IMPLICATIONS OF ENTRY INTO FORCE OF THE LAW OF THE SEA CONVENTION FOR U.S. OCEAN GOVERNANCE

The Ocean Governance Study Group

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Governance of Oceans and Coasts

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Introduction and Acknowledgments

This volume brings together summaries of papers presented at the workshop of the Ocean Governance Study Group, "Implications of Entry Into Force of the Law of the Sea Convention for U.S. Ocean Governance," held in Honolulu, Hawaii on January 9 to 11, 1995.

The United Nations Convention on Law of the Sea entered into force on November 16, 1994, one year after the deposit of the 60th instrument of ratification or accession (made by Guyana). By October 31, 1994, the Convention had been ratified by 67 nations. The 320 articles and nine annexes contained in the Convention constitute a guide for behavior by States in the world's oceans, defining maritime zones, laying down rules for drawing sea boundaries, assigning legal rights, duties and responsibilities to States, and providing machinery for the settlement of disputes.

During the past several years, negotiations have been underway to resolve issues related to Part XI of the Convention dealing with seabed mining in order to remove the obstacles that have prevented the United States and other industrialized countries from becoming parties to the Convention. Objections to Part XI dealt mainly with the detailed procedures for production authorization from the deep seabed; cumbersome financial rules of contracts; decision making in the Council of the Seabed Authority; and mandatory transfer of technology. On July 29, 1994, the United Nations General Assembly reconvened in special session for the purpose of adopting and opening for signature the "Agreement Relating to the Implementation of Part XI of UNCLOS." The Agreement significantly changes the provisions dealing with Part XI regarding the regime to manage deep seabed mining beyond national jurisdiction, in order to overcome the objections of industrialized countries (see further details in the UN information bulletin following this introduction).

Secretary of State Warren Christopher announced on June 30, 1994 the intention of the U.S. to sign the Agreement and to begin the process of submitting the Convention and the Agreement, as a package, to the Senate for advice and consent (see Department of State press release following this introduction). Until the November 1994 congressional election, the U.S. Senate was expected to begin consideration of ratification of the LOS Convention and Agreement in late 1994, with deliberations continuing into 1995. The change in political makeup of the Congress brought about by the 1994 elections brings into question how the Senate will deal with the Law of the Sea Convention (and when), particularly in view of the change in leadership of the Senate Foreign Relations Committee from Senator Clairborne Pell, a long time advocate of the Convention, to Senator Jesse Helms, an opponent of the Law of the Sea Convention and of other multilateral agreements.

Entry into force of the Convention will raise important issues for U.S. ocean governance, whether or not the U.S. ratifies the Convention. Among the most important issues will be the question of conforming the wide array of existing federal laws and policies dealing with the oceans with the provisions of the Convention, as well as consideration of how the actions of coastal states/territories and commonwealths in their offshore zones may or may not be consistent with the Convention.

The workshop, convened by the Ocean Governance Study Group (OGSG), brought together scholars in the field and practitioners at state, national, and international levels. The conference organizers were delighted that the Coastal States Organization decided to hold its annual meeting immediately following the OGSG Workshop (on January 12 to 14) to facilitate participation by the nation's coastal managers in the OGSG Workshop.

Principal funding for the conference was provided by NOAA's Office of Ocean and Coastal Resource Management (OCRM), and by the Hawaii Coastal Zone Management Program through the Pacific Basin Development Council. Special thanks are due to Mr. Jeff Benoit (Director, NOAA/OCRM), and to Doug Tom (Director, Hawaii Coastal Zone Management Program) for

their support of the symposium and ocean governance publications, and to Jerry B. Norris, Executive Director of the Pacific Basin Development Council, and to his staff for all of their work in organizing and hosting the conference. Many thanks, too, to Dick Poirier (Hawaii Office of State Planning) and to Bob Knecht for their assistance in securing the requisite funding. Other financial contributions, which are gratefully acknowledged, came from the following sources: the William S. Richardson School of Law, the Center for the Study of Marine Policy and the Delaware Sea Grant College Program at the University of Delaware, and the Sea Grant Programs which supported the travel of participants to the meeting, i.e.: California, Delaware, Miami, Mississippi/Alabama, Oregon, and Rhode Island.

Many thanks are due to OGSG Steering Committee members Professors Jon M. Van Dyke and M. Casey Jarman for their role in conference organization and as local hosts, and to the other members of the Steering Committee, Jack Archer, David Caron, Richard Delaney, Robert Knecht, and Harry Scheiber, for their continuing assistance and support.

Our special personal thanks go to the staff at the Center for the Study of Marine Policy, particularly to Office Manager Catherine B. Johnston, for their assistance in conference organization, and to Pam Donnelly of the Delaware Sea Grant College Program and to Lynn Phllips of Page by Page, Inc., for their invaluable assistance in publication preparation.

Last, it is important to recognize that numerous members of the Study Group and its policy advisors, international advisors, and network members have most generously given of their financial as well their intellectual resources on behalf of this common enterprise.

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Katherine A. Leccese

April 1995

Background Information on the United Nations Convention on the Law of the Sea

(Provided by the UN Office of Ocean Affairs and Law of the Sea)

CONVENTION CHRONOLOGY

1958

The First United Nations Conference on the Law of the Sea, held at Geneva, resulted in the adoption of four conventions—on the high seas, on the territorial sea and the contiguous zone, on the continental shelf, and on fishing and conservation of the living resources of the high seas. These conventions were based on drafts prepared by the International Law Commission.

1960

The Second United Nations Conference on the Law of the Sea, held at Geneva, made unsuccessful attempts to reach agreement on the breadth of the territorial sea and on fishing zones.

1967

In response to growing concern over the possible militarization of the seabed and amid calls for the designation of the resources of the deep seabed as the common heritage of mankind, the General Assembly established an Ad Hoc Committee to Study the Peaceful Uses of the Seabed and the Ocean Floor beyond the Limits of National Jurisdiction.

1968

Having considered the ad hoc committee's initial report, the General Assembly established the Committee on the Peaceful Uses of the Seabed and the Ocean Floor beyond the Limits of National jurisdiction.

1969

The Committee began work on a statement of legal principles to govern the uses of the seabed and its resources.

1970

The General Assembly unanimously adopted the Committee's Declaration of Principles which stated UNITED NATIONS that the seabed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction ... as well as the resources of the area are the common heritage of mankind", to be reserved for peaceful purposes, not subject to national appropriation and not to be explored or exploited except in accordance with an international regime to be established.

The Assembly, emphasizing that the problems of ocean space are interrelated and need to be considered as a whole, also decided to convene a new Conference on the Law of the Sea to prepare a single, comprehensive treaty.

This new treaty was to encompass all aspects of the establishment of a regime and machinery for the international seabed area, as well as such issues as the regimes of the high seas, the continental shelf and territorial sea (including the question of limits), fishing rights, preservation of the marine environment, scientific research, and access to the sea by landlocked States.

1973

The Third United Nations Conference on the Law of the Sea opened with a brief organizational session.

1974

At its second session, held in Caracas, Venezuela, the Conference endorsed the Seabed Committee's recommendation that it work on a new law of the sea treaty as a "package deal", with no one article or section to be approved before all the others were in place. This reflected not only the interdependence of all the issues involved but also the need to reach a delicate balance of compromises if the final document was to prove viable.

1975

The first informal text of a comprehensive law of the sea convention was prepared as a basis for negotiation. Over the next seven years, in Conference committees and in special negotiating and working groups, the text underwent several major revisions.

1982

The final text of the new convention was approved by the Conference at United Nations Headquarters on 30 April, by a vote of 130 in favour to 4 against, with 17 abstentions. When it was opened for signature at Montego Bay, Jamaica, on 10 December 1982, the new United Nations Convention on the Law of the Sea was signed by 117 States and two other entities, representing the largest number of signatures ever affixed to a treaty on its first day.

1984

By the end of the period of signature, 9 December 1984, the convention had been signed by 159 States and several other entities (i.e. by the United Nations Council for Namibia on behalf of Namibia, and by the 12-nation European Eco-

nomic Community, the Cook Islands and Niue).

1993

The Convention achieved the 60 ratifications or accessions required for its entry into force with the ratification by Guyana on 16 November.

1994

The UN Convention on the Law of the Sea is to enter into force on 16 November 1994, one year after the deposit of the 60th instrument of ratification or accession. By 31 October 1994, it had been ratified, acceded or succeeded to by 67 States.

What the Convention Covers:

The Convention on the Law of the Sea covers almost all ocean space and its uses, including navigation and over flight, resource exploration and exploitation, conservation and pollution, fishing and shipping. Its 320 articles and nine annexes constitute a guide for behaviour by States in the world's oceans, defining maritime zones, laying down rules for drawing sea boundaries, assigning legal rights, duties and responsibilities to States, and providing machinery for the settlement of disputes. Some of the key features of the Convention are the following:

- Coastal States would exercise sovereignty over their territorial sea up to 12 nautical miles in breadth, but foreign vessels would be allowed peaceful "innocent passage" through those waters;
- Ships and aircraft of all countries would be allowed "transit passage" through straits used for international navigation; States alongside the straits would be able to regulate navigational and other aspects of passage;
- Archipelagic States, made up of a group or groups of closely related islands and interconnecting waters, would have sovereignty over a sea area enclosed by straight lines drawn between the outermost points of the islands; all other States would enjoy the right of passage through designated sea lanes;
- Coastal States would have sovereign rights in a 200-nautical mile exclusive economic zone (EEZ) with respect to natural resources and certain economic activities, and would also exercise jurisdiction over marine science research and environmental protection;
- All other States would have freedom of navigation and overflight in the zone, as well as freedom to lay submarine cables and pipelines;
- Landlocked and geographically disadvantaged States would have the opportunity to participate in exploiting part of the zone's fisheries on an equitable basis when the coastal State could not harvest them all itself; highly migratory species of fish and marine mammals would be accorded special protection;
- Coastal States would have sovereign rights over the continental shelf (the national area of the seabed) for exploring and exploiting it; the shelf would extend at least 200 nautical miles from the shore, and more under specified circumstances;
- Coastal States would share with the international community part of the revenue they would derive from exploiting resources from any part of their shelf beyond 200 miles; a Commission on the Limits of the Continental Shelf would make recommendations to States on the shelf's outer boundaries when it extends beyond 200 miles;
- All States would enjoy the traditional freedoms of navigation, overflight, scientific research and fishing on the high seas; they would be obliged to adopt, or cooperate with other States in adopting, measures to manage and conserve living resources;
- The territorial sea, EEZ and continental shelf of islands would be determined in accordance with rules applicable to land territory, but rocks which could not sustain human habitation or economic life of their own would have no economic zone or continental shelf;
- States bordering enclosed or semi-enclosed seas would be expected to cooperate in managing living resources and environmental and research policies and activities;
- Landlocked States would have the right of access to and from the sea and would enjoy freedom of transit through the territory of transit States;
- States would be bound to prevent and control marine pollution and would be liable for damage caused by violation of their international obligations to combat such pollution;
- All marine scientific research in the EEZ and on the continental shelf would be subject to the consent of the coastal State, but they would in most cased be

obliged to grant consent to other States when the research was to be conducted for peaceful purposes and fulfilled specified criteria;

- States would be bound to promote the development and transfer of marine technology "on fair and reasonable terms and conditions," with proper regard for all legitimate interests;
- States would be obliged to settle by peaceful means their disputes concerning the interpretation or application of the convention;
- Disputes could be submitted to an International Tribunal for the Law of the Sea to be established under the Convention, to the International Court of Justice, or to arbitration. Conciliation would also be available and, in certain circumstances, submission to it would be compulsory. The Tribunal would have exclusive jurisdiction over deep seabed mining disputes.

Issue of Deep-Seabed Mining

For many years, following the adoption of the Convention in 1982, the provisions of Part XI, dealing with deep-seabed mining, were viewed as an obstacle to the universal acceptance of and adherence to the Convention.

That was particularly true in view of the fact that the main opposition to those provisions came from the industrialized countries.

Under the provisions of the Convention, all exploring and exploiting activities in the international seabed Area would be under the control of the International Seabed Authority; the Authority would be authorized to conduct its own mining operations through its operating arm, the Enterprise, and also to contract with private and State ventures to give them mining rights in the Area, so that they could operate in parallel with the Authority.

The first generation of seabed prospectors, dubbed "pioneer investors" under resolution II of the Third United Nations Conference on the Law of the Sea, would have guarantees of production once mining was authorized.

Objections to the Convention's provisions dealt mainly with the detailed procedures for production authorization from the deep seabed; cumbersome financial rules of contracts; decision-making in the Council of the Seabed Authority; and mandatory transfer of technology.

To overcome these objections, the United Nations Secretary-General undertook informal consultations with all interested parties, lasting nearly four years. As a result, the General Assembly adopted on 28 July 1994 the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982.

The Agreement, in essence, removes the obstacles that had stood in the way of universal acceptance by substituting general provisions for the detailed procedures contained in the Convention and by leaving it to the Authority to determine at a future date the exact nature of the rules it will adopt with respect to the authorization of deep seabed mining operations. The Agreement also removes the obligation for mandatory transfer of technology and ensures the representation of certain countries, or groups of countries, in the Council, while giving those countries certain powers over decision-making.

Creation of International Seabed Authority

The creation of the International Seabed Authority and the related deep-seabed mining provisions of the Convention have received wide attention due to the strong objections voiced by the industrialized countries to these provisions as originally drafted in the Convention.

Even though those States that objected to its deep-seabed mining provisions were strong supporters of the Convention as a whole, their opposition was the main reason for the 12-year gap between the adoption of the Convention in 1982 and its entry into force this year.

Universal Participation Near

Due to the endeavour of the Secretary-General, and the dedicated efforts of all groups of States, the problems associated with the deep-seabed mining provisions were overcome with the adoption by the General Assembly of the Agreement Relating to the Implementation of Part XI of the Convention. This should make it possible for universal participation in the Convention.

As a direct result of the Agreement, the International Seabed Authority has been assured of nearly universal support, particularly in view of the Agreement's arrangement for provisional membership for those States whose domestic procedures would not allow for rapid ratification or accession.

While the United Nations will continue to be involved in the Authority's administration, at least from a budgetary point of view, for the near future, this is a short-term arrangement that may end as early as in 1996, and certainly by 1998. In short, the Authority is foreseen as

an independent institution.

International Tribunal for the Law of the Sea

The second major institution to be created by the Convention is the International Tribunal for the Law of the Sea. The Tribunal embodies the Convention's unique binding-dispute- settlement arrangements. It will have jurisdiction over disputes arising out of the interpretation or implementation of the Convention, and exclusive jurisdiction over disputes concerning deep-seabed mining.

An ad hoc Meeting of States Parties to the Convention has been scheduled for 21 and 22 November. This meeting is convened in accordance with the provisions of the Convention concerning the establishment of the International Tribunal for the Law of the Sea and the election of the judges of the Tribunal.

However, the Preparatory Commission for the International Seabed Authority and for the International Tribunal for the Law of the Sea has recommended that this Meeting of States Parties post pone the election of the judges for some time to give States the opportunity to ratify or accede to the Convention and thus participate in the elections. By doing so, it is hoped that the Tribunal would reflect, as originally envisaged, all the legal systems of the world.

Commission on the Limits of the Continental Shelf

The third institution created by the Convention is the Commission on the Limits of the Continental Shelf. The Convention provides for the establishment of this Commission to study and make recommendations to States on matters related to the establishment of the outer limits of the continental shelf in those cases where it reaches beyond 200 nautical miles from their baselines. The establishment and servicing of this Commission is entrusted to the Secretary-General.

This Commission has been entrusted with a significant function. In view of the importance of the resources to be derived from the continental shelf the significance of the Commission could only grow with time. This fact is further underscored by the various conflicting claims to shelf jurisdiction throughout the world.

Impact of the Convention

Even prior to its entry into force, the Convention had provided States with an indispensable foundation for their conduct in all aspects of ocean space, its uses and resources. States have consistently, through national and international legislation and through related decision-making, asserted the authority of the Convention as the preeminent international legal instrument on all matters within its purview.

Thus far, its major impact has been on the establishment by 128 coastal States of a territorial seas not exceeding 12 nautical miles, and by 112 coastal States of exclusive economic zones or exclusive fishery zones not exceeding 200 nautical miles, all in conformity with the provisions of the Convention.

Another area positively affected is the passage of ships in the territorial sea or through straits used for international navigation. The Convention's pro visions relating to this matter have been incorporated into the legislation of many coastal States. Although designed primarily to reflect the law of the sea in time of peace, the convention has influenced the law of naval warfare, in particular the rules of neutrality. The establishment of a territorial sea and precise rules for innocent, transit and archipelagic sea-lane passage have contributed to the clarification of the rights and duties of neutral States and those of belligerent forces. These rules have assumed some importance in the context of recent conflicts, particularly the Gulf War.

U.S. DEPARTMENT OF STATE

OFFICE OF THE ASSISTANT SECRETARY/SPOKESMAN

UNITED STATES TO SIGN SEABED MINING AGREEMENT UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

JULY 1, 1994

Secretary of State Warren Christopher announced June 30 that the United States will sign an agreement that reforms the deep seabed mining provisions of the 1982 United Nations Convention on the Law of the Sea. The new agreement addresses long-standing U.S. objections. Removal of those objections now opens the way for United States acceptance of the LOS Convention, a treaty whose provisions are of major strategic, economic and environmental importance to the United States.

Objections to the LOS Convention's provisions on possible development of minerals from the deep seabed led to the U.S. decision in 1982 not to sign the Convention at that time. It has also deterred all major industrialized nations from adhering to the Convention. Nonetheless, a central and bipartisan tenet of United States oceans policy is that U.S. oceans interests would be best served by a universally accepted convention. Conclusion of the new agreement, which will form an integral part of the LOS Convention, brings that goal within reach.

The new agreement, open for signature on July 29 at the United Nations in New York, incorporates legally binding changes to ensure that the U.S., and others with major economic interests at stake, have adequate influence over future decisions on possible deep seabed mining. It also requires the administration of the seabed mining regime to be based on free-market principles. Thus, the agreement meets the U.S. goal of guaranteed access to deep seabed minerals on the basis of reasonable terms and conditions. It makes these changes effective before the LOS Convention enters into force on November 16, 1994.

The Law of the Sea Convention is a comprehensive legal framework that sets forth the rights and obligations of states with respect to uses of the oceans. Its provisions guarantee United States control of economic activities off our coasts, such as fishing and gas and oil development, and enhances U.S. ability to protect the marine environment. At the same time, it preserves and reinforces the freedoms of navigation and overflight essential to national strategic and commercial interests. The end of the Cold War and the resulting changes in U.S. defense policy, which places a greater emphasis on our ability to project U.S. military forces, has highlighted the strategic importance of the preservation of these freedoms.

The Administration is now beginning preparations to submit the Convention and the Agreement as a package to the Senate for advice and consent.

Oceans Policy and the Law of the Sea Convention

On July 29, 1994, the United Nations General Assembly will reconvene in special session for the purpose of adopting and opening for signature the "Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982" (Agreement). The Agreement will fundamentally change the provisions of the Convention (Part XI) that establish a regime to manage deep seabed mining beyond national jurisdiction. In so doing, it removes the obstacles that have prevented the United States and other industrialized countries from becoming parties to the Convention.

The Administration believes that the Agreement satisfactorily addresses long-held objections to the Convention's seabed mining provisions. Therefore, based on a unanimous interagency recommendation, the Administration has decided to sign the Agreement on the date it is open for signature. With the conclusion of this Agreement, it will now be possible for the United States to consider accession to the Convention. This action places the United States on the threshold of achieving an objective that has been pursued by successive United States Administrations for over a quarter century - that is, a

comprehensive and widely ratified Law of the Sea Convention.

Background: United States Oceans Interests

The United States has important and diverse interests in the oceans. As the world's preeminent naval power, the U.S. has a strong national security interest in the ability, as a widely accepted matter of right, to navigate freely and overfly the oceans of the world. The end of the Cold War has, if anything, highlighted this need in view of our decreasing reliance on forward basing and the corresponding growing reliance on our ability to project our military power. Ensuring the free flow of commercial navigation is likewise a basic concern for the United States. As a major trading power, our economic growth is inextricably linked to a robust and growing export sector that is heavily dependent upon maritime transport.

At the same time, the U.S., with one of the longest coastlines of any nation in the world, has basic resource and environmental interests in the oceans. The seabed of the deep oceans offers the potential for economically and strategically important mineral resources. Inshore and coastal waters generate vital economic activities - fisheries, offshore minerals development, ports and transportation facilities and, increasingly, recreation and tourism. The health and well-being of coastal populations - the majority of Americans live in coastal areas - are intimately linked to the quality of the coastal marine environment.

Understanding the oceans, including their role in global processes, is one of the frontiers of human scientific investigation. The U.S. is a leader in the conduct of marine scientific research. Further, such research is essential for understanding and addressing problems associated with the use and protection of the marine environment, including marine pollution, conservation of fish and other marine living species and forecasting of weather and climate variability.

Pursuit of these objectives, however, requires careful and often difficult balancing of interests. As a coastal nation, for example, we naturally tend to seek maximum control over the waters off our shores. Equally, as a major maritime power, we often view such efforts on the part of others as unwarranted limitations on legitimate rights of navigation.

Moreover, traditional perceptions of the inexhaustibility of marine resources and of the capacity of the oceans to neutralize wastes have changed as marine species have been progressively depleted by harvesting and their habitats damaged or threatened by pollution and a variety of other human activities. Maintaining the health and productive capacity of the oceans while seeking to meet the economic aspirations of growing populations also requires difficult choices.

Striking the balances necessary to implement U.S. oceans policy must be viewed in an international context. Living resources migrate. Likewise, marine ecosystems and ocean currents, which transport pollutants and otherwise affect environmental interests, extend across maritime boundaries and jurisdictional limits. National security and commercial shipping interests are also international in scope. Access to mineral resources beyond national jurisdiction will be difficult without a basic international consensus. Achievement of oceans policy objectives thus requires international cooperation at the bilateral, regional and global level. The alternative is increased competition and conflict over control of the oceans and marine resources to the detriment of United States strategic, economic, scientific and environmental interests.

The United Nations Convention on the Law of the Sea

United States oceans policy has always had as a basic objective the application of the rule of law to the use and conservation of the oceans. The United States was a leader in the international community's effort to develop an overall legal framework for the oceans in the Third United Nations Conference on the Law of the Sea, which began its substantive work in 1974.

The resulting United Nations Convention on the Law of the Sea (UNCLOS), concluded in 1982, provides a comprehensive legal framework governing uses of the oceans and the rights and obligations of States relating thereto. It achieved consensus on the nature and extent of jurisdiction that States may exercise off their coasts: a territorial sea of a maximum breadth of 12 nautical miles and coastal State jurisdiction over fisheries and other resources (e.g., oil and gas) in a 200 nautical-mile Exclusive Economic Zone (EEZ) and on the continental shelf where it extends beyond the EEZ. It balances extended coastal State jurisdiction with provision for preservation and elaboration of rights of navigation and overflight in these areas and guarantees of passage through and over straits used for international navigation and archipelagoes.

In addition to the nature and extent of maritime jurisdiction, UNCLOS sets forth rights and

obligations of States with respect to:

- conserving marine living resources, including coastal fisheries populations, straddling stocks (fisheries populations whose range includes both areas of the EEZ and the high seas); and highly migratory species and marine mammals, such as whales;
- protecting the marine environment from all sources of pollution, including from vessels, dumping, seabed activities and land-based activities; and
- the conduct of marine scientific research, including procedures for coastal State exercise of the right to require consent for research in coastal waters and for promoting and facilitating access by researchers to such areas.

The agreements reached in these areas well serve U.S. interests. Nonetheless, the provisions of UNCLOS on the deep seabed posed fundamental difficulties. Negotiations on these provisions were designed to give effect to the generally accepted principle that the resources of the seabed beyond national jurisdiction are the common heritage of mankind and that an international regime should be established to administer these resources. The essence of this principle is that the international community as a whole has an interest in the utilization of resources beyond the limits of national jurisdiction. Before the principle was incorporated into a United Nations Resolution in 1971, it had been endorsed in a statement by President Johnson in somewhat different terms (the "legacy of all human beings") and supported by the Nixon Administration. Subsequently, this principle was affirmed in the deep seabed mining legislation of the United States enacted in 1980.

Unfortunately efforts to negotiate an international regime took place against the backdrop of deep ideological divisions between developing and industrialized nations over how the principle should be translated into a concrete regime. The result from the United States perspective was a fundamentally flawed seabed mining regime.

U.S. objections, shared by other industrialized States, fell into two categories: institutional issues and economic and commercial issues. On the institutional front, we objected to inadequate influence for the United States and other industrialized countries within the seabed organization. On the economic and commercial front, we sought a more market-oriented regime. Therefore, we objected to mandatory technology transfer, production limitations from the seabed, onerous financial obligations on miners and the establishment of a subsidized international public enterprise that would compete unfairly with other commercial enterprises.

Because of basic objections to the seabed mining provisions of UNCLOS, the United States decided that it could not accept the Convention as a whole and did not sign it.

Implementation of United States Policy

In 1983, the United States issued a presidential statement on oceans policy. It restated the objections to Part XI, reiterated our commitment to the objective of a universally acceptable convention and indicated that the United States would accept and act in accordance with the Convention's balance of interests relating to traditional uses of the oceans. This policy has been reaffirmed by successive United States Administrations. On this basis, the United States promoted international acceptance of the non-seabed provisions of UNCLOS, but continued to take the position that the deep seabed regime of Part XI required fundamental reform for the United States to consider accession to the Convention.

In the late 1980's, other nations increasingly began to recognize difficulties in the seabed mining regime contained in UNCLOS. This shift in attitude reflected general changes in the international political environment: the waning of the Cold War and the explosion of interest in free market reforms in developing countries and within Eastern Europe and the States of the former Soviet Union. It also reflected the decline in commercial interest in deep seabed mining as a result of relatively low metals prices and growing convergence of view among industrialized countries on the need for changes in Part XI of the sort consistently advocated by the United States. The views of industrialized nations were matched by expressions of interest in an accommodation by developing countries - the primary defenders of Part XI.

These developments led the United Nations Secretary General in 1990 to launch a process of consultations aimed at resolving the objections that had caused the United States and others to reject the deep seabed mining regime. Initially, the United States took a cautious approach to these talks based on uncertainty regarding the likelihood that they could produce fundamental reform. However, in light of our long-standing commitment to a universally acceptable Convention, we participated to better evaluate the opportunities that might exist.

As they evolved, the Secretary General's consultations revealed growing international support for finding a solution to the problems of Part XI. The prospect of entry into force of the Convention (now definitely to take place on November 16,-1994) added momentum. Other industrialized nations saw a window of opportunity for fundamental change and argued that it would be more difficult to effect such change once the Convention had entered into force and its institutions had been established. Likewise, key developing countries shared concerns about entry into force of Part XI with little or no industrialized country participation.

In early 1993, the Clinton Administration undertook a detailed review of United States oceans policy. It endorsed the basic elements of that policy as they had been consistently articulated by past Administrations. It concluded that the prospects of reforming Part XI of UNCLOS to address our long-standing difficulties had improved to the point that U.S. oceans policy would be best served by taking a more active role in the reform effort.

This conclusion was also based on an assessment, which has been shared by all United States administrations since negotiations began on the Law of the Sea Convention, that a comprehensive and widely ratified Convention best serves United States interests. The merit of the Convention in this regard is not that it provides an answer to every future question regarding the uses of the oceans, but that it frames and channels discussions of new issues along lines favorable to our interests. Therefore, a Convention acceptable to us offers a legal framework within which to pursue and protect our oceans interests with greater predictability and at less political and economic cost than through other alternatives.

The United States has demonstrated that it can successfully assert its oceans interests without treaty relations with other States and that it could continue to do so if our objections to Part XI are not met. The costs of this approach, however, would grow over time, and long-term United States interests in stable and predictable rules concerning uses of the oceans would be best served by entry into force of a widely acceptable convention.

The Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea

Progress in the United Nations Secretary General's consultations has been rapid since the April, 1993 announcement by the United States that it would actively engage in the reform effort. Negotiations concluded June 3rd of this year on the Agreement, which will fundamentally change Part XI.

The "Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982" (Agreement), avoids establishing a detailed regime anticipating all phases of activity associated with mining of the deep seabed. Rather, it sets forth economic and commercial principles that are consistent with our free market philosophy and which form the basis for developing rules and regulations establishing a management regime when interest in commercial mining emerges.

The Agreement retains the institutional outlines of Part XI but scales back the structure and links the activation and operation of institutions to the actual development of concrete interest in seabed mining. Of fundamental importance, it alters Part XI to provide the United States, and other states with major economic interests, a voice in decision-making commensurate with those interests. The United States, acting alone, can block decision on issues of major financial or budgetary significance in a Finance Committee. Acting alone, the United States can block decisions to distribute revenues from mining to States or other entities (e.g., to liberation movements) in the executive Council. Other substantive decisions can be blocked in the Council by the United States and two allies acting in concert.

The mandatory technology transfer provisions are replaced by provisions for the promotion of technology transfer through cooperative arrangements (e.g., joint ventures) and through procurement on the open market. Importantly, such initiatives are to be based on "fair and reasonable commercial terms and conditions, including effective protection of intellectual property rights." Although the prospective operating arm (the Enterprise) is retained, the executive Council must decide whether and when it is to become operational. Moreover, the Agreement subjects the Enterprise to the same obligations as other miners and removes the obligation of developed States to finance it.

The Agreement limits assistance to land-based producers of minerals to adjustment assistance financed out of a portion of royalties from future seabed mining. It also replaces the production control regime of Part XI by the application of GATT principles on subsidization. The Agreement further replaces the detailed and burdensome financial obligations imposed

on miners by a future system for recovering economic rents based on systems applicable to land-based mining and provides that it be designed to avoid competitive incentives or disincentives for seabed mining. The Agreement provides for grandfathering in the mining consortia licensed under U.S. law on the basis of terms and conditions "similar to and no less favorable than" those granted to French, Japanese, Russian, Indian and Chinese companies whose mine site claims have already been registered by the Law of the Sea Preparatory Committee. Finally, substantial financial obligations at the exploration stage are eliminated.

In short, the Agreement achieves a restructuring of Part XI of the Convention which is consistent with our economic principles as well as our need to ensure adequate United States influence over decisions made by the institutions of the regime. In doing so, it achieves the fundamental United States objective of guaranteed United States access to deep seabed resources on the basis of reasonable terms and conditions.

Welcoming Remarks

By
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Aloha and good morning. It is a pleasure to be here to welcome you to Hawaii to this important workshop on the Implications of Entry into Force of the Law of the Sea Convention for U.S. Ocean Governance. Many of you know that Hawaii was one of the founders of this Study Group in 1991, and that your initial meeting was also held here. The diverse and talented mix of individuals serving on the Study Group and Steering Committee, make the OGSG truly the national, and global, leader in pursuing the responsible stewardship of our oceans.

Biliana Cicin-Sain, one of the leaders of the ocean governance movement, noted in her 1993 paper titled, "A National Ocean Governance Strategy is Needed Now," a number of issues concerning effective ocean management, including: conflicts between users, between agencies, and between various levels of government; single-purpose ocean laws which neglect various marine interactions and cumulative impacts; the lack of coordination between the various governmental ocean programs; and the overall lack of vision for the management of our ocean resources.

I think we would all agree that a national ocean governance strategy is absolutely necessary. With the world's largest EEZ, the United States should be the world's leader in ocean governance and policy development. In this regard, the entry into force of the Law of the Sea Convention, considered one of the strongest comprehensive global environmental treaties ever negotiated, provides an opportunity for the United States to again assume leadership in achieving sustainable development of our oceans.

Located in the center of the Pacific Ocean, we here in Hawaii are arguably the most ocean oriented state in the union. We are endowed with an enormously rich and diverse marine resource base, equaled in only a few places in the world. It is, therefore, very important to manage our resources for their preservation and wise use by future generations, as did the ancient Hawaiians. They practiced a stewardship technique known as ahupua'a, involving management from the mountain tops to the ocean, allowing human use and consumption to coexist with resource protection and preservation. Hawaii's more recent achievements in ocean governance, such as the Hawaii Ocean Resources Management Plan and the Hawaiian Islands Humpback Whale National Marine Sanctuary, indicate our acknowledgment of the importance of our oceans and our efforts toward more comprehensive management techniques.

During this workshop, we will be exposed to a number of issues dealing with the implementation of the Law of the Sea Convention, including impacts related to fishing, environmental protection, dispute resolution, marine boundary delimitations, and the upcoming reauthorization of the national Coastal Zone Management Act. We will be educated and informed by individuals who are on the cutting edge of coastal and ocean governance policy development. I know that the results of your work here this week will be useful not only to the State of Hawaii and other island communities in the Pacific region, but also to the mainland United States and, indeed, many other nations worldwide.

On a political note, I urge you not to despair in our collective anxiety as to what is happening or about to happen in Washington, D.C. While the possibility of Congress appointing another Stratton-like Commission to undertake a comprehensive examination of U.S. ocean policy and national interests seems more remote than every, I believe that opportunities still abound in this regard. Matters of how we govern, manage, and responsibly develop our precious ocean resources, I believe, will become more important, not less, in these times of "downsizing," dwindling budgets, unfunded mandates, and declining revenues.

In closing, please accept my personal best wishes as you work through your agenda for change. I know that Hawaii's aloha spirit will make this a memorable occasion for those of you who are first-time or returning visitors. I would also like to extend our thanks to those who helped organize this workshop, including Bob Knecht and Biliana Cicin-Sain from the University of Delaware, Jerry Norris of the Pacific Basin Development Council, Jon Van Dyke and Casey Jarman of the

University of Hawaii Law School, Dick Poirier of the Office of State Planning, and all the others who made it possible to us to be here today.

Again, a warm Mahalo Nui Loa for participating, and I wish you well in your deliberations.

Thank you very much.

The Law of the Sea Treaty and the United States: Reflections Given the Small Likelihood of Ratification in 1995

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During most of 1994, discussions among law of the sea scholars and policy-makers centered on the November 1994 entry into force of the 1982 Law of the Sea Treaty, the relatively likely U.S. ratification of that Treaty, and the implications of such ratification for both domestic and international U.S. ocean policy. The likelihood of United States ratification of the 1982 Law of the Sea Treaty was greatly reduced, however, by the Congressional elections of fall of 1994. Much of the discussion since the election dissects again and again that signal event looking for ways that the Treaty might still receive the advice and consent of the Senate. These brief comments attempt to move beyond the implications of the election and to:

(1) place the question of ratifying the Law of Sea Treaty in the context of U.S. treaty practice generally,

(2) consider what should we make of the likelihood that the U.S. will not ratify the Treaty in 1995, and

(3) consider what are the opportunities for OGSG action given the likelihood of no ratification in 1995?

Before I proceed to these three points, let me provide a very minimal sketch of the arena and principal actors involved. One group of actors are within the Executive branch. The State Department, as a general matter, is responsible for preparing treaties for submission to the Senate. In coordination with the Interagency Task Force for the Law of the Sea, the State Department prepared the Law of the Sea Treaty for such submission and transmitted the document to the Senate in early fall 1994. The timing of the submission was influenced by a July 1994 agreement (the Boat Paper) interpreting (and altering) Part XI of the Treaty and the fact that the Treaty was to come into force on November 16th 1994. The State Department has been supportive of the Treaty's ratification, with the Defense Department strongly joining in such support. The Boat Paper by addressing many of the concerns with the Treaty articulated by the Reagan administration in 1982 made it possible that the Treaty, as altered by the Boat Paper, would gain the Senate's advice and consent. The Senate is the other primary actor in the ratification process. Although at the time the Treaty was first submitted to the Senate for its advice and consent early last fall such advice and consent seemed possible to gain (and even then difficulties were seen), the Senate's advice and consent became far more problematic after last fall's elections.

The following comments suggest that a decision to not press for ratification of the Treaty in 1995 is not the disaster that some argue it to be.

I

This is a time of change for U.S. treaty practice. In conversation with officials at the State Department I twice have been told that they are uncertain whether any treaties should be sent forward to the Senate for ratification at this time unless absolutely necessary. Basically, the issue is whether it is wise to continue with dramatic changes in treaty practice in order to deal with particular personalities present on the Senate Foreign Relations Committee. If one is a career civil servant, one asks why not wait for those personalities to change. Such career officials have begun to recognize that dramatic changes in practice have occurred and that the implications of those changes are unclear. Two centuries of treaty practice in some cases have been altered.

Let me give two examples. First, consider the last minute agreement the Executive reached with the Senate allowing ratification of the World Trade Organization agreement. This special side agreement sets up a process whereby Congress will be able to call for the U.S. withdrawal from the constitutive W.T.O. treaty. That side agreement is unprecedented and leaves many in the Executive Branch wondering how it will affect the Executive and U.S. participation in foreign affairs. Personally, I would think that the process outlined for the World Trade

Organization, namely review of World Trade Organization decisions by a panel of U.S. judges, is in 'practical terms' for the U.S. a step toward, not away from, international cooperation. In the past, the concern has been that a Congress politically displeased with the actions of international organizations, regardless of the legality of those international actions, would pass statutes placing us in violation of obligations arising under international law. The new side agreement, in contrast sets up a "judicial" rather than "political" unilateral review process, a very different situation.

A second example of changed treaty practice arises in the area of human rights. Some five years ago the Department of State attempted to move forward U.S. participation in human rights treaties and did so by coming to a tacit agreement with the Senate Foreign Relations Committee that a set of reservations, understandings and declarations ("RUD's") would satisfy Senate concerns and allow that institution to give its advice and consent. Last fall, however, in a not-widely-noted decision, the Human Rights Committee of the International Covenant on Civil and Political Rights rendered a general note on reservations to the Covenant which all but states that many of such RUD's invalid. The ramifications of that general decision of the Human Rights Committee have yet to be evaluated. In addition, it has yet to be applied to the specific U.S. reservations, understandings and declarations. Nonetheless, it likely will mean that the U.S. will stop for the foreseeable future sending human rights treaties forward to the Senate.

What are the implications of these changes? First, the civil servant concerned with long-term, even medium-term, Presidential-Congressional relations on treaties might decide to wait a few years on further ratification processes. This would seem particularly wise given the fact that there is an interim period of application for the Boat Paper allows the U.S. to do so. Second, the withdrawal of human rights treaties from the docket of the Senate Foreign Relations Committee may only lead to an increased political focus on the Law of the Sea Treaty were it to come forward.

II

What should we make of no ratification in 1995? For some, there often is a frustration that our Senate appears parochial, and a corresponding belief that the solution is to educate the Senate, or their constituencies, as to the importance of an internationalist viewpoint. But, as others have noted in this meeting, it is very hard to sell political action on the basis of long-term interest in supporting international cooperation efforts or long-term interest in a state being viewed as able to deliver on its promises. Rather we need to offer what Jack Davidson described as "good old-fashioned material direct interest."

But isn't it parochial also to focus only on the U.S.'s signing of the Law of the Sea Treaty? The focus suggests that it is the United States that determines whether the Treaty, and the Boat paper effort, are or are not a success. The "Boat Paper," however, is a tremendous success regardless of U.S. action because it allows the Law of the Sea Treaty as a general matter to go forward. As Ronald Barston indicated, the United Kingdom, one of the strongest allies of the United States in opposing the Treaty for the last decade, will likely ratify the Law of the Sea Treaty in the near future. What the "Boat Paper" succeeds in doing most is removing the U.S. pressure placed on other countries to not ratify the Law of the Sea treaty. What the "Boat Paper" does is allow the rest of the world to go forward with the Law of the Sea Treaty.

Thus the question becomes: What should we make of the effect of the U.S. remaining outside of this otherwise global effort for a substantial part of the interim application period, i.e. one or two years? (The separate question of rejecting the Treaty permanently is far more troublesome, is to be avoided, and is not the situation immediately presented.) First, the U.S. will in fact act in accord with many aspects of the Law of the Sea Treaty. Second, delay of ratification of the Law of the Sea Treaty for a substantial part of the interim application period is not equivalent to the U.S. stating that it rejects the Law of the Sea Treaty. Third, the argument that the norms in the Treaty will not harden without the United States assumes not only that all of the Law of the Sea Treaty is equally desirable, but more importantly that chaos is around the corner. The norms in question, e.g., norms concerning passage, in my view likely can withstand a year or two more of the U.S. presence outside the Treaty, Fourth, one must ask to what degree the U.S. will lose influence on the evolution of the Law of the Sea Treaty and the institutions created under it. It may not have a national serving on the Law of the Sea Tribunal and it will not be a member of the Seabed Authority. But it will be an observer at these organizations and if it wishes, its voice will be heard.

All this leads back to ask what is the rush to ratify in 1995, and how long does the United States

have to ratify the Treaty? According to the terms of the Boat Paper, the U.S. has at least until November 16, 1996 to ratify, a period that possibly could be extended for a further two years.

III

Greg Pai, remembering the first meeting of OGSG in 1991, suggested that we recall our roots and purpose. At that time, we recognized that there are windows of opportunity to implement and influence policy. We recognized that those windows are open for a very brief period. We desired to create an organization that would be ready to offer our expertise, namely scholarly analysis, during such windows of opportunity. In this sense, Jack Davidson's call for outreach, is at the core of this organization. Third, in Lewes, Delaware we thought U.S. ratification of the Law of the Sea Treaty would be such an opportunity, perhaps not only for international aspects of U.S. policy, but for also some related domestic aspects because ratification would possibly require some implementing legislation.

My remarks today suggest that this particular window of opportunity depends upon both the attitudes of the Executive and the Senate, and that the Senate influence results in the window being pretty much closed. But, as is often the case, as one opportunity seems to close another opens. In particular, I believe that it would be valuable for the OGSG to consider what the U.S. should do during this coming period of interim application. For example, should there be a new Executive statement on U.S. application of the Treaty given both its coming into force and the Boat Paper?

The Case for Universal Acceptance and Implementation of the 1982 Convention on the Law of the Sea

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The Third United Nations Conference on the Law of the Sea was convened by the General Assembly of the United Nations to prepare an international treaty instrument which would establish a comprehensive global framework for the resolution of questions concerning the rights and obligations of states and non-state entities in the use and management of the oceans and their resources. In the past the absence of a clear and universally recognized regime on the law of the sea had led to tensions between, on the one hand, coastal states which tended to claim extensive rights and powers to control or restrict activities in their sea areas and, on the other hand, maritime and shipping nations which asserted the right of unhindered access to the facilities of the seas, subject only to constraints which might be agreed internationally as necessary for the protection of legitimate national interests or the promotion of community concerns. In recent times new disagreements have emerged - on such issues as the exploitation and sharing of the resources of the seabed and ocean floor beyond the limits of national jurisdiction; the management and conservation of marine living resources; the conduct of marine scientific research; and the protection and preservation of the marine environment.

Among others, the 1982 Convention on the Law of the Sea sets maximum limits for the sea areas within national jurisdiction and clarifies the jurisdictional powers and resource rights of coastal states, in those areas. These include both the "traditional" areas of the territorial sea and contiguous zone, and also the newly created areas such as the exclusive economic zone, archipelagic seas, straits used for international navigation, semi-enclosed seas, and ice-covered areas. The Convention re-asserts, and where necessary extends, the rights of other states and operators in these areas with regard to such matters as navigation and marine scientific research. It sets up a regime for the exploitation, management and conservation of fisheries and other living resources of the seas, and it promulgates international principles and establishes norms and arrangements for the preservation of the marine environment and the prevention of pollution and other forms of environmental degradation from activities at sea or on land. On the high seas the Convention re-states and refines the old freedoms of navigation and overflight and the right to lay sub-marine cables. These rights may be enjoyed by all, subject only to the need to respect the legitimate rights of other states and users and the obligation to take due account of fundamental global interests and concerns, including the protection of certain basic community values and the preservation of the marine environment.

Finally, the Convention establishes, for the first time, a regime for the exploration and exploitation of mineral resources of the area beyond national jurisdiction. Following the position adopted by the General Assembly a decade earlier, the Convention declares these resources to be the "common heritage of mankind."

The 1982 Convention is more than a "legal document" which defines legal rights, obligations, and responsibilities. It is also a political statement of the international community defining the ways in which the seas may be used and managed. Indeed, some have gone so far as to describe it as a "constitution of the oceans." I prefer to view the Convention as a framework document which addresses the most important issues relating to the use and management of the seas and oceans and their resources. Because of the diversity of issues dealt with in the Convention, its provisions are not all the same kind, they do not address the same questions or provide the same kind of answers, they do not all seek the same objectives. For that reason they cannot all have equal legal effect or the same political or moral force. For example, some of the provisions establish or declared general principles of law intended to be binding on states and non-

state actors in their activities within or concerning the seas. Some other articles, on the other hand, do no more than set out objectives to which states and other entities are expected or recommended to aspire, within their respective capabilities. Yet other parts and articles establish mandatory procedures and mechanisms for the implementation of particular programs or measures.

In my view, it is this combination of comprehensive coverage and flexibility of approach which makes the 1982 Convention so appropriate as a global instrument, and so deserving of acceptance by states and the support of all who share the worthy objective stated in the Preamble of the Convention, namely "to establish a legal order for the seas and oceans which will facilitate international communication...promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources and the study, protection and preservation of the marine environment."

It must be admitted, however, that the 1982 Convention, even with the modifications in the 1994 Agreement adopted by the General Assembly in July 1994, does not fully achieve these noble objectives. It is a fact that some states and some learned commentators have identified a number of imperfections and gaps in some or other of its parts. But it is also the case that a large number of states consider that the Convention, as modified by the 1994 Agreement, represents the best attainable compromise in the circumstances of the current international scene. The negotiators of the Convention were called upon to settle ALL ISSUES relating to the law of the sea in one convention. They, therefore, accepted that they were required to construct a framework document which would serve as the basis of action by states and entities from all parts of the world and at different stages of economic and industrial development. To their credit they recognized that this could only be achieved in a "spirit of mutual understanding and co-operation." This meant that there had to be a willingness on the part of each of them to give up or modify some cherished interests and demands in return for similar concessions by others. It meant also that no state could expect to come out of the negotiations with all its positions intact, and no state was to be expected to accept a total loss of all its claims. This is the spirit that guided the conference in its negotiations over a period of almost one decade. It was the rationale behind the innovative procedure of decision-making —the "gentlemen's agreement" based on consensus rather than vote — which was adopted by the conference and diligently followed until its regrettable collapse during the last stages of the conference. The same spirit inspired the Secretary General's tortuous and difficult consultations that eventually led to the 1994 Agreement which, hopefully, will make it possible for the Convention to attract the universal acceptance without which the noble ideals of its drafters cannot be attained.

It is, therefore, not a criticism, of the Convention that it is based on a series of compromises. The negotiators consciously attempted to construct what they called a "package deal." This could only be achieved by means of compromises in almost every part of the Convention. There is a compromise on the breadth of the territorial sea: the maximum limit of twelve nautical miles is much more than many states were prepared to concede and much less than some other states wished to claim. The consequential inclusion of many important traditional international straits in the wider territorial sea was made acceptable to the maritime and naval powers by the adoption of the new concept of transit passage. The establishment of the new area of the exclusive economic zone was accepted because it was based on a compromise which gives to the coastal state near sovereign rights and powers in respect of the utilization and management of fisheries resources and environmental protection while retaining for other states the traditional high seas freedoms of navigation, overflight and the laying of submarine cables. The powers give to archipelagic states to regulate navigational and environmental matters in archipelagic seas were balanced by the requirement that regulations having an international impact should be established in consultation with the competent international organization. Similarly, the extensive jurisdiction given to coastal and port states in the prevention of marine pollution were accepted because they are accompanied by safeguards which protect the interest of flag and other states. On marine scientific research the provisions of the Convention are the result of serious efforts to balance the interests of scientific researchers with the legitimate concerns of the coastal states. With regard to the resources of the area beyond the limits of national jurisdiction, the Convention sought to balance the requirements of efficient and profitable deep-sea mining operations with due recognition of the rights of all nations and peoples to a fair share of the proceeds of those operations.

The 1994 Agreement Relating to the Implementation of Part XI of the Convention is intended to refine this compromise, having regard to developments since the conclusion of the negotiations in 1982. None of these compromises is perfect. Like compromises at all times and in all spheres of human activity, parts of them will appear to favor some of the parties over others. Hence, on the question of the objective fairness of the balance struck in the difficult parts or in the Convention as a whole, reasonable minds may and will differ. But to many, including myself, the weaknesses and inequities of the package, such as they may be, do not and cannot negate the inescapable fact that, without a Convention based on compromises, no one state or entity, however powerful or wherever located, can realistically expect to enjoy all the benefits it seeks without the loss of some other cherished aspirations and interests.

For each of the groups of States within the United Nations the 1982 Convention, even with the 1994 Agreement, presents a difficult choice and an uncomfortable dilemma. For the relatively developed and more powerful states it may be tempting to stay outside the "binding framework" of such a convention in the belief that this will enable them to retain maximum, freedom of action and flexibility to react to developments in accordance with their perceived interests from time to time. A number of persons and groups in these states have in fact advocated this approach. According to these persons the conclusions of the Third United Nations Conference on the Law of the Sea have generated broad statements of state practice which now constitute "customary law" on most of the key issues, and this customary law will continue to be refined by the further developments in state practice in the future. They argue, therefore, that states which feel they can "ride along" in the wake of the new customary law. Such states can accept the rights and obligations under the Convention as arising from customary law, but they need not consider themselves bound by these rules and principles which in their view do not as yet meet the "customary law" test and which must, for the moment, be considered as purely conventional (contractual) in nature. Examples of the rules which are claimed to have attained customary law status are those relating to the maximum breadth of the territorial sea, the concept of the exclusive economic zone, the nature and incidents of transit passage through straits used for international navigation, the concept of archipelagic seas and the right of archipelagic passage, the rules governing marine scientific research as well as the general principles and special regulations concerning the preservation of the marine environment and the prevention of marine pollution from various sources. It has been claimed that the principles and rules of law on these matters as set out in the 1982 Convention have, by a "classic combination" of the elements of state practice and OPINIO JURIS, crystallized into customary law; and, consequently, that the rights and obligations arising from them may be asserted and imposed without necessary reference to the 1982 Convention.

To this it may be, and it has been, countered that these principles were not developed in a vacuum, that they have not arisen from state practice in the classical sense but rather were the result of inter-state negotiations which were commenced and undertaken on the agreed basis that new rules and principles were needed. It has further been pointed out that the agreements on each of the topics were conditioned on acceptance of the consensus reached or to be reached on the other questions. It has further been stressed that the fairly complex rules and regulations, such as those on transit and archipelagic sea passage or the criteria for marine scientific research or the procedures and safeguards for the exercise of port and coastal state jurisdiction for the prevention of vessel-source pollution, have their source and origins not in any prior state practice but only in the negotiations and compromises at the Third United Nations Conference on the Law of the Sea. Thus the rights and obligations of states in respect of those matters cannot be considered, let alone exercised or imposed, without reference to the specific criteria and requirements in the 1982 Convention. Furthermore, it has been pointed out that, whatever might be the merits of the view that the provisions of the Convention are declaratory of customary law, that view cannot be applied to certain parts of the convention to the exclusion of other parts. Accordingly, if it is argued that the agreement in the convention regarding the extent and attributes of an exclusive economic zone gives customary law status to the exclusive economic zone, then it must also be admitted that the clear and consistent declarations by the international community that the resources of the sea-bed and ocean floor beyond the limits national jurisdiction are "the common heritage of mankind" have also given customary law status to that concept. It follows from that the resources of the area can only be utilized for the benefit of all peoples and, for that purpose, must be exploited in accordance with

procedures acceptable to the international community as a whole.

It is thus reasonable to say that no state or group of states can legitimately claim either the right to have a treaty which fully satisfies all their wishes and fulfills every aspiration of theirs or the freedom to pick and choose from the provisions and principles of the Convention, adopting those that suit their current needs and rejecting those which they deem inconvenient or burdensome. Developing countries which reject the Convention because it does not meet all their aims and wishes will discover that, in the absence of an agree international instrument of sorts, they will be obliged to operate in a free-for-all situation in which they may attain even less than might otherwise be available to them under an imperfect but generally accepted agreement. Similarly, developed industrial states which believe that they can escape from the constraints of an international treaty regime by selectively applying the rules and principles to suit their convenience and advantage will have to pay a price for that freedom, and the price may turn out to be unnecessarily high for benefit sought to be gained. For example, a state which takes this course may be deprived of the guaranteed enjoyment of some essential rights, such as unhindered passage through international straits and archipelagic waters, especially in areas where the riparian states do not accept that these rights arise from customary law. In such a situation a state which is not a party to the 1982 Convention may be obliged either to enter into special arrangements in order to enjoy those rights or, failing such agreement, to resort to the use of non-peaceful procedures to assert what it considers to be its legal rights. With regard to deep-sea mining it is widely acknowledged that the vast sums and considerable entrepreneurial and technological resources needed for their meaningful exploration and exploitation are unlikely to be invested and risked for that purpose without a measure of assurance on the legal status of the resources and a reasonable guarantee that the conditions for profitable operation will be available for the period of time needed to give the investors a suitable return on the venture. Thus, while the failure of the convention may satisfy the ideological sentiments of some groups in both the developed and developing world, it is very unlikely that any of the countries or the interests therein will benefit materially from an impasse. For every country, developed or developing, powerful or weak, it must be a clear and substantial advantage to be able to claim rights, exercise powers and discharge responsibilities within a framework in which these rights, powers, and responsibilities are reciprocally accepted on a contractual basis by other states parties to the same instrument.

But apart from the possible loss of benefits and advantage by individual states and interests there is an even more compelling reason for the universal acceptance and implementation of the 1982 Convention. The provisions of the 1982 Convention, whether they are considered as rules of conventional treaty law or as a codification of customary law, do not and cannot constitute the last word on the issues with which they deal. The various principles, rules, and standards underlying the provisions will need to be reviewed, evaluated and up-dated to respond more effectively to new circumstances and to take account of new insights and opportunities. In the very dynamic situation of the contemporary world it would be unrealistic to expect that this can be done either through the slow process of "evolving state practice" or even through the time honored mechanism of periodic diplomatic conferences. In any case there is a real danger that any new diplomatic conference on the law of the sea will be taken by some countries as an opportunity to seek to re-open issues on which they were unable to obtain satisfaction during the 1970-1982 conference. It would appear, therefore, that the most appropriate and realistic way of "progressively developing" the regime in the 1982 Convention is to utilize the institutional machinery established in the Convention. Apart from the International Seabed Authority and the International Tribunal on the Law of the Sea, there is the Conference of Parties to the Convention. While the Seabed Authority's remit is limited to matters relating to Part XI of the Convention and the Tribunal is to deal with disputes between States and other appropriate entities, the Conference of Parties has a relatively unrestricted remit. As such it has the potential of providing a useful, and indeed indispensable, mechanism for developing, refining, clarifying and up-dating the provisions of the Convention in the light of the evolving views of the states parties and developments in the international scene. In this the parties will be following and benefitting from a trend which has now become an established feature of the international law-making and regulatory process.

This has been described in another but not altogether unrelated context as the abandonment

of "diplomatic AD HOCRACY ...for institutionalized and informal review of international regulatory regimes..." This new approach provides an effective and generally acceptable device for law-making and it has been put to good effect under some of the most important international treaty instruments of the past two or three decades. Examples include the 1946 Convention for the Regulation of Whaling, the 1972 London Dumping Convention, the 1973/78 MARPOL, the 1985 Vienna Convention for the Protection of the Ozone Layer and its Montreal Protocol, the 1989 Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Other Wastes, the Antarctic Convention, the 1992 Convention on Biological Diversity and the Framework Convention on Climate Change. This mechanism was also adopted by the Rio Conference on Environment and Development (UNCED) when it established the Commission on Sustainable Development to serve as the body responsible to oversee the implementation and further development of Agenda 21. There is no reason why this device, which has been so widely accepted in respect of these other instruments, should not be equally appropriate or acceptable in respect of what is without doubt one of the most important and pervasive international instruments of modern times. Indeed, the Law of the Sea Convention appears to be more suitable, for, and in need of, such a standing mechanism for continuous and systematic review than some of the other conventions. At all events this is the only way in which the Convention will be enabled to operate as viable and living document, providing guidance and direction to national and international measures, and reacting to the needs arising from rapid and radical changes which are likely to occur in sea use and maritime activity.

If such a mechanism were to be adopted for the progressive development of the law of the sea, it is reasonable to assume that full participation therein would be limited to those states which have agreed to be parties thereto. In certain circumstances non-parties may be able, depending on the wishes of the state's parties, to play some role in the processes of the Conference of State Parties; but such a role is bound to be peripheral. This means that a state not party to the Convention will be put at considerable disadvantage since it will not be in a position to influence the decisions for the further development of the principles and rules of the Convention. To the extent that such decisions affect the nature, meaning and implications of the provisions of the Convention, they may have implications for all states, whether or not they are parties to the Convention. This will be true for small developing states; but it will be of even greater significance for great powers such as the United States, Japan or the member states of the European Union.

For these major powers, there is the added consideration that, as leading members of the international community with a clear interest in and undoubted capacity to influence world affairs, there is an undeniable political advantage in being actively involved in the shaping and application of an international instrument whose ramifications extend to every aspect of economic and social lives not only of their citizens but of the peoples of other countries whose destinies are of significance to them. The smaller and less developed countries of the world need the assurance that they can rely on the willingness of the more powerful and experienced states to operate on the basis of cooperation and compromise in international relations. The benefits of that assurance transcend the areas covered by the Law of the Sea Convention. Equally, absence of that assurance can have negative impacts in areas not directly related to the law of the sea.

Thus the fate of the 1982 Convention is not merely of significance in the maritime context. There may or may not be justification for the view that the industrialized states can stay aloof from the 1982 Convention without significant loss of any of their rights. It may well be that these countries can enjoy all the rights in the convention - by means of special arrangements with individual states or through unilateral assertions against weaker countries regardless of the legal claims of such states. But this might be at a price which could be wholly disproportionate to the advantages gained. The 1982 Convention is the most ambitious law-making treaty ever attempted in international diplomacy. It does not take too much imagination to see that its failure would set a precedent whose negative repercussions will be far reaching. Those would be even more serious if the failure were to be seen to be the result of calculated action by the countries which are expected to be the promoters of law and order in international affairs. No state, and certainly no major world power, should contemplate any action which could undermine such a convention, except where there is incontrovertible evidence that its vital and non-negotiable national interests would be compromised by participation in the convention. In spite of the many and sometimes

extravagant claims made against it by some of its opponents, the 1982 Convention cannot reasonably be said to serve the exclusive interests of any one state or group of states or to jeopardize the vital interests of any state or groups of states. While almost every state can identify aspects of the Convention which it finds unacceptable or inadequate for one reason or another, it is perhaps true to say that every state will also find parts or provisions which it considers fully acceptable and which it would wish to retain unchanged. This is true of both the developing countries as well as the developed industrial states.

It has long been the view of many eminent and knowledgeable scholars and publicists that, with all its undoubted imperfections, the Convention on the Law of the Sea has much to offer the world. The issues which it addresses are of abiding significance to all States and to all sections of the international community. The balancing of interests and rights may not fully satisfy everybody; but it is better than anything available or realistically foreseeable in the near future. The Convention establishes a fairly respectable compromise between the security and resource rights of coastal states and the navigational rights of all nations. This is of importance to all peoples and all economies because maritime transportation is the indispensable artery for the international trade and commerce of all nations, developed and developing. The provisions on fisheries will enable states, individually and collectively, to develop effective management systems and strategies to prevent over-exploitation of the fisheries and other living resources of the seas. The relatively clear statements on the limits of various marine zones, and on the rights and responsibilities of states and other entities within the respective zones will serve to reduce, if not eliminate altogether, assertions and exercise of unilateral and illegitimate national jurisdiction in these areas. The provisions on the protection and preservation of the marine environment provide a framework of measures to be taken at the global, regional and national levels, to protect the sea from pollution and other forms of environmental degradation. A regime on marine scientific research which balances the interests of the coastal state with the essential requirements for effective research will assist the search for knowledge on the hidden potential of the oceans. Such a regime can also help to maximize the contribution of science and technology to the effective and rational use and management of oceans and their resources. With the modifications adopted in the 1994 Agreement, it is now possible to envisage a widely accepted regime for the exploration and exploitation of the resource of the international area which make the benefits of commercially viable deep-sea mining available to all nations and on an equitable basis. Finally, the provisions on regional and global co-operation, and in particular the arrangement for technical co-operation, should enable the international community and the appropriate international organizations to encourage, and where necessary assist, all states to develop national policies and laws which will promote the global objective of sustainable development in the oceans for the benefit of all nations. This is necessary for the "strengthening of peace security and co-operation and friendly relations among all nations" which is given as one of the principal objectives of the Convention.

It is, of course, true that the Convention cannot by itself achieve these lofty aims and objectives. But I believe that the 1982 Convention is more likely than anything available now or in prospect to provide the regime that can help to make the whole of ocean space a sphere of co-operation for the benefit of all humankind, instead of the arena of conflict and confrontation for narrow national and sectional interest, which would inevitably ensue if there were no agreed regime. For that reason, the Convention deserves the support of all who value order in the oceans, not just for its own sake but also as an "important contribution to the maintenance of peace, justice and progress for all peoples of the world."

The State Department Perspective on the Entry into Force of the Law of the Sea Convention for Fisheries: Consolidating Gains and Enabling Future Progress

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From the perspective of the Department of State, the coming into force of the Law of the Sea Convention portends well for sound conservation and management of living marine resources, both domestically and internationally.

On the domestic front, no additional legislation will be required to implement U.S. obligations under the Convention with regard to living marine resources. Indeed, the Convention simply confirms the legal structure that we have had in place to manage our fisheries since the enactment of the Magnuson Act (MFCMA).

Internationally, the wide acceptance of the Convention reflected by its coming into force consolidates the progress that has been made in international marine conservation over the past decade, and will enable and facilitate future progress in this area. It is really the impact of the Convention on international fisheries conservation and management that I want to discuss in this paper.

So, first I will briefly present the view of the State Department on the impact of ratification on domestic fisheries management. Then I will discuss at greater length the impact on international fisheries.

Domestic Impact of Ratification

Entry into force of the Convention, and U.S. adherence to it, will not require any changes to U.S. law and policy with respect to living marine resources. The salient aspects of the Convention in this area are already incorporated into U.S. law. To summarize:

- The Convention provides for the establishment of an Exclusive Economic Zone (EEZ) out to 200 nautical miles.
- The Convention gives the coastal State sovereign rights and exclusive jurisdiction over living marine resources within its territorial sea and EEZ, subject to basic obligations to prevent overfishing and to conserve.
- The coastal State sets all total allowable catch levels, determines all other conservation and management measures, and has exclusive enforcement powers within its waters.
- Any foreign fishing is subject to regulation by the coastal State. Where the coastal State has the capacity to harvest the total allowable catch, it may prohibit foreign fishing entirely.
- Beyond the EEZs (i.e., on the high seas), the Convention requires States to cooperate in the conservation and management of living marine resources, particularly through the negotiation of agreements and the establishment of regional fishery organizations.
- The Convention contains specific provisions relating to particular categories of species, including straddling stocks, highly migratory species, marine mammals, anadromous species, and catadromous species. All of these provisions are consistent with U.S. law and promote U.S. interests.
- Fishing on the high seas is subject to compulsory, binding dispute settlement under the Convention. However, fishing within territorial seas and EEZs is exempted from binding dispute settlement.

In 1976, the year the Magnuson Act was enacted, its authors quite self-consciously viewed themselves as crafting the legislation to be consistent with the Law of the Sea Convention. At the time, although the Law of the Sea negotiations were still on-going, consensus had been achieved on virtually all of the Convention's provisions concerning living marine resources. The authors of the MFCMA claimed, rightly, that the Act would serve as implementing legislation for U.S. obligations regarding conservation and management of living marine resources under the Law of the Sea Convention. This remains true today.

Ratification of the Convention will not necessitate amending the Magnuson Act and may not be the result some may have been hoping for. It means the Convention will not serve to lever changes to what some may regard as undesirable aspects of the Magnuson Act or in the way the Act has been implemented. Also, for those interested in talking and writing about this subject, it means there will be little fodder provided -- the Convention is completely uncontroversial in this regard.

International Impact of Ratification

The entry into force of the Convention, and U.S. adherence to it, will as well require no change in the international fishery agreements to which the United States is party. Since 1983, every international fishery agreement and initiative the United States has been a part of has been negotiated within the framework provided by the living marine resource provisions of the Law of the Sea Convention. Even the Convention for the Conservation of Salmon in the North Atlantic Ocean, which was concluded in 1980, specifically intended to implement the agreement that was reached in the negotiations on the Law of the Sea Convention to ban high seas salmon fishing.

In 1982 President Reagan decided that the United States would not become party to the Law of the Sea Convention until its deep seabed mining provisions were reformed to address U.S. concerns. Shortly thereafter, in proclaiming for the United States an exclusive economic zone (EEZ), he announced that, while the United States would not sign the Convention until the necessary changes were made to Part XI, it viewed the other parts of the Convention to "generally confirm existing maritime law and practice and fairly balance the interests of all States."

Thus since 1983 the United States has been steadfast in insisting that international agreements concerning the oceans to which it is party be consistent with the Law of the Sea Convention. We have regarded the provisions of the Convention, other than those concerning deep seabed mining, as reflecting customary international law. Nowhere is this negotiating approach, and the value of the Law of the Sea Convention for it, more apparent than in our international fishery agreements.

Tommy Koh's observation that the Law of the Sea Convention is "a constitution for the oceans," though by now trite, couldn't ring more true, especially as to international fishery matters. In some cases the Convention contains specific provisions proscribing certain conduct; in some cases the Convention contains more general provisions prescribing certain conduct. While the former may not require much elaboration by the international community, they provide a firm foundation for cooperative fishery relations among States, especially through regional agreements; they are the bottom line. The latter are of course different. It is much easier to agree upon what a clear prohibition requires than it is to agree upon what is required by more general injunctions to take positive action. In such cases, as is said in the language of U.S. constitutional interpretation -- the interstices have to be filled in. In all cases, however, the provisions of the Convention provide the framework within which our important fishery agreements were negotiated and critical international understandings achieved.

In examining the role that the Law of the Sea Convention has had and will continue to have in international fishery agreements and negotiations, I will consider three examples: the Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean (also known as the "North Pacific Anadromous Stocks Convention"), the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (also known as the "Compliance Agreement"), and the on-going United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks.

North Pacific Anadromous Stocks Convention

Salmon are a very important resource to the States of the North Pacific region. Indeed, as Harry Scheiber has shown so well in his study of the origins of the abstention doctrine, from time to time disputes relating to salmon have reached the highest level of government. These disputes have often been messy and difficult to resolve. The Law of the Sea Convention framework, however, provides a foundation that has substantially narrowed debate, and has been a foundation upon which to build additional understandings. It provided the foundation for the North Pacific Anadromous Stocks Convention.

The North Pacific Anadromous Stocks Convention is based on one of those Convention provisions that very specifically proscribe certain conduct. Article 66 of the Law of the Sea Convention prohibits fisheries for salmon on the high seas, except where that would result in economic dislocation. It recognizes that States in whose waters salmon stocks originate have the primary interest in those stocks. But Article 66 also prescribes conduct: States must cooperate with

regard to the conservation and management of salmon stocks when salmon which originate in the waters of one State migrate through the waters of another.

As Japan's economic justification for its high seas salmon fishery weakened through the 1980s, Article 66 served as the lodestar for orienting discussions to eliminate the high seas salmon fishery altogether.

At the same time, the injunction to cooperate contained in Article 66 provided something to bring the Soviet Union, for obvious reasons one of the major players in North Pacific fisheries, and without whose involvement a regional agreement would be one in name only, to the negotiating table.

So the Convention underpins the regime for conservation and management of salmon on the high seas of the North Pacific. It enabled us to bring an end to Japan's high seas salmon fishery and get the Soviet Union involved in a regional regime for North Pacific high seas salmon.

But does the United States gain anything in regard to salmon by ratifying the Law of the Sea Convention? The answer is most certainly "yes."

The Law of the Sea Convention requires all other States parties to abide by the prohibition on high seas salmon fishing -- the basic rule of the North Pacific Anadromous Stocks Convention. The respect in which the prohibition on high seas salmon fishing is held by all other States is a direct result of Article 66. Thus, while we assert our rights, the Law of the Sea Convention not only recognizes them but prohibits all States from eroding those rights by engaging in high seas salmon fisheries.

This prohibition is enforceable against States parties. Parties to the Law of the Sea Convention are required to submit to compulsory binding dispute settlement in some circumstances, including those regarding fishing on the high seas. In most cases there are exceptions to a rule, but in this case there are not. If vessels of a State began to fish for salmon on the high seas, one means of enforcing the prohibition would be to take that State to binding international dispute settlement. International dispute settlement is an effective tool as a deterrent and it is available for parties to the Law of the Sea Convention to use to enforce the high seas salmon fishing prohibition.

So -- for salmon -- the Law of the Sea Convention has brought us much already; it confirms present practice; it gives us clear rules which prohibit high seas salmon fishing; and it provides a new and useful enforcement tool should something come undone in the future. It is a clear case where the coming into force of the Law of the Sea Convention consolidates one of our most important gains of the last decade in international fisheries conservation and management.

Food and Agriculture Organization Agreement

As noted earlier, the Law of the Sea Convention will also enable and facilitate future progress in international fisheries management. The Treaty would be of advantage to us in dealing with problems caused by fishing vessels of other countries outside our 200-mile zone. This arises from both the substantive provisions of the Treaty which require such flag states to cooperate with coastal states on matters of concern, and the dispute settlement provisions which allow for binding dispute settlement for fishery disputes that occur on the high seas. If the Senate approves the Treaty, these provisions will help the United States deal more effectively with fishing problems which arise from foreign fishing beyond our zone.

For many years now regional and subregional fishery organizations have been plagued by the phenomenon of vessels flying the flags of States not party to the organization fishing on the high seas so as to undermine the conservation and management measures agreed to by such organizations. To make matters worse, some regional and subregional organizations, such as the International Commission for the Conservation of Atlantic Tunas (ICCAT), are faced with the disturbing phenomenon of "third generation" flags of convenience -- vessels which change their registry from a traditional flag of convenience State to a State that is a member of the regional organization -- though known not to be vigilant in ensuring the compliance of vessels flying its flag with the conservation measures of the regional organization -- in order to avoid being branded a flag of convenience vessel.

The Law of the Sea Convention provided a basis on which to address this problem. We have done so through an Agreement adopted by consensus of the Conference of the United Nations Food and Agriculture Organization (FAO) on November 24, 1993, as one part of the International Code of Conduct for Responsible Fishing. The full name of this Agreement is the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas. It represents a major step forward in addressing the problems that beset regional fishery organizations in

their efforts to control high seas fishing, and is one critical element in the efforts of the United States to bring high seas fisheries under greater control. It is also a good example of an international agreement that fills in the interstices afforded by the broad, general prescriptions of the Convention. This very important agreement could not have been successfully negotiated had the Law of the Sea Convention not come before it.

The FAO Agreement has two primary objectives that will bolster regional fishery organizations and serve to bring high seas fishing under greater control: (1) to impose upon all States whose fishing vessels operate on the high seas obligations designed to make the activities of those vessels consistent with conservation and management needs; and (2) to increase the transparency of all high seas fishing operations through the collection and dissemination of data. Thus, while the Agreement is often referred to as the "Flagging" or "Reflagging Agreement," these are essentially misnomers, since the Agreement deals with a broader range of issues.

I will not list the panoply of Flag State duties set forth in the Agreement. But, to summarize, it enumerates with specificity and detail Flag State obligations with regard to fishing vessels which operate on the high seas. These obligations establish a sound basis on which high seas fishing must be conducted if living resources are to be properly conserved and managed. Taken together, they also stand for the proposition that no State should allow a fishing vessel to fly its flag on the high seas unless the State can effectively exercise responsibility over that vessel.

The Agreement also mandates the FAO to establish a global registry of high seas fishing vessels. Parties must provide to the FAO pertinent information relating to their fishing vessels that operate on the high seas. The FAO will maintain and circulate this information among the Parties and, with certain exceptions, to regional fisheries organizations. Each Party must also provide information to the FAO relating to activities by its vessels that contravene the provisions of the Agreement, as well as measures the Party has taken in response. These provisions are designed to increase our knowledge of high seas fisheries, which is essential to the development of effective conservation and management measures, as well as to increase their transparency, and, thereby, subject Flag States to public scrutiny in terms of whether they are fulfilling their obligations with respect to vessels flying their flag.

The Agreement builds directly on and gives content to the general obligations in the Law of the Sea Convention regarding high seas fishing and Flag State responsibility.

The Law of Sea Convention makes clear that the freedom to fish on the high seas is not unqualified. Article 116 acknowledges the right of all States for their nationals to fish on the high seas. At the same time, however, Article 116 makes this freedom to fish subject to several important conditions, including:

(a) other treaty obligations of the State concerned;

(b) the right and duties as well as the interests of coastal States; and

(c) obligations to cooperate in the conservation and management of high seas living resources.

Article 192 of the Convention imposes on States a general obligation to protect and preserve the marine environment; this includes the living resources of the high seas.

Under Article 91 of the Convention, States have the right to grant nationality to their ships. Article 91 also requires that there exist a "genuine link" between the State and the vessel flying its flag.

The Flagging Agreement, while preserving the freedom to fish on the high seas, fleshes out these general obligations contained in Articles 91, 116, and 192. By being a party to the FAO Agreement, a State fulfills these basic obligations.

U.N. Fish Stocks Conference

Although the FAO Agreement is of great importance in bringing high seas fishing under greater control, more remains to be done. The efforts of the United States in this regard continue, with the Law of the Sea Convention firmly in our hands pointing the way. This is the case at the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks.

The Conference is all about elaborating rules to give effect to the Law of the Sea Convention's duty to cooperate in the conservation and management of straddling fish stocks and highly migratory fish stocks. The Conference Chairman's Draft Agreement calls for the establishment of regional organizations or arrangement where they do not now exist. It calls for non-Contracting Parties to cooperate in regional organizations. It addresses, though not yet adequately, the problem of vessels fishing on the high seas in ways that undermine the effectiveness of regional organizations or arrangements.

While each of these issues is important, time permits me only to address the third in detail.

High seas enforcement against vessels that undermine the conservation and management measures of regional fishery organizations is one of the major issues the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks has grappled with, and it will likely consume much time at the two remaining sessions of the Conference. The United States has vigorously advocated an approach that will enable enforcement actions to be taken against such vessels by non-Flag States. The Law of the Sea Convention has proved invaluable to the United States in its advocacy of such measures.

In short, we are trying to get the strongest high seas enforcement provisions that could be agreed, consistent with the Law of the Sea Convention.

In fact, the underlying rationale for the traditional rule of exclusive Flag State jurisdiction on the high seas -- that a ship is akin to a floating piece of territory of the State -- is rapidly losing force and falling into desuetude. The obsolescence of the traditional rule is all the more apparent in the case of modern high seas fishing vessels which have the capacity to travel tremendous distances to vacuum the oceans. Nonetheless, the United States is not arguing for a change in the international law of maritime enforcement.

To get at the problem of non-Contracting parties undermining the conservation and management efforts of regional organizations, at the most recent session of the Conference, the United States proposed informally that vessels which persistently violate the conservation and management measures of regional fishery organizations be deemed stateless, so that they would thereby be subject to enforcement actions on the high seas. This idea did not command much support in New York.

The United States will propose at the next session of the Conference changes to the Draft Agreement intended to strengthen its provisions regarding compliance with and enforcement of conservation and management measures on the high seas.

The Draft Agreement already calls upon States party to regional and subregional organizations to develop procedures for mutual boarding and inspection in high seas areas covered by the organization or arrangement. This provision is certainly a necessary and desirable step forward: it may bring some meaningful level of compliance in existing regional and subregional organizations where it is now lacking and help address the problem of "third generation" flags of convenience to which I adverted earlier in discussing ICCAT. But it does not go far enough -- it does not address the problem of vessels flying the flag of States not party to regional and subregional organizations -- non-Contracting parties -- undermining the conservation and management measures of those organizations.

The U.S. proposal seeks to address the problem posed by non-Contracting parties. It authorizes the appropriate authorities of any State party to a regional or subregional organization or arrangement to board and inspect any other fishing vessel in such area flying the flag of a State party to the Agreement. Thus the U.S. will be calling on States to authorize, through the Agreement being negotiated at the United Nations, those party to regional and subregional organizations to make arrangements to take enforcement actions against vessels flying their flag on the high seas.

Furthermore, the United States will propose that where such boarding and inspection reveals evidence that the vessel has violated applicable international conservation and management measures, the Flag State shall either investigate and take enforcement action with respect to the vessel or authorize the authorities of the State conducting the boarding and inspection to take such action on its behalf. This approach reflects the "prosecute or extradite" rule, contained in numerous other international agreements.

In addition, the U.S. will propose a provision explicitly obligating flag States to cooperate with coastal States in investigating and taking appropriate enforcement action in cases where a coastal State has evidence that a vessel on the high seas has previously engaged in unauthorized fishing in areas under the national jurisdiction of the coastal State. In this way, the high seas will cease to function as a safe haven for vessels which flout the conservation and management measures prescribed by coastal States for the living marine resources of their EEZs and run to the high seas to escape legal scrutiny.

None of this runs contrary to the traditional rule of exclusive Flag State jurisdiction on the high seas. The right of a state to authorize the law enforcement officials of another state to enforce the laws of the flag State has long been recognized in international law. The proposal of the United States would do no more than secure such authorization from States party to the agreement coming out of New York.

Conclusion

The Law of the Sea Convention provides both the building materials and the scaffolding for the construction of institutions and arrangements for the conservation and management of high seas living marine resources. Each of these institutions and arrangements, in turn, is part of a mosaic of governing institutions and arrangements that will eventually cover all the oceans. Only when that task is complete will we have the ocean governance necessary to ensure the responsible use of the living marine resources of the high seas. The Law of the Sea Convention makes all this possible.

The Law of the Sea Convention as a Comprehensive Framework Convention for Sustainable Ocean Use

The Legal Foundation for Integrated Coastal and Watershed Management and the Conservation of Marine Species and Biodiversity

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Introduction

The purpose of my presentation is not to look at many specific provisions of the 1982 U.N. Convention on the Law of the Sea (LOS), but rather to discuss how it sets the stage for concrete actions nationally and internationally to deal with the most significant cause of degraded coastal and marine ecosystems: land-based sources of marine pollution (LBSMP). I will outline the comprehensive framework nature of the LOS Convention's provisions on protection and preservation of the marine environment and the conservation of marine living resources, and then turn to the issue of LBSMP. This and related themes are considered in more depth in a report I have recently completed for the World Conservation Union.

The LOS Convention Framework

The nature of the LOS Convention as a global legal framework for the marine environment is set forth in a 1989 United Nations publication, which indicates how its Part XII is the first comprehensive statement of international law on the subject (codifying the principles of marine pollution articulated in the 1972 U.N. Conference on the Human Environment), and that it is expressly designed to operate as an "umbrella" for the progressive development of international marine environmental/species conservation law.[1] It indicates how the Convention urges states to harmonize existing rules, to conclude further global and regional rules for all sources of marine pollution, and to reexamine these rules as necessary. It notes further that the Convention contains several new or emerging principles that serve not only as a foundation for more specific marine laws but also as a model for other international environmental agreements. Many of these principles are explicitly listed in a document prepared for the 1992 U.N. Conference on Environment and Development.[2]

The Convention comprehensively covers all sources of marine pollution and the entire mariné environment. Its provisions on the conservation of marine living resources encompass 200-mile EEZs and all of the high seas. They are not explicit regarding conservation within the territorial sea or regarding sedentary living resources of the continental shelf. All environmental and most conservation disputes are subject to compulsory, binding settlement procedures.

Others have argued that the LOS Convention requires marine ecosystem management,[3] and explored how it serves as a vehicle for incorporating by reference generally accepted international rules and standards on marine environmental protection, which parties to the LOS Convention should apply in their national laws.[4] That is, once international rules and standards adopted pursuant to related oceans agreements meet a "generally accepted" test, they become applicable among states parties to the LOS Convention. Depending on the pollution source in question, these may be considered minimum standards for national laws, or states may be required merely to take them into account. For at-sea activities, including vessel-source pollution, dumping, and offshore continental shelf activities, national laws and standards must be no less effective than generally accepted international rules and standards, whereas for land-based (and airborne) sources of marine pollution, the less stringent "take into account" mandate holds.

It may further be argued that where generally accepted international rules and standards exist and constitute minimum standards for national law, failure to apply and enforce them may lead to compulsory, binding dispute settlement proceedings pursuant to the LOS

Convention, regardless of whether the alleged violator is a party to the agreement setting forth the more detailed requirement. That is, the Convention's dispute settlement system permits framework obligations to be interpreted and applied drawing on a wider range of evolving, more specific legal obligations. In the fisheries context, it has been argued that among states parties to the LOS Convention, legally binding dispute settlement procedures may be invoked to enforce the Convention's duties to conserve and cooperate in conserving high seas resources (and related environmental obligations), taking into account standards set in accordance with a regional agreement even when the offending state is not a party.

Since the LOS Convention refers not only to international rules and standards but also to internationally recommended practices and procedures (marine pollution) and generally recommended international minimum standards (marine living resources conservation), it may be argued that "soft law" should significantly influence state practice as well.

In light of more recent international environmental accords, it is useful to review also the nature of the obligations set forth in the LOS Convention on marine environmental protection and species conservation. Obligations to protect the entire marine environment are unqualified. Obligations to conserve marine living resources are absolute, except within the territorial sea and with respect to continental shelf living resources. That is, the LOS Convention recognizes a different distinction between establishing an obligation and requirements for national implementation than that recognized in, for example, the Framework Convention on Climate Change (FCCC) or the Convention on Biological Diversity. The latter two qualify states' obligations with such language as "should", or "as far as possible and as appropriate", and condition implementation by developing country parties on the transfer by developed countries of financial and technological resources. The approach taken in the LOS Convention neither qualifies the obligation nor the requirement for national action. It does, however, subject the requirement that all states take all measures, consistent with the Convention, necessary to prevent, reduce and control marine pollution from any source, to the use of "best practicable means at [national] disposal" and "in accordance with [national] capabilities;" that is, where international rules and standards do not constitute minimum standards for national action, states must undertake best efforts. This is nevertheless reinforced by the requirement to take into account both internationally agreed rules and standards and recommended practices and procedures.

At the same time, as the first major international treaty negotiation in which many newly-independent nations took part, the LOS Conference recognized throughout the need for substantial international cooperation — so that the entire international community would be in a position to implement and benefit from the treaty. Treaty provisions call explicitly for assistance to developing nations in environmental assessment, environmental monitoring, and response to marine pollution emergencies, and they call in general for scientific, educational, and technical assistance regarding all aspects of marine pollution control and environmental protection. For LBSMP, the language emphasized above recognizes that unless national means and capabilities are upgraded — implicitly through international cooperation — there are limits to what some nations' best efforts will comprise.

Land-Based Source Marine Pollution

Today, the concept of marine pollution is being reformulated to encompass the broad implications of marine and coastal degradation and the health of marine ecosystems. Regarding land based sources, Agenda 21 usefully recast the problems as "land based activities," in order to ensure that the term clearly covers:

- pollution discharged directly to the sea from point sources, such as outlets for industrial wastewater or sewage treatment plants, or other pipelines and conveyances carrying, for example, domestic wastewater;
- diffuse, non-point sources, or "runoff" that flows directly into the sea, such as motor oils or agricultural chemicals washed into the sea by rainwater, or untreated sewage;
- all point and non-point sources that contribute to pollution carried by rivers, estuaries, canals, and other watercourses, including underground watercourses, into the sea;
- sediments resulting from land erosion and land use practices in upstream and coastal areas; and
- the deposition into the marine environment of most airborne pollutants. (The LOS Convention considered pollution from or through the atmosphere separately from land-based sources, but the LBSMP agreements have subsequently

encompassed, at a minimum, air pollution emitted from sources on land and, in some cases, from offshore facilities.)

This reflects the concerns raised in the two global assessments of the health of the marine environment, produced by GESAMP in 1982 and 1990. The 1990 assessment states that coastal areas and habitat are in significant decline, and estimates that atmospheric and land-based discharges constitute 77% of the contributions to marine pollution from human activities. In order of importance, it cites the major causes of concern on a global basis as nutrients; microbial contamination of seafood and beaches by sewage; fouling of seas and beaches by plastic litter, and the progressive buildup of synthetic organic compounds (especially in the tropics and subtropics, due to pesticide use). The report adds that sediments merit special attention. As a major threat to coastal organisms in some parts of the world, it suggests that they should be regarded as pollutants per se.[5]

There are currently 11 regional conventions on protection and preservation of the marine environment that specify more detailed obligations consistent with the LOS Convention framework: (Northeast Atlantic, Baltic, Mediterranean, Black, Gulf area, Red Sea and Gulf, West and Central Africa, East Africa, South East Pacific, South Pacific, Wider Caribbean). In addition, the Antarctic Treaty instruments address these issues, and regional programs that do not yet entail legal agreements exist in varying stages of development in East Asia, South Asia, the Northwest Pacific, the Southwest Atlantic, and the Arctic. Pursuant to six of the regional conventions, specific agreements on LBSMP have been elaborated: Northeast Atlantic, Baltic, Mediterranean, South East Pacific, Gulf area, Black Sea. In December 1994, the Wider Caribbean decided to proceed with the negotiation of a protocol on LBSMP.

The United States will host, in November/December 1995, a global UNEP conference on protection of the marine environment from land-based activities, as called for by Agenda 21. The preparatory process for that conference is underway. Its mandate is to identify approaches for addressing land-based activities that can be tailored to particular economic and/or geographic circumstances, as provided in the LOS Convention; to identify areas requiring and opportunities for international cooperation on a bilateral, regional, and global level; and to identify criteria for development and technical assistance projects. The LOS Convention is the recognized legal basis for Agenda 21's chapter on oceans and coasts.

The implications of Convention obligations on LBSMP are found in the scope of LBSMP, defined above, in the framework nature of the Convention, and in the principles established by the Convention that form the foundation for the further development of its legal obligations. These principles may be summarized as follows:

- the definition of pollution, which includes harm to marine life (Article 1);
- the fact that pollution control measures required of all states must include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened, or endangered species and other forms of marine life (Article 194.5);
- the fact that such measures must also include those necessary to prevent, reduce, and control pollution resulting from the use of technologies under national jurisdiction or control, or the intentional or accidental introduction of alien or new species to a particular part of the marine environment (Article 196);
- the requirement that states shall not act so as to transfer, directly or indirectly, damage or hazards from one area to another or transform one type of pollution into another (Article 195), which compels an integrated approach to pollution and wastes, including those generated on land that may be dumped at sea, particularly in nearshore waters; that may be carried to the sea by rivers or deposited in coastal landfills from which pollutants leach into the marine environment; and wastes received from ships in port for disposal; and
- requirements for environmental assessment and monitoring (Articles 204-206).

In effect, LBSMP, based on the obligations and principles set forth in the LOS Convention and as elaborated in regional agreements, represents the legal expression of what, from a management perspective, is termed integrated coastal and watershed management. The scope of "land-based activities" and the increasingly broad manner in which the regional agreements address land-based pollution, reinforce these management approaches and will fundamentally affect their application. Several governments have recently indicated their support for utilizing LBSMP obligations to promote agreements on pollution control in shared rivers.[6] The Convention's monitoring and assessment require-

ments (and subsequent elaborations of the concept and of notification and consultation procedures) also support these planning and management processes.

Moving from pollution control to conservation obligations, the LOS Convention's pollution control regime, notably for LBSMP and also in relation to protecting vulnerable areas from vessel source pollution, substantially underpins an ecosystem approach to marine management, combining environmental protection with species conservation. The reference to rare or fragile ecosystems and endangered or threatened species provides a handle to ensure that activities governed by the LOS Convention respect designations pursuant to numerous agreements on area and species protection, both terrestrial and marine. The decision taken pursuant to the Wider Caribbean protocol (protected areas and wildlife) to list all species of coral reef, seagrasses, and mangrove, for example, provides a basis for system-wide protection of these vulnerable areas.[7] In addition, the LOS Convention requires that national measures take into account environmental factors and the interdependence of stocks; taken into consideration effects on dependent or associated species; may address fishing gear and practices, which permits regulation to avoid incidental catch and marine debris; and that management be based on international cooperation throughout the range of the stock or species.

Recent recommendations for the proposed protocol on LBSMP in the Wider Caribbean usefully illustrate the broad potential of these agreements. It is recommended that the protocol encompass all point and non-point sources of pollution, including pollution reaching the marine environment through airborne deposition and freshwater courses and pollution from coastal development; include discharges from offshore structures within national jurisdiction, consistent with MARPOL 73/78; provide that riparian nations cooperate to ensure the full application of the protocol in shared watercourses; and ensure that special area and species designations in the region are reinforced by control measures for land-based sources. Some took the view, because dumping is closely related to management and disposal of land-based wastes, particularly in island states, that dumping should be addressed in a regional instrument (consistent with the London Convention), either as an annex to the protocol or in a separate instrument.[8]

Conclusion

The entry into force of the LOS Convention — its foundation for environmentally-sound management of coastal and marine ecosystems, including watersheds, and its elaboration through related agreements — provides a legally-binding basis for a new look at national land-based activities, as defined above. It also permits a close look at international assistance programs and how they contribute to implementation of treaty obligations. Many of these programs clearly entail, or are affected by, land-based activities. A synthesis of current initiatives, region-by-region, would constitute a starting point for a more coherent assessment. That assessment may also set the stage for programs that serve the objectives and purposes of other major international environmental agreements.

The LOS Convention's provisions on pollution control support an integrated approach to pollution and wastes management. As a whole, it establishes relationships between marine environmental protection and marine species conservation that serve ecosystem management. The binding nature of LOS Convention obligations, and its widespread international ratification, make it a useful vehicle for advancing these objectives.

The 1995 UNEP meeting on land-based activities, followed by the 1996 review in the U.N. Commission on Sustainable Development of Agenda 21's chapter on oceans and coasts, offer substantial opportunities to define concrete strategies, program initiatives, priorities, and institutional support arrangements that will further integrated coastal and watershed management and the conservation of marine species and biodiversity, building on the LOS Convention's binding legal obligations. The Convention itself, its annual review in the U.N. General Assembly, and the Secretary-General's role in convening a conference of parties, provide the means for determining when new and emerging issues require further legal and program developments, while the many global and regional agreements that give detailed substance to the Convention framework function as vehicles for doing so.

ENDNOTES

1. *Law of the Sea: protection and preservation of the marine environment, Report of the Secretary-General, U.N. Document A/44/461, 18 September 1989.*

2. *International Institutions and Legal Instruments, prepared by the Office for Ocean Affairs and the Law of the Sea of the U.N. Secretariat, U.N. Conference on Environment and Development, Research Paper No. 10 (July 1991), Appendix I.*

3. *Notably, Martin Belsky. See, inter alia, "Management of Large Marine Ecosystems: Developing a New Rule of Customary International Law", 22 San Diego Law Review 733 (1985), and "Legal*

Regimes for Management of Large Marine Ecosystems and Their Component Resources", in Large Marine Ecosystems: Stress, Mitigation, and Sustainability, eds. K. Sherman, L. Alexander, and B. Gold (AAAS Press 1993), pp. 227-236.

4. *Bernard H. Oxman, "The Duty to Respect Generally Accepted International Standards", 24 N.Y.U. Journal of International Law and Policy 109 (1991); and Jonathan I. Charney, "The Marine Environment and the 1982 U.N. Convention on the Law of the Sea", 28 International Lawyer 879 (1994).*

5. *GESAMP: The Health of the Oceans, Regional Seas Reports and Studies No. 16 (UNEP 1982); and The state of the marine environment, UNEP Regional Seas Reports and Studies No. 115 (UNEP 1990). GESAMP is the Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection, sponsored by a number of U.N. system organizations.*

6. *Report of the Preliminary Meeting of Experts to Assess the Effectiveness of Regional Seas Agreements, Nairobi, 6-10 December 1993, Document UNEP/LBS/WG.1/1/3, 10 December 1993; and Report of the Second Meeting of Experts on Land-Based Sources of Marine Pollution in the Wider Caribbean Region, UNEP(OCA)/CAR WG.14/5, 25 March 1994, Annex IV.*

7. *David Freestone, "Protection of Marine Species and Ecosystems in the Wider Caribbean: The Protocol on Specially Protected Areas and Wildlife", 22 Marine Pollution Bulletin 597 (1991).*

8. *Annex IV, UNEP 1994 Report, note 6.*

PROTECTION OF THE OCEAN ENVIRONMENT: COMPETING VIEWS OF THE IMPLEMENTATION PROCESS

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Introduction

The entry into force of the 1982 United Nations Convention on the Law of the Sea renews interest in the problems associated with its implementation. In this context "treaty implementation" must be understood not only in the traditional, narrowly legal, sense of national legislative enactment, but also in the more modern, broader sense that encompasses all the diplomatic initiatives that should be taken at global and regional and sub-regional levels as well as the legislative and regulatory measures that should be adopted at national and sub-national levels. Admittedly a great deal has already been done at all these levels by way of implementation in the broad sense, in the 12-year post-adoption period before entry into force, on the part of non-ratifying states as well as those states which by November 1993 had contributed to its entry into force one year later. Yet there is no denying the psycho-political impact of entry into force last year, accompanied as it was by the revision of the deep ocean mining provisions, which seems likely to bring in most of the industrialized states, with or without the United States.[1] A very significant part of the implementation process will involve those 59 articles — constituting one-fifth of the text of the Convention — which are of explicit environmental significance. The required initiatives and responsibilities arising from these provisions have been set out in some detail in a recently updated chart prepared for the World Conservation Union (IUCN).[2] As suggested there, the agenda for environmental follow-up action within the framework of the 1982 Convention is extensive despite the maneuvers and important initiatives already taken in the post-adoption, pre-entry years.

In this writer's view, it would be unwise to expect further implementation of these environmental provisions to be a smooth and simple matter. Among the obvious difficulties to be encountered will be an intensified resistance to economically costly proposals for environmental initiatives by cost-conscious politicians who may insist on a new balance to be struck between short-term and long-term costs and benefits. Less obviously, perhaps, the process of implementation will be complicated and retarded by the non-monolithic nature of those committed to the discharge of these environmental responsibilities. It may be useful to distinguish three "communities", all concerned with the implementation of these 59 articles but each reflecting its own distinct mind-set and its own level of expectations. These three communities are not necessarily incompatible with one another and their differences will not prevent them from working together on certain occasions against a common "enemy", but, like all other coalitions, these alignments will always be subject to some degree of internal strain. Not everyone committed to the need for implementing these provisions will feel entirely comfortable with the three-fold classification suggested below, but its purpose is not so much to assign labels to individuals, as to provide a conceptual framework for the analysis of "institutionalized bias."

Three Categories of Environmental Commitment

A. The Formal/Litigational Approach

Chiefly associated with the mainstream of international law and with the tradition of classical diplomacy are those who look upon these 59 provisions, no differently from the other provisions of the Convention and indeed the provisions of other law-making treaties, as the embodiment of formal legal rules and obligations. These provisions, taken together, are hailed as the most systematically developed corpus of legal rules ever assembled for the ocean environment and as a major contribution to the environmental law of the sea. Most law-of-the-sea experts might even claim that the environmental work of UNCLOS III should be regarded as the most

creative accomplishment of the law-of-the-sea community, and as an accomplishment unlikely to be matched in the coming years by any other exercise in environmental law-making diplomacy.

Those inclined to espouse this view are likely to assume that lawyers and legal institutions will and should remain centrally involved in the implementation of these provisions. Their mind-set is likely to be governed in large part by their awareness of the legal values to be served: certainty, predictalulity, clarity, and above all, uniformity. Accordingly, their sense of progress will be determined by the concept of formal legal development proceeding from soft law to hard law, from non-binding instruments to binding instruments, from general language to specific language, from vague commitment to clear commitment, and so on. Concerned chiefly by the prospect of default or violation, these analysts look ideally to adjudication — litigation preferably — as the best means of producing a consistent case-law developed technically on the basis of formal rules which are intended to be uniform in their application to a world community, which is nonetheless conceded to be highly disparate. Their adherence to an "unitarian" view of the world may induce them even to insist on a world-wide pattern of strict compliance. In the belief that the interstate system should be governed by a rule of law, whereby state behavior would be increasingly constrained by uniform legal roles, they look to the entry into force of the Convention as an event of maximal behavioral significance.

This mind-set was common, if not typical, among the diplomatic elites that dominated the negotiations at UNCLOS III, and could be viewed as part of the "UNCLOS III paradigm."[3]

B. The Operational/ Diplomatic Approach

A second category of specialists characterizes the environmental provisions of the UNCLOS III Convention essentially as governmental commitments. Rather than being treated formalistically as legal rules, they are more likely to be dealt with as strenuously negotiated norms of differing degrees of intensity, with symbolic as well as substantive implications, which provide the foundation for future settlements, arrangements, norms, procedures and practices designed for the protection of the ocean environment. They serve rather the purposes of environmental management, and pave the way to future state-directed initiatives in diplomacy and public administration. Accordingly, these provisions have to be treated as having their own special, or even unique, characteristics, and possibly requiring differential application in different contexts.

Adherents to this second group, which is strongly represented among government officials and representatives of international organizations, accept that legal thought competes intellectually with other relevant policy and management sciences in the interpretation, application and development of these provisions at all levels of state and inter-state systems. Their operational mind-set is heavily influenced by their awareness of the relevance of transactional values to be served: flexibility, suitability, integration, sophistication, and perhaps also affordability, as determined by political choices and compromises. Progress is measure by the criteria of acceptability and effectiveness. Accordingly, soft law, non-binding instruments, general language, and vague commitments are seen as part of the process of coastal and ocean management. From a relativist perspective, they seek the best attainable level of substantial or reasonable compliance, given the realities of a system of highly unequal states. Faith is placed primarily in the diplomatic arena, and therefore in the potentiality of diplomatic and regulatory techniques. Entry into force of the 1982 Convention is seen as having political and psychological importance with perceptual and transactional consequences.

This mind-set seems to have been evident among the delegates who were centrally involved in official negotiations at UNCED and in the preparations for that conference, and may be viewed as part of the "official UNCED paradigm."[4]

C. The Societal/Ideological Approach

There is also a third group, which unlike the other two, is societal, and not statist, in orientation. Those who belong to this category are inclined to treat important environmental provisions such as those in the 1982 UN Convention on the Law of the Sea as ethical commitments, which should be enforced as rigorously as possible, at least in the case of the more highly developed countries. These provisions are evaluated according to the influence they seem to have on the building of environmental ethic, which is seen to be less the work of UNCLOS III than of the Stockholm and Rio conferences of 1972 and 1992.

This third group, which is reflected particularly in the nongovernmental community, is deeply distrustful of power and arrogance. Many adherents are explicitly anti-statist, anti-industrial, and anti-

commercial in ideology, and to some extent also anti-academic, or anti-disciplinary, as well as anti-sectorial. Many of them are confrontational rather than conciliatory in style and flourish especially in cultural settings that tend to tolerate frequent confrontations with the holders of power, wealth, and social status. For some the struggle in which they are engaged is spiritual in nature, directed against predatory human behavior. Their commitment essentially is to ethical values: virtue, purity, commonality, and even social justice. Their chief interest in environmental law and environmental diplomacy is in the progress they facilitate toward the attainment of a sacred text for the environment.[5] Their faith resides in the potentiality of participatory democracy and its cognate of civil enlightenment. Their collective effort is to educate electorates, so as to press upon politicians the need for the raising of environmental priorities and standards. However, because electorates reflect multiple interests and concerns, and changing priorities, third group adherents are forced to adopt strategies that are ideological rather than populist in character.

This mind set was pervasive among the thousands of nongovernmental observers at UNCED, and today, in the 1990s, can be described as a major component of the "unofficial UNCED paradigm."[6]

Some Projections

Most of the accomplishments in environmental policy and management around the world since the Stockholm Conference in 1972 are too deeply rooted in structures and processes to be reversed as a result of budgetary reduction policies in the late 1990s. The electoral results of November 1994 seem to suggest that for a number of years the United States may be moving against the general flow, so as to impair the world leadership role that it might otherwise play in a number of environmental contexts. It is hard to believe, however, that this apparent set-back to environmental law, diplomacy, and ethic will extend far into the first decade of the 21st Century. The United States cannot retain credibility as the leading world power if it lacks credibility as a protector of the environment.

In the meantime, three current developments provide windows for the projection of new initiatives relevant to the implementation of the environmental provisions of UNCLOS III. At the time of writing, American involvement is crucial on all three fronts.[7]

Of interest to all three of the groups or communities discussed above is the current United Nations Conference on Straddling and Highly Migratory Stocks. Because of the consensus achieved to produce a treaty instrument, this Conference has attracted the attention of the first (formal/litigational) community, and if the effort is successful the treaty emerging will be given a formal status nearly equivalent to the 1982 UN Convention, which it will be seen to supplement in the area of high seas fisheries, and with special developmental significance for the interpretation and application of Articles 63 and 64 on straddling stocks and highly migratory species respectively. Current uncertainties regarding United States accession to the 1982 Convention extend to this new 1995 treaty, but policy implementation in both cases, in fishery-related matters, may not depend on formal accession.[8]

Of little interest to this first group but of great significance for the second and third groups is the elaborate action plan produced at UNCED, Agenda 21, and especially its ocean component, Chapter 17.[9] There was very little overlap between the delegates who attended UNCED and negotiated Chapter 17 and those who participated most actively throughout the 14 year history of UNCLOS III and its preliminary negotiations in the UN Seabed Committee, even on the part of those who specialized in the fishery conservation and pollution control items on the UNCLOS III agenda. Because national implementation usually rests with senior management officials and cabinet ministers who were not immersed in negotiations in the diplomatic arena, decisions whether and how to implement the environmental provisions of UNCLOS III and the ocean provisions of UNCED may not be critically affected by those colleagues who did attend these conferences.[10] Yet on the face of things there is a degree of incompatibility between those two mind-sets, associated with the first and second groups as described above. It seems impossible to assess whether one is bound to prevail over the other. Those with a formalist/litigational outlook will, of course, agree that the binding outcome of UNCLOS III prevails over the non-binding action plan of UNCED, but many of the younger officials involved in UNCED may wish to give prevalence to the environmental priorities and constructs of the 1990s as reflected in Chapter 17, and NGO pressures will be similar in thrust. If indeed there is a potential collision between the two mind-sets, bureaucracy in the ocean and environment sectors may be enlivened by dissonance. The United States was enormously and controversially engaged in both conferences, and it is highly unlikely that its federal bureaucracy can remain detached

from their consequences, whatever legislative constraints may be imposed in non-self-executing sectors of public policy.

Finally, and very recently, the third (societal/ideological) group seems likely in 1995 to focus its nongovernmental attention on the post-Rio effort of IUCN to convert the basic principles and constructs of Agenda 21 into treaty form. The current Draft International Covenant on Environment and Development[11] might be expected to attract the attention of the formal/litigational group, because of its putatively formal characteristics, but the current trend to environmental restraint or minimalism in the United States and some other countries may prevent this non-official "sacred text" document from being endorsed in the diplomatic arena by the year 1999, as now intended. If the prospects of endorsement look bleak, it must be expected that the operational/diplomatic elite, who effectively control the international environmental agenda, will choose a strategy that preserves current ocean-related priorities around the present critical issues of fishery collapse, land-based marine pollution, and hazardous wastes, issues which were designated for priority attention in the early 1980s.[12]

ENDNOTES

1. *Several years of behind-the-scenes negotiations, engineered by the United Nations Secretariat, resulted in the conclusion of the Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, which was adopted by resolution of the UN General Assembly at its 101st plenary meeting on 28 July 1994. Text of the Implementation Agreement is reproduced at 33 International Legal Materials 1313 (1994). For some American reactions, see Law of the Sea Forum, 88 American Journal of International Law 687 (1994).*

2. *For the text of the original chart, see Krueger, Robert B., and Stefan A. Riesenfeld, eds., The Developing Order of the Oceans (Proceedings of the Eighteenth Annual Conference of the Law of the Sea Institute) (1985), pp. 133-179. The updated IUCN chart was unpublished at the time of writing.*

3. *Suggested elements of the "UNCLOS III paradigm" are discussed in a recent paper by this writer ("UNCLOS III and UNCED: A Collision of Mind-sets?"), which is scheduled for publication in 1995.*

4. *For further discussion of the "UNCED paradigm," see Johnston, supra note 3. These reflecting the UNCED mind-set look with some hope to the soft-law language of Chapter 17 of Agenda 21, adopted at Rio in 1992, as the global framework for national and regional action directed at the protection of coastal and marine areas around the world. On the post-Rio prospects for progress toward the sustainable use of marine and coastal areas, see Miles, Edward L., "Ocean Policy Development in the 1990's: The Uses and Limitations of the Diplomatic Arena," pp 13-16 (paper presented at the first SEAPOL Tri-regional Conference on Current Issues in Ocean in Ocean Law, Policy and Management, held at Bangkok, December 13-16, 1994).*

5. *The concept of "sacred text," originating in the history of scriptural writings associated with the major religions, has become familiar in secular contexts such as that of constitutionalism and "governance," where the model of a "bill of rights" text has been promoted as a pre-requisite of democracy based on fundamental human rights. It may be suggested that the environmental movement, both at global and national levels, is essentially engaged in a quest for a sacred text, analogous with the Universal Declaration of Human Rights, which would possess transcendent status in the world community and "govern" policies designed for the protection of the human environment, or the "environment" in an even larger sense.*

6. *The concept of an "unofficial UNCED paradigm" might be described as reflecting the partly-elitist, partly-populist mind-set of proponents of "civil society." Their perception of progress in international law and diplomacy is thought of as "societal," not statist, and of "ideological" rather than political significance.*

7. *"Idealism" runs strongly in all three mind-sets pivoting on progress in environmental law, diplomacy and ethic. Americans are, of course, emotionally and intellectually involved in all three modes of idealism. See, for example, the diversity of idealism reflected in Van Dyke, Jon M. and others, eds., Freedom for the Seas in the 21st Century: Ocean Governance and Environmental Harmony (1993).*

8. *For a detailed study of the problem of straddling and highly migratory stocks and of the UN conference devoted to it, see Meltzer, Evelyne, "Global Overview of Straddling and Highly Migratory Fish Stocks: The Nonsustainable Nature of High Seas Fisheries," 24 Ocean Development and International Law 255 (1994).*

9. *United Nations Conference on Environment and Development, Agenda 21: Programme of Action for Sustainable Development (1993).*

10. *On the Wide Gap between the achievement levels of "regime development" and "regime implementation," see Miles, supra note 4.*

11. *This draft, prepared by Professor Nicholas Robinson of the United States on behalf of IUCN, was first presented for discussion at the SEAPOL Tri-regional Conference on Current Issues in Ocean Law, Policy and Management, held at Bangkok in December 1994. Consisting of 72 articles in treaty form, this draft sets out fundamental principles drawn from Agenda 21; specific obligations on natural systems and resources, and on processes and activities; general obligations relating to global issues; transboundary issues; implementation and cooperation; responsibility and liability; and other matters.*

12. *See Johnston, Douglas M., "Systemic Environmental Damage: The Challenge to International Law and Organization," 12 Syracuse Journal of International Law and Commerce 255 (1985).*

Implications of Ratification on U.S. Fisheries Management

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Soon after its adoption in 1982, the Convention on the Law of the Sea (CLOS) attracted significant opposition by some in the U.S. fishing community. Among those opposing U.S. acceptance of the treaty were the National Fisheries Institute, the Gulf of Mexico Fishery Management Council, the New England Fishery Management Council, National Federation of Fishermen, and the National Ocean Industries Association, including the Pacific Seafood Processors Association. Some members of Congress contended that various provisions of the treaty were a threat to U.S. interests in fisheries. Recently, an Alaska state official expressed the view that the treaty might undermine existing, desirable fishery arrangements of importance to Alaska fisheries, including high seas and fisheries in the exclusive economic zone (EEZ).

CLOS was sent to the U.S. Senate by President Clinton in October 1994 for its consideration of consent to accession. Such consideration may take place later in 1995, but in a political context very different from that prevailing in October 1994; its reception by the Senate is now not clear.

The Senate will, of course, weigh all U.S. interests in this treaty in reaching a judgment. That the fisheries provisions alone would be considered sufficient justification for withholding its consent seems unlikely, despite the draconian remarks by some politicians. But alleged deficiencies in this part of the treaty might contribute to an overall negative assessment that could be damaging to the prospects of acceptance in the U.S. Senate, and therefore the issue warrants some attention.

Whether all the older objections to the CLOS fisheries provisions are still entertained is not known. In recent hearings, Congressman Jack Fields of Texas repeated an earlier objection about a supposed right of access to EEZ fisheries by land-locked and geographically disadvantaged states. But some have probably changed due to changes in U.S. law, such as the inclusion of tuna within U.S. jurisdiction, or the conclusion of other agreements. But some probably persist and the following remarks address some of these objections as well as those of more recent vintage.

Objections to the fishery provisions of the Law of the Sea (LOS) treaty involve:

(a) the treaty's effects on the scope of fishery management authority within the U.S. exclusive economic zone;

(b) authority over high seas fishing, including salmon and the alleged unsatisfactory application of the precautionary approach in the treaty;

(c) the pernicious effects of compulsory dispute settlement on other agreements; and

(d) proposed conditions burdening consent to ratification of the treaty.

U.S. Fishery Management Authority in the EEZ.

Several objections to the LOS treaty rest on the basic contention that it restricts and interferes with the exercise of fishery management authority under U.S. law within the EEZ.

They are:

(1) The treaty requirement to give access of fish surplus to the permissible harvest by U.S. fishermen (but within the allowable catch) prevents the United States from making determinations of optimum yield under U.S. law for the economic benefit of U.S. fishing interests. The United States could no longer establish optimum yields for catches less than the maximum sustainable yield without making the surplus available to foreign fishing.

(2) The requirement for compulsory conciliation under Article 297 will impose delays on the fishery management process and may lead the U.S. to reconsider its allocation policies and reverse decisions made in accordance with domestic law.

Allegedly, repeated calls for conciliation under the treaty could lead the United States to

reconsider allocation policies and reverse decisions established in accordance with domestic law.

The illustrative hypothetical is an initial decision by the United States to withhold a portion of a surplus as a reserve, which is then challenged as an arbitrary decision for which a conciliation proceeding is demanded, followed by a decision by the State Department to release the potential reserve as an immediate allocation to a foreign fishing state.

(3) Excessive interference with the fish management process will result from the requirement in allocation decisions that the coastal state shall minimize economic dislocation for states whose nationals have habitually fished in the U.S. EEZ.

(4) The provisions on landlocked and geographically disadvantaged states provide for giving access to such states even though the coastal state is fully harvesting stocks within its EEZ. Depending on the definition of a region, this might mean that such disparate states as Mexico, Cuba, South Korea and even Bulgaria might be entitled to demand access to fisheries in the U.S. EEZ.

Authority Over High Seas Fishing

Salmon

It has been contended that Articles 66 and 116-120 of the LOS treaty adversely affect the capability of the United States to deal with salmon and other high seas fishing that adversely impact U.S. interests. In particular, it is claimed that Article 66 means that the U.S. cannot terminate the Japanese high seas salmon fishery which takes salmon of U.S. origin. This objection has little weight in light of the international agreements for salmon in the North Pacific and North Atlantic Oceans. Both the North Pacific Anadromous Stocks Convention (1992) and the Convention on the Conservation of Salmon in the North Atlantic Ocean (1982) prohibit high seas fishing for salmon, which is wholly consistent with CLOS which also prohibits such fishing subject to minimizing economic dislocation. Since there is no longer any high seas fishing for salmon, of course there can be no question of economic dislocation.

Precautionary approach

Another high seas fishery issue arises from the criticism of the LOS treaty that its provision for freedom of fishing means that anyone is free to initiate such a fishery without having to prove that such new fishing is "safe" or not adverse to existing fisheries. What is meant by "adverse" is seldom explained, nor how it would be established short of actual fishing.

Compulsory Dispute Settlement

Driftnet moratorium

The objection has also been raised that the LOS treaty means that the current driftnet moratorium could be changed as a result of a dispute settlement process pursuant to Part XV of the treaty. The view is expressed that this might lead to loss of protection of salmon stocks which some think is now afforded by the UN resolutions and U.S. law. These views have little substance for several reasons. Except for the illegal Taiwan driftnet fishery targeting salmon, an international scientific review of U.S. observer data concluded that driftnets in 1990 had no significant biological impact on North American salmon. In any event, salmon are afforded real protection by the LOS treaty which is now supplemented by the North Pacific Anadromous Stocks Convention which not only forbids direct fishing for salmon on the high seas of the North Pacific but also seeks to eliminate excessive bycatch of salmon in other fisheries.

Pollock agreement

The Law of the Sea Committee of the North Pacific Fisheries Management Council suggests that the dispute settlement provisions of the LOS treaty could cause problems with the management of central Bering Sea pollock, pursuant to the agreement on this fishery concluded earlier in 1994. It is speculated that a nonparty state might challenge the allocation of the fish under the pollock agreement and force a revision of that agreement. In the unlikely event such a challenge arises, the alleged difficulty will be substantially undercut if not eliminated if provisions included in the draft agreement on straddling and highly migratory fish stocks are maintained in the final agreement.

Preconditions to Consent to Ratification

Because of possible challenges to existing arrangements for driftnets and for pollock, there appears to be an implied threat that consent to U.S. ratification must be conditioned upon changes in the straddling stock agreement or upon inclusion of the driftnet moratorium in a binding international agreement.

Conclusion

If one were to make an assessment of the treaty's general value to the United States based only on its impact on U.S. fishery interests, the conclusion would be an unequivocal recommendation of approval. The shortest statement of a reason for this latter conclusion is that the

LOS treaty was most heavily influenced by coastal State interests and it is designed to serve those interests as its overwhelming priority. As it happens, the predominant U.S. interest in fisheries is coastal in nature and therefore the treaty serves those interests. The United States also has significant distant water fishing interests and these are not prejudiced by the treaty.

The fisheries articles of the LOS treaty benefit the U.S. coastal fishing industry because they provide, in confirmation of a U.S. law drafted so that it would be compatible with the treaty (the Magnuson Fishery, Conservation and Management Act), for a very wide discretion in the exercise by the U.S. of its exclusive fishery management jurisdiction in a zone of 200 miles from the baseline for the territorial sea. The treaty recognizes that the U.S. has sovereign rights to explore, exploit, conserve and manage all living resources within 200 nautical miles of the U.S. This discretion to exercise these rights enables the United States to seek its full range of fishery and other interests: political, economic, social, and scientific. Furthermore the treaty recognizes the special authority and needs of the State of origin of anadromous species, and not only extends that authority beyond the 200 nautical mile zone but also requires the agreement of the U.S. for any fishing for such species beyond national zones of jurisdiction.

In short, the LOS treaty is fully consistent with U.S. national interests in fisheries, whether coastal or distant water, and adds further support to such interests by the provisions for compulsory dispute settlement.

The Draft Convention on Straddling and Highly Migratory Fish Stocks - Concepts and Main Issues

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Introduction

The fourth session of the UN Conference on Straddling and Highly Migratory Fish Stocks closed with the Conference Chairman (Satya Nandan, Fiji) putting his so-called "Fish Paper" into draft agreement form.[1] The Conference reached a critical juncture with major differences remaining between the activist coastal states - Canada, Argentina, Peru, Chile, and Norway and the high seas distant water fishing group present at the Conference (Japan, Korea, Poland together with China). Other actors include moderate reformist coastal states (Australia, New Zealand), and other states or groupings with mixed interests, including the European Union (EU), Russian Federation and the United States. Apart from these are developing country interests in both straddling and highly migratory fish stocks. These have, however, remained essentially uncoordinated and spokesmen limited to India, Kenya, and Mexico.[2]

Straddling and highly migratory fish stocks account for around 10% of world food supply, reaching a peak of around 13.7 million tons in 1989. However, problems associated with the fisheries began to command international attention from the late 1980's because of stock issues connected with high seas driftnet fishing and conflicts involving coastal and long range fleets in the Northeast Atlantic (Canada/EU), Bering Sea, Southwest Atlantic, and Pacific.[3] The issues have been addressed within the Food and Agricultural Organization (FAO) and at United Nations Conference on Environment and Development (UNCED) (Chapter 17, Agenda 21).[4] Technical consultations have been held within FAO,[5] which led to the 1993 Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (1993).[6] The 47th session of the General Assembly approved on 29 January 1993 an intergovernmental conference on straddling and highly migratory fish stocks.[7]

Straddling and Highly Migratory Fish Stocks

In this summary four concepts have been highlighted to illustrate the complexity, and some of the differences between the principal players, which have now become recognized during the process of creating an appropriate regime for straddling and highly migratory fish stocks outside the Exclusive Economic Zone (EEZ). These are the geographic area of fisheries regulation; compatibility of measures in and outside the EEZ; regionalism versus international standard setting; and flag state responsibilities.

Geographic Area of Fisheries Application

The area of application issue outside the EEZ or Federal Zone (FZ), has arisen in part because of the difficulties over the term 'adjacent to the zone' in Article 63(2) of UNCLOS. Proposals on adjacency have been put forward by the Russian Federation, to define adjacent area as a narrow area of some 20-70 nautical miles beyond the EEZ, which is the smaller part of the stock's habitat area or a migration route through which the stock passes.[8] The Conference has, however, been reluctant to move in the direction of precise definitions on this issue. Other approaches e.g. by Canada and some Latin American States[9], have sought as the area of application for regulation and enforcement outside the EEZ that area covered by a regional organization.

In practice, these latter proposals would substantially alter the balance from flag to coastal state enforcement and have a number of implications for existing international fisheries organizations. First the proposals blur the regimes for straddling and highly migratory fish stocks. The Draft Agreement does not, as yet, provide for appropriate regimes to cover the different biological, legal, and habitat issues connected with straddling and migratory fish stocks. Nor do all

existing international fisheries institutions have precisely defined areas of application. Extensive areas of high seas might be cross claimed by differing species organizations or lead in some instances to the enclosure of significant high seas areas beyond the EEZ, with the consequent loss of the concept of 'open' ocean high seas, several hundred miles off a coastal state beyond the EEZ. An indirect issue is the range of species covered by a regional organization, which raises the possibility of management conflicts between new and existing organizations being enhanced. Difficulties of these types reflect the fact that the Draft text has not properly addressed regimes for straddling and highly migratory species, focusing in general on the former, without giving adequate attention either to the role of existing international fisheries organizations.

Fisheries Regimes Inside and Outside the EEZ

Negotiations remain incomplete on several questions concerning compatibility, although the wider precautionary principle and revision of the Maximum Sustainable Yield (MSY) concept seem to have wide support. Issues over compatibility include the right of the coastal state to take emergency action; which species are to be managed and conserved beyond the EEZ (the draft agreement now uses 'target and non-target or ecologically related species'); admission of non-members, and the main issue of the equivalence of measures between the high seas and EEZ regimes. The question of coastal states emergency measures to deal with overfishing has so far been dealt within the Draft Agreement on the basis of precautionary reference points being approached or exceeded, (Article 6) and dispute settlement (Article 30). Any action by the coastal state must be on a pre-agreed basis. Whether the coastal state could act decisively, in the sense of immediate temporary measure, given the constraint of pre-agreed action, is unclear. It may also be some time before provisional measures envisaged under Article 30 could be introduced, suggesting the procedure in the Agreement needs to be accelerated given lead and lag times in fisheries regulation. Further the issue is complicated by an apparent two tier regime in Article 7, which provides for "measures necessary for the conservation of (straddling) stocks in the adjacent high seas areas," whereas, for highly migratory stocks there is a different requirement of "promoting the objective of optimum utilization."

Two further issues of note concern non-discrimination and threats to coastal state powers in the EEZ over living resources. With regard to the first issue, the provisions in UNCLOS Article 119(3) on non-discrimination have been progressively weakened in the Draft Agreement in the search for an agreed text acceptable to coastal and distant water fishing nations. Second, a new issue which has arisen over compatibility of measures is the concern of developing coastal states that their EEZ rights over living resources (e.g. to set targets, quotas, Total Allowable Catches (TAC) and conditions for entry) may be undermined by demands of regional organizations regulating stocks outside that particular states EEZ, for different or stricter standards or policing within the coastal state's EEZ.

Regionalism versus Internationalism

The Draft Agreement has a strong regional emphasis at the expense of international or extra-regional agreements and international institutions. Indeed as the Draft has been editorially and otherwise revised during 1993-1994 the word 'international' has been progressively deleted from the Draft Agreement. As a result, the text is particularly regional or sub-regional in emphasis, reflecting the running made by the Canadian-Latin American coastal group. How such regional bodies are to relate to existing international fisheries institutions, if at all, would have to be worked out, since not all of these are of a regional nature. As it regards minimum international standards of a global nature regarding catch and other conservation measures, the Daft Agreement contains only a brief reference reflecting the UNCLOS Article 1191(a) provisions on non-discrimination. From a regional perspective, the requirements in the Draft Agreement regarding membership in regional organizations or participation in other arrangements, could pose difficulties for some regional organization (e.g. South Pacific Forum) which seek to restrict membership to those states from a geographic region and exclude non-parties. The latter would presumably have to accept a "cooperating" status, (Article 8(4)) without a direct role in quota allocation or other conservation measures, unless they could negotiate some kind of association status.

Flag or Coastal State Enforcement

In part the arguments on enforcement have hinged on whether clarifying at an international level flag state duties and responsibilities for vessels flying their flags, and having these spelled out in a clear and detailed manner or whether the approach to enforcement should be from a coastal/regional perspective. A central issue remains detention and arrest,

with the high seas fishing states (Japan, Poland, Korea, Panama, and some members of the EU) maintaining the importance of the requirement for consent of the flag state for detention and arrest of fishing vessels on the high seas. Emphasis too has been placed on the reverse usage of the doctrine of "due regard" in UNCLOS. Japan, for example, has attempted to revise the doctrine of "due regard" by refocusing attention on the rights of flag and high seas fishing states, rather than the coastal state - in other words, changing the swing of the pendulum somewhat back to the flag state.[10]

On the other hand, in attempting to enhance coastal state enforcement powers, concepts have been drawn from other regimes such as port state control. It should be noted that the Draft Agreement in this respect, departs significantly from the concept of "port state control" used in the FAO Compliance Agreement (1993).[11] Potential for considerable confusion now exists in terms of the differing concepts in the two agreements in that 1993 FAO agreement uses essentially an "in port" inspection concept rather than boarding at sea. It would have been preferable to have kept the port state concepts within an UNCLOS/International Maritime Organization context e.g. Paris Memorandum. Other enforcement rules based on the powers of the coastal state, regarding boarding inspection and detention could have been drawn up which would have avoided possible misapplication.

Conclusion

In this paper four concepts central to attempts to create a new convention on straddling and highly migratory fish stocks have been examined to highlight the range of differences and complexity of regime formation. In any implementation agreement there is always the danger that the line between reform or "gap filling" and substantial modification of an agreement becomes blurred. Moreover, in attempting to create new regimes and strike balances, it is not always appropriate to mix up regimes (eg. fish and shipping control). Nevertheless, two central difficulties remain: the area of application (the adjacency problem) and the relationship between flag state and coastal state fisheries enforcement beyond the EEZ.

ENDNOTES

1. *A/CONF.164/22, 23 August 1994.*
2. *See R.P. Barston, "The United Nations Conference on Straddling and Highly Migratory Fish Stocks", Marine Policy, March 1995.*
3. *See Jane Gilliland Dalton, "The Chilean Mar Presencial: A Harmless Concept or a Dangerous Precedent", Marine and Coastal Law, vol. 8 no. 3, August 1993, pp 399-403.*
4. *United Nations Conference on Environment and Development (UNCED), 3-14 June 1992, Agenda 21, 50(d), section 17.49-17.56.*
5. *FAO, Report of the FAO Technical Consultation on High Seas Fishing. 7-15 September 1992.*
6. *Agreement to Promote Compliance with International Conservation and Management measures by Fishing Vessels on the High Seas, FAO, Rome, 1993.*
7. *Report of the Secretary General, A/48/451, 1993.*
8. *A/Conf.164/L.32/Add.1, 12 July 1994.*
9. *See Draft Convention on the Conservation and Management of Straddling Fish Stocks on the High Seas and Highly Migratory Fish Stocks on the High Seas, (Argentina, Canada, Chile, Iceland, and New Zealand) A/CONF.164/L.11/Rev.1,28 July 1993, Article 4(a) (iii); Elements of an International Agreement on the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks on the High Seas (Chile, Colombia, Ecuador, Peru), A/CONF.164/L.14, 16 July 1993, section III(6), and section VII (compliance arrangements), which deals with reciprocal authorization for arrest or prosection by any party "and especially by the coastal state in cases of violation which directly affect their interests" (VIIe).*
10. *See statement by Matsashire Horiguchi, Head of the Japanese delegation, 15 August 1994, which emphasizes the flag state position; attacks unilateral enforcement but accepts that enforcement may be undertaken by a state having an agreement with the Flag State. See Permanent Mission of Japan, United Nations, New York, 15 August 1994.*
11. *Agreement to Promote Compliance with International Conservation and Management measures by Fishing Vessels on the High Seas, FAO, Rome, 1993, Article 5.*

At the crossroads of UNCLOS and UNCED: The United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks

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This Conference was convened by UN General Assembly resolution 71/192 on 22 December 1992. The problems related to high seas fisheries had first been tackled in the UN Conferences on the Law of the Sea and in the course of the preparatory process for the UN Conference on Environment and Development (UNCED). The issue was so sensitive, however, that the 1982 Convention on the Law of the Sea left the management and conservation measures to be negotiated between coastal States and distant water fishing nations (DWFNs). UNCLOS defines straddling and highly migratory fish stocks as including species occurring within the exclusive economic zones (EEZs) of two or more coastal States or both within the EEZ and in an area of high seas beyond and adjacent to it.

Despite repeated efforts on the part of some coastal States, the parties involved in the UNCED preparatory process failed to agree on a new regime for the management of these stocks and Chapter 17 of Agenda 21 called for a conference "with a view to promoting effective implementation of the provisions of the Law of the Sea on straddling and highly migratory fish stocks." Resolution 71/192 specifies that the mandate of the Conference will be to: identify and assess existing problems related to the conservation and management of highly migratory and straddling fish stocks; consider means of improving fisheries cooperation among States; and formulate appropriate recommendations.

An organizational session was held at UN headquarters in New York where Satya Nandan (Fiji), a veteran of the Law of the Sea negotiations, was elected Chairman and the rules of procedure were adopted. In advance of the first session, Nandan prepared a paper containing a list of substantive subjects and issues as a guide for the Conference.

This document was discussed in the course of the first session, which was held in New York from 12-30 July 1993. A first round of debate was dedicated to each of the most contentious issues and a pattern quickly emerged where the interests of the coastal States were pitched against those of the DWFNs. At the end of the three weeks of negotiations, the Chair produced a draft negotiating text (contained in UN document A/CONF.164/13) that contained a summary of the issues raised during the session which included:

- the nature of conservation and management measures to be established through cooperation;
- the mechanisms for international cooperation;
- regional fisheries management organizations or arrangements;
- compliance and enforcement of high seas fisheries, conservation and management measures;
- port States;
- non-parties to a sub-regional or regional agreement or arrangement;
- dispute settlement;
- compatibility and coherence between national and international conservation measures for the same stocks;
- special requirements of developing countries;
- flag State responsibilities; and
- review of the implementation of conservation and management measures.

Intersessional work was carried out on this document and agreement had been reached on 90% of the text before the session was convened. However, outstanding issues remained and were debated in informal meetings. The issues on which disagreement was the strongest were the adoption of a precautionary approach, likened by many DWFNs to moratorium measures, the concept of Maximum

Sustainable Yield (MSY) and alternative ways to evaluate the stocks, and the complementarily between the measures adopted for the high seas and those applied within the EEZs. These were, and remain, very controversial issues and some viewed the adoption of 90% of the document as irrelevant if these particular issues are not agreed to by all parties. Another thorny question was that of the outcome of the Conference, with most coastal States asking for the adoption of a legally-binding document, while the DWFNs wanted the adoption of indicative measures that could possibly be adopted by the regional arrangements of agreements.

The debate resumed in the second session, held in New York from 14-31 March 1994, where "informal-informals" were held most of the time to prepare a new "clean" version of the Chair's text. Non-Governmental Organizations (NGOs) were excluded from those sessions and five of the fourteen days of negotiation were held behind closed doors. On the last day, the Chair produced document A/CONF.164/13/Rev.1, the Revised Negotiating Text (RNT). The third session, held in New York from 15-26 August 1994, began with a review of the RNT on a section-by-section basis. This gave the delegates the opportunity to voice the opposition of their governments on very specific issues. General statements were delivered in the plenary and consultations were carried out in informal-informals.

In the second week of the negotiations, the Chair issued a Draft Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (the "Draft Agreement"), based on the comments that the delegates had made on the RNT. Informal consultations on the most difficult issues were then carried out between the Chair and interested delegations. Delegates reacted to the text and the last version of the Draft Agreement was issued in document A/CONF.164/22 before the Conference adjourned the next day.

The 31-page revised text contains a Preamble, 47 articles in 13 parts, and three annexes. It is in the form of a legally-binding agreement and some of the DWFNs have repeatedly expressed their opposition to such a form. The preamble is short and concise and recalls the principles of UNCLOS, notes the need to improve cooperation between coastal States and flag States, calls for more effective enforcement measures and commits State Parties to responsible fishing. It does not refer to the FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas.

Beyond the strict outcome of the process however, this Conference should be considered within the context of the long evolution in intergovernmental relations that deal with natural resources, and more particularly shared resources.

The holistic approach of UNCLOS goes back to the Geneva negotiations of the 1958 and 1960 conferences. But as this purely "oceanic" stream of negotiations developed, a more general environmental stream took form, first in Stockholm in 1972 for the UN Conference on the Human Environment (UNCHE), and then in Rio in 1992 for the UN Conference on the Environment and Development (UNCED). As a result, some of the issues that were dealt with within the framework of UNCLOS became "tainted" by some of the concepts developed in Stockholm and Rio.

In the case of the straddling and highly migratory fish stocks conference, this influence is even stronger because, in matter of fact, UNCLOS III failed to solve the issue and the problem was "de facto" brought within the realm of UNCED. As such, the Conference can be identified as a hybrid process, drawing heavily from two jurisdictionally, different entities, the UNCLOS III convention, and the UNCED conference. From a normative standpoint, new ground was broken at UNCLOS with the emergence of the common heritage of mankind concept, but UNCED went even further with the highly innovative concept of sustainable development, first identified in the course of UNCHE.

This dual heritage of UNCLOS and UNCED is also manifest in the nature of the participants to the Conference.

The participants can be divided as follows: representatives of the coastal States, of the distant water fishing nations (DWFNs), of developing States (who can fall within either of the first two categories), Intergovernmental Organizations (IGOs), and Non-Governmental Organizations (NGOs). The increased participation of NGOs and IGOs is a clear result of the very open UNCED process, while the staunch opposition between coastal States and DWFNs was passed down from the UNCLOS negotiations. This duality of origin is also apparent in the personality of the negotiators as both veterans of the Law of the Sea and a newer generation of UNCED diplomats came together. The resolution calling for the convening

of the Conference makes very clear that it will take place within the jurisdictional framework of UNCLOS, and yet at the same time, recalls that it was called for by Chapter 17 of Agenda 21.

The generational difference between the negotiators has sometimes led to clashes, but those were not as severe as others that opposed the UNCLOS veterans to the sometimes irreverent representatives of the NGOs. Doug Johnston has identified these three categories of negotiators as belonging to three separate "groups", and this Conference is the perfect example of an instance in which they were brought together and had to find a way to iron out their differences.

Improving International Management of Straddling and Highly Migratory Fish

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A. The Problem

Under existing international law, individual nations have jurisdiction over fish within their 200-mile Exclusive Economic Zones (EEZs). However, fish do not respect political boundaries. Many species important to the US occur in or migrate over vast areas of the ocean, often crossing the EEZs of several nations as well as the high seas. Effective management of these species requires the involvement of all nations with active fisheries for them.

Unfortunately, there are no effective international standards governing how nations must collectively manage species that occur both on the high seas and within the EEZs of one or more nations. As a result, multinational regional organizations established to manage fishing of such species have often failed to prevent overfishing, destructive fishing practices, and drastic depletion. Some areas of the high seas with active fisheries on species important to the US lack any management regime at all.

Global fishing pressure on commercially valuable high seas species has increased rapidly in the last decade, to the point where most are fully fished or overexploited, according to the United Nations Food and Agriculture Organization (FAO). Some, like bluefin tuna and Bering Sea pollock, are in a state of crisis, and others may soon follow. Increasing competition for these species, rapidly advancing technology, and increasingly mobile fleets make the need for an effective international regime urgent.

B. The US Interest in Promoting a Strong International Regime

Fish that occur on the high seas, which principally include straddling stocks and highly migratory species, are of great significance to the US. For example, tunas make up more than one-quarter of the total volume of edible fish imported into this country each year. US fishermen catch hundreds of millions of dollars worth of tuna annually, most of it outside of US waters. Other straddling and highly migratory species of great significance to US fishermen include swordfish, pollock in the Bering Sea, as well as marlins, sailfish, and other billfish important to recreational fishermen. US recreational fishing of billfish has been valued at hundreds of millions of dollars annually.

The lack of an effective international regime has had a major impact on some of these species, and the potential for further damage to US interests is high. For example:

- The International Commission for the Conservation of Atlantic Tunas (ICCAT), the international fisheries management organization charged with managing tuna and other highly migratory species in the Atlantic, has failed to prevent disastrous depletion of bluefin tuna in the western Atlantic, contributing to severe catch reductions for US commercial fishermen.
- The lack of effective international controls has contributed to the severe depletion of swordfish in the North Atlantic and the virtual elimination of the US recreational swordfish fishery there.
- Catches of pollock in the high-seas "Donut Hole" area of the Bering Sea between the US and Russia soared to nearly 1.5 million metric tons in 1989 and then crashed to less than 11,000 tons in 1992. A moratorium on fishing for pollock in the Donut Hole and on the associated populations in the US and Russian zones has been in effect since the beginning of 1993, resulting in economic hardship for US fishers and coastal communities.[1]
- A number of species important to the US are not actively managed by any international authority. These include the North and South Pacific albacore fisheries, swordfish, marlin in the Pacific, and sharks in both the Atlantic and the Pacific. Management regimes are clearly needed for some of these fisheries: both North Pacific albacore and blue marlin in the Pacific are classified by NMFS as overutilized, and according to NMFS no mecha-

nism exists to even assess the status of most billfish in the Pacific, let alone effectively manage fishing for them.

Because high seas fish are so important—as imports to the US and for the domestic fishing and recreational fishing industries—it is in the interests of the United States to see that an effective international regime that ensures the sustainability of these species is established now, before the level of competition precipitates additional crises like those already suffered by bluefin, swordfish, and pollock.

C. The UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks

Stock crashes, the poor performance of a number of existing regional management organizations, and the increasing conflict between nations over fishing of species that occur both within and beyond the EEZs of individual nations led to an agreement at UNCED to conduct negotiations aimed at developing a more effective international regime for these fisheries. The UN negotiations began in July, 1993. Two more formal negotiating sessions are scheduled for March and July of 1995.

The negotiating text that emerged during the most recent session of the Conference, held at the UN in August, contains a number of provisions that have the potential to substantially improve the way straddling socks and highly migratory species are managed. For example, where no regional management organization or arrangement exists to govern active fisheries, the negotiating text would require that states cooperate to establish one. For new and existing regional management organizations, states fishing in a region would be required to participate. The text denies access to fisheries to states that neither participate nor cooperate, prohibits vessels of non-parties from fishing in a manner contrary to conservation and management measures agreed to by regional management organizations, and authorizes states participating to take measures consistent with international law that they deem necessary to deter such activities.[2] The text also requires nations and regional management organizations to adopt precautionary management measures, contains fairly strong language on compliance and enforcement, and provides for binding, compulsory dispute resolution, all essential to effective management of straddling and highly migratory species.

While a good start, the draft negotiating text requires strengthening in a number of key areas. For example, states and regional management organizations are required to apply the precautionary approach both within and outside the EEZs, but the provisions in the text that define the specific measures to be applied and how they must be implemented are weak. Strengthening the section of the text on precautionary management and the companion text in Annex 2 dealing with precautionary management reference points will be a crucial goal in the next round of negotiations. Other sections of the text needing improvement include those regarding NGO participation in, and the overall transparency of, regional management organizations.

Another major issue yet to be resolved is whether the final text should be legally binding or whether some type of nonbinding instrument such as a UN declaration should be adopted. The conservation community strongly supports a binding regime, which is essential to securing meaningful change in the way species that occur on the high seas are managed. In the wake of the US' decision in June to support adoption of a treaty, there are encouraging signs that a consensus is gathering in favor of a binding agreement. However, a number of key nations remain opposed.

Several additional hurdles lie in the path of achieving a strong, legally binding regime for the conservation and management of these fish. Major differences between nations over fundamental issues remain, such as the extent to which management and conservation measures will apply inside EEZs, and how to make measures taken inside and outside EEZs consistent. The enforcement and dispute resolution sections of the text remain controversial. The role of the U.S. in resolving these issues will be key; strong leadership is required if the treaty is to contain meaningful measures to halt overfishing and put international fishing on a more sustainable track.

Despite these hurdles, the process going on at the UN, while not a panacea, provides the best hope for improving the management of large pelagics and other high seas species of importance to the US on a broad scale. The UN Conference will also set an important precedent for international fisheries management throughout the world.

ENDNOTES

1. *The "Convention on the Conservation and Management of the Pollock Resources in the Central Bering Sea," recently signed in Washington, is designed to restore pollock in the Bering Sea and put the fishery on a more sustainable track. Unfortunately,*

however, this convention was negotiated only after the complete collapse of the fishery.

2. *These measures will buttress the recently negotiated flagging agreement, which prohibits vessels from reflagging to avoid conservation methods.*

The Precautionary Principle and the Law of the Sea Convention

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Over the past few years a precautionary principle has been increasingly incorporated into international policies for the environment.[1] As a paradigm for ecologically-aware ways of thinking, precaution stands in direct contrast to the traditional pollution control efforts which operate at the "end-of-pipe," and so merely filter contaminants after they have been created. Thus unlike previous control strategies, this emerging principle 1) places its emphasis on preventing environmental harm in the first place, 2) in cases of scientific uncertainty, it seeks to avoid discharge of potential contaminants into the environment; 3) it shifts the burden of proof off the environment and onto proponents of potentially harmful activities to show actions do not degrade ecosystems and is 4) implemented as by clean production strategies, and green consumption patterns.[2] The industrial nations are brimming with opportunities for pollution prevention--a close kin of precaution. Opportunities range from reducing over-packaging in consumer products, to designing cleaner industrial production strategies, to replacing toxins with benign substitutes within upstream manufacturing processes.[3]

Initially put forward in an international setting at the First Ministerial Conference on North Sea Pollution (held in Bremen) in 1984, the idea of precaution was strengthened at the Second North Sea Conference in 1987 (London) and was reinterpreted at the Third Conference of 1990 (The Hague).[4] The principle is now provoking a wide variety of responses from industrialized nations. Views currently range from a resistance to precautionary action in the case of Britain,[5] to early aspirational acceptance as by Germany and the Nordic nations (whether Germany and the Nordic nations follow through with forceful precautionary policies remains to be seen).[6] Thus a meaningful question arises whether this nascent principle will be abandoned or embraced in future international agreements. It is clear the concept has grown increasingly evident--as seen in the 1991 Bamako Convention for Regulation of Pesticides and Hazardous Wastes (in Africa), and Principle 15 of the Rio Declaration (1992 U.N. Conference on the Environment and Development).[7] Still other instances of precautionary action are the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, the moratorium against whaling, and suspension of disposal of low-level radioactive wastes at sea (without approval of Consultative Parties to the London Dumping Convention).[8]

On the other hand, closer examination of this principle as actually implemented reveals a startlingly different picture. Precautionary thinking had seemingly found early consensus with conclusion of the Second North Sea Conference in 1987. Since that time, however, lack of robust application of precautionary thinking has given its advocates reason for concern. Irresolute efforts to enact precautionary measures at a subsequent Third North Sea Conference have not met environmentalists' expectations.[9] Also, significantly, as seen in strong opposition as expressed at the 1990 Bergen Conference and again at the 1990 Second World Climate Conference, the U.S. is so far generally resisting the precautionary principle.[10] Overall given the key role of the 1982 UNCLOS in establishing norms and principles within international law, the existence--or more accurately absence, of true precautionary action in UNCLOS III merits consideration. Conversely on a domestic front, is precautionary thinking currently embodied in America's Magnuson Act? If not, what type of changes would make fisheries management more precautionary in intent?

Here the recent evolution of the UNCLOS regime is instructive. Of four conventions making up the 1958 UNCLOS I, only the one on the Fishing and Conservation of Living Resources of the High Seas imposed a responsibility to conserve marine resources.[11] In that regime, conservatory obligations were put forth in simplistic terms. Management was not modified by holistic ecological factors such as by complex and cascading anthropogenic impacts; instead, the sole aim

was to maximize fish catch and thus the food available for nations.[12] Fish were not distinguished from marine mammals, nor from the desired highly-migratory species, which left a potential and reality of over-exploitation. From a conservationist perspective, problems with this Convention were legion: distant water fishing nations like Japan and Russia never joined; scientific recommendations for catch efforts could be modified by political and economic considerations--and usually towards overfishing; enforcement was sorely lacking and international inspections were rare; the few procedures for dispute settlement were seldom activated; and nations often viewed the UNCLOS I fisheries' conservation goals as a moral code they preferred to meet, but were prepared to violate if the need was felt.[13] A chief aim of the UNCLOS I regime was not resource conservation, but limiting foreign access to coastal fisheries.

Does the 1982 UNCLOS contain precautionary thinking? Arguably, the UNCLOS III is non-precautionary. It was negotiated as a "package deal" (unlike the quartered 1958 UNCLOS I), thus thorny conservatory matters incapable of consensus were finessed by vague and ambiguous language. Instead of expressly allocating specific levels of total allowable fishing, and agreeing on a robust conservationist definition for Maximum Sustained Yield (MSY), these issues are left at the discretion of nations, or to subsequent agreements.[14] No mechanisms coordinate UNCLOS's assorted jurisdictional regimes for different species which de-emphasizes the marine ecosystems and habitat protection approaches precaution implies (though Articles 61 and 94 go part way towards this goal).[15] New linkages between Parts V and VII on fisheries, and Part XII on pollution prevention could acknowledge inter-relationships between pollution and vitality of stocks.[16] The extant provisions to protect marine environments, as for instance in Part XII are merely hortatory and so nonbinding--and thus more aspirational than operational.[17] Definitive standards are absent from UNCLOS as for waste discharge and reducing contaminants via pollution prevention.[18] UNCLOS III is akin to nascent precaution in one respect. By allowing the creation of the 200-mile Exclusive Economic Zones, and so moving towards ocean enclosure, the regime permits individual nations to take steps towards conservation. However the track record in this regard is disheartening. During the period of nearly two decades that have elapsed since America enacted its 1976 Magnuson Act, this nation has not managed fisheries wisely. Overfishing by foreign ships has merely been replaced by a domestic variety. In light of new recognition of marine ecosystems complexity, it is now possible to identify ways this Act can function in ways analogous to precautionary action.[19] Because very little is known about ecosystem fluctuations, and management is undertaken in the face of sizable scientific uncertainty, a precautionary approach acknowledges this hazard by requiring more conservative governance than is the norm under MSY. Most critically this regime should require reductions in total catch efforts to more conservative figures where uncertainty exists. That errors are rife throughout fisheries management ought to have significant meaning for decisionmaking. It should mean "for modest levels of catch relatively little information is needed to ensure that the risks to a stock are held below a given level, but the required amount of information escalates rapidly when the resource is pushed to its limits."[20]

Injecting the precautionary principle into the Magnuson Act would have other notable consequences as well. It requires government select for types of fishing gear and methods that specifically minimize disturbances to marine ecosystems--and that it regulate or ban outright the gear and methods of fishing that are relatively destructive.[21] Precautionary action also mandates strenuous efforts to prevent the inefficient incidental killing of non-target species (bycatch) which causes stress to ecosystems.[22] Also, areas of productive marine habitat should be now set aside as marine protected reserves so as to assist in essential recruitment of new age classes, and help maintain critical biological diversity.[23]

In conclusion there is scope within UNCLOS III for a precautionary approach, if nations take the politically-difficult option of setting conservative goals for fisheries. The American experience of the Magnuson Act indicates nations are not yet ready to do so. It is still likely ongoing overfishing will occur--and that marine ecosystems will be drastically altered--before real reductions in fishing efforts are achieved. On the other hand, recent movement towards precautionary thinking in environmental regimes provides much reason for hope. Once the ecological crisis of overfishing becomes apparent, and a political will exists to adopt precautionary action/conservation in ocean governance, the UNCLOS III regime can provide a vehicle for better stewardship of the marine environment.

ENDNOTES

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4. *Bernard A. Weintraub,* Science, International Regulation, and the Precautionary Principle: Setting Standards and Defining Terms, *N.Y.U. ENVIRONMENTAL LAW JOURNAL 173, 188-189 (1992).*

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6. *Greenpeace Paper 32,* supra *note 5; Cameron & Aboucher,* supra *note 5.*

7. *Margo B. Baender,* Pesticides and Precaution: The Bamako Convention as a Model for an International Convention on Pesticides Regulation, *24 N.Y.U. JOURNAL OF INTERNATIONAL LAW AND POLITICS 557, 594 (1991). See also, Thorne-Miller,* supra *note 2, at 27-28.*

8. *Patricia W. Birnie and Alan E. Boyle, INTERNATIONAL LAW AND THE ENVIRONMENT 98-102, 406 (1992).*

9. *Greenpeace Paper 32,* supra *note 5, at 1-4. See also, Kevin Stairs and Peter Taylor,* Non-Governmental Organizations and the Legal Protection of the Oceans: A Case Study, *in THE INTERNATIONAL POLITICS OF THE ENVIRONMENT 110, 134-141 (Andrew Hurrell and Benedict Kingsbury, eds., 1992).*

10. *Weintraub,* supra *note 4, at 173-223. Note, however, the strong U.S. position on the UN Driftnet Resolution, which has served to advance a precautionary approach. See William T. Burke,* Unregulated High Seas Fishing and Ocean Governance, *in FREEDOM FOR THE SEAS IN THE 21ST CENTURY: OCEAN GOVERNANCE AND ENVIRONMENTAL HARMONY 235, 256-265 (Jon Van Dyke et al., eds, 1993). This remarkable U.S. position for high seas driftnets seems an exception to the more general rule, which has been U.S. resistance to application of the precautionary principle.*

11. *Patricia W. Birnie And Alan E. Boyle, INTERNATIONAL LAW AND THE ENVIRONMENT 504 (1992).*

12. Id.

13. Id.

14. Id.

15. Id.

16. See id.

17. *Robert L. Friedheim, NEGOTIATING THE NEW OCEAN REGIME 287-288 (1993).*

18. Id.

19. *"To date there is no generally accepted definition of what elements should characterize a precautionary approach in the context of fisheries." Justin G. Cooke, "The Precautionary Approach to Fisheries and Reference Points for Fishery Management," (report by IUCN--World Conservation Union, for the UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, held in New York, 14-31 March 1994).*

20. Id. *at 7.*

21. See Id. *at 1.*

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23. *Ken Kelley,* The Marine Fish Conservation Network: Pressing for basic changes in how fisheries are managed, *74:12 NATIONAL FISHERMAN 56, 56-57 (April 1994).*

The Division of America's Offshore Zones as Between Nation and State

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To discuss the division between the States and the federal government of America's offshore zones, it is first useful to identify those zones. In recent years, the federal government has added a new maritime zone to its dominion, and it has broadened the geographic scope of older zones. (And, it should be said, it has not seen fit to eliminate or contract any zones. It has seen fit, though, to seek to contract the States' offshore zones.) Having identified America's offshore zones, this paper will then relate a bit of the history of how the States got to have any little piece of them, and in the last section describe what offshore jurisdiction the States now enjoy.

The Present List of U.S. Offshore Zones, and Their Breadths

A. The Territorial Sea.

The territorial sea may be the maritime zone most mentioned in the United States today. On December 27, 1988, President Reagan by Proclamation extended the American Territorial Sea from three to twelve miles.[2] The Territorial Sea is that zone over which the coastal state exercises sovereignty as fully as over its land territory, subject to the rights of foreign vessels to innocent passage and archipelagic sea-lanes passage.[3] Most of the other coastal nations of the world also claim twelve miles as the breadth of their territorial seas. Indeed America probably had a twelve-mile territorial sea, or at least a nine-mile territorial sea, for some time in the past, though it was not actually called that then.

In 1782 the United States asserted that nine miles was a reasonable breadth for its territorial sea.[4] In 1790, Congress extended American authority over smuggling to a distance of twelve nautical miles from the coast,[5] and in February of 1793 Congress established customs jurisdiction to a distance of nine nautical miles.[6]

It is true enough that, on April 22 of that latter year, Secretary of State Jefferson declared a three-mile American territorial sea for neutrality purposes.[7] But several months later, on November 8, Jefferson wrote both the Spanish and French ministers to the United States that America was entitled to "as broad a margin...as any nation," and reserved "the ultimate extent of the [territorial sea] for future deliberations."[8] Jefferson later explained that the United States had been forced to accept three miles, and in 1805 suggested that the Gulf Stream would make a good outer limit of the American territorial sea.[9]

During the mid-nineteenth century, foreign governments were not at all beguiled by American pretensions to a mere three-mile territorial sea. The clear-headedness of these governments is illustrated by a diplomatic incident in the 1860s precipitated by our protest of Spain's claim to a six-mile territorial sea off Cuba. In reply to a letter from Secretary of State Seward, Spanish Minister Tassara wrote on December 30, 1862 that the United States' claim to a "much more extensive" territorial sea, one having a breadth of twelve miles, was quite notorious in the international community.[10]

Nevertheless the United States long sought to assert that it claimed but a three-mile territorial sea. It asserted this in its correspondence with Minister Tassara in 1862 and also during World War II, when it declared defense zones of several hundred miles.[11] In 1945, the United States broke with the rest of the world and proclaimed sovereignty (or is "jurisdiction" the euphemism of art?) over the Continental Shelf[12] and in 1958 and 1960 when it sought international agreement on a six-mile territorial sea.[13] It maintained that when, in 1970, it proposed that all the coastal nations of the world adopt a twelve-mile territorial sea.[14] It asserted this in 1976 when it declared a 200-mile fishery conservation zone[15] (this at a time when the International Court of Justice had just recently suggested that twelve miles was the maximum permitted breadth for such a zone[16]). And it asserted that when, in 1983, having refused to sign the 1982 Convention on the Law of the Sea, it unilaterally proclaimed a 200-mile Exclusive Economic Zone, which, of course, is provided for by the Convention.[17] This consistency has been hobgoblin-like.

The venerable territorial sea is the most long-lived of the maritime zones in use today but, with the coming of claims to Continental Shelves and Exclusive Economic Zones, its importance to coastal nations—notwithstanding all the talk about the recent American proclamation—is far less than what it was as recently, even, as the 1950s.

B. The Contiguous Zone

The Contiguous Zone, which lies adjacent to a state's Territorial Sea, is a maritime zone in which the coastal state may exercise powers necessary to:

(a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations with its territory or territorial sea;

(b) punish infringement of the above laws and regulations committed within its territory or territorial sea.[18]

The 1958 Convention on the Territorial Sea and the Contiguous Zone, in Article 24.2, permitted a maximum breadth of twelve miles for the contiguous zone; Article 33.2 of the 1982 Convention allows 24 nautical miles. The President's Proclamation of December 27, 1988 did not extend the breadth of the United States' Contiguous Zone, and so it maintains its former breadth of twelve miles, which makes it precisely coextensive with the American Territorial Sea.

C. The Fishery Conservation Zone

Until its amendment in 1986, the Fishery Conservation and Management Act of 1976 ("FCMA") established the Fishery Conservation Zone, which began at the seaward boundary of each coastal state[19] and extended to 200 miles from the baseline from which the territorial sea was measured.[20]

In 1986 the FCMA was amended to eliminate all references to the Fishery Conservation Zone. In its place, the United States claimed "sovereign rights and exclusive fishery management authority over all fish, and all Continental shelf fishery resources, within the exclusive economic zone."[21] The ramifications of this change are discussed later in this paper.

D. The Continental Shelf

The 1958 Convention on the Continental Shelf defined the Continental Shelf by the "exploitability" criterion. That is to say, the Continental Shelf extends waterward to a depth of 200 meters and, beyond that, to whatever depths permit the exploration of the resources of the seabed and the subsoil of the Shelf. This criterion has been supplanted in Article 76 of the 1982 Convention. The new formulation provides: "The Continental Shelf of a coastal state comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baseline from which the breadth of the Territorial Sea is measured where the outer edge of the continental margin does not extend up to that distance."

The geologic definition of the continental margin contained in the 1982 Convention is exceedingly complicated, but suffice it to say that, in certain geological circumstances, the 1982 Convention permits states to claim continental shelves to distances as great as 350 nautical miles from the baseline from which the territorial sea is measured. Two claims, by Chile and by Ecuador, each made in September of 1985, provide examples. On September 12, Chile proclaimed jurisdiction over the Continental Shelves of the Eastern and Sala y Gomez Islands extending to a distance of 350 nautical miles from the territorial-sea baseline. On September 19, Ecuador issued a similar proclamation asserting its jurisdiction over the Continental Shelf extending between mainland of Ecuador and the Galapagos Islands. The United States contested these claims on the ground the geologic facts did not satisfy the criteria of Article 76.4 of the 1982 convention.[22]

Whether the United States, which has not signed the 1982 Convention, is permitted to claim a continental shelf in accordance with Article 76 is a nice question.[23] By 1980, it was generally thought that the seaward limit of the American Continental Shelf stood at the 1000-fathom isobath (20 to 50 miles offshore in the case of California)—the then-existing limit of exploitability. The President's Proclamation of March 10, 1983, declaring a 200-mile Exclusive Economic Zone (EEZ) produced an unusual claim by the Department of Interior relating to the Outer Continental Shelf Lands Act. The Solicitor of the Department of Interior on May 30, 1985, issued an opinion on the question of seaward extent of the Department's jurisdiction under the Outer Continental Shelf Lands Act in light of the EEZ Proclamation. 92 Interior Decisions 459 (1985).

The Solicitor's Opinion was that on March 10, 1983, by no act of Congress but by virtue of the Proclamation (which made no mention of the Outer Continental Shelf Lands Act), the outer limit of the Department's jurisdiction over the "outer Continental Shelf" leapt from its location on March 9, at approximately the 1000-fathom

contour, to a new limit precisely 200 miles from the territorial sea baseline. (The landward limit of the jurisdiction of the Department of Commerce under the Deep Seabed Hard Minerals Resources Act, would, if the Solicitor is correct, have made a corresponding leap seaward. See 30 U.S.C. §1403(4).) The new limit is not related to any geologic concept of continental shelf, nor to the legal concept of "continental shelf" that had been employed in American law from 1945 until, at least, March 9, 1983.

While the Solicitor's Opinion fills 52 printed pages in Interior Decisions, its essence is found in two sentences on its third page. The Solicitor first notes that in section 2(a) of the OCSLA, Congress defined the expression "outer Continental Shelf" to mean

...all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 1301 of this title, and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control.

43 U.S.C. section 1331(a).

The Opinion then notes (correctly) that the question presented is "when may the subsoil and seabed of its submerged lands be said to 'appertain' to the U.S. and to be 'subject to its jurisdiction and control.'" 92 I.D. at 461. The critical two sentences are then stated:

On its face, the area described by this statutory definition is an expanding one: if a given area of subsoil and seabed becomes subject to the U.S. jurisdiction and control and appertains to the U.S., then that area falls within the definition. The plain meaning of section 2(a) must be followed, unless some unstated limitations must be inferred.

92 I.D. at 461 (footnote omitted).

Without citation of authority, the Solicitor concludes that the plain-meaning rule holds sway, and not any of the several other, usually more preferred rules of statutory construction, such as those suggesting a construction in accordance with contemporaneous circumstances. See generally Train v. Colorado Public Interest Research Group, 426 U.S. 1, 9-11, 23-24 (1976).

Even so, the "plain meaning" attributed by the Solicitor to the OCSLA's definition of "outer Continental Shelf" is not so plain at all. The Solicitor takes great lengths to show that, ever since 1953, the area of the American Continental Shelf had been thought to be expanding. 92 I.D. at 465-68. That is true enough. But the Shelf expanded not because its definition continually changed, but because its definition, fixed in its terms, spoke of the limits of exploitability—and those limits changed. The Truman Proclamation of September 28, 1945, made emphatic reference to the exploitability concept,[24] and the concept, as is well known, was subsequently codified in Article 1 of the 1958 Convention on the Continental Shelf. Substantial areas of the seabed and subsoil that were unexploitable in 1953 were, by 1980, exploitable. In 1953, 100 fathoms of depths was considered the limits of exploitability; by 1980 it was 1000 fathoms.

E. Exclusive Economic Zone.

The 1982 Convention on the Law of the Sea provides in Articles 55 and 57 that every coastal state enjoys an Exclusive Economic Zone ("EEZ") adjacent to its coast, extending as far as 200 nautical miles from the territorial sea baselines. The President's Proclamation of March 10, 1983 proclaimed a 200-mile EEZ for the United States, notwithstanding that we have not refused to ratify the 1982 Convention.[25]

How the States Got What Little They Got

Disputes as to the division of offshore jurisdiction between the federal and state governments have historically arisen mostly in the context of title to offshore submerged lands. With some exceptions, it had long been settled that the States acquired title to the submerged lands of all inland waters within their territories upon admission to the Union. Pollard's Lessee v. Hagen, 44 U.S. (3 How.) 212, 228, 229 (1845).[26] The maritime-jurisdiction disputes of present interest first arose in 1945. The question in that first case, brought by the federal government against California, was whether the states owned any submerged lands off their coasts seaward of the ordinary low watermark, for that line was the seawardmost limit of state ownership then admitted by the federal government. That, of course, was the same year as President Truman's Proclamation on the Continental Shelf. The United States Supreme Court swiftly decided that the federal government, and not California, enjoyed "paramount rights"—something apparently not the equivalent of title—to the submerged lands seaward of the coastline of California. United States v. California, 332 U.S. 19, 39 (1947). In short order this principle was applied to the States of Louisiana and Texas. United States v. Louisiana, 339 U.S. 699, 704-705 (1950); United States v. Texas, 339 U.S. 707, 718 -720 (1950).

Following the decisions in the California, Texas and Louisiana

cases, the federal-state dispute focused on the location of the boundary between the state-owned beds of inland waters, and the federally owned offshore submerged lands. In the California case, a Special Master was appointed to locate the legal coastline of California and, in the process, determine the status, as inland waters or not, of several water bodies such as Monterey Bay and the Santa Barbara Channel. Extensive hearings were conducted in 1952 before the Special Master on these questions.[27]

From the perspective of the coastal States, the following can be said of these early jurisdictional disputes:

1. The whole matter of offshore jurisdiction, and hence of boundaries separating federal and state submerged lands, arose at the least propitious time in American history.
2. From the outset, these disputes have been perceived by the Supreme Court as ineluctably entailing foreign relations; from this perception an undue, indeed inordinate deference has been accorded the views of the federal government, the custodian of our foreign relations.
3. This deference has encouraged the United States to take absurdly conservative positions as to the location of its coastline—nominally in the name of foreign relations, but in truth for the purpose of enlarging the government's Outer Continental Shelf holdings. Its consistent refusal to employ straight baselines where the geography begs for them is one such example.
4. While it niggardly delimits its coastlines, the United States continues to make expansionist claims to ocean resources, redolent of the Truman Proclamation in 1945. In 1976, the United States unilaterally claimed a 200-mile fishery zone; in 1983 President Reagan declared a 200-mile exclusive economic zone, enlarging by a factor of four the sub-marine areas claimed as sovereign U.S. property. And in 1988 he declared a 12-mile territorial sea. Yet, by virtue of language in prior Supreme Court opinions, the states may receive no benefits from these acts of American foreign policy in the law of the sea.
5. The Department of the Interior has been the bête noire in this episode. As one articulate writer has commented:

   > [T]he principal engine for expansion of United States government continental shelf claims during the 1930s and early 1940s was the Interior Department, and in particular its secretary, Harold Ickes. Secretary Ickes worked persistently to gain control of offshore lands for the federal government and to extend the boundary of the continental shelf for the nation. He was willing to pursue any available means including legislation, litigation, and executive proclamation.[28]

More recently, when the Court in 1969 had sent its clearest signal that it would maintain obeisance to the positions of the Government in these cases, the Government formed in 1970 an inter-agency committee, commonly called the "Baselines Committee." The function of this Committee is to determine the United States' baseline, and delimit the outer boundaries of the territorial sea, contiguous zone, and now, the exclusive economic zone. Most of the Committee's membership—representatives of the Departments of State, Defense and Commerce, for example—is unobjectionable enough. But the participation of the Department of the Interior on the Committee has long chafed the States. Interior would seem to have no cause to enter the business of formulating foreign policy, save as that policy serves an ulterior purpose—determining the boundary between state submerged lands and the outer continental shelf, which the Department manages.

The basis for this coastal State perspective on these maritime-jurisdiction disputes may be found in a selection of events, some which are not commonly associated with these disputes.

- December 18, 1944. The United States Supreme Court decides Korematsu v. United States, 323 U.S. 215, 222, upholding, for all intents and purposes, the establishment of detention centers for American citizens of Japanese ancestry.

  > Korematsu v. U.S.... represents the nefarious impact that war...can have on institutional integrity and health.[29]

- August 14, 1945. The Allies are victorious over Japan. The formal surrender takes place aboard the U.S.S. Missouri on September 2, 1945.
- September 28, 1945. President Truman signs Executive Proclamation 2667, declaring to the world 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." 59 Stat. 884. Soon afterwards, in an effusion of jingoistic hyperbole, Professors Clark and Renner of Columbia University write that the proclamation constitutes "one of the decisive acts in history, ranking with the discoveries of Columbus as a turning point in human destiny." Clark and Renner, "We Should Annex 50,000,000 Square Miles of Ocean," Saturday Evening Post 16 (May 4, 1946).

- October 19, 1945. The federal government files suit against California to establish its title to the submerged lands. Paragraph 2 of the complaint against California alleges:

At all times herein mentioned, plaintiff was and now is the owner in fee simple of, or possessed of paramount rights in and powers over, the lands, minerals and other things of value underlying the Pacific Ocean, lying seaward of the ordinary low watermark on the coast of California and outside of the inland waters of the state, extending seaward three nautical miles and bounded on the north and south, respectively, by the northern and southern boundaries of the state of California.[30]

With these events as prologue, it should have come as no surprise that the Supreme Court in 1947 embraced the alternative submission of the United States, holding that it, and not California, was possessed of paramount rights in the submerged lands within the three-mile belt. The Court's rationale discloses the profound influence of those events:

> The ocean, even its three-mile belt, is thus of vital consequence to the nation in its desire to engage in commerce and to live in peace with the world; it also becomes of crucial importance should it ever again become impossible to preserve that peace. And as peace and world commerce are the paramount responsibilities of the nation, rather than an individual state, so, if wars come, they must be fought by the nation.

United States v. California 332 U.S. 19, 35 (1947).

At most other times in American history, the title of the States to the offshore submerged lands would have been thought secure. Even the Supreme Court conceded, in its 1947 decision in the California case, that prior to the dispute it had generally been understood that the States owned the natural resources of the submerged lands within the three-mile belt. The Court cited for this understanding Manchester v. Massachusetts, 139 U.S. 240, Louisiana v. Mississippi, 202 U.S. 1, 52, and The Abby Dodge, 223 U.S. 166. 332 U.S. at 36-37.

Too, the recognition of the States' title in administrative actions of the federal government had been as consistent as California could have hoped. F. W. Clements, for 35 years a law officer in the Department of the Interior, testified before Congress in 1939 that all requests for entry or claim in the submerged lands during his experience in the department "were uniformly turned down, since they were deemed the property of the states."[31]

Indeed, even the acquisitive Secretary Ickes denied an application for a federal mineral prospecting permit in the submerged lands off the coast of California in 1933 with the following words:

> [N]o rights can be granted to you either under the Leasing Act of February 25, 1920 (41 Stat. 437), or under any other public-land law to the bed of the Pacific Ocean either within or without the three-mile limit. Title to the soil under the ocean within the three-mile limit is in the state of California, and the land may not be appropriated except by authority of the State. A permit would be necessary to be obtained from the War Department as a prerequisite to the maintenance of structures in the navigable waters of the United States, but such a permit would not confer any rights in the ocean bed.[32]

As one observer has written, "What clearer declaration of policy could be made by one in high authority, especially one charged with administration of the public lands of the United States and presumably knowing the law and settled policies in regard to what were, and what were not, considered lands of the United States?"[33]

Notwithstanding these unequivocal recognitions of the states' title by the Supreme Court and by the Department of the Interior, the events of the decade, or so preceding the filing of the complaint against California, should have warned of the inauspicious time of the commencement of the litigation.

The leading players in these events were, again, Harold Ickes, and as well President Roosevelt himself. One writer has observed:

> President Franklin D. Roosevelt's willingness to extend coastal jurisdiction for a variety of purposes was particularly striking. In the decade prior to the Truman proclamations, his proclivities resulted in a number of claims characteristic of a regional or middle

> power strong enough to defy the prevailing legal system, yet too weak to impose a new legal regime.[34]

As examples, the United States enacted anti-smuggling legislation in 1935 which permitted the president to declare a customs-control area extending 100 miles north and south from where a suspected ship was hoving, and creating an additional band of 50 miles' width seaward of the 12-mile customs zone.[35]

In 1939, the United States successfully proposed to an inter-American meeting of ministers of foreign affairs that neutrality zones be created around the hemisphere to be patrolled individually or collectively by the American republics. The resulting Declaration of Panama adopted the U.S. proposal for a defense zone which extended 300 miles and more from shore. President Roosevelt personally drew the connecting straight lines of the zone, which in some areas extended the defense area considerably beyond 300 miles.[36]

On July 1, 1939, Roosevelt wrote the Attorney General and the Secretaries of State, Navy and Interior:

> I am still convinced that: (a) federal as opposed to state jurisdiction exists below low-watermark...and that (b) federal jurisdiction can well be exercised as far out into the ocean as it is mechanically possible to drill wells.
>
> I recognize that new principles of international law might have to be asserted but such principles would not in effect be wholly new, because they would be based on the consideration that inventive genius has moved jurisdiction out to sea to the limit of inventive genius.[37]

Meanwhile, Secretary Ickes was, perhaps not inexplicably, coming round to his President's point of view. Precisely why is unclear but, whatever Ickes' motives, by 1943 the forces that would lead two years later to both the Continental Shelf Proclamation and the filing of the California case were in one motion. In that year, General Land Office officials wrote Ickes that the wartime situation offered an ideal opportunity to strike "from our own thinking and international law the shackles of the three-mile limit for territorial waters. ...In the interest of national and domestic security" the United States should adopt a "line of 100 or 150 miles from our shores" thereby taking the United States "beyond the continental shelf and reserving this valuable asset for the United States..."[38] Secretary Ickes took these notions to the president, who immediately embraced them. On June 9 Roosevelt wrote Secretary of State Cordell Hull:

> I think Harold Ickes has the right slant on this. For many years, I have felt that the old three-mile limit or a 20-mile limit should be superseded by a rule of common sense. For instance, the Gulf of Mexico is bounded on the south by Mexico and on the north by the United States. In parts of the gulf, shallow water extends very many miles off shore. It seems to me that the Mexican government should be entitled to drill for oil in the southern half of the gulf and we in the northern half of the gulf. That would be far more sensible than allowing some European nations, for example, to come in there and drill.[39]

The Truman proclamations were issued on September 28, 1945. Precisely three weeks later, the federal government sued California in the Supreme Court's original jurisdiction.

California chose, in pleading to the government's complaint, to avoid the pitfalls of omission. Its answer was in three volumes of 822 printed pages, and weighed 3 pounds, 9 ounces.[40] The answer must have adduced every known incident that could be construed as an acknowledgment of the state's title to the submerged lands. The United States promptly moved the Court for an order striking the answer on the ground of "excessive prolixity." Following negotiations, California filed a more succinct answer on May 21, 1946,[41] and the case was argued on March 13 and 14, 1947.

Before the case was decided, Congress enacted the first of three bills that would have quitclaimed any federal interest in the submerged lands to the state.[42] It was promptly vetoed by President Truman.[43]

The decision in the California case, about which no one should have been surprised, was handed down June 23, 1947. In it, as mentioned before, the Supreme Court declined to embrace the government's primary submission that it owned the submerged lands in issue, and chose instead to achieve the same result—insofar as proprietary rights in the oil were concerned—by adopting the paramount-rights argument. An incident of these "paramount rights," wrote Justice Black for the majority, is "full dominion over the resources of the soil under that water area, including oil." The most perspicacious analysis of the Court's decision is found in the dissenting opinion of Justice

Frankfurter, who wrote:

> [The court does not find] that the United States has proprietary interests in the area. To be sure, it denies such proprietary rights in California. But even if we assume an absence of ownership or possessory interest on the part of California, that does not establish a proprietary interest in the United States.
>
> Of course the United States has "paramount rights" in the sea belt of California—the rights that are implied by the power to regulate interstate and foreign commerce, the power of condemnation, the treaty-making power, the war power. We have not now before us the validity of the exercise of any of these paramount rights. Rights of ownership are here asserted—and rights of ownership are something else. Ownership implies acquisition in the various ways in which land is acquired—by conquest, by discovery and claim, by cession, by prescription, by purchase, by condemnation. When and how did the United States acquire this land?
>
> To declare that the Government has "national dominion" is merely a way of saying that vis a vis all other nations the Government is the sovereign. If that is what the court's decree means, it needs no pronouncement by this court to confer or declare such sovereignty. If it means more than that, it implies that the Government has some proprietary interest. That has not been remotely established except by sliding from absence of ownership by California to ownership by the United States.
>
> On a fair analysis of all the evidence bearing on ownership, then, this area is, I believe, to be deemed unclaimed land... It is noteworthy that the court does not treat the president's proclamation in regard to the disputed area as an assertion of ownership. See Exec. Proc. 2667 (September 28, 1945) 10 F.R. 12303. If California is found to have no title, and this area is regarded as unclaimed land, I have no doubt that the president and the Congress between them could make it part of the national domain...[44]

Significantly, the Court in its 1947 California opinion foreshadowed the decision it would make nearly 30 years later in United States v. Maine[45] 420 U.S. 515 (1975) by finding that there was sparse historical support for the proposition that the 13 original colonies acquired separate ownership of the three-mile belt or the soil under it. That was so, wrote the Court, notwithstanding that the colonies' revolution gave them elements of the sovereignty of the English crown.[46]

The federal government marauded two Gulf Coast States in short order, and succeeded against each in 1950. The Court found that Louisiana's claim to the lands underlying the marginal sea and beyond were no more compelling than California's claims.[47] The Court also rejected Texas's claim, notwithstanding Texas's existence as an independent republic prior to admission to statehood.[48] Ironically, the same principle upon which California and Louisiana had grounded their arguments, the equal-footing doctrine, defeated Texas' argument. Texas argued that as a republic, it had possessed full sovereignty over the territorial sea as well as ownership of it. The Court held, however, that Texas had relinquished sovereignty and ownership to the national government upon admission to the Union. That then placed Texas on an equal footing with the other States.[49]

Upon deciding the 1947 California case, the Court appointed William H. Davis of New York as Special Master to delineate the "ordinary low water mark" along certain disputed segments of the California coast. The Special Master's report was filed with the Court in 1952,[50] but before the Court took it up, Congress passed the Submerged Lands Act.[51] That Act "restored" to the seaboard states the rights to their offshore submerged lands, rights Congress evidently thought the California decision of 1947 had divested.[52] The Act quitclaimed to California and the other coastal states whatever interest the federal government may have had in the lands and natural resources therein lying within three geographic miles seaward of the "coast line";[53] in the instances of Texas and of Florida, on Florida's Gulf Coast, the grant of the Act, as decided in later cases, operates to nine geographic miles.

The Submerged Lands Act defined "coast line" as "the line of ordinary low-water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters."[54] That term has been the principal point of contention in the thirty years of litigation, virtually all of which has occurred in the Supreme Court's original jurisdiction,[55] following passage of the Act.

At the same time as its passage of the Submerged Lands Act, Congress enacted the Outer Continental Shelf Lands Act, which declared that the subsoil and

seabed of the outer continental shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition.[56]

What the States Now Have—That Is To Say, How The Federal Government Has Deigned To Divide Its Offshore Zones With The States.

Because of the 1947 California decision, what jurisdiction the States now enjoy in offshore zones exists virtually all by dint of the largess of Congress. That is to say, even though a State's boundaries extend three, in two cases nine nautical miles from the coast, the States basically possess there only what authority Congress confers on them.

Still, the decision of the Supreme Court in Skiriotes v. Florida, has not expressly been overruled:

If the United States may control the conduct of its citizens upon the high seas, we see no reason why the state of Florida may not likewise govern the conduct of its citizens upon the high seas with respect to matters in which the State has a legitimate interest and where there is no conflict with the acts of Congress.

313 U.S. 69, 77 (1941).

The court held in Skiriotes that Florida had a legitimate interest in regulating its citizens' fishing activities in waters even beyond its borders. Skiriotes is a maritime application, or extension, of the preemption doctrine, which doctrine has its constitutional origin in the Supremacy Clause of the federal Constitution. Ordinarily, then, one would think that the States would be free to regulate within their boundaries, except when a statute of Congress acted to "occupy the field." See DeCanas v. Bica, 424 U.S. 351, 357-58 (1976); Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 480 (1974); Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117, 127 (1973). The Paramount Rights Doctrine, however, as the past 40 years have shown, has served to turn the preemption rule on its head: Now, it seems, the States may not act unless Congress specifically permits them.

There are a host of statutes that spell out these divisions of authority, between nation and state, in the offshore zones of the United States, but five are most pertinent. It is useful first to examine these five principal statutes, to see how each leaves a small package of authority for the coastal states. Then one can riffle through the list of U.S. offshore zones identified in the first section of this paper, and see in what cases the federal authority is shared with the states.

A. The Submerged Lands Act And The Outer Continental Shelf Lands Act of 1953.

This pair of statutes acted to divide the Continental Shelf of the United States between the nation and state, or, put another way, to "restore" to the coastal states the rights to the subsoil and seabed within the territorial sea that were confirmed in the federal government in the 1947 California decision. As observed in the second section of this paper, the part of the Continental Shelf that was apportioned to the coastal States in this pair of statutes was not expressed in terms of the area lying within the territorial sea (or as it was sometimes called then, the "marginal sea"). Instead, the grant extended to a distance of three nautical miles from the "coastline" of the coastal states, with, as it turned out, two exceptions, in the cases of Texas and Florida. The geographic limits of the grants are expressed in sections 2(a) and 2(b) of the Submerged Lands Act, which contain no provision for an extension of state jurisdiction under the Act should the United States proclaim a broader territorial sea.[57]

B. The Clean Water Act, 33 U.S.C. §§ 1251, et seq.

Under this statute, a State may regulate water quality within the territorial sea if it has developed and gotten "certified" by the United States a water-quality program under section 402 of the Act.

C. The Magnuson Fishery Conservation and Management Act of 1976, 16 U.S.C. §§ 1801, et seq.

This statute, which formerly established the Fishery Conservation Zone, now implements the exclusive economic zone ("EEZ") purportedly established by Presidential Proclamation 5030 (March 3, 1983). Curiously, while the EEZ is defined under Proclamation 5030 as a zone extending "to a distance of 200 miles from the baseline from which the breadth of the territorial sea is measured," it is measured differently for purposes of applying the FCMA. Under the FCMA, the inner boundary of the zone is "a line coterminous with the seaward boundary of each of the coastal states."[58]

Because "seaward boundary of the coastal state" was, most probably, intended to refer to the seaward limit of the lands granted under the Submerged Lands Act, the United States' EEZ for FCMA purposes off the coast of California is 197 miles wide, while for all other purposes the EEZ is only 188 miles wide, since the territorial sea is 12 miles in breadth. Conversely, off the coasts of Texas and Florida, the EEZ for FCMA purposes is 191 miles wide, while for other purposes it is 188 miles wide. Thus, while the 1986 amendment to the FCMA did not substantively

change any of the jurisdiction previously enjoyed under the Act, it did create an inconsistency in the geographic read of the EEZ.

Nevertheless, the FCMA does provide two examples of Congress not intending to occupy the field. First, it left in the States the authority to regulate fisheries within the area granted by the Submerged Lands Act. Second, under the Skiriotes holding, the States have the right to regulate fishing, beyond their Submerged Lands Act grants and into the Fishery Conservation Zone (FCZ), in the case of fisheries for which the fishery management councils have not completed "management plans." 16 U.S.C. §§1852(h), 1855(g); and 1856(3); People v. Weeren, 26 Cal.3d 654, 662-663 (1980).

D. The Coastal Zone Management Act of 1972.

Under this statute, federally undertaken activities as well as federally regulated activities in the "coastal zone" are required to be consistent with the coastal State's "coastal management program."[59] Until 1990, the coastal zone was defined in 16 U.S.C. section 1453(1) as extending "seaward to the outer limit of the United States territorial sea." When the statute was written, of course, the territorial sea of the United States extended merely to three nautical miles from the coastline; since December 1988, it extends to 12 nautical miles. Were the States' "consistency" powers correspondingly extended? Needless to say, there was no agreement whatsoever on this score.[60]

Such disagreement is now, however, purely academic. In 1990, section 1453(1) was amended to define the zone as extending "seaward to the outer limit of State title and ownership under the Submerged Lands Act (43 U.S.C. 1301 et seq.), the Act of March 2, 1917, (48 U.S.C. 749), the covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, as approved by the Act of March 24, 1976 (48 U.S.C. 1681 note), or section 1 of the Act of November 20, 1963 (48 U.S.C. 1705), as applicable." In short form, the State's consistency powers were not extended; they remain at either the three-mile mark or, in the case of Texas and Florida, at the nine-mile mark.

Expressing these areas of state jurisdiction by reference to the U.S. offshore zones identified in the first section of this paper, we have the following:

1. *Territorial Sea:* Within the 12-mile Territorial Sea the States have jurisdiction over Continental Shelf resources to the limits of their Submerged Lands Act grant (generally 3 miles). They would seem to enjoy their general police powers (except where pre-empted), but since most state boundaries, by their constitutions, end at the old territorial sea limit of three miles, presumably their police powers still end there, and do not extend to the new 12-mile limit of the territorial sea. Thus, adjacent to California, for example, there is a 9-mile-wide belt that is fully the territory of the United States — every bit as much as Monterey County[61] — but that lies within no state.

   States that have a water-quality program certified under Section 402 of the Clean Water Act may regulate water quality within the territorial sea, and may insist upon "consistency" with its state coastal management program, under the Coastal Zone Management Act within the territorial sea. But the geographic extent of these latter two authorities is subject to the new ambiguity in the term "territorial sea."

2. *The Contiguous Zone:* The Contiguous Zone is now no doubt co-extensive with the territorial sea, and thus any discussion of State authority here is redundant.

3. *The Exclusive Economic Zone Under the FCMA:* This zone, strictly speaking, is one that begins not at the coastline, but rather at the seaward limit of the State's Submerged Lands Act grant. Within the area of that grant then, the State has plenary authority over fisheries. Within the EEZ under the FCMA, then, it has authority over fisheries as to which no fishery management plan has been developed.

4. *Continental Shelf:* The States have the limited Continental Shelf rights granted to them by the Submerged Lands Act of 1953, again, generally speaking, to a distance of 3 nautical miles from the coastline. The federal government's rights in the continental shelf—at least in the view of the Solicitor of the Department of the Interior—now extend to a minimum distance of 200 nautical miles from the baselines from which the territorial sea is measured.

5. *The Exclusive Economic Zone:* Since the Exclusive Economic Zone, for purposes other than the FCMA, is an area "beyond and adjacent to the territorial sea," the American EEZ is now 188 miles in breadth, and not the 197 miles it was when it was first proclaimed on March 10, 1983. The states would appear to have virtually

no rights in the EEZ, save for very limited Skiriotes rights to regulate its citizens with respect to fisheries for which no fishery management plan has been developed, and perhaps some tenuous consistency authority. Several bills, most notably ones authored by Congressman Lowry of Washington, have been introduced in the Congress for the purpose of sharing EEZ authority with the States, but none of the bills has progressed appreciably toward enactment.

Conclusion

While our national government since 1945 has quite consistently used its maritime claims out to sea, it has at the same time drawn its legal coastline or "baseline"-the line from which most offshore zones are measured—in the most conservative ways possible. As an example, in the 1960's the federal government abandoned a long-maintained position of measuring its territorial sea from "straight baselines" connecting the outermost of coastal islands—even though it was a perfectly legal practice, and done in the most conservative manner possible.[62] What explains this apparent anomaly? Little speculation is required. When the baseline is moved landward, the Submerged Lands Act jurisdiction of the States correspondingly moves landward.

ENDNOTES

1. *Mr. Briscoe was once, long ago, a California deputy attorney general and in that capacity litigated offshore jurisdictional disputes against the federal government for that State. More recently he has served as special counsel to the States of Georgia and Hawaii in matters relating to their maritime-jurisdiction claims. For the past fourteen years, he has represented the State of Alaska in the United States Supreme Court in a lawsuit brought by the federal government to determine the seaward boundary of the State of Alaska in the Arctic Ocean. He has no reason to think his clients would wish to disavow any of the statements made in this paper, but he didn't ask.*
2. *Proclamation No. 5928; 54 Fed. Reg. 777 (1989).*
3. *See Article 1 of the 1958 Convention on the Territorial Sea and Contiguous Zone, and Article 2 of the 1982 Convention on the Law of the Sea (New York: United Nations, 1983), Sales No. E83.V.5.*
4. *Crocker, Extent of the Marginal Sea (1919), p. 630; Jessup, The Law of Territorial Waters and Maritime Jurisdiction (1927), p. 50; 7 North Atlantic Coast Fisheries Arbitration, p. 46.*
5. *Act of August 4, 1790, ch. 35, §§ 12-13, 31, 64, 1 Stat. 157-58, 164-65, 175 (1845).*
6. *1 Stat. § 21,305, 313-14.*
7. *Proclamation of Neutrality, April 22, 1793. See Fulton, The Sovereignty of the Sea (1911), 572-574.*
8. *Letter from Secretary of State Jefferson to George Hammond, British Minister to the United States, November 8, 1793, reprinted in Swartztrauber, The Three-Mile Limit of Territorial Sea (1972), p. 57.*
9. *Conversation between President Jefferson, John Quincy Adams, and Mr. Gaillard, as related in Memoirs of J. Q. Adams, Vol. 1, p. 375-376.*
10. *This letter is in evidence in United States v. Alaska, United States Supreme Court, No. 84 Original, as Alaska's Exhibit 85-027.*
11. *See, e.g., Department of State Bulletin, 1, No. 15 (October 7, 1939), 5 Foreign Relations of the United States, pp. 36-37.*
12. *Proclamation No. 2667, September 28, 1945, 10 Fed.Reg. 12303, 59 Stat. 884.*
13. *This we sought at the First and Second United Nations Conferences on the Law of the Sea held in Geneva those years. See generally, 1 Shalowitz, Shore and Sea Boundaries (1962) pp. 269-270.*
14. *1970 Public Papers of the Presidents—Richard Nixon; Statement about United States Oceans Policy, p. 454, May 23, 1970.*
15. *Fishery Conservation and Management Act of 1976, 16 U.S.C. §§ 1801 et seq.*
16. *United Kingdom v. Iceland (Fisheries Jurisdiction) [1974] I.C.J. 3, 130. C F. Magnuson, The Fishery Conservation and Management Act of 1976: First Step Toward Improved Management of Marine Fisheries, 52 Wash. L. Rev. 427, 438-441 and Esp. 441 fn. 46 (1977).*
17. *Proclamation 5030, Exclusive Economic Zone of the United States of America, 1 Public Papers of the President—Ronald Reagan, p. 380, March 10, 1983.*
18. *Article 33.1 of the 1982 Convention on the Law of the Sea; see also Article 24.1 of the 1958 Convention on the Territorial Sea and the Contiguous Zone.*
19. *By "seaward boundary" Congress probably meant the seaward boundaries of the lands restored to the states by the Submerged Lands Act, which is discussed below, rather than the seaward limit of the territorial sea. A Legislative History of the Fishery Conservation and Management Act of 1976, Senate Committee on Commerce & Nat'l Ocean Policy Study, 94th Cong., 2d Sess. (Gov't Printing Office 73-982) (1976), p. 678. The Submerged Lands Act boundaries, most pronouncedly in the cases of Texas and Florida, on Florida's gulf coast, may extend seaward of the territorial sea boundary.*
20. *16 U.S.C. § 1811 (pre-1986). Selecting as the inner boundary of the Zone the seaward boundary of the coastal State, rather than the seaward boundary of the territorial sea, was done intentionally. If the United States, as many then expected, changed its claim of territorial waters from three to twelve miles, the boundaries of the fishery conservation zone would not have to be shifted. See A Legislative History, etc., supra, at 1051, 1101. 16 U.S.C. § 1811.*
21. *16 U.S.C. § 1811(a).*
22. *See Kilaparti Ramakrishna, Robert E. Bowen, and Jack H. Archer, "Outer Limits of the Continental Shelf: A Legal Analysis of Chilean and Ecuadorian Island Claims and U.S. Response," 11 Marine Policy 56-68 (Jan. 1987).*
23. *The United States ratified the four 1958*

Geneva Conventions, which had been sent to the Senate for ratification in 1959 by President Eisenhower, in 1961. The Continental Shelf Convention, like the Territorial Sea Convention, went into force in 1964. Hollick, U.S. Foreign Policy and the Law of the Sea (1981) 159 and 442. U.S. T.I.A.S. 5578; 15 U.S.T. 471. The United States, of course, has not signed, much less ratified, the 1982 Convention. Nor has that Convention gone into force.

24. Proclamation No. 267, 59 Stat. 884.

25. Proclamation 5030, 1 Public Papers of the President—Ronald Reagan 380 (March 10, 1983).

26. The equal-footing doctrine holds that subsequently admitted states attain to all the incidents of sovereignty enjoyed by the original 13 states, one of which is ownership and dominion over tidelands within state borders. See Shively v. Bowlby, 152 U.S. 1, 26 (1894); Knight v. U.S. Land Ass'n, 142 U.S. 161, 183 (1891); but see Summa Corp. v. California ex rel. Lands Commission, 466 U.S. 198 (1984).

27. An order of the Supreme Court, 342 U.S. 891 (1951), directed the Special Master to conduct hearings and make recommendations to the Court on the following questions:

    Question 1. What is the status (inland waters or open sea) of particular channels and other water areas between the mainland and offshore islands, and, if inland waters, then by what criteria are the inland water limits of any such channel or other water areas to be determined?

    Question 2. Are particular segments in fact bays or harbors constituting inland waters and from what landmarks are the lines marking the seaward limits of bays, harbors, rivers and other inland waters to be drawn?

    Question 3. By what criteria is the ordinary low watermark on the coast of California to be ascertained?

28. Hollick, U.S. Foreign Policy and the Law of the Sea, 103-104 (1981).

29. Lawrence Tribe, American Constitutional Law 1452 (2d ed. 1988). See also The Japanese-American Cases - A Disaster, 54 Yale L. Journal 489 (1945).

30. Complaint, United States v. California, No. 12 Original, United States Supreme Court, October 1945 Term.

31. Hearings on S.J. Res. 208 (1939), 220.

32. Letter of Harold L. Ickes, Secretary of the Interior, to Olin S. Proctor, dated December 22, 1933, reprinted in Hearings on S.J. Res. 83 and 92 (1939), 23-24; Hearings on H.J. Res. 176 and 181 (1939), 172-173; and Hearings on H.J. Res. 118 et al. (1945), 18.

33. E. Bartley, The Tidelands Oil Controversy, 129.

34. Hollick, supra, p. 19.

35. Anti-Smuggling Act, 49 Stat. 517; 19 U.S.C. 1701-1711, August 3, 1935.

36. 15 U.S. Department of State, Foreign Relations of the United States 1939, 36-37, 765, as cited in Hollick, supra, pp. 19 -20.

37. Unpublished memorandum from National Archives Record Group 48, as quoted in Hollick, supra, p. 30.

38. Unpublished memorandum from C.E. Jackson et al. to Secretary Ickes dated May 28, 1943, quoted in Hollick, supra, p. 33.

39. Foreign Relations of the United States, 1945, II, 1482, quoted in Hollick, pp. 34-35.

40. Statement of Secretary Ickes in Hearings on S.J. Res. 48 and H.J. Res. 225 (1946), 9. A copy of this answer is on file in the library of the Office of the Attorney General, San Francisco.

41. In the United States' motion to strike, dated March 1946, the government cites the Punishment of Richard Mylward for Drawing, Devising, and Engrossing a Replication of the Length of Six Score Sheets of Paper. In that case according to the government,

    [T]he filing of a replication amounting to six score sheets of paper which "might have been well contrived in 16 sheets of paper", so outraged the court that, in addition to imposing a fine upon the pleader, it ordered that the warden of the fleet take the pleader into custody and "bring him into Westminster Hall, on Saturday next, about ten of the clock in the forenoon, and then and there shall cut a hole in the myddest of the same engrossed replication * * * and put the same Richard's head through the same hole * * * and then, the same so hanging, shall lead the same Richard, bareheaded and barefaced, round about Westminster Hall, whilst the courts are sitting, and shall shew him at the bar of every of the three Courts within the Hall * * *."

    The Supreme Court's records do not disclose whether the same fate was meted the Attorney General of California.

42. H.J. Res. 225, 79th Cong., 2d Sess. (1946); 92 Cong. Rec. 9642, 10316 (1946).

43. 92 Cong. Rec. 10660 (1946). The veto was sustained. 92 Cong. Rec. 10745 (1946).

44. 332 U.S. at 43-45.

45. 420 U.S. at 43-45.

46. 332 U.S. at 31-33.

47. United States v. Louisiana, 339 U.S. 699, 704-705 (1950).

48. United States v. Texas, 339 U.S. 707, 718-720 (1950).

49. 339 U.S. at 718.

50. United States v. California, 344 U.S. 872 (1952).

51. 43 U.S.C. §§1301-43 (1976).

52. See United States v. Louisiana, 363 U.S. 1, 28 (1960).

53. 43 U.S.C. at §1311(b)(1) (1976).

54. Id. at §1301(c).

55. The single exception is United States v. Alaska, 442 U.S. 184, 186 n.2 (1975).

56. 43 U.S.C. at §1332(a).

57. Cf. United States v. California, 381 U.S. 139, 166-167 (1965).

58. 16 U.S.C. § 1802(6).

59. 16 U.S.C. 1451 et seq.

60. President Reagan's Proclamation of December 27, 1988 expressly stated its intention that the expansion of the territorial sea from 3 to 12 miles was to have no effect on domestic legal issues such as the allocation of jurisdiction between the States and the federal government. It stated that nothing in it

"extends or otherwise alters existing federal or state law, or any jurisdiction, rights, legal interests, or obligations derived therefrom." 54 Fed. Reg. 777, (1989). Prior to the issuance of the Proclamation, the United States Department of Justice rendered a legal opinion stating that "the better view is that the expansion of the territorial sea will not extend the coverage of the Coastal Zone Management Act," but concluded that "the effect of the proclamation on the CZMA is not entirely free from doubt, and that the effect of the expansion on other federal statutes raises complex questions." Memorandum to Abraham D. Sofaer, Legal Advisor, Department of State, from Douglas W. Kimiec, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice, dated October 4, 1988, p. 2, reprinted in 1 Terr. Sea J. 1 (1990).

The California Attorney General has reached a contrary conclusion:

Regardless of the analysis used, the effect of the President's proclamation is to extend the seaward boundary of the federal coastal zone from 3 miles to 12 miles from the shoreline.

Letter to Peter Douglas, Executive Director, California Coastal Commission, from John A. Saurenman, Deputy Attorney General, dated March 15, 1989, reprinted in 1 Terr. Sea J. 39 (1990).

61. *With the sole exception of the right of foreign vessels to make "innocent passage." See 1958 Geneva Convention on the Territorial Sea on the Contiguous Zone, Article 14, and 1982 Convention on the Law of the Sea, Articles 17-26.*

62. *United States v. Louisiana (Alabama and Mississippi Boundary Case) 470 U.S. 93 (1985).*

U.S. Claims to Maritime Jurisdictions: Too Much or Not Enough

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Introduction

The U.S. signed the 1982 Convention on the Law of the Sea on July 29, 1994, and although ratification is by no means certain it is appropriate to examine the nature of U.S. claims to sovereignty over offshore regions. These predate the Convention itself in certain respects but are indicative of American views concerning the law of the sea, whether interpreted according to customary law or as defined in an international treaty. The U.S., under the Magnuson Act of 1976, proclaimed a 200 nm fishery zone in early 1977. Subsequently, claims to an EEZ and a 12 nm territorial sea were made. Thus, it might appear the U.S. is taking appropriate advantage of rights to marine waters permissible under the currently recognized law of the sea. This contention is arguable, however, for reasons to be discussed in this paper. In some respects, the U.S. can be considered to be a "minimalist" country, claiming only narrow territorial seas and foregoing claims to straight baselines, which in a number of geographic areas could expand valid claims to marine jurisdictions. However, U.S. EEZ claims take full advantage of the Convention's provisions and in at least one area are overly "imaginative." Thus, we might be accused of being "maximalist." The dichotomy can be explained by an examination of the nature of federal vs. state relationships.

Baselines

The U.S. claims normal baselines, even though in some geographic regions straight baselines appear to be appropriate. The concept of straight baselines where the coast is deeply indented or cut into, or where there is a fringe of islands along the coast was established by the International Court of Justice in the Anglo-Norwegian Fisheries Case. Hence, Norway's coast is considered the model against which straight baseline claims are judged. Compare figures 1, 2, and 3 on the following page. Do not the "rockbound coast of Maine" and the Alexander Archipelago in Southeast Alaska meet the standards? Why then does the U.S. decline to claim what it is clearly entitled to? Two reasons come to mind. In the case of the Alexander Archipelago, Canadian fishermen regularly use the passages among the islands, and the U.S. and Canada have other contentious law of the sea issues without adding another by declaring waters historically used by Canadians as U.S. internal waters. In the cases of both the Maine and Alaskan coasts, the reason may simply be that claiming the waters as internal benefits the states rather than the federal government. There is a long history of state vs. federal cases concerning nearshore waters; as this paper will describe further, federal government policy has been to contest any claims to expanded maritime jurisdictions if the benefits accrue to the states rather than the U.S.

The U.S. has even disputed claims to normal baselines in the case of the U.S. vs. California. The normal baseline is the coast at low water. California, properly noting that the tides along the U.S. west coast are mixed with both lower low waters and higher low waters occurring normally, argued that the mean of the lower low waters rather than the mean of all low waters should be used to establish the normal baseline. The U.S. disagreed but lost the case. Again, federal government motives appear to have been based on the desire to give the state as little as possible, since a baseline further seaward would have provided California with more area between its coast and the three nm territorial sea limit whose waters were to be under state rather than federal jurisdiction after a Congressional Act in 1953.

Closing Lines Across Bays

In general, the U.S. draws closing lines across juridical bays, that is those with seaward entrances less than 24 nm wide and meeting the semicircular rule as spelled out in both the 1958 and 1982 Conventions. Where the bay entrance is more than 24 nm wide, it is appropriate to draw a closing line within the bay which is 24 nm or less in length. In one case, however, Kotzebue Sound, U.S. action has been unusual, to say the

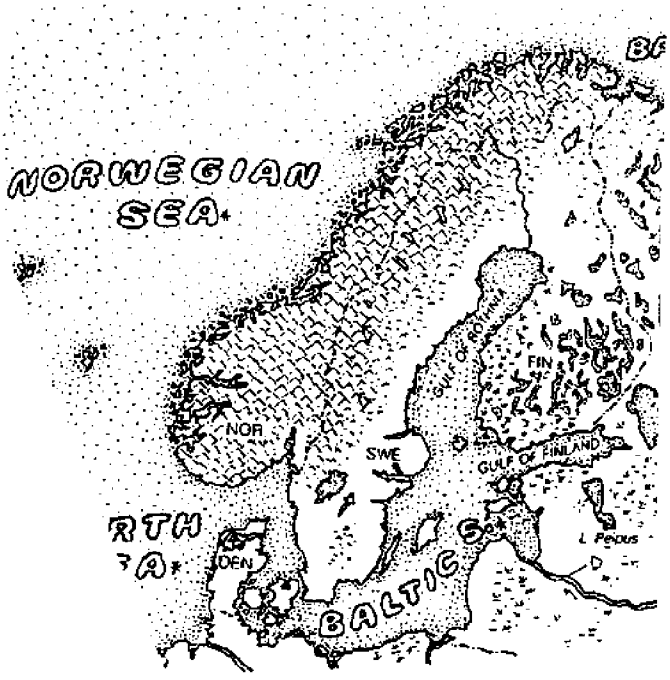


FIGURE 1

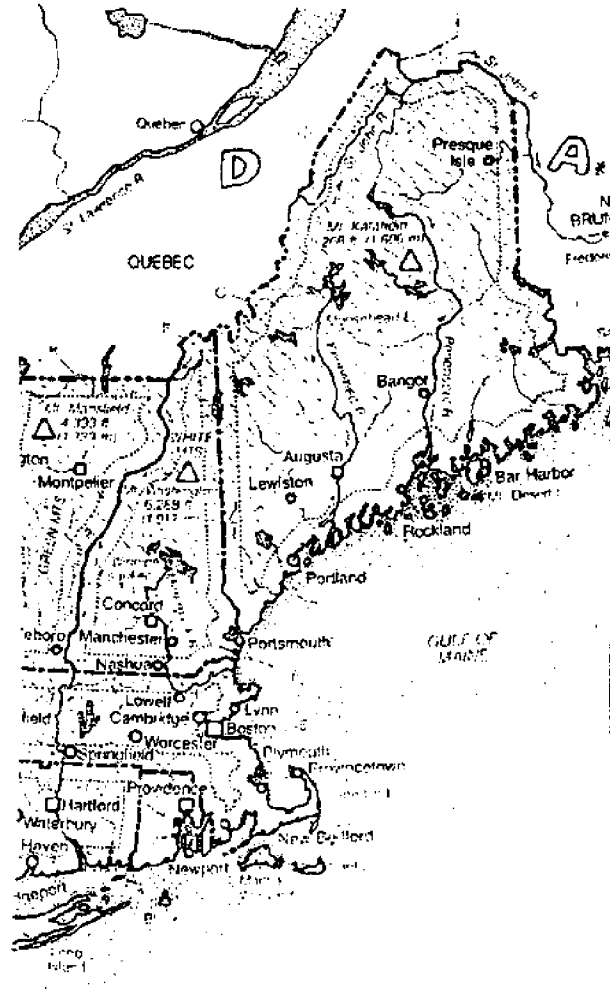


FIGURE 2

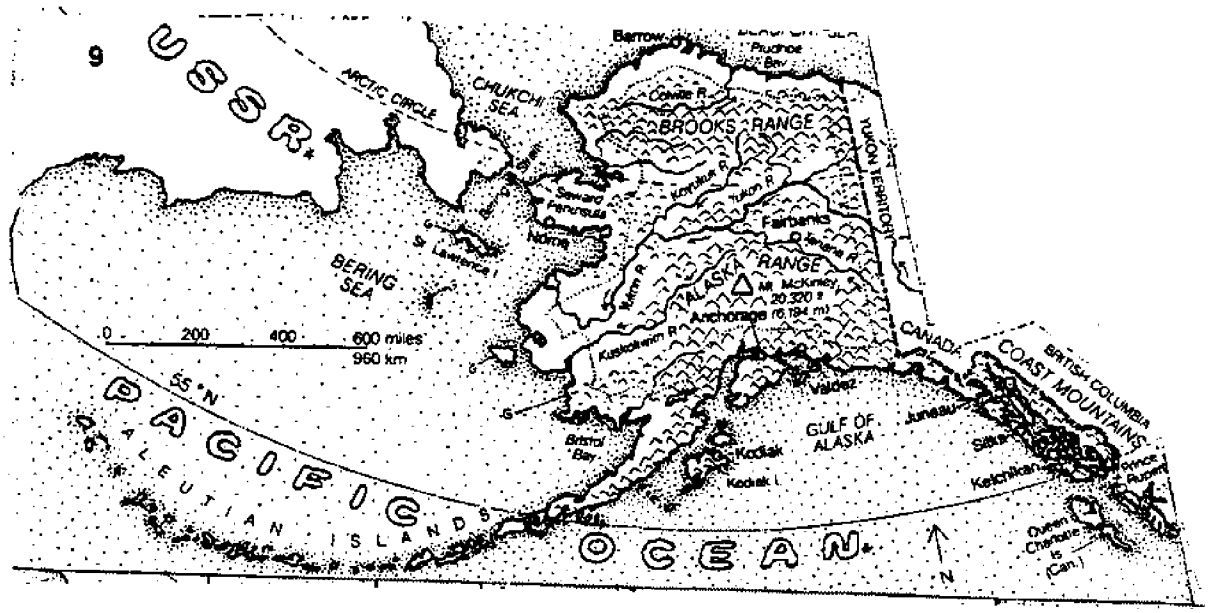


FIGURE 3

least. In 1990, the U.S. deleted the closing line across the bay which had existed for more than 20 years. The stated reason was that the headlands at the entrance of the bay had eroded so that the existing closing line no longer met with width criterion. Rather than moving the closing line landward, as permitted by the Convention, the U.S. simply took it off the official nautical charts, thus disclaiming nearly 1,000,000 acres of inland waters. Again, the federal governments actions were apparently motivated by the desire to deprive the State of Alaska of these waters, since internal waters are under state rather than federal jurisdiction. The Sound could also have been claimed as historic waters, since "no foreign fleet admiral clamors to exercise high-seas freedoms within the Sound; and no high reason of principle has been advanced why the Sound should be denied historic-waters status" (Briscoe 1992, p 249). Other bays notably Chesapeake and Delaware, are closed by appropriate closing lines, although historic waters status has not been claimed.

Historic Waters

The federal government has argued the claims of states that certain bays were historic waters. Again, there are two possible reasons why the U.S. foregoes claims to historic waters to which it seemingly is entitled. First, the U.S. has had a long-standing policy of disputing "outlandish" claims of foreign nations—Libya's claim to the Gulf of Sidra is an example—and we want to avoid similar protests to our own claims. Second, and I believe more likely, once again the federal government fights any claim that would benefit a state as opposed to the federal government. Although the U.S. claimed Chesapeake and Delaware Bays as historic well before the closing lines were established and has long claimed Long Island Sound on historical grounds, there are at least eight cases in which the federal government contested claims of states that certain waters were historic. The score thus far is fees 6, states 2. Mississippi Sound and Vineyard Sound were held to be historic, despite federal government arguments. However, states lost their arguments to claims to historic waters for Santa Barbara Channel and Santa Monica Bay (California), numerous inlets of the Louisiana Coast, Florida Bay (Florida), Cook Inlet (Alaska), and Nantucket Sound (Massachusetts).

The waters between the Hawaiian Islands could be claimed as historic. Arguments for and against making such claims are best left for Professor Van Dyke in his forthcoming paper on Hawaii's claims to archipelagic waters.

The Exclusive Economic Zone

While the U.S. makes minimal claims to internal waters and has until relatively recently been one of the last holdouts regarding the traditional three nm territorial sea, we have embraced the exclusive economic zone with a vengeance, claiming zones around Johnston Atoll, Wake Island, Howland and Baker Islands, Jarvis Island, Kingman Reef, Palmyra Atoll, and all of the Northwestern Hawaiian Islands. Most of these features should be considered "rocks" rather than "islands" under Article 121(3) of the 1982 Convention. Figure 4 on the following page shows the claimed EEZ around the Northwestern Hawaiian Islands. When the claim was made, all features except Midway and Kure probably should have been classed as rocks, which are not entitled to EEZs. Some, such as Gardner Pinnacles, La Perous Pinnacle (in French Frigate Shoals), Nihoa Island, Necker Island, and Maro Reef, are so obviously rocks that any claim to the contrary must fail on simple common sense grounds. Only Midway and Kure were inhabited and had an economic life; they no longer do with the closing of the Loran Station on Kure and the removal of the naval personnel from Midway.

Why then did the U.S. forgo its traditional minimalist view of maritime claims and become a maximalist? There are three possible reasons: First, few other nations make the island vs. rock distinction and it can be reasonably argued that Article 121(#) of the Convention does not represent customary international law as evidence by state practice. Second, and related, no country was liable to protest a U.S. claim to the island status of these features since they are so isolated; in effect nobody cares. Finally (and most important), EEZs are federal not state marine territory.

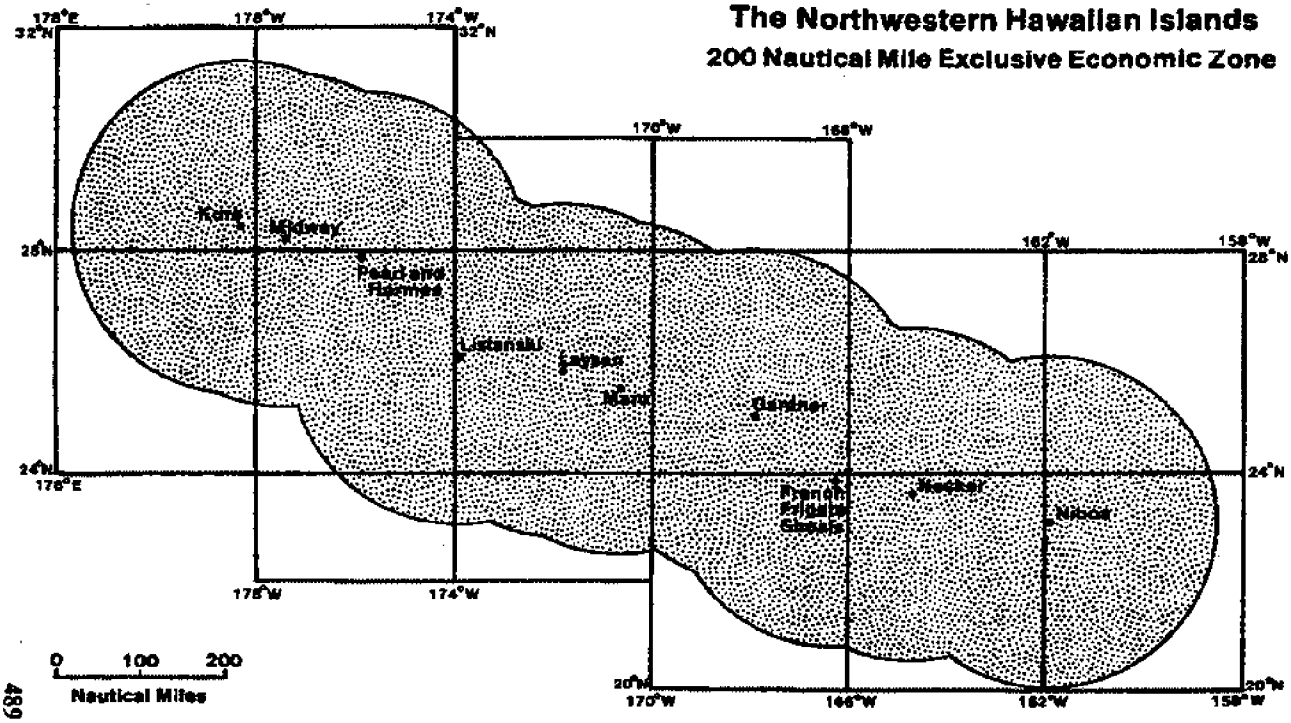
Conclusion

The question of state vs. federal rights, which has existed since the birth of the nation, is the overriding consideration in U.S. policy regarding offshore jurisdictions. As a nation, we prefer less than more, if what we claim accrues to a coastal state as opposed to the federal government.

Figure 4.

The Northwestern Hawaiian Islands

200 Nautical Mile Exclusive Economic Zone



Present Status of Ocean Minerals Development

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Sustainable development is a process of change in which the exploitation of resources, the direction of investment, the orientation of technical development, and institutional change are all in harmony and enhance both current and future potential to meet human needs and aspirations. Our Common Future: United Nations Commission on Environment and Development.

Entry into force of the Law of the Sea Treaty on November 16, 1994 and subsequent questions on consent of the U.S. Senate to ratification, prompt the question of the part played by seabed minerals in this scenario. There is a sustained interest in seabed minerals by many countries outside of the United States, including Japan, Germany, France, Russia, South Africa, India, China, Korea, Indonesia, and Pacific Island nations.

There is an increasing realization that the practice of sustainable global development, as defined at the Brazil conference in 1992, requires that we look to the oceans as an alternate and environmentally preferable source of many of our presently mined materials.

Known marine mineral resources in order of priority to the U.S. are: *sands* for coastal remediation, and beach protection and enhancement; *aggregates* for infrastructure remediation and construction in the highly populated coastal zones; *mineral sands* for production of tin, titanium, rare earth metals, gold, platinum, and diamonds; *manganese nodules or crusts* for the production of nickel, cobalt, manganese, and other by-products; *marine phosphates* for fertilizers; and hydrothermal sulfides for the production of copper, lead, zinc, gold, silver, and other metals. Marine minerals technology is directly transferable to the location and remediation of toxic waste disposal sites on the seabeds.

U.S. participation in marine minerals development has seriously lagged since the early nineteen eighties. This has resulted from a massive and technically highly successful, but economically abortive, effort at manganese nodule development in the Pacific by four U.S. lead international consortia; a legal infrastructure for offshore oil and gas in the U.S. which conflicted with the needs for marine minerals; and an adversarial approach by the U.S. government to marine minerals research and development. Nevertheless the U.S. has maintained a critical nucleus of expertise in the marine minerals field. It is now timely to expand these U.S. efforts to regain the fast diminishing technology lead developed by industry in the nineteen seventies, and to enhance the now obviously critical focus on environmental control of mineral development operations on the seabeds.

The status of each of the resources of interest to the United States is briefly discussed:

Sands: The most ubiquitous of coastal offshore minerals are the sands derived from erosion of the adjacent lands by glaciers, rivers, and waves. The protection of coastlines and enhancement or maintenance of natural beaches throughout the U.S. has drawn heavily on terrestrial sources of sands at great economic and environmental cost. It has been shown that properly designed and managed operations which use offshore sand resources can be accomplished at considerably lesser cost. There are many improvements in resource characterization that are still needed, particularly in areas of *in situ* characterization.

Aggregates: Remediation of the U.S. infrastructure of roads, bridges and public works is a critical aspect of public need which has been well documented, and the development of residential, commercial and industrial buildings continues to increase with national economic progress. Any area within 30 miles of access to coastal waterways, which includes most of the heavily populated areas of the U.S., is likely to see economic and environmental cost advantages in the use of marine aggregates. At the present time, due mainly to a restrictive regulatory infrastructure, there are no such operations in the U.S. This is in marked contrast to other environmentally concerned countries such as Japan and the

United Kingdom which produce approximately 20% and 15% of their respective annual aggregate needs from marine sources.

Minerals sands: Sands and gravels laid down over the years by natural processes frequently contain commercial deposits of economically critical minerals or metals of such commodities as tin, iron, titanium, rare earth metals, precious metals, and precious gemstones. These types of deposit are widespread and many are known to exist in the Pacific Northwest and Alaska. Like all other minerals deposits, their economic extraction, in comparison with similar sources on land, would likely be environmentally benign. Few data are available, however, to prove such assertions and the development of environmental demonstration programs is badly needed.

Manganese nodules and crusts: United States industry led the technical development of mining and processing for manganese nodules in the international seabeds of the Pacific Basin in the nineteen seventies. Over $500 million was spent on this effort, which is being continued at the present as a catch-up game by countries such as India, Korea, China, and Eastern Europe. The nodules are minable using current technologies. Their economic viability is price dependant, mainly based on the price of nickel. The environmental effects of production from the seabed, based on existing data, compares very favorably with equivalent production from land. In the absence of actual operations substantiating data are not available, however. Some Pacific island countries, notably the Cook Islands and the Republic of the Marshall Islands, are seriously interested in the recovery, within their EEZs, of high-cobalt nodules, or at lesser depths, cobalt crust occurring on seamounts and island slopes. Although chemically similar to the Clarion Clipperton nodules, the economics of these deposits are largely dependant on the price of cobalt, rather than nickel. Both crusts and nodules have the probability of high by-product usage for the waste material remaining after the removal of the useful metals. This aspect is being studied by the Marine Minerals Technology Center (MMTC) in Hawaii where it is of particular importance to the small island nations and in Mississippi where its use as stack gas filter material with subsequent recovery of valuable metals concentrated from the gas is proposed. Past studies show manganese oxides to be highly effective in removing sulfur dioxide effluent from flue gas. Such applications are a viable alternative for meeting Clean Air Act Amendment compliance deadlines, with the economic enhancement of metal recovery from spent filter material.

Marine phosphates: New understanding of the uses of direct application phosphate ores for crop fertilization has indicated an important niche for marine phosphate deposits which are widespread in many parts of the seabeds, in both deep and shallow waters, and frequently occur along with, or immediately beneath, cobalt crusts. Marine phosphorites of potentially vast extent have been indicated off the eastern coast of the United States off the Carolinas. These significant resources need to be characterized for economic and environmental evaluation.

Hydrothermal sulfides: These potential ores of many metals are more recently discovered than the oxides and are in most need of additional discovery and characterization. The bulk of the deposits will be found beneath the seabeds and will require quite a different technology than the oxides, both for environmental characterization and for development. These deposits which have the potential for being very extensive and widespread are regarded as major resources for the long term.

Waste dump remediation: Relocation and remediation of marine waste disposal sites can be accomplished using the same technology applicable for the discovery and development of marine mineral deposits. This easily transferable dual use technology is a major facet of the work of the MMTC.

The United States needs to have a policy on the governance of these important resources and a technology base which will permit adequate assessment and development of those deposits which offer a competitive advantage.

Seabed Mining Provisions of the Law of the Sea

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The Law of the Sea contains seventeen parts and nine annexes discussing many general aspects of ocean governance. Fully one-third of the document, in much more detail, relates to mining.[1] All solid, liquid, or gaseous mineral resources in the Area are governed by Part XI and Annexes III and IV.

Part XI established the International Sea Bed Authority (ISA), comprised of an Assembly, Council, Secretariat, and the Enterprise. It set up production ceilings, price controls, payments to developing nations, and peoples. Mining development and environmental conservation standards are both overseen by the ISA. Like other UN bodies, the ISA is exempt from all local legal processes, judicial searches, and regulations.

Annex III discusses basic conditions of prospecting, exploration, and exploitation of the Area. It comprises twenty-two articles. Annex IV prescribes the statute of the Enterprise, comprising thirteen articles. Both are substantially more detailed than any other annexes.

In December 1982, President Reagan did not sign the Convention because of "...fundamental problems with the regime it would establish for managing mineral resource development beyond national jurisdiction."[3] The following reasons were cited[2]

- US was not guaranteed a seat on the ISA Executive Council.
- Developing countries would dominate decision making via the Assembly.
- The treaty could be amended in the future and bind the US without US consent.
- Revenues could be distributed to national liberation movements.
- Forced technology transfer.
- The Enterprise could obtain loan guarantees and not pay royalties while other companies had to.
- Production controls.
- High financial payments to the ISA.

All other aspects of the treaty were acceptable.

On April 26, 1994, State Department Deputy Assistant Secretary for the Oceans David A. Colson testified to the House Merchant Marine and Fisheries Committee that the new Agreement "will fundamentally change the seabed mining regime of the convention."[4] Analysis of the Agreement does not fully support this conclusion; statements by UNCLOS proponents and US deep sea mining representatives both indicate that truly fundamental changes have not been made; in any case three significant problems from the above list still remain.

Of the eight problems, loan guarantees, production controls, and payments to the ISA are now basically acceptable; the two problems concerning decision making have been ameliorated by modifying the governing bodies; technology transfer, revenue distribution, and future treaty amendments are still unacceptable to the mining proponents.

Under pressure from the U.S. **decision-making** was modified by strengthening the Council and separating it into four chambers which grouped countries into four categories: (1) developing states; (2) the eight states with the largest seabed mining investments; (3) major seabed mineral exporters; and (4) states which import or consume more than two percent of the world's total sea bed minerals. Claimed as a major negotiating win, these chambers ensure that the most active mining states have the greatest voice.

A Finance Committee, to be initially controlled by the mining states, was established in Section 9. which states that "Assembly and Council decisions should take into account recommendations of the Finance Committee."[5]

Technology transfer continues to be vague and unworkable. The new Agreement's Section 5 states that "the Enterprise and developing States shall seek to obtain such technology on the open market..." If they are "*...unable* to obtain deep seabed mining technology, the Authority may request...States to cooperate..." These States should "*...ensure* that contractors sponsored by them also *cooperate fully* with the Authority."[6] (Emphasis added.) If the precise meaning of *unable* comes to mean *unable to pay,* how would the sponsoring states resolve the situation? This change retains significant latitude for the Authority and its vagueness may result in lengthy legal wrangling.

Additionally, one US sea bed mining spokesman has stated that Section 5 is unworkable. He explains that a contractor typically develops "new" technology by integrating various proprietary technology from multiple third-party firms. The systems integrator could not obligate those firms to provide their technology to the Enterprise.[7]

Political aspects of **revenue-distribution** including sharing with national liberation movements is not currently an obstacle, but could become one again. During the 1980s, the possibility of sharing revenues with the PLO led to intense political debate. Since the PLO peace agreement with Israel criticism has reduced. However other examples are possible; future UN payments to the Kurds could complicate Middle-East politics. The Kurds are a land-locked people struggling for independence, which makes them a protected category according to Articles 140 and 160 of the UNCLOS.

More importantly, future treaty amendments could bind the US without US consent. This weakness of the entire treaty, not just Part XI, is precisely represented by the July 1994 Agreement awaiting ratification. The July Agreement was completed and signed while waiting to become operative, after sixty other countries had already ratified it. Only forty of the ratifying countries must approve the changes, forcing the remainder to obey the modified treaty with no legal recourse except to withdraw.

If the Senate consents to ratify the treaty, both of the remaining US deep seabed mining consortia claim that they will likely close their offices because the overall effect of the agreement is still to "*totally inhibit private investment in deep ocean mining.*"[8] This is a rational response, since both UNCLOS critic Artemy Saguirian and proponent Elisabeth Borgese concur that "*the proposed international regime does not reflect basic economic interests of the industrially developed countries.*"[9] If the planned regime can not meet this most basic criterion it is not surprising that serious investors would question the risk involved.

The State and Defense Departments desire a "*widely ratified, comprehensive law of the sea treaty protecting and promoting the wide range of U.S. ocean interests.*"[10] These interests include establishing the breadth of territorial seas at 12 miles, innocent passage, archipelagic sea lanes, and freedom of navigation and overflight in the Exclusive Economic Zones and beyond. The treaty successfully preserves the right of US military and commercial vessels to use the oceans, while retaining all resource rights within the continental shelf and 200 mile EEZ.

Recent events show, however, that a signed treaty does not guarantee peace. Iraq invaded Iran partly for access to the Shatt-al-Arab waterway, and invaded Kuwait partly for better access to the Arabian Gulf. Both wars were bloody, costly, and disruptive of international ocean commerce.

In October 1994, Turkish Prime Minister Ciller threatened war if Greece claimed the Treaty's twelve-mile territorial limits.[11] Turkey would lose free access to its entire western and northern coasts because nearly all Aegean islands, including ones very near the Turkish coast, are Greek. This troubling situation between two NATO allies illustrate that a comprehensive treaty is not always desirable. Diplomatic ambiguity occasionally has some benefits.

The State Department testified that the July 1994 Agreement represents *fundamental* change to correct fundamental problems, and should therefore be ratified by the Senate. If the treaty has indeed been fundamentally changed, it is uncertain that 40 of the 67 states which previously ratified the Convention will accede to it. Elisabeth Mann Borgese wrote in 1993 that "*...any change that would affect the basic philosophy of the provisions...intended to serve not only the 'basic economic interests of the industrially developed countries' but equally those of the developing countries, is illegitimate.*"[12] Even should 40 countries accede, the remainder could rightly feel disenfranchised and become obstructionist towards those countries willing to accept the risk to begin seabed mining.

Unlike the US Constitution, the Law of the Sea does not establish separate procedures for states to propose or approve major amendments. Even fundamental alterations are treated the same as routine "legislation."

This time, the July Agreement pleases the US because it will diminish the power of smaller

states. Next time, future Agreements may target provisions essential to fundamental US interests. Signing the Treaty without broadening the nodule-only mindset of Part XI will compound future difficulties. This possibility alone may provide ample reason why the United States should not ratify the Law of the Sea.

Describing the treaty, Elizabeth Mann Borgese optimistically stated *"What was created was the beginning of the new form of ocean governance and world governance for the 21st century,"*[13] but on the same page she goes on to say that *"the international community remained saddled with the most complex apparatus ever designed for [the ocean's] management."* It is this sense of a centrally planned economy's massive bureaucracy that causes many to question the idea of accession to the treaty.

Yoshiya Ariyoshi, president of The Ocean Association of Japan presented a more cynical though less contradictory view in 1981. He stated that *"the 'New International Economic Order' insists that prosperity should not be allowed only to those who are clever enough and diligent enough, but to be shared by all whether some of them are idle and ignorant."*[14] Such indignation is understandable given that the Japanese have few natural resources and yet have become an economic superpower.

Whatever ones judgement of these opinions, it is clear that uncertainties and conflicts are still present in the Law of the Sea and it may require more changes to become an effective vehicle for future ocean management. One option, supported by some industry proponents, is that the Senate return parts of the Law of the Sea back to the drafting table, for the good of both the US and of mankind. On the other hand, the remaining conflicts are mostly universal problems; only the technology transfer provisions are unique to the mining investors. It would seem to be more appropriate to fix the problems as partners rather than as adversaries, to ratify the treaty and to push for further amendments to Part XI which would place the Technology Transfer entirely in the open market, and slash the bureaucracy by eliminating the Enterprise. The vision of seabed mining should be enlarged, as it is defined in Article 133, by inclusion of *all* minerals, not just manganese nodules.

ENDNOTES

1 The Law of the Sea.

2 U.S. Department of State Dispatch, 30 May 1994, p. 360.

3 Ibid. p. 360.

4 Ibid. p. 361.

5 Law of the Sea. Report of the Secretary-General on his consultations on outstanding issues relating to the deep seabed mining provisions of the United Nations Convention on the Law of the Sea, (New York: United Nations, 9 June 1994).

6 Ibid.

7 Conrad Welling, Ocean Mining Company. Telephone interview, 30 Sep. 94.

8 Dick Greenwald, Ocean Mining Associates. Telephone interview, 26 Sep. 94.

9 Elisabeth Mann Borgese, "A Response to Dr. Artemy A. Saguirian." In Freedom for the Seas in the 21st Century, Ed. Jon M. Van Dyke, et al, (Washington, D.C.: Island Press, 1993), p. 388.

10 U.S. Department of State Dispatch, p. 359.

11 Associated Press, "Political Squall over the Aegean Sea", from Compuserve, 4 Oct. 94. 3:21 EDT V0911.

12 Elisabeth Mann Borgese, "A Response", p. 388.

13 Elisabeth Mann Borgese, "Ocean Mining", p. 118.

14 International Cooperation in Marine Science and Technology in the Pacific Region, Proc. of the 6th International Ocean Symposium, 5-6 Nov. 1981 (Tokyo: Ocean Association of Japan, 1982).

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The Changing Political Context of Deep Seabed Mining

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As is well known, the refusal of the United States and most developed states to become party to the 1982 United Nations Convention on the Law of the Sea was occasioned by deep concern with provisions in Part XI of that treaty which addressed the subject of seabed mining beyond the limits of national jurisdiction. Because of a number of specific provisions in that part as well as its general tenor, the Convention as a whole was labeled by the Reagan Administration as fundamentally flawed, even though much of the Convention was treated by the United States government as declaratory of existing customary international law.

As drafted, the Convention required deposit of 60 instruments of ratification for it to enter into force. Some observers hoped that the Preparatory Commission would be able to develop rules which somehow would make the Convention's seabed mining chapter more palatable to the United States and to other developed states. However, the Reagan Administration, believing that fundamental rather than cosmetic change was necessary, saw no point to such an exercise and representatives of the United States did not participate in the work of the Preparatory Commission.

Over time the number of ratifications by states from Africa, Asia, Latin America, the Caribbean, and Oceania began to mount, and the achievement of the requisite 60 ratifications was in sight. The Bush Administration, less ideologically motivated than the previous administration, was more open to discussion of the Convention and UN Secretary-General Javier Perez de Cuellar began consultations, continued by his successor, Boutros Boutros-Ghali, designed to win the support of the United States and other states reluctant to ratify that Convention. On November 16, 1993 the government of Guyana deposited its ratification, number 60, and thus began the one year period which would culminate with the entry into force of the 1982 Convention.

Embodied in a resolution of the UN General Assembly, a new diplomatic agreement was achieved in July of 1994 which provided an opportunity for universal adherence to the new Law of the Sea Convention.[1] What was in this new agreement? Why could such an agreement, containing elements which had been rejected in negotiations at the Third UN Conference on the Law of the Sea (UNCLOS-III), be achieved at this point in time? Further, would the changes accepted be sufficient to bring on board those states, and, specifically, the United States, which to date had refused to ratify the Convention? And, finally, what would be the impact of the congressional elections of 1994 with the consequent takeover of the Congress by the Republicans? This study will consider the changing political context at the international level which allowed for the emergence of a new agreement, and also that at the national level in the United States which threatens to nullify the diplomatic achievement embodied in the July 1994 agreement.

The International Political Context

At UNCLOS-III seabed mining was the subject which more than any other was the source of discord and differences and reflected, to a considerable degree, the sharp split between developed and developing states in the then volatile context of Third World demands for achievement of a New International Economic Order.[2] Without doubt negotiations were made more complex by the very different perception of developing and developed states and their varied expectations of what constituted desirable outcomes.

The developing states approached the subject of deep seabed mining as a new opportunity to generate needed resources for development from their share of benefits from the "common heritage of mankind." In a 1967 address to the UN General Assembly, Amb. Pardo of Malta had estimated, based on what he acknowledged were "some hasty calculations," that by 1975 a new international agency responsible for seabed

mining would have at least five billion dollars annually, after expenses, to further development purposes.[3] Great, and, in retrospect, unrealistic expectations were thus set into motion.[4]

The adoption of the resolution by the UN General Assembly declaring the resources of the deep seabed beyond the limits of national jurisdiction to be "the common heritage of mankind"[5] left the task of operationalizing this concept to the future conference on the law of the sea. Indeed, giving concrete meaning to this ambiguous principle and constructing a legal system for seabed mining became a primary task of the conference. Developing states placed much of their hope in seabed mining and in building a new law of the sea as a "package deal." They may well have concluded that while developed states opposed a number of features of the emerging Part XI, ultimately, given incentives found in other sections of the Treaty, the developed states, nonetheless, would become parties to the Treaty when the package was evaluated as a whole.

That this was not to be the case would soon become apparent. With the advent of the Reagan Administration a reassessment of American negotiating strategy took place and resulted in demands for basic changes in the provisions of Part XI so that mining could take place on a commercial basis.[6] When those changes were not made the United States announced that it would not sign the Treaty[7] and, while some other developed states did sign, they refused to take the step of ratification. The resulting situation was one of stalemate in which a treaty had been adopted and could be brought into force by the developing states; but the provisions on seabed mining favored by developing states could not be made operative without the support of the developed states, states which at minimum had very severe doubts about key provisions regarding deep seabed mining.

Changes in the international political context during the late 1980s and the 1990s, however, opened what Kingdon has referred to as "a window of opportunity."[8] The Reagan Administration was replaced by the Bush Administration, the fall of communism in Eastern Europe served to undermine socialist ideals, and free market concepts began to sweep through parts of the Third World. The hope that the United States and other developed states would become party to the Treaty without change was seen to be mistaken and a new sense of pragmatism emerged which would allow changes to be made to accommodate the needs of developed states. The July 1994 agreement was the result of these developments and was hailed by diplomats from the United States and the other developed countries. An end to the international stalemate was now in sight.

The United States Political Context

In ironic fashion, however, as the world community was moving closer to the views of the United States, the congressional elections of 1994 brought about a shift in power in Washington which could serve to nullify the apparent diplomatic breakthrough. As part of the shake-up of power, Sen. Claiborne Pell, a long time champion of the Convention, was replaced as Chairman of the Senate Foreign Relations Committee by Sen. Jesse Helms, who has been a strong opponent of the Treaty. Having fought the battle for change internationally and having won, a point evident to the states of the European Union and Japan which have or will soon ratify the Law of the Sea Convention, the Clinton Administration may find its desire to ratify the Treaty blocked in the Republican controlled Senate. In this context the window of opportunity may have been closed.

The changes in Congress pose some difficult questions: now that the European Union and Japan have indicated that they will ratify the Treaty, what happens if the United States does not? Is the United States to rely on the Deep Seabed Hard Mineral Resources Act?[9] If so, it is important to take note of a provision in the Law of the Sea Convention which stipulates that no state may acquire or exercise rights over deep seabed minerals except in accordance with the provisions of the Convention. "Otherwise, no such claim, acquisition or exercise of such rights shall be recognized."[10] This provision would be binding upon the other developed states which become party to the 1982 Convention and would raise questions about the legitimacy of United States sponsored seabed mining such that raising the considerable amount of capital for such a venture might become an impossibility.

Seabed mining, an industry which had its roots in the United States, might well be exported as American corporations face a variety of dilemmas consequent to American non-ratification and non-participation in the international mining regime of the modified 1982 Law of the Sea Convention. Were this to occur it could provide an example of seizing defeat out of the jaws of victory. Given the accession of other developed countries to the Convention, there does not appear to be any likelihood of still further concessions and the United States

would have painted itself into a diplomatic corner which would undermine a variety of American interests.

ENDNOTES

1 *United Nations, Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, General Assembly Resolution 48/263 (July 28, 1994) reproduced in 33* ***International Legal Materials*** *1309-1327(1994).*

2 *For a detailed examination of this subject during the ongoing negotiations of UNCLOS-III, see Lawrence Juda, "UNCLOS-III and the New International Economic Order," 7* ***Ocean Development and International Law*** *221-255 (1979).*

3 *United Nations General Assembly,* ***Official Records****, A/C.1/PV.1515 and 1516 (1 November 1967).*

4 *See, for example, the analysis of the general prospects for seabed mining, an analysis which maintains its relevance a decade after it was written, in Marne Dubs, "Minerals of the Deep Sea: Myth and Reality," in Giulio Pontecorvo (ed.),* ***The New Order of the Oceans*** *(New York: Columbia University Press, 1986) pp. 85-121.*

5 *United Nations, General Assembly Resolution 2749 (XXV) (17 December 1970).*

6 *On the changes in American diplomacy on the law of the sea with the advent of the Reagan Administration, see Thomas Clingan, Jr., "The United States and the Law of the Sea Conference," in Pontecorvo (ed.), supra note 4, pp. 219-237.*

7 *Statement of President Reagan on the Convention on the Law of the Sea, 18* ***Weekly Compilation of Presidential Documents*** *887 (July 9, 1982).*

8 *John W. Kingdon,* ***Agendas, Alternatives, and Public Policies*** *(Boston: Little, Brown and Company, 1984).*

9 *Public Law 96-283 (June 28, 1980).*

10 *1982 United Nations Convention on the Law of the Sea, article 137(3).*

HAWAII'S CLAIM TO ARCHIPELAGIC WATERS

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Hawaii is geographically an archipelago. It consists of eight main islands[1], plus a chain of islands extending 1,100 miles to the northwest.[2] Johnston Atoll (Kalama), and Palmyra Island and Kingman Reef to the south of Hawaii were part of the Kingdom of Hawaii, but have been excluded from the geographical boundaries of the State of Hawaii.[4]

During the Nineteenth Century, the monarchs of Hawaii repeatedly claimed the waters surrounding Hawaii, and in particular the waters in the channels connecting the main islands.[5] While Hawaii was a territory of the United States (1898-1959), these claims were not voiced, but almost as soon as Hawaii achieved statehood Hawaii's state government asserted these claims vigorously and repeatedly.[6] One federal court decision[7]—to which Hawaii was not a party-has rejected these claims, but the claim persists and it appears to have greater credibility now that the Law of the Sea Convention[8] has been signed by the United States and has come into force for the 69 nations that have ratified it.

The 1982 Law of the Sea Convention accepted the concept of "archipelagic waters," and the definition of this term grants additional jurisdiction to countries like the Bahamas, Fiji, Indonesia, Papua New Guinea, the Philippines, and the Solomon Islands over the waters within and between their islands. The Convention's definition of an "archipelagic State" in Article 46(a) does not apply to Hawaii's islands, however, because it is limited to "a State constituted wholly by-one or more archipelagos." Hawaii is part of the United States, which is located primarily on the continent of North America. The United States cannot qualify as an archipelagic State because it is not constituted wholly by one or more archipelagos.[10] The United States was never enthusiastic about the archipelagic concept, so it did not seek to modify the definition of archipelago to allow Hawaii to benefit from this new juridical concept.[11]

If Hawaii did qualify as an archipelago under the Law of the Sea Convention, it would not appreciably benefit in terms of gaining additional ocean space, but the United States would have somewhat more control over international navigation through the channels between Hawaii's islands. More significantly, the State of Hawaii would have greater control over the channel waters in relation to the federal government if Hawaii were classified as an archipelago. If these channel waters were deemed to be historic or archipelagic waters, then Hawaii could assert sovereign control over them, because they would be characterized as akin to internal waters, and the federal waters would begin three miles beyond the border of these historic waters. If Hawaii's claim is not upheld, then the federal waters begin three nautical miles beyond the coasts of each island. The main document on the subject of historical claims to waters is a study written at the United Nations and used by the International Law Commission which has defined historic waters as those that a coastal nation has "traditionally asserted and maintained dominion [over] with the acquiescence of foreign nations.[12] The U.S. Supreme Court has rephrased this approach in the following manner:

> There seems to be fairly general agreement that at least three factors have to be taken into consideration in determining whether a State has acquired historic title to a maritime area. These factors are: (1) the exercise of authority over the area by the State claiming the historic right; (2) the continuity of this exercise of authority; (3) the attitude of foreign states.[13]

Applying these criteria to the claims made by Hawaii's kings in the 19th century is tricky, because the Kingdom of Hawaii was a weak nation, without a powerful navy to enforce its claim. The consistency and regularity of Hawaii's claims is relatively clear in the historic record, but no examples can be found of Hawaiian warships enforcing the claims, because the Kingdom of Hawaii did not have

any warships. Nonetheless, many other nations appear to have respected Hawaii's claim during this period. Total acquiescence is apparently not required, but rather that other nations knew or should have known of the authority being asserted, and that they, at least, did not formally object to the claim.[14] Another element that may also be important in sustaining a historic waters claim is a close relationship between the claimed waters and the adjacent land area,[15] and this criterion has led more generally to the acceptance of the concept of archipelagic waters.[16]

Between 1898 and 1959, Hawaii was a territory of the United States and did not have any independent capacity to assert its claim. Once becoming a state, it reasserted its claim quickly and has maintained it consistently, although again without any warships or physical means of enforcement. This claim thus raises the fundamental question of whether only nations with powerful navies can claim historic waters, or whether smaller, less-powerful nations should also be allowed to perfect such claims if they make their assertions loudly and consistently and support them with whatever power they have at their disposal.

It is appropriate to reexamine Hawaii's claim at present, because it appears to be strengthened by virtue of the international acceptance of the notion of archipelagic waters, which its channel waters would qualify for if Hawaii were an independent nation.[17] And indeed the fact that Hawaii once was an independent nation greatly strengthens its claim to an archipelagic status.

Consider the situation of an archipelagic state that sought to form a union with a nonarchipelagic nation. Imagine that the Bahamas, which now qualifies as an archipelagic state, were for some reason desirous of merging with its neighbor the United States. Would the Bahamas have to give up its archipelagic waters by virtue of that merger? Certainly all the arguments that have been voiced to support the concept of archipelagic waters would remain. The people of the Bahamas would still be inextricably linked their islands which provide links between their islands.

Or suppose the nations that now are linked through the regional organization the Association of South-East Asian Nations (ASEAN)—Brunei, Indonesia, Malaysia, the Philippines, Singapore, and Thailand—decided to form a sovereign union, a new nation uniting them all. Would the archipelagic waters of Indonesia and the Philippines disappear as a juridical concept through such a merger, or would the new ASEAN Nation be allowed to continue to maintain sovereignty over these waters as part of the continuing patrimony of the island people who make up the new sovereign entity?

The definition in Article 46(a) of the Law of the Sea Convention is obviously awkward, and would lead to strange results, unless we take a somewhat dynamic view of the concept of "historic waters" in the current context. In the examples above, assuming the hypothetical mergers had taken place, the people of the Bahamas, Indonesia, and the Philippines could argue that they—through their new national entities should continue to exercise sovereignty over the waters connecting their islands as "historic waters," even if they do not literally meet the Article 46 definition. They would be able to demonstrate that they had made their claim consistently and continuously and that it had been recognized by other nations as a formal matter through their ratification of the Law of the Sea Convention, and respected over a period of time.

But if the Bahamas, Indonesia, and the Philippines can make this argument, should not Hawaii also be able to take advantage of the new juridical concept recognized in the Convention? Hawaii's merger with the United States was not entirely consensual, but the end result is nonetheless the merger of one nation that clearly would qualify for archipelagic-state status if independent with another nation that would not. Should Hawaii's people have to sacrifice sovereignty over the waters connecting their islands simply because they have formed a union with a continental neighbor?[18]

The other new development that should strengthen Hawaii's claim is the increasing recognition of a link between island people and their surrounding waters to support historic waters claims. As mentioned above, the International Court of Justice recognized this link in the Norwegian Fisheries Case,[19] where it ruled that Norway could exclude British trawlers from the waters in Norway's deeply-indented northern fjords because of the reliance of the people of these barren regions on the fishing resources of their adjacent waters. Since this decision, the international community has recognized the special links between coastal peoples and their adjacent waters repeatedly, and the new 200-nautical-mile exclusive economic zone and the expanded 12 nautical-mile territorial sea are premised upon these links.

Hawaii's residents have felt a connectedness among their main islands historically, and the links

today are close and commonplace. The channel waters are used for navigation, recreation, and resource exploitation, and it is appropriate to recognize these special links as strong and pervasive. Whether by recognizing the claim to the channel waters as meeting the standards of "historic waters" or by finding an exception to the rigid language of Article 46 for those nations that were once independent and would qualify for archipelagic-state status if they were independent, Hawaii should be able to exercise sovereignty over the channel waters connecting its main islands.

ENDNOTES

1. Hawaii, Maui, Lanai, Molokai, Kahoolawe, Oahu, Kauai, and Niihau.

2. The main features in this chain are Nihoa Island, Necker Island, French Frigate Shoals, Gardner Pinnacles, Maro Reef, Laysan Island, Lisianski Island, Pearl and Hermes Reef, and Kure Island. Midway Island is geographically part of this chain, but is not part of the State of Hawaii. An Act to Provide for the Admission of the State of Hawaii into the Union, sec. 2, March 18, 1959, Pub. L. 86-3, 73 Stat.4. See generally Jon M. Van Dyke, Joseph Morgan, and Jonathan Gurish, The Exclusive Economic Zone of the Northwestern Hawaiian Islands: When Do Uninhabited Islands Generate an EEZ? 25 San Diego L. Rev. 425 (1988).

3. See generally Jon M. Van Dyke, Ted N. Pettit, Jennifer Cook Clark, and Allen L. Clark, The Legal Status of Johnston Atoll and Its Exclusive Economic Zone, 10 U. Haw. L. Rev. 183 (1988).

4. Admissions Act, supra note 2, sec. 2.

5. These claims have been documented in detail in other papers, and will not be repeated here. See, e.g., John Briscoe, The Effect of President Reagan's 12-Mile Territorial Sea Proclamation on the Boundaries and Extraterritorial Powers of the Coastal States, 2 Terr. See J. 225, 235-46 (1992); Rose Pfund, Historic Waters Revisited: Hawaii's Channel Waters, Los Lieder 11 (Law of the Sea Institute, Honolulu), April 1989, at 1; Robert G. Schmitt, Linda K.C. Luke, Edwina Yee, Robert E. Strand, and Carter Kerns, The Hawaiian Archipelago: Defining the Boundaries of the State 63-67 (U. Hawaii Sea Grant Working Paper No. 16, Oct. 1975), Owen Tamamoto, Controversy Over Hawaii's Inter-Island Channel Waters: An Assessment of and an Argument for Hawaii's Historical Claim (University of Hawaii Law School seminar paper on file with the author, May 30, 1978).

6. See, e.g., letter from Christopher Cobb, Chair, Hawaii Bd. of Land & Natural Resources, to Maui Divers of Hawaii, Feb. 4, 1977, claiming that "the waters lying between the main islands of the Hawaiian Archipelago" are part of the "territorial waters of the State of Hawaii."

   Article XV, Section 1 of Hawaii's Constitution defines the state by saying that: "The State of Hawaii shall consist of all the islands, together with their appurtenant reefs and territorial and archipelagic waters..." (emphasis added).

7. Civil Aeronautics Board v. Island Airlines, Inc., 235 F.Supp. 990 (D.Haw. 1964), aff'd sub nom Island Airlines, Inc. v. Civil Aeronautics Board, 352 F.2d 735 (9th Cir. 1965).

8. United Nations Convention on the Law of the Sea, Dec. 10, 1982, U.N. Pub. Sales No. E.83.V.5.

9. Id. arts. 46-54.

10. This odd formulation was insisted upon by Turkey, which was concerned about the effect of Greece's islands in the Aegean Sea on jurisdiction over the waters and resources of the Aegean, and by Burma (now Myanmar) which was concerned about the effect of India's Andaman Islands on jurisdiction over the waters and resources of the eastern Indian Ocean. Interview with Professor Bernard Oxman, University of Miami School of Law, at the Annual Meeting of the Law of the Sea Institute, Honolulu, Hawaii, July 1994.

11. See generally Nancy Barron, Archipelagos and Archipelagic States under UNCLOS III: No Special Treatment for Hawaii, 4 Hastings Int'l & Comp. L. Rev. 509, 514-25 (1981?).

12. United Nations Office of Legal Affairs, Juridical Regime of Historic Waters, Including Historic Bays, 14 U.N.GAOR, U.N.Doc. A/CN.4/143, 2 Y.B. Int'l L. Comm'n 1, 13 (1962).

13. The Louisiana Boundary Case, 394 U.S. 11, 23 n.27 (1969)(emphasis added).

14. United States v. Alaska, 422 U.S. 184, 200 (1975); Tamamoto, supra note 5, at 49.

15. Fisheries Case (U.K. v. Norway), 1951 ICJ 116.

16. See generally Barron, supra note 11.

17. See Briscoe, supra note 5, at 243.

18. The Native Hawaiians, who make up about 20 percent of Hawaii's present population, are now going through a process of reestablishing an autonomous Hawaiian nation. Most Hawaiian groups appear to favor a "nation-within-a-nation" approach, but some support an independent Hawaii.

19. Fisheries Case (U.K. v. Nor.), 1951 ICJ 116.

Ocean Governance Issues in the Territory of Guam

Conflict and Resolution

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United States policies regarding the range of ocean issues which have risen over the past few decades have been, at best, disjointed and confused, conflicting and retrogressive, reactive and exclusionary. No where is this clearer than in the application of (non)policy in the territories of the United States.

It is important to understand first, that all remarks made herein apply to Guam. While one would normally assume that a single, "U.S. Territorial Policy," could be applied to all U.S. territories, or at least all U.S. territories acquired in the same manner at the same time, in truth, there is no U.S. Territorial Policy at all, and certainly no coherent or consistent treatment of any of the territories.

For Guam, in terms of ocean governance issues, three currently stand out at the top of government attention.

State Waters - Zero to Three

There is, perhaps, no single issue in the U.S.-Guam relationship which is more confused than the issue of jurisdiction within the 3 mile State Waters. No other issue could serve better as an example of the direction our relationship is going. While the rest of the nation argues jurisdictional questions for the exclusive economic zone (EEZ), Guam must first argue the waters closer at hand.

Through Public Law 93-435, as amended by P.L. 96-205, and Presidential Proclamation No. 4347 (February 4, 1975), the United States stated that they were returning submerged lands and resources within the 3 mile limitation to the Government of Guam, *except for those submerged land areas which lay adjacent to federal fast-land properties.* The retention amounted to more than 30 miles of coastline, or approximately 1/3 of Guam's waters.

For approximately ten years, no one questioned the validity of these laws. Lands returned subsequently, with the infamous "Brooks Amendment" attached to the transfer, prohibited the Government of Guam from making any profits from the use of those lands. This applied equally to submerged lands. As interestingly, the implied rational nexus of submerged land to fast-land ownership stated earlier, ceased to exist. When all federal fast land properties within the Cocos Lagoon area were returned to the Government of Guam, the adjacent submerged lands did not follow, but were instead pursued independently several years later.

What all had failed to see between 1975 and the mid 1980s was that those laws did not give submerged lands to the people of Guam, they took them! In fact, the United States had, (most certainly by mistake, but a mistake of their own making), granted the submerged lands to within the 3 nautical mile limits, to the Government of Guam in **October of 1950.**

The Organic Act of Guam (1950), was an act written and adopted by the government of the United States, without concurrence of the people of Guam. This Act serves as Guam's Constitution and created the Government of Guam. Section 28 (a) of the Act states: "The title to **all property**, (emphasis added), real and personal, owned by the United States and employed by the Naval Government of Guam in the administration of civil affairs of the inhabitants of Guam...shall be transferred to the government of Guam within 90 days after the date of enactment of this Act."

Section 28 (b) states further: "All other property, real and personal, owned by the United States in Guam, not reserved by the President of the United States within ninety days after the date of enactment of this act, is hereby placed under the control of the government of Guam, to be administered for the benefit of the people of Guam..."

In answer to subsection (a), the submerged lands and waters around Guam *were* used in the administration of civil affairs of the inhabitants of Guam, as fishing, boating, swimming and other uses of the lands and waters surround-

ing Guam, were matters of civil administration. By the language of the Act, therefore, submerged lands were transferred to the Government of Guam.

In answer to subsection (b), Federal District Court Judge J. Gilmartin stated, in deciding against the federal government who had prosecuted five local men for illegal fishing in waters adjacent to federal property on Guam: *"Nevertheless, the waters immediately adjoining the Naval Communication Station below the low water mark were, in effect, expressly excluded from the E.O. No. 10178 reservation of jurisdiction,"* and *"In light of the above, the waters immediately adjacent to the Naval Communication Station, and below the low water mark, like the remainder of the Guam territorial waters, must be held to be outside the exclusive jurisdiction of the United States and a proper subject of legislation by the Guam Legislature."*

It has been Guam's official position for the past four years or more, that the language of the Organic Act of Guam transfers the authority for submerged lands around Guam to the Government of Guam, and that Judge Gilmartin's findings in Criminal Case 1-61 (91 F. Supp. 563), supports that position. It is also the position of the Governor of Guam that because the federal government did not appeal the decision, or argue the findings, that they had in fact accepted the Judge's position and therefore any subsequent actions by the federal government. Contrary to our position, this should be construed as a taking without due process or just compensation.

This issue is currently the center of problems associated with the development of the U.S. Fish & Wildlife Service's Guam Wildlife Refuge. The Service initially requested a federal consistency determination from the Guam Coastal Management Program for the inclusion of a certain amount of submerged lands into the Refuge. The Program took the position that, because the lands were the rightful property of the Government of Guam and the rightful owners permission to utilized the lands in that manner had been neither sought nor granted, that federal consistency was premature until such permissions had been obtained.

The Service did not object to Guam's position, but instead forwarded the argument for decision by the General Services Administration (GSA), who was the property transfer authority for the Refuge, (transferring Department of Defense property to the Service). GSA asked Navy for their opinion on ownership, who replied that they felt they were the rightful owners of the submerged lands. GSA responded to the Service, who re-requested a federal consistency determination for the transfer of submerged lands from Navy to the Service. The Program in February 1995 issued another finding. It found that the Service had no authority to include Government of Guam lands without permission from the proper authority, and that a federal consistency determination would not be issued, as that was the wrong avenue for permission.

This is certainly not a minor issue to the people of Guam. Unlike the States which voluntarily agreed to membership in the United States, Guam was taken as a spoil of war, and has never been asked its opinion or for agreement on the seizure of property or human rights. The waters surrounding Guam, particularly those near waters in question, are essential to the human rights of the indigenous population of Guam in protecting a culture and way of life. The protection for those are not being addressed by the United States.

It is hard to imagine that the State of California would abrogate their rights in the waters adjacent to San Diego, San Francisco, Oxnard, or any other area where a federal property was adjacent to the shore, simply because that facility was adjacent to the shore. It is just as difficult to imagine that the people of Guam, already dispossessed of their rights to determine their own future, will allow further dispossession of their rightful resources.

The question of jurisdiction within Guam's EEZ is of great importance, and is being argued. Guam's rights to its waters in the zero to three are of paramount importance in that argument.

EEZ Benefit Sharing

The fact that the Legislature of Guam declared authority within the EEZ three years before the Reagan Proclamation, demonstrates Guam's understanding of international norms early on. It took a full ten years, however, for the federal government to acknowledge that the rights of territories within the EEZ were different from the rights of States. In one of those very rare occurrences, the rights of territories were greater than the rights of individual States. This was a federal perspective which was difficult to achieve, and still is not fully realized, but major steps forward have been made.

The United Nations Convention on the Law of the Sea states: *"In the case of a territory whose people have not attained full independence or other self-governing status recognized by the United Nations, or a territory under colonial domination, provision concerning rights and interests under the Convention shall be implemented for their well-being and development."*

(Final Act of the UNCLOS, Annex I, Resolution III, 1.).

This declaration conforms to a report completed by the Mineral Mining Service for the Secretary of Interior early in the 1980's, which concluded that in territories which do not enjoy full participation in the national government, the benefits of the EEZ should accrue to the territory.

Guam has spelled out, in its draft Commonwealth Act, (Section 10), its rights to the resources of its EEZ. Guam goes further, however, in asserting its responsibilities to manage the resources (not just exploit them), and to manage non-exploitable concerns, such as pollution. We have heard for too many years that our aspirations are "unconstitutional," which for territories isn't possible as the territorial cases, upon which all territorial directed policies are built upon, in essence states that the Constitution applies to territories any way the Congress dictates through legislation!, (the Organic Act of Guam is a cases in point of such ruling).

On November 9, 1993, the first sign that the federal government recognized territorial rights was received. Secretary of Interior Bruce Babbitt, in a letter to Commerce Secretary Ron Brown, outlined a proposal for a joint agency working group to discuss federal fisheries policies and possible benefit sharing from fisheries for the island territories. The background paper which accompanied the letter was filled with specific language which recognized the rights of territories, the impacts of fisheries on the territories, and the rights of the territories to participate in regional international fisheries agreements and organizations. This paper represents a breakthrough perspective.

In response, and at the suggestion of the Guam Coastal Management Program, the Governor of Guam wrote to Secretary Babbitt on January 10, 1994 requesting that:

1. Any group, working or otherwise, designated for the purpose of disposing of resources or benefits derived from those resources within the EEZ of Guam, include representation from Guam as an equal voice.
2. Any such group should look beyond the singular issue of fisheries revenues, and begin looking more deeply at the issues of all EEZ resources and territorial rights in order to develop meaningful and, for the first time, fair policies which would acknowledge the human rights of America's unenfranchised citizens.

To his credit, Secretary Babbitt, after meeting with the Governor of Guam in Washington in February 1994, expanded the inter-agency committee to include representatives of all U.S. insular territories. The first meeting of this important group was held, on Guam, on April 22, 1994, and a second meeting was held in Honolulu in July 1994.

These meetings included representatives from Departments of Interior and Commerce, Pacific Basin Development Council, Western Pacific Fisheries Management Council, Guam, CNMI, American Samoa, and U.S. Coast Guard. Subjects discussed include non-living resources, the Magnuson Act, U.S. fisheries development funding programs, third country assistance, and research/exploitation of EEZ resources.

The parties certainly do not expect "quick fixes" or easily achieved programs or procedures, but a very positive first (and second) step has been taken, which represent a change in direction for U.S. interpretation of benefit rights, and in particular, the rights of benefit sharing.

United States Coral Reef Initiative

Like the inter-agency EEZ efforts, the U.S. Coral Reef Initiative is another example of the value of remaining alert to the actions of others.

In December of 1993, the U.S. State Department transmitted an innocuous looking notice, proposing a meeting on coral reefs to be held in Washington D.C. in January, the month next.

While the islands, particularly Guam and Hawaii, expressed concerns, it was not until receiving more detailed information from that January meeting that concerns were shown to be justified.

Of the nearly one hundred participants listed, *not a single person was from west of the Mississippi River.* East coast academia and the federal government represented the bulk of participants, with big money non-governmental organizations (NGO) coming in a strong third. Not one state or territorial government was represented, although all coral reefs within the U.S. are within state waters, under the jurisdiction of state and territorial governments.

It became plain that the purpose of the meeting was to draft a U.S. response to the now acceptable Agenda 21 drafted several years earlier at UNCED in Brazil. This was an attempt, or appeared to be an attempt, by the U.S. to try to catch up to a leadership role in world, environmental affairs.

In March, at the Coastal Zone Management Manager's Meeting in

Washington, Coastal Zone Management (CZM) representatives from the U.S. flag insular areas raised very loud, and very strong objections to the manner in which the U.S. Coral Reef Initiative was being pursued. Those voices, bellicose though they may have been, were plainly heard by the Department of State and Department of Commerce (NOAA), who were apparently surprised by the impact of their own blunders.

In addition to the exclusion of proper players from the mix, the U.S. effort was also mired in the myopia too prevalent in U.S. thinking, that tropical waters and coral reefs begin and end in the Caribbean. The Pacific was almost totally ignored in the first cut of the Initiative.

Through the efforts of the insular Governor's and CZM programs, with very strong support from the Office of Ocean and Coastal Resources Management (OCRM) within NOAA, and an honest effort to make corrections by Department of State and Department of Interior, new drafts of the U.S. Initiative were developed. A meeting of CZM Managers, NOAA and State Department officials and Pacific Basin Development Council personnel was held in Maui, Hawaii in June 1994 to provide new draft comments for Pacific area inclusion in all aspects of the Initiative.

The working relationship between the U.S. and the politically divergent islands of the Pacific, has grown to be a model relationship. In reality, it is a rare example of a true partnership. The island territories have been included in all aspects of the initiative, including participation in international efforts. The Pacific flag islands met in December to develop a Pacific Region U.S. Coral Reef Initiative. That effort was supported by the federal agencies, but not directed by them.

Now, as each island government works toward developing local coral reef initiatives, the support for efforts extends in both directions; from the federal government to the local and regional efforts, and from the local governments toward federal and international efforts.

The U.S. Coral Reef Initiative started its life in a difficult manner, but the fact that it could survive that and grow to be a successful effort, even beyond its more narrow purposes, gives great hope that all forms of authorities can be molded to work as true partnerships.

Conclusion

For all too many years, the island territories of the United States have been given no respect, few rights, and many directives. The days of the subservient and well behaved servant are, however, over, and the island governments are demanding a different treatment, both in political areas and resource rights.

While Guam continues to fight for the same territorial water authorities and rights enjoyed by the States and Commonwealths of the U.S., we have achieved some success in other areas, particularly in the broader questions of the EEZ and our coral reefs.

The United States decision to support UNCLOS perhaps signals a new found respect for international norms and rules. If so, the territories of the United States stand to benefit enormously. As one of those territories, Guam looks forward to further improvements in our relationship and our right to manage our resources. After all, those who stand to suffer the greatest from poor decision-making should have the strongest voice in that decision-making. It can only lead to better management, better protection, and wiser use of our ocean resources.

Sustainable Use of Marine and Coastal Resources Under UNCLOS and UNCED:

Some Australian, Canadian, and U.S. Comparisons

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The coming into force of UNCLOS 1982 and agreements reached at UNCED 1992 establish a general framework for sustainable resource use in national EEZs and coastal zones. In 1994 Australia ratified UNCLOS (as modified by the July 28, 1994 Agreement regarding seabed mining under UNCLOS Part XI) and claimed a 200 nautical mile EEZ and 24 nautical mile contiguous zone pursuant to UNCLOS. President Clinton presented the convention as modified to the U.S. Senate for accession in October, 1994.

Domestically, the 1993 final report of the Australian Resource Assessment Commission's Coastal Zone Inquiry is a potentially significant milestone in the discussion of institutional arrangements for sustainable coastal resource use in Australia. In November 1994 Canada's Minister of Fisheries and Oceans issued "A Vision for Ocean Management" paper recommending enactment of a comprehensive Canada Oceans Act based on an oceans and coasts report released by Canada's National Advisory Board on Science and Technology (NABST) earlier in the fall. The United States government has yet to initiate such focussed inquiries. However, sustainability is receiving increasing emphasis in U.S. regional bilateral, state, and local coastal management efforts and the 1995 reauthorization of the U.S. coastal zone management act makes assessment of those efforts timely.

For marine areas, the world's most fully developed regional multiple-use management program is Australia's scheme for the Great Barrier Reef carried out cooperatively between the national government and the Queensland state government pursuant to 1975 national legislation. Multiple-use marine sanctuaries established under the U.S. Marine Sanctuary Act tend to emphasize sustainable resource uses over unsustainable ones. Recently designated sanctuaries include some intensely used areas of the U.S. exclusive economic zone and provide an important test of the program's capabilities. For the Gulf of Maine, adjacent Canadian provinces and U.S. states have committed to a joint program of research and management oriented towards sustainability. The state of Oregon continues to plan and manage state ocean waters under a legal framework which gives priority to renewable resource uses over nonrenewable ones in case of conflict. Unfortunately, many U.S., Australian, and Canadian fisheries which in theory are to be managed sustainably appear in fact to be managed unsustainably. In the U.S. emergency actions taken under the Endangered Species Act may result in major changes in the management regime for some fisheries.

On the terrestrial side, sustainable resource use in Australia, the U.S., and Canada is complicated by mixed private and public ownership of land. Even on the marine side where that factor is not present, significant difficulties exist due to the mobility of the marine species of concern, the fluid nature of their environment, the mixed record of the federal, state, and provincial agencies charged with their protection and management, and congressional and parliamentary inability to legislate in other than a piecemeal fashion. Within all three nations, considerations of federal-state and federal-provincial relations continue to affect the management structure for sustainable use of coastal and marine resources significantly. Those considerations are weighed heavily in the design of national institutional arrangements promoting sustainable resource use within the very general international parameters so far established through the UNCLOS, UNCED, and related international processes.

As a case study in sustainable resource use, the legal and institutional components of the management regimes for marine and coastal resources of Australia, the U.S., and Canada can be measured against four international environmental policy themes. Those are maintenance of biodiversity, the precautionary principle, the polluter pays principle, and sustainability.

Fisheries are managed by all three countries under principles related to sustainability such as optimum yield, but in practice many important fisheries have been overfished in unsustainable ways. Furthermore, from a "polluter pays" perspective, some important external costs of fishing such as bycatch of nontarget species are only beginning to be internalized. For most fisheries, no attempt is made by governments to capture a portion of the economic rent through royalties or fees, and this may be a contributing factor to both the overfishing and the externalities problems. A precautionary rather than an optimistic approach to setting fisheries catch quotas could help reduce overfishing.

In some fisheries, bycatch of nontarget species threatens biodiversity. In the U.S. major legal pressures to reduce such threats are generated under endangered species and marine mammal protection laws. However, without improved protection for habitat important to both commercially valuable fish species and nontarget bycatch species, both overfishing and bycatch problems may be expected to continue. The Canadian legal regime appears to offer the greatest possibility for linkage between habitat protection measures and improved fisheries; in the U.S., Endangered Species Act listings for endangered and threatened coastal and marine species create potentially significant legal protections for their habitat, on a region-wide scale in the case of anadromous fish recently listed as endangered or threatened.

An important function of the Australian Great Barrier Reef and U.S. marine sanctuaries programs is protection of marine habitat. Furthermore, the statutory framework for such marine protected areas in both countries allows implementation of all four of the international environmental law policies including sustainable use of resources within the protected area under multiple-use zoning schemes. However, these marine protected area programs are relatively limited in geographic coverage. In all three countries the management regimes for offshore oil and gas drilling and seabed minerals mining are beginning to reflect the "polluter pays" principle, primarily by imposing compensation requirements when drilling or mining conflicts with other marine resource uses, the most dramatic example being oil spill compensation requirements. Offshore oil and gas and seabed minerals are nonrenewable resources, but current legal and institutional arrangements governing their exploitation do not address the difficult question of how to handle exploitation of nonrenewable resources under sustainability principles. Of course, similar difficult questions confront the managers of onshore oil and gas and minerals deposits as well.

Without a comprehensive land component, Australia's Great Barrier Reef and the U.S. marine sanctuaries programs are incomplete models for integrated management of marine and coastal areas. As one study of sustainable development puts it, "in terms of marine resources, sustainable development begins in the coastal zone, not the edge of the EEZ." (Beller 1990). For a more integrated approach, one model is the United States Coastal Zone Management Program funded at the federal level and carried out at the state level.

The program's strengths are that state CZM plans cover multiple coastal resource uses including federal activities impacting the coast through the CZMA's federal consistency provisions. However, under the CZMA U.S. coastal zone management efforts generally have focused on the policy issues posed by coastal land development, waterfront planning, permit procedures, and interagency coordination, rather than sustainable development as such. (Needham 1991).

Thus, if U.S. CZM is to be used as an international model, for both developed and developing coastal nations, it needs to be reoriented. For example, within the existing CZM framework Oregon's CZM program has incorporated the sustainability, precautionary, and polluter pays principles in the program's Ocean Resources Goal 19 and the recently completed Oregon Ocean Plan which includes a "Stewardship Zone" extending up to 40 nautical miles offshore. (Hout 1990). Implementation of provisions in Goal 19 and the Oregon Ocean Plan for species and habitat protection certainly would help preserve biodiversity too. Goal 19 and the state's ocean planning statute both give priority to renewable resource uses in cases of conflict with nonrenewable resource uses.

Implementation of the Oregon Ocean Plan continues along two fronts:

(1) preparation of a more-detailed

multiple-use resource management plan for the immediately adjacent three nautical miles of ocean and seabed managed by the state pursuant to the federal Submerged Lands Act; and

(2) management of human impacts on coastal tidepools. In an exercise of sustainable ecotourism, at Yaquina Head north of Newport, Oregon, visitors eventually will be routed to artificial tidepools created as the successors to a rock quarrying operation which might have (unsustainably!) consumed most of the very scenic headland. However, on difficult coastal fisheries issues, the Oregon ocean planning program tends to defer to the established federal, regional, and state fisheries management agencies.

Specific Oregon coastal watersheds are receiving attention under separate federal and state programs including the Tillamook Bay National Estuary Project. The U.S. National Estuary Program was established by the federal Water Quality Act of 1987. The act authorizes the federal Environmental Protection Agency to convene management conferences to develop comprehensive conservation and management plans for U.S. estuaries of national significance that are threatened by pollution, development, or overuse. With federal support, such a plan will be prepared by July 1998 for Tillamook Bay addressing pollution problems in the bay and sustainable use of its resources. The lessons learned in the process will be applied to other Oregon and Pacific Northwest estuaries. A similar process is being carried out with state funding under the supervision of the Oregon Governor's Watershed Enhancement Board emphasizing the Rogue River on the south coast and the Grand Rhonde watershed in northeastern Oregon.

These Oregon examples of state-local based sustainability efforts serve to illustrate a much more general point. Studies of institutional aspects of sustainable development in federations such as Australia, Canada, and the U.S., will be very incomplete if they do not look for activity below the federal level, especially in Australia and Canada where the states and provinces tend to be proportionally bigger physically and stronger politically.

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Initiating Integrated Coastal Area Management for Bulgaria's Black Sea Coast

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This paper considers the practical aspects of initiating integrated coastal area management in a former communist nation. From an institutional perspective, this task presents unique problems. For example, in the United States and in other democratic and economically-advanced countries, coastal area management derives from the perceived need to integrate manage of coastal and ocean space, resources, and associated human activities that typically have been managed in separate sectors and under conflicting and competing regimes. It has been common to speak of the need for intergovernmental and intersectoral management, and to propose institutional arrangements that seek to achieve some higher degree of integration across different sectors than currently exists. In the United States, we rely substantially upon the capacity of state and local governments to carry out coastal area management, rather than upon the federal government. Finally, reflecting our democratic culture and tradition, we pay great attention to the need to involve and to respond to the public in devising and implementing coastal management. In the United States at least, we attempt to carry out these tasks in the face of a considerable anti-government and planning bias.

In contrast, highly centralized governments such as Bulgaria's are skilled in the language and techniques of planning. Bulgarian ministries have planned and implemented large-scale projects of great complexity for many years, although clearly many of these projects were ill-conceived and badly managed. Nevertheless, these ministries have professional staff who are by international standards well educated and trained. But they have had practically no experience in preparing development and management plans with the participation of diverse and competing stakeholders. They know well how to fight turf battles with competing ministries, but in their heavily centrally-managed political and economic system, no other "stakeholders" outside the government claimed or had sufficient power to compel attention. Independent public groups did not exist, and citizens lacked standing entirely to affect the process. Moreover, in a relatively small country such as Bulgaria, centralized ministries monopolized professional expertise. Central governmental entities outside the capital could not compete with their Sofia-based colleagues, and local governments were totally dependent upon the central bureaucracy and lacked any other source of support.

In 1992, the World Bank (WB) and the Government of Bulgaria (GOB) began to consider seriously the need and prospects for developing a program of integrated coastal area management for Bulgaria's Black Sea Coast. Like other former communist governments in Eastern Europe, Bulgaria had officially terminated dominance by the communist party of the country's political system, initiated a program of reforms (land and property restitution and privatization, decentralization of governmental functions, etc.), and elected a new Parliament. Like other Eastern European countries, Bulgaria faced serious immediate problems stemming from the collapse of its managed economy and political system, disruption of its normal trading relationships, and the country's general incapacity to interact with western economies and international development organizations that might normally be interested in providing assistance. In this context, the new GOB was obliged to move forward on several fronts, such as the political and economic reforms mentioned above, as well as to give attention to matters that previously the government had neglected. Having largely ignored environmental problems and resource management issues for the preceding four decades, the GOB was suddenly

subjected to pressure by international organizations, such as the WB, to address these problems and issues. In response, Bulgaria quickly organized its first environmental ministry. Further, sizable loans to fund major water supply and infrastructural projects were linked to the government's agreement to undertake environmental and resource management projects. The GOB's proposed Black Sea Coastal Management Program clearly has its origins in the negotiations between the GOB and the WB concerning assistance for such projects.

Of course, a major impetus for changing the system came from the Bulgarian people themselves after the collapse of the former government. Within the new GOB, reformers reorganized the Ministry of Regional Development and Construction (MRD) to institute a program of decentralization and democratization. Devolving authority upon municipal governments and limiting central government authority became an important goal. When the WB and the GOB began discussions of the terms of assistance loans, local government reform as well as improvements in environmental and resource management became matters of high priority.

It is not surprising that the Bulgarian Black Sea coastal region quickly became a focus of attention for both Bulgarian and WB planners. In economic and population terms, the coastal region of Bulgaria is of immense importance to the country. Nor had the former GOB neglected the coastal region. Huge investments in tourism facilities and complexes had been made. The ports of Varna and Bourgas are the centers of the country's export/import trade. Despite this degree of urban, industrial development, large areas of the coastal region are relatively undeveloped and exhibit high natural ecological and scenic values. To maintain the coastal facilities already built and to protect natural areas from the threat of unwise development, the GOB and the WB decided to institute a national program of coastal management as soon as possible.

One factor deemed persuasive by the WB in its decision to provide funding to support the development of the coastal management program was the belief that rapid decentralization of governmental authority from Sofia ministries to the municipal governments would leave development decisions in the hands of local officials unskilled in the exercise of such authority. To provide for a transition period during which the capacity of local government to carry out environmental and resource management would be improved, the WB and the GOB decided upon the following strategy and actions to implement integrated coastal area management:

1. The Council of Ministers (COM) would issue an interim degree (Coastal Rule No. 3, July 1993) establishing two zones within the Black Sea Coastal Region, including all coastal municipalities, pending the enactment of a "coastal act". The GOB asserted ownership of beaches, beds of rivers and streams, parks, and natural areas, based upon the national Constitution which declared such ownership in the name of the people of Bulgaria. On the basis of existing law, the COM decreed that certain activities were prohibited within the first and second zones while other activities were permitted. In sum, development projects that otherwise might be carried out in critical areas such as beaches could not be permitted by local governments eager for economic development.
2. In the interim period between the issuance of the Coastal Rule and the enactment of a new coastal law by the Parliament, the WB would assist the GOB in the development and implementation of the Bulgarian Black Sea Coastal Management Program. For this purpose, the GOB, aided by the WB, contracted with the Harbor and Coastal Center (HCC) of the University of Massachusetts.
3. Since January 1994, the GOB has established the Black Sea Coastal Management Program in the Ministry of Regional Development, with a central office in Sofia and two regional offices in Varna and Bourgas. Staff have been hired and program training carried out with the assistance of the HCC. Several training missions have been conducted, including such topics as basic ICAM principles; project assessment, permitting, and monitoring; coastal GIS; etc. A strong emphasis of the training component has been to foster interministerial and intergovernmental cooperation, and to provide assistance to local governments. Most training activities have been conducted in the coastal region and have involved substantial participation by local officials.

Implementation of the coastal program has had to address problems created by the change in government in 1993 (a six months' delay in issuing the interim coastal rule and organization of the ministerial coastal management office), the recent action by the Supreme Court of Bulgaria setting aside the

interim coastal rule as exceeding existing authority (necessitating actions by the MRD to compensate for the loss of the rule), and the fall of the government, leading to the scheduled elections in mid-December 1994).

4. Despite these developments, support for the coastal management program remains strong in the MRD and the WB. Although local governments have opposed elements of the interim rule (e.g., limiting their capacity to carry out development projects in beach areas), local governments have generally supported the institution of coastal management in the Black Sea Region, primarily because the MRD and the WB have made it clear that the purpose of the program is to improve the capacity of local government to manage its coastal lands and resources. Most recently, assisted by the HCC, the MRD has prepared the draft of the proposed coastal act, institutionalizing many of the features of the interim program, including providing a mechanism for intergovernmental policy and decision-making and involving citizens in implementing the coastal program. Pending the outcome of the election, a decision will be made concerning the submission of the new legislation to the Parliament.

   Meanwhile, the MRD's Coastal Management Office proceeds with a separately-funded but related effort to assist the Black Sea municipalities prepare municipal land use plans that must incorporate elements of ICAM, as exemplified in the interim coastal rule and in guidance documents binding upon the municipalities. Approval of the municipal land use plans by the MRD allows local governments to assume a much larger role in permitting and managing local development activities affecting coastal lands, waters, and resources.

Initiating integrated coastal area management in Bulgaria is viewed by the GOB and the WB as an important governmental reform. Clearly the institutional changes that are necessary to support democratic, intergovernmental environmental and resource management decision-making are integral to the transformation of Bulgarian society and government. In the author's opinion, coastal managers in the United States and other democratic, developed countries are not accustomed to viewing their profession in this manner. But it has become clear that implementing coastal management in a former communist state depends heavily upon creating the institutions and mechanisms that sustain a democratic society. The more technical issues of implementing ICAM pale in significance in contrast to this essential task.

Group Discussion Reports

Editors' note: Several group discussions were held during the conference on topics of major concern. Reports from two of the working groups–on trade and the environment and on marine fisheries–are reported in the next section.

Summary of the Discussion by the Group on Trade and the Environment

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The group began its discussion with a brief overview of potential problems associated with unilateral trade sanctions to protect dolphins, sea turtles, whales, and other marine living resources. It was pointed out that the United States has enacted a significant number of domestic environmental laws that require certain products be embargoed from nations that fail to adequately protect several species of marine animals. Some of these statutes may be construed as violative of specific substantive provisions in the United Nations Convention on the Law of the Sea (UNCLOS), which grant coastal states the right to conserve and manage living marine resources within their territorial seas and exclusive economic zones (EEZ) and to exploit the resources of the high seas subject only to the limited requirements imposed by international agreement and general precepts of international law. Consequently, it was asserted that should the United States accede to UNCLOS, it may have to defend its trade sanction policies before a third-party adjudicative body established under the Convention's compulsory and binding dispute settlement provisions.

Provided with this background, the group was asked to comment on the interaction between trade law and UNCLOS. The first comments focused on whether or not the dispute settlement system established under the General Agreement on Tariff and Trade (GATT) and the newly established World Trade Organization (WTO) is a more appropriate forum for trade-related disputes of this kind. One participant noted that GATT has driven the process of global free trade, but does not recognize the nature of public goods or intergenerational equity. It was suggested that there may be an argument that Part XII of UNCLOS dealing with the protection and preservation of the marine environment is "widely accepted" and hence limits the applicability of GATT in the context of using trade measures to protect marine animals. It was also suggested that other sections of UNCLOS be examined to determine if they provide a basis for dispute settlement independent of GATT.

Some participants voiced concern regarding the continued use of unilateral trade sanctions and felt that U.S. interest may be better served by a multilateral approach. In the future, other countries may use the same types of unilateral trade measures against the United States to further their own particular cultural or environmental objectives.

Significant discussion was devoted to the topic of the duality under international law between GATT and UNCLOS when the issue in dispute has both trade and ocean aspects. For example, it is unclear to what extent claimants may engage in "forum shopping" and "forum racing" to gain advantage in one dispute settlement tribunal versus another. It is also unclear whether a dispute settlement tribunal will be willing to voluntarily defer jurisdiction to another tribunal. Instead, it was

suggested that "institutional arrogance" may require that the tribunal retain jurisdiction over a dispute within its sphere of interest. This could lead to conflicting decisions. One participant noted that the U.S. Trade Representative would not consider a GATT tribunal decision to be binding because nothing in GATT refers to international environmental agreements. However, this may change as a result of the work of the GATT Committee on Trade and Environment which was created to address this issue.

A question was then raised regarding the remedies that may be available should a claimant prevail before a UNCLOS dispute settlement tribunal. It was suggested that unlike the WTO which clearly provides winning parties the right to request that the offending practice be terminated, a tribunal established under UNCLOS may no have the authority to impose penalties beyond monetary damages. This argument was countered by a reading of UNCLOS Article 296 which provides that, "Any decision rendered by a court or tribunal hading jurisdiction under this section shall be final and shall be complied with by all the parties to the dispute." Participants concluded that the implications of Article 296 are unclear and deserve further study.

The discussion then turned to the possible distinctions between "trade sanctions" and "conservation measures." It was suggested that the UNCLOS dispute settlement provisions may be used to challenge "trade sanctions" such as those incorporated in the Pelly Amendment that are intended to punish nations for not adequately protecting the environment. On the other hand, challenges may not be available for trade-related "conservation measures" such as the provisions in the Marine Mammal Protection Act that protect dolphins and the provisions in the Endangered Species Act that protect sea turtles. It was asserted that these trade measures are intended to level the environmental playing field between the U.S. and foreign fishing fleets rather than punish conduct, and therefore should not be viewed as violative of UNCLOS. However, in response, it was noted that although the distinction between domestic environmental statutes that punish versus those that level the playing field may be useful as evidence of the non-coercive motivation behind a particular U.S. trade action, it will not prevent a targeted state party form filing a dispute settlement claim in an effort to force the United States to prove that assertion on the merits.

Finally, there was some question of the precise nature of the substantive provisions in UNCLOS that may be violated as a result of U.S. trade sanctions and whether the parties that drafted UNCLOS ever intended that trade issues be subject to dispute settlement. Several provisions were mentioned as possible grounds for a dispute settlement claim. All seem to be predicated on a finding that the purpose of the U.S. action is to coerce another state party into relinquishing some right granted under the Convention. These include: (1) the provisions dealing with the territorial sea which allow a coastal state to impose whatever regulation it chooses regarding the conservation or management of living resources within this juridical zone, consistent with its international agreements and applicable customary law; (2) Article 56(1) which provides a coastal state with the sovereign and exclusive right to conserve and manage living resources within the 200-mile EEZ; (3) several provisions dealing with the high seas that call on nations to cooperate when taking conservation measures and not to discriminate between fishermen of different nations. It was also suggested that there may be some violation of the Convention's general provisions requiring good faith and no abuse of right.

None of the participants could shed light on the question of whether the drafters of UNCLOS intended that trade issues be subject to compulsory dispute settlement. It was noted that U.S. trade sanctions were probable not an important issue during the negotiations. Although the U.S. had threatened to impose embargoes under the Pelly Amendment, no embargo had been applied when the Convention was finalized in the late 1970s. Rather than speculate, participants agreed that further examination of the negotiating history would be a fruitful area for future research.

Marine Fisheries Management and the Law of the Sea: Summary of Discussion of Current Issues

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Introduction

The Law of the Sea Convention and additional agreements on international fisheries that may follow will likely raise some urgent new issues for marine resources management. The panel discussants were also concerned, however, with the status of national management in the United States, under the Magnuson Fisheries Conservation and Management Act (FCMA), which has experienced some critical failures even without regard to new challenges that may arise as international law evolves. More generally, there are serious issues as to the kind of science that is applied in fisheries management, whether under the present regimes or in modified regimes under evolving rules. Some of the dilemmas that face scientific fishery management as it may be applied in both high-seas and EEZ areas of regimes under evolving rules represent, for some of the panelists, variations and permutations of issues that have bedeviled scientific management for half a century or more.

U.S. Fisheries Management Policies and Enforcement

The Department of State has announced that there will be a representative from the Regional Fishery Management Councils (RFMCs) on the delegation in the continuing UN talks on straddling stocks and highly migratory species—expressive of a concern on the councils regarding the impact of any new agreements on their autonomy in management of EEZ resources in the 3-200 mile zone. Just as some of the principal coastal and distant-water fishing nations have indicated opposition to any loss of autonomy, some of the U.S. RFMCs have indicated concern about the possible extension of international regulation from the high seas areas into the EEZs under the agreements now being negotiated. In addition, there is concern that the precautionary principle as it may find its way into the text of new agreements will have an impact upon the latitude exercised by RFMCs under the Magnuson Act in the coastal fishing zones. (Prof. Lee Anderson, a member of the Mid-Atlantic RFMC, also noted that there are inter-regional conflicts possible, as New England fishing interests displaced by moratoria on their traditional fishery stocks are likely to look southward to engage in fishing.)

The Wespac (Western Pacific RFMC) is in a different situation from many of the councils in the continental USA in that the major fisheries—for tuna and for tuna-like species—are strong. Wespac Director Kitty Simonds indicated that her council has asked to be named as the single authority over all pelagic fisheries in the Pacific region, which includes the insular flag possessions as well as Hawaii, so as to achieve unified and comprehensive management. Moreover, Wespac has indicated that even the restriction of 3 to 200 miles hampers effectiveness; the Council seeks to be able to manager wherever the fishing fleets go. International dimensions of Pacific Rim management have already received much attention in Wespac, which has had talks with the island nations and China, Japan, and other fishing powers with respect to data collection and dissemination of data important to management; and which has had representation at its most recent meetings from the Department of State and the National Marine Fisheries Service to discuss effectiveness of management under current jurisdictional restraints. The amendment of the FCMA to bring tuna under RFMC jurisdiction was of major importance to Wespac planning and management; Prof. Hildreth noted that this switch in U.S. policy represented a retreat from a position that had left the United States something of an "outlaw" nation in regard to international fishery relations in the Pacific region.

Among the immediate policy concerns that have been expressed in Wespac is the matter of the proposed reflagging standards in the UN talks, with exemptions afforded for vessels smaller than 20 tons. Wespac has an international committee in place, and it has also been pursuing systematically the question of native peoples' traditional claims, also the focus of a standing Wespac committee's activities.

The efficacy of enforcement mechanisms in place and projected is a continuing issue of interest. The effects (and control) of incidental takes, Prof. Jarman pointed out, continues to be of concern, especially insofar as it implicates the Endangered Species Act and the Marine Mammals Protection Act. In the Mid-Atlantic FRMC, according to Prof. Anderson, this has not been an important question to date. By contrast, in Wespac's area, there has been action since the 1970s to put area closures into effect in the Northwest Hawaiian Islands to protect monk seals and seabirds. Wespac has placed observers on long-line vessels in the swordfish fishery, where turtles were being hooked; Wespac has tried to work under FCMA and not rely on the other legislation to address this problem.

Costs and effectiveness of dockside enforcement and vessel monitoring (versus patrols, especially in an area such as Wespac's 1.5 million square miles) remain important questions; the Mid-Atlantic council has also moved toward dockside enforcement of its regulations.

Federal-State Relations and Fishery Regulation

There is a trend in court decisions, as Prof. Hildreth's research has found, that reveals what he regards as a "disturbing trend" toward the erosion of state authority under the Magnuson Act. Much of the problem turns on the fact that the three-mile demarcation is arbitrary and ill-suited to coordinated or rational management, in Hildreth's view. In the West Coast fisheries, the councils have produced plans for the 3-to-200 miles area, and the states have come in with plans that are consistent in many important fisheries, so that a consistent set of regimes is being constructed. How federal judicial decisions and the behavior of state authorities in other regions will affect the coordination and consistency issue, however, is as yet uncertain. Many fisheries, Hildreth notes, are under exclusive state control because of their inshore location or for lack of any RFMC plan, and yet the courts are hampering state enforcement. Several panelists saw the councils as losing power vis-a-vis the states, for example, in the development of a flounder plan in the Mid-Atlantic region.

Other anomalies and conflicts in the approaches of state, regional council, and federal agencies were noted, among them the continued guarantee by Congress of loans for vessel construction at the very time that overcapitalization of major fisheries has placed stocks under devastating pressure and undermined effective management. In the view of some panelists, both Congress and the Executive have stepped in an micromanaged policy to the detriment of effective management on some occasions; in the view of others, the lack of a coherent federal intervention, obviously necessary +as in the case of the New England fisheries that are now at such risk, was the root cause of current disastrous problems for the fisheries and the industry at a time when the fishing interests on the councils were unable or unwilling to agree on necessary regulatory measures or closings. It was also observed by some panelists that the NMFS scientists have been slow or remiss (or excessively timid, against political and economic pressures), in providing the level and quality of research data necessary to obtain agreement on management plans and to put them into place. What one discussant termed "political motivated determinants of [stock] availability" have been a problem in management of the Atlantic coastal waters; in the Wespac region, the absence of adequate research effort, as, for example, on the spiny lobster, hampered the development of management plans.

The Law of the Sea Convention and New International Agreements

Straddling stocks and dispute settlement: The possibility of compulsory dispute settlement mechanisms having an impact on national management of EEEs poses an urgent issue. In Prof. Burke's view, the United States and other parties must consider how to accommodate the necessity for agreements that would affect stocks in waters divided by zone boundaries; in his view, either some modification of authority in the national EEZ waters or some extension of coastal state authority beyond 200 miles will be necessary if an agreement is to be reached. Prof. Burke argued in favor of the coastal states' having control extended out over high seas waters, not the reverse, despite past failures of EEZ management. Such control would need to be subject, however, to compulsory dispute settlement procedures. It was agreed that the U.S. Fishery Management Councils would resist loss of full control within 200 miles, just as numerous coastal states are resisting such erosion of autonomy. There was support for the remarks made by Mr. Carr of the State Department in his presentation, to effect that provisions on compulsory dispute settlement would be on balance of distinct advantage to the United States, especially as joint ventures and direct fishing can be expected to "move out" to fish straddling stocks. Participants pointed to GATT and World Trade Organization votes as precedents for the compromise of certain elements of

autonomy in exchange for perceived long-run economic advantages.

Scientific Management Issues

How the "precautionary principle" will be incorporated, if at all, in new agreements—and with what impact on management regimes and international dispute resolution—is a central question now. More generally, the question of "compatability," or "harmonization," looms large. For example, Prof. Barston pointed out that in Annex II of the draft convention on straddling stocks, there is language that seeks to give more substance to the precautionary-principle approach. Similarly, the draft agreement makes reference in Article 7 to two distinctive management concepts—"conservation" as a policy goal with respect to certain straddling stocks, versus "optimal utilization within and beyond the zone" for highly migratory species. If they remain in the agreements and go into force, such provisions require adjustment of national regime standards. Other language, Barston pointed out, that has the potential for significant impact on current regimes is the differentiation in references to regional "organizations" and, alternatively, to regional "arrangements."

The attractiveness of the precautionary principle rests in considerable measure on the failures of the scientific approaches attempted in the past. Prof. Hennessy offered the argument that if "we really don't have the scientific capacity to get `right' answers," as became evident when two the world's leading nations in science could not solve the problem of the cod fishery's depletion, then very different approaches to scientific management msut be undertaken. "Adaptive management," responding to the environmental factors that are subject to a fairly reliable degree of prediction as well as to data on fish catches, is another possible alternative to current approaches that focus on prediction of mortality rates. Prof. Burke pointed out that environmental influences upon stock abundance are enormous, sometimes in cycles of 50 or 60 years or more. It is difficult for science to provide the basis for decision-making even when data for major environmental cycles or events are in hand. In New England, according to Hennessy, typically the scientist provided the Council with "parameters" that were so broad as to accommodate almost any policy, and policy in fact was typically driven by employment needs. Ironically, the broadening of fishery oceanography's scope to focus on ambitious ecosystem research, Prof. Scheiber pointed out, has had the effect of making more explicit the terrific complexity of marine environments, at the same time making explicit the perplexities that must be confronted if policy choices are to be effective. On the other hand, in a case such as the Hawaii program's need for data on the spiny lobster, it was hardly "Nobel laureate science" that was needed, he aergued; it was rather only a commitment by NMFS to take seriously the need for some fairly standard kinds of research.

With such broad agreement among scientists themselves as well as managers as to the perplexities of fisheries oceanography, it was asked, why has there not been a much earlier and broader agreement to endorse what the economists almost unanimously propose: limited entry, the individual transferable quotas (ITQs), or other privatization approaches? Historically, Scheiber pointed out, there was a great reluctance, at least in their initial consideration of limited entry solutions, on the part of the leaders in fishery management and science—Chapman, Herrington, and their cohorts in the 1960s and even 1970s—to abandon the alternative approach that focused on Maximum Sustainable Yield. This was so, he argued, because they felt that MSY represented a policy ideal that had wide support, and to abandon it for economic (rather than biological) concepts of optimal yield, let alone for privatization schemes, risked loss of popular support and industry support for the entire enterprise of scientific management. Later, some of them, notably Herrington, did change their views and become more receptive to economic concepts. But it is only with the recent intensification of the fisheries crisis, and the dramatic collapse of stocks—finally even the word "depletion" is being admitted into the discussion by scientists and policy experts who long derided it as a misleading piece of rhetoric—that the limited entry, ITQ, and general privatization approaches have come to be viewed as better than complete loss of the fisheries. Taking a more contemporary view, Prof. Burke reminded the panel that it is difficult to persuade part-time fishermen to vote against their own interests, and in the U.S. management regime those interests often are highly influential.

Although there exists, of course, a literature on limited entry and other schemes as they have actually worked, there is a serious need for more research and comparative analysis of experiences with privatization as an approach to management and the variables that might make this approach more or less effective in different fishery situations.

Discussion of the collapse of so many of the most important

fisheries on the globe led discussion back to the precautionary principle. Prof. Morgan proposed that fishery managers should proceed on the principle in ways analogous to what civil engineers do. They calculate the strength of materials and the dyanamics of structures, to establish the proper standard, and then multiple by a factor of at least 3 because lives are at stake! The dilemma remained, in the opinion of several panelists, that the principle is value-laden, lacking clear-cut "objective" criteria to guide managers in establishing specific limits on exploitative activity within ecosystems.

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