability is imposed where the pollution has been discharged from two or more ships. Liability for any one incident is limited to 2,000 francs (about $500) per ton of the ship or to a total of 210,000,000 francs (about $55,000,000). The owner is also given an equal right to make claims against himself for expenses

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[27] 12 U.S.T. 2989, T.I.A.S. 4900, 37 U.N.T.S. 3, 9 Int. Legal Materials 1. However, at this writing a major new agreement is being worked out in London. The convention would ban the dumping of radioactive waste, durable plastics, and dangerous substances such as mercury and cadmium that may find their way into the food chain. Other less noxious materials would require special permits. The convention would require each country to undertake measures and to punish violators. A country would have jurisdiction not only over vessels flying its flag, but over any vessel dumping matter that came from its shores. Raleigh News and Observer, Nov. 11, 1972, at 3. col. 4.

[28] 9 Int. Legal Materials 1 (1970).

[29] United Nations Document A/AC.135/10 at p.19.

[30] 9 International Legal Materials 45 (1970).

incurred in clean-up or in efforts to minimize the pollution damage. The agreement further requires the owners to maintain a fund or have insurance to assure ability to pay claims that may arise. Inspection and enforcement provisions are included, giving a state the authority to prevent access to its ports to any vessel carrying more than 2,000 tons of oil for which such insurance is not in force. Jurisdiction of claims is given to any court of a contracting party and courts of other contracting parties are bound to recognize such judgments of other nations' courts. A three year statute of limitations is included.

A third major multilateral agreement concerning oil pollution is the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, Brussels, 1969.[31] This gives a coastal nation whose interests are threatened by oil pollution the right to take such measures on the high seas as may be necessary to prevent, mitigate, or eliminate grave and imminent danger to its coastline following upon a maritime casualty or acts related to such a casualty which may reasonably be expected to result in major harmful consequences. This convention was undertaken in response to situations like that presented by the United Kingdom's response to the Torrey Canyon disaster where British warplanes bombed the wreck in order to burn the oil and prevent further pollution. The legality of the British action has been questioned as a matter of international law.[32]

SOME INHERENT PROBLEMS

Jurisdiction

A major barrier to effective control of pollution of the sea is presented by the problem of jurisdiction. With the exception of piracy, acts committed on the high seas have been largely immune from the jurisdiction of any nation, except that of the flag state. Frequently polluting acts go entirely undetected and offenders are immune from punishment. The two traditional views of the nature of the high seas -- res communalis and res nullis -- are simply inadequate to deal with the problem. An examination of the five traditional bases of jurisdiction[33] in international law will highlight the difficulty, but will also suggest some possible solutions.

1. The Territorial Principle. This gives nations jurisdiction over acts occurring on their own territory including their territorial waters. It is this principle which has been used in also giving a nation jurisdiction over its ships wherever they may be. This principle is the one which is most widely recognized and which is used as a basis for the international agreements to limit pollution; it has been expanded through the addition of the contiguous zones to the national territory. The 1954 International Convention for the Prevention of the Pollution of the Sea by Oil[34] extends these zones out to fifty miles for this purpose. Otherwise the contiguous zone is limited to twelve miles from the measuring baseline by the 1958 Convention on the Territorial Sea and the Contiguous Zone, Geneva.[35] Other nations such as Chile, Ecuador, and Peru have claimed two-hundred mile territorial seas and jurisdiction thereof,[36] but these have been taken primarily to

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[31] 9 International Legal Materials 25 (1970).
[32] Nanda, supra. note 7, at 418.
[33] W. Bishop, International Law Cases and Materials, 531-657 (3d Ed. 1971).
[34] 12 U.S.T. 2989, T.I.A.S. 4900, 37 U.N.T.S. 3, May 12, 1954, Art. III (1954).
[35] 516 U.N.T.S. 205, T.I.A.S. 5639, (1958).
[36] United Nations Document A/AC.135/10/Rev. 1, p. 11-12. (1968).

protect fishing rights. However, prevention of pollution is of concern to fishing nations and one may look for development in this area.

2. The Nationality Principle. This principle gives a nation the right to assert jurisdiction over its own nationals anywhere in the world. This principle has not been invoked in the efforts against pollution except insofar as it justifies jurisdiction by the state of the flag over its own ships. Significantly, however, New Zealand has asserted jurisdiction over any New Zealand Citizen or person ordinarily resident in New Zealand who intentionally or negligently damages a submarine pipeline or cable either while he is on board or by means of a ship on the high seas.[37] In as much as damage to a pipeline might well be expected to result in pollution, this might be considered an anti-pollution measure.

3. The Protective Principle. This gives a nation the right to assert jurisdiction over a person anywhere in the world who is criminally harming the nations interest. Although this could quite logically be used against polluters, its application has usually been reserved to cases of espionage, counterfeiting and the like.

4. The Passive Personality Principle. This principle gives nations the right to exercise jurisdiction over criminals when the victim of their crime is a national of the state exercising jurisdiction. This also would seem to be logically applicable to polluters in the case of a fishing nation whose catch is reduced by pollution or whose fishing equipment is damaged by such pollution.

5. The Universality Principle. This principle gives a nation the right to assert its jurisdiction over acts committed anywhere in the world. It has traditionally been applied only in cases of piracy or particularly heinous war crimes. But the rationale of its application in those cases, that these were crimes against all humanity, would seem to apply equally to deliberate acts of pollution. It's application in the case of negligent acts of pollution would probably be stretching things a bit far.

Finally, in examining the question of jurisdiction it is important to consider the assertions of jurisdiction made by nations over their continental shelves. Many nations, among them Chile,[38] Finland,[39] Maylasia,[40] The Philippines,[41] the USSR,[42] and Yugoslavia[43] have claimed exclusive rights over their continental shelf out to whatever depth can be exploited. While these assertions were made primarily for the purpose of claiming rights, it is as well relevant to the question of pollution, particularly in light of the potential pollution problem posed by offshore drilling rigs. Most other coastal states have made claims extending out to some specified depth or to the median line of a body of water separating them from some other country.[44]

Detection and Enforcement

Detection of pollution presents a particularly difficult problem. Once pollution finds its way into the ocean, there is simply no way, in the majority

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[37] United Nations Document A/AC.135/11, p. 76-77 (1968).
[38] Id. at 27-61.
[39] Id.
[40] Id.
[41] Id.
[42] Id.
[43] Id.
[44] Id.

of cases, to trace it to its source. The 1954 International Convention for the Prevention of Pollution of the Sea by Oil attempted to deal with the problem by two means.[45] First, it provided that any government may report a violation to the responsible government. Second, it required that ships carry an oil record book indicating all discharges and escapes of oil. The difficulties with both provisions are obvious, but it is at least a beginning. A more effective suggestion is that oil be marked with distinctive radioactive tracers so that it would be possible to ascertain the source of oil slicks found on the sea.[46] Records are available for most of the sewage and garbage that is dumped into the sea, though the task of compiling them is difficult.

Enforcement is another difficult problem. The United States Water Pollution Control Act of 1972 provides for, in addition to monetary penalties of up to $50,000 per offense,[47] the right to bar admission to American ports[48] or the cutting off of government contracts with firms responsible for pollution.[49] Also, this act gives the government the right to board and inspect vessels for compliance with technical regulatory standards.[50]

Problems of International Agreement

A final area of difficulty in curbing pollution is that of getting international agreement between nations with varied and often competing interests. This problem is beyond the scope of this paper but a quick look at it will be instructive. First, developing nations often quite justifiably regard pollution as an indicator of progress. They have neither the funds not the inclination to attempt to stop polluting and regard attempts by the developed nations to force them to do so as attempts to keep them underdeveloped and dependent. The rationale is even more compelling when one considers that the nations now pressing most for pollution controls got wealthy on pollution before it became a recognized problem. On the other side of the coin, nations like Finland much of whose livelihood comes from the sea want still stricter measures. Finally, the "flag of convenience" nations hope to attract still more ship registration by offering shipowners an escape from certain pollution regulations and related construction regulations.

APPLICABLE PRINCIPLES OF INTERNATIONAL LAW

Since pollution of the sea is so clearly a problem of international law, and since solution by international agreement is clearly not in the immediate future, it is desirable to look at present principles of international law which are applicable to pollution. Bystricky concludes that there is no universal or customary rule which is directly applicable, but that there are relevant principles.[51]

First. The principle of territorial integrity is applicable. No state can violate the territorial integrity of another, nor is a state obliged to suf-

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[45] 12 U.S.T. 2989, May 12, 1954, (1954).
[46] New York Times, Nov. 12, 1972, at 16, col. 2.
[47] Pub. L. (Oct. 28, 1972). Note 11 supra. S 311.
[48] Id. S 311 (p)(6).
[49] Id. S 508.
[50] Id. S 312.
[51] Bystricky, Pollution of Surface Waters and International Law, 13 Rev. Contemp. Law 37 (1966).

fer violations of its own territory.

Second. Peace must be maintained in the world and disputes between nations must be settled peacebly.

Third. There must be mandatory co-operation between nations in the economic and social spheres. This is derived from Art. I, par. 3 and Art. 55 of the United Nations Charter.

Fourth. Nations must be good neighbors. This is derived from The Preamble, Art. 1, and Art. 74 of the United Nations Charter.

Fifth. Nations must fulfill their assumed obligations. This means that nations must consider the interests of other nations before taking action that might harm them.

Sixth. Sic utero tuo ut alienum laedas. This means that each nation must use its own resources in such a manner as not to injure other nations.

From an application of these principles Bystricky reaches the following conclusions. Pollution of waters is an unavoidable result of technology; the objective is to keep it within bounds so as not to cause injury to other countries. No state is obligated to injure itself to help another state; it has a sovereign right to decide how it will use its waters, but it should notify any state that may be affected of action it is about to take. No state should expect to receive waters from another state in a completely unaltered condition.

Bystricky goes on to say that all facts and circumstances in each case should be considered; it is both undesirable and impossible to have universal rules, and that solutions will require the cooperation of technicians, economists and lawyers. In general, compensatory damages are unwarranted, except in cases of malicious intent or gross negligence. Non-culpable responsibility is not yet accepted in international law.[52]

CONCLUSION

Having surveyed the scope of sea pollution, the range of measures that have been and may be taken to combat it, the major areas of difficulty that these measures present, and some of the applicable principles of international law, one can begin to evaluate the possible methods of curbing pollution of the sea. At this point, only a few very general conclusions are in order. First, international agreements such as the 1954 International Convention for the Prevention of Pollution of the Sea by Oil seem to offer the best possibility of success. However, since international agreements are left to individual nations to enforce and comply with, they are not the final solution. In short they are simply a means of getting nations to take steps together which they might be reluctant to take individually because of competitive and political pressures.

Second, bases for bringing civil actions against polluters of the seas need to be expanded. Environmental group suits represent a significant source of pressure against polluters which cannot presently be brought to bear against them. And as Justice Douglas said in his Sierra Club v. Morton dissent,[53] the inanimate objects of the world need legal protection; it is they who are being injured.

Third, jurisdiction remains a major obstacle to effective control of pollution of the sea. While some expansion can be expected through the extension of the continental shelf claims, one should also look at the traditional theories in the light of the real, harmful effects that pollution causes. And here, of course,

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[52] Id. at 73-75.

[53] 405 U.S. at ___, 92 S. Ct. at 1369-70 (1972).

international agreement is of the essence.

Fourth, one must be content with small steps, but demand a steady pace. The falsity of the maxim about spitting in the ocean is proven by the enormity of the sea's pollution.

INTERNATIONAL CONSERVATION OF MARINE MAMMALS

Bill Raney

> Seals, sea otters, cetaceans (whales, dolphins, and porpoises), walruses, sea lions, and polar bears are either nearing extinction or are in a seriously depleted state.[1] On the high seas...the freedom for nationals of all countries to fish where they please has been accepted as one of the 'freedoms' of the seas almost as an article of faith for generations, and this general principle was reaffirmed in the High Seas Fisheries Convention of 1958.[2]

The above two quotations point vividly to the need for international co-operation for the purpose of protecting the world's sea mammals. After many years of watching ocean mammals decrease, there is evidence now that the world community is ready to try to reverse this trend. Article I, section 2, of the 1958 Geneva Convention states it this way:

> All States have the duty to adopt, or to co-operate with other States in adopting, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas.[3]

Though probably every nation would agree with the above statement, this does not solve the world's problems. There are many hurdles to be reckoned with before effective protection is given to ocean mammals. This article will attempt to study present protection measures and current problems to determine what measures need to be taken to solve these problems.

The existing protection methods can be broken down into three Areas: I. International Agreements; II. Unilateral State Action; and III. Non-Governmental Action.

I. International Agreements

International agreements are by far the most effective of the present methods of international protection and conservation of marine mammals. This is due to the fact that agreements are recognized in international law. By their very nature they denote a co-operation between states which is essential in deal-

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[1] A. Herrington and L. Regenstein, The Plight of Ocean Mammals, 1 Environmental Affairs 792 (1971-72). [hereinafter cited as Herrington].

[2] J. L. Kask, Criticism of the Marine Science Commission Recommendations on International Fisheries Organizations, 4 Law of the Sea 286 (1969).

[3] Convention on Fishing and Conservation of the Living Resources of the High Seas, T.I.A.S. No. 5969, 52 Am J. Int'l. L. 851 (1958).

ing with an international problem. Some of these agreements, however, have met with very great success, and others have not been successful at all. In order to analyze why this has been true, it is necessary to look at the existing agreements in greater detail. Agreements concerning sea mammals can be easily divided into two types for the purpose of analysis, those dealing with seals and those dealing with whales.

A. Seals

In the last half of the nineteenth century, sealing in the North Pacific by the United States and Russia proved to be very profitable. This was due to the ease of harvesting the seals. Each year the seals migrate to islands in the North Pacific owned by Russia and the United States and are easily killed while on land. Russia and the United States quickly saw the need for protection of the seals and passed legislation regulating seal hunting on their islands. The profitability of the venture soon attracted others to the hunt, principally Japan and Canada. Since neither of these countries owned land areas which the seals inhabited, they resorted to taking seals in the open sea on their migrations. This proved destructive of the seal herds to the point that the seals were threatened with extinction in the early 1900's.[4] The need for protection was recognized by the major sealing countries, and in 1911, the Convention for the Preservation and Protection of Fur Seals was signed by the United States, Russia, Japan, and Great Britain (for Canada).[5] This has proved to be the most successful of all international fishing agreements.

All members agreed to prohibit pelagic (open sea) sealing. Russia and the United States were each given the responsibility of managing the herds that used their islands. Japan and Canada each got fifteen percent of the annual harvest of both Russia and the United States in return for abstaining from pelagic sealing.[6] Under this arrangement the seal herds recovered rapidly.[7] Japan withdrew from the Convention prior to World War II, but a new convention was signed in 1957 which was essentially the same as the 1911 agreement, with the exception that a permanent Commission was set up to conduct research and make recommendations.[8]

As successful as it may have been in the past, there is recent evidence that the North Pacific fur seals are once again diminishing in number.[9] This has led conservation groups in the United States to push for complete protection of these animals. It seems likely, however, that Canada and Japan who get a share of the United States' harvest would once again resort to the more destructive pelagic sealing in the event the United States ceased sealing, unless the United States provided for some suitable economic settlement.

Where there are only two countries involved in harvesting seals in a particular area bilateral agreements have proved very effective. There treaties usually provide for quotas, seasons, methods of taking, protected areas, and

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[4] J. B. Henderson, The Fur Seals and the Bering Sea Award, American Diplomatic Questions 12 (1901). [hereinafter cited as Henderson].
[5] Convention for the Preservation and Protection of Fur Seals, July 7, 1911, 37 Stat. 1542, U.S.T.S. 564.
[6] Id at 810.
[7] W. M. Chapman, The Theory and Practice of International Fishery Development-Management, 7 S. D. L. Rev. 421 (1970). [hereinafter cited as Chapman].
[8] Interim Convention on Conservation of North Pacific Fur Seals, Feb. 9, 1957, T.I.A.S. 3948.
[9] Herrington at 800.

joint research. Recent examples are a Norwegian - Russian agreement in 1957,[10] and a Norwegian - Canadian agreement signed in 1971.[11]

A third agreement which must be looked at concerning seals is the Antarctic Treaty[12] and agreements made pursuant to it. Under the First Consultative Meeting the representatives of the parties to the Antarctica Treaty agreed that "animals indigenous to Antarctica shall not be unnecessarily disturbed and shall not be destroyed or injured." Very limited exceptions were allowed in the case of animals killed for research purposes and food.[13]

This, however, applied only to the mainland of Antarctica and did not cover the ice flows on which the great majority of seals are found. This gap in the Antarctic Treaty was filled when twelve nations[14] met in London in February of 1972, and signed the International Convention for the Conservation of Antarctic Seals.[15] The convention calls for absolute protection of a number of species of seals and for quotas on other species. In addition seasons were set, seal reserves set up, sealing methods regulated (pelagic sealing prohibited), and exchange of information required.[16]

This convention represents a milestone in governmental co-operation for the protection of wildlife resources in that it seeks to "conserve populations of animals over a vast area before their existence is jeopardized" by the actions of man.[17] The Convention has been criticized, however, for what appears to be the opening up of a new area for exploitation by man. Arguments are made that such an agreement gives the go ahead to commercial interests and opens for exploitation the only remaining unmolested wildlife refuge on this planet.[18]

B. Whales

International agreements for the conservation of whales were in existence prior to World War II, however these agreements were very weak and gave no more than nominal protection to whales.[19] In 1946, a group comprised of almost all the whaling nations met in Washington and agreed to form the International Whaling Commission.[20] With the notification of adherence by Japan in 1951, all of the important whaling countries agreed to be regulated by this Commission.[21]

The Commission set about its task of conserving the whales by setting quo-

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[10] Chapman at 423.
[11] Canadian - Norwegian Agreement on Sealing, 16 Polar Record 268 (1972).
[12] Antarctic Treaty, Dec. 1, 1959, T.I.A.S. 4780.
[13] Measures in Furtherance of the Principles and Objectives of the Antarctic Treaty, July 24, 1961, T.I.A.S. 5094.
[14] Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, South Africa, U.S.S.R., United Kingdom, and United States.
[15] International Convention for the Conservation of Antarctic Seals, Feb. 11, 1972, 16 Polar Record 271. [hereinafter cited as Int'l. Convention for the Conservation of Antarctic Seals].
[16] Id. at 276-77.
[17] Id. at 271.
[18] Antarctic: Sanctuary No Longer, New York Times (New York City), Feb. 6, 1972, at 12, sec. 4.
[19] Chapman at 427.
[20] International Convention for the Regulation of Whaling, Dec. 2, 1946, 161 U.N.T.S. 74.
[21] Id. at 74.

tas and regulating size, sex, and species. The whale population continued to decrease, largely because of the inability of the members of the Commission to agree to reduce the quotas to the levels needed for a sustained yield. There are a number of reasons why the member countries refused to lower quotas: (1) There was insufficient research to prove that reduced quotas were needed. (2) The primary interest of the member nations was to protect the investment they had in whaling. Some nations even increased their investment for the apparent reason of "getting while the getting was good".[22] (3) There was evidence that the quotas would have made no difference.[23]

Continuing attempts were made by some members to remedy these failures of the quota system by providing for substantially more research, allocation of a percentage of the quota to each nation thereby stopping expansion of the whaling effort,[24] and initiating a system of international observers to assure compliance.[25] These efforts met with little success.

It seems that the reasons for the ineffectiveness of the I.W.C. are at last being remedied. Due largely to world public opinion, much independent research has been done resulting in a firm factual footing on which to base a quota reduction. Quotas have been more realistic since 1966 but have still not been sufficiently reduced to reverse the trend of decreasing population among most species of whales.[26] The United Nations Conference on the Environment held in Stockholm in June, 1972, is an indication of a more enlightened approach to the diminishing whale population. By a vote of 53 to 0 the delegate nations called for a ten-year moratorium on all whaling. However the vote is not as significant as it seems because the Soviet Union was not present at the Conference and Japan abstained from voting.[27] These two nations now account for 80% of all whales taken each year.

The annual meeting of the I.W.C. held one month later in London failed to accept the U.N. Conference mandate to ban whaling for ten years. However, a major step toward making the I.W.C. more effective was taken at this meeting. The Commission approved a system of international observers for the upcoming Antarctic whaling season.[28] Such a system was adopted in a treaty among five whaling states in 1963,[29] however it was adopted too late to be implemented in the 1963 season[30] and was allowed to expire before it ever entered into force.[31] This new police system coupled with reduced quotas for the 1972 season gives reason to be optimistic about the future of the world's whales.

There is evidence now that smaller species of the whale family (dolphin and porpoise) are rapidly diminishing in number due to incidental killing of them by tuna fishermen.[32] These animals theoretically fall under the regulation of the I.W.C., but the I.W.C. has not yet seen fit to act to protect them. It is likely

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[22] Chapman at 428-29.
[23] McKernan, International Fishery Regimes, 4 Law of the Sea 336 (1969). This was a panel from the Law of the Sea Institute.
[24] Chapman at 428-29.
[25] J. E. Carroz and A. G. Roche, The International Policing of High Seas Fisheries, 6 Can. Yearbook of Int'l. L. 61, 82 (1968). [hereinafter cited as Carroz].
[26] Chapman at 429.
[27] New York Times (New York City) June 10, 1972, at 4.
[28] New York Times (New York City) July 7, 1972, at 16, sec. 4.
[29] Agreement Concerning An International Observer Scheme for Factory Ships Engaged in Pelagic Whaling in the Antarctic, October 28, 1963, 61 U.N.T.S. 72.
[30] E. Surrency, International Inspection in Pelagic Whaling, 13 Int & Comp. L.Q. 666, 671 (1964).
[31] Carroz at 82.
[32] N. Y. Times (New York City) March 19, 1972 at 15, sec. 4.

that these animals may suffer the same fate as many other whale species if they are not soon internationally protected, for the whaling nations will likely turn to these more plentiful species when the scarcity of the larger whales or the regulations imposed on the harvesting of the larger species makes their capture unprofitable.[33]

II. Unilateral State Action

It is a well recognized principle of international law that a state can exercise jurisdiction over its territorial waters. Such unilateral protection as a state may give to marine mammals is largely ineffective unless the animal lives exclusively within its territorial jurisdiction. This is rarely the case with marine mammals. There are some steps that a country may take unilaterally which may have a significant impact on the conservation of marine mammals.

Extension of the territorial sea is one such step. Many nations have now claimed jurisdiction over fisheries up to twelve miles, and still others have claimed jurisdiction up to 200 miles.[34] The extension to twelve miles has little effect, for most marine mammals venture much farther than this during yearly migrations. A 200 mile territorial sea could have significant impact; however such an extention creates many international problems. It is unlikely that countries whose traditional fisheries are affected by such an extension would consent. Enormous practical difficulties involving boundaries would also occur. Even where such jurisdiction has been claimed, mostly by South American countries, it has worked to diminish further the numbers of marine mammals rather than to conserve them. This is because such countries have extended their territorial waters for the purpose of exploiting the area without competition rather than for purposes of conservation.[35]

Another unilateral approach has been to claim property rights in certain stocks of marine mammals by virtue of the fact that they spend some part of their life cycle within the territory of the claiming nation. This argument was attempted by the United States in a dispute with Great Britain over the fur seals on the Pribiloff Islands. The claim was rejected by an arbitration commission on the grounds that property rights in the seals could not be claimed just because the seals spent a part of their life within the territorial jurisdiction of the claiming country.[36]

Still another unilateral approach has been a claim of property rights in a specific fishery. The Truman Proclamation of 1945 espoused the principle that the United States could regulate any fisheries which it developed off its coast and that all nations would be subject to such regulations.[37] Such an approach is probably not feasible now since almost all marine mammal fisheries already have been developed, with the exception of the Antarctic seals which are now covered by the Antarctic Fur Seal Convention.

There does seem to be recognition of the principle of property rights in fisheries in the case of the North Pacific fur seals. Here the four parties to the North Pacific Seal Convention appear to have established an exclusive right to the North Pacific fur seals.[38] A similar situation exists concerning the Northwest Atlantic seals which are harvested almost exclusively by Canada and Norway.

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[33]Herrington at 811.
[34]W. Bishop, International Law, Cases and Materials, 642 (1970). [hereinafter cited as Bishop].
[35]Garcia-Amador, The Exploitation and Conservation of the Resources of the Sea, 152. (1963). [hereinafter cited as Garcia-Amador].
[36]Henderson at 60.
[37]Bishop at 647.
[38]Bishop at 647.

It is unclear, however, whether the world community recognizes such rights or whether they have simply decided for commercial reasons that entry into such fisheries would not be advisable. Also it must be noted that in these situations the fisheries are shared and that exclusive rights are not claimed by any single state.

An approach available to nations which use a great many of the products of marine mammals is the economic boycott. By placing a ban on the importation of such products, the consumer country could reduce demand thereby removing much of the economic incentive for the commercial taking of these creatures. It is conceivable that a large consumer such as the United States could halt the harvesting of certain marine mammals by such a boycott or at least prevent such harvesting from increasing.[39]

III. Non-Government Action

Actions by non-government organizations may also be quite effective in protecting marine mammals. Such actions by themselves are of little significance since private groups have no authority to enforce any measures they advocate. Their action, therefore, takes the form of pressuring international governmental organizations, individual states, or private concerns to take the steps necessary to achieve conservation goals.

An example of an organization which has been successful along these lines is the World Wildlife Fund. This is a group made up of conservation minded persons from many countries. Most significant among its efforts in the area of marine mammal protection has been a successful attempt to persuade Peru (not a member of the I.W.C.) to prohibit its nationals from killing the blue whale.[40]

Another success story is that of the British Columbia Society for the Prevention of Cruelty to Animals. This organization succeeded in mustering enormous public support from all over the world in asking the Canadian government to stop the killing of the baby harp seal for humane reasons.[41] This hunt has been significantly curtailed by Canadian laws since the public pressure campaign was begun.[42] Though the Canadian government claims that its sole motive was to conserve the seal population, it seems very likely that international public pressure had a significant effect on their decision.[43]

Pressure by conservationists and conservation groups all over the world was exerted at the Stockholm Conference on the Environment. It cannot be denied that the demonstrations that occurred there had a great deal to do with the nearly unanimous action that conference took in proposing a ten-year moratorium on whaling.[44]

Another private avenue toward protection of sea mammals is that of the economic boycott and secondary boycott. Pressure groups could persuade large private users of marine mammal products to substitute other products in their place. This was done with success by the World Wildlife Fund in the case of a large furrier who was persuaded not to buy any spotted cat pelts.[45] Similarly, such pressure groups could seek to persuade the general public to boycott products which con-

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[39] Herrington at 816.
[40] The U.N. of Conservation, Time Mag., Nov. 1, 1971, at 79. [hereinafter cited as The U.N.].
[41] B. Davies, Savage Luxury, (1970). [hereinafter cited as Davies].
[42] New York Times (New York City), January 19, 1972 at 4.
[43] Davies at 212.
[44] New York Times (New York City), June 9, 1972, at 3.
[45] The U.N. at 79.

tain raw materials or products coming from marine mammal fisheries.

IV. Problems with Present Conservation Methods

(1) Insufficient facts on which to base the need for regulation has often hampered conservation efforts. Countries are reluctant to impose any economic burdens on their industry unless they are certain that they will benefit in the long run. Lack of compelling research has been cited as the reason for the failure of the I.W.C. to effectuate its goals,[46] and failure of the North Pacific Fur Seal Convention to act sooner.[47] Research is also essential in formulating an effective conservation plan.[48]

(2) Very closely related to the problen of insufficient information is the failure of countries to act until the situation is critical or even irreversible. (Some experts believe that the blue whale has already reached the point of no return.[49]) This problem is magnified when taken in conjunction with the slowness with which international agreements are made. The new Antarctic Treaty for the Conservation of Fur Seals[50] may be evidence that the world community will now look before it leaps.

(3) Another problem lies in the relative ineffectiveness of any conservation measures which do not have the participation of all countries contributing to the problem. The Geneva Conference of 1958 appears to be a major step toward conservation efforts until it is noted that such fishing powers as Japan, the Soviet Union, Chile, Ecuador, Peru, and Norway have not ratified the agreement.[51] Also a part of this problem is the entry of new nations into a fishery already regulated. As has already been noted, international law provides no means of excluding new nations from any high seas fisheries. The United States has pushed for the recognition of the principle of abstention which provides that new nations should abstain from entering fisheries developed and maintained by other countries.[52] This principle was rejected by the 1958 Geneva Convention[53] and seems to have met with a great deal of resistence in the only instance in which it has actually been tried.[54]

(4) Overcapitalization of the fishing industry is a major stumbling block to effective conservation. Many nations have continued to expand their fishing efforts in the face of a recognized need for limitation on fisheries. It seems that this has been done in order to assure their country a good bargaining position should quotas be established for individual states.[55] Overcapitalization by some countries has made it very difficult to get such a country's consent to limit significantly their fishing effort because they have made a substantial investment which they do not want to see wasted. A country is naturally reluctant to cut its fishing effort in half when this will mean significant economic loss as compared to an insignificant loss to a country whose fishing industry is not

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[46] Chapman at 427.
[47] Henderson at 61.
[48] Chapman at 427.
[49] Herrington at 806.
[50] Int'l Convention for the Conservation of Antarctic Seals at 271.
[51] 4 U.N. Multilateral Treaties 373, as of Dec. 30, 1970.
[52] Bishop at 651.
[53] W. Bishop, Comment, 50 Am J. Intl. L. 628.
[54] R. Johnson, Japan - U.S. Salmon Conflict, 43 Wash. L. Rev. 1 (1967).
[55] J. A. Crutchfield, Overcapitalization of the Fishing Fleet, 2 Law of the Sea 28 (1967). This was a speech before the Law of the Sea Institute.

highly capitalized.

(5) Economic and social considerations are the bases for perhaps the greatest problem confronting conservation efforts. This is the problem presented by underdeveloped nations who are entering world fisheries for the first time. Such countries are concerned first with the short term goals of feeding their populations and developing their industry so as to raise their standard of living. Conservation arguments are not persuasive to these countries when made by stable, developed countries who can afford to look to long term effects.[56] Illustrative of the view taken by these countries is the provision in Article 2 of the Geneva Convention of 1958, the last sentence of which states that "conservation programs should be formulated with a view to securing in the first place a supply of food for human consumption."[57] A recent statement by the Brazilian Interior Minister regarding pollution aptly states the feelings of most underdeveloped states toward conservation measures. He said, "A country that has not yet reached minimum satisfactory levels of these essentials (living necessities) is not in a position to divert considerable resources in favor of environmental protection."[58]

V. Conclusions

The complete solution to the problem of conserving marine mammals lies in intergovernmental co-operation. This is not to say that private and unilateral state actions are to no avail. Such methods are helpful and should be diligently pursued, but they alone will not completely solve the problem. It is essential that co-operation be among all states who are part of the problem or who may be part of the problem. A single non co-operating state has the potential to render ineffective even the grandest schemes of the rest of the world. Also, without participation by a significant party, those states that do participate in international organizations are reluctant to impose needed restrictions on themselves.

This need for an international organization with universal participation is not a new idea. An international fisheries organization was recommended by Larry Leonard in 1944,[59] and this recommendation has been reiterated to the present day.[60] An attempt was made at implementation of such a plan by the Geneva Convention of 1958; however, the convention has failed to gain worldwide support. Even where such organizations have developed on a limited scale with widespread support they have been unsuccessful. The I.W.C. is testimony to this fact. Why have these attempts been unsupported or unsuccessful?

The answer lies in simple economics. A country will not submit to the jurisdiction of such an organization unless it is in its economic interest to do so. Likewise, countries will not regulate themselves once they are within such an organization unless it will benefit them economically. The solution is twofold. (1) Persuade countries that in the long-run it is in their best economic interest to conserve marine mammals. (2) Make it economically desirable for hesitant countries to submit to group efforts.

Most countries have already come to realize that it is in their best inter-

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[56] Garcia-Amador at 152.

[57] Convention on Fishing and Conservation of the Living Resources of the High Seas, Apr. 28, 1958., 559 U.N.T.S. 285, T.I.A.S. No. 5969.

[58] Brazil Accepts Pollution for Industrialization, N. C. Morning Star (Wilmington), Nov. 25, 1972, at 5 Sec. B.

[59] L. Leonard, International Regulation of Fisheries, 164 (1944).

[60] V. Norton and T. O'Keefe, International Fisheries Regimes, 4 Law of the Sea 332 (1970). This was a paper delivered before a panel on the International Fisheries Regimes of the Law of the Sea Institute on June 25, 1969.

est to practice conservation measures. These "leader" countries are willing to practice co-operative conservation methods, but only if they are assured that such measures will not be negated by countries who are not willing to co-operate. Here is where the second step in the solution must come into play. The "leader" countries must make it economically desirable for the hesitant countries to comply with conservation measures. The leader countries will be those who can and will consent to suffering short term loss for long term gain. The hesitant countries are those which cannot or will not take a short term loss; generally, the developing countries. The leader countries can exert a great deal of economic pressure in the right places and can earmark their economic aid in such a way as to make it economically profitable for the developing countries to submit to control by an international organization. For example, a developed country could refuse economic aid for fishery development or earmark aid for development of industry that produces fish product substitutes.[61]

Summary

What are the prospects for effective conservation of marine mammals? Existing organizations are adopting more effective measures. Unilateral state action is becoming more vigorous. Private groups are having an increasing effect on international actions. These facts in themselves are reasons for optimism. Yet the ultimate and lasting solution has failed to materialize. We can but hope that existing, partially effective conservation measures can defer the threat of disaster to marine mammals until effective international control can be established.

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[61] Herrington at 816.

OFFSHORE OIL DRILLING:

A COMPARISON OF STATE LAWS

John M. Geil

Our present highly technical and sophisticated civilization demands a continuous supply of minerals. Minerals are required to produce much of the goods which constitute material welfare. Even more important is the fact that primary energy production is based almost entirely on coal, oil, natural gas, and uranium.

Minerals are unevenly distributed throughout the world in the earth's crust. The larger, more industrialized states can produce an adequate supply of these minerals domestically, while other states are forced to import large quantities. International trade in minerals is, therefore, understandably an important factor in the world's political, social and economic situation. Also, the mineral policy of individual countries has international repercussions. The international aspects of mineral production, plus its tremendous internal importance, combine to make mining legislation within a country of vital political significance. Thus, with the discovery and exploration of offshore underwater oil fields new impetus attaches to domestic mining laws and their international interplay.

This paper will examine and compare the ways in which several sovereign states with appreciable interests in petroleum exploration and mining have dealt with offshore oil drilling legislatively.

However, before going into the specific legislation of several states, it is necessary to lay a background to aid in the understanding of the problems involved. There are basically five problems of importance in the area of offshore oil drilling legislation.[1]

(1) What is the area of jurisdiction of the petroleum law?
(2) Who owns the petroleum?
(3) What requirements must be fulfilled to explore for the petroleum?
(4) What requirements are necessary for the production of the petroleum?
(5) What are the financial arrangements between the state or landowner and the company?

When mining legislation is applicable to onshore areas, the geographical extent of the area of jurisdiction can normally be rather easily established, since legislation encompasses a part, or the entire territory, of a state. In most cases, the boundaries between the various states are rather well established. Offshore, the extension of the area of jurisdiction is less firmly regulated. There are three different areas which can be distinguished: the territorial seas, the continental shelf, and the deep-ocean floor.

The area beneath the territorial seas is normally considered to belong without question to the jurisdiction of the coastal state. The extent of the territorial seas differs from country to country. More difficulties arise concerning the continental shelf. In 1958, the Geneva Conference on the Law of the Sea adopted the Convention of the Continental Shelf, which became effective

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[1] A. Van Meurs, Petroleum Economics and Offshore Mining Legislation 47 (1971). [hereinafter cited as Van Meurs].

June 10, 1964.[2] This convention regulates the rights of the coastal states on the continental shelf adjacent to their territorial areas. The convention, however, contains a number of weak provisions. Suffice it to say that the Convention defines the outer edge of the continental shelf as "to a depth of 200 meters or, beyond that limit, to where the depth of the superjacent waters admits the exploitation of the natural resources of the said areas."[3]

Other difficulties arise when several states claim the same offshore area. According to the Convention, the boundary between various states must be determined by agreement; and in the absence of any agreement, the boundary is the line equidistant from the coasts of the states, unless another boundary is justified by special circumstances.[4] Also, regulations about the deep ocean floor do not exist. This may result in considerable difficulties in the future with the development of new mining techniques.

There are considered to be four different systems of ownership of underwater petroleum.[5]

(1) The occupation system. In countries where immigrants settle for the first time, the minerals usually belong to the discoverér or the person or company who claims the mineral area first. Since this system can easily result in disagreements among the prospectors, the government must enforce rather strict obligations.

(2) The accession system. Since access to the minerals is only possible through the surface, the owner of the surface in this system is automatically the owner of the minerals beneath the surface. This system can seldom be applied strictly, because the state must provide rules to assure the safe and reasonable use of the mineral producing area. This system is applied in the United States for those areas where the surface is privately owned.

(3) The regalian system. In this case the state reserves the right to regulate mineral exploration and production. The state chooses the persons or companies that are allowed to produce minerals and establishes their obligations towards the state.

(4) The dominal system. In the dominal system, the state owns the minerals and is consequently able to require all necessary obligations from mineral companies which propose to produce the minerals. This system is widely adopted in the Middle East and for all offshore areas assessed as under the continental shelf.

Normally, one must obtain an exploration license to explore for oil, whether onshore or offshore. Frequently the right to explore implies the right to produce, but this is not always the case. The right to explore a certain area is generally exclusive. For petroleum exploration, these exclusive rights are necessary to provide for orderly exploration when the drilling of exploration wells is included in the license. The concession area for exploration is normally limited geographically and seldom includes the entire area of a state. Also, these concessions are generally for a specified duration.

A production license is granted in most cases for one stated mineral. It is for a certain geographical area and limited time-wise to a few decades. Work obligations are normally included in the concession provisions, including regulations for safety measures and rules to prevent or compensate damage to third parties as, for instance, pollution resulting from petroleum production. There may be special provisions relating to the use of national transportation or the

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[2] L. Alexander, The Law of the Sea 245 (1967).
[3] Id. at 246.
[4] Id. at 246.
[5] A. Van Meurs at 49.

re-investment of profits.

Financial arrangements affecting petroleum companies include bonus payments, surface duties, royalties, taxes, and participation agreements. A bonus is paid to the land-owner or the state to obtain the right to explore or produce in a certain concession area.[6] Surface duties and rentals are either fixed yearly payments or payments assigned according to the amount of the surface occupied by the concession.[7] These are usually paid to the state, but are sometimes paid to the land-owner in the United States. Royalties are paid in relation to the amount of production. These royalties can be expressed as a certain amount of money per volume or weight of petroleum, or as a percentage of the value of the production.[8] Most petroleum companies are required to pay the taxes normally applicable in the country to each company and individual. The tax law, especially in most industrialized countries, is rather complicated and includes a large variety of taxes. The most important are excise taxes, customs duties, and income tax. Apart from these payments, a government may require an agreement to participate in the operations. This is very prevalent in the Middle East.

UNITED STATES

The mineral legislation in the United States dates from 1866, when the first essentials were incorporated into the law. A central principle is that the land-owner of the surface has the right to earn the proceeds from the mining operations.[9] In petroleum exploration and production, land-owners earn bonuses, rentals, royalties, or acquire other rights by transferring the minerals ownership to a petroleum company. The federal government is only earning taxes from the activity on private property. For the areas of federal influence, such as the continental shelf, the federal government acts as a land-owner by requiring the various financial compensations.

The United States Proclamation of September 28, 1945, issued by President Truman, proclaimed the policy of the United States to regard "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..."[10] Many states followed the United States soon after in declarations of this type. Up until 1937, and after considerable adjudication, it is also now a general principle that the coastal states have jurisdiction over the seabed and its oil out to the extent of the territorial sea, which is considered to be three miles in the United States.[11] Therefore, state laws apply to the offshore drilling out to the three-mile limit. Beyond that, to the extent of the continental shelf, the federal laws apply.

The competitive leasing principle was applied to the outer continental shelf by the Outer Continental Shelf Lands Act of August 7, 1953.[12] The Secretary of the Interior was given wide range to prescribe such rules and regulations as he believes advisable with respect to leasing the oil of the outer continental shelf. These leases are granted by competitive bidding on the basis of a cash bonus and a royalty fixed by the secretary at not less than 12 1/2 per cent in amount of

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[6] Id. at 51.
[7] Id. at 51.
[8] Id. at 51.
[9] N. Ely, Summary of Mining and Petroleum Laws of the World 15 (1961). [hereinafter cited as Ely].
[10] Slovenko, Oil and Gas Operations: Legal Considerations in the Tidelands and on Land 226 (1963). [hereinafter cited as Slovenko, Oil and Gas].
[11] H. Marshall, and B. Zisk The Federal-State Struggle for Offshore Oil 4 (1966)
[12] Ely at 17.

shelf, and to which the Netherlands was a party. The resulting legislation was the Continental Shelf Mining Act, and it dealt with regulations regarding the exploration for and the production of minerals in or on the part of the continental shelf that is situated underneath the North Sea.[25] It is very general in content and goes into no detail. It makes it possible to close a certain area to exploration or production by administrative order. It vaguely opens the possibility of raising annual fixed or surface duties. Article 10 of the act establishes the possibility for the state to demand a bonus at the beginning of the exploration or production.[26] No bonus is required at the discovery date or any date after the start of exploration. Article 11, possibly the most important, raises the possibility for the state to impose royalties, taxes, and to require state participation.[27] The royalties can be fixed, as they are in the United States, or on a sliding scale.[28] A tax similar to the 50 per cent corporate income tax of the United States is provided for here also.[29] It also says that when a company locates an economically recoverable reserve, it must be ready to accept state participation.[30] Without doubt, the provision for state participation is the most important. Under the provision, the state dise-steps the geological and economic risk that the company is taking in its exploration. The state participation provision has been interpreted by one legislative faction to apply only to "dry" gas reserves, and not to oil, although it is generally held to apply to both gas and oil reserves.[31]

GREAT BRITAIN

The British petroleum legislation is based on the Continental-Shelf Act of 1964 and the regalian system.[32] The state does not own the minerals but has the right to regulate exploration and production. It is possible to obtain a non-exclusive exploration license and an exclusive production license. The non-exclusive exploration license includes the possibility of drilling wells to a depth of 1,000 feet.[33] The surface of the blocs in the exclusive production license is 100 square miles and it has a duration of forty years.[34] After six years, 50 per cent of the area must be relinquished.[35] The work obligation is negotiated before the license is granted. There is no limitation on the number of licenses which may be held by one person or one company.[36]

The financial aspects of the legislation include the payment of a fixed-initial bonus of about $600 for each of the first ten blocs and about $15 for each subsequent bloc.[37] The surface duties amount to about $75 per square kilometer for the first six years and about $120 in the seventh year.[38] Each

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[25] Id. at 153.
[26] Id. at 154.
[27] Id. at 155.
[28] Id. at 155.
[29] Id. at 161.
[30] Id. at 162.
[31] Id. at 168.
[32] Id. at 171.
[33] Id. at 172.
[34] Ely at 99.
[35] Id. at 99.
[36] Id. at 99.
[37] Van Meurs at 172.
[38] Id. at 172.

value of the oil production.[13] The act does permit the secretary, at his descretion, to fix the cash bonus and allow competitive bidding on the amount of royalty, but only competitive bidding on the cash bonus with a fixed royalty has been used.[14] The royalties for federal leases are now set at 16-2/3 per cent of the value of production.[15] As a general rule, the bonuses established by this competitive bidding have been very high compared to other offshore oil producing countries in the world. For example, the offshore sale in Texas resulted in bonuses at an average of $1,100 per acre, whereas the fixed bonuses paid on the sale of offshore leases in the Netherlands are only $1.00 per acre.[16] This is, however, naturally affected by the prospect of discovery of oil in the bid area.

Concerning the states' jurisdiction over the oil in the seabed out to the three-mile limit, the states' laws are similar to the federal laws, but with some marked differences. Louisiana law is here referred to as typical. The first step to obtain a lease of a state offshore area is through written bid and not competitive bid.[17] The bid is directed to the State Mineral Board describing the area desired to be leased and giving a deposit.[18] The board makes any examination it deems necessary into the desirability of leasing the area. If it deems it inadvisable, it simply rejects the bid. If it deems it advisable, a public advertisement is made calling for more written bids.[19] If the board decides that none of the written bids are, in its opinion, advantageous to the state, the board may reject all the written bids and put the area up for competitive bidding or merely decide not to lease the area at all.[20] The board, however, may not accept a bid to lease a state area for less than certain minimum requirements. One of these requirements is that the annual rental payment must be at least one-half the amount of the bonus.[21] The bonus and royalty arrangements in the state leases are comparable to those in the federal leases.

THE NETHERLANDS

The discovery date of the Slochteren gas field was August 14, 1959.[22] About three years were necessary to delineate the field. The developments in the Slochteren area drew the attention of the world to the North Sea as a possible giant source of gas and oil. In 1962, Shell and Esso drilled a few exploratory wells not too far from the Dutch coast.[23] The results were only dry holes, but this didn't curb the enthusiasm for the North Sea exploration area. The Dutch government, afraid of chaotic exploration, declared that all drilling activities in the Dutch offshore waters would be regarded as an unfriendly action against the Dutch state.[24] In the meantime, the government began to prepare legislation for offshore mining. Their right to develop this legislation stemmed from the Treaty on the Continental Shelf concluded in Geneva in April, 1958, which was in reality an international adoption of the Truman proclamation regarding a state's jurisdiction over its contiguous continental

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[13] Id. at 17.
[14] N. Ely at 18.
[15] A. Van Meurs at 179.
[16] Id. at 179.
[17] Slovenko, Oil and Gas at 226.
[18] Id. at 226.
[19] Id. at 227.
[20] Slovenko, Oil and Gas at 227.
[21] Id. at 227.
[22] Van Meurs at 151.
[23] Id. at 151.
[24] Id. at 151.

following year the surface duties increases by about $75 to a maximum of about $900 per square kilometer in the seventeenth year.[39] The royalty is 12.5 per cent of the wellhead price based on the sales price.[40] The corporate income tax is 40 per cent of the taxable income and an investment credit of 30 per cent exists for fixed assets and intangible drilling expenditures.[41] The British law differs greatly from the Dutch law in that no state participation is required. The financial conditions, especially the low bonuses and surface duties, point out the government's expectation of a relatively low probability of success. Also, both the low taxes and favorable investment credits are attractive to the oil companies. However, I don't think it would be too speculative to say that when, and if, the exploration becomes successful, a considerable amount of rent will become due to the British government.

DENMARK

A different type of offshore oil drilling procedure has developed in Denmark as contrasted with the Netherlands and Great Britain. Exploration and production of oil in the continental shelf off Denmark has been awarded to a consortium made up of a Danish shipping magnate, Gulf, Shell, Texaco and California Oil Company.[42] The concession embraces the entire Danish part of the shelf, and its duration is fifty years.[43] There are no bonuses, surface duties, or state participation. The royalty is 5 per cent for the first five years and 8.5 per cent for subsequent years, calculated on the wellhead value.[44] The corporate income tax is 44 per cent, but half of the tax paid in the previous years may be subtracted for the calculation of the taxable income.[45] This makes the ultimate tax rate about 36 per cent. The conditions imposed on offshore oil drilling on the Danish side of the continental shelf are the most favorable of any of those imposed upon companies by countries in the North Sea. However, these low cost conditions correspond to the low geological expectations for this portion of the North Sea continental shelf. As of yet, no important discoveries of oil have been made within the Danish offshore jurisdiction.[46]

MIDDLE EAST

Economic conditions affecting petroleum exploration and production in developing countries quite naturally differ from those in industrialized countries. Exploration, development, and production costs are normally higher, given comparable situations. Most of the equipment must be imported form industrialized areas and qualified personnel must also be brought in. The local markets are usually restricted. Therefore the oil produced must be transported long and costly distances before important markets are reached. In addition to these economic conditions which lead to higher costs, the oil companies generally regard the political conditions in developing countries as unfavorable also.

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[39] Id. at 172.
[40] Id. at 172.
[41] Id. at 172.
[42] Id. at 174.
[43] Ely at 72.
[44] Van Meurs at 174.
[45] Id. at 174.
[46] Id. at 174.

There is always the danger of nationalization. Thus the outlook for oil must be particularly rich for a company to invest in one of these areas. This is the situation in the Middle East.

The Middle East is fortunate in possessing a large number of excellent oil fields. Much effort, therefore, has been spent by the major oil companies in this area. Three different types of contracts are presently operating in the Middle East. These are "equal profit split" contracts, participation contracts, and work contracts.[47]

Most of the oil in the Middle East is produced under "equal profit split" contracts. They are used in Iran, Iraq, Saudi Arabia, and Kuwait.[48] Typical characteristics of these contracts are that they cover a very large area and are for a long duration of time.[49] Originally, the royalties due on these contracts could be offset against the income tax. In reality, they had the character of advance tax payments. Since 1962, however, this is no longer true. The royalties are now considered compensation for the extraction of the petroleum.[50] Apart from this, there is a 50-50 split of the net profits between the company and the state.[51]

Participation contracts can take different forms. The most simple variation is government participation in the capital stock of an oil company. This was the form of the first concession granted in the Middle East.[52] The most common of these participation agreements, however, are the participation of the government in an oil production company and the participation of the government in an integrated oil company. The first is where two single companies (or consortiums) form a separate company, with each owning 50 per cent of its stock.[53] This separate entity carries out the exploration and production of the oil. The royalty and the taxes are charged to this company and two 50 per cent shareholders share in the profits respectively.[54] An example of the second type of contract is where a state-owned company and a private company enter into a contract to produce oil.[55] The private company takes all the risk of exploration and the state can participate for a specified percentage in the integrated activities if a commercial discovery is made. The royalty due is set on a sliding scale related to annual production.[56] Often there is a preference in the agreement to use state-owned transportation.

The work contracts depart from the previous types in establishing a new relation between the host country and the company. The company has the sole function of rendering services to the host country. For these services the company bears the entire risk. Another difference between the work contract and the others is that the duration is for a relatively short time of twenty-five years.[58] This is the newest type of contract for the exploration and production of offshore oil in the Middle East, and to a large extent the move to it has been a political choice of the host countries.

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[47] Id. at 184.
[48] H. Catton, The Law of Oil Concessions in the Middle East and North Africa 119 (1967). [hereinafter cited as Catton, Law of Oil].
[49] Ely at 140.
[50] Van Meurs at 185.
[51] Catton, Law of Oil at 119.
[52] Van Meurs at 186.
[53] Catton, The Evolution of Oil Concessions in the Middle East and North Africa 126 (1967).
[54] Van Meurs at 187.
[55] Id. at 187.
[56] Id. at 187.
[57] Catton, Law of Oil at 125.
[58] Van Meurs at 188.

The accent of the Middle East petroleum laws is on taxation and state participation. This, naturally, is for the purpose of maximizing public revenues to help speed development, both economic and social, in their countries.

ARGENTINA

Deposits of liquid and gaseous hydrocarbons existing within the territory of the Republic of Argentina and its continental shelf are the exclusive, inalienable and imprescriptible property of the federal government according to Argentinian Law 17,319 of 1967.[59] The federal government grants to the provinces a participation in the crude product equal to the royalty collected by the state.[60] The exploration and production of the oil may be carried out by the state and private or mixed companies whose major objective is to satisfy the country's needs for oil while maintaining adequate reserves.[61] The government will authorize exports only when internal needs have been met. The executive branch determines the location and the size of the areas in which the activities of the private and state enterprises may be carried out. Seventy-five per cent of all personnel involved in the petroleum operations must be Argentine, and the government may sponsor bidding for the exclusive participation of those companies whose capital is exclusively Argentine.[62] These provisions seem to effect more or less a cross between the offshore oil legislation of the industrialized countries and the undeveloped countries of the Middle East. The exploration for oil must be carried out within a fixed period of time -- twelve years for the area of the continental shelf.[63] The concessions are in units of 150 square kilometers for offshore areas and a maximum of five are allowed for each individual.[64] The exploitation concessions are for a twenty-five year period with an option for ten more.[65] At the end of this period the area reverts to the state without any charge. The fiscal conditions to these concessions are that 55 per cent of the profits must be paid to the state. This 55 per cent is made up of royalties, surface taxes, municipal and provincial taxes, and special taxes. The royalties range from 5 per cent to 12 per cent of the oil produced from each well.[66]

MEXICO

Mexico has taken a completely different stance on the exploration and production of oil, both onshore and offshore, than have the other countries discussed. Their oil policy, however, is in keeping with their general policy of establishing the Mexican industry and market as a stable force. All petroleum properties were expropriated and nationalized in 1938.[67] Later, Article 7 of the Law of November 27, 1958, reaffirmed the government's direct, inalienable, and imprescriptible ownership of all oil found in the national territory,

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[59] Mining and Petroleum Legislation in Latin America, Pan American Union, 11 (1969). [hereinafter cited as Mining and Petroleum].
[60] Id. at 11.
[61] Id. at 11.
[62] Id. at 11.
[63] Id. at 12.
[64] Id. at 12.
[65] Id. at 12.
[66] Id. at 13.
[67] Ely at 13.

"including the continental shelf."[68] The same statute said that only the nation may carry out the different phases of the oil industry, which comprises the exploration, exploitation, refining, transportation, storage, distribution, and sale of oil and its by-products. The government has set up the Petroleos Mexicana, to carry out the production of oil in Mexico.[69] This agency, administered by a governing board of eleven members, six of whom are chosen by the federal executive and five by the Oil Workers Union, is required to pay the federal government a certain percentage as royalties which can be not less than 10 per cent nor more than 35 per cent.[70] There have been a few contracts with foreign individuals relating to the Mexican oil industry, but they have been only for geological, geophysical, exploratory, or development services.[71]

I would venture to say that once the industries and economies of the Middle Eastern and South American countries have reached the level of development that is present in Mexico, these countries will turn to a policy of totally nationalizing the oil industry as Mexico has done. In this way they believe that their nation's economic development will be accelerated.

The United States and the North Sea countries are highly developed and industrialized nations. There are individuals within their citizenry who have the technological know how to explore and produce the oil located offshore. The profits made by these individuals will find their way back into the economies of these nations. The nations' concerns, expressed in their legislation, are for the orderly and efficient production of this oil with some economic return to the state because of the oil's value as a natural resource. The underdeveloped nations, on the other hand, do not have the technical know how or skills to produce this oil and create more money for their economies. They have to let other nations do it for them. However, they put restrictions on the exploitation of the oil which is one of their natural resources. The foreigners still exploit the oil of these countries because of the vastness of the oil deposits, even though there are risks involved. Gradually, as the host country picks up the skills from the oil companies, they decide that they can handle the whole operation themselves and thus reap all the profits. This is what happened in Mexico. Carried further, when these countries become well developed, their legislation will most likely resemble that of the presently developed countries. This is because, as their whole socio-economic make-up is changed, so will the purposes and goals of their legislation change.

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[68] Mining and Petroleum at 233.
[69] Ely at 13.
[70] Mining and Petroleum at 234.
[71] Ely at 14.

INTERNATIONAL PROTECTION OF MARINE LIFE

FROM THE EFFECTS OF POLLUTION DUE TO LAND-RELATED ACTIVITIES

Robert L. Mullinax

The Secretary-General of the United Nations stated in 1968, that the "investigation and control of marine pollution...is a matter on which international action on both regional and global scale is now becoming urgent."[1] The need for international cooperation to protect marine life is obvious due to the fact that marine animals and pollutants do not recognize national boundaries and jurisdictions.

Marine pollution has been defined as the "introduction by man, directly or indirectly, of substances or energy into the marine environments (including estuaries) resulting in such deleterious effects as harm to living resources, hazard to human health, hindrance to marine activities including fishing, impairment of quality for use of sea water and reduction of amenities."[2] No standards of water quality criteria have been established to determine the extent or effect of pollution on marine life. Until such standards are established for each pollutant along with a global monitoring system, no effective permanent international regulation of the seas will be possible.

The effects on marine life by pollution are not fully known or understood. The condition of the seas is maintained primarily by interaction with the atmosphere and the disposal in the seas of waters and debris carried by the rivers. The assumption has been that the oceans are capable of absorbing all foreign matter introduced in this manner without any lasting or significant effects. The problem facing us now is to determine the effect of human introduction of foreign matter and at what point any portion of the marine environment is detrimentally affected.

Every year, eight billion dollars worth of sea life is extracted from the oceans.[3] Every year a smaller portion of the oceans and seas is available for fishing. The Baltic Sea is dying from poisoning by DDT, mercury, oil, and industrial wastes. In many areas, all marine life is dead. In other areas, the fish are too contaminated to eat and their reproductive cycle has been affected. Below the halocline, there are 400,000 tons of phosphates, increasing at the rate of 16,000 tons a year, resulting in a decrease in oxygen and a build-up of hydrogen sulfide.[4] In the United States, more than ten per cent of the shellfish-pro-

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[1] U. N. Doc. E/4487 at para. 278 (1968).
[2] Comprehensive Outline of the Scope of the Long-Term and Expanded Programme of Oceanic Exploration and Research as approved by IOC, Part I. 3 (UNESCO/IOC. Summary Report of Sixth Session, Doc. SC/MD/19, Annex IV at 12 (1970).
[3] Holt, The Food Resources of the Ocean, 22 Sci. Am. 178 (1969).
[4] Hamblin, Pollution: The World Crisis, 32 (1970).

ducing estuaries have been closed due to pollution. San Francisco Bay once produced 15 million pounds of oysters and 300,000 pounds of clams per year. No clams or oysters from the Bay are fit for consumption today.[5] Sewage sludge dumping has created a twenty-square-mile area off Long Island in which fish have fin rot caused by bacteria. This entire area has been closed to shellfishing since anyone who eats these shellfish may get hepatitis.[6] In Japan, between 1953 and 1963, 105 persons died or were seriously disabled due to mercury poisoning from eating oysters from Minamata Bay.[7] Many other marine areas are contaminated including the North Sea, Caspian Sea, and the coastal zones near major industrial or metropolitan areas or near the mouths of rivers flowing past such areas.

There are twelve major categories of ocean pollutants: oil; radioactive wastes; domestic sewage; pesticides; inorganic wastes including heavy metals; organic wastes; military wastes; petrochemicals and organic chemicals; heat; detergents; solid objects; and dredging spoils and inert wastes.[8] Historically, regulation of the disposal of foreign matter into the seas has depended primarily upon the nature of the pollutant or upon the degree of possible danger. Due to the nature of pollution itself, this has resulted in very fragmented and ineffective controls which have left most categories of pollutants virtually unregulated. Both oil and radioactivity have alarmed legislative bodies in many nations which resulted in some effective, but limited, national and international regulations on ocean pollution. For many years, the United States has dumped low-level radioactive wastes in 18-guage steel drums into the Atlantic Ocean. Some of these disposals met loud protests from the governments of Spain, Portugal and the Bahamas when these drums were carried near their shores. The British run a pipeline two miles out into the sea to discharge their radioactive wastes.

Oil has been described as being, in some ways, the most dangerous pollutant. Oil will float on the surface and is not diluted until bacteria break it up. This changes the water evaporation rate and cuts off air and light to the sub-surface waters. Pollution by oil and disposal of radioactivity are serious problems but some controls are now being applied. International conventions along with national legislation now partially regulate these forms of pollution even though more stringent controls are necessary. The other ten pollutants have either been ignored or regulated to a limited but ineffective extent. These regulations are either limited by territorial legislation or by restricted adoption and enforcement of international conventions.

The twelve pollutants reach the sea through three major routes: (1) exploration and exploitation of the sea-bed resources; (2) spillage from ships carrying these substances or other activities related to man's use of the ocean surface; and (3) man's land-related activities. The ultimate solution to marine pollution can only be reached through regulating the routes through which pollutants reach the sea. By far, the most serious foreseeable threat to marine life is due to man's land-related activities: (1) agricultural run-off; (2) industrial and domestic wastes; (3) deliberate dumping; and (4) transfers into the atmosphere. While some pollutants are involved in all of these activities, thereby compounding the regulatory problems, other pollutants are involved in only one activity. Obviously, it is impossible to deal with pollutants and/or activities separately as there are no clear divisions.

Deliberate dumping into the sea is a more easily dealt with source of ocean

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[5] Id. at 33.
[6] Id. at 36.
[7] Id. at 34.
[8] IMCO/FAO/UNESCO/WMO/WHO/IAEA Joint Group of Experts on the Scientific Aspects of Marine Pollution, Report of the Second Session (1970).

pollution resulting from man's land-related activities. Dumping usually results in the pollution of international waters. No serious dispute has yet occurred due to dumping in international waters. If such a dispute did occur, it would have to be settled according to the principles of international law: freedom of the seas; reasonable regard of the rights of others; non-abuse of national rights; and the doctrine of sic utere tuo ut alienam non laedas. The danger in ocean dumping is not one of a sudden large catastrophe, but of a steadily deteriorating situation over a period of years. The 1958 Convention on the High Seas does not include the right to dump as one of the freedoms of the high seas, but no international tribunal has stated that dumping is absolutely prohibited due to the universal custom of disposal on the high seas. The issue would ultimately turn on the extent of knowledge of the effect of dumping on the marine environment, the foreseeability of the harm, the standard of proof required, and the kind of damages suffered by the complaining state.

The first treaty dealing directly with ocean dumping was not opened for signatures until November 13, 1972. "The Convention on the Dumping of Wastes at Sea" prohibits the dumping of high-level radioactive wastes, biological and chemical warfare agents, crude oil, some pesticides, durable plastics, mercury, and cadmium. Special permits will be required to dump arsenic, lead, copper, scrap metal, zinc cyanides, nickel, vanadium, beryllium, and chromium.[9] General permits will be required to dump any substance not listed. Individual governments are given control over ocean dumping including enforcement.

Article I of the treaty requires the signatories to "individually and collectively promote the effective control of all sources of pollution of the marine environment." The countries are to take all "practical steps to prevent the pollution of the sea by the dumping of waste and other matter that is liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea."[10] A secretariat will be established to coordinate and disseminate technical and scientific data on ocean pollution and dumping and to advise states how to dispose of wastes that cannot be dumped at sea. The convention will take effect when it is ratified by 15 nations. Fifty-seven countries have now signed it. This convention should not be viewed as a permanent solution, but as a temporary alleviation of the dumping problem until such time as an overall environmental protection convention is politically feasible.

Agricultural run-off, industrial and domestic wastes, and transfers from the atmosphere are the most difficult to control. Unlike deliberate dumping, these activities result in pollution of international water from within a national territory. Land waste dumped into rivers and carried out to sea is the largest source of pollution. The estuaries are the areas first affected by pollutants being carried to sea. Shrimp, salmon, oysters, crabs, clams, menhaden, flounder and many other species spend significant portions of their lives in estuaries. Some organisms exist only in these protected areas and cannot move out to sea when the area becomes polluted. More than half of the fishery products harvested in the United States are dependent upon estuaries.[11] This proportion varies from country to country depending upon geography and eating habits, but all nations which harvest a significant quantity of marine life are at least partially dependent upon estuaries. Estuaries, by definition and purpose, are located within terri-

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[9] N.Y. Times (New York City), November 14, 1972, at 1, col.5. [hereinafter N.Y. Times].
[10] Id. at 14, col. 1.
[11] McHugh, Are Estuaries Necessary?, Com. Fish. Rev. 39 (1968).

torial waters and subject to the control of various sovereign states. Estuarine pollution must be solved by effective legislation on the national level with close cooperation on the regional or even global level. Since any permanent solution would require a comprehensive regulatory scheme, regional cooperation among states is mandatory to protect each state's interests. Nowhere is this more evident than is Western Europe where rivers transport industrial wastes through the estuaries of one nation only to be swept by ocean currents into the estuaries of bordering states.

Another major problem is caused by pesticides such as fungicides, herbicides, insecticides, fumicides, and rodenticides. The synthetic organic compounds (such as DDT) are the most dangerous. Many pesticides are resistant to degradation; therefore, large quantities reach the oceans via land run-off in rivers and the air. DDT residues have been carried by summer monsoon winds from Africa to the Bay of Bengal and by the Northeast Trade Winds from Africa to the Caribbean.[12] Insecticide residues build up in the food chain with the principle victims being the predatory birds. Chlorinated hydrocarbon insecticides are affecting the avian reproductive cycle resulting in few young to replace the adult population when the adults die. Species may become extinct which may upset the balance of an ecological system. DDT has been wholly or partially banned by Sweden, Denmark, Hungary, and the United States. Banning DDT presents few problems for developed nations but since it may increase agricultural yield and control disease, the developing nations are not very concerned with efforts to protect marine life due to their national priorities. However, controlled use of DDT in developing nations coupled with banning it in developed nations would significantly reduce its impact on the marine environment.

Tetraethyl lead, an additive to gasoline, is released into the atmosphere as a result of the inefficient internal combustion engine used in automobiles. Due to the interaction between the atmosphere and oceans, the lead content of Northern Hemisphere waters has increased five hundred per cent.[13] The eventual oceanic deposition of evaporated gasoline, oil, polychlorinated biphenyls (PCB's), and dry cleaning solvents is beginning to have adverse affects on some species of marine life.[14]

Regulation of these activities by treaty is virtually non-existent. The prohibition of pollution must be sought in the general rules pertaining to the use of the seas. All of these rules are vague and can only be used to regulate polluting activities if they are interpreted as pertaining to pollution.

The 1958 Geneva Convention on the High Seas states, in Article 2, that the freedoms that are recognized by the general principles of international law are to be exercised by all States with reasonable regard to the interests of other States in the exercise of these freedoms of the high seas. The test applied here is one of reasonableness. This convention imposed a duty on all States to adopt regulations to prevent marine pollution due to oil, radioactive waste dumping, and exploration and exploitation of the seabed and subsoil. No duty was imposed on States to prevent pollution from any other source.

Fairly precise rules for civil liability have been developed for cases of oil spills from ships, but these rules do not extend to other types or sources of pollution. At the present time, international customary law is unable to control pollution of the marine environment due to land-related activities. However, if

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[12] Global Ocean Research, The Sci. Comm. on Oceanic Research, and the World Meteorological Org. 19 (1969). This is a report of a Joint Working Party of the Advisory Committee on Marine Resources Research.

[13] Goldberg, Chemical Invasion of Ocean by Man, McGraw-Hill Yb. of Sci. and Tech. 67 (1970).

[14] Id. at 68.

United Nations resolutions can be taken to be the emergence of a new international custom, states cannot treat the marine environment with reckless disregard. A number of recent United Nations resolutions have proclaimed that no state can use international waters for purposes which threaten the marine environment or interfere with the peaceful use and reasonable exploitation of the common heritage of mankind.[15]

An increasing number of nations now have domestic legislation which promotes conservation of the environment and reduced pollution. A good example of such legislation is the United States National Environmental Policy Act of 1969.[16] Section 102 (E) of this act directs the agencies of the Federal government to recognize the worldwide and long-range nature of environmental problems and to support appropriate programs which establish international cooperation in anticipating and preventing a decline in the world environment. In addition to this act, effective air and water quality acts have been passed which will reduce pollution (air and water) to "acceptable" levels during the next ten years in the United States. Similar legislation has been enacted in other developed nations which will substantially reduce pollution from land-related activities.

With the exception of the Convention on the Dumping of Wastes at Sea, the multilateral conventions which relate to marine pollution are concerned with the exploration and exploitation of sea-bed resources, spillage from ships carrying hazardous substances, and other uses of the ocean surfaces.[17] Only The Convention on the Dumping of Wastes at Sea aims to control the effects of man's land-related activities on the marine environment. While this convention is limited to the dumping of wastes, Article 1 does require the signing states, individually and in cooperation with other states, to promote the effective control of all sources of pollution of the marine environment.[18] Whether this imposes a positive duty on the signatories to provide for effective domestic controls on all land-related activities which have adverse effects on the marine environment remains to be seen. However, it is doubtful that such a broad interpretation will be given this convention.

Several bilateral treaties and agreements have been centered into for the purpose of controlling pollution and protecting the environment. The United States and Spain entered into an Agreement of Cooperation and Friendship in Washington on August 16, 1970. Article 16 of this agreement provides that the two states will cooperate in the fight against pollution of the air, water, and soil. This clearly covers all land-related activities which adversely effect marine life; however, Article 16 is without real substance. Another example of a bilateral agreement is that between the United States and the U.S.S.R. on Cooperation in the Field of Environmental Protection of May 23, 1972. In addition to providing for joint projects of conservation of endangered species and control of oil pollution, the agreement provides that information on research will be exchanged on the "chemical aspects of marine pollution and the effects of pollutants on marine organisms, including chemical and biological analysis of fish, monitor-

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[15] Legault, The Freedom of the Seas: A License to Pollute, 21 V. Toronto L. J. 221 (1971).

[16] 42 U. S. C. Section 4321 et seq.

[17] See: International Convention for the Prevention of Pollution of the Sea by Oil, May 12, 1954, as amended April 11, 1962, 12 U.S.T. 2989, T.I.A.S. 4900; 17 U.S.T. 1523, T.I.A.S. 6109. Convention on the High Seas, April 29, 1958, 13 U.S.T. 2312, T.I.A.S. 5200. Convention on the Continental Shelf, April 29, 1958, 15 U.S.T. 471, T.I.A.S. 5578. International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, November 29, 1969, __U.S.T.__, T.I.A.S.___.

[18] N. Y. Times at 1, col. 5.

ing of rare species, exchange of specimens, and rehabilitation of sea life after major pollution incidents.[19]

Article 10 of the "Helsinki Rules" in the 1966 Report of the International Law Association Committee on the Uses of the Waters of International Rivers states that nations must prevent new forms of or increases in the degree of water pollution in any international drainage basin which would cause substantial injury in the territory of a co-basin state. In addition, such states are to take all reasonable steps to abate existing water pollution. Although the "Helsinki Rules" are just a proposal, this does represent the current thinking of international legal scholars.

In the Trail Smelter Arbitration, Canada was to be environmentally responsible for damages for injury done within the United States by fumes discharged by a smelter operation within Canadian territory. These fumes were carried by the wind, and Canada was required to prevent such damages in the future. When the arbitration tribunal found no international law which governed, it turned to United States law finding an analogy between the quasi-sovereign rights of the states and the sovereign rights of the nations. The tribunal concluded that under the principles of international law, as well as United States law, no state has the right to use or allow the use of its territory so as to cause injury by fumes to the territory of another.[20]

The law to be applied by the International Court of Justice is stated in Article 38 of the Statute of the International Court of Justice. The Court is to apply: (1) international conventions; (2) international custom as evidence of a general practice accepted as law; (3) the general principles of law recognized by civilized nations (domestic law); and (4) judicial decisions and the teachings of the most highly qualified publicists of various nations. While there are no conventions that could directly be applied, the other sources of international law are increasingly recognizing an environmental responsibility. Most of the developed nations are recognizing this responsibility as evidenced by United Nations resolutions, domestic legislation, international drainage basin agreements, bilateral agreements, and judicial decisions. However, this may not offer much protection for marine life from land-related activities.

Traditionally, the interests protected by international law have been State interests. No public right of action on behalf of the community exists as such.[21] Any plaintiff state may be denied an international forum for lack of standing on the grounds that the injured interests were those of the international community and mankind as a whole and not an injury to the individual state's interest.[22] Therefore, even if an obligation to refrain from polluting the seas could be found, no single state has a property interest in or dominion over the living resources of the sea which could be injured by the given polluting activity.

The United Nations Conference on the Human Environment held in Stockholm in June, 1972, proved to be of little value in protecting marine life from the effects of pollution. The primary achievement was the creation of a new United Nations environmental agency with a twenty million dollar budget. Half of this budget will be used to continue Earthwatch (formally called World Weather Watch) and the other half will be used for research and surveys.[23]

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[19] 67 Dep't State Bull., Oct. 16, 1972, at 453.
[20] 3 U. N. R. I. A. A. 1905 (1949), 35 Am. J. Int'l. L. 684 (1941).
[21] Hardy, International Control of Marine Pollution, 11 Natural Resources 299 (1971).
[22] For example, see the Southwest Africa Cases, I.C.J. 4, 32 (1966).
[23] The Washington Post (Washington, D.C.), June 25, 1972, at B6.

"In publication, in conference, in international units, the matters are generally divided into air pollution, land pollution, and water pollution. In fact, there is only one pollution because every single thing, every chemical whether in the air or on land, will end up in the ocean."[24] Therefore, the only effective way to regulate pollution of the marine environment, is a global pollution control regime.

It is a generally accepted principle of international law that a state may do whatever it wishes within its territory so long as there are no unacceptable repercussions outside its territory. This means that a State may establish acceptability levels for pollutants as long as an internationally unacceptable amount doesn't escape its territory. However, air currents, land run-off, and dumping in rivers carry pollutants into international waters and therefore become subject to international regulation.

Marine pollution must be treated as part of a wider concern for the maintenance of the environment as a whole. However, given the current political realities, a more rapidly achievable goal should be adopted until a global pollution control regime can be established. This would involve temporarily treating marine pollution as a separate issue and would focus on three major problems: (1) continuing scientific studies on ocean conditions and the effects of pollution; (2) establishing regulations to control the various forms of pollution; (3) enforcement and the problem of liability for pollution resulting from specific activities and causing damage to others.

The regional approach could be used to meet immediate pollution problems thereby minimizing economic and ideological conflicts between the states. Such regional organization would be in addition to an international supervising organization and could adopt more stringent pollution control standards than the international standards.

Control of pollution in the territorial waters could be given to the individual states, but no standards should be adopted or enforced which are less stringent than the international or regional standards. Control of the land-related activities would be left to the governments of the individual states. However, the states should be required, by convention, to adopt standards for pollution control which would meet the minimum international requirements.

The developing states would be economically and perhaps socially disadvantaged by any such international convention (if they signed). The developed states all enjoyed their economic growth during a period in which there were no controls on the pollution of international waters, thereby realizing a significant cost advantege. Therefore, any cost disadvantage suffered by developing nations should be shared by the developed nations.

At the present time, there is no international machinery to protect marine life from the effects of pollution due to land-related activities. There is a present need to establish by convention that it is the clear duty of states and individuals not to pollute and to provide for the promulgation of anti-pollution regulations. Uniform standards must be adopted as pollution recognizes no jurisdictional boundaries. Once the duties are established and standards are adopted, methods for enforcing them must be found. An international tribunal should be available whereby states and the appropriate international authority can bring offending states before it for adjudication.

The ultimate solution does not lie in post hoc complaints, but lies in the acceptance by each state of regulations to control marine pollution resulting from land-related activity. Marine life is threatened by man's land-related activities

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[24] J. Cousteau, Our Oceans Are Dying, N. Y. Times (New York City), Nov. 14, 1971, at 13, sec. 4, col. 3.

and any changes in the marine environment must be in accord with the natural principles. A new convention is necessary to determine the relationship between man, the states, the international community, and the marine environment.

ATTITUDES OF DISTANT FISHING NATIONS TO THE CONSERVATION OF FISHERY RESOURCES

Anderson Haynes

"ECUADOR SEIZING TUNABOATS AGAIN"[1]

> Ecuador has resumed the seizure of U.S. tunaboats operating within 200 miles of its shore with four American vessels rounded up by gunboats within the past two days of the new fishing season.
>
> The new seizures brought an immediate protest from the U.S. State Department which argues that international law allows national jurisdiction to extend only 12 miles off shore.
>
> The General Office of Fishing levies fines against boats which infringe on waters claimed by Ecuador. Ecuadorian officials said seven foreign boats have already paid fines totaling $454,230 so far this year.
>
> In 1971, some 50 U.S. flag tunaboats were sanctioned for entering Ecuadorian waters and forced to pay $2.2 million in fines and license fees.

This seizure by Ecuador is emblematic of a persistent and complex problem in the law of the sea, that is, the conflict between distant fishing nations and coastal nations over the resources of the sea. The issues involved are a tangle of political, economic, and conservational considerations which are further complicated by professions that often only illogically correspond to purpose.

The international situation has become intense in the last twenty-five years. Prior to World War II, Western Hemisphere countries had the Pacific Ocean to themselves, for the most part. In 1966 the Secretary of State's Special Assistant for Fisheries and Wildlife painted a pastoral picture of the postwar fishery:[2]

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[1] Ecuador Seizing Tuna Boats Again, Durham Morning Herald (Durham, N.C.), November 14, 1972, at 10A, col. 1.

[2] W. C. Herrington, International Issues of Pacific Fisheries, 55 Dept. State Bull. 500 (1966).

U.S. vessels fished off Canada, and Canadian fishermen did some fishing off the United States, mostly along the coast of Alaska. U.S. tuna fishermen were beginning to get the hang of catching the tropical tunas found along the coasts of southern California and Latin America. Japan had tried some salmon fishing in the eastern Bering Sea but backed off on protest from Secretary of State Cordell Hull. The Soviet Union had shown no great interest in high-seas fishing.

After the war, however, the situation changed. The development of large stern-ramp trawlers, factory ships that would process, freeze, and store the fish at sea, and supply ships greatly extended the practical radius of fishing operations and brought the fishery resources of the entire ocean within the range of man's fishing implements.[3] A rapid development of fishing effort on a worldwide basis pursuant to this technological change has put a strain on the productive capabilities of the fish population of the high seas.[4] The rapid rise in the usage of fish resources is seen in the fact that the total world catch of fish and shellfish products in 1930 was about 10 million tons, while in 1968 it was 64 million tons.[5] It has been estimated that the gross revenue from this annual harvest approaches nine billion dollars.[6] Regardless of the precise accuracy of this figure; it is clear that fisheries are of great economic value, and there will be fierce international competition for a share of the wealth.

Coastal waters, by and large, contain the best fisheries and are more fertile than waters of the mid-oceans.[7] The coastal fisherman is typically at a serious disadvantage vis-à-vis the well organized fleets from other countries that appear on the grounds he has traditionally fished: his vessel is smaller, his equipment is less modern, and he may be restricted by local conservation measures that do not apply to foreign fishermen.[8] Consequently, coastal nations wish to preserve the offshore fisheries for themselves while nations with aggressive, wide ranging fleets wish to preserve freedom of high seas fisheries.

The fishery situation is muddied by the fact that many nations contain, at the same time, distant and coastal fishermen. Thus, peculiar inconsistencies arise in the attitudes of a given nation, depending on which hat is being worn. Russia, after unilaterally restricting Japan's right to salmon off the Russian coast for alleged reasons of conservation, might violently protest a similar restriction by the United States on Atlantic flounder. There is conflict, moreover, within a nation itself. Local fishermen plead for a protective 200 mile fishery zone while the distant fishing industry urges maintenance of the narrow-

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[3] Id.

[4] W. Chapman, The Theory and Practice of International Fishery Development-Management, 7 San D. L. Rev. 414 (1970). [hereinafter cited as Chapman].

[5] Moiseev, The Present State and Development of World Fisheries, Sea Going Fellowship Study Tour of Fishery Biology and Oceanography, USSR-FAO at 1-42 (1967).

[6] Chapman, Some Problems and Prospects for the Harvest of Living Marine Resources to the Year 2000, at 1, April 1, 1970 (unpublished paper presented to a UNITAR Symposium). SEE F. T. Christy, Fisheries and the New Conventions on the Law of the Sea, 7 San D. L. Rev. 455, 456 (1970).

[7] F. T. Christy and A. Scott, The Common Wealth in Ocean Fisheries, 62-63 (1965). See figures 10 and 11.

[8] L. A. Teclaff, Jurisdiction Over Offshore Fisheries -- How Far into the High Seas 35 Fordham L. Rev. 409, 413 (1966). [hereinafter cited as Teclaff, Jurisdiction].

er zone To make sense of the attitudes, therefore, it is necessary to examine the underlying interests.

The basic interest involved is conservation and that is the topic with which this paper attempts to deal. Conservation, however, has a broad meaning in the context of the fishery dispute. It has been said that conservation like motherhood, is a policy all rush to serve.[9] For the most part distant fishing nations purport to rush equally as hard as coastal nations. Toward what do they rush? Conservation has been defined as "the controlled, restricted, or postponed enjoyment, and the consequent perpetuation of a renewable physical resource. . ."[10] Nations competing for the same resource, while agreeing on the broad ecological principle, have differing views as to who is to control the resource, how it is to be restricted, and how long postponed. Thus, within the laudable concept of conserving the resource is the more practical question of who gets the available fish. In addition to overfishing, another aspect of conservation of a renewable resource is underfishing. With a hungry world, a maximum sustainable yield must be taken or the resource is wasted. Some insight into the complexity of the fishing problem is gained when we recognize on the one hand a need for a delicate balancing of conservation and maximum sustainable yields and on the other, an expanding system where all compete independently for as large a share of the wealth as they can get.

An attempt to set up a written constitution for the sea was made at Geneva in 1958. Four conventions were concluded: the Convention on the High Seas,[11] the Convention on the Continental Shelf,[12] the Convention on the Territorial Sea and the Contiguous Zone,[13] and the Convention on Fishing and Conservation of the Living Resources of the High Seas.[14] The High Seas convention expressly sets forth in Article 2 the right of freedom to fish, provided that the right is exercised with regard to the interests of other states in their exercise of freedom of the high seas. The convention further developed the nature of fishing rights:

Article 1

> 1. All States have the right for their nationals to engage in fishing on the high seas, subject (a) to their treaty obligations, (b) to the interests and rights of coastal States as provided for in this convention, and (c) to the provisions contained in the following articles concerning conservation of the living resources of the high seas.
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> 2. All States have the duty to adopt, or to cooperate with other States in adopting, such measures for their respective nationals as may be necessary for the conservation of the liv-

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[9] A. E. Shenker, Foreign Fishing in Pacific Northwest Coastal Waters, 46 Ore. L. Rev. 422, 451.

[10] D. M. Johnson, The International Law of Fisheries, 4 (1965).

[11] Convention on the High Seas, April 29, 1958 (1962) 13 U.S.T. 2312, T.I.A.S. No.5200.

[12] Convention on the Continental Shelf, April 28, 1958 (1964) 499 U.N.T.S. 311, T.I.A.S. No. 5578.

[13] Convention on the Territorial Sea and the Contiguous Zone, April 29, 1958 (1964) 15 U.S.T. 1606, T.I.A.S. No. 5639.

[14] Convention on Fishing and Conservation of the Living Resources of the High Seas, April 29, 1958, (1966) 559 U.N.T.S. 285 T.I.A.S. No. 5969.

ing resources of the high seas.

Article 2

> As employed in this Convention, the expression "conservation of the living resources of the high seas" means the aggregate of the measures rendering possible the optimum sustainable yield from those resources so as to secure a maximum supply of food and other marine products. Conservation programmes should be formulated with a view to securing in the first place a supply of food for human consumption.[15]

The convention sets out certain concrete duties of fishing States. A State whose nationals are engaged in fishing any stock of fish shall adopt for its own nationals measures for the conservation of the living resources affected.[16] If the nationals of two or more States are engaged in fishing the same stock, these States shall enter into negotiation with a view to prescribing for their nationals the necessary measures for the conservation of the stock.[17] Any States which newly enter an area shall adopt the existing conservational measures as established.[18]

As indicated in Article 1(b) the convention sets out special rights of the coastal state. A coastal state is entitled to equal footing with other fishing states in conservation measures affecting adjacent high seas, even though its nationals do not carry on fishing there.[19] Furthermore, any coastal state may adopt unilateral measures of conservation in any area of the high seas adjacent to its territorial sea provided that there is an urgent need and that such measures do not discriminate against foreign fishermen.[20]

Although the Convention on Conservation was adopted in Geneva by the overwhelming majority of 45 votes to 1 (with 18 abstentions), it took eight years to come into effect and was the last of the four conventions to do so. This delay probably came about because the attenuated compromise satisfied neither side. The Distant fishing nations felt that freedom of the seas was too much curtailed in favor of the coastal states, while the coastal nations felt constricted by the conservational requirement of "urgent" need before being able to exclude foreign fishermen.[21]

In addition, certain problems which had a direct bearing on the coastal-distant nation dispute were left unsolved in 1958. There was a failure to set the seaward limits of the territorial sea, and a failure to explicate the measures which coastal states may take in high seas areas adjacent to their coast to regulate the activities of foreign fishing fleets and to explicate the distance from the coastline in which coastal state rights would apply.[22] The effect of these shortcomings was to step up the usage of a short circuit device, the unilateral decree. For the conservation of their own offshore resources and, more importantly, for the conservation of their own fishermen's rights to those resources, na-

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[15] Id. Art. 1, Art. 2
[16] Id. Art. 3.
[17] Id. Art. 4 at 1.
[18] Id. Art. 5 at 1.
[19] Id. Art. 6 at 2.
[20] Id. Art. 7
[21] Teclaff, Jurisdiction at 409, 416.
[22] D. Stang, The Donnybrook Fair of the Oceans, 9 San D. L. Rev. 569, 571 (1972).

tions began to assert exclusive jurisdiction over special fishery zones and, in some cases, began to extend their territorial sea. The right of free access of all states to the fisheries of the high seas is apparently upheld by most nations, but the high seas, for fisheries purposes, at least, are shrinking.[23]

There are varying responses from the distant fishing nations to the concept of conservation and the erosion of freedom of the seas attendant to it. As pointed out, distant fishing nations are coastal nations themselves, and they must also be concerned with protecting home fisheries. Their response to conservation is by and large a function of the distant nation's dependence on foreign fishery resources and the size and influence of their distant fishing industry vis à vis their local fishing operation. Japan, the Union of Soviet Socialist Republics, and the United States of America are three nations whose varying attitudes typify a broad range of distant fishing nations.

JAPAN

Japan's far sea fisheries include the large-scale mothership type bottomfish fishery in the North Pacific, the bottomfish fishery in the Atlantic Ocean, the tuna longline fishery around the world, the mothership-type salmon fishery and the king crab fishery in the North Pacific.[24] Japan has been in the forefront of the post-war expansion. The tuna fishery in 1952 numbered 1,074 vessels aggregating 89,803 gross tons. Ten years later Japan had a fleet numbering 1590 with an aggregate tonnage of 340,600.[25]

The precise importance of the sea to Japan was outlined by the Japanese delegation to the 1958 Geneva Conference:[26]

> Japanese territory, supporting some 90 million people, consists of small mountainous islands with but very small arable space and meagre natural resources. Consequently, the life of the Japanese people depends heavily upon the sea, which is the source of livelihood for a large segment of the population. Since the development of live-stock industry is naturally restricted on account of the small limited territory, the Japanese people obtain almost 90% of their animal protein requirements from the living resources of the sea. Moreover, the fishing industry plays an important role in Japan's foreign trade, because a part of the fishery products is exported, enabling Japan to import foodstuffs and raw materials which are not available domestically.

Because of the need for fishery resources and because of the fact that the coastal fisheries are unable to satisfy these requirements, Japanese fishermen have made a solid commitment in terms of labor and capital to distant fishing. Through favorable loans and other incentives the government has fostered this industry and, indeed, has taken a strong role in the management and regulation of all fishing. Given these conditions it is not surprising that Japan feels that it has a vested interest in the orderliness and freedom of the high seas. It is furthermore not surprising that Japan has resisted attempts at restricting freedom of fishing. Because restrictive measures, such as unilateral declarations of

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[23] M. B. Schaefer, Some Recent Developments Concerning Fishing and the Conservation of Living Resources of the High Seas, 7 San D. L. Rev. 371, 386 (1970). [hereinafter cited as Schaefer].

[24] F. Nagasaki, Some Japanese Far-Sea Fisheries, 43 Wash. L. Rev. 197 (1967).

[25] J. L. Kask, Tuna -- A World Resource, Occasional Paper No. 2. Law of the Sea Institute (1969).

[26] U.N. Doc., A/CONF. 13/39 at 24. [hereinafter cited as U.N. Doc.].

fishery zones and of extensions of territorial waters, artificial quotas, and abstention principles are, couched in terms of conservation, Japan has most often been associated with non-conservation attitudes. However, Japan is fully aware of the dangers of overfishing and the consequent extinction of the resource. Her fishery scientists are as competent as those of any highly industrialized nation. It is true that Japan is reluctant to provide fishery research money to international fishery bodies and commissions.[27] It is also clear that Japan has not signed the Geneva Convention on Fishing and Conservation, but it would be simplistic to conclude on the basis of this that Japan was less conservationally minded than any other state. Japan like most other fishing states is concerned with "who gets the fish," and Japan, to the greatest degree possible, wants to participate in that decision in every coastal fishery. Japan often sees "conservation" as a roadblock thrown up by coastal nations so that coastal fishermen can secure greater fishery interests. The Japanese view, in part, is reflected in a model of competition described by Professor Oda of Tohoku University:[28]

> If the demand for the catch of a certain species is 150, and prudent conservation practice demands that the total allowable catch be only 100, the burden of abstaining from harvesting the extra 50 will have to be imposed in some way upon the States concerned in exploiting the available 100. Each State can, of course, freely compete in fishing within the total allowable catch of 100. Free competition, however, does not satisfy the States with less advanced technologies and economies, or the States which so substantially pre-empt the fisheries concerned that fishing by any newcomer will necessarily decrease their own catch. In such cases, conflict between two parties, both of whom may agree upon the desirability of conservation of fish resources, cannot be avoided. One State adheres to traditional arguments of free competition in fishing on the high seas since it considers that its own technology and economy can bring for itself a larger share of the resources, while the other, seeking to assure itself of a constant, preferably large, share of the resources, will invoke all kinds of reasoning in attempting to keep its competitors from exploiting the areas it considers most important. The allocation of limitations has in fact made it difficult and sometimes impossible to compromise conflicting national interests even among those States which are most vitally concerned with the conservation of resources.

Professor Oda sees two possible avenues for the conservation-allocation of fish resources: to leave all states to compete, fishing freely among themselves within the limit fixed by the conservation consideration, or to allow unilateral decrees of artificial allocation providing for preferential shares for privileged states such as coastal states or those entitled to historical titles.[29] The sec-

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[27] Chapman at 408, 450.

[28] S. Oda, Some Observations on the International Law of the Sea, 11 Japanese Ann. of Int'L L. 37, 48 (1967).

[29] Id.

ond possibility is by and large what exists today but is one that is not completely acceptable to Japan.

Japan's attitude toward the unilateral decree has not changed since Geneva in 1960 when Japan maintained that "a rule of international law can be altered only through an international agreement based on a consensus of opinion among the family of nations."[30] Nevertheless, Japan has been forced to contend with unilateral conservation measures of nations extending their territorial waters, raising protective fishing zones, and forcing allocations.

Except for an agreement with Korea,[31] Japan has stuck to a three mile territorial sea. It has been critical[32] of states which have extended territorial waters to meet their own needs and afterwards justified it on conservational grounds. Furthermore, Japan is not in agreement with the United States' compromise measure of a twelve-mile protective fishery zone, feeling that this, like the territorial zone, is merely a prophylactic device to benefit the coastal fishing industry. It would seem that on this issue the Japanese are justified, in that fish do not limit themselves to a twelve mile area nor, indeed, to any zone, and hence the pure conservation justification is weakened. The Japanese have, nevertheless, been forced to accept the zone determinations of coastal states and have had to bargain to get any rights in the territorial fisheries.[33]

Other conservation devices of which the Japanese have been critical are the artificial quota and the abstention principle. Japanese writers see these as the products of pressure brought by coastal states at the negotiation stage of a convention in an effort by the coastal states to secure for themselves a more favorable share in the distribution of resources.[34] An example of the quota system is the Northwest Pacific Fisheries Convention concluded between Japan and the Soviet Union in 1956. The negotiations were subsequent to a Soviet decree purporting to regulate salmon fishing in certain high seas areas. The U.S.S.R. was in a strong bargaining position at the time as a leading nation and was powerful enough to put into effect its assertion that a state could modify the legal status of its adjacent waters to meet the needs of its economy.[35] The convention prohibited salmon fishing in certain areas of the high seas, limited it in others, and established a commission to regulate the specified high seas areas. Joint regulation for conservation was the Soviet Union's profession in forcing Japan to bargain. But the Soviet Union catches its salmon, not on the high seas, as does Japan, but in its inland waterways and is hence not subject to the regulatory commission. Thus, the true purpose of the convention seems to be less pure, equitable conservation than discriminatory allocation.

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[30] Official Records of the Second United Nations Conference on the Law of the Sea, Geneva, 17 March - 26 April 1960 document A/CONF. 19/9 United Nations, New York, 1962.

[31] Agreement on Fisheries Between Japan and the Republic of Korea, 10 Japanese Ann. of Int'L L. 264 (1966).

[32] U.N. Doc. at 24.

[33] For Examples of such Treaties, D. W. Windley, International Practice Regarding Traditional Fishing Privileges of Foreign Fishermen in Zones of Extended Maritime Jurisdiction, 63 Am. J. Int'L L. 490 (1969); Agreement on Fisheries Between Japan and the Commonwealth of Australia, November 27, 1968 (1969), 14 Japanese An. Int'L L. 203 (1970); Agreement on Fisheries Between Japan and New Zealand, July 12, 1967 (1968), 13 Japanese An. Int'L L. 221 (1969).

[34] S. Oda, Japan and the International Fisheries, 4 Japanese Ann. Int'L L. 50 (1960).

[35] Z. Ohira, Fishery Problems Between Soviet Russia and Japan, 2 Japanese Ann. Int'L L. 1, 9 (1958).

Abstention is the concept whereby one nation is required by other nations in a traditional fishing ground to abstain from fishing so that the optimum yield of the stocks in the areas can be maintained. It was first adopted in the North Pacific High Seas Fishery Convention[36] between the U.S., Japan, and Canada in 1953. The treaty was negotiated with Japan in a weak bargaining position as an occupied nation, and under it Japan agreed to abstain from fishing stocks of salmon whenever it was determined that Canada and the U.S. were themselves already taking the maximum yield. Japanese writers[37] have been particularly critical of this conservational measure saying that there is no precedent in international law for totally excluding one nation from a high seas fishery that certain other nations can utilize. Japan has never fully accepted the principle of abstention as a legitimate doctrine of international law, and at the 1958 Geneva Convention it rejected the United States' attempt to incorporate the concept. Now that Japan has a stronger position in the world, it has begun to renegotiate the treaty. It is interesting to note that since 1963 Japan has had the right to terminate the treaty and fish up to the U.S.'s twelve-mile limit. But, respecting the United States' position, it has not done so.

In summary, it seems that while Japan recognizes conservation as a desirable goal, it is most concerned with whether Japan will be treated equally under a given conservation measure. Because of a solid reliance on sea resources Japan is suspicious of any measures to restrict unfairly the freedom of the seas in any guise, even the hallowed concept of conservation. Because of its highly developed distant fishing industry Japan favors freedom of both competition and movement on the seas. Japan is in favor of conservation measures that rationally relate to the purpose of conservation and that place equal restrictions on all fishing nations.

RUSSIA

Russia has not traditionally been a distant fishing nation, but in the last decade it has greatly expanded efforts in all foreign seas. Like Japan, Russia needs sea resources for its protein requirements. This was particularly true at the time of expansion when Russia's agricultural programs were unsuccessful. Sea resources, furthermore, form a large part of Russia's international trade. To harvest the sea, the Russians have the largest number of fishing craft of any nation and 49 percent of the world tonnage total for vessels over 100 tons. The nature of the Soviet Distant fishing operation was described in a report to the U.S. Senate Subcommittee on Merchant Marine and Fisheries in May, 1966:

> These [large trawler] fleets might not be a low cost operation, but they are mobile and can easily fish one year in the Bering Sea and the next year outside South Africa. Thus if a ground has been over-fished the fleet can move to another area. If restrictions for purpose of conservation are implemented, such as catch quotas, closed season, closed areas, the oceangoing trawlers and factory ships can fish elsewhere dur-

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[36] International Convention for the High Seas Fisheries of the North Pacific Ocean, May 9, 1952, (1953) 4 U.S.T. 380, T.I.A.S. No. 2786.

[37] North Pacific Fisheries Symposium, 43 Wash. L. Rev. 1 (1967).

ing the closed season.[38]

Despite the commitment to distant fishing, Russia has not taken as extreme a position on existing conservation devices as Japan. There are two reasons for this. One is the fact that Russia has an extensive coastal fishery which it must protect with 12 mile territorial waters and artificial quotas, the very devices of which Japan has been critical. The second is the fact that Russia can close its waters and rely on its bargaining position as a wealthy and industrialized superpower to gain entry into the similarly closed waters of other nations.

Although not as critical of the existing regime of conservation as Japan, Russia is still very interested in who gets the available fish. Russia did not sign the Geneva Convention on Fishing and Conservation, possibly because that would have given the U.S.S.R. less control over the division of the resources. Russia has, rather, relied on bilateral treaties for conservation and development which insure it at least an equal participation in the resource. An example of this is the U.S.S.R. - U.S. Agreement on Fishery Problems in the Western Areas of the Middle Atlantic Ocean in 1967, wherein the parties agree to conduct the fishery "on a rational basis with due attention to their mutual interests.[39] There are commendable conservation provisions ensuring the reproductive cycle of fish stocks through mutual abstention, providing for exchange of scientific information and establishing periods of closed seasons. The agreement is acceptable to both because it insures equal division of the available resources.

Russia, nevertheless, like Japan, does criticize the existing conservation regime when Russia is disadvantaged. In response to Argentina's 1966 extension of a 200-mile zone of territorial waters the U.S.S.R. declared it impermissible:

> Recognition of freedom of the high seas is one of the most important principles of the international law of the sea. Freedom of the high seas comprises, especially, freedom of fishing, which all countries exercise reasonably, taking into account the interest of other states.
>
> The Government of Argentina, in adopting the new law, is essentially attempting to place under its sovereignty broad areas of the high seas to the prejudice of the rights and interests of other states. These actions of the Government of Argentina are fraught with dangerous consequences, and they are in obvious contravention of the principles of contemporary international law.[40]

In summary, by working toward a rational fishery management, wherein, incidentally, it insures itself a division of the wealth, through treaties and commissions such as the International Whaling Commission and the International Commission for the Northwest Atlantic Fisheries, Russia is gaining a reputation for becoming more conservationally minded. Still, Russia is division oriented on a self interest scale, as opposed to conservationally motivated for the good of the international community at large. It is significant to note in this regard that

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[38] Hearings on S. 2218 Before the Subcomm. on Merchant Marine and Fisheries of the Sen. Comm. on Commerce, 89th Congress, 2nd Sess., Ser. 65 (1966).

[39] U.S.S.R. - U.S. Agreement on Fishery Problems in the Western Areas of the Middle Atlantic Ocean, 7 Int'L Legal Mat. 144 (1968).

[40] U.S.S.R. Ministry of Fisheries on Freedom of High Seas, 8 Int'L Legal Mat. 896 (1969).

Russia is not a member of the U.N. Food and Agriculture Organization which makes at least an attempt at multilateral fishery management.

THE UNITED STATES

The United States is a distant fishing nation of lesser magnitude than either Japan or Russia. Its operation is by and large only in the shrimp and tuna fisheries. The total number of vessels is small, and they operate individually rather than as a fleet. The U.S. depends on living resources of the sea far less than many other nations. The U.S. has recently imported more fish than it has produced.

As a lesser distant fishing nation the U.S. is less critical of the existing international machinery for conservation. Nevertheless, the U.S., just as other nations, is critical to the degree that its interests are prejudiced or its share of the wealth diminished. The major confrontation is over the Latin American powers' unilateral extension of fishery zones to 200 miles and the consequent restriction of the rights of the U.S. distant tuna fleet. The position of the United States according to the Special Assistant to the Secretary of State for Fisheries and Wildlife is that attempts by coastal States to protect their fishery interests by unilateral action through extending their jurisdictional claims beyond twelve miles can hamper full utilization of fishery resources, and may lead to retaliatory actions by distant-water fishing States, with harmful results.[41] The Latin American powers have not been amenable to international negotiations on the subject and there is no immediate solution to the problem in sight.

Despite extensive operations of the tuna fleet, the bulk of the pressure is for the U.S. to protect its coastal fishing industry. The great percentage of the total U.S. catch is within twelve miles of U.S. shores.[42] Consequently the U.S., while not abandoning the three mile territorial sea limit, has moved to establish an additional nine-mile protective fishery zone. At the 1958 Geneva Convention the U.S. unsuccessfully supported the three mile territorial limit largely because of strategic naval reasons. It seems clear at this point that the U.S. would be willing to support a twelve-mile zone if for no other reason than to curb the escalation of seaward zones.

The United States is perhaps the strongest supporter of conservational measures of any fishing state. This is perhaps because of the extensive coterie of fishery scientists and conservationalists in the U.S. and because the U.S. depends less on actually catching the fish itself. The U.S. is rich enough to afford the luxury of rational, long term exploitation of the sea, and hence it participates in all major treaties and commissions of conservation including the Geneva Convention on Fishing and Conservation, the Inter-American Tropical Tuna Commission, the U.N. FAO, and the International Commission for the Northwest Atlantic Fisheries.

CONCLUSION

This paper has attempted to analyze distant fishing nations' attitudes toward the solutions for conservation that arose in international law both be-

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[41] McKernan and Van Campen, An Approach to Solving International Fishery Disputes, Ann. Meeting Am. Fish. Soc. (1969). This is a paper presented in New Orleans on September 11, 1969.

[42] H. R. Rep. No. 2086, 89th Cong. 2nd Sess. (1966).

fore the Geneva Conventions and afterwards in response to the failures of those conferences. Unilateral measures by coastal states and the rise of devices that speak more to discriminatory allocation within a particular area than to concerted conservation are the manifestations of a piecemeal approach necessitated by the breakdown of broad international cooperation.

Perhaps when nations are fighting for as large a share of the wealth as possible, there can be no cooperation. If this is true, it will result in the closing of the commons of the ocean. For as sea resources become scarce the competition will escalate and the "sea-rush" will be on. Eventually it will be economically disasterous for any state to fail to extend its territorial waters for as far as it can possibly exercise control.

The international situation does not have to go in this direction, however. All nations seem to be in agreement on the principle of conservation. That is a beginning point for cooperation. A second nexus is the fundamental need of every human being for food. As the need for food resources increases, so too will the need for tight, effective, and strategic management of sea resources to insure the optimum harvest. Perhaps the United Nations is the organization to oversee this operation. Most nations see this as a draconian solution and are indisposed to release their actual or potential rights in any resource to world control. However, as more nations enter the competition for the ocean wealth the less those rights are going to mean; for the supply will be depleted, perhaps beyond regeneration and a right in nothing is nothing.

Perhaps the Fur Seal situation will be an instructive analogy for the fishing problem. It took the near extinction of the seal herds to awaken the competing nations to the dangers of unconcerted and unplanned usage of a resource. Now the Fur Seal Convention is a model of international cooperation and one of the most successful examples of concerted regulation. At a future Law of the Sea Conference, it is hoped that nations will realize the mistakes of the past and attempt to formulate an equitable, comprehensive and concerted plan for the use of the living resources of the sea.

AFRICAN ATTITUDES TOWARD THE LAW OF THE SEA

Paul Carruth, Jr.

As with any subject on an international scale, a comment on the international position of the African states concerning the laws of the sea, especially in commenting on the attitudes of those few landlocked states within the continent, involves a certain amount of gazing into a crystal ball. No sector of international law is in such a state of flux and dynamic development as the African situation. The continent is grandly exhibiting the predicament of a massive, inner growth, combined with an indiscriminate, outreaching, infantile hand, able to grasp internationally any passing political or social system. The immediate exterior cause of the problem is the relative ease of world trade due to modern improved modes of transportation. The force within that is contributing to the duality is the struggle of the newly independent states to assert their sovereignty while economically attempting to stabilize the effects of a post-colonial period. The law of the sea is therefore relevant in this context as it may be seen as a reflection of movement within and without Africa to move those countries toward actual, as well as potential, international standing with other world states. The crystal ball, at this stage, becomes the appropriate instrument of measurement of present and future developments. As the Committee on the Uses of Waters of International Rivers of the American Branch of the International Law Association phrased it in their May 1958 Report:

> International law is not static. Like all living systems it grows and changes. Recognition of what the law is may follow long after the law comes into being. This is peculiarly true of the law based upon international custom giving evidence of general practice accepted as law. In the view of this committee it is artificial to seek to identify nice gradations between principles that are already generally recognized as constituting existing law, principles that are coming to be recognized as representing already existing law, principles that are recognized as becoming existing law, and so on. Such classifications may appear to be scientific, but they do not fit a living system such as the law. Customary law necessarily develops by accretion, and as Prof. H. A. Smith pointed out at the Geneva meeting of the international committee in October, 1957, the recognition and expression of customary law necessarily lags.[1]

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[1] International Law Association, New York University Conference (1958), Principles of Law and Recommendations on the Uses of International Rivers, May, 1958, p. viii-ix.

The attitudes of the African states toward the laws of the sea may be obtained by inquiry into three levels of possible international consequence. First, the laws that an individual country may have passed or policy statements that may have been issued would afford a ground level view of concrete actions, inactions, or reactions. This movement would reflect the impact of outside forces, as well as inside pressures, to establish some sort of standard within the country as to sea law legislation. In the case of most African countries, the form of pressure would most likely be at the lowest level, need for a local statute concerning a local, probably long existing nuisance. The purely local problem which only remotely would concern sea law would, as will be shown later, most likely be an anti-dumping or polluting ordinance. The second level, however, more nearly approaches a positive response to international attitude. The collective legal actions of the states of Africa, as a whole, may at least expose a reaction to a common outside stimuli in the area of sea law. The primitive state of Africa, as a whole, leads to the belief that the action will be in actuality a reaction to the inadequacies that exist in Africa and to the proding of outside powers. Lastly are the voting records of the individual African states on resolutions concerning sea law that come before the United Nations committees and the General Assembly. International agreement is indeed the function and purpose of the United Nations. Resolutions on sea law matters are increasingly surfacing in United Nations agendae. Recent movements in sea law are reflected in such resolutions which are discussed before the members and on occasion voted upon. From this level, hopefully, the local action that is reflected in the individual vote will be affected by a filtering down of ideas. At least thought upon the matter is produced, and perhaps future action may be seen from this thought provoking level.

African History

Africa is definitely wrestling with the effects of its past. Pre-colonial Africa is characterized by primarily a multitude of overlapping circles upon a map of the continent. Thousands of tribes are known to have existed and are still in existence today. Intertribal marriage and overlapping hunting grounds, once evolved from thousands of years of contact and strife, are still visible in customary action and territorial usage today. The European conquerors are viewed today in Africa as the disruptors of a common community of customary peace which the African people themselves formed over a period of centuries. Warfare is known to have existed, but the procedures for battle are believed to have been very complex, with the purpose of settling the conflict quickly, efficiently, and summarily. Many tribes are known to have practiced a kind of warfare which involved a battle to the death of the leaders on the opposing sides. The side of the leader that survived was, of course, declared to be the winner of the dispute. The number of men or women used for the "trial" varied, essentially holding an equal amount of votes for each side, with one death equal to one vote against that side. A tie was seen not to resolve the situation. Nevertheless, such intricate systems of government and settlement of governmental disputes between tribes is recognized to have been well established.

The influx of the Moslem religion from the north is the beginning major contributing factor in the disruption of the relative order and peace. The fierce belief of the Moslems, "convert or you die", disrupted all of the family and tribal orders. The Moslems rode south and conquered the northern third of the continent. A unifying force was brought to these countries, but the old governments were reformed and family ties retained but reshaped.

Later in time but more quick to develop was the introduction of the European and his Christian religion into the central and southern areas of the continent. The Christians converted the "heathens" away from their worship of the gods

and family ancestors, and superimposed a European colonial government upon the confusing existing system. Not realizing how complex and developed was the existing system, the Europeans, the British no less than anyone else, gave the people a European government to enable them to raise themselves from their ignorance and become Christian Europeans. Being militarily defeated and the governments being run by and for Europeans, the old systems became phased out, family ties and traditions disrupted, old trading customs reformed, and incomprehensible rules were established over the old tribal rules. European lines were drawn to demark territorial boundaries to include one governing unit where fifty existed before. Tribes, very different from each other and completely without contact prior to the governmental formations, were made to deal with each other. In many cases, due to the rise of certain groups in the civil service or preference by the governing powers, one group came to govern many groups within the country. The rise of the Ibos in Nigeria was a prime example. Different religious sects were "given" to the people, who then became more confused than ever and were able to do nothing to remedy the situation themselves. The Moslem north retained the religion with a mixing of the old tribal customs to fight with the Christian central region. The whites plundered and dominated with the aid of the government, and the African was demobilized and confused.

It is no wonder that the emergence of a sense of nationalism in different so-called African countries has brought about internal struggles, fighting across borders, and a spin-off hatred of the European white ruler. The colonial period for Africa is easily seen by historians as a mistake on a grand level. Might, in this case, has not made right but has made wrong. Independence for the states perhaps has not made matters worse internally, but the suppressed hate for the European and whites in general has been allowed to express itself.

African Governmental Reflection

The purpose of the review on African history and African state of mind has been to set the mood for a presentation of the reasons for the internal laws and international actions on the part of separate governmental units. African history explains why attempts to organize the African states, as is being attempted by the questionable Organization of African Unity, has met with less than complete support by Africans themselves. Stability in government and governmental action is still a viable issue throughout the continent. This explains the why the O.A.U. provides in its Charter for members to be states, as opposed to governments.[2] The existing state of mind for Africa is probably very healthy, for the resentment of the past white rule serves as a badly needed unifying force within the countries. The fact that the hatred may be directed toward one past government, for example the Kenyans' attitude toward the British, can tend to focus the people, as a whole, in one direction and toward a common ground. The smaller issues are swallowed up by the main issue. Uganda serves to illustrate the outward hostility by a recent foreign policy statement:

> 3. Uganda believes that no part of Africa can feel completely free and secure until the whole continent of Africa has been liberated from the

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[2]A reference to this distinction is noted in a foreign policy statement issued by President H. E. General Idi Amin Dada on March 15, 1971, under the subheading, Organization of African Unity, Numbers 6 and 7, Page 2.

> joke of colonialism and freed from insidious attempts to introduce noe-colonialism.
>
> 4. Uganda is, therefore, committed to supporting the elimination of colonialism and neo-colonialism from the continent of Africa and to this end the Uganda government pledges to continue to give its moral and material support to all the liberation movements and freedom fighters recognized by the O. A. U.[3]

Many African countries are not so blatant, for the leaders realize that the survival of their countries depends on the trade and assistance given by the European and United States governments. Internally, the situation is:

> The governments of those African states which retain civilian constitutions usually have the power, both constitutionally and practically, to make sure that any law they wish to see enacted can be brought into being within a very short space of time. Subservient legislatures, especially in one-party states, and the side range of executive power vested in African presidents, assist this process.
>
> The position is even simpler in the military dictatorship, where rule by decree, untrammelled by any constitution other than that which is self-imposed, in theory allows the military government to effect radical and breathtakingly rapid changes in legal institutions, as in the division of Nigeria into twelve new states to replace the former four regions.[4]

The types of laws enacted are also not very surprising:

> Today virtually every African government places rapid economic development high on its public list of national priorities. Government planning concentrates, however, on channeling human and material resources into infrastructure projects and productive activities conducive to economic growth. Even in "comprehensive" plans very little attention is given to the effect on economic growth of the operation of social institutions. In particular, little attention is paid to the effect of law on economic development, or at least to the effect of those ordinary legal institutions not tied to reform.[5]

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[3] Id.
[4] A. Allott, The Unification of Laws in Africa 16 Am. J. of Comp. L. 51-52, (1968-69).
[5] Dunning, Law and Economic Development in Africa: The Law of Eminent Domain, 68 Columbia L. Rev. 1286. (1968).

Development into contributing international states has, in fact, already begun in some countries, but for the rest, the trend is inevitable. Foreign aid programs and rapid transportation have virtually eliminated the barriers most acutely facing African independence, inaccessibility and educational isolation.[6] Relatively stable governments have allowed some social processes to develop and international relationships to grow. Probably most notable, however, has been participation in the United Nations. If nothing else, mere participation in the United Nations has forced the individual governments to issue foreign policy statements on world wide issues concerning peace and harmony. Attitudes on issues such as disarmament and sea law are reflected in voting records as they are presented before the nations in the General Assembly. Even an abstention is a positive reflection of status on the pertinent matter. Treaties combining certain expertise and treaties making available results of certain experiments in almost any field have encompassed the work of the United Nations. Therefore, forcing these problems out into the open has allowed at least a reaction to be exercised by the developing countries that have as yet not been exposed to such situations and the problems that may follow. If such situations do arise at any future time, the probable policy actions of the governments involved are likely to be predictable by reference to the previous voting records on such issues.

African Viewpoint on Sea Law

Despite attempts in recent years by outside powers to capitalize on the untapped potential of the heartland of Africa, most notably the Communist Chinese movement in West Africa, the Africans have remained their own people. The government may be overturned but it still is African. The tapping of the labor and mineral deposits, just two examples of the extensive wealth, is being attempted by the local governments. Such projects, however, involve finding a market. Primarily, the market is European countries, which also aid in the exploitation. Shipping goods outside Africa by air and by sea involves economic commitment which, internationally concerning the sea, directly affect the life of the country. Economic and political stability depend on the power able to be exercised not only in the country but in the world community.

To begin on the basic level, the internal laws may show where the importance of sea law lies. Having already made reference to the kinds of governments involved and their ability to create laws, the actual amount of legislation may not be indicative of the interest to be placed in the sea law area. The laws that do exist are of the remedial type made to resolve a present issue. An example of this is the recent action by the government of Cameroon.

> The Federal National Assembly voted on 21 October 1967 to extend Cameroon's territorial sea to 18 nautical miles from the present 6-mile limit. This modification of the Merchant Marine Code will not

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[6]A note in a publication issued by the government of the Chad Republic dated 1972, and interestingly, published in France, cites that an extension of the Trans-Cameroon railway from N'Gaoundi'ere', Cameroon to Fort-Archambanlt, due to be started in 1972, "will considerably shorten the Chad Republic's access to the Atlantic." Whether it will be started soon and how long it will take to finish, is not known. However, access to the sea is of interest, even to this most central, and partially Sahara, African country.

> go into effect until the President of the Republic promulgates the law.[7]

The action in the notice coincides with similar measures taken by many other African states on the issue during this period of time.[8] Other states along the so-called "gold coast," such as Ghana, have taken extra measures to protect the wealth that might lie beneath the waters on the extended continental shelf. The Ghana Fishery Conservation Zone is presently 12 miles off the coast with the territorial continental shelf restricted to 100 miles. However, a 1968 law established the territorial seabed and subsoil at 100 fathoms but with an extension of the territory to a "depth capable of exploitation."[9] Oil is only one of the possibilities contemplated in this action. The Ivory Coast has analogous legislation.[10] Kenya, Tanzania, and Liberia all have laws fairly representative of the other coastal states, those retaining the 12 mile limit.[11] However, a change may be in the offing with the change on August 21, 1971, of the Nigerian limit from the 12 mile to a 30 mile limit.[12] The issuance is given by the Federal Military Government, decreeing the measurement is to be "made from the low water mark or from the seaward limits of the inland waters."[13] The undeveloped off-shore oil deposits and the massive aid given to the Gowan government following the recent civil war undoubtedly are factors which enabled such a bold, international move to take place. Obviously, the Nigerian government thinks that they will be able to enforce this boundary and that the country is able to develop these resources in some way economically beneficial to Nigeria. Otherwise, such action would be only folly and would lead to economic stagnation rather than progress. All of the above laws deal primarily with local territorial issues. Sea laws in other kinds of context are almost non-existent. Laws concerning oil pollution are indicative of the situation.

> To summarize, it is safe to say that the amount of African legislation which could conceivably deal with the problem of oil pollution is not staggering . . . . The legislation is strictly territorial and . . . applicable only to inland waterways.[14]

Often, no enforcement procedures or penalties are to be found, in these laws.[15]

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[7] Limits and Status of the Territorial Sea, Exclusive Fishing Zones, Fishing Conservation Zones, and the Continental Shelf, by Legal Office and Fishing Liaison Office, Department of Fisheries, F.A.O., Am. Society of International Law, 40 I.L.M. 1259 (1971).
[8] Id. at 1255-88.
[9] Id. at 1262.
[10] Id. at 1269.
[11] Id. at 1265 and 1269.
[12] Nigeria: Decree Extending Territorial Waters to Thirty Miles, [Reproduced from the Supp. to the Official Gazette of Nigeria, Vol. 58, No. 44 (Sept. 2, 1971); Part A.]. 11 I.L.M. 154 (1972).
[13] Id. at 154.
[14] Herrington, Oil Pollution: Its Nature and Africa's Legislative Response, 4 African L. Studies 47, (1971).
[15] Id. at 60.

Thus, the local level of legislation remains in a primitive state.

United Nations resolutions and conventions are more promising as a source of study because an international expression is available here more easily than on the local level. Perhaps the most important United Nations action to date concerning the law of the sea is the United Nations Resolution 1105 (XI) of February 21, 1957, an analysis of which is given by Annette Blum in an article called, The Continental Shelf Convention and African Ratification.[16] Of the four Conventions prepared and opened for signature in Geneva, February 24 to April 27, 1958, in reaction to Resolution 1105, Miss Blum concertrates on the Continental Shelf resolution and how the African nations react to it. The resolution, ratified or acceded to by forty-nine nations as of November 15, 1971, presents a far reaching, nationalistic point of view. The definition of the continental shelf is indicative:

> The continental shelf refers (a) to the sea-bed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 meters or, beyond that limit, to where the depth of the superadjacent waters admits of the exploration of the natural resources of the said areas; (b) to the sea-bed and subsoil of similar submarine areas adjacent to the coasts of islands.[17]

The rights of the coastal states over exploration and exploitation is exclusive and without reservation.[18] Any and all types of resources are included under the definition of natural resources, "Mineral and other non-living resources of the sea-bed and subsoil together with living organisms belonging to sedentary species . . . ."[19] Of the ten countries who have signed and ratified the Convention as of December 31, 1971, Swaziland, Uganda, and Malawi, three landlocked states, are included. Three other countries have signed the convention but have not ratified it. Noting that some of the countries, such as Nigeria, have their own local laws, the common factors in this grouping seem to be that either the nation is internally wealthy and strong or it is not directly affected by such an accession.[20] Those countries economically weal and needing outside help in developing their natural wealth do not dare assert themselves in the direction of exclusive control over their assets. That outside developers should not be scared off by such actions is a logical argument against anti-exploitation policies. Political self-determination can only come with economic growth and stability.

In the view of at least one author, future African voting in the United Nations cannot be seen in a context of the African states alone in their status of developing nations. A recent article by Margaret Lynch Gerstle proposes that an alliance of "Afro-Asian" nations with "Latin" nations is the future movement to be recognized in the voting spheres within the United Nations.[21]

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[16] A. Blum, The Continental Shelf Convention and African Ratification, 6 African L. Studies 35 (1972).
[17] Id. at 39.
[18] Id.
[19] Id.
[20] Id. at 42-43.
[21] Gerstle, The Politics of U.N. Voting: A View of the Seabed from the Glass Palace, Law of the Sea Institute, Univ. of Rhode Island, Occasional Paper, No. 7, July 1970. As to a Latin American viewpoint of just such a possibility, reference is made to a forthcoming paper on the Latin American Viewpoint on the laws of the sea by Robert Fuerst and Jan Samet.

> The Afro-Asian block is the heart of the developing nation vote. While Latin interests are not always consonant with those of other developing nations, it is increasingly allied with, and has become adept in using, alliance with the Afro-Asian block for tactical purposes . . . . Within this dominant framework, the degree of unity of the developing nation vote is affected by the nature of the subject at hand. This is particularly noticeable on economic subjects which align rich vs. poor. The seabeds item is a relatively pure example; at stake is a pot of gold which not only divides rich and poor but which is at present largely conjectural and hence adaptable to unrestrained fantasy.[22]

Miss Gerstle goes on to say that the seabeds item is still in its primitive stage, for the most part, resulting in a delay of complete unification of the power "blocs." "Mineral exploitation," however, has been a somewhat developed issue as to those states presently able to exploit their natural wealth. The voting of a "tactical" resolution in December 1969 clearly shows a split not only in the world, but also in the African "developed" and "developing" nations. "Developing nations want their fair share of the 'pot,'"[23] while the rich nations are prepared to utilize the resources of the other country as much as possible for their own ends. To add to the Gerstle article, this is not only a battle between the rich and the poor but between the united weak nations against the individual strong nations.

The real problem that the African nations face, not only in sea law but in most international matters, is that of unity within Africa itself. The development of the sea law will vitally affect the long range development of the continent, for much of the wealth that Africa has to bargain with is immediately off the coast. The old adage, that a divided house cannot stand, is especially applicable when the dividing comes from within. Even the landlocked nations have a stake in the final outcome, as their source of economic wealth also depends upon shipment of their goods and resources out from the continent. Territorial integrity allows the individual nation to be the primary beneficiary of the wealth that may exist beneath the waters or upon the land. The hope against the inevitable plunder of Africa will be a unification, within or without the United Nations, of the poor African nations alone or in conjunction with other developing world nations. The present attitude of the nations is not encouraging, purely judging from their collective legislative history and United Nations voting record. Sea law is undeveloped for many nations over the world, both rich and poor. However, the rapid growth in this area of the law and the direct effect either path will have on the African systems demands that present planning and organization be undertaken. Protective legislation is needed immediately within most of the states, similar to that taken by Nigeria,[24] to guard against outside exploitation of off-shore natural resources. Being realistic, however, most governments will gladly allow the country to be exploited in return for even a minor share of the benefits.

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[22] Id. at 3.
[23] Id. at 8.
[24] Nigeria: Decree Extending Territorial Waters to Thirty Miles, supra note 12.

Landlocked States' Attitude Toward the Law of the Sea

Landlocked states obviously are more interested, in relation to sea law, in the law concerning access to the sea over foreign territories. Therefore, any action taken by a country in such a predicament will likely be to protect access rights and rights of the transversed nation in its own coastal waters. Despite the scarcity of local laws on the subject, governmental executive actions and United Nations voting records are likely indicators of possible attitudes of the transversed state, even when the transversed state prefers to remain neutral. Uganda is just such a case in point, as the people of that country must cross Kenya and Tanzania by rail and air to get to the ports of Mombasa and Dar Es Salaam. Uganda is likely to reflect the attitudes of Kenya and Tanzania as well as its own policies, especially when both of those countries would prefer to remain neutral on sea law in a public debate. In any case, the landlocked states in Africa do have at least an indirect interest in the law of the sea.

There are presently fourteen African countries which are without a border that opens onto a sea or ocean.[25] Though these countries do not have a sea coast of their own, all of them make use of the nearest or most convenient seaport to export and import goods. The transversed state or states, under international law, allow these countries to cross over their borders to ship these goods. Compensation is of course given to the transversed state; but where the landlocked state is a poor, developing state, as most all of the African states may be classified, the sum to be paid becomes an unending problem. Having and maintaining friendly neighbors is important in this situation. How these states became states and landlocked states is an interesting historical anomaly.

> Functionally, the landlocked states can be categorized as buffer states, refuge states and administrative conveniences. All of the mediterranean states of South America and Asia and the larger ones of Europe may be characterized as being, to some degree, buffer states. The smaller European states, plus Lesotho and Botswana in Africa, are refuges of harassed minorities escaping from the persecution, warfare and political disintegration raging about them. The remainder of the African landlocked states have no real raison d'etre, having no long histories as national entities, no ethnic homogeneity, weak economic foundations, few natural boundaries, and no national cultures. They simply happened, largely by chance, as the major European powers carved up the continent for their own benefit. The boundaries separating British, French, and German territories resulted largely from their relative military and economic power in the region and the divisions within the respective colonial areas were drawn partly along tribal lines, but mostly for administrative convenience. These have now become states. Whether they have a future remains to be seen. They are, apparent-

[25] Botswana, Burundi, Central African Republic, Chad, Lesotho, Malawi, Mali, Niger, Rhodesia, Rwanda, Swaziland, Uganda, and Upper Volta.

ly, developing distinctive national personalities and may survive for some time.[26]

The two basic problems in reaching the nearest or most convenient seaport are the means of travel and the distance encountered. Travel by air is relatively swift and avoids climatic and geographic encumbrances. However, shipment of bulk goods by air is expensive and quantitively limiting. A small number of transport-type airplanes for non-military use is a general characteristic of developing nations. Poor nations also usually do not have the money nor developed natural resources to construct systems of highways that allow convenient travel to and from the seaport. In recent years, the roadway situation has vastly improved in Africa, not only with the building of more all weather highways but with the influx of more cars and trucks. Botswana, in a recent government publication, takes great pride in announcing that the main road link which "carries the highest density of traffic, will soon be bitumen surfaced."[27] This does not eliminate, though, the problems encountered in passing through the foreign state to arrive at the port. Railroads seem to be the solution to bulk transfer problems, and they have been extensively employed and improved going back to the early colonial period.

Geographic and territorial problems could, however, create problems in preventing construction or use of rail lines over both the landlocked and the transversed countries. Thus, no perfect means of travel exists, just a best means for the individual situation.

The problem of the distance encountered is pure chance with the difficulties of the territory in between the two points, the state boundary and the seaport, an added burden. The variations run from 100 miles to 900 miles.[28] Some countries are in a position to travel, fairly equally, to either of two main ports, but the distance up or down the coast or the crossing of the mountains in between may make one port more desirable than another.[29] Therefore, distance is no more significant than is the particular means of travel.

The protection of the rights of access to the sea is encompassed by a need to protect the rights of the transversed countries in matters including laws of the sea. The Blum article on the Continental Shelf Convention of 1958 shows that of the ten African nations to sign and ratify to date the admittedly protective document, three are landlocked states.[30] More significant is the Gerstle article which points out that all but one of the landlocked African states voted for the "tactical" resolution which stated:

> . . . pending the establishment of an international regime states and persons 'are bound to refrain from

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[26] M. Glassner, Access to the Sea for Developing Landlocked States, 10 (1970).

[27] Facts About Botswana, Embassy of Botswana, 5.

[28] Martin Ira, Access to the Sea, at 6, Swaziland to Louvenco Marques, 100 miles; and Chad to Lagos, 900. The average distance for most of the landlocked states seems to be from 600 to 700 miles.

[29] Id. For instance, Rwanda to Mombasa is 700, but to Dar es Salaam is 750. Niger to Cotonou is 500, while to Abidjan is 725.

[30] Blum, The Continental Shelf Convention and African Ratification, 42 and 43. Malawi, Nov. 3, 1965; Swaziland, October 16, 1970; and Uganda, September 14, 1964. Admittedly, there is not very much of a continental shelf on East Africa, but the policy vote is significant for the less developed African states, both landlocked and coastal.

> all activities of exploitation of the resources of the area of the seabed beyond the limits of national jurisdiction.'[31]

Even the abstaining state is responding to the vote of its access state, Upper Volta abstaining with Ghana. The other nine states are responding to the vote by the other fifty developing nations who voted for the resolution.[32] Twenty-three developing or future developed states are credited with abstentions, and two are in the "no" column. Two developed states are for, five abstain, and twenty-six wish to exploit. True class lines of rich versus poor are formed with a sizeable swaying middle-class in the center. The landlocked states are no less committed to their own self interest by supporting their access states. They have, really, no choice.

Uganda, in many respects, is more fortunate than most of the landlocked states. Uganda, at least up until the last few months, is enjoying a combination of factors which makes the country one of the richest states in Africa. Uganda has allied itself with its neighbors, Kenya and Tanzania, to form what is called the East African Community. Despite the fact that Uganda has faced and is facing the problem of internal stability, the country has managed to work with Kenya and Tanzania to form the long sought union so as to ensure free and unhindered access to the sea. Cotton and coffee crops have allowed Uganda a favorable balance of trade which is an uncommon occurrence in developing Africa.[33] The destination for both of these crops is almost totally outside of Africa, the United States the main customer. Thus, access to Mombasa is essential to the survival of the country with these bulk items.

East Africa, according to Glassner, has one of the best transportation systems in Africa in the form of the East African Railways and Harbours, an agency incorporated into the new East African Community.[34] Because of the emphasis on the building of the railroads, highway construction has not been encouraged, at least for commercial vehicles. This is all well and good for the Kenyans and Tanzanians who are of the same opinion. They, too, depend heavily of the railroad and outside trade.

> Basically, Uganda does enjoy unrestricted transit across Kenya and, should she desire to use it, across Tanzania as well. She also enjoys relatively low freight rates on the Kenya-Uganda Line of the EAR and H . . . . Not only was the railway originally built to serve Uganda, but Uganda transit trade is very important to the railway. Since the EAR and H is a public non-profit corporation owned by all three East African governments, it has not and is not likely to interfere with this transit trade.

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[31] Gerstle, The Politics of U. N. Voting, at 4, 12, and 13. Resolution 25740, 24th General Assembly, December, 1969. Only Upper Volta abstained following the lead of Ghana, which also abstained. This is not surprising considering the interest recently created in the offshore oil drillings by non-African companies.

[32] Id. at 5.

[33] Glassner, Access to the Sea at 144.

[34] Id.

> But transit is still subject to interference by the government of Kenya . . . . Kenya's attitude is significant because Uganda's foreign trade is absolutely dependent upon transit across Kenya; she has no feasible alternative.[35]

Dependence on the trade with Uganda may in time fix the relationships between Kenya, Tanzania, and Uganda so that fears of disruptions of the lines of access with the prospering Mombasa will be appreciably reduced. The recent instability in Uganda does not encourage this outlook. However, no matter what Uganda does internally, the country is tied to Kenya and Tanzania in a state of dependence which is not necessarily reciprocal. Foreign trade is the name of the game, and Kenya holds the ace, the port of Mombasa.

Conclusion

In the final analysis, African attitudes toward the law of the sea may be divided into three groups: the developing nations, the developed nations, and the landlocked nations. Much of the African attitude toward the law of the sea, as with any other topic of international law, involves a reaction to its colonial past. The developing states are battling with internal stability, a hatred of the past colonial rulers, and a conflicting need to trade with these same European, white powers. The laws on seabed exploitation are the main issues in this frustrating situation. The newly developed states wish to continue their prosperity by not interrupting the inflow of foreign trade and aid to their country. Exploitation is a proper and an expendable right to give in return for prosperity. The landlocked nation is a mixture of the two, with much to lose by not following its access country. The direct effect of sea law on the coastal country is felt just as strongly by the landlocked state, and each reacts accordingly. Thus, the complexities of a dynamic African attitude toward the law of the sea reflect an excitement in change, the only sure characteristic of the newly independent continent.

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[35] Id. at 170-1.

COOPERATION BETWEEN CANADA AND THE UNITED STATES OF AMERICA IN THE CONSERVATION OF THE LIVING RESOURCES OF THE SEAS

Noel Allen

In the area of conservation agreements, Canada and the United States of America share some of the most cooperative arrangements in the panoply of foreign relations. Their mutually beneficial approach has its roots in the earliest years of each nation's history and has born as fruit several landmark conventions.

This paper is an exposition of the various bilateral and regional agreements to which Canada and the United States are major parties. Because of the larger international nature of much of the subject matter, attention is given also to the implications of this cooperation on the relevant aspects of certain United Nations conventions. It is in this legal and historical setting that the Canadian-American example of cooperation lends promise to the future of other international arrangements, not only in regard to fisheries, but analogous areas of concern as well. Just as no human relationship can enjoy perfection, neither can the Canadian-United States approach be considered entirely model. But if success is a fair gauge, then the concerted efforts of these two nations deserve scrutiny.

The Treaty of Paris

The earliest formal roots of cooperation between Canada and the United States pertaining to fisheries were prenatal, indeed. It was in the so-called "Treaty of Independence"[1] of the Thirteen United Colonies that there was reference to the fishery rights of citizens of the United States and of citizens of the British Empire in the waters off Canada. This treaty, which concluded the American Revolution, gave Americans certain rights to North Atlantic fisheries as provided in its Article III:

> ...It is agreed that the people of the United States shall continue to enjoy unmolested the right to take fish of every kind on the Grand Bank, and on all the other banks of Newfoundland; also in the Gulf of St. Lawrence, and at all other places in the sea where the inhabitants of both countries used at any time heretofore to fish; and also that the inhabitants of the United States shall have liberty to take fish of every kind on such part of the coast of Newfoundland as British fishermen shall use...and also on the coasts, bays, and creeks of all other of His Britannic Majesty's dominions in America...

[1] The Treaty of Paris, Sept. 3, 1783, 8 Stat. 80-83, T.S. No. 104.

Of course, it could not be reasonably inferred that this early agreement was indicative of any friendly intent, either on the part of Britain, the United States, or the yet unborn Canada. Instead, the elements of cooperation here were mutual benefit and the practical reality that an agreement to the contrary might be either difficult to enforce or obtain.[2] Economics and enforceability, no doubt, have been the dominant motivating forces of the many subsequent accords. "Friendship" in this binational context appears not to be a prerequisite to, but more probably a consequence of, such pragmatic novations.

The Fur Seal Convention

The precursor to the modern era of Canadian-American fishery relations was the Fur Seal Convention.[3] This was the first international convention expressly intended to conserve a marine animal. It was signed in 1911 by Great Britain (for Canada), the United States, Japan, and Russia, and it was designed to protect the herds of fur seals in the North Pacific which had been seriously threatened by pelagic sealing.[4]

The success of this early indication of prospective Canadian-American collaboration could be measured by the overwhelming response of the fur seal herds. The seals on Pribilov Island had nearly doubled their numbers by 1916 and had multiplied to approximately 1.5 million individuals by 1930.[5] Progress in this respect continued until, in October, 1940, Japan informed the other members of its plans to withdraw one year hence, which it did.[6]

Meanwhile, Canada had, at last, achieved its nationhood (1923) and no longer required the agency of its "Mother Country." In its independent course it had become party to other agreements concerning fisheries.[7] Thus, during World War II, protection of fur seals in the northern and eastern Pacific was maintained under a special agreement between Canada and the United States. (The Soviet Union had not been participating in pelagic sealing.) Japan, by agreement subsequent to

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[2]Cushing, The Treaty of Washington 226 (1873).

[3]Convention for the Preservation and Protection of Fur Seals, July 7, 1911, 37 Stat. 1542, T.S. No. 564 (effective Dec. 15, 1911) This Treaty was terminated on Oct. 23, 1941.

[4]Chapman, The Theory and Practice of International Fishery Development-Management, 7 San Diego L. Rev. 408, 420 (1970). [hereinafter cited as Chapman, Theory]. All the members of the newly formed commission agreed to prohibit pelagic sealing. In return, the United States would manage the Pribilov Islands seal herds and pay Canada and Japan each 15 percent of the annual harvest. Russia consented to manage the Commander Island seal population and pay Canada and Japan each 15 percent of its annual harvest. Japan handled the herd on Robben Island and paid Canada and Russia 10 percent each of its yearly harvest. Id. at 420-421; see Scheffer & Todd, History of the Scientific Study of the Alaskan Fur Seal, 1786-1964, Washington Bureau of Commercial Fisheries (1967).

[5]Id. at 408.

[6]Id. at 408. Japan contended that the fur seal population had increased so much that the purposes of the convention had been fulfilled, and that the animals were now so abundant that they were adversely affecting the yield of Japanese fisheries. Of course, another influence may have been the political tensions in the Pacific area at that time. Id.

[7]These include the Conventions on halibut and salmon which are discussed infra.

the treaty of peace, abstained from pelagic sealing.[8]

Finally, in 1957, following considerable investigations which had been made that assessed the number of fur seals in the North Pacific more accurately than had been the case previously, and also assessed their relationship to the stocks of fish used commercially in the area, the four parties to the original convention agreed upon a new convention.[9] This new convention, called the Interim Convention of Conservation of North Pacific Fur Seals,[10] retained the essential provisions of the former one. Furthermore, it established a continuing Commission which would make such recommendations periodically to the member governments as research under its auspices dictated.[11] With only slight modification, this convention was extended for another six years in 1963[12] and remains in force today, with the Commission still convening annually.

The exemplary traits of the Fur Seal Convention are slightly clouded by the fact that it involves a business of relatively modest economic interest, while the expense of exploiting the crop by nations outside the North Pacific is high.[13] Yet, the unique wealth distribution features in the agreement could offer promise to analogous situations.

The fact remains that this arrangement has worked to the mutual benefit of the two continuous members, Canada and the United States, for over 61 years. In economic terms the fur seal herds of the North Pacific have been restored and managed at the most practical level of abundance which will provide the maximum yearly crop of furs, to the perpetual approval of Canada and the United States. Indeed, there appears to have been no other marine conservation convention with such a long history of accomplishment.[14]

The American-Canadian Fisheries Conference

The foreshadowing development, which was to precede the first bilateral agreement between Canada and the United States on fisheries, was an American-Canadian Fisheries Conference held in Washington in 1918. The conference was convened to discuss pertinent issues concerning fisheries on both the Atlantic and Pacific coasts.[15] Its final report called for: (1) a treaty on the sockeye salmon of the Fraser River system; (2) reciprocal legislation on the halibut; (3) prohibition of lobster wellsmack fishing just beyond the territorial waters off the coast of Nova Scotia; and (4) passage of legislation by certain American states to accord with Canadian legislation regarding the sturgeon in Lake Erie.[16]

The Halibut Convention

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[8] Chapman, Theory at 421. Japan was perhaps at a bargaining disadvantage, considering the circumstances of its signing of the treaty of peace.

[9] Id. at 421.

[10] Interim Convention of Conservation of the North Pacific Fur Seal, Feb. 9, 1957, 8 U.S.T. 2283, T.I.A.S. No. 3948, 314 U.N.T.S. 105.

[11] Chapamn, Theory at 421.

[12] Protocol amending the Interim Convention of Conservation of the North Pacific Fur Seal, Oct. 28, 1963, 15 U.S.T. 316, T.I.A.S. No. 5558, 494 U.N.T.S. 303 (effective April 10, 1964).

[13] Id. at 422.

[14] Id. at 422.

[15] Reiff, The United States and The Treaty Law of the Sea 121 (1959). [hereinafter cited as Reiff, United States].

[16] Id. at 121.

With that foundation laid, Canada and the United States embarked on a different approach to the protection of the living resources of the sea. The Convention for the Preservation of the Halibut Fishery of the Northern Pacific Ocean Including Bering Sea,[17] signed on March 2, 1923, was an encouraging portent of future Canadian-American cooperation in that it was the first treaty that the newly independent Canada signed.[18] The intent of the treaty was not immediately to regulate the fishery, but to lay the basis for future regulation.[19]

Thus, the treaty established the International Fisheries Commission to make scientific investigations aimed at providing sufficient data for later regulation procedures.[20] The commission began its work with just two members from each nation, which was adequate.[21] In its first report, released in 1928, the Commission confirmed the general impression that the fishery was in a state of decline.[22] The several recommendations made in this report[23] were later adopted in a new agreement signed on May 9, 1930, at Ottowa.[24]

This revised convention conferred affirmative regulatory power on the Commission, thus enabling it to manage the entire eastern Pacific halibut fishery within and about one hundred miles beyond the territorial waters.[25] On January 22, 1937, another agreement was concluded which revised the treaty of 1930 and extended the regulative authority of the Commission.[26] As a consequence of the total of these concerted efforts, the United States Bureau of Fisheries in 1938 was able to report that the Commission's investigations reveal that "the condition of the stocks is still improving, as a result of regulation, and offer new assurance of the ultimate success of the Commission in rebuilding the stocks of halibut to a higher level of productiveness."[27]

A threat, which perhaps foreboded later difficulties, arose in 1936. For

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[17] 43 Stat. 181, T.S. No. 701 (effective Oct. 22, 1924).

[18] Allen, Law, Fish, and Policy, 5 Int. Law. 621, 622 (1971). [hereinafter cited as Allen, Fish].

[19] Leonard, International Regulation of Fisheries 111 (1944). [hereinafter cited as Leonard, Fisheries].

[20] Id. at 111-112. The name of this commission was later changed to "International Pacific Halibut Commission" after other fishery commissions were created.

[21] Allen, Fish at 622. But as a result of fishermen's pressure the number was subsequently increased to three, but with no increase in efficiency. Id.

[22] Leonard, Fisheries at 112.

[23] The Commission recommended that adequate power be given to fishery authorities (a) to establish areas within which the total catch of halibut might be lowered by a predetermined percentage annually in the hope of achieving a stability of yield; (b) to close indefinitely such areas populated by only small, immature halibut; (c) to prevent the use of unduly destructive gear; (d) to extend the closed season and to alter it whenever necessary; and (e) to license all vessels fishing for halibut within treaty waters. 1 International Fisheries Commission Report 13-14 (Seattle, Washington, 1931).

[24] Convention on Preservation of Halibut Fishery of Northern Pacific Ocean and Bering Sea, May 9, 1930, 47 Stat. 1872, T.S. No. 837.

[25] Allen, Fish at 625. This regulatory power was subject to the approval of the President of the United States and the governor general of Canada. Reiff, United States at 168.

[26] Convention Revising the Convention of May 9, 1930, 50 Stat. 1351, T.S. No. 917.

[27] U.S. Dep't of Commerce, Bureau of Fisheries, Report of the United States Commissioner of Fisheries for the Fiscal Year 1938 with Appendixes 96 (1940).

a while it appeared as though the effectiveness of the Commission's conservation efforts might be gravely jeopardized by the activities of nationals of non-signatory states fishing beyond the territorial limits.[28] In response, both Canada and the United States passed laws which would bar the use of ports and territorial waters by any "vessel, national or inhabitant of any country not a party to the Convention" fishing with disregard for the conservation regulations.[29] These measures may have seemed sufficient in the context of the fishing technology of that time, but as shall be discussed later, modern fishing fleets and greater demands have later germinated this seed of conflict.

The good works of the International Fisheries Commission continued on that course of skillful research and restoration until, in 1953, the results of the regulations were deemed to be so beneficial that the treaty was once more renegotiated, further expanding and defining the regulatory powers.[30] Under this revised framework, the Commission, renamed the "International Pacific Halibut Commission", has continued the cooperative tradition of what has become recognized as one of the most successful international commissions to conserve a high seas fishery. Although not all of the problems of the Northern Pacific halibut fishery have been solved, Canada and the United States' reaffirmations of their faith in the Commission's work are strong evidence of the importance and general acceptance of this bilateral program.[31]

The Sockeye Salmon Convention

The excellent preliminary results of the Halibut Convention encouraged Canada and the United States, in 1930, to negotiate a convention which would similarly conserve the sockeye salmon fisheries dependent upon runs originating in the Fraser River system.[32] In this Convention, the ratifications of which were exchanged in 1937, the two contracting nations agreed to establish the International Pacific Salmon Fisheries Commission which would make a complete study of the natural history of the Fraser River sockeye salmon.[33] After eight years of investigation, the Commission, on January 11, 1944, urged the adoption of remedial measures for overcoming obstacles to the ascent of the salmon in Hell's Gate Can-

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[28] Leonard, Fisheries at 113.

[29] see the Northern Pacific Halibut Fishery (Convention) Act, 1937, Statutes of Canada, 1937, I George VI, c. 36, passed on April 19, 1937; and see An Act for the Protection of the Northern Pacific Halibut Fishery, 50 Stat. 325, passed on June 28, 1937.

[30] Chapamn, Theory at 423. Convention for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea, March 2, 1953, 5 U.S.T. 5, T.I.A.S. No. 2900. This convention incorporated the following unique provisions: (a) the Commission was given a budget of its own, supported equally by both nations; (b) it had power to allow it to accomplish the tasks assigned to it by the Convention; (c) the objective was to conserve the halibut stocks to such a level that they would produce the maximum sustainable yield.

[31] Telephone interview with R.J. Myhre, Nov. 29, 1971. Mr. Myhre is the Assistant Director for the International Pacific Halibut Commission in Seattle, Washington. [hereinafter cited as Telephone interview with Myhre].

[32] Sockeye Salmon Fisheries Convention, May 26, 1930, 50 Stat. 1355, T.S. No. 918 (effective July 28, 1937).

[33] Whiteman, Digest of International Law 1013 (1965) [hereinafter cited as Whiteman, Digest]. The Commission was composed of six members, three from each nation. Id. It also had the authority to improve spawning grounds and recommend to the Governments the removal of any obstructions to the salmon runs. Id.

yon, and urged further study in regard to the ascent of salmon elsewhere in the Fraser River system.[34] Canada and the United States agreed to the thrust of these recommendations in 1944.[35] An unusual attribute of this Commission was that the total catch was to be divided equally each year between the fishermen of the two nations. Through improved knowledge of the nature of the several salmon runs and fisheries within the Commission's jurisdiction, this otherwise seemingly impractical task has been done effectively to the satisfaction of the two industries and their governments.[36] This prosperity led to an extension of the Commission's managerial authority to include the pink salmon fisheries dependent upon Fraser River runs in 1956.[37]

The factors contributing to cooperation in the conservation of this important fishery have been generally the same as those which have boosted the halibut agreements, including the economic benefits and the nature of the fishery. But an additional inducement for bilateral concord has been the habits of the fish themselves.[38] Although the Fraser River is Canadian, the sockeye salmon run through the Puget Sound in their yearly migrations to and from the open sea. Also, many of these salmon are caught in the territorial waters of the United States, and many return to the Fraser only in four year cycles.[39] This has necessitated the agreement, which, like the halibut program, has revived a once endangered fishery to the satisfaction of both parties, and has thus gained a reputation as "one of the most forward-looking enterprises ever undertaken jointly by two governments in relation to a common resource of the sea."[40]

The North American Council on Fishery Investigations

An early effort on behalf of fishery conservation in the Atlantic Ocean is worthy of mention. In September of 1920, the organizational meeting of the North American Council on Fishery Investigations was held in Ottawa.[41] This informal council, composed of Canada and the United States, along with Newfoundland, and later France, had much the same aims in the western North Atlantic as did the International Council for the Exploration of the Sea in the eastern North Atlantic.[42]

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[34] Id.

[35] Sockeye Salmon Fisheries Agreement, 59 Stat. 1614, 121 U.N.T.S. 299 (effective Aug. 5, 1944). Both further agreed to split the cost of $2 million evenly. Whiteman, Digest at 1013.

[36] Chapman, Theories at 425.

[37] Protocol signed at Ottawa, Dec. 28, 1956, 8 U.S.T. 1056, T.I.A.S. No. 3867 (effecitve July 3, 1957).

[38] Telephone interview with Stewart Blow, Nov. 29, 1972. Mr. Blow is Foreign Affairs Assistant of the Office of Ocean Affairs in Washington, D.C. [hereinafter cited as Telephone interview with Blow].

[39] Leonard, Fisheries at 114.

[40] Reiff, United States at 173.

[41] Herrington & Kask, International Fishery Conservation Problems and Solutions Developed in Existing Conventions 7, International Technical Conference on the Conservation of the Living Resources of the Sea, Rome 1955, Doc. A/CONF.10/L,4, Mar. 29, 1955 [hereinafter cited as Herrington, Conservation Problems].

[42] Id. The International Council for the Exploration of the Sea is primarily an advisory body, set up to study the seas. Although it was conceived back in 1899, Canada did not join until 1967. Lucas, International Fishery Bodies of the North Atlantic, 2-3, Law of the Sea Institute, University of Rhode Island, Occasional Paper No. 5, (April, 1970). [hereinafter cited as Lucas, Fishery Bodies]. And the United States, a member until World War I, has recently rejoined. Telephone interview with Blow.

Until World War II, it held annual meetings at which research workers, primarily from Canada and the United States, were able to exchange ideas and coordinate programs.[43] The commission's groundwork and good will paved the way for the later International Convention for the Northwest Atlantic Fisheries.[44]

The I.C.N.A.F. Convention

Although the International Convention for the Northwest Atlantic Fisheries[45] (ICNAF) concluded in 1949, and its Commission are open to all nations who participate in the fisheries of this region and to all adjacent coastal states,[46] the research laboratories of only Canada and the United States are situated within their area of concern.[47] Thus it seems likely that the influence and cooperation of these two nations is vital to the effectiveness of the Commission for their benefit and in general. The works of the various organs of the Convention include taking measures concerning open and closed seasons, spawning and nursery areas, fish size limits, restrictions on gear, and total catch limits, with the hope of maintaining all fishery resources in the area at a level permitting the maximum sustainable yield.[48]

However, the 1949 Convention did not provide an international enforcement system, nor did it permit submission of proposals for international measures of control to its member states.[49] To remedy partially the harm of this deficiency, Canada and the United States agreed separately to allow inspectors to board the vessels of each other's governments in order to insure that certain Convention regulations were being observed.[50] This example of bilateral cooperation, even within the context of multi-national agreements, is reminiscent of the nearly constant good fortune that these two nations have enjoyed in their fishery treaties.

The North Pacific Fisheries Tripartite Convention

The most recent convention of major significance to the North Pacific region was one negotiated by Canada, the United States, and Japan. The International Convention for the High Seas Fisheries of the North Pacific Ocean,[51]

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[43] Herrington, Conservation Problems at 7.
[44] Id. at 7.
[45] International Convention for Northwest Atlantic Fisheries, 1 U.S.T. 477, T.I.A.S. No. 2089 (effective for U.S. July 3, 1950).
[46] Report of the International Technical Conference on the Conservation of the Living Resources of the Sea, 18 April to 10 May 1955, Rome 4, A/CONF.10/6 (1955). Other members are Denmark, France, Germany (Fed. Rep.), Iceland, Italy, Norway, Poland, Portugal, Rumania, Spain, U.S.S.R., and United Kingdom.
[47] Lucas, Fishery Bodies at 22.
[48] Id. at 18-19.
[49] Carraz and Roche, The International Policing of High Seas Fisheries, 6 The Can. Yearbook of Int. L. 61, 66 n.23 (1968). A Protocol, signed in Washington on November 28, 1965, which sould somewhat correct these inadequacies, has not yet entered into force. Id.
[50] Canadian Practice in International Law, 1965 and 1966, 6 The Can. Yearbook of Int. L. 295-296 (1968). Agreements were also reached between U.S.S.R. and the United States. Id.
[51] International Convention for the High Seas Fisheries of the North Pacific Ocean, May 9, 1952, 4 U.S.T. 380, T.I.A.S. No. 2786 (effective June 12, 1953).

or Tripartite Treaty as it is sometimes called, was initially demonstrative of bilateral cooperation (between Canada and the United States) in what amounts to a mutual defense arrangement, perhaps more against Japan than with her. By 1951, the time at which the Tripartite Convention was negotiated, Canada and the United States were quite accustomed to binational efforts to conserve fisheries. And both realized the frequent threats which Japan had posed to the effectiveness of these programs.[52]

Thus, with that background plus the underlying negotiating disadvantage of being recently defeated in a World War,[53] Japan signed an agreement which, beyond the ordinary conservation schemes, incorporated the controversial principle of "abstention."[54] The Tripartite Convention is thus especially notable in that it is one of the earliest official revelations of the implications of Canadian-United States cooperation in the larger context of multinational international law.

Under the principle of abstention, when a nation (or nations) has fully developed a fishery and, as a result of constant scientific investigation, is regulating it so as to obtain the maximum sustainable yield, newcomers who are parties to the treaty agree to abstain from fishing the stocks concerned.[56] Accordingly, in the International Convention for the High Seas Fisheries of the North Pacific Ocean, Japan agreed to abstain from fishing salmon east of 175 degrees West Longitude, halibut of North American origin, and herring in certain

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[52]The halibut fisheries were on occasion endangered by large fishing fleets of Japan and Russia which might overfish a stock. Leonard, supra note 19, at 113. Indeed the tensions arising out of the growing Japanese fishing activities in the North Pacific undoubtedly contributed to the demise of Japan's peaceful relations with Canada and the United States prior to 1939. Reiff, United States at 278.

[53]Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3189, T.I.A.S. 2490 (effective April 28, 1952). Article 9 of this treaty provided for a later convention to resolve differences on fisheries.

[54]Swygard, Politics of the North Pacific Fisheries, 43 Wash. L. Rev. 269, 272 [hereinafter cited as Swygard, Politics]. An earlier unilateral action taken by the United States to safeguard its conservation measures was the Truman Proclamation of September 28, 1945 which provided for the establishment of:

> ...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 jointly
>
> ...explicitly bounded conservation zones may be established under agreements between the United States and such other States; and all fishing activities in such zones shall be subject to regulation and control as provided in such agreements.

Proclamation No. 2668, Sept. 28, 1945 10F 3 C.F.R. 68/ (1943-1948 Comp.). The unofficial attitude of the State Department toward this particular decree was apparently indifference. Allen, Fish at 631. The inclusion of "abstention" in the Tripartite treaty somewhat dissipated the political pressures which had brought about the Truman Proclamation on fisheries. Swygard, Politics at 272.

[55]The principle of abstention in the context of the United Nations Conventions will be discussed later in this paper.

[56]Van Cleve & Johnson, Management of the High Seas Fisheries of the Northeastern Pacific 1, U. of Wash. Publications in Fisheries, New Series, Vol. II, No. 2 (1963).

areas.[57]

Other characteristics of this convention included a thorough research program, an organizational structure of one commission and several panels, a high degree of flexibility to enable the Commission to handle both bilateral and trilateral problems, and a set of elaborate enforcement procedures.[58] The Commission has operated reasonably successfully within these bounds[59] although Japan has not admitted any validity to abstention as a principle.[60]

The Reciprocal Fishing Rights Agreement

The enduring history of the cooperation of Canada and the United States on a bilateral basis was enhanced by a more recent agreement in 1970.[61] In this treaty each nation agreed to accord the fishing vessels of the other country reciprocal fishing rights in particular exclusive fishing zones. The vessels taking advantage of this agreement were to do so subject to regulation by the host nation.[62] The agreement also urged expanded cooperation between the United States and Canada in regard to both national and joint research programs on species of mutual interest off their coasts.[63] The accord, which was originally to remain in force for two years, was recently extended in the light of its apparent success.[64]

As a postscript to this discussion of bilateral agreements, it should be noted that there have been new negotiations between both countries since 1971 dealing with special problems of the salmon runs.[65] Obviously, there is no end in sight to the fruitful cooperation of the United States and Canada in this sector of the law of the sea.

There have been several regional multinational agreements aimed at the conservation of fisheries to which Canada and the United States have been par-

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[57]Reiff, United States at 279. Some restrictions were also placed on Canadian fishing in the Bristol Bay.

[58]Id. at 279-280.

[59]Telephone interview with Blow.

[60]Chapman, Theory at 439. When the original period of the treaty expired (1963) the Japanese gave notice of a desire to renegotiate on the issue of abstention. While this renegotiation has continued, Japan has not abbrogated the agreement, although it could have at any time since 1963. Id.

[61]Fishing Agreement with Canada, 21 U.S.T. 1283, T.I.A.S. No. 6879 (effective April 24, 1970). [hereinafter cited as T.I.A.S. No. 6879].

[62]Recent Developments in the Law of the Seas II, A Synopsis, 8 San Diego L. Rev. 658, 662 (1971).

[63]Id. The agreement reads in part:

> 5. The two governments recognized the importance of maintaining the fishery resources in their reciprocal fishing areas at appropriate levels. Both governments agree to continue and expand cooperation in both national and joint research programs on species of common interest off their coasts. The appropriate agencies of the two governments will arrange for exchanges and periodic joint reviews of scientific information.

T.I.A.S. No. 6879 at 1285.

[64]Effected by an exchange of notes at Ottawa April 7 and April 21, 1972. 66 Dep't State Bull. 777 (effective April 21, 1972).

[65]Telephone interview with Blow.

ties.[66] However, because these conventions are more largely examples of multinational cooperation rather than products of the concerted efforts primarily of Canada and the United States, discussion of them in detail herein would be tangental.

Abstention and the U.N. Convention on Fishing and Conservation

As has been suggested above, the implications of Canadian-American cooperation in the conservation of the living resources of the oceans have radiated beyond regional agreements. The most prominent of these radiations has been the principle of abstention. It is not at all surprising that this theory of conservation arose from the long tradition of cooperation between Canada and the United States. As has been observed previously, these two nations have devised extensive fishery conservation programs on several fronts. But, logically, the continued success of these agreements has been dependent not only upon their own compliance but also upon the cooperation of non-signatory nations. Thus, to defend their substantial investments, Canada and the United States have advocated abstention.[67]

Since its formal entry via the Tripartite Convention into the consideration of international law, the principle of abstention has been in contention with the generally espoused theory of freedom of the seas.[68] The Rome Technical Conference, held April 18 to May 10, in 1955, provided an early forum for debate on this matter in its discussion of draft articles on the international regulation of fisheries.[69] This conference endorsed the principle of abstention.[70] However, the International Law Commission, which was playing a larger role in the preparation of draft articles on the international regulations of fisheries for the Conference on the Law of the Sea, avoided adoption of the abstention principle in its 1956 report, claiming a lack of scientific and economic compe-

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[66]These conventions include: (a) the International Whaling Convention, July 18, 1947, 62 Stat. 1716, T.I.A.S. No. 1849, 161 U.N.T.S. 72 (effective Nov. 10, 1948); (b) Inter-American Tropical Tuna Convention, Jan. 25, 1949, 1 U.S.T. 230, T.I.A.S. No. 2044 (effective July 11, 1950); (c) International Convention for the Conservation of Atlantic Tunas, May 14, 1966, ___U.S.T.___, T.I.A.S. No. 6767 (effective March 21, 1969).

[67]The investment is not measured only in time and money, but in the self imposed catch limits which fishermen of both nations are bound to honor.

[68]Two fundamental freedoms have been applied historically to fishing on the high seas. One, the freedom to fish, is now guaranteed under Article 2 of the 1958 Convention on the High Seas. see Article 2 of U.N. Doc. A/Conf. 13/L53 (1958). The second is the common property doctrine which contends that the fish are free for the taking. Clingan, A Second Look at United States Fisheries Management, 9 San Diego L. Rev. 432, 435 (1972).

[69]Reiff, United States at 317. This conference had been called by the General Assembly of the United Nations to deal only with the scientific and technical aspects of law of the seas. Id.

[70]Id.

tence.[71]

At the First United Nations Conference on the Law of the Sea, held at Geneva in 1958, Canada and the United States proposed that the abstention principle, in largely the same form as at the Rome Conference, be included in the text of the Convention on Fishing and Conservation of the Living Resources of the High Seas:

> 1. Where the nationals of a coastal State, alone or with the nationals of one or more other States, are (a) fishing a stock of fish in an area of the high seas adjacent to the territorial sea of the coastal State with such intensity that an increase in fishing effort will not result in a substantial increase in the yield which can be maintained year after year, and (b) where the maintenance of the current yield, or when possible, the further development of it is dependent upon a conservation programme carried out by those States, involving research and limitations upon the size or quantity of the fish which may be caught, then (c) States whose nationals are not fishing the stock regularly or which have not theretofore done so within a reasonable period of time, shall abstain from fishing such stock, provided however that this shall not apply to any coastal State with respect to fishing any stock in waters adjacent to its territorial sea.[72]

The principle was debated,[73] but eventually it was omitted from the Convention itself.[74] The main argument against its adoption had been that underdeveloped coastal states would be barred from or admitted only at a serious disadvantage to some of the world's most valuable fisheries by rigid application of the principle.[75] However, the Convention in its final form, did include encouragement and protection of conservation agreements. Article 1, paragraph 2 of the Convention provides:

> 2. All states have the duty to adopt, or to co-operate with other States in adopting such measures for their respective

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[71] Int'l L. Comm'n. Report, 11 U.N. GAOR, Supp. 9, at 35, U.N. Doc. A/3159 (1956). In reference to the Rome Conference proposal, the report stated:

> (5) The Commission recognized that both this proposal, the purpose of which was to encourage the building up or restoration of the productivity of resources...may reflect problems and interests which deserve recognition in international law. However, lacking the necessary competence in the scientific and economic domains to study these exceptional situations adequately, the Commission, while drawing attention to the problem, refrained from making any concrete proposal. Id.

[72] U.N. Conference on the Law of the Sea, Third Committee (High Seas: Fishing: Conservation of Living Resources), at 155, A/Conf. 13/C.3/L.69, V.

[73] The essentials of both sides of the argument are in Whiteman, Digest at 969-977.

[74] Whiteman, Digest at 975.

[75] Crutchfield, Management of the North Pacific Fisheries: Economic Objectives and Issues, 43 Wash. L. Rev. 283, 305.

nationals as may be necessary for the conservation of the living resources of the high seas.[76]

Abstention and a New Conference on the Law of the Sea

With the apparently increasing demand among nations for a new international conference on the law of the sea[77] (originally planned for 1973), it is of interest to speculate on the attitudes that Canada and the United States will hold in regard to abstention at any new conference. The need for a new conference to review and revise the provisions of the Convention on Fishing and Conservation of the Living Resources of the High Seas is evidenced by this growing demand and by the recent methods used by nations to deal with fisheries claims and disputes outside of, or beyond, the measures prescribed in the 1958 Convention.[78]

It would appear, in part, that some of the same conditions which dictated the Canadian-American advocation of abstention in 1958 still exist. The regional agreements between the two countries are still thriving and greatly valued by both.[79] And, modern technology continues to enhance the potential threat of large foreign fishing fleets off the coasts of Canada and the United States.[80]

However, a hint of what was to come to pass could be found in the following statement by the chairman of the United States delegation at the close of the 1958 Conference on the Law of the Sea, in reference to the defeat by the Conference of the proposal on abstention:

> ...The U.S. Government considers that this procedure is an essential measure to protect and conserve the living resources

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[76]The Convention on Fishing and Conservation of the Living Resources of the High Seas, April 29, 1958, 559 U.N.T.S. 285, T.I.A.S. No. 5969 (effective March 20, 1966). Also, Article 6, paragraph 1 provides:

1. A Coastal state has a special interest in the maintenance of the productivity of the living resources of any area of the high seas adjacent to its territorial sea. Id.

[77]Schaefer, Some Recent Developments Concerning Fishing and the Conservation of Living Resources of the High Seas, 7 San Diego L. Rev. 371 (1970). [hereinafter cited as Schaefer, Recent Development].

[78]Id. at 372. For example: the so-called "Twelve Mile Bill" passed by the United States in 1966, 80 Stat. 908 (1966), discussed at length in Swygard, Politics at 272; and the Canadian Bill on Fishing Zones, Bill C-202 (1970), discussed in Canadian Practice in International Law, 1970, 9 Can. Yearbook of Int. L. 285-294 (1971). [hereinafter cited as the "Twelve Mile Bill"; hereinafter cited as The Fishing Zone Bill].

Other complaints about the 1958 Convention include: (a) its provisions do not supply a completely satisfactory basis for resolution of fishing disputes; (b) it fails to agree on the breadth of the territorial sea; (c) it fails to define "adjacency" in the sentence "high seas adjacent to the territorial seas"; and (d) its preliminary procedures for arbitration favor States acting only on the pretext of conservation to the detriment of others. The Territorial Sea 20, United Kingdom Information Service, Canada (Sep. 1961). Also, see Johnson, The Geneva Conference on the Law of the Sea, 12 Yearbook of World Affairs 90-91 (1959).

[79]Telephone interview with Myhre.

[80]Swygard, Politics at 272.

> of the sea....For these reasons the United States will continue to pursue the objective of the general acceptance of the procedure of abstention, and will enter into agreements with interested states which will incorporate this sound conservation measure.[81]

What appears to have happened is that the United States and Canada have entered into separate executive agreements with the U.S.S.R. and Japan (the two nations which have posed the most serious threats) to conserve certain fisheries of mutual interest.[82] Other intervening factors included particular unilateral actions on the part of both the United States and Canada aimed at protecting their fishing interests.[83]

Although the governments recognize the inadequacies of such limited measures,[84] the sense of urgency has apparently been reduced. This, coupled with the practical politics which may be required to contrive some agreement on territorial limits,[85] may necessitate compromise on any new proposal for abstention. Indeed, it appears that the United States, at least, may advocate something short of abstention at the next Conference on the Law of the Sea.[86]

Conclusion

The bilateral history of Canadian-American fishery conservation has led the United States State Department to observe that "the history of U.S.-Canadian relations is unique in world affairs for its closeness and cooperation."[87] This closeness is the fruit of several mutually beneficial agreements which have grown on economic gain, but which have been founded on forward looking compromises.

The goal espoused by these two nations of "maximum sustainable yield" rather than uncontrolled exploitation has provided a reasonable means for the perpetuation of the living resources of the seas. To protect their own advanced conservation programs, Canada and the United States have created the principle of abstention. But as other nations of the world begin to follow the many successful examples made by Canada and the United States, the need for abstention may diminish.

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[81] Whiteman, Digest at 975.

[82] For example, the United States concluded a bilateral agreement with the U.S.S.R. in regard to certain fisheries in the northeastern part of the Pacific off the coast, Feb. 12, 1971, 22 U.S.T. 143, T.I.A.S. No. 7046 (effective Feb. 12, 1971); and an agreement with Japan on Salmon and certain other fish, Dec. 11, 1970, 21 U.S.T. 2746, T.I.A.S. No. 7020 (effective Dec. 11, 1970).

[83] "Twelve Mile Bill"; Fishing Zones Bill.

[84] Schaefer, Recent Developments at 399.

[85] see The Territorial Sea 20, United Kingdom Information Service, Canada (Sep. 1961); and see Schaefer, Recent Developments at 371.

[86] Telephone interview with Myhre.

[87] 62 Dep't State Bull. 611 (1970). This observation, although in the context of a dispute between the two nations over the then proposed Canadian Fishing Zones Amendment Bill is representative of the positive relationship of the two nations, and its tone is reflected in the response of the Canadians in the same exchange: "The Canadian Government reaffirms its faith in the spirit of cooperation which Canada and the U.S. have shown throughout so much of the history of their relations..." 9 Int'l Legal Materials 615 (April 16, 1970).

COLOMBIA'S VIEW OF MARITIME LEGAL PROBLEMS

George Wood

The 1945 Truman Proclamation marked the beginning of much of the Latin American maritime legal problems. Up to this time the more developed nations had almost unlimited access to the sea and its resources surrounding the South American continent. But with the Truman Proclamation, the way became open for a unilateral action of any one riparian state to declare increased sovereignty and juristiction over its contiguous seas and the resources beneath. And one by one they followed this course.

The present situation encompasses a potpourri of individual proclamations by Latin American states on delimitation of territorial waters, fishing rights, and continental shelf exploration and exploitation. Recently a great deal of activity and success occurred to synthesise and amalgamate these views in a number of conferences and declarations. The main element in common is desire for extended sovereignty and juristiction over the contiguous sea and its resources. But against the backdrop of this Latin American scenario and running slightly counter to it is the position suprisingly taken by Colombia.

Aloofness best describes Colombia's approach to these problems. Since the Truman Proclamation, she has maintained a fairly steadfast position of restricted sovereignty and jurisdiction over the sea's resources. But this is not to be interpreted as support for the more developed nations because Colombia greatly sympathizes with the positions held by her South American neighbors. Rather, it stresses her individuality and idealism in the entire conflict.

BACKGROUND

With its unique positioning, Colombia's shoreline faces two different bodies of water separated by the Isthmus of Panama. On the Pacific side there is no continental shelf, while on the Carribean shores the shelf is long and shallow. The fact that half of Colombia's shoreline faces the Pacific and is void of a continental shelf should tend to steer her position towards that of Peru, Ecuador, and Chile. But such is not the case. Colombia's largest ports, Santa Marta, Cartagena and Barranquilla, are situated on the Carribean with strong transportation links between them and the rest of the country.

Colombia exudes great pride in her history, independence, and achievements. She looks upon her small merchant fleet of 45 vessels as of equal quality with the most developed nations. To maintain a high standard Colombia imposes strict rules of registration, navigation licenses, and requirements to fly her flag.[1] Only Colombian nationals, juridical persons, or foreign juridical persons duly domiciled and established in Colombia may exercise the right of ownership of a vessal flying the Colombian flag. Any violations of the strict rules for registration will incur immediate termination of Colombian registry.

Since her separation from Venezuela, Colombia has tried to be conciliatory and friendly with her South American neighbors. As a matter of principle, Colombia attempts to follow a course of good will and friendship. This spirit prevails within its democratic tradition and system of government. Though fiercely nationalistic, Colombia supports an outward looking and brotherly policy with all nations.

[1] B. Reuda, A Statement of the Law of Colombia in Matters Affecting Business, 88 (1961).

DELIMITATION OF TERRITORIAL WATERS

Colombia places herself in the group of states which favor the 12 mile limit on territorial waters.[2] In the United Nations' proposal of 1958 and the Geneva Convention on the Sea of 1958, she first showed her willingness to accept the compromise of a 12 mile limit in order to obtain worldwide agreement. This territorial sovereignty is measured from the low tide mark on the continental and insular domain.

Colombia places much of the blame for the disagreement over territorial water delimitation on the Truman Proclamation. Before the proclamation, no state could claim that its unilateral action of extending sovereignty and jurisdiction over its contiguous seas and resources was an international right. But the Truman Proclamation changed all this. Though the proclamation pertains only to the seabed and the subsoil, it opened the door to the idea that a nation could extend as an international right its sovereignty beyond its territorial waters. This has become entrenched as a new principle of customary international law.[3] Under this principle anarchy reigns. Each country decides its own territory without negotiations or regard for the rights of other nations. Colombia fears that the principle of mare liberum (freedom of the seas) set by Grotius will disappear, and in its place nations will fight each other under the much earlier principle of mare nostrum (master of the seas).[4] Colombia, therefore, strives to repudiate the Truman Proclamation and replace it with an international agreement to maintain the freedom of the seas and to safeguard the rights of all nations.

When delimiting territorial waters between two nations, Colombia supports a simple and widely accepted view. The equidistant line drawn between the points fartherest out from each shoreline would be the fairest solution. This concept is presently used in the partially settled dispute between Colombia and Venezuela. The dispute still continues over resource exploitation in the Gulf of Venezuela and will be discussed shortly.[5]

Colombia feels a great deal of sympathy towards the 200 mile territorial view adhered to by other South American countries like Peru, Ecuador, and Chile.[6] These countries desperately need the resources to feed their growing and impoverished populations. Colombia, however, believes a difference should be drawn between the 200 mile territorial waters and 200 miles of fishing rights and resource exploitation. There is no real need to include the 200 mile territorial water requirement in their position. Colombia would agree to support the 200 mile fishing and resource exploitation sovereignty proposal if all the other South American countries agree together. She abhors unilateral action. The action would have to be taken as a regional proclamation of an American international right. And if this were to be done, Colombia points out that the 200 mile fishing zone would cause insolvable problems in the Carribean. As a result of the closeness of many islands there would be a great deal of overlapping between fishing zones and territorial waters.[7] But Colombia would be willing to shift her position in favor of the 200 mile fishing zone sovereignty in order to promote regional solodarity.

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[2] I.L.M. 892-893 (1972). [hereinafter cited al 11 I.L.M.].

[3] J. M. Yepes, 4 La Plataforma Submarina Ante la Constitucion Americana la Reforma Constitucional Colombiana, 43-57 (1953). [hereinafter cited as Yepes.].

[4] Colombian Information Service, Una Politica 8 (1970). [hereinafter cited as Politica].

[5] Id. at 12.

[6] Id. at 15.

[7] Id. at 14.

In June, 1972, Colombia changed her position by the Santo Domingo Declaration. This declaration, signed by the Carribean nations, opens the possibility of sovereignty rights over renewable and non-renewable water resources up to the 200 mile limit. The impact of Colombia's initiation and signing of this declaration prepares her officially to accept the 200 mile sovereign fishing zone of her South American neighbors.

With the advent of war in Europe in 1939, Colombia joined with most of the other South American nations in the Declaration of Panama. This declaration established, using the straight line principle, a wide security zone around South America, in places several hundred miles from shore, which was to be free from any hostile acts of any non-American belligerent nations. The security zone sets forth merely a statement of principle based on the inherent right of protection rather than a change in international law.[8]

In any territorial dispute, Colombia steadfastly maintains it can be solved as long as each side puts forth an open mind and a spirit of cooperation. These high minded principles of good will and friendship establish the cornerstone of Colombia's view on resolving maritime problems or any other problems. This attitude opened the way to settling the border dispute between Colombia and Venezuela and the eventual treaty of 1933. And it will further resolve the disagreement over resource sovereignty in the Gulf of Venezuela.

SEABED AND SUBSOIL ADJACENT TO TERRITORIAL WATERS

The Truman Proclamation created an even worse impact on national jurisdiction over the continental shelf than it did regarding territorial waters. Unilateral action became the hallmark of expansion of marine resource sovereignty. Colombia would like to return to an international principle which appeared first in 1942 in the agreement between Venezuela and Great Britain on a sovereignty and juristiction division of the seabed in the Gulf of Paria.[9] The principle was one of contract between two nations rather than unilateral action. The final division agreement separated the Gulf of Paria in half as measured from both shorelines.

This same spirit of bilateral agreement exemplifies Colombia's approach to her dispute with Venezuela over the marine resources in the Gulf of Venezuela. The main part of the disagreement was settles in the Declaration of Sochagota in August of 1969.[10] But legal and technical problems still remain to be resolved over resource exploitation which centers on large petroleum reserves. Sometimes high tension arises in the press and public opinion in each country, but there still remains a great deal of mutual friendship and respect between the countries. It is quite difficult to divide petroleum deposits under the same principle as territorial waters between two nations where an equidistant line is drawn between the furtherest projecting points on each shoreline. But under the spirit of cooperation and good will, much has been done and a final solution will be reached.

In May of 1970, nine Latin American countries met and signed the Declaration of Montevideo on the Law of the Sea.[11] This declaration extended the right of coastal populations to explore, conserve, and exploit natural resources beyond territorial waters. Colombia, as well as Venezuela, did not sign. Later Colombia did express support in principle for the declaration.[12]

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[8] W. Bishop, Jr., International Law: Cases and Materials, 632 (1962).
[9] Id. at 17.
[10] Id. at 18.
[11] D. M. Sasson, 2 J. Mar. L. & Comm. 223-224 (1970). [hereinafter cited as Sasson.]
[12] J. J. Santa-Pinter, Latin American Countries Facing the Problems of Territorial Waters, 8 Dan Diego L. Rev. 615 (1971).

As stated earlier, Colombia has officially taken the high road on the subject of resource exploration and exploitation, but there has occurred a fair degree of countermovement to her stated policy. In 1953, highly respected professor Dr. J. M. Yepes proclaimed the idea that Colombia would be the loser for maintaining her present position.[13] In his thesis, all the other countries of the world would claim and divide the high seas and their resources through unilateral actions of extending sovereignty. Colombia would receive nothing. He proposed that Colombia should pick up the lead in recognizing the new international principle of unilaterally extending its sovereignty by officially legalizing this right in written form in its constitution. The extent of sovereignty expansion would depend on the present scientific capabilities to explore and exploit the seabed and subsoil. Another countermovement occurred in 1958 in the Colombian Senate. An attempt was made to pass legislation to allow sovereignty of resource exploration and exploitation of the marine subsoil commensurate with the capability of science.[14]

Colombia considers the waters adjacent to the territorial sea as the 'patrimonial sea.' When she first referred to this sea, she defined it as an area where other nations should respect the rights of Colombia to regulate and protect the renewable and non-renewable natural water resources.[15] Since then, under the Santo Domingo Declaration, she has expanded it to sovereign rights over an area 200 nautical miles from the shoreline or within the capabilities of science to explore.[16] The nine countries signing declared that the following were to be the definitions of the 'patrimonial':

1. The coastal State has sovereign rights over the renewable and non-renewable natural resources, which are found in the water, in the seabed and in the subsoil of an area adjacent to the territorial sea called the patrimonial sea.

2. The coastal state has the duty to promote and the right to regulate the conduct of scientific research within the patrimonial sea, as well as the right to adopt the necessary measures to prevent marine pollution and to ensure its sovereignty over the resources of the area.

3. The breadth of this zone should be the subject of an international agreement, preferably of a worldwide scope. The whole of the area of both the territorial sea and the patrimonial sea, taking into account geographic circumstances, should not exceed a maximum of 200 nautical miles.[17]

Colombia feels this sovereign right over a patrimonial sea will serve as an acceptable compromise between the restricted sovereignty view of the more developed countries and the expansionary policy of the less developed countries.

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[13] Yepes at 49.
[14] A. Constain, Elementos de Derecho Constitutional, 64-68 (1959). [hereinafter cited as Constain].
[15] United Nations General Assembly, A/AC. 138/SC. I/Sr. 45, 200 (1972). [hereinafter cited as SR. 45].
[16] 11 I.L.M. at 91-114.
[17] Id. at 892.

This could be used as a settlement in the Law of the Sea Conference in 1974 for establishing a general agreement on the demarcation line between territorial, continental shelf, patrimonial sea, and an international zone for the ocean and deep sea bed. Time is running out for creating rules for marine resource exploitation. The world population explosion will soon demand these resources, and the nations of the world should direct their attention to fulfilling this need instead of disputing among themselves over sovereign rights.

Besides holding international conferences, Colombia believes a great deal could be, and should be, done on a regional level.[18] For instance, Interamerican Conferences should be called on a regular basis. This is a workable idea since Latin America has its own peculiar problems, and there are only some twenty-two nations involved in reaching an agreement. Once a position has been established regionally this group could act as a block in international conventions to work out a universal principle. This idea incorporates regional solutions and planning into international agreement and might accelerate the process.

INTERNATIONAL SEABED AND HIGH SEAS

Colombia takes a firm stand with many of the less developed nations on questions of how the seabed and its subsoil under the high seas is to be explored and exploited. Under the present system any nation can unilaterally exploit the marine resources in the high seas. Only the most developed nations can take advantage of this with their superior technology and vast wealth. As a result the rich get richer and the poor stay poor. Colombia feels this is inequitable. She favors establishing an international body to oversee and regulate deep sea activity. In the 1950's Colombia was interested in participating in the Neptune Plan under ONU auspices. This would create a maritime empire for the purpose of exploring and exploiting the sea, its basin, and its subsoil under ONU supervision. One of the major pruposes was to prevent small riparian nations from losing all these resources to the large powers.

Presently in the UN, the whole problem of exploration and exploitation of the deep seabed is under discussion. Two opposing proposals face each other.[19] On one side the developed countries favor a licensing system where any one country can apply through an internationally organized body for a concession to explore or exploit a specific open sea area. The other side, representing the less developed nations, proposes creating an international authority to oversee foreign mixed companies to tap the ocean's resources. Colombia steadfastly supports the latter. Like so many of her Latin American neighbors, Colombia forsees the licensing system as just another way that the more powerful nations become wealthier while the less developed nations gain little. Only the more developed nations can take advantage of the system. It would be a long time before the smaller nations could build up the technology and capital needed to tap the deep sea resources, and by then the larger nations would have extracted most anything of value. Something should be done to create a more equitable system where all nations benefit from the sea's vast wealth. To Colombia, this something evolves in the second proposal of creating an international authority to regulate investigation and exploitation done by foreign mixed companies.

Colombia perceives the international authority as being strong and representing all nations of the world. The authority will have to lay down strict rules on investigation procedures and exploitation to prevent depletion problems,

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[18] Politica at 13.

[19] SR. 45 at 201.

hazards to human life, and pollution. The purposes behind the investigations should be to extract and distribute resources with the major benefit going to the less developed nations. Their need for food and minerals is much greater than that of the more developed countries. Of course any investigation or exploitation accomplished in the sovereign or juristictional territory of a nation must be done with the approval of that nation, and it must receive the predominant share of such resources.

The proposal for a powerful international supervisory authority has been discussed in General Assembly Resolution 2794 (XXV).[20] Colombia believes this is a good start. Basically, the authority would control exploration in the deep sea areas outside of national jurisdiction. Foreign mixed companies, of course, would be permitted to operate, but so also would single country entities. To discourage and benefit from the latter, they would be assessed for a large percentage of their resource extraction profits. The international authority would have to grow slowly to avoid creating an unwieldy bureaucracy. This means stressing a small secretariat and small subsidiaries. Less developed nations would be balanced against the larger nations in the composition of the authority to allow for equality of representation. It is important not to permit the more powerful countries to have veto power as in the Security Council which could hamper developing countries' aspirations. Colombia hopes that the finalization and international acceptance of Resolution 2749 (XXV) will occur at the Law of the Sea Conference in 1974.

The Latin American Proposal, which also has Colombia's support, is almost identical to Resolution 2749 (XXV).[21] It influenced the drafting of this resolution. Both strive to exploit and administer marine resources for the betterment of humanity.

The Latin American Proposal explains more clearly the activities of the foreign mixed companies and discusses ways of raising the initial capital for these ventures. Basically, the proposal outlines the agreement between the diverse foreign groups along similar lines to agreements between foreign petroleum corporations and governments owning petroleum reserves.[22] This agreement entails a partnership where the wealthy partner covers all initial survey and investment costs. Thereafter, both share equally, or as preveously agreed upon in different percentages, in the costs and risks. The wealthy partner also agrees to render his services and technology in training the workers of the other partner in the operation of the company. In the event of a discovery, the profits from the enterprise are to be shared equally or in a previously agreed manner. If the resources were to be discovered in a contracting country's sovereign territory, the local state would have to reimburse the company for its initial investment plus profits, and after thirty-one years the local state would completely own and operate the enterprise.

The initial capital for establishing these foreign mixed companies will come from investments made by the wealthier nations. Lucrative incentives and returns on investment will be offered, but control of the company will remain in the hands of the members of the foreign mixed company.[23] This all remains consistent with the goal and spirit of the General Assembly Resolution 2749 (XXV), as well as with the Latin American Proposal, to promote exploration for the good of all mankind.

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[20] United Nations General Assembly, A/AC. 138/SC.I/SR.39, 97 (1972). [hereinafter cited as Sr. 39].
[21] SR. 45 at 201.
[22] Id. at 199.
[23] Id. at 200.

CONTAMINATION OF THE SEA

Colombia recognizes the ever increasing problem of sea pollution. She clearly defines her position by supporting the Canadian proposal presented in the General Assembly.[24] The Canadian proposal states that only the riparian states who are closest to the physical contamination are in a position to do anything about it. And furthermore, the partial responsibility for prevention of such acts must lie with these states. They ought to be given the international right to intercede and capture the offenders who violate international rules of contamination within certain economic and jurisdictional zones near these riparian states' territorial waters. The Law of the Sea Conference should place high priority on discussion and formulation of rules based on the Canadian proposal.

In August of 1970, many of the Latin American states met at the Lima Law of the Sea Conference to discuss the problem of water pollution. From this conference they decided that a reasonable method of preventing water contamination would encompass rendering "the right of coastal states to establish the limits of their sovereignty or jurisdiction over the sea in conformity with reasonable criteria; taking into account their geographical, geological, and biological situation and the need for rational utilization of their resources."[25] The loose end in this idea is the discretion of each state to decide for itself how far this non-contamination zone extends out to sea. But Colombia signed and agrees with the principles set forth at the Conference.

Under the Santo Domingo Declaration, Colombia has become more specific than either the Canadian proposal or the Lima Conference by advocating the 200 mile limit of pollution jurisdiction for each riparian state. As has already been discussed, this appears under the patrimonial sea section in the Santo Domingo Declaration.[26]

CONCLUSION

Colombia's past view of maritime legal problems placed her in a unique position in relation to her Latin American neighbors. Her view, until very recent months, has been restrictive. She neither believed in nor practiced the unilateral expansionary policy of her neighbors over maritime resources. This neither signified support for the larger powers nor a lack of interest in maritime problems, but rather a desire to retain in practice freedom of the seas and establish a strong international body to protect and regulate its resources for the betterment of all mankind. This position represented a feasible compromise between the presently entrenched conflicting positions of the have and have not camps over maritime legal problems. But with the recent Santo Domingo Declaration, Colombia has left this restrictive policy. This may well signify her growing frustration with trying to establish an international authority. Though this declaration only applies to the Carribean, it now aligns Colombia with the expansionary policy of the other South American nations.

Just as one may classify Colombia's past view of maritime legal problems as restrictive, so also can one point to its aloofness and idealism. Time and time again she stressed the attitude of good will and open mindedness as the key to resolving conflict. She placed heavy emphasis on individual states putting aside petty differences to create a viable and harmonious international community. But similar to the impact of the Santo Domingo Declaration on the restrictive view, one discovers an apparent shift in Colombia's aloofness and idealism. Colombia may well forsee that she is losing out on valuable resources exploration and has decided to protect her own offshore resources and to join the expansionary policy of the other South American countries.

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[24] UN Doc. A/AC.138/SC.III/SR.19, 26 (1972).

[25] Sasson at 91-114.

[26] 11 I.L.M. at 892.

FRENCH LAW AND THE POLICY TOWARD POLLUTION IN THE MEDITERRANEAN

W. Vance Brown, II

We shall here attempt to trace the laws and policy of only one of the Mediterranean coastal states, France, as it faces the tragic and all too rapid metamorphosis of its "Cote d'Azur" and the sparkling sea whose color inspired the name. During the second half of the nineteenth century, the French Riviera was "discovered" by the English aristocracy, and the simple fishing village of Cannes took on a patina of elegance, an elegance that soon spread in varying degrees up and down the coast. At the turn of the century, practically every painter of the Impressionist and post-Impressionist schools flocked to the Riviera, not for social reasons, to be sure, but to experiment with paint in the extraordinary sunlight of the region. Renoir, Bonnard, Signac, Segonzac, Terlikowski and hundreds of others have left us a legacy of great richness, inspired by the beauty of the region and its gentle sea. Halcyon days reigned only briefly, however. The Second World War came and went, wreaking its share of havoc, but resistence was not great on the coast and the destruction was minimal.

It was primarily in the 1950's that the great and irreversible changes began. An increasingly affluent and mobile middle class, wondering how best to profit from their "vacances payées," soon flocked in progressing numbers to the only area where the sun was unfailing. Some built villas, others chose the convenience of hotels, while masses of others discovered, and are still discovering, the economy of "le camping." Nice became a modern metropolis in every sense, the elegant mansions giving way to glass and steel high-rise apartments and condominiums. Cannes has grown in every direction, while the towns of St. Raphael, St. Maxime, and St. Tropez, still modest some twenty years ago, now revel in a rather exhuberant vulgarity in full season, with no hotel rooms to be found within seventy-five miles.

All this has been a great boon to the local economies, the hotel keepers, restauranteurs and shopkeepers. Real estate prices for waterfront property have long since risen out of sight, and the hillsides are now being stripped for even more building sites. The "rochers rouges" of Agay, so beloved of the painter Armand Guillaumin, are now stained with that new symbol of the middle class, the "second home." There would appear to be room for even more people, more villas, more hotels (and more roads?), but it is high time to question the effect of all of this "progress" on the drawing card itself, the Mediterranean.

The effect, in fact, is astounding. We are told (though not by French authorities) that the azure sea is rapidly becoming one of the most polluted bodies of water in the world, and, sad to admit, this is woefully apparent to even the most casual tourist. We read that summer tourists swimming in the Mediterranean stand a one-in-seven chance of getting sick. Professor W. Brumfitt,

a microbiologist at the Royal Free Hospital in London, has announced that the discharge of sewage into the sea has created a crisis situation, to the point where one in ten people living along the coastline had changes in their blood showing exposure to the hepatitus virus, according to recent medical research.[1] We see on NBC-TV reports on how the public beaches in Nice are sprayed daily with a lavendar scented deodorant in the pre-dawn hours, the official explanation for this action being that the "hippies" who sleep on the beach are the cause of the offensive odors. We see garbage boats literally fishing debris from the water to prevent its reaching the eyes of the tourists on the beaches. And ultimately we read the inevitable, that at certain beaches swimming is strictly forbidden.[2]

It takes no specialist to understand that the Mediterranean is called upon not only to serve the needs of an over-consuming society, but also to serve as an artery for increasingly gigantic transport ships carrying millions of tons of potentially noxious and pollutant products.[3] The situation is further aggravated by the fact that the cities and their industries have tended to develop almost exclusively on or very near the sea, which is precisely of course where one finds the greatest concentration of tourists in the entire country. Even though the French Mediterranean coast is still relatively under-industrialized, this in itself poses a problem. There exists an understandable temptation for the coastal municipalities to over-accomodate, as regards the minimal norms deemed tolerable from the pollution standpoint, and this in turn may be expected to give rise to a marked increase of both industry and pollution in the coming decade. Perhaps the only solution possible would be to adopt a system of international reform, recognized and controlled by an international administration instead of the present system of allowing each region its own voice in the matter.[4]

In spite of a slowly awakening caution to these matters, however, there is all too much cause for pessimism. Let us cite four basic reasons. First, an increasing proportion of personal incomes of people everywhere is being directed toward travel and leisure. Second, the French government and its municipalities have been understandably reluctant to impose strict controls on development, fearing that such controls would ward off potential developers, with resultant economic losses to the various regions. Third, due to modern technology, the scale of development has increased drastically, resulting in more and larger structures in areas previously impossible or impractical to develop. Fourth, the advice of environmentalists is often disregarded for the sake of greater profits,[5] and it might be noted that qualified environmentalists are not to be found in sufficiently large nembers.

What specific action, then, is being taken by the French government to curb or at least checkmate its country's pollution of the Mediterranean Sea? What laws exist to deter the major pollutors, what sanctions are available against them, and how strictly applied are they? The most recent international agreement was reported in the November 27, 1972 issue of Time Magazine, which stated that representatives of 91 nations, including all the major maritime powers, have just signed an agreement to forbid the dumping of highly toxic substances into the open seas.[6]

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[1] Parade Magazine, Nov. 12, 1972, p. 12.
[2] Neway, L'Amélioration du Cadre de Vie en Zone Méditerranéene par la Maîtrise des Paysages, Options Méditerranéenes - Numero 13 (1972).
[3] Henry, La Civilisation Industrielle du XX Siecle et le Destin Culturel et Human de la Méditerrannée, Options Méditerranéennees, Numero 13 (1972).
[4] Neuray, supra. note 3, at 66.
[5] Mann, copy omitted footnote I at p. 1 here.

The highly toxic substances include all high-level radioactive wastes, biological and chemical-warfare agents, long-lived pesticides, mercury, and heavy-grade oils. Some specified, less dangerous substances may be dumped, but only with the official permission of national governments.

The agreement is good as far as it goes, but from an idealistic standpoint it does not go nearly far enough. In the first place, rivers were not mentioned by the convention, and rivers are a major source of pollution to the oceans. Secondly, there is no strict enforcement of clear standards called for, rather a dependency on international cooperation, and violators are to be penalized by their own governments as these governments see fit. And finally, in an emergency situation, dumping may be allowed, after appropriate efforts have been made to minimize the damage.[7] Nevertheless, the pact is certainly a step in the right direction, and may offer hope of future, stricter agreements with perhaps some form of international sanctions.

One law that is considered to be an outstanding piece of modern European legislation concerning pollution is the French law of Dec. 16, 1964. It seeks primarily to establish the administrative machinery necessary to regulate and protect surface waters through specific regulations to be issued by the proper administrative body.[8] It calls for a water census which sould catalogue the quality of all bodies of surface water in France, such census to be kept current. It also calls for a system of "charges" to be imposed on those guilty of causing particular instances of water pollution.[9] It further allows the appropriate tribunal to make any necessary improvements in a particular situation, the cost to be borne by the charged malfeasor, which remedy, if effectively and stringently used, could be a powerful weapon in the battle to save the sea.

Although France has refused to accede to the treaties banning surface nuclear tests and the proliferation of nuclear weapons,[10] the Dec. 16, 1964 law nevertheless forbids the discharge or immersion of nuclear wastes into territorial waters capable of affecting public health.[11] The law of Nov. 12, 1965 deals with the civil responsibility of nuclear operators of merchant or military vessels who either come into a French port or sail close by any French coastal region. This latter law gives discretion to the French authorities as to whether to allow the entry of any nuclear-powered vessel. Such vessel must carry a certificate of financial guarantee and proof that the flag-state will stand surety for it.[12]

As to pollution brought about by the exploration and exploitation of the continental shelf, the 1958 Geneva Conference on the Law of the Sea inserted a provision in the Convention on the High Seas that required states to "draw up regulations to prevent pollution of the seas by the discharge of oil from ships or pipelines or resulting from the exploration and exploitation of the seabed and its subsoil, taking account of existing treating provisions."[13] This 1958 Convention was considered a codification of existing international law, thus underscor-

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[6] Time Magazine, Nov. 27, 1972, p. 70.
[7] Id. at 70.
[8] Juergensmeyer, A Comparative View of the Legal Aspects of Pollution Control, 5 Suffolk U.S. Rev. 741, 774 (1971).
[9] Id. at 775.
[10] W. G. Friedmann, The Future of the Oceans (1971).
[11] du Pontavice, Reglementation Relative a la Pollution des Eaux Douces et des Eaux Maritimes dan les Pays Mediterraneenes, p. 206 (1972).
[12] Id. at 207.
[13] Sweeney, Oil Pollution of the Oceans, 37 Fordham L. Rev. 155, 192 (1968).

ing the duty of states to take action to prevent pollution. Relative to this is the French law of Dec. 30, 1968, which imposes a fine of from 2,000 to 20,000 francs, and, in case of repetition, a prison sentence of from six days to six months and a fine of from 5,000 to 50,000 francs, on any person who while engaged in the exploration or exploitation of the continental shelf, discharges or allows the discharge of any hydrocarbons.[14] There is considered to be no infraction of the law, however, if the discharge was for the purpose of preventing harm or saving a life, or if it was considered unforseeable and if all possible measures were taken to prevent it. Thus we see that while the maximum potential sentence may be sufficiently severe to deter most deliberate wrongdoing, nevertheless liability is far from absolute and may not serve to curb the many instances of carelessness which occur with such frequency.

Water pollution due to detergents has been a recognized problem of great import in the United States for some time now, and happily is recieving due attention in a number of European states. France signed on Sept. 18, 1968 in Strasbourg a European agreement limiting the use of certain detergents,[15] certainly a hopeful sign for those who feel that the use of international accords is the best available method of attacking the general problem. This particular agreement leaves it up to the individual states, however, to prevent the sale and use in their territory of all detergents less than 80% biodegradable. Conforming to this accord is the French decree of Sept. 25, 1970, dealing with the prohibition of the discharge of certain detergents in the sea and the regulation of the sale and use of such products.[16]

The impact of tourism has been mentioned above, but final resolution of the problem, if any, will be slow in coming. Financial, economic, and political interests see to it that existing regulations remain grossly inadequate to deal with any impact on the situation, and perhaps the only real answer would be for the state itself to acquire certain stretches of coastal property to be set aside as protected reserves. Tunisia has already undertaken studies, notably on the island of Djerba, to determine just how many hotels a certain locale can support without unduly disrupting the ecological and environmental balance of the area.[17] Similar studies would certainly be advisable along the French coast where further development is planned. Others feel it would be wiser, rather than allow controlled development the entire length of the coast, to concentrate an absolute maximum number of tourists in certain selected areas in order to further protect those areas not yet invaded.[18] The idea is theoretically sound, but given the present situation along much of the Mediterranean coast, further expansion of many areas would result only in an exaggerated concentration intolerable even to the seemingly unmindful tourist.

The earliest areas of sea pollution were the ports, and they have remained a problem in spite of, as well as due to, modern technology. The seaport code of May 27, 1956, modified by a regulation of Jan. 7, 1964 forbids any dumping of excrement in port waters,[19] but the fine is only 36 francs, hardly a sufficient deterrent. Liability, however, is absolute in this case, and the action is considered a voluntary refusal to obey the orders of port officers. Sections 80-84 of

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[14] du Pontavice, supra. note 12, at 207.
[15] Id. at 259.
[16] Id. at 259.
[17] Neuray, supra. note 3, at 67.
[18] Id. at 67.
[19] du Pontavice, supra. note 12, at 260.

the code deal in a more severe vein with the dumping of dangerous and malodorous matter, which can bring fines of from 40 to 7200 francs. In the case of repeat offenses, these fines may be doubled and in addition sentences of from three days to one month imprisonment may be incurred.[20] It has been suggested that rather than merely impose penalties upon wrongdoers, it would be much more realistic to seek means of preventing pollution by building more salvage stations and urging pleasure boats and fishermen to use them.[21]

A problem of growing concern is that of pleasure ports. Each of the past few years has seen the addition of literally hundreds of berths for private boats. The town of St. Raphael has recently completed a large ultra-modern facility, whose berths sell for thousands of dollars. Inspired by success, the town has since expropriated several hundred more yards of formerly public beach, approaching the center of town, which is now being filled with tons of boulders and paved over to create even more port area, in what some claim is an attempt to rival the port of the city of Cannes. Most of these ports are placed under the control of the licensee, according to the procedure outlined in the decree of Feb. 6, 1969, and the licensee is required to take a number of steps toward water purification, under an edict issued on Dec. 29, 1965.[22]

One area which is of vital concern to all the coastal countries of the world is the discharge of oil and hydrocarbons into the oceans and seas. This is a major problem to those dealing with the law of the sea, since marine carriage of oil today accounts for more than 60% of the world's ocean commerce.[23] The most noticeable damage caused by oil pollution is its accumulation on public beaches and shorefront property. Anyone who has bathed on the rocky beaches of the Riviera in recent years will attest to the annoying presence of small accumulations of oil, so difficult to remove from certain fabrics. It is estimated that one half million tons of oil are washed ashore every year,[24] despoiling the beaches and fouling the air. This in turn can lead to economic loss for hotel keepers and restauranteurs, as well as navigational and fire hazards in harbors, ports, and marinas.

The major international conventions attended and ratified by France have been the 1954 Convention on the prevention of Pollution of the Sea by Oil, in London, and the 1962 Second London Conference on Prevention of Pollution of the Seas by Oil, which amended much of the 1954 convention.[25] Neither of these London conventions, however, set any standards as to either the nature or the amount of penalties which the contracting states should exact; rather they simply required that penalties for violations committed outside of territorial waters be sufficiently severe to deter potential violators and that they not be any less severe than those the contracting states inflicted for violations within their territorial waters.[26]

The French law of Dec. 16, 1971 authorized the approval of new amendments adopted on Oct. 21, 1969 by the Assemblée de L'Organisation Maritime Consultative Internationale (OMCI). These amendments enacted the following measures: strict prohibition of the discharge of any mixture of hydrocarbons within a zone of fifty

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[20] Id. at 260.
[21] Id. at 261.
[22] Id.
[23] Neuman, Oil on Troubled Waters: The International Control of Marine Pollution, 2 Jour. of Mar. Law and Commerce 349, 352 (1971).
[24] Comment, Oil Pollution of the Sea, 10 Harv. Int. L. J. 316, 322 (1969).
[25] Shutler, Pollution of the Sea by Oil, 7 Houston L. Rev. 415, 422 (1970).
[26] du Pontavice, supra. note 12, at 200.

nautical miles from the coast; prohibition of the same in zones where previously allowed; and prohibition of the discharge of a number of specified mixtures.[27] The French government considers these amendments a current strengthening of the convention which ought to bring about a noticeable improvement in the present situation.

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[27] Id. at

ISRAEL'S VIEW OF HER MARITIME LEGAL PROBLEMS

Michael A. Jacobs

> The concerted effort of the United Nations and a number of its member states to create an international climate conducive to productive negotiations and enlightened concensus, culminating in a widely-accepted convention, is the most vital current development in the Law of the Sea.[1]

> I think the Middle East now is terribly dangerous: it's like the Balkans before World War I, where the two superpowers, the United States and the Soviet Union could be drawn into a confrontation that neither of them wants.[2]

> National suicide is not an international obligation.[3]

The first of the above quotations states an ideal; the second, a reality that very likely could long delay the fulfillment of that ideal; and the third is indicative of the tenacity of one of the countries, Israel, that is in the fore of the crisis in the Middle East.

Maritime legal problems have played a large part in the hostilities of the last quarter century in that part of the world. The world powers, both individually and through the United Nations, have tried unsuccessfully to bring about a solution to the Middle East problem. The International Conference on the Law of the Sea is scheduled to begin in 1974. It is rather ironic that the international climate conducive to productive negotiation referred to above is in danger of being jeopardized by the crisis involving Israel and her Arab neighbors, none of whom can be seen as world maritime powers.

As a result of the Middle East War of 1967, the Suez Canal is closed and Israel occupies the Straits of Tiran, both important international waterways and of vital concern to international maritime relations.

The focus of this paper will be to explore the Israeli position regarding the Suez Canal, the Straits of Tiran and the Gulf of Aqabe, not with any idea of providing a solution to the disputes, but rather to give a brief exposition of the etiology of the problem and the rational for Israel's present positions.

THE SUEZ CANAL

The Suez Maritime Canal, connecting the Mediterranean and Red Seas, has been closed to Israeli ships since the inception of the State of Israel in 1948,

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[1] S. Wurfel, Introduction to Attitudes Regarding a Law of the Sea Convention To Establish An International Seabed Regime, U.N.C. School of Law Sea Grant Publication (1972).

[2] Interview with Richard M. Nixon, President of the United States, as cited in Near East Report, Washington Letter on American Policy in the Near East, VOL. XIV, No. 14, July 8, 1970.

[3] Address by Abba Eban, Israeli Foreign Minister, to U.N. Security Council on Oct. 2, 1967, as quoted in the Jurusalem Post, Weekly Overseas Edition, Oct. 2, 1967 at 5.

and Egypt has also interfered with ships of other nations destined for Israel.[4] Israel regards these actions as blatant violations of international law and relies primarily on the following to support her contentions:

1. The Constantinople Convention of 1888,[5] in which Egypt pledged in Article I that "The Suez Maritime Canal shall always be free and open, in time of war as in time of peace, to every vessel of commerce or of war, without distinction of flag."[6]

2. The Egyptian-Israeli Armistice Agreement of 1949,[7] which terminated the war and thus eliminated any possible claim of Egypt's right to close the canal to Israel, even if one assumes for the sake of argument that there was a valid legal basis grounded in self-defense irrespective of the terms of Article I of the Convention of 1888.

3. A Unite Nations Security Resolution of 1957,[8] which found Egyptian interference with Israeli shipping "inconsistent with the objectives of a peaceful settlement between the parties[9]....and that "that practice cannot in the prevailing circumstances by justified on the grounds that it is necessary for self-defense."[10]

4. A reiteration by Egypt, after her nationalization of the Suez Canal in 1956, that she undertook "to respect the terms and the spirit of the Constantinople Convention of 1888 and the rights and obligations arising therefrom."[11]

At the present time, Israel and Egypt are observing an uneasy cease-fire around the Suez Canal in compliance with a resolution by the United Nations Security Council.[12] The Canal is closed to all shipping, and Israel refuses to withdraw her troops, even under international supervision, because of what she feels is the lack of good faith on the part of Egypt to uphold her commitments and the failure of the United Nations to enforce its resolutions.[13] She has strongly resisted the plan for peace which included the opening of the Suez Canal, put forward by the United States in 1969, stating that it would create essentially the same situation as in 1957, a situation untenable to Israel.[14] Israel has also refused the Egyptian offer to submit to the compulsory jurisdiction of the International Court of Justice the question of the legality of Egypt's closure of the Canal to Israel's ships.[15] Israel's rationale for this refusal is that there is no question on which to adjudicate, the Egyptian action being an obvious violation of both customary international law and the specific provisions of the Constantinople Convention.[16] However, the Israeli refusal to submit is more likely based

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[4] Bloomfield, Egypt, Israel and the Gulf of Aqaba in International Law 43 (1957).
[5] 79 Brit. and For. State Papers 18 (1887-88).
[6] Id.
[7] 42 U.N.T.S. 251, no. 654.
[8] S.C. Off. Rec. (S/PV-558, S/2241) cited in W. Bishop, Jr., International Law: Cases and Materials 621 (1962).
[9] Id.
[10] Id.
[11] U. N. Doc. S/3818 (1957).
[12] S. C. Res. 233 (1967).
[13] Interview with Abba Eban, Israeli Foreign Minister, in the Jerusalem Post, Weekly Overseas Edition, June 4, 1968 at 7
[14] Address by Golda Meir in the Knesset Pariliament), Jerusalem, Dec. 29, 1969, from Embassy of Israel, Wash., D. C.
[15] Khadduri, Closure of the Suez Canal to Israeli Shipping, 33 Law and Contemp. Prob. 147 (1968).
[16] Id.

on her realization that there are valid legal questions as to what rights she does or does not possess, not being a signatory to the Constantinople Convention. Even if the Court would find that Israel enjoys the right to use of the Canal by deeming her a third party beneficiary of the Convention, Israel would be placed in the uncomfortable position of having to defend her occupation of the Suez Canal which is in direct violation of the neutral status of the Canal as specified in that Convention. This in turn would necessitate a determination by the Court as to who was in fact the aggressor in the hostilities of 1949, 1956 and 1967.[17] The mere possiblity of an adverse decision is obviously enough to explain Israel's reluctance to submit to that court's jurisdiction.

> We make this announcement in accordance with the accepted principles of international law under which all States have an inherent right to use their forces to protect their ships and their rights against interference by armed force.[18]

Egypt's closure of the Straits to Israeli shipping in May, 1967, brought a response from Israel consistent with the above statement. Although the closure of the Suez Canal to Israel had been tolerated, the closure of the Straits was intolerable. Israel can function without the Suez Canal, but closure of the Straits would prevent water access to East Africe, India, and other potentially lucrative trading markets.

Israel assumes that the Straits of Tiran and the Gulf of Aqaba are international waters. This contention appears valid. "Under general international law, and the Convention of 1958 on the territorial sea, which Egypt has not ratified but which appears to be declaratory of general international law, international straits connecting portions of the high seas are open to innocent passage by vessels of all states."[19]

There are, however, certain questions as to whether the Gulf of Aqaba is in fact high seas. A brief description of the dimensions of the Gulf is appropriate.

> The Gulf of Aqaba is a large narrow gulf on the eastern side of the Sinai Peninsula. The western shore is Egyptian, the eastern shore is Saudi Arabian and the head of the Gulf is Israeli and Jordanian territory. The length of the Gulf is about 96 miles. The breadth of the Gulf at the entrance is 5-3/4 miles, at its widest part it is 14-1/2 miles wide, but that further up the average breadth is between 8-1/2 and 11 miles. The Gulf narrows to between 3 and 4 miles wide towards the land.[20]

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[17] The Middle East: Prospects For Peace. Background Papers and Proceedings of the Thirteenth Hammarskjold Forum 47 (I. Shapiro ed. 1968). [hereinafter cited as Middle East Prospects].

[18] Address by Golda Meir, Israeli Foreign Minister, to the General Assembly of the U.N., Mar. 1, 1957, as quoted in L. Bloomfield, Egypt, Israel and the Gulf of Aqaba in International Law 221 (1957).

[19] Middle East Prospects, at 28.

[20] Johnson, Some Legal Problems of International Waterways, With Particular Reference to the Straits of Tiran and the Suez Canal, 31 Mod. L. Rev. 153 (1968).

Israel is a acutely aware of these questions. During the meetings which culminated in the Geneva Conventions on the Territorial Sea and Contiguous Zones of 1958, the Arab states reiterated their claim to a 12-mile territorial jurisdiction. The Israeli deligation showed much concern over the possibility of an acceptance of an extension of recognized territorial waters,[21] because, in regard to the width of the Gulf of Aqaba, an extension of the limit to 12 miles would preclude any part of that body from constituting high seas. This would have a direct effect on the status of the Straits of Tiran, because they would no longer constitute a narrow passage connecting two sections of the high seas, a prerequisite for the assumption that a strait constitutes international waters.[22] Fearing the implications of such action, the Israeli delegate criticized the manner in which the International Law Commission had approached the matter of straits, saying that the unduly rigid distinction between the regime of the territorial sea and that of the high seas would create a so-called "invisible frontier" at some point of shore, beyond which there was freedom of navigation, but within which shipping would be subject to interference by a coastal state. He advocated that the commission re-draft its statement to encompass both innocent passage through territorial waters and passage on the high seas within the larger framework of freedom of navigation.[23] Thus, even if there were acceptance of the extension of territorial waters, Israeli ships would be protected by this concept. The final Convention evaded this question by neither specifying any uniform limit of territorial waters nor including a general article regarding straits.[24] This issue is bound to be a point of much debate at any future meeting to further refine and define the law of the sea.

RELATED CONSIDERATIONS AND CONCLUSION

The status of the Jordan River is another maritime controversy which appears insoluble until a political solution is first reached. The lower part of the river was within Jordan's territory before the 1967 war, and it now forms the cease-fire line between Jordan and the Israeli-occupied Jordanian territory. In 1964, Israel began diverting a considerable portion of the river's water for irrigational purposes. She is also considering diversion of water directly from the Sea of Galilee to irrigate the Negev Desert. In retaliation, Syria, Jordan, and Lebanon have considered plans to divert the tributaries of the Jordan River and thus deplete the water available to Israel.[25] Israel has stated that she will prevent any attempt to effectuate such a plan.[26] This issue must be solved by negotiations and treaties among the riparian states, which is the recognized mechanism in international law dealing with such problems.[27] Such agreement is impossible given the current situation.

The present situation regarding Israel's refusal to withdraw from the Suez Canal and her occupation of the Straits of Tiran cannot last forever. Pressure is being applied, not only through the numerous resolutions in the United Nations calling for her withdrawal, but also by the United States,[28] Israel's primary arms supplier as well as her lifeline for non-military aid. These pressures,

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[21] Id.
[22] Id.
[23] Id.
[24] Id.
[25] Middle East Report, at 23.
[26] H. de Blig, Geography, Regions and Concepts 406 (1971).
[27] W. Bishop, Jr., International Law: Cases and Materials 456 (1962).
[28] Raleigh News and Observer, Dec. 2, 1972, Page 3, col. 1 & 2.

combined with the strain on Israel's economy resulting from relations between the United States and the Soviet Union, normalization of the Middle East appears one of the major stumbling blocks which must be removed in order to approach the "international climate conducive to productive negotiation and enlightened concensus" necessary to resolve the hard issues which face not only the impending conference on the Law of the Sea, but also the vaster goal of world peace.

THE JAPANESE LEGAL APPROACH TO MARINE POLLUTION

C. Edward Alexander

In the last forty years Japan has rushed anxiously into the modernity of the Twentieth Century. Although severely damaged by the Second World War, she has now caught up with her advanced industrial and technological counterparts in the Western Hemisphere, and is a power on the economic scene. Japan, like these other nations, was too intent on rapid expansion and prosperity to worry about what was happening to her environment, and only within the last few years has she come to realize that something has to be done.

As an island nation Japan must be particularly concerned with the sea and with the dangers of ocean pollution. Like the other technologically advanced nations, she has not been too concerned in the past. After all, the seas cover two-thirds of the earth's surface, so until man reached the present level of industrial civilization, he did not think ahead to see that his activities could produce harmful changes in the seawater.[1] Yet like the other great industrialized nations, she uses the ocean as a "burial ground for radioactive wastes, for sludge and sewage and garbage."[2] She dumps wastes into her rivers which in turn flow into the sea. Just recently she has been particularly shocked by the mercury poisoning of her fish, as the fishing industry provides a vital source of food.[3] Her own ships engage in the carriage of oil, and the tankers of other nations call often at her ports. In fact marine carriage of oil accounts for more than sixty per cent of the world's ocean commerce.[4] Oil spills have not only caused and can continue to cause damage to Japanese shores and sealife, but one spill can cause damage to several countries. When a spill occurs, the oily polluting agent spreads quickly over the surface of the water and can disperse over a wide area, aided by winds and currents.[5] Besides damage which can be done by tankers, ordinary vessels can cause pollution through the pumping of bilges and discarding of other wastes.

Because a recognition of the danger of ocean pollution has only taken place within the last twenty years or so, there has not been enough time for the development of customary international law on sea pollution. Yet there are international

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[1] Teclaff, International Law and the Protection of the Oceans from Pollution, 40 FORDHAM LAW REVIEW 529, 530 (1972).

[2] Douglas, Environmental Problems of the Oceans: The Need for International Controls, 1 ENVIRONMENTAL LAW 149, 150 (1971).

[3] Id.

[4] Neuman, Oil on Troubled Waters, 2 JOURNAL OF MARITIME LAW AND COMMERCE 349, 352 (1970).

[5] Id.

conventions on the matter, to which Japan is party. The 1954 Convention for the Prevention of Pollution of the Sea by Oil (Geneva) set up zones wherein oil discharges were curtailed. At first the protected area was generally within fifty miles of the coast of treaty parties, and in 1962 the prohibited zones were extended to one hundred miles in most areas. It is important to note that the 1954 Convention, as amended in 1962 and 1969, does not purport to restrict discharges throughout the high seas. It is only a zonal approach. Also it does not altogether prohibit discharge in the zones, only the amount. For example, the permissible rate of discharge of oil for ships other than tankers is sixty litres per mile, and the oil content must be less than one hundred parts per one million.[6] For tankers the permissible discharge is more stringent. Finally, the 1954 Convention leaves enforcement up to the state of registry of a violating vessel, not to the damaged state. There is general agreement that this Convention has not solved the problem of ocean pollution.[7]

In 1969 representatives of various nations, including Japan, met in Brussels and came up with two conventions. Both impose a duty not to pollute the oceans. The Convention on Civil Liability for Oil Pollution imposes strict liability for such damages, and the shipowner must bear the burden. The limit is 210 million francs per incident. Different from the 1954 Convention is the power of the damaged state to take jurisdiction once injury has occurred.[8] The second convention, somewhat controversial, gives a state in "grave imminent danger of major harmful consequences," following a maritime casualty, the right to take protective measures against foreign vessels on the high seas. Note that such action can be taken only AFTER a casualty has occurred.[9] Remember that these 1969 Conventions are good only as between the signatories and the Conventions can be denounced at any time by a party.[10]

In theory, Japan believes that the various states of the world must take "all possible steps to prevent pollution of the seas." And she favors not so much a state by state approach, but a concept of JOINT responsibility. In short, Japan feels that the problem is world-wide and should therefore merit international cooperation. Ambassador Ogiso stated in Geneva in July 1972:

> As long as we adhere to the unilateral approach for the preservation of marine environment we will never be able to effectively eliminate marine pollution... The ocean should be treated as an integrated whole and the division of oceans by coastal states with a view to protecting its own individual environment while ignoring the environment of the other states cannot be a solution to the global problem of marine pollution.[11]

Thus while Japan at this point in time is a party to the 1954 (Geneva) and 1969 (Brussels) Conventions, with their zonal approach, she really looks to future controls over the entire ocean area: "We should establish a global framework in which rules and standards to be internationally agreed upon be observed by all states in every part of the sea."[12]

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[6]Teclaff, supra note 1, at 534.
[7]Neuman, supra note 4, at 352.
[8]Teclaff, supra note 1, at 541.
[9]Neuman, supra note 4, at 353.
[10]International Convention on Civil Liability for Oil Pollution Damage in 1 JOURNAL OF MARITIME LAW AND COMMERCE 373-384 (1969).
[11]Orgiso, M. (Ambassador), Statement on the Prevention of Maritime Pollution in Sub-Committee III, Geneva (July 1972), at 3.
[12]Id.

Looking to pragmatics alone, Japan points out that continued development of merely national legislation by many states will only result in a "state of confusion on the high seas."[13]

In addition to international regulations restricting the actual discharge of oil and other pollutants into the sea, Japan favors common rules and standards with regard to ocean vessels, since faulty equipment, construction, and incorrect operating procedures can result in damage. Also Japan believes that all kinds of pollutants should be controlled at their source, including land-based pollution which ends up in the sea. With respect to pollutants which originate on land, however, Japan does recognize that measures for prevention and control are more ably undertaken at the national level.[14] She hopes here that the various nations will cooperate in achieving some uniformity of legislation. With respect to enforcement of any future international standards, Japan feels that basically the flag state of violating vessels should be responsible. She also favors uniform liability and compensation standards, and sees the 1969 Convention on Liability as a "very constructive multilateral effort" and a "point of departure for further developing rules of law."[15] Japan feels that none of these controls, when applied uniformly the world over, would result in any loss to the freedom of navigation.

Unfortunately the universal cooperation which Japan hopes for is as yet unrealized, so the Japanese Government has resorted to anti-pollution legislation of its own for the time being. Law No. 136 of December 1970 states:

> The purpose of this Law is to prevent marine pollution by controlling the discharge to the ocean of oil and wastes from a ship and an offshore facility, by securing appropriate disposal of waste oil and by taking measures for the prevention of marine pollution, thereby contributing to the preservation of the marine environment.[16]

Chapter III of the Law deals with the Control of Discharge of Oil from a Ship, and Article 4 directs that "no one shall discharge oil from a ship on the sea areas." Excepted are discharges necessary for saving the ship or human life, and discharges due to "damage to a ship or by other unavoidable reasons." Also it is allowed to discharge oil if not exceeding sixty litres per nautical mile, if the oil content is less than one hundred parts per one million, and if the ship is proceeding en route.[17] This corresponds to the 1954 Convention in that absolute discharge prohibition is not set forth; rather permissible limits are specified. Article 5 requires prevention devices on board ships in order to curb bilge leakage (bilge is oily mixture which accumulates at the bottom of a ship). Article 6 specifies that every ship shall have an officer who will act as an oil pollution supervisor, and each ship is to have an Oil Record Book with entries describing any oil discharges or other operations concerning the handling of oil (Article 8). Articles 5 through 8 apply only to tankers and other ships over 300 tons gross tonnage.

Chapter III deals with the control of wastes from ships, and contains most of the same directives as Chapter II governing oil disposal. Here again waste discharges necessary for the safety of the ship, or for saving human life,

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[13] Id. at 4.
[14] Id. at 9.
[15] Id., p. 10.
[16] Marine Pollution Prevention Law No. 136 of 25 December, 1970 (Japan), Art. 1.
[17] Id., Art. 4.

or caused by unavoidable accidents are excepted. And total prohibition is not prescribed; wastes can be discharged in accordance with certain standards. Record books on wastes, as in Chapter II on oil, are to be maintained.

Chapter IV contains similar provisions aimed at controling waste and oil discharges from an offshore facility, which is defined as "any structure constructed in the sea areas."[18]

Recognizing the importance of businesses concerned with waste oil disposal, Chapter V sets out governing provisions. Any person who wishes to operate such a business must secure permission from the Minister of Transport, and this will be granted only if the applicant shows that he can perform the business properly, and if it will meet the demand of the sea area surrounding the intended location of such a waste oil disposal facility. Once in business, the operator must charge fair rates and cannot discriminate or refuse to accept waste oil for disposal (Article 27). Violations can result in suspension of the business privilege by the Minister of Transport (Article 33).

If an oil discharge in large quantity should be made, the master of the ship or facility must "immediately take emergency measures to prevent the dispersion of the oil... and to remove" it.[19] The Commandant of Maritime Safety is also empowered to take any necessary measures, with the ship or facility owner bearing all expenses. The most drastic act which the Government may take is the disposal of property in the water, including the destruction of a ship, if necessary to prevent heavy damage and/or injury to human life.[20] This provision corresponds to the Second 1969 Brussels Convention emergency measures. Other sanctions include the cancellation of ship registration (Article 15), certain penal sentences (the highest possible six months), and monetary fines (not to exceed 200,000 yen).

Law No. 136 refers broadly to the "sea areas" and its commands state "no one shall discharge" oil and wastes. Thus there is some lack of clarity as to jurisdiction in case of violation. The only specific mention of foreign ships merely exempts them from having to have an oil pollution supervisor and an Oil Record Book.[21] Thus foreign vessels are apparently subject to all of the main provisions. But to what extent geographically? Obviously Japan can apply the law within the recognized three-mile territorial waters. The 1958 United Nations Convention on the Territorial Sea and the Contiguous Zone (signed by Japan) gives the coastal state jurisdiction out to twelve miles from the base line for certain purposes, including "sanitary matters."[22] Most states have interpreted pollution control as fitting into this category, thus giving the Japanese Marine Pollution Law effect over foreign ships within twelve miles of the coast.[23] Beyond this Japan cannot act, except with respect to those nations who are co-parties to the 1954 Convention. With those countries the pollution control zone is one hundred miles, according to the 1962 Amendment. And of course with regard to these co-signatories Japan cannot actually apply Law No. 136 out to a one-hundred mile line; all she can do is to apply the Convention provisions. From the semantics of the Law, it appears that all Japanese-registered ships are subject to the restrictions wherever they may be on the high seas.

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[18] Id., Art. 3, Sec. 6.
[19] Id., Art. 39.
[20] Id., Art. 42.
[21] Id., Art. 9.
[22] Teclaff, supra. note 1, at 551.
[23] Id.

In addition to this important legislation directed specifically at marine pollution, Japan has passed other laws indirectly affecting pollution of the sea. Projects for the dredging of sludge and dirty mud from rivers and ports have been set out. Increased use of terminal treatment plants rather than sewage disposal into rivers and the sea is prescribed. Various restrictions on air pollution will also aid the ocean environment.[24]

Japan has certainly made a needed beginning with the legislation which she has enacted within the last three years. But as Ambassador Ogiso stated, the ideal solution to the world-wide problem of marine pollution should not be merely national, but international. The high seas are a common heritage of all mankind. The oceans are vital not only for transportation but as a source of food and minerals. Japan's spirit of world-wide cooperation, which she is working diligently to spread, can be the key to saving these oceans, and thus our planet.

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[24] 18 INFORMATION BULLETIN, MINISTRY OF FOREIGN AFFAIRS, JAPAN 1, 1-6 (January 1971).

THE PEOPLE'S REPUBLIC OF CHINA'S VIEW OF CONTEMPORARY MARITIME LEGAL PROBLEMS

James Hugenschmidt

Background

Historically, China has been land-oriented philosophically, culturally, and economically from time immemorial. The philosophic structure developed as a part of a stable, well-structured, agrarian society so situated as to insulate it from other cultures, and the major religions and philosophies--Taoism, Buddhism, Confucianism, and Neo-Confucianism--in time reinforced this tendency.[1] As China blossomed both culturally and materially any need or desire for foreign contact waned. The commercial motive, which contributed to many of Europe's expansions over the globe, was absent in China. Ethno-centricity deepened. Occupations associated with foreign trade, such as merchant or mariner, were culturally disdained[2], and the late Ming and early Ch'ing dynasties went so far as to ban foreign intercourse.[3] China did have a trickle of contacts with various parts of the world, usually by incoming traders, but there was little to stimulate reciprocity. China did send forth a few exploratory voyages, some of which reached the eastern coast of Africa, but they found little of note and ventured forth no more.

Traditional China was unable to absorb the impact of the West, and as the traditional society began to disintegrate, the philosophical crisis which climaxed in the late nineteenth and early twentieth centuries was repeatedly met by eclectic theories trying to reconcile the old and the new.[4] Unable to shed the old, but met with the irrepressible force of the new, the People's Republic of China has sought to achieve an accomodation of clashing philosophies. This conflict must be kept in mind throughout the subsequent analysis. For our purposes, the basic change which has been wrought by the new regime is in the people's attitude toward economic, military, and industrial development and, above all, in her attitude toward involvement in world affairs. In the following analysis China's position on maritime legal problems will be dealt with as an extension of her foreign and domestic policies.

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[1] See generally, E. Reischaur and J. Fairbank, East Asia the Great Tradition, (1958).
[2] W. Tung, China and the Foreign Powers, 3 (1970).
[3] J. Fairbank, E. Reischaur and A. Craig, East Asia the Modern Transformation, (1965).
[4] See generally, J. Levenson, Liang Ch'i-Ch'ao and the Mind of Modern China, (1967).

Territorial Seas

China's claim to territorial seas was set at 3 nautical miles in 1930. This was adequate during the early years of the People's Republic when it was preoccupied with consolidating its power, domestic problems, and the Korean Conflict. A pressing need for an expansion of this territorial claim came in 1958 with the flaring of the problem of the offshore islands of Quemoy and Matsu, concerning Taiwan and the United States.[5] The response was a statement issued on September 4 of that year which claimed a limit of 12 nautical miles.

The legal justification for this position was based on three concepts of international law. First was the assertion that the determination of the extent of territorial seas is an act of sovereignty and therefore is a matter of right to be exercised in accordance with the existing conditions and circumstances and is not to be questioned or challenged by other nations. Second, China claimed that neither the 3 mile limit nor any other has been universally recognized and has the force of international law, and therefore each country has the right to establish its own territorial limit. This argument is reinforced by the fact that international conferences have been unable to agree on territorial limits. The final argument put forth was that the 3 mile limit has become obsolete. They cited the several nations which had extended their territorial seas outright to from 4 to 12 miles and other nations, such as the United States, which had indirectly extended their limits by the use of the concept of contiguous zones.[6]

This 1958 claim reflected not only the immediate defensive needs of the People's Republic but also a basic fear of aggression by the United States and the U.S.S.R. which had been growing both before and since that time. Such fear has been fostered by the active character of U.S. policies in Asia--the strong influence in post-war Japan, support of the Nationalist Chinese both before and after 1949, activity in the Korean Conflict, and the presence in Viet Nam, Laos, and Thailand. Given also the more recent ideological split with the U.S.S.R., their long-standing boundary disputes, and the traditional ill-feeling between the Chinese and the Russians, China's defensive posture in world affairs has been quite understandable.

In addition to being a defensive measure, however, her position on territorial seas has proved valuable in other respects. China's 12 mile claim in 1958 constituted a rejection of the 3 mile limit which several of the developed nations sought to establish as the limit of territorial seas at that time. Her position on the extent of territorial waters has continued to be consonant with that of most of the underdeveloped countries, particularly those of Latin America. In a speech on peaceful uses of the seabed and ocean floor in the United Nations on March 3, 1972, a representative of the People's Republic strongly supported the "just stand of safeguarding state sovereignty and opposing big-power hegemony"[7] by Asian, African, and Latin American countries. The "two superpowers" are charged with "brazen intrusions into the territorial seas and unbridled plunder of the sea-bed resources and coastal fishing areas of other countries...[which]...con-

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[5] Tao Cheng, Communist China and the Law of the Sea, 63 Am. J. Int'l L. 47, 57 (1969). [hereinafter cited as Cheng, Communist China and the Law of the Sea].

[6] Id. at 54-57.

[7] Speech by Chih-Yuan at the U.N. Committee on the Peaceful Uses of the Sea-bed and the Ocean Floor Beyond the Limits of National Jurisdiction, March 3, 1972. [hereinafter cited as Chih-Yuan, U.N. Committee on the Peaceful Uses of the Sea-bed and the Ocean Floor Beyond the Limits of National Jurisdiction].

stitute a grave threat to the economic interests and state sovereignty of many coastal countries, especially those of Asia, Africa, and Latin America."[8] The thrust of the proposals put forth by the People's Republic regarding territorial seas is that all coastal countries can "determine reasonably the limits of their territorial seas and jurisdiction according to their geographical conditions, taking into account the needs of their security and national economic interests."[9]

The legal justification for this position was based on the concept that there is no limit in international law on the breadth of territorial seas. To support this they cite the fact that the superpowers who once asserted a 3 mile limit as established are now saying that it should be 12 miles and that at the present time there are more than ten different stipulations ranging from 3 to 200 nautical miles.[10]

Other positions on territorial seas taken in 1958 and continued to the present have been reaffirmed by the implications of the 1972 statement. As to the measurement of territorial seas, China claims the use of straight baselines and cites the Fisheries Case.[11] Such a claim is not usually considered discretionary under international law but must be justified by coastal conditions. China claims an indented coastline dotted with islands as the determinative geographic factor[12] and this seems within the spirit of the precedent. This method of straight baselines has also had the effect of securing all of Pohai Bay as territorial waters, and this has been seen as vital for defense.[13]

China's position on innocent passage differs from that of the Geneva Convention in two respects. First, China insists that warships seek and obtain permission before exercising the right of innocent passage. Second, China asserts complete discretion to enact laws regarding innocent passage, while the Geneva Convention stipulates that such laws be in conformity with its provisions and the rules of international law.[14] The attitudes reflected are her traditional defense-mindedness and her expansive view of sovereign rights.

On its face, China's statement of March 3, 1972, is a reaffirmation of her position as champion of the Third World nations, but the recent actions of the Chinese leave room for doubt. China had isolated herself diplomatically for a time from the main powers. The wisdom of this policy has been questioned.[15] It is apparent that the warming of relations with the United States and Japan and her entry into the United Nations portends increasing co-operation with the major powers and thus a basic change in her international role. It has been suggested that these actions have cost China "credibility as international revolutionaries" with the Third World, and that this may be a trend.[16] Although China is not presently of the economic or military status of a superpower, this appears to be her destiny. As she developes in that direction it is likely that it will be at the expense of the favor that she has curried in the Third World, and her recent statement on the seas, although ideological in nature, may not indicate a

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[8] Id.
[9] Id.
[10] Id.
[11] Cheng, at 57-58.
[12] Id. at 58.
[13] Id. at 61.
[14] Id. at 63.
[15] O. Clubb and E. Seligmess, The International Position of Communist China, Background Papers and Proceedings of the Fifth Hammarskjold Forum 33 (1965).
[16] Yahunda, China's New Foreign Policy, 28 World Today 14, 21 (1972).

long term trend. As Matsudaira put it, despite the isolation fostered by the Cultural Revolution "[h]er ideological fervor will be inexorably eroded at the tests of hard facts of international life and domestic construction."[17] It appears, however, that any departure from the position indicated in the aforementioned 1972 statement is a long way in the future. It will take considerable time for China to rebuild diplomatic credibility with the major powers, especially after its early emasculation of the concepts of pacta sunt servanda and rebus sic stantibus.[18] Also, China's ideological affinity for the Third World must not be underestimated and could strongly influence China's foreign policy in the future.

Coastal Fishing

Although China has never developed into a maritime power, it has managed somewhat more development of its coastal fishing industry. The China coast is relatively short compared with her area (4,000 miles compared with Japan's 16,000 miles), but her coastal seas provide important fishing grounds and her fisheries production ranked her fourth in the prewar world.[19] During the war years production dwindled from 1.5 million metric tons in 1936 to 45 metric tons in 1949.[20] Upon ascending to power, the Communist government set out to redevelop the fishing industry by organizing the country's fishermen, providing loans for them to buy equipment, establishing markets and transportation to the markets, and generally modernizing the fishing fleet, fish processing industry, and fishery research.[21] These measures have been rewarded with some success. China has been placed second and third in the world in fisheries production in surveys between 1958 and 1967[22] and fourth in a 1968 survey.[23] However these figures are deceptive since sources for these years are unreliable and the figures apparently combine fresh water with ocean production, and most experts agree that this ranking is probably too high.[24] Her production in the 1968 survey was listed at 5.8 million metric tons,[25] but her full potential from coastal fishing has not been fully developed. One estimate states China's possible annual yield from territorial seas alone to be over 10 million metric tons.[26] Present indications are that China is intent on utilizing this potential.

Continued expansion will bring conflicts of interest with neighboring nations seeking to exploit the same seas, particularly Japan. Commencing in 1955, Japan and the People's Republic of China have entered into several fisheries agreements through informal organizations (since Japan has not recognized the People's Republic). These agreements have been sanctioned by the Chinese government and

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[17] Matsudaira, Peaceful Settlement of International Disputes and the People's Republic of China, 15 Jap. Annual Int'l L. 38, 68-69 (1971).
[18] H. Chin, The People's Republic of China and the Law of Treaties 100-103 (1972).
[19] N. Ginsberg, ed, The Pattern of Asia 186 (1958). [hereinafter cited as Ginsberg, The Pattern of Asia].
[20] Cheng, at 48.
[21] Id. at 49.
[22] C. P. Idyll, The Sea Against Hunger 123 (1970).
[23] Id. at 111.
[24] Id. at 110.
[25] Id. at 111.
[26] Ginsberg, The Pattern of Asia at 186.

given the force of treaties, but this has not been done by Japan. The most recent such agreement was concluded in December of 1965 covering the Yellow Sea and the East China Sea. Generally, these agreements have provided for:

1) Fishing zones with a maximum number of vessels of each party permitted in each zone;

2) Restrictions on the size of nets and dragnet zones for the purpose of conserving fishing resources;

3) Safety regulations and emergency provisions;

4) Exchange of marine research and data;

5) Reporting violations;

6) Mutual consultation for settlement of disputes;

7) Military areas into which Japanese vessels are not permitted.[27]

Since China in 1958 claimed exclusive fishing rights within her 12 mile territorial seas, the fishing zones begin from 13 to 80 miles off the coast. These agreements are bilateral and do not purport to delineate these as exclusive fishing zones, thus avoiding legal jurisdictional problems. But it is apparent from the agreements, such as where China excludes zones for military or other purposes, that China demands and Japan recognizes that as the coastal state China has special interests in these areas. One indication of China's view on the rights of coastal states may be inferred from a statement in the U.N. in March, 1972, in which reference is made to the superpowers' plundering of the coastal fishing areas of other countries. It further indicated that the extension of territorial seas to 200 miles to prevent this plunder is a legal and reasonable response.[28] It is clear that China recognizes and supports the interests of coastal states in fishery resources outside the territorial waters and the right to protect that interest. This is emphasized by a further statement, "The seabed resources of the... shallow seas adjacent to...China belong to China and it is absolutely impermissable for any foreign aggressor to poke his fingers into them."[29] The Chinese view this as a legitimate extension of the policy annunciated by President Truman in his Proclamation of September 28, 1945, which claimed the establishment of conservation zones in regions of the high seas contiguous to the coast. While the Truman Proclamation did not extend sovereignty or even unilateral control in all cases, it recognized rights created by contiguity as well as by substantial fishing and that these rights could be protected. This doctrine has been used by Latin American countries to extend sovereignty over these areas to protect ocean resources, and their position is endorsed by the People's Republic.[30]

There is no present indication that China will try to assert exclusive control over the fishing areas of the Yellow and East China Seas. At this time, despite considerable modernization, her fishing fleet cannot compare with those of advanced fishing countries. While large in number, most of her vessels lack the efficiency of the more modern equipment, and since many of them are small wooden vessels, they are limited to fisheries fairly near the coast. Coupling this with an historically great demand for fish that has invariably exceeded production[31], it becomes clear that expansion and modernization of the fleet must continue. As

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[27] L. Lee, China and International Agreements 61-65 and appendix 7 (1969). [hereinafter cited as Lee, China and International Agreements].

[28] Chih-Yuan, supra note 7.

[29] Id.

[30] G. Weissberg, Recent Developments in the Law of the Sea and the Japanese-Korean Fishery Dispute 26-27 (1966).

[31] Ginsberg, The Pattern of Asia at 188.

the fleet is able to venture further and exploit its waters more fully, her position on the jurisdictional issue of the Latin American countries may be used as a justification for the assertion of further control. It is unlikely that this would take the form of an extension of territorial waters as the Latin American countries have done, but rather would probably be closer to Truman's Proclamation but with greater control for China than Truman sought for the United States. The legal justification would be precedent--the Truman Proclamation, Latin American claims--analogy to the concept of contiguous zones, and the relatively new concept of specialized competences.[32] Tao Cheng is of the opinion that China has adopted the principle of contiguous zones for customs and other regulatory purposes and gives the example of a requirement that Japanese ships observe Chinese regulations from the time they enter within 15 nautical miles of the coast, while the territorial seas begin at 12 nautical miles, and further they prohibit "hovering" within 15 nautical miles.[33] By way of specialized competences, she has already delimited a zone from the Sino-Korean border to Chekiang which entends beyond the 12 nautical mile limit in which she has prohibited fishing by trawlers in order to conserve fishery resources. This has been the source of some friction with Japan, but the Japanese, while refusing to acknowledge the legal principle, comply with the regulations.[34]

The fisheries agreements between China and Japan have generally been considered quite favorable to the latter, and they have fared quite well. As with any agreement involving so many small vessels, violations are bound to occur and disputes inevitably arise. But the indications are that both parties have adhered to the agreements in good faith and that the settlement of the disputes which do occur is generally rapid with the utmost care for the preservation of good feelings and friendly relations.[35] For the present, China has had adequate success in controlling fishing off her coast by international agreement, and this is beneficial to her both in ease of enforcement and with regard to the more active role she is beginning to assume in world diplomacy. Assertions of control may prove to be disruptive diplomatically and will probably be resorted to only as a last resort. It is to be expected, however, that China will continue to support the position of the underdeveloped countries on the issue of fishing rights of coastal states. This position comports with the defensive posture she has felt it necessary to assume, with her possible future needs in fisheries development, and her ideological gambit in the Third World.

Continental Shelf

In geographical terms China is blessed with a broad continental shelf, being over 50 miles at its narrowest point and extending over 300 miles at its widest, taking for general purposes the 100 fathom isobath as its terminal point. The government of China has made no definitive policy statements regarding either its continental shelf or actions taken by other states or conventions regarding their continental shelves or continental shelves in general.

The question of jurisdiction over the continental shelf by coastal states did not come into the limelight until President Truman's 1945 Proclamation which

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[32] F. Garcia-Amador, The Exploitation and Concervation of the Resources of the Sea 67 (1963).
[33] Cheng, Supra note 5, at 67.
[34] Id. at 65-66.
[35] Lee, China and International Agreements at 66-68.

claimed that the United States "regards the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control." This Proclamation further stated that waters above the continental shelf were unaffected and retained their character as high seas.[36] Rather than meet international disapproval, the Proclamation was readily accepted and other nations followed with their own pronouncements on their continental shelves, some of which varied from Truman's Proclamation considerably. Diversity reigned until some semblance of international agreement was reached at the Geneva Convention of 1958. Article I of this convention limited the continental shelf to the 200 meter isobath or beyond that "to where the depth of superadjacent waters admits of the exploitation of the natural resources of the said areas..."[37] Article II gave sovereign rights over the continental shelf for the purpose of exploration and exploitation of natural resources and provided that this sovereignty did not depend on exploration or occupation.[38] Article III provided that rights over the continental shelf do not affect the status of superadjacent waters as high seas.[39] As a convention its provisions are only enforceable against the parties to it, of which China was not one. But the question has arisen whether any of these provisions have become a part of customary international law, thereby binding the People's Republic. Some writers have claimed that the Geneva Convention has so far guided practice in terms of the acceptance of the concept of sovereignty of the coastal state over the continental shelf. This is so generally accepted that this provision, at least, is now part of customary international law. There is a persuasive argument that objections to this concept have not been made even though such claims impinge upon the freedom of the high seas and all states are thereby affected.[40] It is probably accurate to say that this concept is now a part of international law, and also that this right appertains to the coastal state without proclamation or occupation, and that it consists of something less than complete sovereignty.[41] It can probably be said also, but with less assurance, that since claims to the resources of the water above the continental shelf have been met with such protest and uniform rejection, that such a claim would probably be a violation of international law. We see then that a few of the basic concepts are generally settled, but the more complex issues remain: a workable definition of the continental shelf and its delimitation, the legality of claiming jurisdiction over the continental shelf by extending claims to territorial seas, how facing and adjacent states determine their shelf boundaries, and the extent of the "sovereign rights" which the coastal state possesses. Examining these problems and the merits of possible solutions is beyond the scope of this brief work, but it is important to understand the framework into which China's policy will fit.

Mainland China has been endowed with considerable mineral wealth and, in relation to domestic needs, is deficient only in copper and nickel. She has the world's largest reserves of antimony and tungsten and a surplus of many other metals.[42] While her petroleum industry is presently small, indications are that re-

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[36] J. Andrassy, International Law and the Resources of the Sea 50 (1970). [hereinafter cited as Andrassy, Resources of the Sea].
[37] F. V. Garcia Amador, supra note 32, at 117.
[38] Id. at 117.
[39] Id. at 118.
[40] Andrassy, Resources of the Sea at 63-65.
[41] Id. at 65.
[42] Rand McNally Illustrated Atlas of China 60-61 (1972).

serves are considerable. From general estimates of world production and consumption until the year 2000, present on-land reserves will be adequate so, barring any radical change of circumstances, exploitation of the ocean for petroleum will not be necessary.[43] If such predictions hold, it is unlikely that China will turn to development of the continental shelf for many years. There are advantages to earlier development, such as converting land from mining to other uses, avoiding the destruction and pollution to land that mining often causes, furthering her ocean research which may be beneficial in other areas, having inexpensive transportation of mineral products readily available, and conserving on-land resources. But there are also disadvantages[44]--in case of war a mining industry based at sea is particularly vulnerable; the economy which China is now developing is based on regional self-sufficiency with development of industry close to its source of resources. Moreover, in a spatial sense the People's Republic has been careful to limit the growth of its cities and to distribute its industry and population evenly throughout the hinterland rather than allowing concentrations on the coast. Resource supply in coastal waters would be disruptive of this design. Probably the greatest reason for not developing the continental shelf immediately is that it would require large initial investment, and until extensive exploration was completed, it would be quite risky. At least in the short term, this last factor should be determinative.

Probably the only way that the continental shelf of China will be developed in the near future is if the People's Republic will consent to development, probably on a lease basis, by a technologically advanced nation in need of certain natural resources. Japan is an obvious candidate. Such a liason would be hindered by memories of the war years and Japan's ties with the United States, but China and Japan, if they are both economically strong, complement each other, and there have been recent signs of improving relations. Such an arrangement could not be termed likely at this point but it is within the realm of possibility.

Even though China will probably not actively exploit its continental shelf immediately, with its recent admission to the United Nations it will undoubtedly soon be in a position where it must take some stand on continental shelves in general. As far as protecting her own interests, acceding to the terms of the 1958 Geneva Convention would seem to cover her rather routine situation. The 200 meter isobath would secure a very broad shelf for her, and adopting the median line principle as to adjacent and facing states would not be too particularly odious, and if it were it could be altered by bilateral agreement. In the area of foreign policy, however, she may well find it politic to lend support to the claims of the Third World countries. U.N. politics since 1960 has been characterized by the "gaping fissure between developed and developing nations, accompanied and abetted by the substantial increase in U.N. membership of newly emergent nations."[45] On the issue of the seabed and continental shelf the developing countries have been unified to a reasonable extent, usually with only those with exceptional circumstances or with present developmental ambitions from the bloc. Support for this position by China has already been indicated, although the problem of the breadth of the shelf was not expressly mentioned. In her U.N. statement of March 3, 1972,[46]

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[43] D. Brooks and B. Lloyd, Mineral Economics and the Ocean 23-27, in Mineral Resources of the World Ocean, Proceedings of a symposium held at the Naval War College, Newport, R.I., July 11-12, 1968. Occasional Publication No. 4, Editor: Elizabeth Keiffer.

[44] Id. at 28-29.

[45] M. Gerstle, The Politics of U.N. Voting: A View of the Seabed from the Class Palace 2 (1970).

[46] Chih-Yuan, supra note 7.

she expressly supported 200 mile claims to territorial sea which is a way of indirectly extending claims to the shelf. She also maintained that coastal states have a right to the natural resources in "the coastal seas, sea-bed and the subsoil thereof"[47]--a quite inclusive statement not necessarily limited by concepts of territorial seas or continental shelf as they have been envisioned by the Geneva Convention.

Since China probably has no plans for developing the continental shelves of other countries, there would be no conflict of interest for her in supporting the position of the developing nations in seeking a broad shelf. With her prospective increase in diplomatic activity, this dichotomy will probably recur with some frequency--while China's own claims may be modest, she will support the larger demands of the developing nations where such support will not prejudice one of her substantive goals.

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[47] Id.

PRIMARY ELEMENTS INFLUENCING THE DEVELOPMENT OF THE LEGAL REGIME OF SOVIET TERRITORIAL WATERS

Elmo Zumwalt III

> A United States Coast Guard icebreaker on an ocenaographic voyage in the Kara Sea is harassed and forced to turn back by Soviet naval and air forces, the incident provoking diplomatic notes and protests; the Soviet Union again proposed the Baltic Sea be closed to warships of noncontiguous states; the masters of Russian fishing trawlers arrested and fined for violating the American twelve-mile fishing zone face disciplinary action upon their return home; Japanese fishermen are periodically arrested for violating the regime of Soviet territorial waters; American and Soviet warships are involved in brushing incidents in the Sea of Japan, a body of water Soviet publicists deem to be a regional sea; a war breaks out in the Near East over the legal status of the Gulf of Aqaba and Strait of Tiran, water routes which in geographic configuration and historical tradition are closely analogous to seas washing Soviet coasts; the Soviet Union announces the opening of the Northern Sea Route, and Japan is one of the first states to negotiate an agreement to use the Route; the Soviet Union campaigns strenuously for expanded foreign trade, a development which will entail increased contact by foreigners with the legal regime of Soviet territorial waters.[1]

These current events constantly displayed in our newspapers show the importance of a study of the Soviet Union's law of territorial waters. Although several factors have influenced the development of the legal regime of Soviet territorial waters, its pattern has primarily been the product of national security requirements, economic considerations, and historical traditions.[2] In order to gain an insight into the past and present Soviet thinking as to the status of maritime waters, these influencing elements must be examined.

National security has been the most significant factor in determining the pattern of the boundaries and the legal regime of Soviet territorial waters.[3] The recent history of Russia illustrates the sea's impact on her national security. The very presence of Allied ships restrained the Bolshevik ambitions of expansion and helped secure the independence of the nations of Eastern Europe.[4] The presence of Allied ships in the Baltic and the Dardanelles has restricted the actions of the Soviet Union. Since all the bordering seas to the Soviet Union have narrow entrances, they can be easily dominated by hostile nations. The Soviet Union's weakness in sea power in the Baltic area was a significant factor in determining Soviet foreign Policy toward Finland and the other Baltic states during the years

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[1] Butler, The Law of Soviet Territorial Waters vii (1967).
[2] Butler, ibid., 91.
[3] Mitchell, The Maritime History of Russia 848-948 (1949).
[4] Hartingh, Les Conceptions Sovietetiques du Droit de la Mer 134-135 (1960).

between 1939 and 1941.[5] With the Soviet Union's Black Sea fleet immobilized the Soviets were forced not to take any action against Turkish violations of the Nontreux Convention of the Turkish Straits during World War II.[6] Both the Atlantic and the Pacific approaches to the Artic seas can easily be blockaded by hostile naval powers. The Artic seas have also become vulnerable with the development of nuclear submarines. The proximity of the North Atlantic Treaty Organization's naval forces to the Baltic sea has caused the Soviet Union to threaten to close the sea to noncoastal nations. The tremendous influence national security has in formulating the legal regime of Soviet territorial waters has been apparent in both the actions of the Soviet Union and in the writings of Soviet jurists. Soviet jurists in defending a twelve mile breadth for their territorial waters noted that the effectiveness of an attack by a nuclear submarine depends to a meaningful extent upon the proximity of the submarine to the Soviet coast.[7] The Soviet Union's preoccupation with and realization of the importance of the strategic value of its territorial waters has led their jurists to develop several Soviet maritime doctrines to enable the domination of all approaches to their coasts.

To begin with, the U.S.S.R. advocates the recognition of the twelve-mile limit for territorial waters; yet, historically Russia has not consistently proclaimed her desire for the twelve-mile rule. The Russian jurists of the prerevolutionary days were composed of three different schools. The most influential school's advocate was F. F. Martens, who defined the territorial sea as "that part of the sea which washes a possession of the coastal state and which is deemed the property of the state, and is considered an extension of the coastal territory and subject to its authority."[8] P. Kazanskii's school represented the middle ground which believed the territorial sea was both a possession of the coastal state and a part of the high seas. Under this theory the coastal state possessed only limited authority over territorial waters.[9] The third school led by P. Sivers and A. N. Stoianov believed that territorial waters were part of the high seas, and consequently the coastal state was entitled to exert only limited sovereignty.[10] The first assertion of Russia of a territorial sea was in treaties with France, the Kingdom of the Two Sicilies, and with Portugal in the late seventeen hundreds. In these treaties Russia used the cannon-shot rule.[11] In 1787 Russia's legislation incorporated the cannon-shot rule for the regulation of privateering.[12] During the 1840's Russian trading people asked the government to extend the territorial waters to forty miles in order to reduce the competition of foreign whalers. Yet, the Russian government refused to do so, "since no clear and uniform agreement has yet been arrived at among nations in regard to the limits of jurisdiction at sea."[13] By 1853 the Russian government issued orders to their

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[5] Mitchell, op.cit. 848-948.
[6] Vasilev, On Turkish Neutrality in World War II 56 (1951).
[7] Kolodkin, The Legal Regime of Territorial Waters and the High Seas 11 (1961).
[8] Martens, Contemporary International Law of Civilized Peoples, 383 (1898).
[9] Kazanskii, Textbook on International Law, 137-138 (1902).
[10] Sivres, The Most Important Information Concerning International Maritime Law, 5 (1902).
[11] Polnoe, Complete Collection of Laws of the Russian Empire Since 1649, 968-972 (1830).
[12] Polnoe, ibid., 968-972.
[13] Fulton, The Sovereignty of the Sea, 585 (1911).

to their cruisers to enforce a three-mile limit off the shores of Russian America.[14] In the late eighteen hundreds the Russian Code of Prize Law and the Custom Code provided the three-mile limit. But the Russian government made its position clear that though Russian practice supported the three-mile rule, she considered the legal view unsettled.[15] F. F. Martens rejected the three-mile rule as an obligatory law and suggested a ten-mile limit would be more in line with artillery capabilities.[16] A Draft Statute on Russian Territorial Waters recommended the cannon-shot rule with a minimum limit of six miles except where otherwise established by international decree or treaty after long undisputed usage.[17] With these many varying views Russia had a very indefinite position on the extent of her territorial waters. Then on December 10, 1909, a Russian decree established a customs belt and subjected all ships to supervision within twelve miles of shore.[18] The twelve-mile limit was also established in general fishing regulations.[19] These decrees, establishing the twelve-mile limit, were protested by Great Britain and Japan, but Russia asserted the argument, "in modern international law there exists no generally accepted rule concerning the limits of territorial waters within which sovereign state authority may be exercised."[20] A. N. Nikolaev believed that the Soviet Government received the twelve-mile limit by rule of succession.[21]

In the past the Soviet Union has dealt with its territorial waters as being under its exclusive jurisdiction. The government did not accept limitations on this jurisdiction with respect to foreign ships. It contended that the only rights that foreign ships had were the rights that the U.S.S.R. granted. But in 1958 the Soviet Union ratified the Convention on the Territorial Sea and the Contiguous Zone. The Convention specifically subjects coastal states' control of territorial seas to the international norm of innocent passage and in other ways limits coastal state control of the territorial sea.[22] In respect to its strategic importance the U.S.S.R. considers the twelve-mile rule as only a first line of defense.

The Soviet jurist have developed the "closed sea" and the "historic bay" doctrines further to restrict the accessibility of foreign nations to Soviet coasts. Prior to World War II, the "closed sea" was almost never recorded in Soviet maritime works. In 1948, B. A. Dranov stated that the Black Sea was a closed sea; whose restrictions should be established by the coastal states. Dranov believed straits leading into a closed sea should be regulated by those states most interested in the freedom of commercial navigation and security of the sea; that is, the coastal states.[23] Bakhov expanded the doctrine by differentiating among three types of closed sea: (a) a sea fully enclosed by the land territory of two or more states which has no entrance to another sea; i.e. the Caspian; (b) a sea enclosed by a limited number of states which is connected with other seas by one or several narrow straits whose region is regulated by an international convention; i.e., the Black and Baltic Seas; (c) a sea enclosed by the land territory of two or several states which is not regulated by international convention; i.e., the Sea of Japan and the Okhotsk Sea. There are also no basic water routes of international importance which pass through any of these

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[14] Fulton, ibid., 585.
[15] Smith, Great Britain and the Law of Nations, 206 (1935).
[16] Martin, op. cit., 386-387.
[17] Meyer, The Extent of Jurisdiction in Coastal Waters, 237-238 (1937).
[18] Masterson, Jurisdiction in Marginal Seas, 286 (1929).
[19] Polnoe, op. cit., 449-452.
[20] "Note of the Russian Minister for Foreign Affairs to the Japanese Ambassador to Russia", (1912) Foreign Relations U. S. 1308 (1919).
[21] Nikolaev, Problem of Territorial Waters in International Law, 57 (1954).
[22] United Nations Document A/CONF. 13/L. 52, 27 April 1958.
[23] Dranov, The Black Sea Straits: International Legal Regime, 227 (1948).

categories.[24] "States not contiguous to these seas can not and do not have any legal grounds for claiming participation in deciding questions concerning the regime of navigation in closed seas or in the straits leading to these seas."[25] Even though the Soviet Union has unilaterally developed the concept of closed bays or closed seas, it is not a concept that international law recognizes. Generally the Soviet Government has followed the view that the regime of the closed seas can be regulated only with the concurrence of all the coastal states. For example, the U.S.S.R. accepted the rejections of Japan and Sweden to exclude the warships of foreign nations. Yet, the Soviet Union has taken unilateral action in the case of the Sea of Okhotsk when the Soviets told Japan of its intention to exclude all foreign fisherman from the sea after 1959.[26] Vereshchetin and Malinin have agreed that the basic factor in determining the closed sea status of a body of water was the security interests of the contiguous states, and that in order to make the closed sea doctrine more palatable, it was stressed that merchant ships of non-contiguous states cannot be excluded under international law from the closed sea.[27] This Soviet security conscious doctrine of closed seas has even made attempts to claim the Baltic Sea. Although in practice the Soviets allow the Baltic to be an open sea, a Soviet book published in 1956 described several old treaties in which Denmark and Sweden agreed with Tsarist Russia to exclude foreign warships from the Baltic Sea.[28]

"Historic bays or seas" is still another doctrine the Soviet jurists have developed to further restrict the accessibility of foreign powers to Soviet coasts. The Soviet Government has turned to its own purposes the international practice which holds that certain bays, long regarded by other nations as the exclusive property of a particular nation, are exempt from the informally accepted dimensional limitations applicable to bays designated as internal waters. The Soviet Union has unilaterally assumed the right to establish new historic bays never so regarded by other nations. This concept has also been expanded to include parts of the open sea. The category of historic bay has been applied to the White Sea, Sea of Azov, Kara, Laptev, East Siberian, Chukotsk Sea, and Riga Bay.[29] The ten-mile closing line rule for historic bays was abandoned by the Soviet Union after the judgement of the International Court of Justice in the 1951 Anglo-Norwegian Fisheries case. Even prior to this case the Soviets in practice ignored the ten-mile closing line rule, as for example, the White Sea and the Cheshkays Gulf were declared to be internal waters though their entrances were far in excess of ten miles.

In the Convention on the Territorial Sea and the Contiguous Zone, Article 7, provides that (a) 15 to 24 miles is the maximum width of the entrance to bays to be closed off as internal waters, (b) the waters in the bay could be enclosed as internal waters only if the coasts of the bay belonged to a single state, (c) there must be as much or more water area on the shore side of the line drawn across the mouth of the bay as there would be in the semi-circle on the seaward side of the same line, (d) these provisions were not to apply to the concept of historic bays.[30] Although these adopted provisions did not legalize Soviet designations of historic bays, the Convention's provision that historic bays did not necessarily need to meet the listed limitations, made it easier for the concept to be used.[31]

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[24] Bakhov, Naval International Law Manual, 53 (1956).
[25] Bakhov, ibid., 54.
[26] Keilin, Soviet Maritime Law, 91 (1954).
[27] Vereshchetin, Freedom of Navigation on the High Seas, 7 (1958).
[28] Voyenno, Naval International Law Handbook, 53-55 (1956).
[29] Bakhov, op. cit., 118-119.
[30] General Assembly Official Records: 11th Session, Supp. 9, 15 (1956).
[31] Harben, "Soviet Attitudes and Practices Concerning Maritime Waters: A Recent Historical Survey," 15 JAG Journal 152 (1961).

The Soviet Union's most recent application of the historic bay concept, was, when the bay of Peter the Great was declared to be an historic bay with a closing line of 108 miles. Peter the Great Bay had never been mentioned before in any Soviet publication as being an historic bay.[32] Therefore, it seems that the Soviet Union assumes she has the right to specify new historic bays without the consent of any other nation. Yet, apparently the Soviet jurists do not recognize a similar right for other states. A. K. Nikolayev critizes the United States claim that the bays of Alaska are the internal waters of the United States.[33]

The concept of the Continental Shelf has been used by the Soviet Union to expand further the boundaries of the historic seas.[34] In 1958 the Convention on the Continental Shelf established the doctrine that the natural resources of the continental shelf contiguous to the coasts of a nation could be used for the exclusive exploitation of that nation. The East Siberian Sea is a historic sea with an outer boundary which is identical to the continental shelf's outer limit. Thus the Soviet Union claims complete sovereignty over an area which the provisions of the Convention on the Continental Shelf has established that only the resources of the seabed and subsoil could be exclusively claimed.[35]

To what extent does the right of innocent passage cut into the doctrines that the Soviet jurists have developed to restrict the accessibility of foreign nations to Soviet coasts? In the prewar and postwar era there was disagreement among the Soviet jurists as to the extent of innocent passage.[36] Nikolaev took an extreme position:

> It is commonly stated in courses on international law that the authority of the coastal state in territorial waters is limited by the so-called right of innocent passage of foreign vessels, both merchant and military...this view can never be deemed correct, as it contradicts the sovereignty of the state over territorial waters and gives an opportunity to aggressive blocs to commit hostile actions against the state under the guise of the right of innocent passage.[37]

> Foreign non-military vessels may freely pass through the territorial waters of a coastal state if this passage is not only innocent, but is necessary from the viewpoint of customary navigation; but the coastal state may legally prohibit the navigation of foreign non-military vessels in its territorial waters if this navigation is not called for by navigational necessity.[38]

Yet, at the 1958 Geneva Convention of the Territorial Sea and Contiguous Zone the Soviet Union entered the convention's agreements but with two reservations: (a) the Soviet Union considers that state vessels in foreign territorial waters will have immunity and therefore convention article may apply only with the consent of the state whose flag the ship sails, and (b) the Soviet Union reserves the right to deny warships passage except in cases where undisclosed Soviet conditions may be met.[39] Soviets now require that thirty days' advance notice of a proposed passage of a warship be given by the foreign state and they reserve the right to withhold authorization. In effect there exists no right to innocent passage for

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[32] Strohl, The Regime of Bays in International Law, 225 (1964).
[33] Nikolayev, The Problem of Territorial Waters in International Law, 77 (1954).
[34] Harben, op.cit., 154.
[35] Harben, op.cit., 153.
[36] Butler, "Soviet Concepts of Innocent Passage", 7 Harvard International Law Journal, 113-130 (1965).
[37] Nikolaev, op.cit., 47.
[38] Ibid. 51.
[39] Butler, op.cit., 113-125.

a foreign warship but only a privilege to grant such a right by the Soviet Union.[40] Foreign non-military ships do have a right of innocent passage through Soviet territorial waters.[41] Apparently the Soviet's position to restrict foreign warships from innocent passage is based on their preoccupation with defense and by a belief that if the Soviet's position was widely accepted it would weaken the dominance of western sea power in many parts of the world.[42]

Although national security is the most significant factor in the developmental pattern of the boundaries and the legal regime of Soviet Territorial waters, Soviet economic considerations have also been influential. The U.S.S.R. has indirect access through sea routes to three oceans. Almost all of the coastline freezes during parts of the year and this has caused the Soviets to be constantly searching for warm-water ports. The Soviet jurist, Meshera, has said that the cooperative attitude of the Soviet state towards the rules applied by the bourgeois states was due to the dependence on foreign shipping after the World War destroyed most of the Russian merchant marine, and on the Soviets lack of industrial commodities which requires them to be imported by water from the West.[43] Fishing is one of the Soviet Union's largest industries. The importance of the fishing industry is reflected in Soviet postwar fishing legislation and its miltiplicity of treaties with other states. The Soviet desire for a greater breadth in her territorial waters was primarily to protect seal and fisheries.[44] The U.S.S.R. regards fishing zones as rights which a coastal state may exercise within its territorial waters. The exclusive right to fishing is restricted for the use of only Soviet organizations and citizens.[45] The only way for a foreign state to be able to fish within Soviet waters is by an international agreement with the Soviet Union. As recently as 1958 the Soviet Union has issued a decree establishing her exclusive fishing rights in all Soviet territorial waters.[46] After 1945 it was very difficult to acquire fishing agreements with the Soviet Union. For example, the strong Soviet claims to the Sea of Japan and the Okhotsk Sea as being closed seas, are influenced by the Soviet fisheries in these waters, and for this reason Japan has not been able to obtain adequate access to Soviet territorial waters along the Pacific coast. The Soviet Union has in fact unilaterally kept Japanese and other nations' fishermen out of fishing areas located far outside its territorial seas, and has admitted that international law does not provide for such action.[47]

Soviet practice in waters next to her territory is not consistent with the Soviet view in regard to similar claims by South American countries. In 1956 and 1957 Soviet works verified the right of coastal states to exclude other states from their fisheries over their continental shelfs.[48] Yet, a Soviet book in 1951 stated that the 200-mile special fishing zone, decreed by Peru and Chile, was illegal and was an imperialistic action to "ensure monopoly domination of the exploitation of the natural riches of the open sea".[49] In other Soviet writings the 200-mile special fishing zone is cited as an illustration of the right of a coastal state to establish the width of territorial waters as it desires.[50]

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[40] United Nations Conference on Law of the Sea, 130 (1958).
[41] Butler, Supra at note 37.
[42] Ibid.
[43] Meshera, Maritime Law: Legal Regime of Maritime Routes, 5 (1959).
[44] Butler, The Law of Soviet Territorial Waters: A Case Study of Maritime Legislation and Practice, 4 (1967).
[45] Imenitov, Soviet Maritime and Fishing Law, 21 (1951).
[46] U. N. Leg., Series, Laws and Regulations on the Regime of the Territorial Sea, 577-578 (1957).
[47] Harben, op.cit., 154.
[48] Uustal, Questions of the Regime of Territorial Waters, 77 (1957).
[49] Academy of Sciences of the U.S.S.R., International Law, 305-306 (1951).
[50] Harben, op.cit., 160.

Historical discoveries, explorations, and conquests, are other factors which have had an important influence in the development of the boundaries and the legal regime of Soviet Territorial waters.[51] The earliest historical claim of the Russians goes back at least nine centuries to when they settled on the shores of the White Sea. Russian control of the Baltic, Black, Aral, Azov and Caspian Seas only took place in the early seventeen hundreds. Exploration of the coasts of the Arctic was at least as early as the thirteenth century. Although Russian explorers have taken part in exploring expeditions and have used them as a basis for claiming coastal waters, her problem has been that written accounts of Russian explorations, in comparison to the English exploits, are relatively obscure.

The U.S.S.R. has had both ideological and practical reasons to oppose concepts of international law. There are many schools of international legal thought which can be considered to be inconsistent with the ideological and practical reasons to oppose concepts of international law. There are many schools of international legal thought which can be considered to be inconsistent with the ideological Marxists theories of man and state. Practically, the Soviet preoccupation with national security has had the consequence of the development of the closed bays and closed seas doctrines which are contrary to accepted principles of international law. The twelve-mile rule of territorial waters is advocated by the U.S.S.R. to be justified on the basis of economic and security considerations. The twelve-mile rule also has the support of many other states especially smaller nations. But the closed sea concept which applies to six of Russia's fourteen seas and the closed bay concept which applies to her four Arctic seas, are not accepted or supported by international law. The Soviets maintain their position by pointing out that there are no major international shipping routes in the closed seas and these seas do remain open to commercial shipping of all states. It is pointed out that their claim to the closed bays of the Arctic is justified by Russian exploration and development.[52]

> The principal legal difficulty with the Soviet positions is that Soviet jurists do not discuss the general applicability of these principles to other bodies of water in the world. Where international law and custom have long served to quiet maritime disputes, the Soviet theories would introduce conflict and chaos. In a world community where a balance must be struck between legitimate security needs of the coastal state and the requirements of international commerce, many of the Soviet claims — particularly those relating to historic bays and seas — are extreme or unfounded; these are likely to continue to be subordinated to broader maritime interests in freedom of navigation.[53]

[51] Golder, Russian Expansion on the Pacific: 1641-1850, (1914).
[52] Butler, op.cit., 93.
[53] Butler, The Law of Soviet Territorial Waters: A Case Study of Maritime Legislation and Practice, 94 (1967).

THE APPLICATION OF THE JONES ACT

TO FOREIGN SEAMEN AND FOREIGN FLAG OPERATIONS

R. L. Moore

One aspect of international law in which there is a vacuum of black-letter principles is the extent to which domestic statutory law may be applied to include aliens. The reason for this is fairly self-explanatory: There exists such a delicate balance between a nation's self-interest in enforcing and applying its own laws and its desire to effectuate amicable relations with the other countries of the world, that it would be exceedingly difficult for anyone to attempt to codify a nation's duties and responsibilities in this area. Therefore, these matters are generally reserved for the judiciary of each nation to determine. This paper seems to afford an understanding of how judicial treatment of statutory application may vary over time. Basically, it is a case history of what has come to be known as the Jones Act[1], insofar as it has been interpreted by the courts of the United States.

The Jones Act is a liberal negligence statute enacted by Congress in 1920 as an amendment to the Seamen's Act of 1915. It was part of a series of amendments added by Congress to the existing statutory maritme law, intended by Congress to: ". . . provide for the promotion and maintenance of the American Merchant Marine."[2] It was quite clear that it was not intended to affect generally vessels within the flag jurisdiction of other countries--according to well-established international principles, the law of the foreign state would clearly apply.[3] However, the proponents of the bill were able to demonstrate that Congress did have the authority to deal with the treatment of foreign seamen within the territorial jurisdiction of the United States.[4] In enacting this legislation, Congress extended the liberal benefits of the Railway Act to "<u>any</u> seaman . . ."(emphasis added), while in other current legislation it expressly delimited the rights included to "any <u>American citizen</u> rated as an able seaman,"(emphasis added), thereby presumptively establishing the fact that it was quite aware of what class of seamen it intended to include within the coverage of the Act.[5] Congressional power to legislate for foreign seamen, besides having been declared constitutional, was considered in accord with the generally recognized principle of international law that a nation has jurisdiction over all those who come within its territory

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[1] Jones Act, 41Stat.1007,46U.S.C.Sec.688. [hereinafter cited as Jones Act].
[2] H.R.10378,66thCong.,2ndSes.,(1920).
[3] Harolds, <u>Some Legal Problems Arising out of Foreign Flag Operations</u>, 28 Fordham L.Rev.306(1920). [hereinafter cited as Harolds].
[4] 59Cong.Rec.7043 (1920).
[5] Harolds at 308.

(subject, of course, to any agreements between nations and the doctrine of sovereign immunity, which is more relevant to consideration by the executive, rather than the judicial, branch of government).

Congress perhaps had a variety of purposes in enacting the Jones Act, but it is clear that the primary motive was economic. In attempting to provide for the "promotion and maintenance" of the American Merchant Marine, the Jones Act's fundamental function was to equalize the operating expenses between American vessels and foreign shipping concerns. By providing for a uniform system of compensating seamen for shipboard injuries, any potential competitive advantage inurring to foreign shipowners by virtue of less stringent negligence laws of their national state would be obviated. Congress evidently felt that those foreign shipowners who carried on business in the United States should be compelled to submit to equalized operating costs which were not inherent in their operations. This may or may not be logical, but it was clear that Congress had the right to do it. It is important to understand the economic motivations of the Jones Act because in the delineation of the case history following the promulgation of the Act it will be seen that the courts which considered the problems that were raised in applying it were very mechanical in their reasoning and were apparently unaware or unconcerned with the economies of the situation. It should be reasonably clear that Congress was trying to neutralize the competetive advantages of those foreign shipowners who were substantially competing with American shipowners, and thus the test of who should be included within the coverage of the Act should include considerations which should determine which foreign concerns were substantial competitors and exclude those who were not. It will be shown that it took fifty years for the federal courts to evolve such a test.

The first important case which considered the Jones Act arose in 1924. Stewart v. Pacific Steam and Navigation Co,[6] involved a British seaman injured on a British vessel in the Panama Canal, the defendent shipowner having a place of business in New York. The significance of this case is that it judicially resolved the question of whether the Jones Act was meant to apply in any case in which alien interests were involved. The court, while declining to fashion a formalized standard as to when the statute should be applied, held that Congress had intended it to apply to foreign seamen and vessels in general. The major contention was that the Act only applied to those who had substantial business interests in the United States, relying on the language of the statute which read: "Jurisdiction in such actions will be under the court of the district in which the defendent employer resides, or in which his principal office is located."[7] Defendent claimed that since his principal office was in England, jurisdiction for Jones Act purposes would not lie, and that generally the statute was not meant to include any foreign corporation. In holding the Act applicable, Judge Learned Hand commented that it was common knowledge that Congress had intended for the statute to cover foreign seamen and shipowners, and treated the statutory language as a venue, rather than jurisdictional, statement.[8] Although the decision was most probably correct, Judge Hand got the Jones Act cases off to a poor start due to his vague and rather nebulous statement about Congressional intent. This decision opened the door to numerous Jones Act suits against corporate defendents which had been doing merely nominal business in the United States, but which were

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[6] Stewart v. Pacific Steam and Navigation Co., 3F.2nd329, (circ.1924). [hereinafter cited as Stewart v. Pacific Steam and Navigation Co.].

[7] Jones Act.

[8] Stewart v. Pacific Steam and Navigation Co. at 330.

sued by virtue of the dictum in Stewart.

The first instance in which the Supreme Court had occasion to consider the problem was Uravic v. F. Jarka Co.[9], which arose in 1931. Uravic, while affirming the cases which had liberally applied the Jones Act, extended its reach to include stevedores who had been injured while temporarily working on board a foreign vessel. Again, the decision was correct in that it was obvious that at least American stevedores' tort claims should not depend on what ship they happened to be working when they sustained the injury; however, Uravic failed in the sense that it was unable to produce a logical and economically justifiable standard for the lower courts to follow.

Until 1948, the appellate courts consistently followed the decisions and reasoning of Stewart and Uravic, and just as consistently, the dicta of those courts became more and more divorced from the underlying policy of the Jones Act. Typical of these cases was Arthur v. Compagnie General Trnasatlantique[10] which stated that the Jones right was intended to be given to all seamen, regardless of nationality, so they would not be forced to bring the action against the alien defendent in an alien forum.[11] This case is significant only in that it indicates how the courts were misconstruing the raison d'etre of the Jones Act.[12] Clearly, the purposes of the Act could have been easily accomplished without the vast overreach that needlessly penalized a great many foreign shipowners who did not compete with American shipping, and needlessly endangered commercial relations with many nations.

In 1948, the case of Sonnesen v. Panama Transportation[13] heralded the coming of a second trend in the Jones Act history, one in which the pendulum was to swing as far in the direction that restricted the application of the Act as the first trend had gone in expanding it. Sonnesen involved a Danish seaman injured on a Panamanian flag vessel while on the high seas. This decision held the Jones Act inapplicable, ostensibly because there was no valid reason to apply it when neither the plaintiff nor the defendant were American nationals, and the injury occurred outside of the territorial jurisdiction of the United States. However, the court chose to disregard the fact that the corporate defendant, though technically a Panamanian corporation, was a wholly owned subsidiary of Standard Oil of New Jersey. This conflicted with the well established rule ennunicated by Gerradin v. United Fruit Co.[14] in 1932, and it followed consistently thereafter, that when the foreign flag vessel was owned and operated ultimately by an American corporation, Jones Act jurisdiction would not be barred by reason of the foreign flag. The reasoning of the court is slightly elusive, but generally it seems to have reflected a post-war sentiment that for economic reasons, world commerce should not be interfered with by domestic legislation. Basically the courts seem to have evinced a change of heart regarding application of Jones--that there was a vague feeling that the statute should not cover cases where direct American interests were not involved.

The trend toward restrictive application of Jones became more and more prevalent at the appellate and district court levels, finally resulting in the historic case of Lauritzen v. Larsen[15] in 1953. The importance of Lauritzen lies

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[9] Uravic v. F. Jarka Co., 282U.S.234,75L.Ed.312,51S.Ct.111,(1931).
[10] Arthur v. Compagnie General Transatlantique, 27F.2nd662, (circ.1934).
[11] Id. at 664.
[12] Harolds at 310.
[13] Sonnesen v. Panama Transportation Co., 298N.Y.262,82N.E.2nd569,(1948).
[14] Gerradin v. United Fruit Co., 60F.2nd927, (circ.1932).
[15] Lauritzen v. Larsen, 345U.S.571,97L.Ed.1254,73S.Ct.921, (1953). [hereinafter cited as Lauritzen v. Larsen].

in the fact that, for the first time, the Supreme Court produced a formalized standard upon which the lower courts could rely, ostensibly making possible a uniform and clearly ennunciated system of law in which to apply Jones. The significance of Lauritzen was that the test formulated by the Supreme Court, though it was as specific as could be reasonably expected, still reflected considerations which focused on secondary characteristics of the case--namely, it followed the Sonnesen thinking that Jones should be restricted to cases in which direct American interests were involved.

Lauritzen was a Danish seaman who had signed the articles and contract of employment in New York. He was injured on a Danish vessel in the port of Havana, and was provided a remedy for his claim under Danish maritime law. The primary issue in the case was whether the Act was to be interpreted literally to give any seaman Jones' rights regardless of what, if any, connections the transaction had with the United States. The Court held that United States statutes such as the Jones Act were to be construed to apply ". . . only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law."[16] This was in accord with Chief Justice Marshall's opinion, quoted by the court, that "An Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[17] The Court was obviously focusing on well established international law principles rather than on considerations of Congressional policy or statutory interpretation. The basic approach the Court took in this area was summarized by Justice Jackson when he said "Courts. . . have generally deferred to . . . international law of impressive maturity and universality. It has the force of law. . . from acceptance by common consent of civilized communities of rules designed to foster amicable and workable commercial relations."[18] He proceeded to outline seven factors which comprised the test of whether or not Jones Act jurisdiction would lie. They were: 1) the place where the wrongful act occurred, 2) the law of the flag nation, 3) the allegiance or domicile of the plaintiff, 4) the allegiance of the defendant shipowner, 5) place where the contract of employment was signed, 6) the inaccessability of a foreign forum to the plaintiff and 7) the law of the forum state.[19]

This kind of standard can obviously be applied in one of two ways. The court could merely add up factors to be considered, and award the decision to the party which had the highest figure, thus allotting equal weight to each of the individual factors. The Court in Lauritzen clearly meant to avoid this type of mechanical application by its dictum that the most venerable and universal rule of maritime law relevant to the choice of law issue was that of the law of the flag.[20] Although the mechanical approach to the Lauritzen test would undoubtedly have led to many disastrous results, the Court, by so emphasizing the importance of the law of the flag, basically muted the test taken as a whole. It implied that the law of the flag should prevail except in those cases in which the other six factors were so heavily weighted in favor of allowing jurisdiction as to demand Jones Act jurisidction. Given the Court's concern which the international implications of Jones, this is most likely what they intended the result to be.

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[16] Id. at 577.
[17] The Charming Betsy, 2Cranch 118.
[18] Lauritzen v. Larsen, at 581-2.
[19] Id. at 584.
[20] Id. at 587.

This solution tends to emasculate the Act. Under this approach, only American shipowners, with very few exceptions, would be within the purview of jurisdiction which, though probably in accord with international principles of law, is antithetical to the Congressional policy underlying Jones.

The lower courts, subsequent to Lauritzen, followed this standard happily. However, there seemed to be one maverick line of thought which was giving increasing weight to the factor of the place of the wrongful act. In 1958, the Supreme Court quickly disposed of this idea in Romero v. International Terminal Operating Co.,[21] when Justice Frankfurter, speaking for the Court said "The test of location of the wrongful act. . . is of limited application to shipboard torts because of the varieties of legal authority over waters she may navigate. . . The territorial standard is so unfitted to an enterprise conducted under many territorial rules and under none that it usually is modified by the more constant law of the flag."[22]

Although the law of the flag had thus been established, the Court in Romero reaffirmed the doctrine ennunciated by Gerradin v. United Fruit Co. in 1932, and followed consistently thereafter, that the law of the flag was an illusory principle when the vessel in question was what has come to be referred to as a flag-of-convenience vessel, a ship registered in a foreign country that is owned and/or operated by American citizens. Southern Cross Steamship Co. v. Firpis[23] quoted tha language of Justice Jackson speaking in Lauritzen:

> But it is common knowledge that in recent years a practice has grown, particularly among American shipowners, to avoid stringent shipping laws by seeking foreign registration eagerly offered by some countries. Confronted with such operations, our courts on occasion have pressed beyond the formalities of more or less nominal registration to enforce against American shipowners the obligations which our law place upon them.[24]

And it proceeded to examine the nature of the corporate defendant before it. The court concluded that it was ultimately owned by an American corporation, and held the Jones Act applicable regardless of the fact that the plaintiff was Greek, that the flag was Greek, and that the tort had occurred outside of United States territorial jurisdiction.[25]

The Lauritzen rationale controlled problems arising under the Jones Act until the landmark case of Hellenic Lines v. Rhoditis[26] was decided in 1970. The case involved a Greek seaman who was injured on a Greek freighter in American territorial waters. The defendant shipowner was Greek, but had been an American dom-

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[21] Romero v. International Terminal Operating Co., 358U.S.354,3L.Ed.368,79S.Ct. 468, (1958).
[22] Id. at 384.
[23] Southern Cross Steamship Co. v. Firpis. 285F.2nd651,84A.L.R.2nd895, (1960). [hereinafter cited as Southern Cross Steamship Co. v. Firpis].
[24] Lauritzen v. Larsen at 587.
[25] Southern Cross Steamship Co. v. Firpis at 899.
[26] Hellenic Lines v. Rhoditis, 398U.S.306,26L.Ed.252,90S.Ct.1731, (1970). [hereinafter cited as Hellenic Lines v. Rhoditis].

icilary for twenty years. The decision could have been based on the Lauritzen law of the flag approach, or on a mechanical application of the seven factors constituting the Lauritzen test, both of which would have denied jurisdiction. The flag-of-convenience doctrine did not apply here because the defendant was not an American citizen. Justice Douglas, speaking for the Court, said that although "We indicated that the law of the flag of the ship may, at times, alone be sufficient . . . The significance of one or more factors must be considered in light of the national interest served by the assertion of Jones Act jurisdiction."[27] He then quoted approvingly from the Second Circuit's opinion in Bartholomew v. Universe Tankships, Inc.[28] (1959), in which Judge Medina said that the real test of Jones Act applicability depended on the substantiality of the particular transaction's contacts or connections with the United States, and ". . . moreover, each factor, or contact, or group of facts, must be tested in the light of the underlying objective, which is to effectuate the liberal purposes of the Jones Act."[29]

What kind of standard does that represent? Justice Douglas proceeded to demonstrate that it was rather a straightforward test by his application of it to the factual pattern of Rhoditis. He looked past the nominal fact that the defendant shipping concern was a Greek company, and examined the substantiality of its competition against American shipping interests. He concluded that regardless of the nationality of the corporation and its owner, the defendant did in fact carry on a significant volume of business within the United States, competed directly with the American Merchant Marine, and, consistent with the dictates of Jones Act policy considerations, should not be allowed to maintain his substantial cost advantage vis-a-vis his American competitors.[30]

Thus for the first time the Supreme Court has formulated a standard for applying the Jones Act to foreign seamen and shipowners which is consistent with the original economic motivations that led to the passage of the bill in 1920. Critics of this decision may point out that the economic position of the American Merchant Marine is so much stronger today than it was in 1920 that the need for such an application of Jones has been obviated, and that the considerations of international commercial relations stressed in Lauritzen are much more important than the promotion of American business interests, which realistically do not need to be protected any longer. If such is the case then Congress or the Executive should be the one to initiate legislation which would modify or repeal this portion of the Jones Act. It is also true that Rhoditis did not purport to overrule Lauritzen, and thus it may well be that the next Supreme Court which considers the problem may return to the considerations of the earlier opinion. This paper has emphasized the vicissitudes of the law in areas in which international relations is potentially, at least, of paramount concern.

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[27] Id. at 308-9.
[28] Bartholomew v. Universe Tankships Inc., 263F.2nd437 (1959).
[29] Id. at 441.
[30] Hellenic Lines v. Rhoditis at 310.

ACTIONS FOR PERSONAL INJURY AND WRONGFUL DEATH IN MARITIME SURROUNDINGS

John Morgan

If one takes the time to study the various facets of maritime law, he will find that it encompasses many different types of people; and it should not take him long to discover that probably the most unglamorous position to be in is that of shipowner-employer, whether the employer be one man operating a small fishing vessel or a corporation operating a fleet of cargo ships. Any potential shipowner-employer anticiaptes injured workers and faulty equipment aboard ship and within the harbor area itself. However, initially, he probably has no idea how many different kinds of events can take place for which he will be held accountable. There are well over a hundred types of accidents for which suits are brought in maritime surroundings, accidents that occur on and off the ship.[1] Of course, the injured worker will not always prevail in court, but the shipowner has to expend time and money defending the action just the same. Thus, while one would expect a decision such as Nelson v. American-West African Line, Inc.,[2] where it was held that liability will result for an officer's assault, if he intended to further the employer's interest, one might not completely accept the holding of Tetterton v. Arctic Tankers, Inc.,[3] where the employer was found to be negligent in failing to protect a crewman from committing suicide. The Court said that the ship's master "fell just short of the standard of care required under all the circumstances," by failing to check Tetterton's personal belongings, where the master knew that Tetterton was disturbed about something.[4] Actions for personal injury and wrongful death are brought daily and the two cases just cited are examples of the types of actions which the shipowner must defend. Shipowners' liabilities and maritime workers' rights are found in various federal and state statutes. This writer will discuss three of the most frequently used statutes--the Jones Act,[5] the Death on the High Seas Act (hereinafter Death Act),[6] and the Longshoremen's and Harborworkers' Compensation Act (hereinafter Harborworkers' Act).[7] These statutes are all important devices of maritime law because they cover all the different types of maritime workers--crewmen, stevedors, and other classes of harborworkers, and because where an action will not lie under one statute, it will lie under another, and maybe under two of the statutes concur-

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[1] P. Edelman, Maritime Injury and Death 1033-80 (1960).
[2] 86 F. 2d 730 (1937).
[3] 116 F. 2d 429 (1953).
[4] Id. at 431.
[5] 46 U.S.C. section 688.
[6] 46 U.S.C. sections 761-767.
[7] 33 U.S.C. sections 901 et seq.

rently.

Seamen had rights as far back as 1600 that are still recognized today. They had the right to look to the shipowner and the ship to provide medical care when they were sick or injured aboard ship. They were also entitled to expect a staunch and seaworthy vessel.[8] American crewmen today, however, have substantial rights that those in the past lacked. There exists the right to collect for injuries resulting from the negligence of an owner or an officer, as well as the right to collect from fellow crew members. In case of death due to negligence, the right of recovery belongs to the next of kin.[9] The Jones Act, which became effective in 1920, was the first successful legislation that gave substantial, effective rights to crew members to recover against the shipowner for negligence.[10] It states concisely those situations in which a seaman may recover against his employer:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.[11]

Many cases have arisen under the Jones Act, and numerous important decisions have been handed down by the United States Supreme Court, one of the most significant of which is Moragne v. States Marine Lines, Inc.[12] Decided on June 15, 1970, Moragne contains a substantial history of Supreme Court decisions which prefaces the Court's holding that an action does lie under general maritime law for death caused by violation of maritime duties.[13] In so holding, the Court expressly overruled The Harrisburg decision[14] that maritime law does not afford a cause of action for wrongful death. Moragne, a longshoreman, was killed while working on a vessel in navigable waters within the state of Florida. His wife brought suit on claims of negligence and unseaworthiness of the vessel. In affirming the District Court's dismissal, the Appellate Court had relied on the Supreme Court's decision in Tungus v. Skovgaard,[15] wherein the entire Court agreed

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[8]Edelman, supra note 1, at 1.
[9]Id.
[10]Id. at 2.
[11]46 U.S.C. section 688.
[12]398 U.S. 375 (1970).
[13]Id. at 409.
[14]119 U.S. 199 (1886).
[15]358 U.S. 588 (1959).

that where death on state territorial waters is left remediless by general maritime law and federal statutes, a remedy may be provided under any applicable state law giving a right of action for death by wrongful act. As Florida Statutes 768.01 (1965) then did not encompass unseaworthiness as a basis of liability, the Appellate Court decided that since there was no "applicable state law" under which Moragne's wife could bring the action, it must be dismissed.[16] The Supreme Court, however, in discussing the various statutes that give a cause of action for wrongful death, acknowledged the fact that perhaps because of their decision in Mahnich v. Southern S.S. Co.,[17] a seaman's right to recover damages for injury caused by unseaworthiness was an obscure and relatively little used remedy, as the shipowner's duty was only to use due diligence. There is now an absolute duty to provide a seaworthy ship "not satisfied by due diligence."[18] Thus, the Supreme Court concluded its opinion with the hopeful observation that "in contrast to the torrent of difficult litigation that has swirled about The Harrisburg, The Tungus, . . . and the problems of federal-state accomodation they occasioned, the recognition of a remedy for wrongful death under general maritime law can be expected to bring more placid waters."[19]

There are some key areas in which a working knowledge of what the Jones Act does and does not cover is necessary in order to compare it with other statutes. Generally, the Jones Act allows a crew member suffering personal injury in the course of his employment to sue in a civil suit at law with a jury trial.[20] Incorporated into the Jones Act is the Federal Employers' Liability Act of 1908 (FELA),[21] which, coupled with the literal language of the Jones Act itself, indicates that the latter is a negligence statute; and it has always been given a liberal interpretation.[22] Indeed, the obligations of a shipowner to his seamen are substantially greater than that of an ordinary employer to his employees.[23] An interesting case to illustrate this point is Warren v. U.S.[24] Petitioner Warren, a messman who went ashore on leave with other crew members, did a little drinking and a little dancing before falling off an unprotected ledge while trying to get a better view of the ocean. The Supreme Court, captained by Mr. Justice Douglas, held that the crewman had a right to subsistence and medical care, even if the injury occurred while petitioner was on his own personal business and even though he displayed incompetent behavior. Citing the Shipowners' Liability Convention,[25] Mr. Justice Douglas stated that "(i)n maritime law it has long been held that while fault of the seaman will forfeit the right to maintenance and cure, it must be 'some positively vicious conduct--such as gross negligence or

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[16] 398 U.S. at 377.
[17] 521 U.S. 96 (1944).
[18] 398 U.S. at 399.
[19] Id. at 408. See also D.L., Nine Admirals at the Helm: A New Cause of Action for Wrongful Death in Maritime Law--Moragne v. States Marine Lines, Inc., 1970 UTAH L. REV. 653, and Payne, Admiralty--Wrongful Death Action Under General Maritime Law, 49 N.C. L. REV. 329 (1970-71).
[20] Edelman, supra note 1, at 63.
[21] 45 U.S.C. sections 51-60.
[22] Jamison v. Encarnacion, 281 U.S. 635 (1930).
[23] Koehler v. Presgne-Isle Trans. Co., 141 F. 2d 490 (cert. den. 1944).
[24] 340 U.S. 523 (1951).
[25] Id. at 525.

willful disobedience of orders.'"[26] It is important to recall at this point that only crew members have this right to maintenance and cure under the Jones Act.[27]

Negligence with respect to a shipowner's obligations may arise in a number of ways, either from actual or constructive notice that a place is unsafe for crew members, or from failing to furnish proper equipment after notice has been received. Where an employer knows or should know of insufficiencies, he will be held liable where harm might reasonably be anticipated.[28] The test, as applied in Ferguson v. Moore-McCormack Lines, Inc.,[29] is now whether "employer negligence played any part, even the slightest, in producing injury or death." In Ferguson, the petitioner was serving as a baker on respondent's passenger ship, and was dishing ice-cream from a large container. Halfway down the container, the ice-cream became so hard that the scoop with which the petitioner had been furnished was useless. He attempted to loosen the ice-cream by chipping at it with a sharp butcher knife. He struck a spot so hard that his hand slipped onto the blade of the knife, causing the loss of two fingers on his right hand. Quoting the above test from Rogers v. Missouri Pacific R. Co., decided on the same day,[30] Mr. Justice Douglas stated that "fairminded men could conclude that respondent should have foreseen that petitioner might be tempted to use a knife to perform his task with dispatch, since no adequate implement was furnished him."[31] Respondent's negligence need not have been the sole cause of the injury, if it was a substantial cause.[32]

In a landmark decision in 1958, Kernan v. American Dredging Co.,[33] the Supreme Court allowed a recovery under the Jones Act without requiring proof of negligence. A seaman died as a result of a violation of Coast Guard regulations that openflame kerosene lamps not be carried at a height of less than eight feet from the water surface. The lamp, not more than three feet above tha water, ignited certain vapors lying above an accumulation of petroleum products, causing petitioner's vessel to catch fire. In a sharply divided decision, the Court allowed recovery although the regulation was for navigational purposes and not to protect against the occurrence which was claimed to have caused the fire. Mr. Justice Harlan, writing for the dissent, said the majority based its holding on a series of FELA cases based on violations of the Safety Appliance Act, 45 U.S.C. sections 1-16, and the Boiler Inspection Act, 45 U.S.C. sections 22-34, which decisions have created under the FELA an absolute liability without regard to negligence. "From this, the Court concludes that there is no reason not to extend this absolute liability to cases based on the violation of a statutory duty which are brought under the Jones Act."[34] It is at this point that Justices Brennan, who authored the majority opinion, and Harlan disagreed sharply. The case, however, has not been overruled to date.

As much ground as the Jones Act covers, there are persons and issues not covered. Longshoremen are not protected by the Jones Act. The Supreme Court had held in 1927 that longshoremen were seamen for Jones Act purposes[35] and Congress responded by passing the Harbor Workers' Act. The Supreme Court has now held in

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[26] Id. at 528, citing The Chandos, 6 Sawy. 544, 549-50.
[27] Edelman, supra note 1, at 7.
[28] Sanford v. Caswell, 200 F. 2d 830, 832 (1953).
[29] 352 U.S. at 521, 523 (1957).
[30] 352 U.S. 500 (1957).
[31] Id. at 506.
[32] Rey v. Colonial Navigation Co., 116 F. 2d 580 (1941).
[33] 355 U.S. 426 (1958).
[34] Id. at 443.
[35] G. Gilmore and C. Black, The Law of Admiralty 283 (1957).

Swanson v. Marra Bros., Inc.[36] that a longshoreman injured on land has no rights under the Jones Act. The issue is still hotly contested, because it is clear that to protect themselves against liability through third party damages suits, shipowners more and more frequently employ longshoremen directly. As a result of this device, the employee has only a compensation remedy.[37] To date, there has been a uniform denial of suits for damages against the shipowner employer or against the ship in rem by longshoremen employees.[38] Also, a Jones Act case will not lie against a State as shipowner where the State has not waived its sovereign immunity.[39] If a State does waive its sovereign immunity, a suit under the Jones Act will be allowed. In Petty v. Tennessee-Missouri Bridge Comm'n,[40] a ferry boat employee died in a collision with another boat and his estate sued his employer under the Jones Act. The employer was a bi-state agency, organized by a state compact approved by Congress. The Court held that there had been a waiver of state sovereignty by federal interpretation, despite a state view to the contrary; thus, the suit under the Jones Act was allowed.[41]

Actions for false imprisonment and misrepresentation and deceit are also not allowed under the Jones Act. In a Per Curiam opinion from the Third Circuit, Forgione v. United States,[42] it was held the alleged false arrest and imprisonment of a merchant seaman while on shore leave in a foreign port and not on navigable waters were not maritime torts for which proceedings in admiralty could be maintained against a private owner or operator of the vessel. In still another area of non-coverage, the Supreme Court in Lauritzen v. Larsen[43] held the Jones Act inapplicable to a Danish seaman who joined the crew of a ship of the Danish flag. The seaman signed the ship's articles which provided that rights of crew members would be governed by Danish law and by the employer's contract with the Danish Seamen's Union, of which the seaman was a member. He was negligently injured aboard the ship, in the course of his employment. He sued the ship's owner in the federal district court for damages under the Jones Act. In disallowing the claim, the Supreme Court stated that the seaman's presence in New York was transitory and created no national interest in, or duty toward him to justify application of the Act.[44] The reasoning behind the decision was that all obligations of the owner growing out of Danish law had been performed to the seaman in question, and allowance of an additional remedy under the Jones Act would sharply conflict with the policy and letter of Danish law. Mr. Justice Jackson, writing for the majority, pointed out that literally, Congress has conferred an American right of action which requires only that the petitioner be "any seaman who shall suffer personal injury in the course of his employment." However, Congress enacted these statutes with regard to the seasoned body of maritime law stemming from "experience of American courts accustomed to dealing with admiralty problems in reconciling our own with foreign interests."[45] Then, quoting Mr. Chief Justice Marshall, Justice Jackson said, "(A)n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[46]

Ability to maintain an action under the Jones Act rests on the fulfillment

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[36] 328 U.S. 1(1946).
[37] Edelman, supra note 1, at 74, 75.
[38] Bennett v. The Mormacteal, 254 F. 2d 138 (1958).
[39] Maloney v. State, 3 N.Y. 2d 356 (1957).
[40] 359 U.S. 275 (1959).
[41] Id. at 283.
[42] 202 F. 2d 249 (1953).
[43] 345 U.S. 571 (1953).
[44] Id. at 587.
[45] Id. at 576-77.
[46] Id. at 578.

of several requirements, the main one being that the petitioner, or the person for whom the personal representative is bringing an action in a wrongful death case, be or have been a crew member. The crew member must be attached to a vessel which is at least partially navigable.[47] He may be covered for injuries suffered although adjacent to a vessel,[48] and he does not have to be attached to a vessel in the sense of a standard navigable ship. A jury may reasonably find a "vessel" to be any floating object which could be made navigable.[49] This definition includes barges and scows,[50] dredges,[51] a pleasurable yacht,[52] and a houseboat without power.[53]

A third requirement is that the suit be one by an employee against the employer.[54] The Jones Act follows the FELA in this respect. The accident must occur in the course of employment.[55] Time of employment for this purpose includes off-duty occupations, coming on and leaving the ship.[56] What constitutes course of duty requires very liberal interpretation, and as the Court in Powers v. N.Y. Central R. Co.[57] recognized, it may be a jury question. One of the more difficult requirements to deal with is the one that requires a crewman to have some connection with the naviagtion or well-being of the vessel. In Perez v. Marine Transport Lines, Inc.,[58] the judge, as trier of fact, held that a man sent by a union to clean the tanks on board ship, was not a crewman for Jones Act purposes. The worker ate aboard ship but slept ashore. The court stated the test to be "whether the claimant is more or less permanently employed aboard the vessel in a capacity which contributes to the accomplishment of her mission."[59] One realizes upon reading that definition the trouble with trying to lay down a hard and fast rule for testing every claimant as to his status for Jones Act purposes. The judge could have omitted that particular two dozen or so words and eliminated a lot of confusion. The court in Grimes v. Raymond Concrete Pile Co.[60] was content to say that whether the claimant is a crew member is a question of fact; and in Long Island R. Co. v. Lowe,[61] it was suggested, though not held, that a person's status as a crew member may change depending on the type of work he is doing at a particular time. Perhaps Lowe has the best idea, that of allowing for a flexible definition of "crew member." An attempt to regiment people into categories from which there is no escape may mean depriving someone of the only right he has to recover under a particular statute.

In connection with recovery under the Jones Act, it is important to point out that, as a wrongful death statute, the Act supersedes application of the death statutes of the several states.[62] The personal representative does not act for the benefit of the seaman's estate, but for the designated survivors who are named

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[47] Edelman, supra note 1, at 76.
[48] Senko v. LaCrosse Dredging Corp., 352 U.S. 370 (1957).
[49] Gianfala v. Texas Co., 350 U.S. 879 (1955).
[50] Wilkes v. Mississippi River Sand & Gravel Co., 202 F. 2d 383 (1953).
[51] Kibadeaux v. Standard Dredging Co., 81 F. 2d 670 (1936).
[52] Daffin v. Pope, 170 F. 2d 622 (1948).
[53] The Ark, 17 F. 2d 446 (1926).
[54] Edelman, supra note 1, at 82.
[55] Id. at 91.
[56] Marceau v. Great Lakes Transit Corp., 146 F. 2d 416 (1945).
[57] 251 F. 2d 813 (1958).
[58] 160 F.S. 853 (1958).
[59] Id. at 855.
[60] 356 U.S. 252 (1958).
[61] 145 F. 2d 516 (1944).
[62] Lindgren v. United States, 281 U.S. 38, 44 (1930).

in the statute. He is the trustee of the beneficiaries so designated, and if no beneficiary survives the deceased seaman, the personal representative cannot maintain an action.[63] There are two kinds of actions which the representative may pursue. First, he may sue on the wrong to the crewman's personal loss and suffering before he died. Second, he may sue on the wrong to the beneficiary, in which case he is confined to their pecuniary loss through the crewman's death.[64] The classes are three in number,[65] the first of which includes the surviving widow or husband and children. If there are no surviving widow or husband and children, the parents of the deceased constitute the second class. However, pecuniary loss to parents of a deceased adult child must be alleged and proved.[66] Finally, if there are no survivors of either of the first two classes, the beneficiaries are the next of kin dependent on the deceased crewman. If another next of kin is more closely related but not dependent on the deceased, the dependent next of kin will recover.[67]

Although probably the major source of admiralty litigation, the Jones Act is not the only statute applicable to personal injury and wrongful death actions. The Death on the High Seas Act (Death Act), states in section 761:

> Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decendent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedents's wife, husband, parent, child, or dependent relative against the vessel, person or corporation which would have been liable if death had not ensued. Mar. 30, 1920.

If death is caused by the negligent acts occurring within one league of shore, the Jones Act applies to the exclusion of the Death Act.[68] The two acts are not mutually exclusive, however; if an injury occurs beyond one league, there is a cause of action under the Death Act, the Jones Act, or both concurrently. The Death Act allows an admiralty court to enforce any foreign death act,[69] but it is doubtful that the Act gives validity to a state act.[70]

There are several important differences between the Death Act and Jones Act. The former allows a suit only in an admiralty court without a jury[71]; however, various classes may recover under this Act, whereas the Jones Act is written so that a taking by a nearer class of kin excludes more distant classes.[72] The Death Act does not specifically authorize recovery for pain and suffering[73]; it

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[63] Id.
[64] Van Beeck v. Sabine Towing Co., 300 U.S. 342 (1937).
[65] M. Norris, The Law of Maritime Personal Injuries 348 (2d ed. 1966). See also 45 U.S.C. section 51.
[66] Id. at 349. See also Garrett v. Louisville & N. R.R. Co., 235 U.S. 308 (1946).
[67] Poff v. Penn. R. Co., 327 U.S. 399 (1946).
[68] In Re Nelson, 5 N.Y. Supp. 2d 398 (1938).
[69] Powers v. Cunard S.S. Co., 32 F. 2d 720 (1925).
[70] Wilson v. Transocean Airlines, 121 F.S. 85 (1954).
[71] Romero v. International Terminal Operation Co., 358 U.S. 354 n. 28 (1959). See also Gilmore, supra note 35, at 304.
[72] 46 U.S.C. section 761.

covers a situation only where a suit for injuries was begun and death followed.[74] Therefore, where the statute is very narrowly construed, there is a denial of survivorship of the injury action.[75] It is important, however, to keep in mind the alternative remedy available under the Death Act, because the lists of specific beneficiaries provided by the FELA and the Death Act are not the same.[76]

With the Jones Act and Death Act in mind, one should next consider the Longshoremen's and Harbor Workers' Compensation Act, in order to complete the study of the individuals protected by the various maritime statutes. Perhaps the best description of the mechanics of the Act is found in Flowers v. Travelers Insurance Co.[77]:

> Unlike some State compensation acts the (Act) is almost self executing. Compensation benefits are payable and paid, medical care and attention furnished, generally without even the necessity of filing a formal claim, as such, almost universally without a formal hearing by the Deputy Commissioner. Only in a few cases does the matter proceed to a formal hearing and award and even more rare is the resort to the limited judicial review. The heart of any such system is the mandatory report of an injury by an employer within 10 days under Sec. 930 (a). A failure to file subjects the employer to the sanctions of civil penalties, Sec. 930 (e). With this the Act moves swiftly to require affirmative action by the employer. If disability persists for the statutory minimum, payments must be commenced within 14 days, Sec. 914 (d). Failure to commence and continue payment of compensation benefits and to furnish requisite medical aid, care and attention where no controversion is filed subjects the employer again to substantial sanctions, Secs. 914 (e) and (f).

The history of the Harbor Workers' Act is volatile and confusing, and it begins with Southern Pacific Co. v. Jensen.[78] There a longshoreman was operating a small electric freight truck while unloading cargo from the ship's hold. He backed the truck into the ship and died as a result of a broken neck. His beneficiaries sought compensation under the New York State Workmen's Compensation Act, which at the time covered longshore work on waters within the territorial limits of the state. Jensen's average weekly wage was $19.60; but the award was only $5.87 a week to his widow and $1.96 a week to each of his two children. The Supreme Court held that a state statute on workmen's compensation could not be applied to a maritime worker injured on navigable waters. The decision brought a great deal of criticism, and after Jensen, Congress decided to legislate in the maritime worker compensation field. Congress amended the "saving to suitors" clause of the Judiciary Act of 1789 several times. One such amendment read "to claimants the rights and remedies under workmen's compensation law of any state."[79]

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[73] But see Tetterton v. Arctic Tankers, Inc., 116 F. 2d 429 (1953).
[74] 46 U.S.C. section 765.
[75] Decker v. Moore-McCormack Lines, Inc., 91 F.S. 560 (1950).
[76] Compare FELA section 51 and 46 U.S.C. section 761. See also Four Sisters, 75 F.S. 399 (1947).
[77] 258 F. 2d 220 (1958).
[78] 244 U.S. 205 (1917).
[79] Act of October 6, 1917, 40 Stat. 395.

The Supreme Court declared it unconstitutional, saying that the use of state statutes to compensate maritime workers interfered with the proper uniformity of maritime law.[80] Congress then amended the Judiciary Act again, this time to read "and to claimants for compensation for injuries to or death of persons other than the masters or members of the crew of a vessel their rights and remedies under workmen's compensation law of any State."[81] The Supreme Court also struck down this amendment,[82] but Congress finally came up with a solution in 1927 with the passage of the Harbor Workers' Act, which provides for the payment of compensation benefits for disability or death of an employee coming under it, if the disability or death results from injury occurring on navigable waters of the United States. Dry dock is included in the term "navigable waters." Payment is predicated on recovery through workmen's compensation proceedings not otherwise being validly provided by state law.[83]

There are several exceptions to coverage under the Act. A master or member of a crew of any vessel may not bring an action under the Act. This exception eliminates everyone with a Jones Act remedy for recovery of personal injury or death and their remedy for maintenance and cure. Also not covered is anyone engaged by a master to load or unload or repair any small vessel under 18 tons net,[84] and an officer or employer of the United States or any agency thereof or of any state or foreign government or any political subdivision thereof.[85] Finally, there will be no compensation if the injury is occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another.[86]

Ordinarily, determination of status does not present a problem. The really difficult question here is whether or not a stevedore, who usually lives at home, but who comes aboard a craft to work, is a crewmember so as to be outside the Harbor Workers' Act. In South Chicago Coal & Dock Co. v. Bassett,[87] the Supreme Court stated that Congress, in adopting "a master or member of a crew" in the exceptions, intended to leave entitled to compensation all the various kinds of longshoremen and harbor workers who were performing labor on a vessel and to whom the state statutes were inapplicable. Thus "crew" is not a completely inflexible term; it should be read in light of the end to be attained by the statute.[88]

Under the Harbor Workers' Act, the employer is liable for payments arising out of injury or death of an employee and for the cost of necessary medical care. If the employer is a subcontractor, the primary contractor is liable for payments unless they are secured by the subcontractor.[89] The theory behind this section is that the industry is better fitted to sustain the loss than the employee.[90] Compensation is payable without regard to fault as a cause of injury.[91]

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[80] Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1919).
[81] Act of June 10, 1922, 42 Stat. 634.
[82] State of Washington v. W.C. Dawson and Co., 264 U.S. 219 (1924).
[83] 33 U.S.C. 903 (a).
[84] 33 U.S.C. section 903 (1).
[85] 33 U.S.C. section 903 (2).
[86] 33 U.S.C. section 903 (b).
[87] 309 U.S. 251 (1940).
[88] See generally H. Baer, Admiralty Law of the Supreme Court (2d ed. 1969).
[89] 33 U.S.C. section 904 (a).
[90] See Arizona Employers' Liability Cases, 250 U.S. 400 (1919), opinion by Mr. Justice Holmes, for the philosophy of shifting the financial burden arising from industrial accidents from injured worker to, eventually, the consumer.
[91] 33 U.S.C. section 904 (b).

The injured worker is guaranteed a minimum recovery despite any finding of fault on his part.[92] It is important to remember, however, that section 903 (b) sets out instances of misconduct for which the statute disallows compensation. Burns Steamship Co. v. Pillsbury[93] illustrates how a court deals with this section. There a longshoreman was killed by a falling sling load of coal. He had previously been told by the ship's mate to let the sling load remain on the pier, that it would later be brought aboard by the ship's crew. The longshoreman disregarded the mate, and while the load was being hoisted, it fell, killing the worker. Although the argument of willful disobedience was made, the Deputy Commissioner said that the disobedience was minor in nature and that the longshoreman was killed performing duties within the scope of his employment. This decision was upheld on the ground that there was no evidence of willful intention to kill himself. As a final point with respect to the Harbor Workers' Act, it should be pointed out that the burden of proof is on the party controverting the claim to show that, in the section 903 (b) exceptions to recovery, intoxication or willful intention was the sole cause of the injury.[94] That the employee was intoxicated at the time of the injury will not preclude an award of compensation.[95]

Always important in a discussion of federal statutes is a consideration of applicable state statutes. Every state in the United States now has a death statute that gives a remedy for wrongful death.[96] Most of the state statutes are patterned after Lord Campbell's Act, which was passed in England in 1746, to correct the common law rule that there was no action for wrongful death.[97] Lord Campbell's Act created a cause of action in favor of the personal representative of the deceased for the benefit of certain designated persons or class of persons for the loss sustained by them through the wrongful death. The statute does not transfer the original right of recovery for the tort to the personal representative, but allows him to recover in his own right for the benefit of the designated survivors or the estate.

In some states, the remedy is in the form of "survival acts," that is, a theory of preserving a cause of action vested in the decedent at the time of injury and enlarging it to include damages resulting from death. The difference between a cause of action under a survival act and one under a death act is that where death is instantaneous or virtually so, there can be no action under a survival act since the deceased had no time to suffer appreciable damage. Thus, no cause of action vested in him.[98] It is notable that while a right of recovery for wrongful death was denied under general maritime law, state wrongful death statutes granting recovery where injuries resulting in death have taken place on navigable waters have been used by admiralty courts and upheld as statutes implementing the maritime law.[99]

If there is a wrongful death on navigable water within the territorial limits of a state, and that state's death statute is relied on for recovery, there are always two questions which must be answered. First, does state or federal substantive law apply? Second, can a state death statute be applied where

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[92] Davis v. U.S. Lines Co., 253 F. 2d 262 (1958).
[93] 175 F. 2d 473 (1949).
[94] 33 U.S.C. section 920 (c) & (d).
[95] Maryland Casualty Co. v. Cardillo, 107 F. 2d 959 (1939).
[96] See 6A Knauth's Benedict on Admiralty (7th ed. rev. 1969).
[97] Norris, supra note 65, at 355.
[98] Id. See also Bufford, Admiralty--General Maritime Law Finally Accorded Remedy for Wrongful Death in State Territorial Waters, 24 ARK. L. REV. 526 (1970).
[99] The Hamilton, 207 U.S. 398 (1907).

the death was proximately caused by vessel unseaworthiness?[100] If the state substantive law is made applicable, the contributory negligence of the decedent may bar recovery, if the state law does not recognize comparative negligence. A long line of cases has held that while jurisdiction in admiralty exists with the aid of a state death statute, the right to maintain suit under that statute can be enforced in admiralty only in accordance with the substantive law of that state.[101] The test, as set forth in Curtis v. A. Garcia y Cia,[102] is whether the right of recovery is one rooted in general maritime law or one rooted in state law. When the origin of the right has been determined, the court, federal or state, must apply the law of that jurisdiction in which the right originated. When the state wrongful death is relied on for recovery, the plaintiff undertakes the enforcement of a right which is neither rooted in maritime or common law, but is wholly state created.[103]

The history of the maritime worker's rights for personal injury and wrongful death goes back at least as far as 1886 and The Harrisburg decision. Since that time, innumerable actions have been brought for hundreds of types of accidents, and even today there remains an infinite number of possible claims under existing federal and state statutes. To trace the development of personal injury and wrongful death rights is not an easy task because the various statutes themselves have often given rise to such complex and conflicting interpretations that judicial reasoning has often been less than clear. Nevertheless, 86 years of Congressional enactment and judicial interpretation (or misinterpretation) have made the history of maritime law one of the most interesting, and perhaps one of the least predictable, areas to study.

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[100] Norris, supra note 65, at 356.

[101] Holly v. The Manfred Stansfield, 269 F. 2d 317 (1959). See also Gorman, Wrongful Death on State Waters: A Remedy Under General Maritime Law, 44 TEMP. L.Q. 292 (1970-71).

[102] 241 F. 2d 30 (1957).

[103] Id.

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