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SOME THOUGHTS ON FISHERIES
AND
A NEW CONFERENCE ON THE LAW OF THE SEA

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Some Thoughts on Fisheries

and

A New Conference on the Law of the Sea*

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Introduction

The subject I would like to examine today, albeit far more briefly than is appropriate, is the relationship between international fishery regulation and the next, presumably imminent, conference on the law of the sea. The assumptions underlying this topic are that (1) a new conference on the law of the sea will probably be held in the foreseeable future, (2) such a conference will deal with some specific issues that bear on fisheries directly or indirectly, (3) the conference will seek to deal with many other issues, and (4) it is presently useful to speculate about the effect of such a meeting upon future fishery regulation. On the first two of these items it is possible that an explicit indication of the future will be available very shortly (written 11/12/70). It is expected that the General Assembly will decide during this session whether to convene a conference and, if so, what items will not be decided but that a preparatory meeting would be convened to determine this complicated question. The prevailing expectation is that the Assembly will decide to convene a conference, that the conference will deal with a number of issues pertinent to fisheries management, and that the conference will begin within two years, perhaps even next summer on a preparatory basis.

Why bother to speculate about the relationship of such a conference to world fisheries? My assumption is that consideration of this subject now may assist by calling attention to some of the possible outcomes at such a meeting that could be harmful to the common interest in fisheries regulation. It is also perhaps helpful to begin now to envisage the changes in regulatory structure that might eventuate and to consider how to cope with these changes. Outcomes may be forestalled by calling attention to their excessive cost, and changes might be made to occur more smoothly or with less disruption by anticipation and planning. In any event some effort at foresight is necessary to realize any advantage to be gained from anticipation of change in regulatory structure, and change is about the only thing we are certain of these days.

For purposes of this inquiry I have tried to think and to organize the result in terms of certain phases in the process of decision employed in projecting international fishery regulation. The latter concept is here conceived broadly to include the unilateral actions of states, as in prescribing fishery limits of other boundaries affecting fisheries, as well as regulatory activity conducted in an organized, highly structured way by means of the international fishery commission or other instrumentality. Accordingly the categories used to depict phases of the decision process are in terms of who, for what goals, employing what assets, guided by what strategies makes what decisions (achieves what outcomes) with what effects. Who refers to the identity of the decision-makers; goals refers to the objectives of fishery regulation; assets refers to the values employed in seeking goals; strategies calls attention to the means used in manipulating assets; outcomes denominates the immediate result of the decision process; effects is a reference to longer-term consequences.

A. Decision-Makers

1. Clarification of Policy

Before discussing the future as it appears now, it is useful to focus upon desirable policy regarding participation in decision-making at a forth-

coming LOS conference. More precisely, since this is a broad multilateral gathering composed of virtually all states on the globe, what kinds of decisions ought to be made by those participating.

Among the many issues to be negotiated there would seem to be least question, from a legal perspective, that boundary issues are most appropriately within the competence of a broad international conference. Decisions of fisheries limits or more broadly on territorial boundaries should be inclusive in nature. An important matter of this kind should not be left to the uncertainties and time-consuming nature of the customary decision process, featuring unilateral claim and response as the prime technique. Such a policy preference not only accords with general expectations but also reflects the nature of fisheries. Limits and boundaries are not isolated or regional issues for the reason that fishing is now prosecuted by numerous states in the most distant reaches of the globe. Since the effects of boundary delimitation are so obviously inclusive in nature, it is appropriate that the permissibility of boundaries be determined inclusively and through an organized method.

For other controversies over fisheries, however, participation in decisions should vary in terms of the localized character of the basic problem. Decisions about distribution of the benefits, or the yield, of particular fisheries are necessarily affected by numerous factors unique to the particular situation. Decisions over conflicting claims in specific contexts should be left to the states most closely concerned therewith. At the same time, however, some factors important for decision are sufficiently common, even if they are not always applicable, that some general principles might be enunciated and this task is appropriately performed through a multilateral conference. General principles regarding preferential rights might fall in the latter category.

2. Probable Trends in Decision

An initial question of particular interest is whether one or another significant aspect of fishery regulation around the globe will be promulgated by the states participation in the next law of the sea conference or whether some other method will be employed in addition to or instead of a multilateral conference. This query can be more narrowly put, as follows: will states decide this and other questions by acting unilaterally or will they act in concert, by mutual agreement. The probable answer is that both methods will be employed. As a preliminary matter it is important to take note of the effect of the mere fact that LOS negotiations will be expected to occur. As these words are being composed it seems to be the prevailing expectation that the LOS Conference will have among its very many agenda items those of the territorial sea and fishery limits. If it does become clear that the conference will address the latter question (as well as the former) this perception could influence the eventual substantive outcome. One contingency to consider is that a number of states, perhaps a large number, will anticipate the conference and prior to its convening will unilaterally extend their territorial sea or contiguous fishing zone or both. The purpose of such action would be, of course, to permit the tactic of arguing at the conference that no lesser limit for these regions is acceptable or feasible or, even, possible, in view of the pre-existing limit. The significance of these unilateral decisions might be, thus, to have some, perhaps important, effect on the range of choice for states at the LOS conference. The nature of this effect would be to diminish the likelihood that certain limits, lesser than the limit or limits claimed by the several states, could attract the necessary number of votes at the conference.

The end result could be to prejudice fatally any agreement at the conference on a particular limit. [In commenting on this paragraph, Dr. Francis Christy observes as follows: "A contrary effect can also be conceived - that States may refrain from unilateral claims until they can see whether or not (and how) they might benefit from alternatives presented at the Conference." I agree that this effect may well occur. It also may be that States will use still another anticipatory strategy, namely of covert threats of unilaterally established wide limits to be carried out unless satisfactory benefits are obtained at the Conference.]

An additional possible effect, though not too likely, is that the pattern of unilateral claims would be so repetitive among so many states that a new customary international law limit would be established. This seems too remote an eventuality to warrant more than mere mention at this stage.

In whatever manner states behave prior to the meeting, it is highly probable that the next LOS Conference will be charged with the burden of attempting to establish, by one or another method, a limit on exclusive coastal control over fisheries. The implications of this need some emphasis in terms of who would be making decisions. The most important one is that a very considerable number of states will participate in decision-making that do not themselves have a coast, or, most likely, a single fishing vessel. This participation means that states which cannot themselves assert a claim to a fishing limit (though they can reject others' claims) are influential in determining the outcome of the community's organized decision process. This oddity aside the import of this is that it seems difficult to determine how these states will vote for the numerous likely proposals at a conference. Since these states do not engage in fishing themselves the factors they consider important for choice may vary a great deal from one state to another or even for the same state as the conference progresses. Another way of putting this is that for landlocked states the tradeoffs may be especially arbitrary insofar as the specific issue is concerned. These states could turn out to be of pivotal importance on some crucial issues at the conference.

There is a pretty good chance (it seems more likely than not) that the Conference will be unable to agree on a fishing limit. On such an assumption the alternatives for states might resemble those that presented themselves in 1958. As may be recalled, states were then unable to agree at a general LOS Conference on a fishing limit and it was agreed to try again at a conference focused on only issues pertinent thereto, i.e., the territorial sea and a contiguous fishing zone.

In sum it seems very likely that in the next few years over 100 states will convene at least twice to attempt to reach general agreement on fisheries limits.

I do not want to suggest by this emphasis on fishing limits that this alternative is the only or the most important way of resolving the question of allocating fisheries around the world. However, a limit will be an important part of the solution, if one is reached, and it appears, in sum, that both unilateral claims and organized multilateral decisions will be employed for decision-making. In the end there is a good chance states can resolve this problem by general agreement but this is more likely to happen, in my opinion, at a conference dealing especially with this problem. And such a conference is probably many years away, probably not less than five.

If states are unable to establish fishery limits at a large multilateral conference, because no single set of provisions can attract sufficient support, the ensuing situation could be most unhappy. The discouraging prospect would be even grimmer if this failure occurs at two successive conferences, the second devoted to this issue alone. The experience of the 1960's strongly suggests that states will extend their boundaries unilaterally, to increasing distances, and that there will be no recourse short of force for reversing this trend if, indeed, force could do so in any except particular instances. This development, in which states proceed unilaterally and outside organized processes, could be extremely dangerous if a large number of states deal with the fisheries questions only as an adjunct to territorial aggrandizement. In such a circumstance active violence cannot be ruled out as the arbiter of ensuing ocean disputes. Since such confrontations are usually resolved in favor of the stronger antagonist there would appear to be advantage for many states in avoiding this possibility.

B. Objectives

In considering the future of fishery regulation around the world the most important task is to specify the goals one prefers, i.e., the objectives to be sought in attempting to resolve regulatory problems. Unless there is some conception of goal or objective, it obviously is very difficult to assess the various alternatives that might have more or less serious prospects of coming into existence.

1. Preservation of minimum order -- the avoidance of violent conflict

Except for sporadic and not overly consequential outbursts, fishery disputes have not produced significant violence between or among states since World War II. It is very much doubtful if at any time during this period nations in general seriously expected fishery disputes would be resolved by the application of force leading to serious loss of life for the contending sides. In some isolated situations, however, this expectation of violence may well have prevailed but this does not change the more general attitude. Obviously force has been used, and often in support of claims that find extremely slight acceptance amongst states generally, however it is still accurate to assert that few expect disputes to be resolved by superior force. If such were the case it seems reasonably obvious that U.S. and Soviet relations with South American states would be different than they have been. And the U.K.'s dispute with Iceland would have had a far different outcome.

The question is whether the future will be much different from the past in this regard. In other words, can we detect new conditions which might escalate these disputes to such levels of intensity that disputants or other nations come to expect that superior force would be the determining factor. Without elaborating on it I doubt if the future will be much different, i.e., I believe that expectations of violent outcomes will not prevail in this type of dispute. If this hypothesis turns out to be wrong, I suspect it will be because, as suggested above, fishery matters have become entangled with other issues more intimately connected with power considerations so that the outcome of a fishery dispute has such implications for power (i.e., military security) that the state with superior strength in terms of force will seek to make that strength determinative. This eventuality could occur if territorial limits become very exaggerated and supersede any nation of a separate fishing limit.

Accordingly one objective to be sought is that of preserving minimum order. In this specific context, of fishery regulation, the operational significance of this goal is to counsel against wide territorial limits which by their nature could be alleged to be dispositive of disputes over fisheries. It does not seem to me very likely that preserving minimum order will often be at stake in resolving other fishery disputes which present only such questions as distribution of yield or income from a fishery or provision for maintaining yields.

2. Wider distribution of benefits of fishery exploitation

It seems to me entirely possible that nations will begin to raise certain hitherto muted questions about the distribution of income from world fisheries. As everyone is now aware the developing countries (LDC's) have mounted a furious and wholly serious campaign in the UN to seek a share in the benefits to be realized from mineral exploitation in the ocean beyond national jurisdiction. This goal finds eloquent expression in the concept that the seabed (and resources thereof) beyond national jurisdiction are the "common heritage of mankind." The notion here is that all states should share in the income produced by exploitation of the natural resources of this area even if they do not themselves participate in the actual production. My suggestion is that it may well be that some will suggest this same notion should apply to fishery exploitation in the international common. (This notion has been dubbed "creeping common heritage," otherwise known as Christy's Law.) The question for present purposes is how such goal provides guidance in appraising outcomes for fishery regulation at a new LOS conference.

There seem to be two rather obvious implications of this goal, one in connection with fishery limits and the other in regard to financing regulation beyond such limit.

With respect to the first of these, it may be that if high seas fisheries were also to be considered part of the common heritage of mankind, the effect might be to encourage a contraction of fishery limits, at least in those cases in which the coastal state had no strong interest in adjacent fisheries. It is difficult to generalize about effects otherwise. States which did not engage in full exploitation in their exclusive fishing zone might prefer to maintain a wide zone so that fishing rights therein might be disposed of for profit. Such states would also have to calculate, of course, that to keep this golden egg in untarnished condition there would probably need to be expenditures for management efforts. Since these costs might be substantial, especially if the state has an inadequate indigenous science base, some of these states might prefer to enlarge the area of common heritage and share therein. This would entail the contraction of national boundaries.

The other implication mentioned is that if fisheries beyond national jurisdiction were also to be denominated as the "common heritage of mankind," this would appear to place direct responsibility for the management on international institutions. This could presage a truly remarkable change in the arrangements for management. In such a circumstance states engaging in exploitation might no longer feel required to expend resources on research and management, since presumably the common heritage should be regulated by the world community as such. This would differ vastly from the present situation in which the fishery commissions are almost completely the creature of their creators and in nearly all cases without any significant independent power or initiative. If fish are part of the common heritage then, presumably, their exploitation should provide some revenue for the states of the world. If these

states wish, in turn, to maintain or increase this revenue flow then they will have to take measures to impose reasonable regulation upon the heritage in order to provide the conditions necessary for this goal. As you are aware this process of regulation is very complex and difficult and could prove to be very costly.

This requirement of international action for direct management of fisheries is, very plainly, an extraordinary step to contemplate (although the step is frequently recommended) and there is every reason to doubt that states are at all inclined to take it. It is useful, however, to remind ourselves that a serious move toward realizing the goal of wider distribution of benefits from fishing, through the device of the "common heritage of mankind", entails drastic changes in international fisheries management.

The common heritage concept is of course only one means, and not an overly plausible one, of achieving the goal of improving distribution. Enlarging exclusive fishing zones is another method and will probably be more popular than any other at the LOS Conference.

3. Increase production of protein

In a world plagued by maldistribution of protein it seems likely that enlarging the supply is a reasonable goal and that increasing the production of animal protein from the sea is desirable. The assumption is that if the total amount available is enlarged the chances are better that increased portions will go to those in need of it. This may not be true, of course, but the conditions determining consumption frequently have little to do with the ocean. It remains desirable policy therefore to seek to increase the production of animal protein from the ocean and to seek this increase under circumstances that are favorable to distribution to protein-short areas.

This goal may be contrasted to that of decreasing the yield of animal protein from the sea. Measures having such effect do not seem in the common interest. Proposals for fishery regulation should, at least, be able to pass such a test of desirability. It is to be questioned, from this perspective, whether expanding exclusive fishery limits is acceptable community policy. To the extent such expanded limits act as a deterrent to expansion of fishery efforts by developing states needing protein, or limit continuing efforts, they contravene the common interest in increasing animal protein production from the sea.

4. Maintenance of physical yield from the ocean

There is hardly anyone who is prepared to argue that a stock should be exploited to the point that it is unable to reproduce itself and maintain a fishery. Although argument has been made that this policy should in fact be implemented with respect to some species or stocks, it is not commonly regarded as a desirable general goal at least as an original proposition. Where costs of rehabilitating a stock exceed the benefits then of course there would be justification for destruction of a stock. Accordingly, with the latter exception, a minimum policy concerning physical yield is to avoid measures which permit this eventuality to occur.

There is more and more doubt attending the desirability of policies which are formulated in terms of maximum sustainable yield. It is more widely recog-

nized now than ever before that a fishery regulated so as to permit a yield at this level may still be in very dire trouble and that far different regulation is required. Indeed the only real defense that can be made of this goal of management is that it may be a means of permitting still other goals to be achieved. It is more and more frequently recognized that MSY serves an important political purpose: indeed this purpose is perhaps its primary significance. As an independent management goal, therefore, the MSY leaves a great deal to be desired. What is required, instead, is focus upon the objectives which MSY is said to promote or to facilitate. It is not suggested that these objectives are indefensible, merely that MSY is meaningful primarily in terms of such objectives and as a quantity by itself is nearly meaningless.

5. Improving economic benefits from fisheries

Probably not many would advocate that fishery regulation should aim primarily at enhancing the welfare of fish or for safeguarding the bureaucratic interests of government officials. The ultimate aim of fishery regulation is to improve the lot of people, and primarily (but not solely) of the people who endure the hazards of fishing or of investment in fish catching. On most occasions, but not all, the maximum contribution to this end is achieved by increasing the net yield which can be secured by catching and selling fish. This net yield itself is most likely to be enhanced by lowering the cost involved in catching the fish, but obviously other measures are relevant including those promoting use of unexploited species. The overall general interests of the community are promoted when resources are not unnecessarily devoted to fisheries which could be employed to meet other human needs.

This particular goal is becoming more and more significant on the international level, but it would surprise me if it were expressly sought at the next LOS conference as a major objective of participants except in connection with fishing limits. With respect to management generally it would be desirable if any international arrangements resulting from the conference do not pose a barrier to seeking this goal. But I suspect it is asking too much to expect that MSY will be enshrined explicitly as an international fishery management goal.

The key question at this stage is which of these objectives or combination thereof will be sought by the U.S. at a LOS Conference. On this point it is important to distinguish the total U.S. government position from that advocated by individual components thereof. At the present time the objective sought by the U.S. appears to be a combination of protecting the economic interests of coastal states (the US certainly being our prime concern) and deterring, hopefully, further extensions of coastal authority which would affect military interests. But there is reason to doubt that this combined position has any great promise of longevity. I believe the twin objectives will probably collapse rather quickly, to be replaced by the single idea of assuring U.S. military interests.

There is no doubt, I think, in the mind of most observers that U.S. LOS policy is most importantly affected by the Pentagon's view of U.S. military interests. This is the major reason for believing that of the two objectives mentioned the military interest is paramount. In order to secure a narrow territorial sea or free transit through straits the U.S. will very probably be willing to sacrifice its alleged fishery interests.

In fact there would not be a large element of sacrifice involved if the U.S. were willing to concur in a wide exclusive fishing zone (amongst other things) in return for a narrow territorial sea or free transit. As others have observed, notably Wib Chapman, the largest gainer from a 200 mile fishing zone would probably be the U.S. The reasoning is that the U.S. already suffers from the disadvantages of a 200 mile zone without enjoying any of its advantages. I.e., the tuna industry as our main distant water fleet already is confronted with a 200 mile zone which we cannot successfully avoid or reject. At the same time our nearshore fleets do not have the competitive advantage of a 200 mile zone. In these circumstances it would not seem overly difficult to accept a very wide fishery zone in return for transit rights, especially where the latter are prized the higher anyway. In these matters the strongest voice within the U.S. is military and the total U.S. position would probably defer to this voice rather than accept the more moderate views of those in the Department of State. Another way of stating this is that goals for fishery regulation very probably are irrelevant to U.S. policy objectives at an LOS conference and will be sacrificed with equanimity if U.S. military interests might be served.

C. Assets

Is there anything consequential to be said regarding the values various states or groups thereof can utilize at a new LOS conference. One obvious fact is that states will vary enormously in many of the vital components of power and other values. For example, in undifferentiated terms it is perfectly clear that the U.S. and the U.S.S.R. will be the most powerful states at the meeting, even if power were measured only in elements pertinent to use and management of the marine environment. However it is scarcely less obvious that in many instances at such a conference neither of these states will exert anywhere near the affirmative influence their general power position would suggest.

Thus it is reasonable speculation that the most potent asset or value a state can employ at the LOS conference is its identification or participation with other states as part of a group sharing strong common interests on a particular issue or set of issues. As a general proposition neither the U.S. nor the U.S.S.R. is a part of a very large group with such common interests-- indeed, on numerous issues each of these two states whose interests are otherwise conflicting may find the other his only major ally. As is well known, however, the very numerous lesser developed countries (LDCs) do often find strong common interests composed of shared demands and expectations concerning their common plight. Accordingly, though in many respects any particular LDC state may be infinitesimal on the usual power scales its actual influence at the LOS conference will be substantial because of its alliance with numerous other LDCs.

It would not be surprising, partially because of the general strength of LDCs as such, that one or two or even several of these states came to have unusually marked influence, in terms of affecting outcomes, by reason of a leadership role among LDCs and a mediating role with developed states. Presumably, this would occur because of various unusual capacities of individual representatives which would make them pivotal figures in negotiations. However it is accounted for, some of the weakest states, in general power terms, may turn out to be the most powerful at the LOS conference.

Disparity in control over wealth will be just as marked as with respect to power at the LOS conference but there is good reason to believe that this imbalance will be more important as a base of power than power itself. It does not seem likely that the U.S. will use wealth to affect the outcome for fisheries but it is still interesting to note what appears to be happening or seems likely to happen.

The wealth I refer to is the near certain prospect that the U.S. (and probably a few other countries as well including especially Japan) will be in the forefront in developing the natural resources of the seabed beyond national jurisdiction. Unless treaty arrangements are concluded which alter the present situation, this development would almost certainly produce benefits solely for the producing enterprises and states except for the possible wider gains from lowering mineral prices. The reason the U.S. will play a dominant role in deep sea mineral development is primarily technological in nature but also partly because of high capital requirements and its importance as a consumer.

It is the offer to relinquish some of the benefits of this superior position that I refer to as a use of wealth. This effort to secure power by employing wealth is to be seen in the President's statement of May 23, 1970, and the subsequent draft seabed treaty which was tabled as a position paper in August, 1970, at the meeting of the UN Seabed Committee. In its present form the U.S. draft seabed treaty seeks to hold out the promise of a money pay-off to the LDCs as a means of achieving their agreement to a seabed regime which is thought to favor U.S. military interests and which does not seriously impinge on any private U.S. interests in development of oil or minerals from the seabed. This arrangement is implemented by limiting the continental shelf to a relatively narrow band adjacent to a coastal state and allocating a substantial part of the net revenues from the mineral resources of the seabed area beyond the shelf to an international authority to be spent for specified international purposes. Coastal states would retain the sole right to tax revenues out to the shelf limit, retaining a portion of no more than 50% and no less than 33-1/3% of the net revenues in the area between the shelf limit and the continental margin (the so-called trusteeship zone), and all the net revenues in the areas beyond the margin would go to an international body to be spent for certain specified purposes. All activities beyond the shelf limit would be open to all states without restriction except for those activities specifically mentioned in the draft treaty and the only ones mentioned are exploration and exploitation of natural resources. The idea is to prohibit any controls over military uses of the ocean in the region beyond the shelf but at the same time to provide a payoff for the coastal state and to individual states through an international organization to be created for this specific purpose. Incidentally it should be emphasized that my reference is to the present apparent U.S. position. Change is certainly not to be excluded. If the U.S. can secure its military interests by recognizing a wide continental shelf and no intermediate or trusteeship zone this possibility becomes very likely.

One ingredient of this payoff to the coastal state concerns fishery resources. The coastal state would retain complete disposition of the living resources (undefined in the draft) of the seabed in the trusteeship area, i.e., between the 200 meter isobath and the continental margin. This is in contrast to minerals since the surplus income produced by these would be divided between the coastal state and the international authority.

Enlightenment and skill will, as implied above, sometimes prove to be important values for some states and on some issues these values would be extremely significant. Enlightenment is here used to refer to knowledge and, specifically, knowledge of the legal, political, and economic issues at the conference. As usual, enlightenment will be in rather short supply and some states will have a lot, and many states will have very little. In a sense this value is another measure of a state's involvement in the ocean since intense involvement will probably result in ample preparation for the LOS conference. But I do not think a large supply of knowledge will be determinative on issues except under limited but important circumstances. Among the many LDCs at the conference it is probable that the majority will not have anything near the expertise that a few of their number will possess. These few could well turn out to be leaders and their views and positions could carry unusual weight among their less informed allies. Because, as noted more below, the LDCs could be such a potent force the positions advocated by their more informed leaders could be of decisive influence on some problems.

D. Strategies

1. Diplomatic Instrument

The principal strategies at the LOS Conference will be diplomatic in nature, comprising offers and counteroffers conveying suggested trades involving one preferred outcome for another. The tradeoffs will also include, of course, promises concerning some matters which have no connection with the ocean. I do not intend to consider here the various parameters of national interests which might provide guidance on what tradeoffs will be invoked by whom in fisheries matters. This task is such a complex job that it is best left with those who have the resources to do it.

Discussion might be devoted to a number of elements of the diplomatic instrument as they relate to the LOS Conference including:

- 1) Size of delegation in relation to agenda size;
- 2) Sequence of deliberations on agenda;
- 3) Capabilities at determining influence factors;
- 4) Knowledge and background on issues;
- 5) Financing delegation and staff;
- 6) Importance of bloc voting: Afro-Asia (AA); Latin American (LA); Soviet (S); West (W); Soviet and Western (SW); LDC's v. DC's.
- 7) Relative number and weight of interests (tradeoffs available).

For present purposes, however, discussion is limited to voting, which is easily the most important strategic problem at a conference. Under the usual ground rules at these conferences important questions will require approval by a two-thirds majority. On the assumption that all 126 member states of the UN participate on any given question, 84 votes would be required for adoption of an important provision and 43 votes would be required to defeat such adoption. With these quantities in mind the significance of bloc voting becomes exceedingly obvious as does the nature of certain issues.

The most important probable split amongst states at the conference will not be on ideological lines, as was often the case at the earlier Geneva conferences, but on the familiar discrepancy between developed and developing states. Since the latter group is conventionally taken to include 77 members, the weight of this group is impressive. If the 77 vote together they have nearly enough votes to adopt any single provision, needing to attract only 7 additional votes. Even serious division within the group need not prevent a small majority of the 77 from blocking any proposal they deem unacceptable.

Since the 77 is such a dominant group it is exceedingly important to envisage how they might operate. Here the most vital point is how issues are perceived at the conference. If an issue perceived as an economic one primarily, as affecting the allocation of resources or the benefits of resources, it seems to me highly probable that the developed states will seek to act as a single group. It does not follow that they will always succeed in identifying a common interest which can be protected by shared action. Nonetheless that an effort at group consensus is made will be extremely important even if it fails to achieve cohesiveness. For even if the group is divided it may easily happen that one segment is sufficiently large to block any proposals thought unacceptable. Or one of the segments may be sufficiently large that it is conceivable that enough out-group votes can be obtained to carry the day.

For states not part of the 77, including primarily the U.S., U.S.S.R., Canada, eastern and western Europe, Japan, and Australia, the most practical voting strategy is probably that of attempting to form a blocking third (plus one) at all feasible points. On very many issues it seems clear that the dominant voting strength is in the LDC bloc. At the very least, or perhaps most, the effort needs to be made to prevent these states from imposing their will irrespective of common interests. The formation of a strong blocking third may open the way to reasonable compromise in addition to preventing provisions contrary to genuine common interests.

2. Economic Instrument

It was noted above that the U.S. is seeking to use its favorable wealth position as a means of obtaining a particular outcome at the next LOS meeting. Fishery resources are only a minor part of this insofar as the seabed treaty is concerned since the main bargaining points in this regard have to do with oil and hard mineral resources. Moreover the U.S. occupies an entirely different position in reference to exploitation of oil and minerals resources than it does with reference to fisheries. For the former the U.S. is by far the most intensive exploiter in the world and has interests throughout the world as a result of oil industry activities. The U.S. fishing industry is, in contrast, and with a couple of notable exceptions, largely local in nature, seldom straying far from the U.S. coast. The U.S. has little actual control over world fisheries or any dominance therein.

It is nonetheless a provocative question, already mentioned briefly earlier, whether the U.S. will seek to employ the concept of coastal control over fisheries as another of the means of securing military interests. The parlay here would be to establish a zone for fisheries just as one has been proposed for minerals, i.e., to assimilate fisheries above the continental shelf or other submarine zone to the minerals on the shelf and below. In return for allocating both minerals and fisheries to the coastal state, the latter would agree to a narrow territorial sea of no more than twelve miles and

permit free transit through it. In suggesting this possibility, which is not original, the thought is simply that U.S. officials may be willing to trade both fisheries and minerals for military advantage. There is very little evidence to suggest this tactic will work and much reason to suggest it will not.

This strategy could obviously have a number of variations. One might be to propose several fishing zones such as an exclusive fishing zone beyond the territorial sea and beyond this an exclusive management zone. In the latter zone the coastal state would act as "trustee" for the world community in managing the fishery resources but would not have exclusive access.

It would not be wise to dismiss this idea too quickly. In 1958 the U.S. did propose an exclusive fishing zone as one means of retaining a narrow territorial sea. There is no reason to believe the latter is now regarded as any less important to the U.S. than it was in 1958.

One intriguing aspect of this possibility is that it is the exact reverse of the creeping jurisdiction notion that is so fondly held in the Pentagon. This notion, you will recall, is that extension of jurisdiction over the seabed for one purpose leads inevitably to expansion of that jurisdiction to another purpose. If the U.S. attempts to trade both minerals and fisheries for military security, it would mean an extension of jurisdiction for several purposes was being used to limit jurisdiction for another. Such are the ironies of international diplomacy.

An economic strategy is relevant here for other reasons closely concerned with fisheries. If a modicum of rational calculation is conceivable in this context, it is not unlikely that some major bargaining considerations are economic in nature. In negotiating over fisheries zones the major offers may well be examined in economic terms--how much cost is incurred if Deal A is accepted rather than B. Fishing limits and conditions of access to various zones will probably be appraised in terms of their effects on the cost of fishing. Coastal states who are seriously concerned with reaching agreement can bargain most effectively in terms of arrangements that seem likely to lessen the costs imposed by a wide limit. The wider the limit the greater the importance attached to the costs of access to the area: how large a license fee; what stocks of fish will be open to foreign exploitation under license; when will fishing be permitted. Offers and counteroffers so expressed are instances of what I call the economic instrument of policy.

3. Military Instrument

Although a major stake at the next LOS conference is military power, it is not to be expected that military means will play any significant role at the conference itself. However it is true that individual threats of coercion are not unknown in proceedings of this kind. Fisheries do not appear to be valued so highly as to occasion a threat of force, but it may be recalled that during the 1958 Geneva Conference on the law of the sea a threat of assassination was employed on at least one occasion. But it does not seem likely that any state would employ this instrument regularly or even in any situation where it became public knowledge.

E. Outcomes

What alternatives for fishery regulation could eventuate at a new LOS conference. A review of these in relation to the goals we postulate for such regulation perhaps suggests some outcomes to avoid at such a conference.

It seems to me that two lines of development important for fishery regulation can be derived from the 1958 and 1960 Geneva conferences and that they could provide some guidance to likely happenings at a new conference. The first of these was the effort to reach agreement on a relatively narrow territorial sea by adopting the strategy of separating the issue of fisheries from the territorial sea issue and urging a wider limit for the former than the latter. The aim in this strategy was to satisfy the military interest in safeguarding transit from coastal interference and at the same time indulge coastal states who felt a need for enlarging the extent of control over fisheries. These solutions put the emphasis on delimitation of zones in the ocean.

A second line of development begun at Geneva, and mostly left to lie dormant since, is expressed in the provision of Article 6 of the Conservation Convention. This is the recognition of the "special interest" of the coastal state which, in this particular agreement, refers only to the "maintenance of the productivity of the living resources in any area of the high seas adjacent to its territorial sea." In terms of implementation of this Convention the coastal state's special interest has gone largely unrecognized. However as you are also aware, the various bilateral agreements negotiated among and between the U.S., Japan, the Soviet Union, Poland, various European states, Indonesia, and Australia do seek in various ways to recognize a special interest of the coastal state. In part these arrangements are important in relation to the 12-mile fishing limit, but they go much beyond to deal with operations within and beyond special fishing zones.

In mentioning these two features of recent international negotiations the aim is to suggest that it is useful to view the forthcoming LOS negotiations as something of a contest between, or contrast of, these two different approaches. In a sense the suggestion of a modest exclusive fishing zone coupled with provisions for carefully defined preferential rights to stocks beyond such zone is the analogue to the 200-meter continental shelf plus trusteeship zone which the U.S. is promoting for the seabed and subsoil beyond the territorial sea. This idea of a narrow territorial sea or exclusive fishing zone plus preferential rights beyond is in my opinion to be contrasted sharply with proposals for a greatly enlarged territorial sea or fishing zone. These possibilities might be outlined as follows.

On the one side is the suggestion by the U.S. for a 12-mile territorial sea, with issues concerning fisheries beyond resolved by means of recognition of certain preferential rights in the coastal state. (The U.S. 12-mile territorial sea proposal is accompanied by a proposal for recognizing freedom of transit through and over straits.) In this view there would be no special zone for fishing rights but rather a set of formulae for disposing of particular stocks. It is the emphasis of this approach to deal flexibly with the adjustment of coastal interests, identifying these interests in a variety of ways and permitting some foreign fishing in the area adjacent to the territorial sea.

The opposing positions are various but, in the view here proposed, have in common a reliance on the notion of establishing specific limits for accommodating coastal and noncoastal rights. The limits can obviously be defined in a variety of plausible ways combining (or not) a territorial sea and an exclusive fishing zone in conjunction with preferential rights. Likely possibilities are a 200-mile territorial sea, or a lesser territorial sea with an exclusive fishing zone out to 200 miles. The extended zone could be

measured in terms of the continental shelf, assuming this is somewhere defined as, for example, the seabed out to 200 meters or 50 miles whichever is greater. It may be that some states would seek a territorial sea wider than 12 miles, but not 200, say 30 miles, plus a fishing zone for a further distance plus a system of certain detailed preferential rights out to 200 miles. In this latter instance the two contrasting approaches are merged although it might be said from the U.S. official view that its proposal was completely submerged. As noted earlier it would not be a great surprise if the U.S. were willing to accede to such proposals providing free transit is recognized.

At this stage in time the prospects appear to be better for those taking the more simplistic view of using wide fishery limits alone without recourse to the greater complexities of preferential rights. A number of reasons might be cited for this former view. For one a number of states already employ wide limits and some of these are bound to make a proposal for their general adoption at such a conference. There may be attractions in a proposal which appears both beautifully simple and at the same time gives the coastal state greater authority over a large area of ocean water. This latter feature would be extremely appealing to some of the developing states who might perceive the possibility of additional revenue from this source. Another reason is that states might be persuaded by the contention that there is ample precedent for a wide fishing zone. After all a great many states have exclusive fishing zones of 12 miles hence it is demonstrably true that some such zone is perfectly lawful. Moreover several states have had a very wide zone for many years and have not been successfully diverted from this path by the contravening objections. And to bolster this case it might be emphasized by some that the method of international regulation of fisheries has not at all been a marked success, and no other plausible method appears to be in view.

It is not irrelevant to make explicit reiteration here that the U.S. may well place such great weight on satisfying its supposed military interests that it will be willing to accept a large exclusive fishing zone in exchange for arrangements assuring free transit in straits. This possibility adds credibility to speculation that a wide fishery limit may emerge as the most popular single choice at the next LOS conference. However in my opinion the U.S. will not succeed in trading off a fisheries limit for freedom of transit. The LDCs will accept the former but not the latter.

F. Effects

An important task is to speculate about the potential long-term consequences of various outcomes at a LOS conference insofar as fisheries are concerned. One such outcome is that no agreement is reached on fishery issues.

If no agreement is reached on a limit for the territorial sea which is satisfactory for fishery purposes or on a fisheries limit, it seems probable that states will initially proceed to act unilaterally to promulgate a limit for fisheries purposes. Such a limit will probably constitute the boundary of an area within which the coastal state will dispose of complete control over all aspects of fishery exploitation including especially the competence to determine who will get what portion of the permissible catch and under what conditions. The limit seems likely to be extensive, embracing all areas of even remote interest to the coastal state. It would certainly not be surprising if the limit were very commonly set at 200 miles. While this limit would not take care of anadromous species, it would embrace many others except for their lateral movements into adjacent exclusive fishing zones.

The 200-mile fishery limit could conceivably also be an outcome of an agreement at the LOS conference or a subsequent meeting. In either event, whether it eventuates as the outcome of negotiations or as a result of a failure to negotiate an acceptable limit, it is useful to inquire into the effect of such a limit upon the existing international fishery commissions. The following discussion considers first the effect of a 200-mile limit and then, rather briefly, the effect of a modest limit coupled with preferential rights.

The impact of the 200-mile limit on fishery commission will vary, of course, depending on the proximity of the commission area and the stocks therein to coastal states, on the identity of parties to the commission and probably on other pertinent factors. For some commissions, such as the whale and tuna, the stocks are caught throughout the ocean and coastal limits do not embrace anywhere near all of the resource. Accordingly there is no feasible alternative than to employ an entity inclusive enough to cover the entire stock being exploited. An entity meeting this description is one which is composed of all those states who engage in significant exploitation. No single coastal state could possibly serve this function.

The question for other fisheries is whether or not an expansion of the fisheries limit to 200 miles would embrace a sufficient proportion of the exploited stock that effective coastal controls are possible. Apparently there are some very important fisheries which would be embraced by this seaward limit--the Georges Bank haddock, the entire fishery area of the Grand Banks, the fisheries off Norway, fisheries off South Africa, the Peruvian anchovy fishery, saury fisheries off the west coast of the U.S., and practically all crab, lobster and shrimp fisheries of the world. Important stocks would thus be subjected to the regulation of a single state during most of the harvestable stage.

The question is, then, what purpose would remain to be served by fishery commissions formerly having sole cognizance of any of these stocks. If the coastal state is fully competent, i.e., legally authorized, to establish regulations limiting catch and effort (including even total exclusion if it wishes) then it would not seem that commissions any longer serve a purpose. The only reason for creating the commission in the first place was that no political authority existed which could adopt regulations extending to a sufficient proportion of the stock to be effective. International agreement was the only alternative.

It may be, however, that even a 200-mile limit frequently does not include the whole of a stock in its exploitable range. This may occur because the stock normally occupies an area extending beyond the limit. Or it may be because the stock migrates into the area for a period but then moves on again to another region outside the 200-mile limit. The movement may be into the waters of another 200-mile limit state or it may be into the high seas or both. Such fish would resemble somewhat the situation of anadromous fish which are subject to fishing both on the high seas and within the waters of one or more coastal states.

In this situation it would appear that a commission, but not necessarily a pre-existing one, may continue to serve a purpose. There still will be situations in which coastal state regulation alone cannot be made effective and international regulation remains necessary. It may be, however, that there is no need to maintain a formal commission with a secretariat for this purpose, an annual meeting of interested states being sufficient to dispose

of any of the problems. This latter pattern might be particularly applicable in those instances in which the stock moves only from one coastal state zone to another and back again. It could be under these circumstances that bilateral agreement, renewable annually or periodically, would be wholly adequate for the task without the need for any special intergovernmental mechanism. Certain situations however may require more formal arrangements because of the complexity of management needs--the Pacific Salmon Commission may illustrate this set of circumstances.

For those situations in which stocks move in and out of coastal zones, including high seas, something like the present arrangements (only much improved) may continue to be useful since the problem of regulation will strongly resemble that presently confronted only perhaps in lesser intensity. In these circumstances the fish are still vulnerable to uncontrolled access in the high seas as well as to controlled access within the fisheries zone. Unless the fish spent a sufficient period of time in the region of coastal states' control, this form of regulation would be inadequate. Accordingly it may still be useful to examine these present arrangements for the purpose of suggesting improvements in them for future application.

Another possibility requires mention. If states generally do extend their fishing limits drastically, as to 200 miles, it could have a number of consequences prominent amongst which is that fishing states equipped to do distant water fishing may increase their efforts to develop unexploited stocks which lie beyond the new limits. If this proceeds on a sufficient scale with a number of participating states, the result would very likely be a need for a regulatory program established by agreement amongst these states. It is not inconceivable therefore that extension of fishery limits may produce a need for new institutions in some parts of the world even as other institutions became unnecessary. It could be also that some existing mechanisms may feel pressure for improvement under these circumstances, e.g., the Indian Ocean Fishery Commission.

Another consequence of enlarged fishery zones is that coastal states will seek to dispose of some or all of their right to exploit by means of selling such rights to others. That is, instead of actually attempting full exploitation of fisheries enclosed by the extended limit the coastal state prefers to realize revenue by permitting others to engage therein on payment of a fee of some sort. The conditions for permitting access, including most importantly the amount of consideration exchanged therefor, could conceivably be the occasion for negotiation between the coastal state and interested exploiting states or private exploiters. Although these arrangements could perhaps be most usefully concluded on a bilateral ad hoc basis, it could be that a wider institutional arrangement might prove more effective. It is even conceivable that outside fishing states seeking access to the fishery zones of an entire region might attempt to coordinate their activities and operations in order to promote efficiency and, perhaps, minimize bidding against each other for the rights in desirable places. The end result of this process could be, again, the creation of some institutional mechanism for safeguarding the various interests at stake. An organization of this type would probably differ very substantially from the fishery commissions we know now since the primary emphasis would be on accommodation of economic interests, leaving the scientific problem of safeguarding stocks to the coastal state involved. At the same time the coastal state would continue to have an interest in fishing methods and practices since data on this would be essential for its management system, hence coastal states might also be interested in a role in new institutions of this kind.

Accordingly the above discussion suggests that enlarged fishery zones might be accompanied by, or lead to, the continuation of some of the present international institutions for management, the creation of some new regional institutions composed of coastal states, and, possibly, also of distant water states wishing to fish in the various state coastal zones, and the evolution of a need for new institutions for regulation of fishery exploitation beyond any area of coastal control.

But what if the assumptions above turn out to be incorrect and states succeed in reaching agreement on a moderate but satisfactory fishing limit coupled with measures for according a preference to coastal fishermen with regard to stocks beyond such limit. The question here is whether it is possible to anticipate enough detail in advance to speculate reasonably about this situation with respect to fishery commissions. Some comments still seem possible. One, the granting of preferential rights will probably be geographically determined, i.e., the area of preferential right will be immediately outside the coastal states' boundary. In this circumstance it is entirely possible that an entire stock will be the object of several exclusive rights, since the stock moves between and among coastal areas, and it will accordingly continue to be necessary to enter into agreements to adjust competing claims and interests.

Second the high seas pelagic fisheries would still present a problem and an international arrangement would still be at least as necessary as presently. As noted earlier the necessity may extend to new situations not now anticipated.

A third possibility emerges from the potential situation in which the same species is subject to several exclusive rights, each in a different area of course. It is possible to imagine that some states holding such rights will not themselves wish to engage in the fishery and instead seek to sell their right. States wishing to acquire such rights might deal with this situation in a number of ways. One is that they will not wish to bid against each other to acquire the preferred right but rather arrange among themselves to bid in such a way as to minimize the cost. It is conceivable that this practice could lead to some institutional means for disposing and acquiring fishery rights, with the coastal states also participating in the institution.

In sum the adoption of a moderate fishing limit, coupled with provision for preferential rights, may not be significantly different in gross outline than promulgation of very extensive fishery limits.

In one respect the preferential right approach may call for continued, sometimes complex, negotiations concerning allocation of rights to the coastal state vis-a-vis other states. If the coastal state does wish to exercise its right it may wish to do so only in part, or only with respect to particular stocks, and it is conceivable that an institutional means for dealing with this situation could be felt justified or might prove to be needed.

