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CURRENT ASPECTS OF SEA LAW

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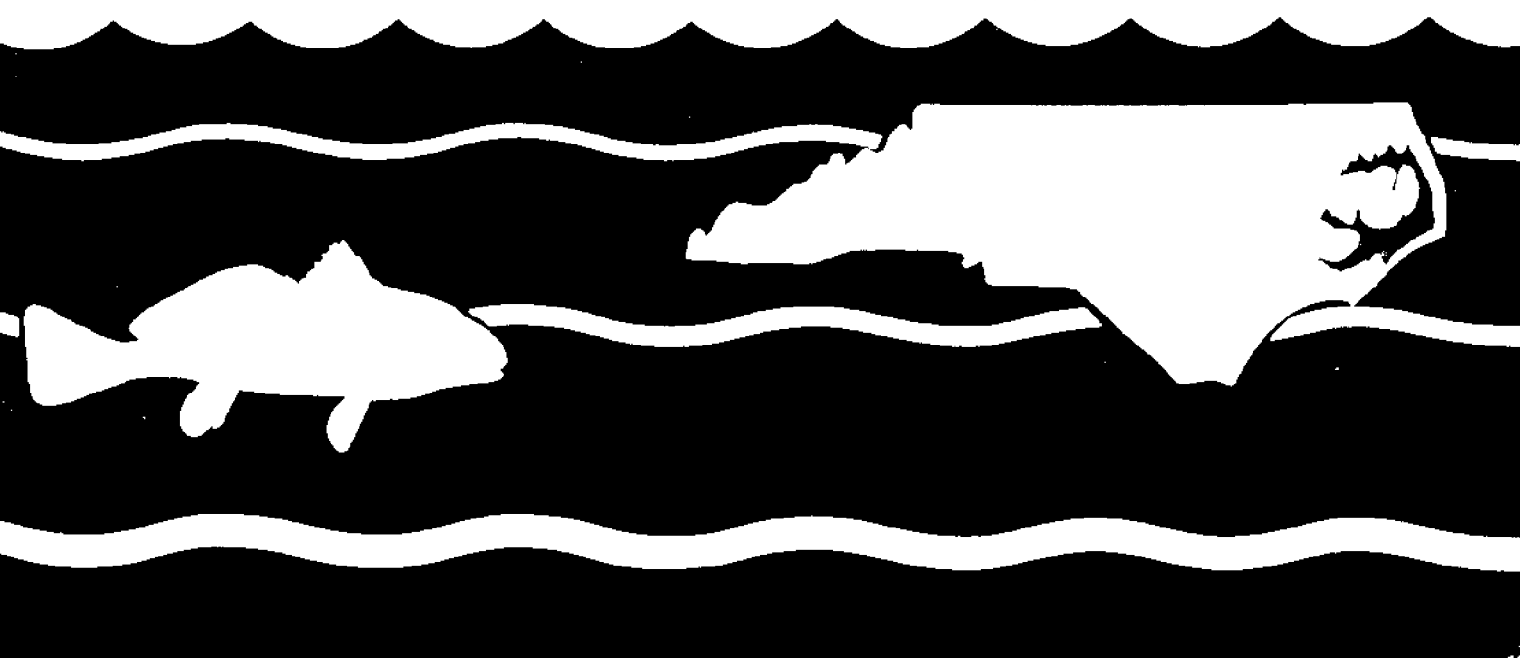

CURRENT ASPECTS OF SEA LAW

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by
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INTRODUCTION

> "And I saw a new heaven and a new earth: for the first heaven and the first earth were passed away; and there was no more sea."

Is this biblical admonition from the Revelation of St. John the Divine (Chapter 21, verse 1), an inexorable prophecy of doom or a stern warning, which promptly and drastically heeded may lead to ecological salvation of the ocean? Marine scientists, conservation oriented lawyers, some dedicated legislators both state and national, many members of the United Nations Deep Sea Bed Committee, and all concerned citizens hope for the latter alternative and are questing for means to achieve it. An essential component of this collective effort is a wide understanding of existing and developing rules of law to protect the oceans and control activities upon and within the seas. A primary purpose of this publication is to afford a compact compendium of representative and current legal data relevant to the conservation of marine resources. Perhaps some readers may here find new insights to assist their own specialized efforts to preserve the sea and its precious contents.

The year 1973 was largely one of legal frustration for marine ecologists. Coastal state legislatures have been slow to adopt state laws to supplement and match federal legislation on coastal zone management; doubts have arisen as to the effectiveness of a 1974 Law of the Sea International Conference to solve vital legal issues crying out for definitive international resolution; and the free-world energy crisis has exacerbated control problems of petroleum development at sea. Though the prognosis may be pessimistic, the only realistic response by all concerned is to press forward on the broadest possible front to attain legal sanctions for necessary marine resources conservation objectives. The more extensive this effort is, the greater becomes the possibility of rewarding achievement.

The articles comprising this Sea Grant document were researched and written by international law students in the University of North Carolina School of Law during the fall semester of 1973. The Table of Contents attests the broad sweep of their endeavor. This is the third Sea Law Symposium thus produced. The 1971 class authored the Sea Grant publication entitled, "Attitudes Regarding a Law of the Sea Convention to Establish an International Sea Bed Regime." The 1972 class prepared, "The Surge of Sea Law," Sea Grant Publication UNC-SG-73-01, March 1973. It is perhaps not over-optimistic to hope that the 1974 class may contribute an analysis of the achievements and shortcomings of a 1974 Law of the Sea Conference. This is but one of six volumes of North Carolina Sea Grant legal research scheduled for publication in 1974.

Appreciation is expressed for the able assistance of third year law student Keith Hennessee in performing many of the details of editing this symposium. He is a veteran of, and contributor to, the 1973 Sea Grant publication, "The Surge of Sea Law."

Doctors B. J. Copeland and William Richards, Director and Assistant Director, respectively, of the North Carolina Sea Grant Program have provided wise counsel and rare interdisciplinary understanding in their support of Law of the Sea research, which is only one facet of their wide-ranging marine resources program. Their help and encouragement in making this publication possible bespeak their dedication to all aspects of the program which they serve.

This work is a result of research sponsored by the National Oceanic and Atmospheric Administration (NOAA), Office of Sea Grant, United States Department of Commerce, and the State of North Carolina Department of Administration.

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IN SEARCH OF AN INTERNATIONAL SEABED REGIME.

THE UNITED STATES DRAFT SEABED CONVENTION:

BACKGROUND, INTERESTS REPRESENTED, AND

PROSPECTS FOR AGREEMENT.

Luther Cochrane

Since August 17, 1967, when Ambassador Arvid Pardo of Malta[1] raised the possibility of an International Regime for the administration of the Seabed and Ocean Floor beyond national jurisdiction, such argument and opinion has been advanced concerning the problems inherent in such an ambitious proposal and to the prospects for agreement on such a regime.

Even though the scheduled 1973 United Nations Conference on the Law of the Sea was postponed until 1974, ostensibly because of insufficient progress in preparatory work,[2] interest remains high in the projected conference, with much of the discussion centered around the United States "Draft United Nations Convention on the International Seabed Area".[3] This draft, submitted in 1970 as a working paper, has been followed by drafts from at least nine sovereign states or groups of states[4] but apparently remains the best working paper on which the delegates to the 1974 Conference can proceed.

This paper will therefore attempt to deal primarily with the United States draft in terms of the national and international interests recognized and dealt with, with the problems arising from certain of the draft proposals, and with the prospects for international agreement on a Seabed Regime.

In considering the United States' draft, an attempt will be made to assess the influence of such recent developments as the predicted 17% energy shortage in the United States, the "oil blackmail" tactics of Arab states arising out of the Middle East War, the current concern of multinational corporations about expropriation, and the ever present

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[1]Ambassador Pardo's most recent examination of current prospects for agreement on an International Seabed Regime are set forth in Development of Ocean Space - An International Dilemma, 31 La. L. Rev. 45 (1970).

[2]G.A. Res. 1750 C XXV (1970). See E.D. Brown, The 1973 Conference on the Law of the Sea; The Consequences of Failure to Agree, in The Law of the Sea: A Geneva Conference 1 (edited by L.M. Alexander, University of Rhode Island Kingston Jan., 1972.) (1971 vol.)

[3]U.N.Doc. A/AC. 138/25 (August, 1970).

[4]In addition to the United States draft, drafts and working papers have been submitted by Canada, France, the United Kingdom, the USSR, Malta, Japan, the "Seven Powers" (Afghanistan, Austria, Belgium, Hungary, Nepal, the Netherlands and Singapore, shelf-landlocked nations), Tanzania, and a group of thirteen Latin American nations, including Mexico, Chile, Ecuador, and Peru.

conflict between technologically developed nations and the newly emerging "have-nots" of the international community. Whatever prospects for agreement exist would seem to hinge in large part on the Conference being able to deal satisfactorily with these major areas of national and international tension. Because these areas of concern relate so closely to the present world energy situation, this paper will deal primarily with the mineral, non-living resources of the seabed. Defense,[5] ecological, and fishing resource interests will be only briefly mentioned.

The 1967 proposal of Ambassador Pardo was accompanied by a memorandum[6] in which the Ambassador pointed out the concerns underlying his proposal and the envisioned plan of international seabed control:

> In view of rapid progress in the development of new techniques by technologically advanced countries, it is feared that...the seabed and ocean floor...will become progressively and competively subject to national appropriation and use.
>
> It is believed that the proposed treaty should envisage the creation of an international agency (a) to assume jurisdiction, as trustee for all countries, over the area; (b) to regulate, supervise, and control all activities thereon; and (c) to ensure that the activities undertaken conform to the principles and provisions of the proposed treaty.

The initial response of the United States, enunciated by then Ambassador Arthur Goldberg, was cautious and predicated upon a desire to develop policy.[7] A similar position was taken by most, if not all, of the major powers.[8] The United Nations General Assembly thereafter created an ad hoc committee[9] to study the proposal, but the committee was generally unable to reach agreement. The next significant response of the UN came during December of 1968 in the form of four resolutions dealing with the Seabed Regime question, the most important of which established a permanent United Nations Seabed Committee charged with the responsibility of devising a set of principles upon which further consideration of a seabed regime might be based.[10]

Subsequent resolutions of the General Assembly in 1969 proved more controversial, particularly the so-called "moratorium" resolution[11] which called for a halt to exploitation of the seabed and to the further expansion of nations' claims to areas of the sea. As might have been expected, the United States and other technologically advanced nations resisted the adoption of this resolution (with the United States announcing that it would not be bound by the resolution)[12] but were

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[5]See Evenson, Present Military Uses of the Seabed and Foreseeable Developments, 3 Cornell Int'l. L.J. 121 (1970).
[6]U.N. Doc. A/6695, paras. 2 and 3 of Memorandum (August, 1967).
[7]Knight, The Draft United Nations Conventions on the International Seabed Area, 8 San Diego L.Rev. 459, 479 (1971) (hereinafter cited as Knight).
[8]Id. at 480.
[9]G.A. Res. 1240 XXII (1967).
[10]G.A. Res. 2467A XXIII (1968).
[11]G.A. Res. 2574D XXIV (1969).
[12]U.S. Explains Its Vote on Seabed Resolutions, 62 Dept. State Bull. 89 (1970).

unsuccessful. The effect of the resolution was not as damaging as had been feared by the United States, however, because of defects in the defining of the areas to which the "moratorium" applied. In fact, it has been suggested that the actual effect of the resolution was to expand the areas claimed by states as part of their "national jurisdiction", the term used to describe areas in which exploitation was proper under the 1958 Geneva Convention on the Continental Shelf.[13]

During this period of United Nations activity, interested groups and Congress began actively to contribute to policy discussions within this nation. Foremost among the ranks of private groups joining the debate was the National Petroleum Council, which submitted a position paper in March of 1969.[14] This paper was not to be the only published comment of the oil industry, for in response to the United States draft of 1970, the Petroleum Council published a Supplemental Report,[15] actively disagreeing with portions of the United States draft Convention which the Petroleum Council felt unnecessarily relinquished United States' rights to seabed resources in certain areas.[16]

The draft convention of the United States,[17] submitted in August of 1970, called for the creation of an international regime to administer an International Seabed Area lying seaward of a 200 meter isobath. This Seabed Area was to be divided into two distinct sub-areas, an International Trusteeship area lying between the 200 meter isobath and the seaward edge of the continental margin,[18] and a true International Seabed Area lying seaward of the continental margin boundary. Within the proposed Trusteeship area, the adjacent coastal state retains the right to administer all exploration attempts and subsequent exploitation of mineral resources found in the seabed or subsoil on such terms as it may decide to apply. The true International Area, however, is administered by an International Seabed Resource Authority (ISRA), with revenue derived from operations in this area to be shared by all nations. The draft convention also provides that a portion (one-half to two-thirds) of the revenue derived from control and licensing of the Trusteeship area by the adjacent coastal state is to be paid to the ISRA.[19]

The draft contains additional provisions detailing the manner of operation of the ISRA, the selection of Members of the Authority's constituent organs, the powerful Council, the Assembly, the dispute-solving tribunal, and the Secretariat. Significantly, the draft also

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[13]Knight, supra n. 7, at 483.
[14]National Petroleum Council, Petroleum Resources Under the Ocean Floor, 1969.
[15]National Petroleum Council, Supplemental Report to Petroleum Resources under the Ocean Floor, 1971 (hereinafter cited as Supp. Report).
[16]See generally, Pitts, Attitudes of Petroleum, Anti-Pollution and Ecology Interest Groups Toward a Seabed Regime Convention, in Attitudes Regarding a Law of the Sea Convention to Establish an International Seabed Regime 130, Sea Grant Pub. UNC-SG-72-02 (1972) (Wurfel, ed.) (hereinafter cited as Pitts).
[17]U.N. Doc. A/AC. 138/25 (1970).
[18]For an excellent discussion of the definition problems posed by the United States' draft boundaries, see Knight, supra n. 7, at 463.
[19]Id.

contains a proposal designed to accomplish a smooth transition from present sea law to the hoped-for new Law of the Sea Convention.

Examination of the United States' draft reveals that despite its attempted precision and inclusiveness, many problems exist in regard to the defining of boundaries between areas. In overall scope, however, the draft represents a compromise position designed to accommodate the major interests sure to be heard from at the 1974 Convention. Satisfying international interests is not the only obstacle facing the United States proposal, for strong interests within the United States must be accommodated. Within the United States, the petroleum industry appears to be the most affected and interested group; within the international community, the ever-increasing conflict between the interests of technologically advanced nations and emerging, less developed nations will surely be manifested at the 1974 Conference. Therefore, the United States draft, to have any chance of achieving consensus at the 1974 Conference, must deal effectively with strong national interests while accommodating the large number of developing nations demanding an "equitable sharing"[20] approach in any Seabed Regime.

NATIONAL INTERESTS

The oil industry within the United States would naturally prefer to have the seabed area under United States control as large as possible while being able to rely on some form of international control as a means of insuring stability of investment and operation in those areas of the world's sea not under United States control. One commentator has pointed out that the strong absolute ownership posture of oil interests represents a carryover of "land-oriented" international law into the realm of the law of the sea,[21] with the difference being the "common property" orientation espoused in international law with regard to most of the world's seas. While the desire of domestic oil interests for a strong United States policy of securing greater rights to areas of the seabed may well be attributed to purely economic reasons, it is at least arguable that petroleum companies have the wider interests of the United States itself at heart. The gravity of this national interest is demonstrated by the fact that the ratio of years of petroleum reserves to annual United States production of natural gas has declined from 26.9 in 1950 to 12.1 in 1970 while the ratio of crude oil reserves to production for the same period has dropped from 13 to 8.9. The forecast effect of such a drop in reserves, even in the face of greater oil and gas exploitation in Alaska, means that by 1980 the United States will have to import more than 50% of its oil and gas needs.[22]

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[20]Wilkes, Law of the Sea Needs for the 1970's, 8 San Diego L. Rev. 453, 454 (1971) (hereinafter cited as Wilkes).

[21]Borgese, Towards an International Ocean Regime, 5 Texas International L. Forum 218, 224 (1969).

[22]Remarks of Cecil J. Olmstead, Sixty-Fifth Annual Meeting of the American Society of International Law, 65 Am. J. of International L. 114 (1971).

In contrast, the area of coastal state control (from the coast to the 200 meter isobath) has been estimated to contain resources of 660-780 billion barrels of oil and 1,640 to 2,200 trillion cubic feet of natural gas.[23] It has also been estimated by the United States Geological Survey that the area from the 200 meter isobath to the 2,500 meter isobath contains approximately the same quantity of oil and gas resources as is contained in the subsoil beneath the proposed area of coastal state control,[24] thus making the Trusteeship zone a valuable source of badly needed natural resources. The petroleum industry's interest is thus but a part of the overall interest of the United States in securing continued availability of adequate oil and gas resources.

While the United States draft convention does nothing to disturb present rights of the United States landward of the 200 meter isobath, objections have been raised to the treatment of United States rights beyond that proposed boundary. Specifically, the petroleum industry[25] and members of Congress[26] have strongly disagreed with the Trusteeship concept, which they view as a relinquishment of existing rights in that area in return for rather uncertain status as a trustee for an area containing valuable resources.[27]

As stated by the National Petroleum Council, the objection is that:

> As long as the foundation of the Draft remains unchanged that is, the relinquishment of existing national powers to an international regime and the receipt back of limited rights under a treaty - it is impossible to correct the Draft by mere rewording or minor revision which does not change the basic concept. Shoring up inadequacies such as the fact that the Draft does not even enable the Trustee State to protect the Trusteeship Area from trespassers nor provide for the situation that would result if a Trustee State were to withdraw from the treaty would not rectify the basic deficiency of renouncing all rights in the outer continental margin and vesting residual powers as to that area in an international agency.[28]

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[23] Id. at 115.
[24] Id.
[25] Supp. Report, supra n. 15, at 5.
[26] Report of Special Subcommittee on the Outer Continental Shelf - Senate Committee on Interior and Insular Affairs, 91st Cong. 2d Sess., Dec. 21, 1970; quoted in 65 Am. J. of International L. 137 (1971).
[27] See text accompanying n. 22-24 supra.
[28] Supp. Report, supra n. 15, at 16.

This fear that subsequent withdrawal of the United States from any Seabed Convention would be disastrous in view of the seemingly required irrevocable renunciation of rights to mineral resources beneath the continental shelf beyond the 200 meter isobath is certainly not quieted when one realizes that the United States draft convention does not provide a "veto" power for the advanced-nation members of the Council,[29] the most important governing organ of the International Seabed Resource Authority. Thus there is the likelihood that decisions of the Council regarding leasing of the International Seabed area or decisions affecting revenue allocation which may be very prejudicial to United States interests cannot be averted by use of a "veto" employed in the United Nations Security Council. While the possibility of a United States withdrawal does seem somewhat remote, the lack of a veto power in the Council combined with the uncertain nature of the trusteeship concept makes our position within the ISRA more precarious than U.S. oil interests would like.

A related objection, that the United States draft proposal regarding the trusteeship concept and the transition provisions may have amounted to a unilateral renunciation of rights to seabed resources appertaining to the United States by virtue of the 1958 Geneva Convention on the Continental Shelf, has been expressed by members of the United States Senate in a letter to Secretary of State William Rogers in 1970:

> Article 2 carries with it the improper implication that the United States has in fact already renounced its sovereign rights to the natural resources of the seabed of the U.S. continental margin beyond the 200 meter depth limit. Further, it purports to surrender our sovereign rights to those resources without any provision that such renunciation would be effective only upon the condition that a sizeable majority of other coastal states would likewise agree to surrender their sovereign rights to such resources. In other words, it appears to be a unilateral renunciation without any quid pro quo.[30]

This objection appears to be less than well founded in view of the fact that President Nixon, in a broad seabed policy statement made on May 23, 1970, indicated that any relinquishment of rights by the United States in a transition period would have to be conditioned upon the willingness of a sufficient number of other states to join in such action.[31] Additionally, it is clear that the United States draft convention unmistakably reserves to the United States all rights held under the 1958 Geneva Convention on the Continental Shelf in the caveat to Article 2 of the draft.[32]

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[29]Knight, supra n. 7, at 530.
[30]Letter of Senators Allott, Jackson, Bellmon, and Metcalf to Secretary of State of July 21, 1970; quoted in Knight, supra n. 7, at 494.
[31]Nixon, United States Policy for the Seabed, 62 Dept. State Bull. 737, 738 (1970).
[32]Knight, supra n. 7, at 494.

The effect of these "transition" plan objections may be substantial, however, in that such objections could necessitate further consideration and clarification of the transition mechanism and amendment of the 1958 Geneva Convention on the Continental Shelf so that inconsistency between the two conventions (as to permissible areas of exclusive national control) might be averted.

A third major objection to the United States draft convention raised by oil interests has to do with the mechanics of obtaining a license to explore or exploit areas of the true International Seabed area (areas outside the Trusteeship area). Two specific objections have been lodged, that the size of the area which may be explored or exploited under a license is not large enough to insure profitable activity and that the disclosure rules are unduly harsh and may well result in competitive injury to the lessee.[33] The logic of the oil industry argument here is that substantial disclosure as a prerequisite for obtaining a lease violates the work-product privilege and may result in disclosing trade secrets. The oil industry further argues that proposed disclosure of the required geophysical data would serve no useful purpose to the ISRA.

It is submitted, however, that substantial disclosure would indeed be valuable to the ISRA for two primary reasons: (1) full disclosure would enable the ISRA to arrive at a lease value which more fairly reflects the economic potential of the particular seabed area and (2) the interests of environmental protection are best served by substantial disclosure of geophysical data.

It is at least arguable, therefore, that the specific objections of the oil industry are based on improbabilities or that the objections should nevertheless be overcome by the force of more compelling policy reasons such as environmental protection and the need for implementing an economically realistic system of administering the international seabed. It is also arguable that oil interests in parts of the world not under United States control would benefit from the protection of the ISRA, particularly in view of the current tensions regarding expansion of territorial sea claims and expropriation. Creation of an international seabed authority may thus result in expanding the areas of the world's seas available for profitable explcitation by United States oil interests.

A consideration of national interests affected would not be complete without mention of the positions of the United States' Defense Department and environmental groups. While it appears that domestic environmental groups have been slow to react to the United States draft convention,[34] the Department of Defense and the State Department have both actively supported adoption of such a seabed regime as that outlined by the United States draft.[35] Quite obviously, this position reflects the Defense Department view that such a Convention will serve to maintain rights of free passage and freedom of the seas beyond the

[33]Aitkens, The New Outer Continental Shelf Operations and Leasing Regulations and Oil and Gas Lease Form, 3 Nat. Res. Lawyer 298, 302-306 (1970).
[34]Pitts, supra n. 16, at 137.
[35]Knight, supra n. 7, at 590.

200 meter isobath boundary while serving as an assurance against further unilateral extensions by coastal states of authority over wider areas of the sea.[36] It remains to be seen whether the current energy crisis will so weaken the resolve of the Defense Department that the similarly powerful oil interests will face a less adamant opponent in debate over the United States draft provisions.

INTERNATIONAL INTERESTS

The ability of proponents of the United States draft convention to accommodate the interests of less developed, often newly emerging nations will in great part determine the success of the 1974 Conference. Analysis of the United States draft with regard to resource and revenue allocation and with regard to the organizational framework of the ISRA is therefore mandated.

Quite significantly, the Trusteeship zone concept set forth by the United States draft provides for a sharing of the revenues derived from licensing agreements among all parties to the Convention.[37] In this regard, the United States draft represents a compromise position designed to accommodate the interests of technologically advanced nations with large continental shelf areas (who stand to profit greatly from extended national control) and the less developed states with neither rich offshore areas nor the technology required to exploit resources.[38]

While the organizational framework set forth in the United States draft arguably provides for a great measure of control by the big powers over seabed resources, the trusteeship and revenue sharing plans appear to be an equitable method of providing for exploitation by those most capable of such activity while insuring that the seabed area is used for the benefit of all mankind, at least in the economic sense.[39] The United States draft thus appears to accomplish some measure of equalization of economic benefit derived from seabed use on a basis other than that of geographical accident. By restricting the area controlled by the coastal state, the United States draft maximizes the area from which international revenues will be derived for the benefit of all nations. This restricted sovereignty position appears to be in the best interests of landlocked and developing nations with no appreciable seabed resources.[40]

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[36] Id.

[37] See text accompanying n. 18 and 19, supra.

[38] Knight, supra n. 7, at 491.

[39] Id. Significantly, the United States draft calls for two "landlocked" states to be members of the twenty-four nation Council of the ISRA, together with the six most industrially advanced parties and at least twelve "developing" nations.

[40] 65 Am. J. of International L. 139 (1971).

PROSPECTS FOR AGREEMENT

The success or failure of the 1974 Conference will depend largely upon the question of whether any draft convention will be flexible enough to accommodate all the interests previously discussed. Certainly, the United States draft admirably deals with its national interests and with many of the competing interests of developed and underdeveloped nations, but even this inclusive working paper must be held deficient in some areas. These deficiencies and the current world situation limit the probability of great accord being reached at the 1974 Conference.

Any draft convention will face immediate definitional problems in regards to boundary fixing;[41] there is also the problem that promise of benefits to landlocked and underdeveloped nations from adoption of such an international regime may be at best illusory for the near future because of the lack of immediate prospects for substantial exploitation of the seabed beyond the 200 meter isobath.[42] Additionally, there is the problem of the market effect of extensive seabed resource exploitation upon the current Arab dominance of the world's energy market. And, although this paper has not extensively discussed the pollution aspect of seabed development, a reaction to increased exploitation may well be expected from environmental protection groups.

There is also the numbers problem. Many Seabed Conference delegates presently contend that the increased number of participating nations makes any sort of agreement unlikely.[43] Finally, there is the precarious international climate, as typified by war in the Middle East, the increasing testing of "detent", and the territorial sea controversy over fishing rights off the coasts of Iceland and South America.

This is not to say that positive factors do not exist. First of all, there has been a remarkable degree of agreement since 1970 over the "common heritage of mankind" approach to the international seabed.[44] Secondly, the danger of continuing an unorganized approach to the regulation of the international seabed area has been illustrated by the increasing territorial sea - fishing resources controversy.[45] Additionally, it would appear that consideration of a draft convention will not be hampered by the ideological conflict evidenced by historical international block voting; the United States draft appears to offer adequate economic incentive to both developed and underdeveloped nations and to establish an arguable community of interest with the USSR.

In terms of the specific interests of the United States, several advantages would seem to follow adoption of a seabed regime. First of all,

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[41] See n. 18 supra.

[42] Gerstle, The UN and the Law of the Sea: Prospects for the United States Seabeds Treaty, 8 San Diego L. Rev. 573, 577 (1971). (hereinafter cited as Gerstle).

[43] Wilkes, supra n. 20, at 458.

[44] Gerstle, supra n. 42, at 582.

[45] Knight, supra n. 7, at 543.

the advocacy of such an approach to the resource-rich seabed area certainly improves our image in the international community when measured against what we stand to gain from continued non-regulation of the seabed. Secondly, creation of such an international regime for the purposes of administering the seabed for the economic benefit of all nations must eventually lighten the burden which the United States now bears in terms of aid to underdeveloped nations. Advocacy of a seabed authority is thus consistent with a policy of assuring aid to underdeveloped nations through multinational bodies rather than by the United States solely assuming such responsibility.[46]

Finally, limiting the area of a coastal state's control and providing for international administration of the deep seabed area is in the interests of current United States defense policy. And, while oil interests may disagree with the "trusteeship" concept, their interests in stability of operation beyond the range of United States jurisdiction over the seabed is furthered by such a scheme of administration.

It is therefore to be hoped that the 1974 Conference on the Law of the Sea will be successful, for the continued passage of time without international agreement only increases the chances that power will prevail over equity in administration of the seabed area.

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[46] Id.

THE STOCKHOLM CONFERENCE: SOME IMPLICATIONS FOR THE LAW OF THE SEA

Antoinette R. Wike

> "A point has been reached in history when we must shape our actions throughout the world with a more prudent care for their environmental consequences."[1]

These words from the United Nations Declaration on the Human Environment, adopted by the Stockholm Conference, June 5-16, 1972, contain both a warning and an inspiration--a challenge to the international legal order. Sixteen months later, Brian Johnson, a British authority on international law, was quoted as saying: "It is as though ecology ...and Stockholm had never happened. It looks like business as usual, pending annihilation."[2] Some observers are not quite so pessimistic, particularly about the prospects for the law of the sea. In this respect, an assessment of the United Nations Conference on the Human Environment must await the outcome of the Conference on the Law of the Sea to be held in early 1974.[3] It is not too soon, however, to consider some of the immediate effects of the Stockholm Conference as well as some of its more far-reaching legal implications.

As the Secretary General of the Conference, Maurice Strong of Canada, said in his opening address, Global environmental demands require new concepts of sovereignty, new codes of international law, new international means of managing the oceans, and new ways of financing continued international collaboration.[4] The scope of the proposals considered at Stockholm far exeeeds that of existing international law.[5] Matters once considered solely domestic took on global significance. It was immediately recognized that, whatever comes of the Conference, states will no longer be able to conduct their activities without regard for the environmental consequences or with "tacit international approval."[6] Nevertheless, whether the world order will respond to the issues raised at Stockholm remains to be seen. Let us look at what has occurred so far.

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[1] 11 INT'L LEGAL MAT. 1417 (1972).
[2] Wall St. Journal, Oct. 2, 1973, at 1, col. 3.
[3] Cf. Brown, The Conventional Law of the Environment, 13 Nat. Res. J. 203, 232 (1973).
[4] N.Y. Times, June 6, 1972, at 4, col. 4.
[5] See Teclaff, The Impact of Environmental Concern on the Development of International Law, 13 Nat. Res. J. 357, 366 (1973) (hereinafter cited as Teclaff).
[6] SCIENCE, June 23, 1972, at 1308.

Preparation

In its preparation--perhaps the most extensive of any international conference to date--the Stockholm Conference has had an impact on the law of the sea. For example, the Intergovernmental Working Group on Marine Pollution dealt so effectively with the subject of ocean dumping that as a result of Stockholm there was signed, on December 29, 1972, in London, Moscow, Mexico City and Washington, a Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters.[7]

The stimulation of public awareness of environmental problems and their international significance would seem to be prerequisite to any development in international environmental law, customary or conventional. With the work of the twenty-seven nation Preparatory Committee came public education. National reports necessitated national decision making.[8] Much original environmental legislation resulted.[9] Mr. Strong is reported to have taken the McLuhanesque view that the process is the policy, that the real value of Stockholm may have consisted in getting there.[10]

The preparation by the developing countries played a large part in the overall outlook of the Conference. These states came ready to defend their positions relative to the developed nations. It should now be well established that the less developed states present a force to be reckoned with in future international efforts to protect the environment.[11] Concern about the relationship between economic development and the environment constituted the primary focus of the preparatory work.

As preparation for the Conference progressed, it shifted from a crisis-control approach to an emphasis on the acquisition of knowledge.[12] This new thrust emerged in the proposals submitted to the Conference and later adopted as the Action Plan. Thus, even in the early stages, the Conference was geared toward long-range achievement on a step-by-step basis.

Unofficial and ad hoc bodies also prepared for Stockholm. In May of 1971, a "mini-conference" was held at Rensselaerville, N.Y., jointly sponsored by the Institute on Man and Science and the Aspen Institute on Humanistic Studies. Chaired by Professor Jessup, this conference raised crucial issues, clarified options open to the Stockholm delegates, and identified areas of consensus.[13]

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[7]See Teclaff, supra note 5, at 369.
[8]Lear, Global Pollution I-The Chinese Influence, Saturday Rev., Aug. 7, 1971, at 42.
[9]Strong, One Year After Stockholm, Foreign Affairs, July, 1973, at 694 (hereinafter cited as Strong).
[10] Gardner, The Role of the U.N. in Environmental Problems, 26 Int'l Org. 237, 241 (1972).
[11]See text accompanying note 40 infra.
[12]Hardy, The United Nations Environmental Program, 13 Nat. Res. J. 235, 237 (1973) (hereinafter cited as Hardy).
[13]Gardner, Global Pollution III--U.N. as Policeman, Saturday Rev., Aug. 7, 1971, at 48-49 (hereinafter cited as Gardner).

Work Product

The major document produced by the Stockholm Conference is the United Nations Declaration on the Human Environment.[14] Although it is rather non-legalistic in tone, the Declaration is thought by many to represent the foundation for a new body of international law. Conference organizers felt the document outlined standards that some day might be cited against "environmental aggression."[15] In purpose and effect, it has been compared to the Declaration of Human Rights.[16]

Of the twenty-six principles set out in the Declaration, numbers twenty-one and twenty-two have aroused the greatest interest.

> 21. States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment beyond the limits of national jurisdiction.
>
> 22. States shall co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.

Neither the assertion of sovereignty nor the recognition of state responsibility is a novel concept in international law. Professor Brownlie has called the Declaration an example of the genesis of general standards through a multinational reaction to problems.[17] It is arguable, however, that in addition to restating existing principles, these declarations suggest an extension of state responsibility. Commentators have noted that Principle 21, despite its limitations as a loss distribution system,[18] goes beyond Corfu Channel[19] and covers areas not within the jurisdiction of any state--for example, the high seas. Furthermore, as Professor Sohn remarks, an overbroad reading of the assertion of sovereignty in Principle 21 would not be consistent with the overall theme of the Declaration, an international perspective in environmental matters.[20]

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[14]U.N. Doc. A/CONF. 48/14 (1972).
[15]N.Y. Times, June 9, 1972, at 3, col. 5.
[16]See Brown, supra note 3, at 209.
[17]Brownlie, A Survey of International Customary Rules of Environmental Protection, 13 Nat. Res. J. 179, 188 (1973).
[18]Id.
[19]The Corfu Channel Case (1949) I.C.J. Rep. 4. Albania was held liable for failing to notify Great Britain of mines in Albanian waters.
[20]Sohn, The Stockholm Declaration on the Human Environment, 14 Harv. Int'l. L. J. 423, 492 (1973).

He points out that Principle 22 is not limited to pollution but includes other damage caused by activities under state control.[21] Presumably, this refers to a state's responsibility for oil spills from tankers flying its flag as well as for damage due to the discharge of waste into the sea via its waterways. To whom the state would be liable, of course, is another matter.

Implementation of these principles of responsibility will require treaty provisions. Some difficult questions have been left unanswered. Liability must be predicated on common definitions of pollutants and on uniform standards of water quality. Sometimes the tortfeasor is not easily identifiable--or if he is, enforcement of liability is not feasible. What is to be the basis of liability? Principle 21 indicates that a state may continue to engage in risk-creating activities. Does Principle 22 give some relief by allowing for the imposition of strict liability under extreme circumstances?[22] A provision for the submission of disputes to the International Court of Justice seems desirable. But what about the "domestic" nature of the activity giving rise to the dispute? Professor Jessup has urged that the ICJ be used, sitting in special chambers with the assistance of scientific "assessors."[23] Whatever the difficulties involved in the conventional implementation of these principles, however, state responsibility for damage to the marine environment may be on its way to becoming a rule of customary international law.[24]

The Action Plan

The Declaration is followed by an Action Plan[25]--109 recommendations addressed to the Secretary General and specialized agencies of the United Nations, new environmental organizations, regional and non-governmental organizations, and, perhaps most importantly, to national governments. Specific proposals relating to marine pollution[26] include: (1) that governments support efforts to strengthen existing programs (Global Investigation of Pollution in the Marine Environment, GIPME; Integrated Global Ocean Station System, IGOSS) and bodies (Joint Group of Experts on the Scientific Aspects of Marine Pollution, GESAMP; Intergovernmental Oceanographic Commission, IOC): (2) that governments provide to the Food and Agricultural Organization (FAO) and the United Nations Conference on Trade and Development (UNCTAD) information on the production and use of toxic and dangerous substances that are potential pollutants; (3) that the Secretary General ensure that programs are developed to identify and monitor high-priority marine pollutants (a term that is undefined) within the IGOSS framework: and (4) that the IOC encourage the exchange of information among organizations and governments. Moreover, governments are

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[21] Id. at 495.
[22] For a thoughtful analysis of variations on the issue of liability, see Goldie, Pollution and Liability Problems Connected with Deep-Sea Mining, 12 Nat. Res. J. 172 (1972).
[23] Gardner, supra note 13, at 49.
[24] See Teclaff, supra note 5, at 371.
[25] U.N. Doc. A/CONF. 48/14 (1972).
[26] Recommendations 86 - 94.

requested to accept and implement available instruments for pollution control, to ensure that ships flying their flags and sailing their waters comply with the use of these instruments, and to control dumping and land-based sources of marine pollution.

Additional recommendations with implications for the marine environment are found elsewhere in the Action Plan. Recommendation 72 concerns the setting of standards for pollutants of international significance (another undefined term) through the cooperation of governments and international organizations. Substantial agreement on standards could lead to a state's being bound by a pollution standard which it has not itself adopted. On the other hand, the duty of a state to establish national pollution standards may become mandatory under customary international law.[27]

A key part of the Action Plan is the proposal for a global environmental monitoring system--Earthwatch--to provide an awareness and advance warning of deleterious effects to human health and well-being from man-made pollutants.[28] Consistent with this emphasis on information gathering is the recommendation[29] that states consult bilaterally on the environmental effects of their major projects. Although there is no international requirement that states file with a central authority a statement similar to our NEPA impact statements, such a requirement could be incorporated into treaties with much the same effect.[30]

The Action Plan is replete with directives which, it is estimated, will take perhaps twenty-five years to carry out.[31] The thoroughness with which the Conference dealt with the need for co-ordination is encouraging, notwithstanding the vagueness of the terminology in many of the recommendations. This at least leaves room for interpretation and negotiation. In a way, the approach of the Action Plan represents a new departure in international affairs, for instead of a general charter or constitution determining the operation of international organizations, the Conference has set forth detailed directives to policy-making bodies on all levels.[32]

Institutional Response

On December 15, 1972, the General Assembly responded to the Action Plan proposals for a United Nations Environmental Program.[33] The resolution established the Governing Council, the Secretariat, the Environmental Co-ordination Board and the Environmental Fund. The Council is composed of representatives from fifty-eight states, including both East and West Germany.[34] In acknowledgement of the importance of the developing countries, the Secretariat--appropriately headed by Maurice Strong--is located in

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[27]See Teclaff, supra note 5, at 367.
[28]Recommendation 74.
[29]Recommendation 3.
[30]See Teclaff, supra note 5, at 367.
[31]Hardy, supra note 12, at 238.
[32]Id.
[33]G.A. Res. 2997, U.N. Doc. A/890 (1972).
[34]Strong, supra note 9, at 694. Russia refused to attend the Stockholm Conference because East Germany was not seated on a par with West Germany.

Nairobi, Kenya. The Secretariat has approved en bloc 103 of the Action Plan recommendations.[35]

There seems to be general agreement that new institutions for environmental action should be created within the United Nations framework but not in a new specialized agency,[36] which would mean substantial duplication of efforts. It is argued that the United Nations is the only structure providing for cooperation on both a North-South and an East-West basis.[37] Also, the United Nations is the one institution to which states have given up some of their sovereignty[38]--and global environmental demands are putting a strain on traditional concepts of sovereignty. Maurice Strong has written, somewhat cryptically, that "the development of new international machinery to deal with the complex problems of an increasingly interdependent technological civilization will not come about through the surrender of sovereignty but only by the purposeful exercise of that sovereignty."[39] In other words, environmental problems are peculiarly susceptible to resolution at the national level, but the duty of states to devise solutions is an international one.

Some observers have expressed reservations about the role of the less developed countries at Stockholm and the voting power they exercise within the United Nations. One critic contends that these states abused their bargaining position vis a vis the developed nations to gain economic concessions irrelevant to the purposes of the Stockholm Conference.[40] The former United Nations ambassador from Malta, Arvid Pardo, would establish an agency having three categories of member states, each based on population. A decision by the agency would require a majority in two of the three categories.[41] Stockholm recognized but did not solve the problem of the disparate interests among developed and developing nations.

This conflict has important implications for the law of the sea. All nations now are asserting the right to share in the ocean's resources. One writer has noted that, contrary to the assumption that the developing countries generally do not share the environmental concern of the industrialized nations, one of the strongest seabed proposals submitted for international consideration has come from Chile and fourteen other Latin American countries. Their draft would require all seabed exploitation activities to be conducted in a manner that will prevent damage to the living resources of the sea.[42] The less developed countries will play a

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[35]Siehl, Environmental Update, Library J., May 1, 1973, at 1436.
[36]See, e.g., Gardner, supra note 13, at 48.
[37]Gardner, supra note 10, at 238.
[38]See generally D. KAY & E. SKOLNIKOFF, WORLD ECO-CRISIS 70 (1972).
[39]Strong, supra note 9, at 706.
[40]Wijkman, Second-best Solution at Stockholm, 9 Inter-Economics 262 (1972).
[41]Chaos at Sea, Saturday Review/World, Nov. 6, 1972, at 14. See also Kennan, To Prevent a World Wasteland: A Proposal, Foreign Affairs, April, 1970, at 401.
[42]Lanctot, Marine Pollution: A Critique of Present and Proposed International Agreements and Institutions, 24 Hast. L.J. 67, 84 (1973).

critical role at the upcoming Conference on the Law of the Sea.

Perhaps the law of the sea is an area in which the interests of the developed and the less developed countries can be reconciled. This would be a step toward the resolution of economic conflicts on a broader environmental scale. For example, an arrangement for sharing the sea's resources might contain the basic mechanism for sharing the burden of pollution control costs, one of the major points of disagreement at Stockholm. On an even wider front, it has been suggested that a successful management of environmental problems could help the world to deal with other pressing matters.[43]

From the outset it was the hope of Secretary-General Strong that the Stockholm Conference would serve to revitalize the United Nations.[44] Whether or not his hopes will materialize depends largely on the manner in which the Conference on the Law of the Sea deals with the fundamental issues raised at Stockholm. Thus we come full circle; from the implications of the Stockholm Conference for the law of the sea to the implications of the Law of the Sea Conference for Stockholm, the United Nations Environmental Program, and ultimately for the world order. Despite the achievements at Stockholm, we still are faced with the threat so clearly perceived and articulated by Wolfgang Friedmann:

> The tragedy of mankind may prove to be the inability to adapt its modes of behavior to the products of its intellect. Twentieth century man threatens to be a new kind of dinosaur, an animal suffering from a brain ill-adjusted to its environment.[45]

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[43]Gardner, Stockholm Conference Postscript, World Today, Sept., 1972, at 376. Mr. Gardner warns that "failure to devise a workable pattern of co-operation to cope with urgent environmental issues could lead to international disputes and a poisoning of political relations."

[44]Lindsay, Global Pollution II-Cleanup Man Maurice Strong, Saturday Rev., Aug. 7, 1971, at 43.

[45]W. FRIEDMANN, THE FUTURE OF THE OCEANS 120 (1971).

DEVELOPMENTS IN THE OCEAN RIGHTS OF LAND-LOCKED NATIONS

Robert I. Weisberg

I. Introduction

As the ever-increasing importance of the resources of the sea becomes evident, the land-locked nations of the world have grown more anxious to establish rights of access to the oceans.[1] For centuries, man saw the sea merely as a source of animal and plant products--in the future scientists and economists anticipate substantial utilization of mineral resources of the sea. This broadening of scientific and economic expectations has served to stimulate an upsurge in the efforts of the major powers of the world to assert claims to the high seas and to the seabeds. Not far behind have been the smaller coastal states, sensing (accurately, no doubt) that they can compete favorably with the larger powers due to their geographically-advantageous location.

Clearly, the inland nations are concerned that they, too, share in the future extractions of wealth from the sea. Traditionally, these countries have sought to gain access to the sea by relying on natural law, servitudes of necessity, and the freedom of the seas as legal justification for their demands addressed to states between them and the ocean.[2] These arguments have not been met with great enthusiasm--as a result, in their efforts to take advantage of the sea as the least expensive mode of transportation and, in many cases, the only way in which to reach international markets, inland states have had to resort to bilateral treaties with neighbouring coastal states.[3]

> "It is consistent with the view that there is no general right of passage over international rivers that proposals have been made after both World Wars that the rivers of Europe should be open to free and unrestricted navigation. When reference has been made to some general principle of 'free navigation', the principle has been spoken of as one which is not self-executing and

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[1]Land-locked nations have no direct access to the sea. Comprising twenty percent of the nations of the world, they are: Botswana, Burundi, Central African Republic, Chad, Lesotho, Malawi, Mali, Niger, Rhodesia, Rwanda, Swaziland, Uganda, Upper Volta and Zambia (Africa); Afghanistan, Bhutan, Laos, Mongolia, Nepal (Asia); Austria, Byelorussian S.S.R., Czechoslovakia, Hungary, Liechtenstein, Luxembourg, San Marino, and Switzerland (Europe); Bolivia and Paraguay (South America). Also included are Sikkim, Tibet, Andorra, and the State of Vatican City. See UNION OF INTERNATIONAL ASSOCIATIONS, 21 YEARBOOK OF INTERNATIONAL ORGANIZATIONS at 17-21 (12th ed. 1969).

[2]D. BOWETT, THE LAW OF THE SEA 50 (1967).

[3]Note, The Interests of Land-locked States in Law of the Seas, 9 San Diego L. Rev. 701, 703 (1972).

requires implementation through agreements applicable to individual rivers or groups of rivers."[4]

Bilateral treaties have not been altogether satisfactory for the land-locked signatories, however. While the principal concession made by the coastal state is generally allowing the use of an inexhaustable natural resource, the inland nation has been forced to pay quite a high price for its use of the waterway in question.[5] This obvious contractual disadvantage, combined with the inland countries' desires to maintain present avenues of incoming fish and fish products, has caused these nations to demand to participate in decisions made by international bodies in reference to conservation and exploration of ocean resources.[6] Recent United Nations conferences are demonstrative of how urgently these nations are pressing forward with these demands. Admittedly, the land-locked countries have not acted as a unified group--nonetheless, it is becoming apparent that there are many common needs among them.[7]

II. Moves to insure freedom of the seas for land-locked nations

Efforts to codify rules for access to the oceans have been channelled principally through the United Nations General Assembly, international conventions, and, to some extent, the International Court. Representatives from several inland countries have voiced their concern for determination and respect of transit rights for the oceangoing vessels of their respective states, these expressions of concern cropping up several times in 1971 in the General Assembly.[8]

There has been some recognition of transit rights by the International Court. Although a 1904 arbitration between Germany and Venezuela appeared to hold that there is no general right of free navigation over a river flowing through two or more states and affording access to the sea,

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[4]BAXTER, THE LAW OF INTERNATIONAL WATERWAYS 157 (1964).
[5]Childs, The Interests of Land-locked States in the Law of the Seas, San Diego L. Rev. 701, 703-4 (1972) (hereinafter cited as 9 San Diego L. Rev.).
[6]Id., at 704.
[7]See, e.g., 8 U.N. MONTHLY CHRON. (no. 4) 25 (1971).
[8]Id., see also 8 U.N. MONTHLY CHRON. (no. 1) 40 (1971).

more recent decisions by the Court have reached a contrary conclusion.[9] For example, in the Right of Passage over Indian Territory case,[10] the Court indicated that the historical exercise of transit rights can lay the foundations for a legal status quo.

The Barcelona Conference, which convened under the auspices of the League of Nations in 1921, is generally recognized as the basis of modern attempts to codify rules of transit by land-locked countries.[11] The participants at this Conference drew up the Convention on the Freedom of Transit, providing that adherents to the Convention "reciprocally permit free exercise of navigation to vessels on waterways under the sovereignty of any of the contracting States."[12] Although this agreement is rather restricted in its scope when subjected to present-day interpretation, such limitations as are found in the document are probably due to the more narrow range of modes of transport in 1921. However, this Convention did serve as a catalyst and as a foundation for several later and broader efforts at codification.

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[9]The Faber Case (Germany v. Venezuela), RALSTON, VENEZUELAN ARBITRATIONS OF 1903, 600 at 620 and 630. A German national made a claim for the losses which he sustained through the cutting off of his trade as a consequence of the measures taken by Venezuela with respect to the navigation of the rivers Catatumbo and Zulia in 1901 and 1902. Because there was a possibility that hostile forces might enter Venezuela along these rivers, the Umpire concluded that Venezuela had the right to regulate and "if necessary to the peace, safety, or convenience of her own citizens, to prohibit altogether navigation on these rivers." In dictum, the Umpire added that if the case had had to be decided on a general principle of international law, he would have had to say that there was no right of free navigation over the rivers in the absence of a treaty to that effect--even though the Zulia linked Colombia with the high seas.

[10] 1960 I.C.J. 42. Here, Portugal claimed the right of passage through Indian territory so as to retain contact with the Portuguese inland colonies of Dadra and Nagar-Aveli. Basing her claim on an old treaty, Portugal had her right affirmed instead on the theory of continual usage over a long period of time. The Court did limit its holding to non-military goods and personnel. See E. Hambro, THE CASE LAW OF THE INTERNATIONAL COURT 1959-1963 at § 185 (1966).

[11]7 U.N.T.S. 12, April 10, 1921.

[12]Id., see also G. HACKWORTH, 4 DIGEST OF INTERNATIONAL LAW § 363 at 345-46, 355 (Dept. of State, 1942); ACADEMY OF SCIENCES OF THE U.S.S.R., INSTITUTE OF STATE AND LAW, INTERNATIONAL LAW 237 (1960).

Three of the most outstanding attempts at setting up rules for transit have been the General Agreement on Tariffs and Trade (GATT),[13] the Convention on the High Seas (1958)[14] and the Convention on Transit Trade of Land-locked Countries.[15]

While the GATT was not formulated specifically for meeting the demands of the inland nations, it does seek to set up means by which these goals may be realized. Article V of the GATT is significant for this discussion because it covers international transit. Basically, this article facilitates the implementation of these demands by making it easier for inland states to export goods through the territory of contracting coastal states.[16] The initial paragraphs of Article V would seem to call for unhindered transport of goods between land-locked nations and the sea. However, the third paragraph, by allowing contracting coastal states to require that goods be entered at customs, could present problems in terms of the importation of goods by inland nations because the coastal state seems to be able to impose a tax arbitrarily.[17]

In 1958 in the Convention of the High Seas, the inland states received significant recognition of their plight. Article 2 of this Convention declares that the high seas are open to all nations and are not subject to the sovereignty of any one nation.[18]

Article 3 of the Convention on the High Seas is indicative of the international community's attitude in favour of defining the rights of the inland states.

> "Article 3
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> 1. In order to enjoy the freedom of the seas on equal terms with coastal States, States having no seacoast should have free access to the sea. To this end States situated between the sea and a State having no seacoast shall by common agreement with the latter and in conformity with existing international conventions accord:

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[13]The General Agreement on Tariffs and Trade, 61 Stat. pts. 5-6 (1969) T.I.A.S. No. 1700, 55-61 U.N.T.S. (hereinafter cited as GATT).

[14] 1962 pt.2 U.S.T. 2312, T.I.A.S. 5200, 450 U.N.T.S. 82, Geneva, April 29, 1958.

[15] 1965 pt.5 U.S.T. 7383; T.I.A.S. 6592; 597 U.N.T.S. 42, New York, July 8, 1965.

[16]See the GATT, 61 Stat. pts.5-6, T.I.A.S. No. 1700, 55-61 U.N.T.S. for the text of Article V, paragraphs 1-7. See also 9 San Diego L. Rev. n. 5 supra at 707-709.

[17]9 San Diego L. Rev. n. 5 supra at 707-709. This note contains a good discussion of the provisions of Article V, as well as the actual wording of the suggested legislation.

[18]The Convention on the High Seas; 1962 pt.2, U.S.T. 2312, T.I.A.S. 5200, 450 U.N.T.S. 82, Geneva, April 29, 1958. Approximately forty-nine states are parties to the Convention. TREATIES IN FORCE 332 (Dept. of State, 1972).

(a) To the State having no seacoast, on a basis of reciprocity, free transit through their territory and

(b) To ships flying the flag of that state treatment equal to that accorded to their own ships, or to the ships of any other states, as regards access to seaports and the use of such ports.

2. States situated between the sea and a State having no seacoast shall settle by mutual agreement with the latter, and taking into account the rights of the coastal State or State of transit and the special conditions of the State having no seacoast, all matters relating to freedom of transit and equal treatment in ports, in case such States are not already parties to existing international conventions."[19]

Although this article seems at first blush to insure free access to the sea for those countries lacking seacoasts, the need for common agreement prevents the article from being construed as a blanket guarantee. "The use of the word 'should' in paragraph one exemplifies the reluctance, on the part of the international community, to take a firm position on this matter."[20] Because of this near-disclaimer, some writers have said that the coastal nations still have the power to exclude any person or resource they wish.[21]

The third of the important international agreements with respect to the rights of land-locked nations is the Convention on Transit Trade of Land-locked Countries. "The importance of the Convention....is two-fold. First, it is an attempt to establish a framework in international law that grants not merely the rights associated with access, but further, a method whereby those rights can be enforced against the contracting parties. Secondly, the convention was drawn up by many nations who were either not represented at the formulation of the 1958 Convention on the High Seas or who were not yet in existence. There is no doubt that the more representative participation by inland countries contributed to the strengthening of demands."[22]

Article 2 of this Convention does much to work towards parity between littoral and inland states; for example, it is explicit in calling for freedom of transit, as agreed by common agreement (unlike the 1958 High Seas Convention, Article 2 here sets forth the principles under which these common agreements must be made). Furthermore, other articles place an affirmative duty on the coastal states to cooperate towards the removal of any impediment or obstruction to the free flow of goods.[23] Article 16 provides for an arbitration committee to resolve failures of parties to reach an agreement under the Convention.[24]

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[19]The Convention on the High Seas, supra, note 18, Article 3.
[20]9 San Diego L. Rev. n. 5 supra at 701, 711.
[21]M. McDOUGAL & W. BURKE, THE PUBLIC ORDER OF THE OCEANS 65-66 (1962).
[22]9 San Diego L. Rev. n. 5 supra at 701, 712.
[23]The Convention on Transit Trade of Land-locked Countries, supra, note 15, Article 2.
[24]Id., Article 16.

Hence, it may be observed that there has been a definite trend towards the acknowledgment and protection of the rights in inland countries to be assured of access to the sea. It has been predicted that in the future the inland nations, controlling about twenty percent of the votes in the General Assembly, will be able to effect even more legislation directed towards insuring these recently-acquired rights.[25] Doubtless the greatest difficulty facing these countries is the very economic dependence on littoral states which the inland nations wish to escape. This weakened bargaining power (in terms of concluding treaties for access) makes it questionable as to how much strength is really represented by the holding of one-fifth of the seats in the General Assembly.

III. The Rights to the Ocean's Resources--What measures are Available to the Land-locked Nations?

Originally, the inland states sought access for two reasons: they were anxious to take advantage of fish and other ocean animal and plant life as sources of food, and also they wanted to avail themselves of the sea as a mode of transport for the carrying on of international commerce. While both of these aspirations still figure very much in the policy-making and treaty-making of inland states, they have been augmented by the desire to share with the other nations of the world the newly-discovered mineral resources in the ocean.

These mineral resources, plentiful and at times relatively inexpensive to extract, are being sought by nearly every country in the world. Understandably, the under-developed nations are interested in bringing income into their treasuries, a goal that would be realized through exploitation of the seabeds. The unique problem confronting the land-locked nations is that "they must demonstrate a right to participation based upon the fact of their existence and not upon the physical attributes of their territory."[26]

There is no doubt that the importance of sea bed extraction will continue to grow in the next few years. Many studies have indicated the vast reserves of petroleum (particularly important in light of our current energy crisis), various metals, and hydrocarbons. In 1968 the United Nations espoused the view that all nations should take part in the utilization of ocean resources.[27] No one is as yet certain as to how much effect the exploitation of these resources will have on the respective economies of the world's states, but all land-locked nations are mindful of the added expenses they will incur on the open market due to overland transportation costs.[28]

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[25] 9 San Diego L. Rev., n. 5 supra at 701, 715-716.

[26] Id. at 718. This note has a very good analysis of the extent of world activity in reference to the development of non-living ocean resources. The author describes also the economic ramifications of these activities upon the economies of the inland states. Id. at 717-19.

[27] Report of the Ad Hoc Committee to Study the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction, U.N. Doc. A/7230 (1968).

[28] See, e.g., the concerns voiced by Czechoslovakia and Bolivia in 1971: 8 U.N. MONTHLY CHRON. (No. 1) 40 (1971).

Several plans have been formulated as to possible international supervision and regulation of the seabed resources.[29] Generally, these proposals have suggested a sort of licensing authority, under the auspices of the United Nations, to divide the seabed among the nations of the world, without regard to location--attention would be given to stages of development, so as to insure that the resources would be most efficiently exploited. Of course, whatever plan is adopted, the license fees must not be so high as to discourage investment, and thus delay development of this enormous potential source of energy.[30] Also, the laws that are decided upon should carry with them practical means of enforcement. Needless to say, politics will play a dominant role in the selection of an international scheme for protection of the rights of land-locked nations in conjunction with the ascertaining and development of ocean resources. As the nations of the world prepare for the Third United Nations Conference on the Law of the Sea, it is clear to observers that the land-locked states are divided among themselves due to the stances of their respective governments in international affairs.

IV. Political considerations behind recent assertions by land-locked countries

One has only to read a Soviet treatise on international law to realize that politics has not been a stranger to the struggles between inland countries and littoral states. That is to say, the claims to rights of access have not always been founded on purely geographical and/or economic grounds.[31] For example, the Soviet view of the 1921 Conference at Barcelona (see page 5 supra) is:

> "...The Convention obliged its participants reciprocally to permit free exercise of navigation to vessels on water-ways under the sovereignty of any of the contracting States. In this way it gave additional opportunities for the subjection of weak countries by strong capitalist States."[32]

This position seems a bit inconsistent with the Soviet Union's continuous contemporary backing of the underdeveloped nations, for it is out of this

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[29]Two noteworthy suggestions are by W. Frank Newton (for an ocean floor divided among all countries) and by E. Brown (governing international bodies will supervise the use of resources and allocation of funds received from exploitation of the ocean floor). See 9 San Diego L. Rev. n. 5 supra at 701, note 68 at 724, note 69 at 725.

[30]No matter what plan is used, the inland nations are aware that it is essential that they act now to promote the idea of an international governing body over exploitation of the seabeds. Unfortunately, this awareness is somewhat tempered by political considerations--not always present by the choice of the inland states. See Part IV of this paper, supra.

[31]See ACADEMY OF SCIENCES OF THE U.S.S.R., supra, note 12, at 203 and following pages.

[32]Id., at 237.

latter group that those land-locked nations most in favour of free access rights have emerged. In May of 1973, the Council of Ministers of the Organization of African Unity, meeting in Addis Ababa, Ethiopia, issued very strong statements asserting the rights of under-developed and in-land African countries.[33]

The statements began with recognition of the lack of participation by African nations in past Law of the Sea Conferences, and continued with words to the effect that African states must act together in order to insure that they share in the future exploitation of the seabeds.[34] The declaration then mentions the inland states:

> "13. Recognizing that Africa had many disadvantaged States including those that are land-locked or shelf-locked and those whose access to ocean space depends exclusively on passage through straits;.....
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> A.....
> 2. The African States endorse the principle of the right of access to and from the sea by the land-locked African countries, and the inclusion of such a provision in the universal treaty to be negotiated at the Law of the Sea Conference;..."[35]

Further on, the declaration states that "all States regardless of their geographical situation have the right to carry out scientific research in the marine environment."[36]

These statements highlight the fears of under-developed African nations of total control of the high seas by the super powers. However, they realize that they indeed do have some influence in world affairs since the United States, the Soviet Union, and China have all been anxious to achieve favor with Third World nations, particularly the African states. It seems possible that the issue of land-locked nations' access to the sea might become a focal point of East-West confrontation.

One would expect the formerly-intransigent attitude of the Soviets regarding free transit to be altered somewhat in light of the fact that several of the members of the East European Bloc are land-locked (Czechoslovakia, Hungary, Byelorussia). Indeed, two bloc members took part in the issuance of draft articles relating to the rights of land-locked

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[33] U.N. Committee on the Peaceful Uses of the Sea-bed and the Ocean Floor beyond the limits of National Jurisdiction, Organization of African Unity Declaration on the Issues of the Law of the Sea--CM/Res. 289 (XIX); 12 I.L.M. 1200 (July, 1973).

[34] Id., at 12 I.L.M. 1200-1202.

[35] Id., at 1202, 1203.

[36] Id., at 1206. The declaration also calls for land-locked nations to share in the exploitation of living resources in neighbouring economic zones on equal basis as nationals of coastal states on bases of African solidarity and under regional or bilateral treaties. Id., at 1204-5.

states in August of 1973.[37] Since these articles several times say explicitly that the right of free access is an established principle of international law, the presence of Czechoslovakia and Hungary as proponents of these articles is doubtless prima facie evidence of a change in Soviet posture.

The African Unity draft articles are a detailed outline of the rights of inland states in terms of access,[38] freedom of transit,[39] use of Maritime ports,[40] actual transport of goods,[41] and contain provisions for settlement of disputes, negotiations, and other pertinent items.[42] What is most salient about these proposals is their joint authorship--a union of Bloc countries with under-developed ones. Clearly, the Soviets have cleverly tried to promote their conception of international "brotherhood" by portraying the needs of the Third World as being congruent with the needs of the Eastern Bloc. The United States and China are left to attempt to forge some other kind of solidarity with the under-developed nations.

There have been several other declarations during 1973 in which the rights of land-locked nations have been loudly proclaimed. The effect is rather that of the bandwagon--the major powers recognizing yet another group of countries to court while the Third World sees another opportunity to strengthen itself collectively. Papers calling for free access and sharing in the resources of the sea by inland states have been issued by Ecuador, Panama and Peru,[43] by Canada, India, Kenya and Sri Lanka, (Principally a proposal relating to fisheries),[44] by China,[45] and by the Netherlands.[46] This melange of countries in support of greater recognition of the needs of land-locked states could be construed as newly-developed feelings of altruism among nations and the genesis of true international unity. More realistically, the presence of these nations as signatories of these declarations indicates more interest by more different interest groups in winning the friendship of formerly-unrecognized potential sources of power.

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[37]Draft Articles relating to Land-locked States submitted by Afghanistan, Bolivia, Czechoslovakia, Hungary, Mali, Nepal and Zambia. A/AC. 138/93 (2 August 1973); 12 I.L.M. 1214 (Sept., 1973). See text accompanying notes 31 and 32, supra.

[38]Id., Article II.

[39]Id., Article III.

[40]Id., Article V.

[41]Id., Articles IX-XI.

[42]Id., Articles XII-XXII.

[43]Draft Articles for Inclusion in a Convention on the Law of the Sea. A/AC. 138/SC.II/L.27 (13 July 1973); 12 I.L.M. 1223 (September, 1973).

[44]Draft Articles on Fisheries, A/AC. 138/SC.II/L.38 (16 July 1973).

[45]Working Paper on General Principles for the International Sea Area, A/AC. 138/SC.II/L.45 (2 August 1973).

[46]Proposal concerning an Intermediate Zone, A/AC.128/SC.II/L.59, (17 August 1973).

V. Conclusion

After so long existing in a most disadvantaged position in relation to the littoral states, the inland nations are now beginning to be heard in the council of nations. Their increased strength at the bargaining table is due to their number; their presence in East, West, and Third World movements; and their own socialization in terms of being able to articulate their needs to themselves and to their neighbour nations. The trend seems to be such that at this time we can expect the 1974 Law of the Sea Conference to be much concerned with determining explicitly the rights and the enforcement of the rights of land-locked countries.

RECENT TRENDS IN THE DEVELOPMENT OF THE LAW OF UNDERSEA INSTALLATIONS

James MacDonald

While man has utilized the resources of the sea for several thousand years through fishing, he has largely left untapped the vast resources of the ocean bed. As he develops his technological capacity, he looks with increasing interest to the utilization of the riches of the ocean floor. Some contemplated uses of the ocean space include undersea habitats for scientific research or mining, networks of automated stations to report meterological and other data, aquacultural installations and large fresh water conversion units. In addition, the recovery of oil from depths of over 1000 feet is possible and a process for the recovery of manganese nodules rich in manganese, cobalt, copper, and nickel is being perfected.[1] To implement the recovery of these resources and to carry on other scientific operations, the installation of seabed structures and facilities will be required. With the installation of seabed structures, questions as to their placement, ownership, scope of activities and liability may arise.[2] While there is not a great deal of international law with respect to undersea installations, two emerging principles are evident; first, the creation of an international zone of the deep sea bed where undersea installations are subject to international control[3] and second, the restriction of the use of undersea installations to peaceful purposes.[4]

Traditionally, the exercise of jurisdiction over undersea installations or resources turns on whether they fall within the area of national jurisdiction. Under existing law, the coastal state has exclusive jurisdiction and control in three zones: internal waters, the territorial sea, and the continental shelf. With respect to internal waters and territorial sea, the coastal state has sovereignty over the seabed, its superjacent waters and the air space above. With regard to the continental shelf, its sovereignty encompasses only exploitation and exploration of the seabed and subsoil.[5] The Continental Shelf Convention completed in Geneva in 1958 defined the limit of this shelf, in dual terms as the 200 meter depth line "or, beyond that limit, to

[1]Young, The Legal Regime of the Deep Sea Floor, 62 Am. J. Int'l L. 641, 642 (1968) (hereinafter cited as Young).
[2]Goldie, Two Neglected Problems in Drafting Regimes for Deep Ocean Resources, 64 Am. J. Int'l L. 906 (1970).
[3]See generally, U.N. Committee of the World Peace Through Law Center, Revised Draft Treaty Governing the Exploration and Exploitation of the Ocean Bed (1971).
[4]See generally, annex to U.N. Res. 2660 (XXV) (1970). Reprinted at 10 International Legal Materials 145 (1971).
[5]Jennings, Jurisdictional Adventure at Sea, 4 Natural Resources Lawyer 829, 830 (1971) (hereinafter cited as Jennings).

where the depth of the superjacent waters admits of the exploitation of such resources."[6] This elastic second part of the definition allows extension of jurisdiction corresponding to increased technological capacity to exploit resources at greater depths. Furthermore, once the technological capacity exists, it extends the jurisdiction of all countries to that particular depth irrespective of the individual country's technological capacity.[7]

In March 1971, the special Senate Subcommittee on the Outer Continental Shelf concluded that the:

> heart of our sovereign rights under the 1958 Geneva Convention consist of the following:
> (1) The exclusive ownership of the mineral estate and sedentary species of the entire continental margin
> (2) The exclusive right to control access for exploratior of the entire continental margin and
> (3) The exclusive jurisdiction to fully regulate and control the exploration and exploitation of the natural resources of the entire continental margin.[8]

The pronouncement indicates that the United States believes its national jurisdiction extends to the edge of the continental margin as opposed to the 200 meter depth. This view would allow the United States exclusive control and sovereignty over undersea installations within the continental margin. Since the United States bases this claim on the doctrine of appurtenance - that the continental shelf is an extension of the land mass and thus appurtenant to it - it is compelled by the reciprocal nature of the claim to recognize the exclusive sovereignty of other nations to undersea installations upon their own continental margins.[9]

When considering control of the ocean bed beyond national jurisdiction, it appears that customary principles of law support the idea that a portion of the ocean bed may be subject to exclusive authority in situ. However, the application of this principle to the ocean bed would create some problems such as what standard measures the degree of occupation necessary to create a claim. While there would be little problem with undersea structures with a defined perimeter, there would be questions concerning the extent of occupation by structures such as a dredging barge or hybrid type drilling rig.[10] Furthermore, if individual states could acquire exclusive sovereignty over the ocean bed, it may create a rush for territorial claims as technology makes the installation of undersea bases more feasible and profitable. As a viable alternative, the deep sea installations could be regulated by an international agency

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[6]Convention on the Continental Shelf, Art. I., Geneva, 1958, 15 U.S.T. 471; 499 U.N.T.S. 311 T.I.A.S. No. 5578; 52 Am. J. Int'l L. 858 (1958).
[7]Young supra at 644.
[8]Outer Continental Shelf: Report by the Special Subcommittee On Outer Continental Shelf to the Committee on Interior and Insular Affairs, United States Senate, Dec. 21, 1970, 91st Cong., 1d Sess. p. 19. Cited in Ely, United States Seabed Minerals Policy, 4 Nat. Res. Lawyer 605 (1971).
[9]Jennings supra at 832.
[10]Young supra at 645.

whose function would be the protection of deep sea resources for the benefit of all people.

While all the countries agree that there is an area beyond national jurisdiction, there has been no consensus on the establishment of a regime to deal with the problem. There exist four general possibilities for a legal regime. The first proposal would impose a vacuum as to areas outside state jurisdiction.[11] This alternative does nothing to further the regulation of undersea installations, and its approach is acceptable only as long as man lacks the technological know-how to utilize the resources of the deep sea bed. The second proposal would allow the extension of national sovereignty to encompass the entire ocean floor by allowing an extension of the shelf doctrine to all ocean areas.[12] This suggestion would result in inequities according to the geographical situation of the respective countries with islands reaping benefits and land-locked countries being denied them. A third alternative would permit appropriation on a first-come, first-served basis which would be supervised by an international registration system, along with international controls and provisions for preventing or resolving conflicts.[13] This proposal has the disadvantage of placing a high premium on advanced technology. In the rush to claim the seabed, the technologically advanced nations would have the advantage in exploring and claiming the most promising areas of the seabed with the result that the underdeveloped countries would not receive their fair share. The fourth proposal suggests the vesting of the deep sea floor in some international agency which would either lease concessions to explore and exploit the mineral resources in the area or would itself carry on the exploration and exploitation activities.[14] This proposal by virtue of its licensing system would be the only one which could be utilized to impose international regulation on the development of undersea installations and the scope of their activities.

The General Assembly of the U.N. has enunciated the principle that the resources of the area beyond the national jurisdiction are the heritage of all mankind.[15] Implementation of these goals would seem to require some sort of international control over undersea installations in this area. Furthermore, international control could insure a more equitable distribution of the wealth and information gained from undersea operations. One suggestion would utilize fees collected from licensing undersea operations as funding grants for the developing states.[16] Additional advantages accruing from international control

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[11] Newton, New Quest for Atlantis: Proposed Regimes for Seabed Resources, 25 JAG Journal 79, 81 (1970-1971) (hereinafter cited as Newton).
[12] Id.
[13] Young supra at 648.
[14] Id.
[15] G. A. Res. 2749 (XXV) (1970).
[16] Jennings supra at 839.

over the ocean bed include: the assurance to all states of equal participation in the deep sea bed's development; the provision of a source of income to the international community for worthy purposes; the elimination of national rivalries; an exploitation plan geared to avoid waste and encourage rational development of resources from a world-wide standpoint; and the hope of preventing the use of the ocean bed for military purposes.[17]

Since there has been little international regulation of undersea installations and operations, some experts propose that the United States enact temporary measures as a stopgap until superceded by an international regime established pursuant to a multilateral convention. The proposed action would require obtaining licenses prior to mining or other uses and the enacting of regulations designed to protect the marine environment. The proposed action would not confer rights as against nationals other than those of the United States, nor purport to claim territorial jurisdiction over any area of the deep seabed.[18]

In 1971, the U.N. Committee of the World Peace through Law Center set forth a revised draft treaty governing the exploration and exploitation of the ocean bed. If adopted, the treaty would insure international regulation of undersea installations. The draft begins by granting jurisdiction to the United Nations over the resources of the ocean bed and the non-living resources of the high seas. Article I defines ocean bed as:

> a) the seabed and subsoil of the submarine areas adjacent to the coast beyond the first depth of 200 meters but outside the area of territorial sea;
> b) the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.[19]

With the adoption of the treaty, a country would by virtue of Article I renounce regulatory powers over undersea installations outside this national 200 meter depth. Since the U.S. presently asserts exploitation jurisdiction to the edge of the continental shelf and possesses one of the richest continental margins, some writers contend adoption of the treaty would be detrimental to its best interests.[20] In order to promote adoption of the treaty and to placate opponents, the draft treaty provides that one half of the net income derived from license fees, royalties and the like in the area beyond the shelf up to 50 miles from the coast accrue to the benefit of the coastal state.[21] Thus the

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[17]Young supra at 649.
[18]Laylin, The Law to Govern Deep Sea Mining until Superceded by International Agreement, 10 San Diego L. Rev. 433, 440 (1973).
[19]Draft Treaty, supra note 3, Article I.
[20]Ely, United States Seabed Minerals Policy, 4 Nat. Res. Lawyer 605 (1971).
[21]Draft Treaty, supra n. 3, Art. XIII.

draft treaty would cut off the rights to the seabed of those few countries claiming exclusive rights extending for 200 miles but it would not interfere with nor restrict their fishing rights.[22]

One of the more important features of the proposed treaty concerns the creation of an Ocean Agency which "shall have the sole and exclusive authority to grant and administer exclusive exploration and exploitation rights pertaining to the ocean bed, and to fix charges therefore to be paid to said Agency."[23] As a U.N. affiliate, the Agency would not itself engage in exploitation activities but would grant licenses to both governmental and non-governmental entities, the funds from which would be earmarked for purposes specified in Article 55, subparagraphs a and b, of the U.N. charter.[24] A Tribunal, whose members and decision making would be independent of the Agency, would adjudicate disputes arising out of the work of the Agency or operations under its jurisdiction. Provision is also made for preliminary administrative hearing within the Agency.[25]

While the draft stipulates that "no portion of the ocean bed... is subject to national or private appropriation or any exclusive use by claim of sovereignty," ownership of objects "in, on or under the Ocean Bed is not affected by their presence in or on the Ocean Bed and shall remain with the State or entity having title thereto.[26] Since the U.N. draft specifies that no claim of sovereignty will be allowed, the fact that a state may have a seabed installation on a portion of the seabed will not be sufficient to give it a claim of possession to that area. Furthermore, ownership of the particular undersea installation would seem to insure that the owner, whether governmental or non-governmental, could be held liable under Article VI which dictates absolute liability "for damages to the resources of the ocean bed, and of the high seas and to the person or property of persons."[27]

An additional restrictive power within the Agency's authority involves its power to regulate and control the disposal of harmful material on the Ocean Floor.[28] The provision implies that the Agency has the power to prohibit the disposal of harmful material on the ocean floor. This prohibitionary power could be invoked against the U.S. to prevent it from dumping radioactive materials and nerve gas into international waters as it has done in the past.[29] Therefore, the provision appears to control not only wastes from undersea installations but all wastes dumped into international waters.

Article V indicates that the treaty contemplates that the ocean bed should be used exclusively for peaceful purposes. Going beyond the existing prohibition against emplantation of nuclear weapons or other weapons of mass destruction, Article V prohibits the undersea installation of military bases, installations and fortifications, the testing placement or conduct of military maneuvers in, on or under the Ocean Bed.

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[22]Draft Treaty, supra n. 3, Art. III.
[23]Draft Treaty, supra n. 3, Art. XIII.
[24]Draft Treaty, supra n. 3.
[25]Draft Treaty, supra n. 3, Art. XIII A (vi).
[26]Draft Treaty, supra n. 3, Arts. III, IV.
[27]Draft Treaty, supra n. 3, Art. VI.
[28]Draft Treaty, supra n. 3, Art. IX.
[29]Draft Treaty, supra n. 3, cmt. on Art. IX.

While Article V does permit the installation of devices for interception of, detection, and tracking of military activity, it imposes the additional restriction that advance notice of this type installation must be provided to the Ocean Agency along with an opportunity to inspect such structures at the Agency's discretion. These restraints embodied in Article V of the draft treaty manifest the growing desire to restrict seabed installations to peaceful purposes.[30]

While there is little agreement on the international level as to the approach which should be taken to regulate undersea facilities, the U.N. - prompted by a desire to preserve the ocean bed for the peaceful purposes of securing food, energy and minerals - adopted the Seabed Arms Control Treaty (hereinafter cited as SACT). On December 7, 1970 the U.N. approved SACT in resolution 2660 which prohibited "the emplantation or emplacement on the sea bed and ocean floor and in the subsoil...any nuclear weapon or other type of weapon of mass destruction as well as structures, launching installations or other facilities for storing, testing or using such weapons."[31] It is noteworthy that the ban extends to other types of weapons of mass destruction besides nuclear ones. By virtue of this provision, the storage or emplantation of chemical or germ warfare materials would constitute a violation. Also significant is the fact that the prohibition covers all areas outside the maximum contiguous zone (12 miles) provided for in the 1958 Geneva Convention.[32] Since the treaty's coverage extends to the vast majority of the ocean bed, a country's acceptance of the treaty indicates a willingness to forego some potential security benefits. Admittedly, the interest which the individual country gives up may be slight in that most countries have not acquired the technology to install these weapons. However the importance of the treaty remains the possibility that it will herald further restrictions which will insure that the seabed is utilized exclusively for peaceful purposes.

The treaty also provides notable exceptions. The prohibitions in the SACT did not extend to: facilities for research or commercial exploration not specifically designed for using nuclear weapons or other weapons of mass destructions; the deployment of submarine tracking stations which includes the deployment of sonic devices on the ocean floor; and the use of military personnel and equipment for research.[33] It appears that the prohibition extended only to undersea structures for offensive weapons (warheads) as opposed to defensive ones (detection devices) and that the prohibition did not curtail any military practices currently in operation. To a certain extent, the success in reaching the accord on the treaty can be attributed to the fact that fixed installations do not offer as great a security value

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[30]Draft Treaty, supra n. 3, Art. V.

[31]G. A. Res. 2660 (XXV) (1970) Article I. Reprinted in 10 International Legal Materials 145, 147 (1971).

[32]Gorove, Toward Denuclearization of the Ocean Floor, 7 San Diego L. Rev. 504, 510 (1971).

[33]Rao, Seabed Arms Control Treaty: A Study of the Contemporary Law of the Military Uses of the Sea, 4 Journal of Maritime Law and Commerce 67, 78 (1971).

to the powerful nations as do submarines which are mobile, and that fixed installations present a greater probability of unreasonable interference with the other uses of the sea.[34]

The verification procedures as specified in the treaty may provide some guidelines with respect to future international efforts to regulate the activities of undersea installations. Two procedures were suggested for the administration of this verification process. The first proposal advocated by the USSR envisioned free access on a reciprocal basis to all seabed installations. The second procedure set forth by the U.S. favored reliance on mere observation and consultation.[35] Opponents of the Russian plan argued that some countries lacked the technological capacity to make on-site inspections of undersea installations whereas opponents of the American proposal objected that observation alone was insufficient for verification of compliance with the treaty. In an effort to compromise and to remedy some of the defects of each proposal, the treaty provides that a complaining party may seek third party assistance in the verification procedure, that a complaining party shall have access to the undersea structure and that the complaining party has recourse to the Security Council of the U.N..[36]

With the increasing need for the food, energy, and minerals which the ocean bed has to offer, the coastal states, particularly the more technologically advanced ones, will be pressured to appropriate these benefits to their exclusive use. This trend would lead to conflicting claims, to wasteful use of the ocean bed and to the denial of equal participation to all countries in sharing the benefits. In order to achieve the goal of peaceful development of seabed resources for the benefit of all people, the countries must adopt international controls comparable to those proposed in the draft treaty for exploration and exploitation of the deep sea bed which would regulate undersea installations and operations.

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[34] Id.
[35] Id. at pp. 70-78.
[36] G. A. Res. 2660, supra note 31, Article III.

THE PROBLEM OF OCEANIC RESEARCH:

UNITED STATES AND LATIN AMERICAN PERSPECTIVES

Joseph E. Kilpatrick

One of the complex topics to be resolved by the upcoming Law of the Sea Conference is the status of marine scientific research. For developed nations such as the United States, the issue is to what freedom or protection under international law should marine scientists be entitled, in view of their special research requirements and its benefits to mankind. The developing nations raise a different question: what regulation by coastal states of scientific research is necessary to protect and promote special national interests in adjacent ocean areas.

This paper examines the political and legal conflicts underlying these differing approaches, as reflected in the specific declarations or draft treaty articles of the United States and the Latin American countries.

UNITED STATES PERSPECTIVE

The Importance of Marine Scientific Research:

Under the mandate of the 1970 United Nations Resolution to prepare for a Conference on the Law of the Sea, the separate topic of marine research has been studied by Subcommittee III of the Committee on the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction.[1] The United States, with support from other developed nations such as the Soviet Union, has vigorously defended the freedom of marine research. On July 20, 1973, the United States presented its current position in the form of draft treaty articles.[2]

The United States proposal is premised on a recognition of the rising importance of marine research for mankind in general; because of its unique value, research efforts should be actively supported by all states. Article One begins: "Scientific research in the sea being essential to an understanding of global environment, the preservation and enhancement of the sea and its rational and effective use, States shall promote and facilitate the development and conduct of all scientific research in the sea for the benefit of the international community."[2] In a statement before the Subcommittee, United States Ambassador McKernan summarized the achievement of ocean research: "Marine Science has led to a better understanding of the environmental consequences of

[1] G. A. Resolution; 2750 (XYV); December 17, 1970.
[2] U.N. Doc. A/AC. 138/SC. III/SR.

marine pollution, the geology of the seabed, the interaction of the ocean and the atmosphere, the productivity of the living resources of the ocean, the ocean's chemical composition, and a vast array of knowledge of importance to mankind as a whole."[3] The increasing significance of marine research is undeniable; but the manner in which it benefits the international community presents a problem. Currently, there is great disparity in the capacity of individual nations to benefit.

Emphasis on Freedom:

The prevailing emphasis of the proposal is the freedom to conduct scientific research based on the freedom of the seas doctrine. Article One continues: "All states, irrespective of geographic location, as well as appropriate international organizations may engage in scientific research in the sea, . . ." Traditionally, scientific research has been considered one of the sacrosanct freedoms of the high seas. The 1958 Convention on the Continental Shelf which granted coastal states exclusive sovereignty rights to explore and develop shelf resources provided specific safeguards for the freedom to conduct fundamental scientific research certified by a qualified institution and intended for open publication.[4] Due in part to the precedent of the Continental Shelf Convention, however, many states have declared sovereignty or special jurisdiction over ocean areas far beyond established limits, and have intensified the regulation of marine research activities in these areas, causing marine scientists considerable inconvenience. "Under present conditions, plans for research cruises and projects center more around the legal requirements of the voyage than the relevant scientific criteria."[5]

One chief purpose of the proposal is to keep coastal state legal interference to a minimum, in view of the marine scientist's unique needs. Article Six is attuned to the marine scientist's special dependency on coastal waters and ports, and attempts to temper the sovereign power of coastal states in their territorial sea to allow for this dependency. Furthermore, the prevailing promise of freedom in the proposal complements the marine scientist's special need for freedom in general. According to one observer, the name of the scientist's game is change: "Scientific understanding is changing continually, and the goals and methods of an investigation are subject to continual updating'; also ". . . observations may suggest the desirability of changes from a preconceived route. Even in the case of relatively timeless measurements, such as those of the sea floor, the observed topography or structure may be so different from that expected that different locations and strategies are called for."[6] In short, many

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[3]Id., July 20, 1973.
[4]Convention on the Continental Shelf, Art. 5(e), 15 U.S.T. 471; T.I.A.S. No. 5578; 499 U.N.T.S. 311; 52 Am. J. Int'l L. 858 (1958).
[5]Woodhead, Drag Anchor on Knowledge: The Law of the Sea and Marine Scientific Research, Utah L. Rev. 524, 525 (1971).
[6]Warren S. Wooster and Michael D. Bradley, Access Requirements of Oceanic Research: The Scientists' Perspective, in FREEDOM OF OCEANIC RESEARCH 30 (Warren S. Wooster ed. 1973).

coastal state regulations undermine the scientist's need for flexibility and spontaneous reaction.

Limitations:

Although the proposal is couched in freedom of the seas language, the actual freedom required is a far cry from the days of the rigid three-miles territorial sea and expansive high seas. Indeed, the freedom to conduct research is limited in deference to special coastal state rights and interests. Article One ends with the following qualification on the right to conduct research: researchers must ". . . recognize the rights and interests of the international community and coastal states, particularly the interests and needs of developing countries . . . ." Article Two requires that research "be conducted with reasonable regard to other uses of the seas," and Article Three requires adherence to "strict and adequate safeguards for the protection of the marine environment."

Most important, Article 7 imposes a series of requirements on the researcher "in areas beyond the territorial sea where the coastal state exercises jurisdiction . . ." These include (a) reasonable notice to the coastal state; (b) certification from a qualified institution "with a view to purely scientific research"; (c) giving the coastal state full opportunity to participate; (d) sharing results with the coastal states; (e) open and widespread publication of "significant" findings; and (f) to "assist the coastal state in assessing the implications for its interests of the data and results . . . ."

These provisions are specifically designed to give the coastal state the opportunity to benefit from research in contiguous zones. Only "purely scientific research" is allowed in these areas (Article 7(b)), provided the other conditions are met as well; but the articles offer no guidelines for a workable definition. Also, the right to participate and mandatory open publication are of little value if the state lacks the scientific and technical capability to take advantage of them.

Capacity to Benefit:

Comparisons by country of the number of marine scientists, oceanographic vessels, and total annual expenditures reveal that the United States has the largest marine science capability in the world.[7] Nevertheless, the United States argues in its proposal that freedom of scientific research is necessary for the benefit of manking, and not simply for the benefit of exclusive national interests.

Most purely scientific projects, such as those sponsored by the Woods Hole Oceanographic Institution, are concerned with knowledge for its own sake as a tool of greater understanding.[8] However,

[7]United Nations, ECOSOC, Marine Science and Technology: Survey and Proposals; Report to the Secretary-General, pp. 35-36.
[8]Wall Street Journal, 2 November 1973, p. 1 at col. 1.

beneficial side-effects on private or commercial interests are inevitable. "Scientific knowledge has laid the foundation for commercial exploration of ocean resources. The scientists of Scripps' Deep Sea Drilling Project, for example, are interested in learning more about the earth's crust and seabed tectonics, but some of their core sample can be used to indicate where conditions for oil exploration are most favorable."[9]

Such side-effects would not cause a problem if every nation had relatively the same capacity to enjoy them. Unfortunately, the Latin American countries and other developing nations do not. More relevant than any distinction between types of research is the general technical capability to put research results to productive use. The United States is in the most favorable position to benefit. No doubt, this fact accounts for much of its concern for preserving the freedom of marine research.

The United States is not blind to the developing countries' need for additional technical and scientific expertise. In addition to Article One and Article 7(f), Article Five calls for greater state support of international cooperation in scientific research through (a) multi-national research projects, (b) active publication and transfer of research results, and (c) "through measures to strengthen scientific research capabilities of developing countries, including assistance in assessing the implications for their interests of scientific research data and results, the participation of their nations in research programs, and education and training of their personnel." Before evaluating the effect of this remedy, an examination of the Latin American position is appropriate.

LATIN AMERICAN PERSPECTIVE

Recent Law of the Sea declarations and proposals by Latin American countries reflect a dominant concern for national sovereignty and economic development.

On May 8, 1970, most Latin American countries joined in the Declaration of Montevideo and affirmed "the right of littoral states to exercise control over the natural resources of the sea adjacent to their coasts and of the seabed and subsoil thereof in order to achieve the maximum development of their economy and to raise the living standard of their peoples," and "the right to delimit their maritime sovereignty and jurisdiction in conformity with their own geographic and geological characteristics and consonant with factors that condition existence of marine resources and the need for national exploitation."[10]

These principles were reaffirmed at the Lima Conference on Aspects of the Law of the Sea in August, 1970. The Lima declaration defined the "right of the coastal state to authorize, supervise and participate in all scientific research activities that may be carried out in the maritime zone subject to its sovereignty or jurisdiction." It also espoused the

[9]Franssen, Developing Country Views of Marine Science and Law, in Freedom of Oceanic Research 149 (Wooster; ed. 1973).
[10]9 Int./Legal Materials 1081 (1970).

right of the coastal state to be informed of the results, to treat samples as its property, to participate and to benefit from research in its maritime zones. Finally, the declaration stipulated that these research activities must be of a "strictly scientific character."[11]

Perhaps the most recent expression of the Latin American position on marine research can be found in the Law of the Sea proposal prepared by The Inter-American Juridicial Committee of the General Secretariat of the Organization of American States at the beginning of 1973.[12] Although the articles of this proposal are only recommendations to be considered for adoption by the Latin American States, their content is representative of Latin American concerns. Again, the emphasis on sovereignty, economic development, and coastal state authority over adjacent ocean areas stands out. Two zones are delineated: the first is limited to twelve nautical miles from shore and resembles a teriitorial sea; the second is an outer zone extending no further than 200 nautical miles from shore. The coastal state is entitled to use the outer zone to achieve maximum development of the economy and raise the standard of living (Article Six).

One of the several powers of the coastal state within its outer zone defined by Article 7(a) is the following:

> . . . to regulate and conduct exploration of the sea, its bed, and its subsoil, and exploitation of the living and non-living resources that are found there; and it may reserve those activities for itself or its nationals or allow them also to third parties in accordance with the provisions of its domestic legislation or of any international agreements it concludes in this regard.

In effect, the proposal declares an exclusive economic resource zone in which the coastal state has absolute authority to regulate research concerning resources of the zone.

Limitations on Authority:

Coastal state authority is qualified somewhat by the definition of another coastal state "power" in the outer zone contained in Article 7(c): "to promote scientific research activities, to participate in carrying them out, and to receive the results obtained, taking into account the advisability of facilitating such activities without unjustified discrimination or restriction" (emphasis added). In light of this "power" to promote scientific research, it appears that the authority to regulate exploration in Article 7(a) pertains to commercial or other "applied" research directly related to the economic resources of the zone. It can be reasonably inferred that Article 7(c) incorporates the "purely scientific research" standard and provides special "protection" or "freedom" for this type of research in terms of the "advisability principle."

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[11]10 Int./Legal Materials 207 (1971).
[12]OEA/Ser. Q./IV.6. CJI-13, pp. 85-87.

The Comparison:

Clearly the United States and the Latin American countries have different legal positions. The United States has a much higher stake in the fruits of marine scientific research than the Latin American countries at this time, due to its superior technological capability. The freedom of the seas doctrine constitutes a convenient legal tool by which the United States can serve its national interest in scientific research, along with other more important objectives regarding the law of the sea--such as protecting the right of innocent passage for military vessels beyond the traditional three mile territorial sea. On the other hand, the Latin American countries rely on the principle of sovereignty to justify greater authority to regulate research in special zones. The difference lies in the way protection for a regulation of scientific research is defined. The United States assigns major responsibility to international law, while the Latin American approach makes regulation in special "outer zones" more the responsibility of the coastal states.

Perhaps, this antithesis in legal approach involves more form than substance. In view of the OAS Juridicial Committee's recommendation for coastal state support of scientific research in outer zones, it is possible that the standards of coastal states for the regulation of scientific research may not differ greatly from the United States preferred standard of "freedom" for scientific research.

On the other hand, it is likely that Article 7(c) of the Juridicial Committee recommendation represents nothing more than a concession to make the proposed exclusive economic resource zone more palatable to the United States. The general apathy of these developing nations in regard to scientific research probably has not changed, and stiffer controls than the United States deems necessary or reasonable will probably continue.

The reason for "unreasonable" coastal state interference is primarily ignorance. Due to their lack of scientific and technical capabilities, the Latin American countries do not yet understand the universal benefit of purely scientific research and tend to be suspicious of the intentions and possible harmful effects of foreign research projects.[13] No doubt, their lack of technical expertise makes these countries painfully vulnerable to unfair exploitation. Not having the means to accurately assess the value of their resources, they are therefore hesitant to enter concession or joint venture agreements with foreign commercial interests without assurances of fairness guaranteed by their own law.

Evaulation:

Thus far, United States strategy has involved two aspects. In the short run, the United States has sought to educate Latin American and other developing nations about the unique importance of marine

[13]Telephone conversation with Normal Wulf, Office of the General Counsel, National Science Foundation, who is a member of the United States' delegation for Subcommittee III, 15 November, 1973.

science for mankind as a whole. Article 7(f) of its draft treaty is a vital part of this effort. In the long run, the United States aims to improve the capacity of developing nations to benefit from marine research by strengthening their scientific and technical capability.

The efficacy of this strategy depends on the amount and purpose of the assistance the United States is willing to provide. If technical assistance is intended to enhance United States national interests which appear to be in conflict with unique Latin American interests, it is destined to fail as a measure to reduce developing coastal states' interference with oceanic research.

Thus, the issue of oceanic research under international law reflects the fundamental political differences between developed and developing nations. A solution to the problem depends upon the ability of these two groups of nations to resolve their differences. In the context of the Law of the Sea Conference, whether the United States and other developed nations can gain widespread support for the freedom of oceanic research will depend in large measure on their willingness to promote the economic development of developing nations and incorporate their commitment into the structures of international law.

THE RIGHT OF INNOCENT PASSAGE

IN

INTERNATIONAL STRAITS

Gary L. Murphy

On February 21, 1957, the General Assembly of the United Nations voted to convene an International Conference of Plenipotentiaries to examine the law of the sea. The Conference met in Geneva from February to April, 1958, and considered not only the legal but also the technical, biological, economic and political aspects of problems related to the law of the sea. In an effort to resolve the many difficulties in this area of international law, four conventions were prepared by the Conference.

On September 10, 1964, one of these, the Convention of The Territorial Sea and the Contiguous Zone cam into effect, having been ratified by the requisite twenty-two states. Article I of this Convention declared that the coastal state exercises sovereignty over its territorial sea, subject only to the provisions of the Convention and the general rules of international law.[1] Much of the energy and effort of the Conference went into an effort to determine what was the extent of a State's territorial sea and what were the exceptions to that State's sovereignty within its territorial sea. One of the exceptions, to which the Convention devoted much consideration, was the right of innocent passage of foreign ships. This is the right whereby the ships of all states are allowed to navigate through the territorial seas of other states. This passage can be for the purpose of traversing the sea, or of entering or leaving internal waters, and it must be exercised so as not to affect the security or tranquility of the coastal state.[2]

Despite the efforts of the delegates at the 1958 Conference, many questions concerning territorial seas, and consequently, the right of innocent passage, still remained after ratification of the Convention. In an effort to resolve these and other still unresolved problems, another Conference has been scheduled for 1974. As with the 1958 Conference the United States is vitally concerned with what transpires. One area certain to cause extensive discussion and disagreement will be the extension of the territorial sea and related problems. The United States is particularly concerned with the effect that any extension of coastal state sovereignty or of the territorial sea will have on the right of innocent passage and related concepts, particularly with respect to international straits. This paper will attempt to analyze the problems which the United States must face in this area at the 1974 Conference, in light of the treatment given the same or similar problems in the 1958 Convention. An effort will be made to show that certain attitudes have changed since the 1958

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[1]See Article I of the Geneva Convention of the Territorial Sea and the Contiguous Zone 516 U.N.T.S. 205; T.I.A.S. No. 5639 (1958) [hereinafter cited as 1958 Geneva Convention].

[2]See Art. 14, 1958 Geneva Convention (note 1 supra).

Convention and some of the more recent developments in this area.

Background

The idea of freedom of the seas has been in existence since man first ventured from the shores. As his methods of maritime travel became more sophisticated, man developed other concepts which conflicted with the freedom of the seas notion. One of the most basic was that of the territorial sea, whereby a state exercised sovereignty over a belt of the sea adjacent to its coast. The right of innocent passage seems to have developed by necessity as an attempt to reconcile the territorial seas concept with that of freedom of navigation of the oceans.[3] Although the right is one of the oldest and most universally recognized concepts of international law, it has certain unanswerable questions inherent in its existence. "The essential question is: to what extent is the right of innocent passage an independent right, on a parity with that of the sovereignty of the coastal state; and to what extent should it be deemed a subordinate right, perhaps even a grant, of the coastal state?"[4] The current trend seems to be that it is a subordinate right.

The countries with the greatest influence on the development of the law of the sea were the strong maritime powers. They recognized that the freer the seas, the greater would be the opportunity for them to control. Also, the narrower the territorial sea claims, the larger the area of their influence. This factor and the "cannon shot" rule combined to set the breadth of the territorial sea at three (3) nautical miles. The three-mile limit was important in international law for many years, but its propriety has been increasingly questioned since World War II. Many countries, particularly states without great naval strength, are now advocating an extension of the territorial sea.

The 1958 Conference was unable to agree on a plan for any extension, leaving the question unresolved. The ultimate demise of the three-mile limit is almost certain, since its champion at the Geneva Conference, the United States, is now amenable to an extension. One focus of this paper will be on the effect any extension would have on international straits and the right of innocent passage therein.

1958 Geneva Convention

Many areas of the oceans are inaccessible by water except through various straits. Recognizing this fact and customary international law, the 1958 Convention provided in Article 16(4):

> 4. There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign state.

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[4] Id.

This paragraph addresses itself to several problems which must be faced again at the 1974 Conference. An earlier attempt by the International Court of Justice to deal with similar problems was the Corfu Channel Case. In that case the Court upheld the right of innocent passage, saying:

> It is,...generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal state, provided that the passage is innocent. Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace.[5]

This case was in accord with the practice which recognized a right of passage through straits that were within a state's territorial waters but that form a channel of navigation between parts of the high seas.

While the Corfu case held that warships had a right of innocent passage through straits in time of peace, the Court left open the question of whether such a right existed in other territorial waters.[6] The Court also failed to qualify the meaning of innocent, leaving the term arguably open to interpretation.

The 1958 Geneva Convention was unable to reach an agreement on the specific question of the innocent passage of warships through territorial waters. The only direct mention of warships was in Article 23 which empowers the coastal state to require a warship passing through its territorial waters to leave if the warship fails to comply with that state's regulations.[7] The status of warships in territorial waters is thus unresolved. However, "certainly notification to the coastal state, if required, would seem to be the minimum requirement before warships could lawfully exercise the right of innocent passage."[8]

The status of warships in territorial waters becomes more significant when considered in connection with the probable extension of the breadth of the territorial sea at the upcoming Conference. An extension of the territorial sea from three to twelve miles will "remove some 116 straits as free high seas, placing them under the national sovereignty of the bordering states."[9] In most cases where an international strait is already within the territorial sea of a bordering state or states, treaties specify the extent of control over navigation which the littoral state will exercise within the strait, despite the international status.

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[5]The Corfu Channel Case, 1949 I.C.J. Rep. 4 (1949).
[6]Slonim supra n. 3 at 116.
[7]See Article 23 of the 1958 Geneva Convention, supra n. 1.
[8]Slonim supra n. 3 at 120.
[9]Swarztrauber, The Three-Mile Limit of Territorial Seas 240 (1972) hereinafter cited as Swarztrauber .

The effect which extension of the territorial sea could have on global naval operations becomes clearer when considered in light of the Soviet Union's view that the right of innocent passage does not apply to warships.

Another related area with which the United States was concerned at the 1958 Conference and which will again be a problem at the upcoming Conference is the freedom to fly over the high seas of the world. This freedom, "which belongs to all peoples and states alike, is denied entirely in the airspace over the territorial sea unless the coastal state gives its consent."[10]

While surface ships have a right of innocent passage in straits connecting parts of the high seas, even though the straits are entirely territorial seas, this right does not, in the absence of treaty, extend to aircraft rights to overfly. Thus, any extension of the territorial sea beyond three miles will not only restrict freedom of the seas, it will completely cut off some areas to air traffic in the absence of treaties, and will result pro tanto in diminishing freedom of flight.[11] Military aircraft would not be the only ones affected. The routes and practices of freight and passenger aircraft would also be disrupted. Extensions of the territorial sea might require new treaties or agreements with each coastal state over whose territorial waters the aircraft would then pass. The widening of an individual coastal state's territorial sea would also increase the possibilities of international disputes caused by the unintentional violation of a nation's territory by unauthorized aerial overflight.[12]

Shift in the United States Position

The post-World War II period saw America in the forefront of world naval powers. As such she became the champion of the three-mile limit, adopting the position of deposed Great Britain. However, the three-mile limit was never as important to the United States as it had been to the British. The United States was in favor of the limit, but she chose to enforce it by diplomatic means rather than by forceful methods that had been used by the British. This shift in procedures was necessary in light of the post-war alliances and Cold War politics. Other factors which helped prevent the use of United States military forces to uphold the limit were the danger of a direct confrontation with Russia, who claimed twelve miles during this period, and economic interests in the United States who were interested in petroleum and fishing in the contiguous waters beyond the three-mile limit. There was also a difficulty for the United States in building "a strong and convincing case against the claim of a state to some special maritime jurisdiction when the United States had so many special-purpose maritime jurisdiction claims of her own."[13] Maritime Control Areas, Air Defense Identification Zones, neutrality zones, customs zones, the Truman Fisheries Proclamation of 1945, and the Oil Pollution Act of 1961 are but a few examples of special-purpose maritime jurisdiction claims of the United States. "For nearly every advantage or jurisdiction associated with the territorial sea, the United States has found it to be in her national interest

[10]Dean, The Law of the Sea 38 Dep't State Bull. 579 (1958).
[11]Id.
[12]Dean, The Geneva Conference on the Law of the Sea: What Was Accomplished 52 Am. J. Int'l L. 613 (1958).
[13]Swarztrauber supra n. 9 at 243.

to claim jurisdiction greater than that afforded by the three-mile limit."[14] In effect, the only interest which the United States still has in maintaining the three-mile limit is due to the uncertainty of the right of innocent passage of warships.

Under the original concept of innocent passage, the movement of warships through territorial waters was permitted so long as they did not commit acts of war. This is similar to the view that was recognized in the Corfu Channel Case, but it is at odds with the position that the Soviet Union has taken in this area. The Soviets feel "that a foreign warship, by its very nature and presence in the territorial sea, is less than innocent."[15] If this view is accepted, any extension of the territorial sea would reduce the area available for naval maneuvers. If the right of innocent passage in international straits is also considered under this theory, the extension of the territorial sea would remove many straits from the free high seas classification and make them subject to the sovereignty of a coastal state. Warships might be required to seek authorization before passing through a strait, or they might be denied access altogether. This situation could reduce or eliminate America's naval influence in many areas of the world. Similar problems would be found with aircraft and the air space over straits which become part of a country's territorial sea.

Recognizing in the 1960's that the three-mile limit was no longer a meaningful principle of international law, the United States began discussing the problem with other countries and negotiating for a position whereby freedom of the seas would be preserved as much as possible. The United States was attempting to trade its recognition of twelve-mile territorial sea claims for a guaranteed right of "free transit" through and over traditional international straits which would become a part of the territorial waters of a coastal state in any expansion. The United States and the Soviet Union reached a tentative agreement on the twelve-mile limit and a draft convention was prepared:

> The key article granted each state the right to establish the breadth of the territorial sea up to the limit of twelve miles, as long advocated by Russia. The quid pro quo took the form of two additional articles. One of them --free passage, as opposed to innocent passage--guaranteed the right of all ships and aircraft--naval and military included--to pass through all international straits connecting areas of the high seas.[16]

As a final step in the shift of the United States position, U.S. State Department Legal Advisor John R. Stevenson publicly announced United States support for the twelve-mile limit on February 18, 1970.[17]

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[14]Id. at 240.
[15]Swarztrauber supra n. 9 at 240.
[16]Swarztrauber supra n. 9 at 246.
[17]Washington Post, Feb. 19, 1970, p. 16 at col. 3.

1974 Law of the Sea Conference

On December 17, 1970, the United Nations resolved to convene a new law of the sea conference in the fall of 1973. The meeting was scheduled to begin at United Nations Headquarters in New York, and then move to Santiago, Chile, for a substantive session to be held during the spring of 1974. The United Nations Seabed Committee, composed of ninety member states, was given the responsibility for the preparatory work. Issues to be considered at the United Nations Law of the Sea Conference include "the breadth of the territorial sea, free transit through and over international straits, jurisdiction over fisheries and seabeds minerals, scientific research, and the protection of the marine environment."[18] The United States delegation was active at the planning and drafting stages of the pre-conference preparation attempting to gain support for and recognition of its views on the various topics. In each of the subcommittees and throughout the entire preparation for the Conference, the United States delegation emphasized the importance of not compromising "free access to the oceans and other navigational rights by jurisdiction which, though not explicitly aimed at those rights, could have the effect of unnecessarily restricting them."[19] In a statement on August 13, 1973, to the Committee on the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction, John Norton Moore, the Vice Chairman of the United States Delegation, recognized the desire of the coastal states for expanded economic jurisdiction but emphasized that freedom of navigation and other non-resource uses must also be protected. He indicated that the United States was prepared to accept broad coastal state economic jurisdiction in adjacent waters and seabed areas beyond the territorial sea if the problem of free access to the oceans was also properly resolved.

Other evidence of the work which the United States has been doing to preserve freedom of the seas was seen in the draft articles on the breadth of the territorial sea, straits and fisheries which the United States submitted to the fisheries subcommittee on August 3, 1971, to aid in their preparation for the 1974 Conference. In a statement which accompanied the introduction of those articles, John R. Stevenson, United States Representative to the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, emphasized the vital interest which all nations have in assuring their freedom of movement on the sea, to protect both their security and their international trade. He said that changes in the law of the sea which would reduce air and sea mobility would also cause changes which would affect "fundamental security interests not only of states compelled to maintain significant military preparedness, but also of states that rely on the stability created by political and military balance to pursue other important national goals."[20]

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[18]U.S. Information Service Press Release 2 (Aug. 13, 1973).

[19]U.S. Information Service Press Release on the Statement by John Norton Moore, Vice Chairman of the United States Delegation to the Committee on the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction, Aug. 13, 1973 hereinafter cited as Statement by Moore .

The first article of the proposed draft would establish a maximum breadth of twelve miles for the territorial sea. Within this twelve-mile limit the coastal state would exercise jurisdiction over navigation and overflight, subject to a limited right of innocent passage for vessels. Stevenson argues that the twelve-mile limit is the only possible ground for agreement and reasons that broader jurisdictional claims are resource-oriented and can be accommodated in the course of the work of the various Subcommittees. However, he conditions any agreement by the United States to a treaty extending the territorial sea on the grounds that the international strait problem must be resolved. Increasing the territorial sea from three to twelve miles would place many important straits totally within the territorial sea of coastal states, thus subjecting movements through such straits to the limitations of innocent passage. The United States does not feel that the doctrine of innocent passage is adequate when applied to international straits. There are too many intangible factors involved. For example, some states argue that passage of certain types of vessels is inherently non-innocent, or that innocence may depend on the flag, cargo, or destination of a vessel. Also, neither aircraft nor submerged submarines have a right of innocent passage. Stevenson expresses the view that an extension of the territorial sea should not have the same effect in straits as it has in other coastal areas. The interests of the international community and of the coastal state are quite different in these two separate areas.[21]

The second article of the proposed draft recognized these different interests involved by providing for "a right of free transit for vessels and aircraft through and over all international straits overlapped by territorial seas."[22] The United States believes that, until the 1974 Conference changes the law, all straits wider than six miles currently have high seas within them where freedom of the seas is the international rule. However, the United States is willing to give up high seas freedoms in these international straits in exchange for the limited right of free transit. Subject only to this right, the territorial waters in international straits would retain their national character in each and every respect. The right of free transit is a narrow one--"merely one of transiting the straits, not of conducting any other activities."[23] Should a vessel engage in any activities that are not allowed under the right of free transit, the coastal State would be allowed to take appropriate enforcement action. Moreover, the right would apply only in international straits.

Mr. Stevenson realizes that many countries attach greater importance to offshore resource management than they do to freedom of

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[20]U.S. Department of State Press Release No. 169 at 2, 3 (Aug. 3, 1971) hereinafter cited as No. 169 .

[21]Id at 4.

[22]Id.

[23]Id. at 5.

navigation. However, he feels that the United States proposals represent "a considered effort to balance the coastal and international interests in seabed resources without jeopardizing important navigational interests."[24]

Approximately one year later, on July 18, 1972, John R. Stevenson again addressed Subcommittee II and re-emphasized the draft treaty articles and the reasons behind them. He also made further proposals regarding straits to accommodate the concerns of coastal states, particularly those which adjoin straits, regarding navigational safety and the question of liability. By its straits proposals, the United States is not seeking the right to navigate unsafely or to pollute. It is merely seeking to guarantee access to different areas of the world. The United States is willing to obey reasonable traffic safety regulations which are consistent with the right of free transit, but these safety standards should not be unilaterally imposed by the coastal state. They should be set up by two specialized agencies of the United Nations which are already expert in this field. These bodies are the Intergovernmental Maritime Consultative Organization (IMCO) in the case of ships, and the International Civil Aviation Organization (ICAO) in the case of aircraft. In order to encourage scrupulous observation of any safety rules and regulations set up by agencies, the law of the sea treaty should provide for strict liability for any accident caused by vessels or aircraft deviating from standards and procedures as established.[25] The adoption of these proposals should substantially reduce the risk of accidents or pollution in international straits, and provide for adequate compensation should they occur.

Conclusion

Despite the codification of efforts made at the 1958 Geneva Conference, uncertainties and difficulties concerning the nature of innocent passage continue. The United States position for the 1974 Conference is that the effect of these uncertainties and difficulties would be greatly amplified were they to accompany an extension of the territorial sea into areas of international straits traditionally regarded as high seas.[26] The United States is now willing to agree to an extension of the territorial sea to a twelve-mile limit, but this agreement must be coupled with an agreement on the free transit of straits used for international navigation. Any proposal dealing with this problem must recognize that "it is completely inappropriate to approach the problem of transit through straits as though it were simply a problem of passage through the territorial sea which could be dealt with by the doctrine of innocent passage."[27] There are community interests at stake in international straits that are far more vital than simply the right of innocent passage in the territorial sea. "The issue is no less than whether the freedoms of the high seas enjoyed by all nations are to remain meaningful."[28]

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[24] Id. at 6.
[25] Statement by the Honorable John R. Stevenson to Subcommittee II of the Committee on the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction at 1, 2 (July 28, 1972).
[26] Press Release USUN-32(73) at 3 (April 3, 1973).
[27] Id. at 2.
[28] Id.

LEGAL CONSIDERATIONS OF EGYPTIAN RESTRICTION OF FREE PASSAGE IN THE STRAITS OF TIRAN AND THE GULF OF AQABA

Joseph E. Slate, Jr.

On 19 June 1967, President Johnson made an address in which he reflected on the recently resumed hostilities in the Middle East:

> "A third lesson from this last month is that maritime rights must be respected. Our nation has long been committed to free maritime passage through international waterways; and we, along with other nations, were taking the necessary steps to implement this principle when hostilities exploded. If a single act of folly was more responsible for this explosion than any other, I think it was the arbitrary and dangerous announced decision that the Strait of Tiran would be closed."[1]

In view of the many sources of friction in the Arab-Israeli struggle, why would the Strait of Tiran be considered so important?

The Strait of Tiran is the entrance to the Gulf of Aqaba, Israel's sole non-Mediterranean access to the high seas. There is only one commercially usable channel, about 500 meters wide, the remainder of the Strait being rendered unsuitable for commercial traffic by reefs and shallows.[2] This channel runs through Enterprise Passage, in the western part of the Strait near the Sinai Peninsula. The eastern margin of the Strait is Saudi Arabian territory. Within the Strait are the islands of Tiran and Sinafir.

The Gulf of Aqaba is at the north end of the Red Sea, and constitutes the right arm of that sea. The Gulf of Suez forms the left arm. The Gulf of Aqaba is approximately 100 miles long and varies in width from 7 to 17 miles. There are four littoral states on the Gulf--Egypt on the West, Saudi Arabia on the East, Israel and Jordan on the North--with shorelines of 125, 94, 7 and 4 miles, respectively.[3]

The one navigable channel into the Gulf forms part of the territorial waters of Egypt as promulgated in that nation's Territorial Waters Decree of 15 January 1951.[4] As an exercise of its rights over territorial waters, Egypt has felt free to close the Strait, and thereby the Gulf, to

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[1] 53 Dept. of State Bull. 31, 33 (1967).
[2] Murti, The Legal Status of the Gulf of Aqaba, 7 Indian J. of Int. Law 201 (1967) (hereinafter cited as Murti).
[3] Id.
[4] Id.

Israeli shipping. President Johnson's address referred to the action by Egypt on 23 May 1967 closing the Gulf to all ships which were flying the Israeli flag or, if under the flag of another country, were carrying strategic materials to Israel. Egypt's position denying the right of innocent passage seemed to be grounded "either on the existence of a state of war and consequential belligerent rights or on the 'national' character of the waters involved . . ."[5] The following is an examination to determine whether Egypt's action was well founded in international law.

I. Legitimacy of Israel's Territory

Egypt denies that Israel is a littoral state on the Gulf. This is based on the theory that Israel holds no sovereignty over land on the Gulf but merely occupies a portion of the coastline by virtue of armed aggression. The Israeli portion of the coast around the port of Elath was awarded to Israel in the Palestine Partition of 29 November 1947. That award, or at least possession of the territory awarded, was recognized in the Jordan-Israel Armistice agreement of 3 April 1949.[6] Egypt, however, does not recognize the partition as legal, and therefore does not recognize Israeli sovereignty over any territory awarded by that partition. Additionally, Egypt was not a party to the Jordan-Israel Armistice, but signed a separate armistice agreement which did not concern the Israeli coastal territory. But there are other factors which would seem to outweigh the arguments put forth by Egypt. They are succinctly stated by Professor Quincy Wright:

> The justifiability of the original Arab objection to partition can hardly be questioned, but its acceptance by the U.N., the recognition of Israel by most states, the willingness of the Arabs at the Lausanne Conference, prior to the armistice of 1949 to accept Israel within the boundaries proposed in the original U.N. resolutions of 1947, the admission of Israel as a member of the U.N., and its continued existence as such for a period of twenty years, indicates that it must now be considered a sovereign state under international law.[7]

Recognition of Israel as a sovereign state would imply a recognition of the 1947 partition which initiated that sovereignty and would establish the legitimacy of Israel's coastal territory. Additionally, "the Arabs also maintain that Israel should not be allowed to claim Elath until she has complied with the original Palestine Partition Plan, which would involve her giving up certain other areas to the Arab States."[8]

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[5]Gross, The Geneva Conference on the Law of the Sea and the Right of Innocent Passage Through the Gulf of Aqaba, 53 Am. J. Int. Law 564, 566 (1959) (hereinafter cited as Gross).
[6]Murti, supra n. 2 at 203.
[7]Wright, The Middle East Problem, 4 Int. Lawyer 364, 370 (1970).
[8]Murti, supra n. 2 at 204.

II. Historic Waters

In 1957 Saudi Arabia provided a bolster for Egypt's position by advocating a theory of the Gulf of Aqaba as historic waters. It was an attempt to analogize Aqaba to the Gulf of Fonseca, which the Central American Court of Justice had found to be an historic bay, the waters of which were held to belong to El Salvador, Honduras and Guatemala, the three littoral states.[9] Among the factors which the court felt were determinative and satisfied in that case were secular or immemorial possession, peaceful and continuous animo domini, and acquiescence by other nations. In the case of the Gulf of Aqaba, the first would seem to be effectively negated by the intervention of Ottoman sovereignty in the area until the end of World War I. The second would be voided by the events of 1948 and the years following. The third, if it exists at all, would doubtless be very difficult to prove.

In the U.N. General Assembly, the representative from Saudi Arabia made the assertion that "Pilgrims from different Muslim countries have been streaming through the Gulf, year after year, for fourteen centuries."[10] This is in direct contradiction to the following statements by Alexander Melamid:

> ...the Gulf was rarely used by ships prior to the advent of steam navigation[11]...Moslem pilgrim sailing ships do not appear to have used the Gulf[12] ...After construction of a road from Egypt about 1840, Aqaba became a land staging point for pilgrims, without, however, handling any maritime traffic[13]... The introduction of steam navigation into the Red Sea about 1837 did not bring traffic to the Gulf until 1917, when the British Government commenced to supply its troops in Ottoman territory by this route[14]... substantial tonnages were not handled in the Gulf before 1952[15]...Use of the Gulf by Arab states, particularly for pilgrim travel, followed only upon the pioneering efforts of other nations.[16]

Even were the Gulf of Aqaba considered to be historic waters, this would not necessarily support the assertion of an Arab mare clausum. As Gross points out, "The doctrine, even in the case of historic bays the coasts of which belong to a single state, does not seem to be unanimous

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[9]See 11 Am. J. Int. Law 674-730 (1917).
[10]Gross, supra n. 5, at 567.
[11]Melamid, Legal Status of the Gulf of Aqaba, 53 Am. J. Int. Law 412 (1959).
[12]Id.
[13]Id.
[14]Id., at 412-13.
[15]Id., at 413.
[16]Id., at 413.

whether the waters are to be regarded as 'internal waters,' thus excluding the right of innocent passage, or partly as 'internal waters' and partly as territorial sea. In the latter case there would presumably be a right of innocent passage in the territorial sea."[17] In the Gulf of Fonseca case the court made no ruling as to the existence of internal waters.

III. Belligerent Rights Under a State of War

"The Arab States consider themselves in a state of war with Israel entitling them to exercise the rights of belligerency."[18] Egypt has claimed that the state of war with Israel was not terminated by the Rhodes General Armistice of 24 February 1949.[19] The Secretary-General would not categorically affirm or deny this assertion, but found a middle ground by saying that

> ...in a situation where the armistice regime is partly operative by observance of the provisions of the Armistice Agreement concerning the armistice lines, possible claims to rights of belligerency would be at least so much in doubt that, having regard for the general international interest at stake, no such claim should be exercised in the Gulf of Aqaba and the Straits of Tiran.[20]

Can a belligerent status exist while an armistice is in effect? In 1951 the Security Council felt that since the armistice commission was extant and had been in operation for two years that "neither party can reasonably assert that it is actively a belligerent or requires to exercise the right of visit, search, and seizure for any legitimate purpose of self-defense ..."[21] There are, however, authorities which hold that an armistice does not eradicate the belligerent status of the parties. The situation considered by Oppenheim below would apply to either case:

> ...as a rule, all gulfs and bays enclosed by the land of more than one littoral State, however narrow their entrance may be, are non-territorial. They are parts of the open sea, the marginal belt inside the gulfs and bays excepted. They can never be appropriated; they are in time of peace and war open to vessels of all nations, including men-of-war...[22]

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[17]Gross, supra n. 5 at 569.
[18]Murti, supra n. 2 at 204.
[19]Selak, A Consideration of the Legal Status of the Gulf of Aqaba, 52 Am. J. Int. Law 660, 663 (1958).
[20]Murti, supra n. 5 at 575.
[21]U.N. Doc. S/2298/Rev. 1. Official Records, 558th Meeting, Sept. 1, 1951, p. 2.
[22]1 OPPENHEIM, INTERNATIONAL LAW 460-61 (7th ed. 1948).

The 1958 Geneva Conference on the Territorial Sea and the Contiguous Zone supplied what should be the unambiguous answer. Article 16, paragraph 4 requires that "There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign state."[23] The Convention applies in time of war as well as in time of peace.

IV. Strait of Tiran as an International Waterway

Egypt has stated that the Strait of Tiran does not join two portions of the high seas, or two international waters, and therfore is not an international waterway. By this reasoning the compulsion of the Corfu Channel Case may be avoided. That case held that "States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is innocent."[24] Further, it stated that "today, the passage through the territorial sea of a State, or through straits situated therein, and also through straits of an international character, is not a simple tolerance but is a right possessed by merchant ships belonging to other states."[25]

Israel felt that the Strait was indeed an international waterway. On 15 February 1954, the Israeli representative to the Security Council expressed his government's opinion that

> "Where a narrow waterway is the only junction between two parts of the high seas, or the only outlet to a part of the high seas, then its international character has to be preserved, and no sovereign rights based upon the doctrine of territorial waters is inherent in any country from the viewpoint of holding up free maritime traffic."[26]

The United States also felt that the Strait was an international waterway. A 1957 aide-memoire from Secretary of State Dulles to Israeli Foreign Minister Eban stated that

> "With respect to the Gulf of Aqaba and access thereto--the United States believes that the Gulf comprehends international waters and that no nation has the right to prevent free and innocent passage in the Gulf and through the Straits giving access thereto."[27]

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[23]BISHOP, INTERNATIONAL LAW 617 (3d ed. 1971).
[24]Id. at 618.
[25]The Corfu Channel Case (Merits), 1949 I.C.J. Rep. 46 (1949).
[26]Gross, supra n. 5.
[27]36 Dept. of State Bull. 393 (1957).

President Johnson re-affirmed that position ten years later in an address of 23 May 1967:

> "The United States considers the Gulf to be an international waterway and feels that the blockade of Israeli shipping is illegal and potentially disastrous to the cause of peace. The right of free, innocent passage of the international waterway is a vital interest of the entire international community."[28]

In 1950, Egypt has seemed to be at least partially of the same opinion. The aide-memoire, noted supra, stated that

> The United States recalls that on January 28, 1950, the Egyptian Ministry of Foreign Affairs informed the United States that the Egyptian occupation of the two islands of Tiran and Senafir at the entrance of the Gulf of Aqaba was only to protect the islands themselves against possible damage or violation and that 'this occupation being in no way conceived in a spirit of obstructing in any way innocent passage through the stretch of water separating these two islands from the Egyptian coast of Sinai; it follows that this passage, the only practicable one, will remain free as in the past, in conformity with international practice and recognized principles of the law of nations.[29]

While Egypt was subsequently changing its position to that of assertion of belligerent rights, Israel was embracing an even more liberal doctrine of innocent passage:

> ...where access to a given port--whether an existing one or one which at some future date a State may wish to establish--is only possible by traversing a strait (in the geographical sense), then it is quite immaterial whether that strait is or is not within the waters classed as territorial sea of one or more of the littoral States, or what is the legal nature (gulf, bay, high seas) of the waters on which the harbour is situated. In such circumstances the right of passage for the ships of all nations, and quite regardless of their cargo, is and must remain absolutely unqualified, and the littoral State or States have no right whatsoever, so long as the matter is not regulated by Convention, to hinder, hamper, impede or suspend the free passage of those ships. The same rule is also true of warships.[30]

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[28] 56 Dept. of State Bull. 870-71 (1967).
[29] 36 Dept. of State Bull. 393 (1957).
[30] Gross, supra n. 5 at 572.

From an Arab spokesman came the answer to this:

> A port was not a natural feature existing from time immemorial, and if a State saw fit to establish a port at a point to which the only access was through the territorial waters of other States, it must accept the consequences. It was always open to the State in question to establish a port elsewhere or to conclude agreements with the other coastal States on the question of access to the port.[31]

The adoption of Article 16, paragraph 4 by the 1958 Geneva Conference would seem to resolve the problem along the line advocated by Israel. It is directly in point with the Aqaba situation. And therein lies the problem. Paragraph 4 is too directly on point. Our representative to the Convention stated that indeed ". . . it specifically determines the heated controversy between Israel and the Arab States as to the right of Israeli shipping to pass through the Strait of Tiran to the Gulf of Aqaba."[32] Egypt will certainly be far from happy to find itself the target of such "specific legislation."

On the other hand, Gross feels that "In the present submission the rule does represent a codification of customary international law although it could also be argued that it contains an element of progressive development of the law."[33] And the acceptability of the provision may be enhanced by the fact that "The point was made by several governments at the Conference that the essential aspect of the traditional principle of freedom of navigation was for ships to enter the port of destination and to have the right, for this purpose, to pass through the territorial sea."[34]

Hopefully, paragraph 4 will find acceptance as valid international law when considered in light of the prescient statement of Judge Alvarez in the Corfu Channel Case that ". . . in consequence of profound changes which had taken place in international relations, a new international law had arisen; it is founded on social interdependence. . . It is entirely different from the old law, which was strictly juridical; it approaches nearer to the notion of equity, without however being merged in it."[35]

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[31] Id. at 573.
[32] Gross, Passage Through the Strait of Tiran and in the Gulf of Aqaba, 33 Law and Cont. Prob. 125, 143 (1968).
[33] Id.
[34] Id. at 141-42.
[35] 1949 I.C.J. Rep. at 40 (1949).

SOME LEGAL IMPLICATIONS OF CONTEMPORARY NAVAL OPERATIONS IN INTERNATIONAL WATERS

Peter Chastain

I. Introduction

International lawyers seem to have neglected the laws of naval warfare since World War II. As a result, modern naval involvements are still being analyzed with recourse to traditional, and perhaps outdated terms and concepts. A further result has been confusion on the part of naval planning staffs and operational commanders in their attempt to write orders to meet situations of limited conflict.

The lack of interest on the part of international lawyers and academics in the field of naval warfare may stem from the fact that modern technology has so far outpaced expectations in naval weapons and tactics that no one could be expected to keep up. Another explanation may be that since World War II there have been no traditional declared wars. However, this explanation fails to account for the numerous modern naval involvements short of war that have occurred since 1945--namely, Korea, twice in the Middle East, the confrontation between Malaysia and Indonesia, the Algerian emergency, and Vietnam. Nor does it account for the number of international naval incidents which may have brought us to the "brink" of war--including the Cuban quarantine, the Pueblo incident, and the shooting-down of the EC-121 naval reconnaisance plane by the North Koreans, to name a few.

The impact of the above naval encounters on the traditional rules of war at sea is the focus of this paper. Its purpose is to stimulate discussion about contemporary naval operations, and in doing so, perhaps, increase the dialogue between international lawyers and naval officers. Problem areas regarding conflicts between traditional and contemporary thought in this area of the law will be examined. Tentative suggestions concerning their resolution will be offered, hopefully of assistance to the naval officer of today.

II. International Law and Its Effect on Naval Officers

International law affects the thinking and actions of naval officers at all command levels. Diplomatic incidents may be ignited as easily by the improper actions of a junior officer in command of a patrol boat engaged in fishery protection, as by the actions of the commander of a major fleet. International law has immediate effects on the operational commander as well as the naval planner. Questions of international law are also of importance to the staff officer, especially when formulating contingency plans. These plans, if not coordinated with the political branch of the government, may prove extremely embarrassing in times of international tension.

More specifically, Rules of Engagement, which specify in detail the circumstances under which fire may be opened, are usually supplied to all operational commanders in the navy. These rules are concerned with the traditional law of the sea, i.e., the concepts of the territorial sea, hot pursuit, contiguous zones and positive identification. These rules of engagement are supplemented by operational orders from a task force commander, which may expand on the above concepts, but more particularly, specify circumstances of visit and search, or the amount of force which may be employed to terminate hot pursuit. Obviously, the drafting of such rules and operational orders presupposes some knowledge and appreciation of the fundamentals of international law. On the other end, the operational commanders to whom such orders are addressed must be adequately versed in these principles in order to interpret them. After all, the primary purpose of these instruments is to minimize the commander's area of doubt and circumscribe his freedom of action when faced with an awkward encounter in international waters.

From the discussion above, it can be seen that international law may play an important part in a naval officer's career, therefore a brief outline of international law in this area is appropriate. This sketch of the law of the sea is not all-inclusive, but should impart some knowledge of basic principles.

III. Basic Principles of the Law of the Sea and their Limitations on Naval Warfare

In 1609 the Dutch jurist Hugo Grotius published his famous pamphlet, Mare Liberum, in which he first conceived of the freedom of seas as a principle of the law of nations. Grotius later rationalized the principle of freedom of the seas on the ground that since the sea was not divisible it could not be appropriated for individual use.[1] The freedom of the seas doctrine has been codified in modern times by the U.N. Convention on the High Seas at Geneva in 1958 in Article 2 which declared the high seas to be free for navigational purposes. High seas is a term of art and has been defined as:

> All water beyond the outer limit of the territorial sea. Here are the vast ocean areas of the world subject to the freedom of the seas--surface navigation, aerial navigation, fishing, laying of cables, and laying of pipelines to name the more important.[2]

Article 8 of the above Convention further defines the freedom of the seas principle when it states that warships on the high seas have complete immunity from the jurisdiction of any foreign state. The concept of immunity of warships on the high seas has been best explained by Oppenheim.

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[1] 4 WHITEMAN, INTERNATIONAL LAW 501 (1965).

[2] Pearcy, Geographical Aspects of the Law of the Sea, 49 Annals of the Association of American Geographers 1, 16 (1959).

> ...Men-of-war are State organs just as the armed forces are, a man-of-war being in fact a part of the armed forces of a State. (Military aircraft in principle would seem to be in the same position as men-of-war when lawfully on or over the territory or territorial waters of a foreign state ...). With regard to their character as State organs, it matters not whether men-of-war are at home, or in foreign territorial waters, or on the high seas. But it must be emphasized that men-of-war are State organs only so long as they are in the service of a State. A shipwrecked man-of-war abandoned by her crew is no longer a State organ; nor does a man-of-war in revolt against her State, and sailing for her own purposes, retain her character as an organ of the State.[3]

A warship has been defined in the Articles as a ship bearing the external marks which distinguish warships of its nationality. Problems arise in this regard when merchant ships are outfitted with guns in a wartime situation. The arming of British merchant ships during World War II with the resulting claim that these were "warships", was partly responsible for the legal justification by the German Navy of their policy of unrestricted submarine warfare. Another potential problem area has been the policy concerning submerged submarines. Although obviously not being able to display their national markings while submerged, it is clear that submarines at all times are encompassed within the definition of "warships."[4] Within Article 14, concerning innocent passage, of the Convention on the Territorial Sea and the Contiguous Zone is Paragraph 6 which, since 1958, has provided that submarines are required to navigate on the surface in the territorial and contiguous waters of other nations. This subject will be discussed infra.

Another well recognized principle of international law limiting the freedom of the seas principle, is that a merchant ship on the high seas is subject to being boarded only by a warship of its own state. Exceptions to this rule are found in Article 22 of the Convention on the High Seas, which states the conditions for visit and search during peacetime. Summarily, it is stated that a warship is justified in boarding a foreign merchant ship encountered on the high seas if there are reasonable grounds for suspecting that the ship is engaged in piracy or the slave trade, or, though flying a foreign flag, or refusing to show its flag, the ship is in reality of the same nationality as the warship. Paragraph 2 of Article 22 expands on this right of approach or visit by saying that the warship may proceed to verify the ship's right to fly its flag. To this end, the warship may send a boat to the suspected merchant ship to inspect its documents. A provision for damages for any loss caused by this inspection, if the suspicions prove to be unfounded, is also reserved in the Article. In the Commentary of the 1956 Report of the International Law Commission on the Law of the Sea there can be seen some of the feeling of futility on the part of the Commission in dealing with this sensitive area. The question arose during their

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[3] I Lauterpacht, Oppenheim's International Law (8th ed., 1955) 851-52.
[4] O'Connell, International Law and Contemporary Naval Operations, 44 Brit. Yr. Book of Int'l Law 24 (1970) [hereinafter cited as O'Connell].

sessions whether the right to board a vessel should be recognized also in the event of a ship being suspected of committing acts hostile to the State to which the warship belongs, at a time of imminent danger to the security of that state. The question was framed in terms very much like an event which actually took place five years later--the Cuban missile crisis or quarantine. The frustration in the Commission is evident when in response to such question they reported that "the Commistion did not deem it advisable to include such a provision, mainly because of the vagueness of terms like 'imminent danger' and 'hostile acts', which leaves them open to abuse."[5]

No ships may be visited and searched in times of ostensible peace except under the conditions laid down in Article 22, and warships may not be attacked even if in a threatening position. However, this does not exclude the inherent right of self-defense against armed attack. This principle of self-defense is incorporated in the United Nations Charter in Article 51, and has been repeatedly used to legitimize naval operations against foreign vessels during hostilities short of war. It states simply that:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations.[6]

Debate has continued regarding the above provision for self-defense, and it has usually been centered on the controversy of whether there is any right of self-defense other than that conceded by Article 51 against an "armed attack", or whether the "inherent right" of self-defense referred more generally to other legitimate measures of national security. It is this latter principle which the United States invoked to justify the mining of the Hai-Phong harbor in the Vietnam War. For if Article 51 were to be strictly construed, the traditional law of neutrality on the high seas would not be applicable in situations less than a declared war. For there could only be self-defense against an armed attack, and no interference is permissible with other nations' shipping, even shipping which is supporting the attacker.[7] The United States position with regard to the mining of Hai-Phong was based on the argument that if interference with the freedom of navigation of non-hostile shipping is "necessary and proportionate" to self-defense, it can be legitimate.[8]

Article 51 was also invoked by the United States government after the Gulf of Tonkin incident to lay an international legal foundation for the U.S. air and naval operations against North Vietnam

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[5]II YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1956, 253, 283-84.
[6]UNITED NATIONS CHARTER, Art. 51.
[7]O'Connell, supra note 4 at 24.
[8]CARLISLE, THE JAG JOURNAL OF THE UNITED STATES NAVY 22 (1967). Note that immediately after the Gulf of Tonkin incident in 1964, nine years prior to the actual mining, the Director of the International Law Division of the U.S. Navy wrote: "If a legal state of war existed between the U.S. and North Vietnam we could immediately blockade the port of Hai-Phong as a belligerent right of warfare. Without a state of war, such a blockade would be of doubtful legality." Id. at 11.

(Operation Sea Dragon). On 2 August 1964 North Vietnamese torpedo boats, operating in the Gulf, allegedly attacked the USS Maddox and other destroyers in international waters. The destroyers immediately retaliated and on August 4, carrier -borne aircraft attacked not only the torpedo boats, but also their support facilities on the coast of North Vietnam. The U.S. Representative in the Security Council on August 6 gave the following explanation:

> I want to emphasize that the action we have taken is a limited and measured response, fitted precisely to the attack that produced it, and that the deployments of additional U.S. forces to Southeast Asia are designed solely to deter further aggression...
>
> Let me repeat that freedom of the seas is guaranteed under long-accepted international law applying to all nations alike.
>
> Let me repeat that these vessels took no belligerent actions of any kind until they were subject to armed attack.
>
> And let me say once more that the action they took in self-defence is the right of all nations and is fully within the provisions of the Charter of the United Nations.[9]

The response the United States immediately employed to this armed attack was one of interdiction and harassment. These "inherently defensive" measures all took place within the 12-mile territorial limit claimed by the North Vietnamese. These measures included the surveillance of all foreign vessels and upon proper identification their destruction was authorized, and naval gunfire was directed at truck parks, missile sites, coastal batteries, bridges and other military installations in support of the movement of personnel and supplies into South Vietnam. It should be noted that the logical point at which self-defensive measures become offensive is most difficult to discern. But it can be said that the United States did feel the limitations of international law during this time. Not only were these naval operations restricted to the "territory" of North Viet Nam, but also no interference with foreign ships which were exercising their freedom of navigation in transit from and to Hai-Phong was allowed.

Perhaps the most perplexing legal question confronting international lawyers and naval staff planners today is what constitutes "armed attack" within the meaning of Article 51. The modern technology and tactics employed particularly in the naval missile and anti-submarine warfare fields have greatly obscured this question. The controversy seems to turn on the question of whether "armed attack" excludes anticipatory actions in self-defense. The answer to this question, in reality, is dependent on a larger one, that is whether Article 51 has effectively limited the right of self-defense to instances of offensive armed attack. Brownlie has concluded that "the whole problem is rendered incredibly delicate by the existence of long-range missiles ready for use; the difference between attack and imminent attack may now be negligible."[10]

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[9] O'Connell, supra note 4 at 35.

[10] BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 178, 365-68 (1963).

The above situation is more confusing when one recalls that the Navy uses the expression "hostile act" instead of "armed attack", and further differentiates "hostile intent." Naval thinking is dominated by the notion that force against a foreign ship is not legitimate unless in response to a hostile act, and then it is to be restricted in scale to countering that hostile act. Usually this notion of hostile act has been limited to the actual employment of weapons, and this act is always coupled with a "hostile intent."[11] Needless to say in these times of limited hostilities when "to await the launching of a controlled projectile from a potentially hostile contact before exercising the right of self-defense may well be to lose the capacity of self-defense." These notions are therefore much too vague and offer very little guidance to operational commanders.[12] It seems that legal consideration must concentrate on what constitutes armed attack or hostile act by a missile-armed vessel under conditions of limited hostilities. There is also lurking the ever-present question of what measures are appropriate and proportional to the risk of destruction. It has been argued by some that the moment of armed attack may be the moment when the contacted vessel's radar "locks on" in a firing position, not when the missile is launched.[13] Thus the ultimate discussion of armed attack must be inextricably intertwined with the doctrine of "pre-emption." Pre-emption, according to naval doctrine is the elimination of a vessel of "hostile intent" merely because of its capability and without awaiting any overt action on its part. In other words, "a missile firing ship undoubtedly constitutes an enormous hazard to warships, and the best defense against it is to sink it before it can fire its missiles."[14] This latter type of thinking must be curbed, and new thoughts concerning the control of modern technological methods of warfare should be stimulated if there is to be hope for the lessening of world tension.

Another principle of international law which has been the source of some confusion to naval commanders in their role of protecting the coast of states is the right of a national vessel to pursue a foreign vessel into the high seas for the purpose of arrest if "competent authorities of the coastal state believe that the ship has violated the laws and regulations of that State." The violation must have taken place within the territorial waters of the coastal state. This principle, which is embodied in Article 23 of the Geneva Convention on the High Seas, also gives this "right of hot pursuit" to military aircraft, as well as the warships of the coastal state. The multiplicity of problems encountered in this area of the law usually relate to the question of how far does the territory of a state extend, i.e. does it include contiguous zones and unilateral assertions of extra-territoriality on the part of the coastal states. It is not the intention of the writer to cover the international law concerning territorial jurisdiction which remains very murky.

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[11] O'Connell, supra note 4 at 25.
[12] Id.
[13] Id.
[14] Marriott, Naval Missiles, [1969] International Defense Rev. 247 (1969).

An area of the gravest concern to naval planners and international lawyers is limiting the force necessary to terminate hot pursuit. That fire may be opened in hot pursuit is beyond question. In the I'm Alone case the Commission said that the United States was entitled:

> ...to use necessary and reasonable force for the purpose of effecting the objects of boarding, searching, seizing and bringing into port the suspected vessel; and if sinking should occur incidentally, as a result of the exercise of necessary and reasonable force for such purposes, the pursuing might be entirely blameless...[15]

In the above case the facts were found not to justify the sinking of the vessel, so there certainly is some notion that reasonable force only should be employed. Beyond this reasonableness test there is little to guide the tactical commander in his coastal protection role, and whether the use of weapons is "excessive" remains primarily a matter of his judgment.

IV. Conclusion

The expression "limited war" should be employed to cover the situation of hostilities, not amounting to declared war, which are limited in respect of (a) the area of operations; (b) the weapons employed; and (c) the targets engaged.[16] It is primarily this topic that should be the concern of naval authorities and international legal scholars if international incidents of the future are going to be contained. International law alone in this area, will not be helpful. Indeed, like any other aspect of the law, there are many ramifications to the problem, other than military, including political, economic, psychological, and humanitarian considerations. Every discussion of the rules of such warfare should include assessments of the implications of such rules on the total situation. If the rules of naval warfare in times of limited hostilities are to be workable, they must be stated with precision and clarity, if that is possible. New definitions of older terms and concepts must be employed to make them meaningful as guidelines to tactical commanders at sea. We must attempt to give the commander at sea maximum guidance concerning permissible courses of action in order to avert major international naval incidents.

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[15] The I'm Alone (Canada v. U.S.), 2 HACKWORTH, INTERNATIONAL LAW 703-708 (1941).

[16] O'Connell, supra note 4 at 85.

THE NAVAL BLOCKADE - ITS DEVELOPMENT AND CONTINUED USE IN THE TWENTIETH CENTURY

Thomas W. Eiden

The development of the law of naval blockade has been an evolutionary process over a period of centuries. As military technology has advanced and the international political system has changed so have the rules governing the use of naval blockade. Especially during the twentieth century rather heated controversies have arisen concerning its use. Although at one time it was generally believed that the naval blockade was outmoded and no longer feasible, it has seen continued use up to the present. The current uses of naval forces for blockading purposes, though, are a bit different from those of preceding eras.

One of the traditional uses is a wartime blockade arising out of the rights of belligerency. A war blockade has been defined as the interception by sea of the approaches to the coasts or ports of an enemy with the purpose of cutting off all his overseas communications. Blockades are designed to cut off all imports and exports.[1] Blockade as a practice of warfare was in its earlier forms limited to specific ports and was generally regarded as a maritime counterpart of seige by land. The original purpose was purely strategic; it was to reduce a defending place by cutting off all supplies. At an earlier time an attempt to breach a blockade was a form of carriage of contraband, or bringing to the enemy goods which would help him in the prosecution of his war effort. But since the eighteenth century blockade and contraband have been recognized as two distinct branches of law. The extension of blockade to long coastlines and their use as measures of economic warfare are mainly developments of the nineteenth century.[2] In order for the rules of blockade to develop as a body of law it was also necessary for neutrality in some form to be recognized as an institution of the law of nations. For though blockade is a means of warfare it concerns non-belligerents as well. Freedom of commerce of neutrals in some form had to be guaranteed before the law of blockade could arise.[3]

By the end of the nineteenth century the rules governing a war time blockade were pretty well agreed upon by most of the seafaring nations. The rules as adopted in the Declaration of London of 1909 were in many instances the result of compromises between the groups with opposing points of view. The first requirement for a lawful blockade under the Declaration was effectiveness. In order for a blockade to be effective the blockading country had to maintain a force capable of preventing access to the blockaded area. This has been interpreted to mean

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[1]C.J. COLOMBOS, THE INTERNATIONAL LAW OF THE SEA 714 (6th ed. 1967) [hereinafter cited as Colombos].

[2]H.A. SMITH, THE LAW AND CUSTOM OF THE SEA 103 (1948) [hereinafter cited as Smith].

[3]2 L. OPPENHEIM, INTERNATIONAL LAW-WAR AND NEUTRALITY 399 (1906) [hereinafter cited as Oppenheim].

a number of warships so situated as to bring about a reasonable expectation that a vessel seeking to breach the blockade would be captured.[4] This rule was aimed at the so-called "paper" or constructive blockades, where a blockade was purported to be established by proclamation but was unsupported by the presence of a sufficient force to support it.[5] The declarations of the German government in the world wars are examples of paper blockades. They purported to establish a blockade zone around Great Britain by submarines and aircraft but were unable to maintain any real control of the Atlantic or the North Sea.[6]

The second requirement of the Declaration of London is a formal declaration of a blockade and its communication to non-participant states and to the authorities of the port to be blockaded. Certain data must be set forth in the declaration such as the geographical location of the blockade, the limits of its area, a time for commencement of the blockade, and the days of grace to be allowed to neutral vessels.[7] There had at one time been a considerable amount of discussion concerning the notification which had to be given. Some authorities claimed, and indeed it had been the French practice that a warning should be given to each vessel approaching the blockade and that notification of the blockade should be recorded in the vessel's log book.[8] Now under the Declaration of London knowledge of the blockade by the neutral is presumed where official notice has reached the government of the flag which the ship is flying or the last port of departure of the neutral ship. The burden of ignorance is on the blockade-runner.[9]

Another rule of the Declaration of London is that the blockade must be limited to enemy coasts and ports and not extended to control access to neutral coasts. This rule was one of the main sources of dispute between the belligerents and neutrals during the world wars. And the final major rule of blockade is that the enforcement of the blockade must be impartial. It must be enforced equally against ships of all nations.[10] Exceptions to this rule of impartial application are found in the Declaration. Neutral warships may be given permission to enter and leave a blockaded port and merchant vessels may be allowed to enter if they are in distress or are forced to take shelter during a storm.[11]

Another form of blockade which has been used with some degree of frequency, especially during the nineteenth century, is the so-called pacific blockade. Before the nineteenth century blockade was only known as a measure between belligerents in time of war.[12] The pacific blockade usually involves a "closing by force one or more ports of a country in order to bring the country to terms."[13] A pacific blockade does not

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[4]M.S. McDOUGAL & F.P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 490 (1961) [hereinafter cited as McDougal & Feliciano].
[5]Colombos, supra note 1 at 714.
[6]Colombos, supra note 1 at 718.
[7]McDougal & Feliciano, supra note 4 at 490-91.
[8]Smith, supra note 2 at 106.
[9]Id. at 106.
[10]McDougal & Feliciano, supra note 4 at 490-91.
[11]Smith, supra note 2 at 186.
[12]2 Oppenheim, supra note 3 at 43.
[13]A.E. HINDMARSH, FORCE IN PEACE-FORCE SHORT OF WAR IN INTERNATIONAL RELATIONS 72 (1933).

involve a state of war and is really a form of reprisal. In its early applications pacific blockade was intended to prevent all communication by sea with the territory blockaded. But since about the middle of the nineteenth century vessels of third countries have usually not been included.[14]

Since 1814 there have been more than twenty pacific blockades. They have been resorted to exclusively by the more powerful countries, mostly those of Europe. Pacific blockade then has been a method used by powerful states against smaller states to obtain reparation for alleged wrongs, to put an end to a disturbance, to prevent the outbreak of war, to ensure the execution of general treaties, or to safeguard the "interests of humanity."[15] Because of the circumstances in which pacific blockade has been used many people have argued that it is merely an illegal method of coercion used against countries which are unable to defend themselves.

While a large number of authors do argue against the legality of the pacific blockade it has by now been rather widely accepted and practiced. The earliest example of a pacific blockade was in 1813 by Great Britain against Norway. Some of the more notable incidents of pacific blockade have been the 1827 blockade by the European great powers of the part of the Greek coast occupied by Turkish forces, allegedly done in the interests of Greek independence; the 1838 blockade of Mexico by France; the 1848 blockades of Argentina by Great Britain and France; the 1884 blockade of Formosa by France; the 1886 blockade of Greece by the great powers to keep her from going to war against Turkey; and the highly controversial blockade of Venezuela by Great Britain, Germany, and Italy to make Venezuela pay her debts. This blockade of Venezuela was later justified by Great Britain as a belligerent blockade.[16]

A list of rules governing the use of pacific blockades was formulated in 1885 by the Institute of International Law. This formulation by a private organization has no real force as law but it is some evidence of growing custom and has been generally accepted, at least by the powers. These rules state that the establishment of a naval blockade without war is only permissible where: First, ships under a foreign flag can enter freely notwithstanding the blockade. Interference with neutral shipping is claimed to be a right which comes only with belligerency and is therefore not justifiable outside of a state of war. Second, the official blockade must be officially declared and notified and maintained by a sufficient force. Third, the ships of the blockaded power which do not respect such a blockade may be sequestered, but when the blockade ceases must be restored with their cargoes without indemnity.[17] Again confiscation of a vessel is assumed to be a right granted only when a state of war exists between the two countries.

The foregoing represent the types of blockades and the rules that, although not consistently applied or accepted by everyone, were nevertheless generally believed to exist at the beginning of the present century.

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[14] Id. at 72.
[15] H.W. BRIGGS, THE LAW OF NATIONS 959 (2nd ed. 1952).
[16] 2 Oppenheim, supra, note 3 at 44-45.
[17] Washburn, Legality of Pacific Blockade, 21 Col. L. Rev. 57 (January 1921).

Since the beginning of the twentieth century the practice of naval blockade has perhaps not been quite so frequent as in the nineteenth century but those countries which did resort to use of the blockade quickly came to the realization that the rules which had been formulated in the nineteenth century were not always adequate to deal with the complex situations which arose in the twentieth.

World War I brought about a situation which had not previously arisen in the world. There was almost total world involvement in a war in a time of rapidly developing technology. The First World War and also the Second involved the use of the so-called "long distance blockade." This "blockade" relied on a combination of mine fields, surface patrols, and submarines. Because of the extended range of shore batteries, fast torpedo boats, long-range aircraft, and the like, a traditional close-in blockade of the ports and coasts became impracticable.[18] The only close-in blockades in World War I which conformed to the regular rules of blockade were all in minor theatres of war. The most important allied blockade was of the Axis Adriatic coasts which could easily be accomplished by blockading the Straits of Otranto and did not interfere with access to neutral countries.[19] In World War II there were no blockades in the strict sense except for the 1939 Soviet blockade of Finland which is subject to doubt because of its lack of effectiveness.[20]

Attempting to blockade an enemy from a distance obviously makes it more likely that a blockade will interfere with access to adjacent neutral coasts. Because of this it was impossible for the allies to proclaim a regular blockade of the German coasts in World War I. Prohibition of trade with Germany was enforced by controlling the North and South entrances to the North Sea. But during the First World War the cordon established by the allies cut across access to four neutral countries.[21] It was therefore argued from a legal point of view that measures directed towards total prevention of enemy sea-borne trade during the two world wars were outside the ordinary law of blockade. During World War I, neutrals, especially the United States, argued that while the old rules of blockade were no longer practicable, the allied measures did not conform to the spirit and principles of the traditional rules. They argued that: First, the measures were a blockade of neutral ports. The cordon of ships affected the territory through which neutral ships had to go to get to neutral ports. Second, the blockade was not impartially enforced since trade between Scandinavian and German Baltic ports was unaffected. Third, the blockade was ineffective because of this and because German cruisers were operating in the Baltic and North Seas and were capturing neutral vessels bound for Scandinavian and German ports. Great Britain said the measures were adaptations of the rules of blockade to meet special circumstances and that they did conform to the spirit of the old rules.[22] From a legal point of view the measures taken by the allies

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[18]Commander Bruce Clark, Recent Evolutionary Trends Concerning Naval Interdiction of Seaborne Commerce as a Viable Sanctioning Device 27 JAG Journal No. 2 161 (1973) hereinafter cited as Clark .
[19]Smith, supra, note 2 at 108.
[20]Clark, supra, note 18, at 161.
[21]Smith, supra, note 2 at 105.
[22]Colombos, supra note 1 at 722.

were also defended as a development of the law of contraband and the law of reprisal.[23]

Following the two world wars a "close-in" blockade was thought to be militarily and economically inadvisable or even impossible especially in situations where the two belligerent countries were of similar military prowess. With the Korean War, however, "close-in" blockade again became a reality with the United States blockading the coasts of Korea. This was possible largely because of the naval and air superiority of the United States.[24] But the Korean War did show that in a limited war involving great powers the traditional type of maritime blockade may still be feasible.[25]

The argument over the law of blockade during the two World Wars and the Korean War was also concerned with the new methods being used to enforce the blockade. One of the major arguments was over the use of mines. Those against the use of mines argued that the effectiveness required of a valid blockade could not be secured by means violative of other established rules. It was argued that when a ship tried to run a blockade it did so with the knowledge that its liability would be understood in terms of a liability to seizure and eventual condemnation, but under traditional blockade rules it did not anticipate destruction by a mine or a submarine.[26] The other side of the argument was that changes in military technology justified use of new means of blockade. It was argued that in order to prevent the blockade from being broken, for example, by a submarine, mines were justified. Also the liability from destruction by an exploding mine was really not significantly different from the liability which a ship incurred from fire by surface cruisers when attempting to escape.[27] This school of thought believed a blockade such as a mine blockade should be appraised by its "reasonableness" and the methods used as compared to the objectives of the blockade and the alternatives available. The reasonableness of the blockade according to this theory should be determined by such factors as the strategic importance in the war of stopping the enemy's commerce, the specific disposition of the mines, the possible economy of time and effort, and the type of notification given to neutrals.[28]

Further problems have arisen concerning the use of naval power for a blockade in instances subsequent to the Korean War. Here the actions were generally taken for strong policy reasons and the attempts to justify the actions legally have come after the fact. Often these actions defy categorization in traditional concepts of blockade.

One of the most controversial instances of the use of a naval force in a type of blockade was the United States "quarantine" of Cuba in 1962. This quarantine, as the United States insisted on calling it, presented several important legal problems. The quarantine did not really resemble other previous blockades in its methods or manner of enforecement. Also any use of force including a naval blockade occurring after World War II must be justified within the boundaries of the United Nations Charter.

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[23]Smith, supra, note 2 at 108.
[24]Clark, supra, note 18 at 168.
[25]McDougal & Feliciano, supra, note 1 at 492.
[26]Clark, supra, note 18 at 168.
[27]McDougal & Feliciano, supra note 1 at 495.
[28]Id. at 494-495.

The quarantine of Cuba which was called for by President Kennedy on October 23, 1962 was an attempt by the United States to prevent the flow of offensive weapons and associated material into Cuba.[29] The United States and its supporters attempted to justify the blockade of Cuba on two grounds. It was conceded that the quarantine did not exactly meet the requirements of a traditional belligerent blockade or even of a pacific blockade. However, they argued that the quarantine action had to be weighed in its factual environment. They claimed that under such a new situation as the United States faced it had a right to use the naval quarantine; it was argued that a new legal rule had been created. The quarantine was claimed as an additional and unique option within the continuum of "force in peace." It allowed the option of restrained coercion and an avoidance of drastic procedures and consequences built around the traditional concept of blockade. It permitted access to procedure and practices which were unavailable under the traditional concepts of belligerent and pacific blockade.[30] The United States also based its action on the proclamation of the Organization of American States under the Rio Treaty of 1947. This resolution authorized the countries of America to take the necessary action to prevent Cuba from getting military materials from Russia which could affect the peace of the hemisphere. The United States claimed that this resolution was binding on Cuba also since Cuba was still a member of the O.A.S. Also it was claimed that the United Nations charter recognized the place of regional organizations in the preservation of world order and also the traditional right of self-defense. It was admitted that the United Nations charter calls for approval of regional action by the Security Council, but since the Security Council as a viable organization to preserve peace was no longer of any use, the United States was justified in using another route. This new route was the increased assumption of authority by the regional organization.[31]

For the argument against the legality of the United States quarantine, it was claimed that the methods used by the United States in no way conformed to traditional international law. The United States had claimed no state of belligerency, so it could not be a regular wartime blockade. It also could not be a pacific blockade since it was aimed at third party vessels, and this was not allowed under United States concepts of freedom of the seas and under the traditional rules of pacific blockade.[32] This argument also asserted that there is no justification for United States action under the charter of the United Nations. The action was not approved by the Security Council and could be construed as a threat of force forbidden under Article 2(4) of the U.N. charter. Article 51 of the U.N. charter justifies individual or collective self-defense, but only where there has been an armed attack,

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[29]Carl Christol & Commander Charles Davis, Maritime Quarantine-The Naval Interdiction of Offensive Weapons and Associated Material to Cuba 57 Am. J. of International Law 527-529 (1962).

[30]Id. at 531.

[31]Leonard C. Meeker, Defensive Quarantine and the Law, 57 Am. J. of International Law 517-518 (1962).

[32]Wright, Cuban Quarantine, 57 Am. J. of International Law 553-555 (1962).

not just because another country has undertaken alarming military perparations.[33]

Another major use of naval blockade after World War II was the Egyptian blockade of the Suez canal and the Gulf of Aqaba against the State of Israel. Simultaneously with the armed warfare on land in 1948 Egypt proclaimed a general blockade against Israel. The Egyptians used several tactics including black-listing ships carrying goods to Israel and seizing Israel bound cargo. All Israeli ships were barred from the Suez canal.[34] As a result of the 1967 Arab-Israeli war the Suez canal has since been closed completely. This is a unique situation since the Suez canal is within the territorial boundaries of Egypt and would normally be regarded as internal waters. But under a treaty signed in October, 1888, by the European great powers it was provided that the canal should never be subject to blockade even in time of war.[35] Egypt justified her position by saying that she was not a signatory of the treaty and that in any event Article 10 of the treaty provided that the canal could be closed to maintain public order within Egypt. Egypt also argued that she was still a belligerent against Israel and so was entitled to use the belligerent right of blockade, and that Great Britain herself had violated the treaty in both world wars by preventing enemy shipping from using the canal.

On the other hand, Israel argued that the closing of the canal to Israel did not relate to public order and was not justified under the treaty. Although Egypt was not a signatory she did affirm her position as being bound by the treaty of 1888 by referring to it as being in effect in treaties with other countries. Also Israel maintained that the armistice between Israel and Egypt in 1949 meant that a state of war no longer existed.[36]

In 1967 prior to the first Arab-Israeli war Egypt blockaded the Straits of Tiran and the entrance to the Gulf of Aqaba. The traditional view of international law is that all straits not more than six miles wide are territorial and the right of innocent passage alone is guaranteed.[37] The Israelis denied the legality of the blockade by relying on the 1958 Convention on Territorial Seas which said that there should be "no suspension of innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another or the territorial sea of a foreign state."[38] Also the Israelis relied on the Corfu Channel case in which the International Court of Justice said that the channel between Corfu and Albania could not be mined and the determining factors were its position between two parts of the high seas and the fact that it was customarily used for international navigation.[39] The whole problem of the Arab-Israeli conflict does not seem to be amenable to resolution under the rules of international law at all. The problem of the Suez and the Gulf of Aqaba (now controlled by Israel anyway) will probably have to be resolved by political negotiation.

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[33]Id. at 555-560.
[34]Dinitz, Legal Aspects of the Egyptian Blockade of the Suez Canal 45 Georgetown L. J. 171-172 (Winter '56-'57) [hereinafter cited as Dinitz].
[35]Id. at 174.
[36]Dinitz, supra note 34 at 176-186.
[37]Robert H. Forward et al., The Arab-Israeli War and International Law 9 Harv. J. of Int'l. Law 246 (1968) [hereinafter cited as Forward].
[38]Id. at 247.
[39]Forward, supra note 37 at 246.

There has been much debate in recent years concerning the use of a naval blockade as a sanction against those countries which defy the great weight of world opinion by their internal policies on such things as race. Much of this argument has centered in proposals which have been suggested to the United Nations. One instance in which a blockade was actually used was in the British oil blockade of Southern Rhodesia in 1967-1966 following the Rhodesian declaration of independence from Great Britain. The Royal Navy intercepted two Greek ships which were carrying oil to Rhodesia. This action was authorized by the Security Council by a resolution of April 1966.[40] This blockade was unsuccessful, however, in bringing Rhodesia to terms. There has also been considerable discussion concerning imposition of a naval blockade on South Afircа. Those in favor of such a blockade feel that South Africa will not yield to diplomatic pressures and the blockade would be an effective way of sanctioning the South Africans without actually going to war. Those opposed feel that a blockade would be of little use and very well might result in an actual armed conflict with South Africa.[41]

The most recent use of naval blockade was the United States mining of the harbors of North Vietnam. The same general arguments over the legality or illegality of recent naval blockades arose again in this case. The United States defended its position by trying to show that its actions were reasonable and were calculated to cause the least confrontation with third countries. All of the mines were sown in North Vietnam's territorial waters, a detailed communication of planned United States mining measures was communicated to the nations concerned and a three day grace period was allowed for neutral vessels to depart. The United States avoided using the term "blockade" to describe this action, as it wanted to "avoid inadvertently signalling a wider objective such as economic or political subjugation of North Vietnam implied by the term blockade."[42] The purpose of the blockade was supposedly to bring about an end to the fighting in South Vietnam. A question also arose concerning whether the United States and North Vietnam were formally at war so that the United States actions could be justified as belligerent rights.

It seems that as long as force is considered a viable means for a country to use in obtaining its objectives, the naval blockade in one guise or another will continue to be used. The present trend, however, appears to be toward an avoidance of the term "blockade" in describing these actions. The word blockade to many people carries with it a connotation of oppression of smaller countries by a larger power. It also appears that in the future the traditional rules of blockade as they were formulated in the nineteenth century will be followed only as long as they allow a blockading country to accomplish its purposes. The position of some authorities is that the rules of blockade were developed in a different factual and legal context from that which exists today and that instances of blockade today must be judged in the light of a new technological and legal structure. They claim that preservation of peace, not

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[40]Colombos, supra note 1 at 469.
[41]Legum & Sampson, Blockading South Africa-The Case for Sanction and The Case Against Sanctions, Atlas Magazine January 1965, pp. 22-27.
[42]Clark, supra note 18 at 168.

the regulation of warfare is the purpose of international laws and that a blockade is legal where the purposes sought and the means employed are consistent with the world community's current legal values--in the same sense that the nineteenth century rules of blockade served that era's purposes.[43] This is an appealing argument, but it is still difficult to determine just what world community's values are, if in fact there are any. If each country is allowed to make its own rules to serve its own purposes in each situation, rules of law governing blockades will be meaningless and the world will continue to be governed by arbitrary force used at the discretion of those with such force at their command.

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[43]MacChesney, Editorial Comment in Quarantine of Cuba 57 Am. J. of International Law 594 (1961).

EXERCISE OF SOVEREIGNTY IN DANGER ZONES: THE FRENCH SEIZURE OF THE FRI IN A NUCLEAR TEST ZONE

Alfred Pollard

The right of exclusive use of sections of the high seas by a state has long been recognized in customary international law for such diverse purposes as scientific research, naval maneuvers and most recently contiguous zones for the protection of natural resources have been established.[1] When use of the high seas is associated with military training, off-shore radar emplacements and weapon testing, a zone of use is created which is popularly called a danger or warning zone.[2] There is, however, a differentiation between use and jurisdiction and the right to exercise the rights of a sovereign in such a danger zone. Although much of the recent interest in the law of the sea has turned to its ecological aspects,[3] the recent nuclear detonations by the United States at Amchitka and by France in the South Pacific have brought oceanic nuclear testing back to the world's attention. With the signing of the 1964 Limited Test Ban Treaty, it appeared that testing of nuclear weapons near the high seas--which poses the double threat of atmospheric and aquatic pollution and imbalance--might be at a close. The emergence of France as a nuclear power soon ended that hope. With the Soviet Union favoring an end to all ocean testing of nuclear weapons[4] and the United States urging signing of the Test Ban Treaty, it would appear that every effort would be made to dissuade French nuclear detonations. The attitude created in France by DeGaulle continues today --France will disregard any effort to limit French self-sufficiency and independence from outside aid in regards to her security and self defense.[5]

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[1] See, 4 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 491-553, 604-606 (1965). hereinafter cited as Whiteman .

[2] There is an important distinction in terms and some overlap. In the definition of terms for the International Civil Aviation Organization and in the usage of the United States, three distinct zones exist--a "restricted" or "prohibited" zone which immediately surrounds the activity, usually the extent of the territorial sea in the case of an island; a "danger" or "security" zone, usually a zone with a radius varying from 5 to 400 miles, and; a "warning" zone which may have an area of several hundred thousand square miles in the case of nuclear tests. Pender, Jurisdictional Approaches to Maritime Environments, 15 Jag. J. 155, 157 (1961) hereinafter cited as Pender .

[3] McDougal, The Law of the High Seas in Time of Peace, 3 Denver J. Int. L. & Pol 45-58 (1973).

[4] For a discussion of the Soviet attitude at the 1958 Conference on the Law of the Sea, see, Hardy, The Atom at Sea, 14 JAG. J. 9, 14 (1959).

[5] Washington Post, July 19, 1973, at A29, col. 1.

Recent French intransigence to world opinion during nuclear tests and French conduct during those tests in South French Polynesia which included assertions of sovereignty over an area of the high seas resurrects the problems associated with nuclear testing and danger zones.

Since 1966, the French have exploded twenty-eight atomic devices in the South Pacific.[6] During the first atomic bomb test by France in July of 1966, the United States expressed its displeasure by failing to deliver computers promised for the test.[7] At that time[8] and subsequently, the United States had not failed to send its "regrets" to the French for their testing and failure to sign the 1964 Treaty.[9] It is interesting to note that in regard to the location of the 1973 tests by France, midway between Latin America and Australia, the French just recently signed the 1967 treaty making Latin America a nuclear free zone.[10] With the French announcement of a summer series of tests for 1973 at the Mururoa Atoll test site, Australia and New Zealand began a protest which soon gained the support of the International Confederation of Free Trade Unions which included a boycott by thirty-five unions of the French.[11] The protest was brought to the International Court of Justice which on June 22, 1973 rendered an injunction against France and Australia and New Zealand ordering all parties to take no action.[12] France declared that she would ignore the injunction and denied the Court's jurisdiction as France's actions, it was argued, were tied to national defense and hence a matter of domestic concern, beyond the ICJ's inquiry.[13] (The case is still before the Court and has been continued into 1974.)[14] France's test site at Mururoa was estab lished with an announced restricted area of about three miles and a danger zone with a radius varying from sixty-six to seventy-two miles, (based on conflicting accounts).[15] The French warning zone extended to a radius of about 3500 miles around Mururoa. In announcing the danger zone a decree stated that the French admiral in charge of the test area was empowered to take "all necessary measures with regards to ships found in the area to assure their safety and that of persons on board."

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[6]119 Cong. Rec. S15425 (daily ed. Aug. 2, 1973) (Hartke).
[7]F. B. Miller, That Day in Mururoa, 49 Sat. Rev. 62, 64 (October 8, 1966).
[8]France; After the Bomb, 68 Newsweek 34 (July 18, 1966) (article lists states protesting the French tests).
[9]France: Bombs Away, 102 Time 34 (August 6, 1973).
[10]Washington Post, July 19, 1973, at A29, col. 1.
[11]South Pacific: The Mushroom Season, 81 Newsweek 52 (May 21, 1973).
[12]Washington Post, June 23, 1973, at A3, col. 6.
[13]Id.
[14]10 U.N.Mo.Chron. 87 (Aug.-Sept. 1973).
[15]Washington Post, July 9, 1973, at A17, col. 1 (66 miles); N.Y. Times, July 18, 1973, at 5 col. 1 (72 miles).

There was no notice of a prohibition of entry into the danger zone.[16] A schooner of United States registry set out in May to protest the French tests. On May 12, 1973, the United States Coast Guard advised the schooner of the danger and urged her skipper not to proceed.[17] The schooner, the FRI, after sailing within 12 miles of the test site, anchored about twenty-eight miles from the site inside the French danger zone.[18] Also located inside the danger zone and also there to protest was the New Zealand cruiser Otago. Anchored about a mile away was the U.S. Corpus Christi and aircraft of the United States flew within the danger zone as well as observers from the Soviet Union and China.[19] Only the aforementioned notice was given concerning the danger zone and by the presence of uninvited warships and aircraft of several nations, it seems the warning did not state a prohibition of entry. On the 17th of July, a French minesweeper ordered the FRI to remove from the area; its captain refused. On the 18th of July, fifteen seamen from the French ship boarded the FRI, removed the sixteen passengers to Hoa Atoll in South French Polynesia for five days of imprisonment and towed their ship out of the danger zone.[20] The United States made neither protest about the French nuclear test on July 21st, nor any other public protest of the seizure.[21]

For the first time a state not only had called for the exclusive use of a danger zone but also had exercised sovereign power to exclude a ship of foreign registry from such a zone. The use of the terminology danger zone or security zone has, by the majority of writers, been viewed as a cautionary device only.[22] There has been dispute over the ability of a state to extend its jurisdiction over an area of the high seas and exclude foreign ships, especially under the guise of a danger zone which can vary from five to five hundred miles.

Two questions of international law consequence are presented by the French seizure of the FRI--may a state exercise sovereignty in a zone of use described as a danger zone, and if such exercise is permissible, may the exercise of such sovereignty extend to non-nationals.

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[16]Washington Post, July 9, 1973, at A17, col. 1.
[17]Letter of the Department of State, Office of the Assistant Legal Adviser for Ocean Affairs, August 17, 1973 (response to an inquiry concerning the legality of the seizure of the FRI) [hereinafter cited as Letter of State Dept.].
[18]N.Y. Times, July 18, 1973, at 5 col 1.
[19]Washington Post, July 22, 1973, at A1, col. 7.
[20]Id.
[21]An unpublished protest was reportedly submitted by the United States to France; the effect of this is not known. Letter of State Dept., note 17 supra.
[22]Specifically, Pender, note 2 supra at 157.

International law in this area has not been resolved by any codified agreements. The 1958 Geneva Conference on the Law of the Sea did not deal specifically with nuclear testing despite a Soviet proposal to ban all ocean testing of such weapons.[23] The Conference affirmed the right to establish nuclear test or rocket testing zones by its inaction. What powers a state could exercise in these zones were never set forth in any convention. Interpretation of Article 2 of the Convention on the High Seas provides the best guide for any situation where freedom of the seas is involved. That article provides:

> These freedoms and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the seas.

From this it may be concluded that codified international law calls for reasonable action where freedom of the seas is limited by one state's use of an area for its own benefit. Certainly no less than equal treatment for all is intended.[24]

The United States position has been summarized in a working paper for the United States Delegation to the Conference on the Law of the Sea in 1958.

> The Delegation should bear in mind, however, it does not necessarily follow as seemingly suggested by McDougal and Schlei ["The Hydrogen Bomb Tests in Perspective", 64 Yale 648 (1955)], that a nation may unilaterally appropriate for its exclusive use a portion of the high seas for this purpose. In particular the United States has been careful not to claim the right to establish a prohibited or restricted area which is tantamount to closing off a portion of the seas as a matter of enforceable right, action customarily taken only within the limits of territorial waters.
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> In contrast Danger or Warning areas on the high seas are predicated on the principle of voluntary compliance. As a matter of comity these areas are generally observed... [This] has been brought out in International Law Situation & Documents (1956) of the U.S. Naval War College. This reference states in a Note at p. 617: "The nuclear testing areas in question have been established as danger areas, warning all vessels and aircraft to stay clear, but not prohibiting them from the hazard area."[25]

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[23]A resolution was passed by the Conference recognizing

> ...that there is a serious and genuine apprehension on the part of many States that nuclear explosions constitute an infringement to the freedom of the seas.

(Cited in International Law Studies 1959-1960, U.S. Naval War College 178, 187 (1961) [hereinafter cited as U.S. Naval War College].

[24]The view of a danger zone as the high seas and therefore subject to Article 2 will be explained in the following discussion.

[25]Whiteman, supra note 1 at 546.

Generally, the United States position is one of distinguishing danger zones from restricted areas, which are announced as such, and although the danger zone is not as free as the high seas are usually considered, such a zone is permissible where it is treated as if it were a part of the high seas--in a reasonable manner, not infringing the rights of other states. These zones are essentially a part of the high seas and absent a restrictive notice by a state making the danger zone a prohibited area, the customary law of the sea applies.[26]

There have been only a limited number of danger zones established other than in the nuclear test situation. Seizures have never taken place in these zones, however, seizures have occurred outside the zones. The law of seizure has been construed very restrictively as to opportunities to seize ships on the high seas, and seizures within danger zones would be seizures on the high seas.[27] The ability to seize a ship in a danger zone has never been approved or witnessed before. Contrary to McDougal's assertion that the ability to establish danger zones carries with it the right to exercise jurisdiction of a sovereign nature,[28] the distinction must be made between a danger zone with limited access and a danger zone as traditionally conceived acting only to caution ships and aircraft of an impending danger.[29] Perhaps to strike a balance between competing international law approaches and to deal more directly with the French seizure of the FRI, it may be stated that no state has ever claimed to exercise a sovereign right to exclude ships from a danger area or to use its jurisdiction to remove a ship from a danger zone without a prior notice of a restriction on entry.[30] The FRI was seized for its own safety; such a seizure expands the scope and purpose of a state's establishment of a danger zone far beyond its recognized necessity.[31]

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[26]The establishment and nature of danger zones by the United States is provided for in 33 U.S.C. 1, 3. See also, 33 C.F.R. §§ 204.1-204.232 (1971 Supp.).

[27]Whiteman, note 1 supra at 513-517.

[28]M. McDOUGAL & W. BURKE, THE PUBLIC ORDER OF THE OCEANS 804 (1961) [hereinafter cited as McDougal & Burke].

[29]Pender, note 2 supra at 156; in discussing ICAO definitions, Pender notes

> ...a 'danger area' is defined as a 'specified area within or over which there may exist activities constituting a potential danger to aircraft flying over it.' The 'Explanatory Notes' for these definitions make it clear that, from a legal standpoint, there is a fundamental difference between a 'danger area,' on the one hand, and 'prohibited' or 'restricted' areas, on the other.

[30]In the Defence Act of 1952, the Australians did establish a danger zone of about 6000 miles limited to areas above their continental shelf and notice was published that access was prohibited and criminal penalties were set forth. McDougal & Schlei, The Hydrogen Bomb Tests in Perspective, 64 Yale L. J. 648, 680 (1955) [hereinafter cited as McDougal & Schlei]. Pender, supra note 1 at 157 (notes that the only restricted areas were territorial).

[31]Pender, note 2 supra at 157 "...[T]he 'effect' of a danger area is to 'caution' pilots 'that it is necessary for them to assess the dangers in relation to their responsibility to their aircraft."

The Otago from New Zealand sailed into the area without permission of any sort, expressly to protest the nuclear detonation, as was the FRI's intent. The distinction was made that the Otago had radiation shields. This distinction would allow nations to assert that in any contiguous zone or off-shore security zone safety is a factor--one which may be determined by the state using the zone--and thereby exclude ships and aircraft from large areas of the high seas.

The second question of international law presented by the French seizure is the ability of a state to seize a ship of foreign registry in any area other than its own territorial waters or on the high seas pursuant to the right of hot pursuit. Never has such a seizure as occurred at Mururoa taken place before and although McDougal would argue to the contrary,[32] seizures on the high seas, in contiguous zones and in danger zones should be based on a concept of self defense or to carry out the purpose of the zone, not just an assertion of power because a right of use has been set forth.[33] The purpose of a danger zone is to urge caution and promote safety, not to enforce safety. No concept of reasonableness in allowing establishment of nuclear or missile test sites and surrounding danger zones should allow seizures of ships bearing the flag of a foreign state to occur, unless direct interference with the test is probable.[34]

Treaty law would indicate that the French action was, indeed, unreasonable. Article 2 Section 3 of the Convention on the High Seas dealing with disasters or any "incident of navigation" provides, that "no arrest or detention of the ship, even as a measure of investigation, shall be ordered by any authorities other than those of the flag state." While a danger zone, as previously noted, is not purely an area of the high seas, it may be viewed as a contiguous zone in which the stated purpose is to warn vessels of a danger and for all other purposes is part of the high seas.[35] Analogy to Article 2 Section 3 is therefore permissible as well as to Article 22 of the same Convention on the High Seas which provides that unless "acts of interference" are sanctioned by treaty, no boarding of a ship shall occur unless there is suspicion of piracy, slave trade or that the ship is flying a false flag and is in reality of the same nationality as the warship desiring to stop the vessel. Certainly none of these descriptions apply to the case of the FRI. Under codified law, which, absent direct mention of danger zones, can only be used by inference, it would appear that seizures are not generally favored and interference with non-national ships is severely restricted and should not occur by caprice. The ability to forcibly exclude a ship of foreign registry or remove such a vessel from a danger zone over the high seas and not within the territorial water area of a state cannot be justified under the Convention on the

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[32]McDougal & Burke, note 28 supra at 804, note 209a.

[33]For examples of seizures in contiguous zones or on the high seas, see, Whiteman, supra note 1 at 491-553.

[34]U.S. Naval War College, supra note 23 at 186, suggests that once a state has performed its duty to warn, it receives in return immunity from liability to ships which enter the zone.

[35]McDougal discusses the rights in contiguous zones and their uses for the protection of the coastal state, McDougal & Burke, note 28 supra at 582-607. Also, for the purposes of a contiguous zone recognized by the Geneva Convention, see, Art. 24, Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. 1606; T.I.A.S. No. 5639; 516 U.N.T.S. 205 (1958).

High Seas; analogy to the semi-sovereign rights of states in continental shelf installations cannot be sustained.[36]

The position of the United States concerning seizures of foreign ships on the high seas and the exercise of sovereignty in danger zones may be traced from case law and practice. In the case of Church v. Hubbart,[37] involving the seizure of a vessel of United States registry by Portuguese officials off the coast of Brazil but outside territorial waters, Chief Justice Marshall distinguished the ability of a state to exercise "absolute and exclusive jurisdiction" within its own territory and contrasted that power with a state's exercise of its limited power to use reasonable means to seize ships beyond that territory on suspicion of illicit trade.[38] The test of reasonableness, as seen in the discussion of the conventions on the high seas, is of great importance. It should be noted that the right of the Portuguese to seize the vessel was predicated on the concept of self defense and this guided the reasonableness of the action. Marshall noted that failure to protest the seizure would make the action acceptable under international practice.[39] Certainly, no overriding concern for protection of the nuclear test site prompted the French seizure of the FRI.

The practice of the United States in regards to danger zones has been one of excluding ships from danger zones only upon notice that the area is restricted, and that restriction applies only to United States-registered vessels, this being a matter of domestic concern.[40] In 1958 at the Eniwetok Proving Grounds in the Pacific, the Atomic Energy Commission issued formal regulations making it unlawful for vessels to enter the area without prior permission; the prohibition applied only to vessels of United States origin.[41] During this period, two vessels were stopped prior to entering the danger zone; they were both of United States registry.[42] This action was upheld in federal court action.[43] More recently,

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[36]U.S. Naval War College, supra note 23 at 189 "[O]ne notes a decided difference in the possible need for a coastal state to exclude foreign vessels from the 'protected high seas' of the safety zone around the continental shelf installation, as contrasted with the lack of any such possible need in a designated [nuclear] test area."

[37]6 U.S. (2 Cranch.) 187 (1804).

[38]Heinzer, The Three-Mile Limit, 11 Stan. L. Rev. 597, 623 (1959).

[39]6 U.S. (2 Cranch.) 187, 235-236 (1804) " I f other nations followed suit or did not protest the seizing state's claim to exercise jurisdiction, it was proper for a bystander to conclude that the seizing state's action was reasonable and consequently, not internationally invalid."

[40]Pender, supra note 2 at 157 "In short, therefore, certain designations of areas outside territorial seas...are not intended to reflect any claim of governmental authority of one nation over the area to the exclusion of other nations."

[41]Id.

[42]The Golden Rule and the Phoenix were seized under the AEC regulations; see 23 Fed. Regis. 2401 (April 12, 1958).

[43]Bigelow v. United States, 267 F. 2d 398 (9th Cir. 1959) cert. den. 361 U.S. 852, 80 S. Ct. 163 (1959).

in 1960, a Russian trawler-electronics ship sailed into a Polaris submarine testing area off the coast of Long Island. The United States simply watched the vessel and made no protest of the incident to the Soviet Union. Although in a danger area, the vessel was for United States purposes on the high seas and could not be disturbed.[44] Not only the United States, but almost every state which has had a vessel seized, has protested the action where it occurred on the high seas or in a disputed contiguous zone.[45] From past experience and case law, the position of the United States and a majority of other states, including the Soviet Union, is that the exercise of jurisdiction over a danger zone is essentially the exercise of jurisdiction over the high seas and such exercise must be within recognized norms of international law. Seizures do not seem to fit within any norm of international law, nor does the exclusion of vessels from danger zones, and they have never been accepted without strong protests.[46]

International law, reflected in scholarly writings, seems to support the view of the United States concerning seizures on the high seas and in danger zones. In Pender's article, he notes,

> Experience indicates that the conduct of these activities by governmental agencies in international water or airspace need not entail an extension of jurisdiction over the area involved. Thus the designation of an area as a danger, caution or warning area merely indicates that the designating nation is using the area periodically for a special activity which is a valid use of the res communis, under the principle of the freedom of the seas and superjacent airspace, and that it is calling this activity to the attention of other regular or potential users of the area so that they may either avoid the area or be especially alert while using the area, thereby permitting all interested users to make maximum use of and derive maximum benefit from the area.[47]

In this area, McDougal does not appear to dispute Pender's conclusion and, indeed, ties the nature of the zone, its designation and purposes to the reasonableness required of a state's actions within such a zone.

> Ordinarily, no claim is made to enforce warning areas by means of formal sanctions, and the normal responsibility for taking reasonable measures at the scene to avoid accidents is considered to rest with the authorities using the areas for dangerous operations. Some danger areas are, however, announced in terms which

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[44]Whiteman, supra note 1 at 516-517.
[45]Id. at 513-517.
[46]Letter of the State Dept., supra note 17.
[47]Pender, supra note 2 at 157-158.

make clear that the authorities using them are expected to enforce compliance.[48]

In the absence of a claim to civil jurisdiction and notice thereof, it is difficult to see a right accruing to a sovereign asserting a danger zone to go beyond customary international law and exclude a vessel or aircraft of a foreign state from the danger area.

Comparison of the French action to the security powers expressed by states in identification zones cannot justify the French seizure. The Air Defense Identification Zone surrounding the United States does constitute a restricted area of airspace over the high seas. Within this zone police aircraft do patrol; jurisdiction is apparent.[49] The ADIZ, however, reflects not only the recognized international purpose of self defense and safety but also carries powers related to that purpose. The exercise of authority over this zone is limited and cannot be compared to the extent of power exercised by the French at Mururoa.

The failure of the United States to protest publicly the French seizure[50] may have significant effects. Only Congressional rumblings were heard urging the President to protest the French test itself.[51] At best the failure to protest may be seen as part of the United States policy of detente. The failure of the United States to act publicly a month before when the Chinese detonated a nuclear device in the atmosphere may have been the cause for the failure to protest the French action.[52] The French test, in spite of an adverse ICJ ruling, caused Japan, Mexico, American Samoa, several Latin American countries, England, Sweden, Canada and others to protest and for Peru to break relations with Paris.[53]

While one should not expect states to begin using contiguous zones as areas to seize foreign ships and promote international disputes or to create security zones of immense proportions and rule them with virtual sovereign rights, the recent seizure of the FRI and the failure to protest publicly that action does mark a change in customary international law. More importantly, the action at Mururoa returns to the limelight the testing of nuclear weapons at sea, as well as military activity requiring exclusive use of a part of the high seas. The seizure, and other problems involving nuclear weapons, cannot be dealt with adequately under existing international law. The FRI incident should prompt the upcoming Conference on the Law of the Sea to take up the issue of nuclear testing and use at sea, and hopefully to devise some better legal means to handle the problems thereof.

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[48]McDougal & Schlei, note 30, supra, at 679 "'Restricted,' 'closed,' and 'prohibited' areas are announced in such terms...and are apparently differentiated carefully from 'danger,' 'warning,' and 'caution' areas.'"
[49]McDougal & Burke, note 28, supra, at 626.
[50]Note 21 supra, and authorities there cited.
[51]119 Cong. Rec. S16193 (daily ed. Sept. 10, 1973) (Hartke).
[52]France: Bombs Away, 102 Time 34 (August 6, 1973).
[53]Note 51 supra.

UNITED STATES ENABLING LEGISLATION

UNDER THE

GREAT LAKES WATER QUALITY AGREEMENT

Jack Floyd

Congress overrode President Nixon's veto on October 18, 1972, and thereby passed into law the Federal Water Pollution Control Act Amendments of 1972[1] [hereinafter referred to as the Pollution Control Act of 1972], concerning navigable waters under United States control, and essentially making anew all legislation in this field.[2] This piece of legislation is highly important in domestic law, but can also be used to fulfill the obligations of the United States under the Agreement between the United States of America and Canada on Great Lakes Water Quality [hereafter referred to as the Water Quality Agreement] entered into by the two nations on April 15, 1972.[3] It is the intent of this article to examine the powers of the Pollution Control Act of 1972 in light of the goals of the Water Quality Agreement.

The United States and Canada have pledged mutual cooperation on all problems concerning their common boundary since 1910. In that year, the Convention Concerning the Boundary Waters between the United States and Canada was ratified as a Treaty between the United States and Britain, and it is presently still in force [hereinafter referred to as the Boundary Waters Treaty].[4] The preamble to the Treaty states that its purpose is to resolve all questions of water use which would affect the level of water in the Great Lakes and other boundary waters for navigational purposes. Its Preliminary Article defines boundary waters as "the waters from main shore to main shore of the lakes and rivers and connecting waterways or the portions thereof, along which the international boundary between the United States and the Dominion of Canada passes, including all bays, arms, and inlets thereof, "but not including tributary waters of the Great Lakes.[5]

The International Joint Commission [hereafter referred to as the IJC] was set up under the Boundary Waters Treaty, originally for the main purpose of passing on schemes of control of the boundary waters which might affect water levels.[6] This body is composed of six members, three from each party, and is vested with authority to pass upon all cases involving use of boundary waters arising under Articles III and IV of the Treaty.[7] For our purposes, the latter Article is the most important, for it provides,

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[1]118 Cong. Record S. 18554 (daily ed. Oct. 17, 1972). Id at H. 10272 (daily ed. Oct. 18, 1972); Pub. L. 92-500, 86 Stat. 816 (codified as 33 U.S.C.A. § § 1251-1376 (supp. 1973)).

[2]McThenia, An Examination of the Federal Water Pollution Control Act Amendments of 1972, 30 Wash. & Lee L. Rev. 195, 202 (1973).

[3]T.I.A.S. 7312; 11 Int'l. Legal Materials 694 (1972).

[4]36 Stat. 2448; T.I.A.S. No. 548 (1910).

[5]Boundary Waters Treaty, Preliminary Article 36 Stat. 2448; T.I.A.S. No. 548 (1910).

[6]Id., Art. VII.

[7]Id., Art. VIII.

> It is further agreed that the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other.[8]

This system, standing alone, could have been used to abate all pollution in the Great Lakes, but the Treaty further states that all conclusions and recommendations of the IJC are merely that-recommendations. The Treaty specifically states that the decisions of the IJC have no binding force.[9] Article X of the Boundary Waters Treaty provides that in situations where matters of dispute arise, and the IJC is unable to arrive at a decision, the question shall be referred to an umpire, who shall have final say in the matter. At present, under the United States acceptance of Article 36, paragraph 2 of the Statute of the International Court of Justice, the interpretation of a treaty such as this would be subject to the Court's jurisdiction. However, since the pollution would have to originate in the United States, the "Connally Amendment" could block its submission, by interpreting the question to be purely domestic concern.[10] However, no dispute has ever gone to the arbitral stage.[11]

Under the Treaty, either government can make a request to the IJC to investigate matters concerning the international boundary; as a practical matter, all references have been made by both simultaneously.[12] One of the first references made concerning pollution was in 1912, and the IJC submitted a comprehensive report in 1918, which found that although most of the Great Lakes were pure, the shore waters and river mouths were generally polluted. As a result of this study, in 1920 the IJC submitted a draft treaty to the parties which would have conferred upon the IJC power to regulate inter-boundary pollution. The United States showed little interest in such a delegation of power, and negotiations ceased in 1929.[13]

The IJC was next called upon to furnish a major pollution study in 1946, and in its report for the first time recommended specific technical objectives, and international boards to oversee development of subsequent events. This is now the standard procedure.[14]

The most ambitious pollution reference came to the IJC in 1964, requesting it to study pollution of Lake Erie, Lake Ontario, and the International Section of the St. Lawrence River. As a result of the IJC report, the United States and Canada entered into the Water Quality Agreement of 1972 on April 15 of that year.[15]

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[8] Id., Art. IV.
[9] Id., Art. IX.
[10] 61 Stat. 1218; 15 Dept. State Bull. 452 (1946).
[11] Share, Pollution of the Great Lakes: A Study of International Environmental Control Efforts, 19 Wayne L. Rev. 165, 168, fn. 17, (1972) [hereinafter cited as Share].
[12] Bilder, Controlling Great Lakes Pollution: A Study in United States Environmental Cooperation, 70 Mich. L. Rev. 469, 485 (1972).
[13] Id. 490-91.
[14] Id. 492-93.
[15] Water Quality Agreement, Preamble.
[16] Id., Art. II.
[17] Id., Art. III.

Basically, the Water Quality Agreement states General Water Quality Objectives,[16] Specific Objectives,[17] Standards and Other Regulatory Requirements,[18] Programs and Other Measures,[19] the role of the IJC,[20] and provides for joint institutions,[21] for information exchange,[22] and for periodic consultation[23] as well as for Articles covering implementation[24] and amendment.[25]

The United States is said to view the General and Specific Water Quality Objectives as without binding legal force, being rather suggestive in nature.[26] Article IV states that the parties "shall use their best efforts" to implement the objectives of Articles II and III, language which is admittedly open to question in the United States, where any legislation must pass the House, the Senate, and the President.

Article V seems to be more than just suggestive in its language, though. It states that, "unless otherwise agreed, such programs and other measures (to achieve pollution control) shall be either completed or in process of implementation by December 31, 1975." The programs outlined include the following:

> (1) Municipal source pollution - operation and construction of waste treatment plants of sufficient caliber, financial assistance where needed, establishment of construction and operation requirements, monitoring and enforcement systems;[27]
>
> (2) Industrial source pollutants - establishment of general control requirements, requirements for substantial elimination of toxic heavy metals and toxic organic persistents, requirements for thermal and radioactive waste discharge, monitoring and enforcement requirements;[28]
>
> (3) Pollution from agricultural, forestry, and other land use activities - measures to abate and control indirect and direct discharges of pesticides, wastes from animal husbandry, wastes from land fill and dumping, and nutrient runoff;[29]
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> (4) Eutrophication - requirements for control of certain nutrients, especially phosphorous, in accord with Annex 2;[30]

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[18] Id., Art. IV.
[19] Id., Art. V.
[20] Id., Art. VI.
[21] Id., Art. VII.
[22] Id., Art. VIII.
[23] Id., Art. IX.
[24] Id., Art. X.
[25] Id., Art. XII.
[26] Share, supra note 11, at 174-5, (based on that author's interviews with government officials).
[27] Water Quality Agreement of 1972, Art. V, No. 1(a).
[28] Id., Art. V, No. 1(b).
[29] Id., Art. V, No. 1(d).
[30] Id., Art. V, No. 1(c).

(5) Shipping source pollution - measures to control discharges of oil and other hazardous substances from vessels, through vessel design, construction and operation improvements, in accord with Annex 3; regulations to control vessel waste discharges in accord with Annex 4; regulations to control shipping source pollution under studies in accord with Annex 5; programs for safe handling of shipboard generated wastes of all types, including provision for shore reception facilities, and monitoring and enforcement measures.[31]

(6) Dredging activities pollution - measures for abatement and control, including standards for dredged spoil in accordance with Annex 6;[32]

(7) Onshore and offshore pollution - measures for abatement and control, in accordance with Annex 7.[33]

Annexes 3 through 7 are almost as general as the subsections of the Article which refer to them. Annex 4 requires the parties to adopt regulations for vessel wastes within one year with certain minimums: no garbage dumping; all vessels with toilets must have some sort of treatment capacity; no deleterious amounts or concentrations of waste water must be discharged.[34]

Annex 2 is the most specific, as the IJC believed eutrophication to be the most pressing problem. Yet the only definite requirements here are that municipal waste treatment plants shall not discharge more than one milligram of phosphorus per litre of water into Lakes Erie, Ontario, and the International Section of the St. Lawrence River,[35] and that the parties shall within one year determine the gross reduction of phosphorous loadings desired by them into Lakes Huron and Superior.[36]

All other Annexes and parts thereof call for determination of criteria, standards, and programs, but are not specific as to times or to definite goals. It is also noted that Article V calls, at minimum, for its programs to "be in the process of implementation" by the end of 1975. Minimal starts can be made on study grants, committee formation, and the like, and the dilatory party will still have lived up to the letter of the Water Quality Agreement, if not its spirit.

The Pollution Control Act of 1972 may be the only piece of enabling legislation that the United States needs to fulfill its entire obligation, to the letter and in the spirit of the Water Quality Agreement. It specifically holds that all unauthorized discharge of pollutants is unlawful.[37]

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[31] Id., Art. V, No. 1(e).
[32] Water Quality Agreement of 1972, Art. V, No. 1(f).
[33] Id., Art. V, No. 1(g).
[34] Id., Annex 4, No. 2.
[35] Id., Annex 2, No. 2.
[36] Id., Annex 2, No. 8.
[37] 33 U.S.C.A. § 1311(a) (1972).

It can negate one suspected weak spot in the Agreement, i.e. that it is only an executive agreement and not as binding as a treaty,[38] since the Act covers all navigable waters, including those tributaries not covered by the Boundary Waters Treaty. There are also sections of the Pollution Control Act which relate specifically to the Great Lakes.

The Administrator of the Environmental Protection Agency [here inafter referred to as the Administrator] is required to conduct studies, research and technical development including: analysis of present and projected future Great Lakes water quality under varying conditions; evaluation of water quality needs of persons served by the Lakes; evaluation of the municipal, industrial, and vessel wastes treatment and disposal in the area; and a study of alternate means of waste management with respect to the Lakes.[39]

The Administrator is authorized to enter into agreements with any public entities to set up one or more demonstration projects to study the economic and engineering practicability of various means of pollution prevention and removal. Federal participation can be up to 75% of costs, and the other public body can fund its share in any manner, including furnishing land and manpower.[40] Further, the Secretary of the Army, through the Corps of Engineers, is directed to set up a demonstration project for the repair of Lake Erie.[41]

International pollution is also specifically covered in the Act.[42] When the Administrator has received reports from "any duly constituted international agency" that pollution is occurring to the detriment of persons in a foreign country, and if he is requested to act by the Secretary of State, he shall give notice to the appropriate agency in the state where the polluter is located. If he believes that the situation warrants it, and if the foreign state accords the United States the same rights, the Administrator shall invite a representative of the foreign state to a hearing. For the hearing, and for any proceedings thereafter, the foreign representative shall have the same rights as does a state pollution agency. It is further stated that nothing hereunder shall be construed as to in any way affect the Boundary Waters Treaty of 1909.[43]

It appears from this section that the foreign representative has the same right to move in state and federal courts against a polluter as does a state, and further that the provisions of the Boundary Waters Treaty exist unimpaired by this Act, and may go beyond it.

It is also to be noted that the section expressly provides that it shall not be construed as in any way limiting the powers of the Administrator under the Pollution Control Act.[44] He can act to take steps which

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[38]Share, note 11 supra at 174.
[39]33 U.S.C.A. § 1254(f) (1972).
[40]33 U.S.C.A. § 1258(a)-(c) (1972).
[41]33 U.S.C.A. § 1258(d), (e) (1972).
[42]33 U.S.C.A. § 1320 (1972).
[43]33 U.S.C.A. § 1320(a) (1972).
[44]33 U.S.C.A. § 1320(b) (1972).

would result in the abatement or diminution of international pollution, without any action under the section.

Under the Pollution Control Act, the Administrator is vested with wide discretionary powers. It may be most convenient if these powers are viewed in comparison with their possible effects on the Water Quality Agreement.

The Agreement calls for programs to control pollution from municipal waste treatment plants.[45] The Administrator is directed to publish information on the degree of effluent limitations reachable through secondary waste treatment by public waste treatment works, and such works in existence on July 1, 1977, or approved prior to June 30, 1974 to be constructed within four years shall achieve such limitations.[46] Chapter II of the Act authorizes grants of up to 75% of costs for research and construction of such treatment works by states and municipalities. President Nixon has, however, impounded a substantial amount of the Chapter II grant funds, and the ability of public entities to meet the deadlines of the section is now in doubt.[47]

As to pollution from industrial sources, covered in Article V, No. 1(b) of the Water Quality Agreement, the Administrator is to define (for sources other than public waste treatment plants) the "best practicable control technology currently available" as the 1977 standard.[48] More immediately, he is directed to publish a list of categories of pollution sources, which sources if built after publication of proposed rules for its category, shall adhere to whatever rules are adopted.[49] Each state may establish and enforce its own rules, if found as stringent as federal requirements.[50] The Administrator is also required to publish a list of toxic pollutants, for which effluent limitations shall be promulgated, effective not more than one year after promulgation.[51] No radioactive discharges are to be permitted,[52] and thermal discharges must be considered with other pollutants. Such thermal discharges must at least be at such low level as to assure protection and propagation of marine life.[53]

Discharge of oil or other hazardous substances from vessels, onshore, and offshore facilities, as covered in the Water Quality Agreement, Article V and Annexes 3, 4, 5, and 7, is covered in detail in section 1321 of the Pollution Control Act. It provides for a range of penalties for persons discharging oil or hazardous substances intentionally or negligently[54] subject to some mitigation for self-removal,[55] for promulgation of

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[45]Water Quality Agreement, Art. V, No. 1(a).
[46]33 U.S.C.A. § 1317 (b) 1 (1972).
[47]Note, The Federal Water Pollution Control Act Amendments of 1972: Ambiguity as a Control Device, 10 Harv. Jour. Legis. 565, at fn. 146, 594 (1973).
[48]33 U.S.C.A. § 1311(b) 1 (A) 1973).
[49]33 U.S.C.A. § 1316(a) 2 (1973).
[50]33 U.S.C.A. § 1316(c) (1973).
[51]33 U.S.C.A. § 1317(a) 6 (1973).
[52]33 U.S.C.A. § 1311(f) (1973).
[53]33 U.S.C.A. § 1326 (1973).
[54]33 U.S.C.A. § 1321(b) 1 (B) iii (1973) (aa), (bb); 1321(b) 5, 6; 1321(f) (1973).
[55]33 U.S.C.A. § 1321(i) (1973).

definitions of hazardous substances,[56] for establishment of a national contingency plan in case of pollution emergencies,[57] for prevention and/or containment on board of discharges by vessels or facilities,[58] and further for injunctive relief against imminent and substantial dangers of discharge.[59]

Rules for marine sanitation devices,[60] as called for in Article V of the Water Quality Agreement, are to become effective for new vessels within two years after promulgation of standards by the Administrator, and within five years for existing vessels.[61] Further, the Secretary of the Department in which the Coast Guard is operating shall certify for sale only those sanitation facilities which meet the promulgated standards.[62] Boarding and inspection of vessels is also authorized under this section.[63]

The Administrator shall also, under section 1314 of the Pollution Control Act, develop guidelines and criteria for determining water quality, effluent limitations, for identifying non-point sources of pollution including agricultural, forestry, and other land use activities as covered under Article V of the Water Quality Agreement.

Many proposed rules, guidelines, criteria, and other data have already been published in the Federal Register, in accordance with the various timetables in the Sections. As yet there are no comparable guidelines under the provisions of the Water Quality Agreement.

As far as implementation of United States obligations under the Water Quality Agreement of 1972, the strength of the Federal Pollution Control Act is also its weakness - or it can be. The Administrator of the Environmental Protection Agency is given such broad powers to propose, promulgate, and revise that almost any steps, forward or backward, can be taken by him. In many sections of the Pollution Control Act, he is authorized to consider costs in his decisions on standards,[64] including in some cases economic and social costs in the communities affected,[65] and almost any reasons he gives for not proposing or promulgating any certain set or type of rules can probably be explained plausibly. He serves at the pleasure of the President, and so must bow before stiff political winds. The enormous discretion of the Administrator, the "cost" elements, and their practical effect on the Act has been discussed critically in some detail in Note, The Federal Water Pollution Control Act Amendments of 1972: Ambiguity as a Control Device, 10 Harv. Jour. Legis. 565 (1973); and in McThenia, An Examination of the Federal Water Pollution Control Act Amendments of 1972, 30 Wash. & Lee L. Rev. 195 (1973).

This article has raised more questions than it has answered. Almost nothing about either the Water Quality Agreement or the Pollution Control Act is concrete. Before it can be answered how the United States will fulfill its promises under the Agreement, it must be determined what those general promises actually require.

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[56] 33 U.S.C.A. § 1321(b) 2 (A) (1973).
[57] 33 U.S.C.A. § 1321(c) (1973).
[58] 33 U.S.C.A. § 1321(j) (1973).
[59] 33 U.S.C.A. § 1321(e) (1973).
[60] 33 U.S.C.A. § 1322 (1973).
[61] 33 U.S.C.A. § 1322(c) 1 (1973).
[62] 33 U.S.C.A. § 1322(g) (1973).
[63] 33 U.S.C.A. § 1322(1) (1973).
[64] 33 U.S.C.A. § 1312(b) 2; 1314(b) 1 (B); 1316(b) 1 (B) (1973).
[65] 33 U.S.C.A. § 1312(b) 2.

DAMAGES FOR WRONGFUL DEATH AND GENERAL MARITIME LAW

A HISTORICAL PERSPECTIVE

Allen H. Olson

In Moragne v. States Marine Lines, Inc.,[1] the United States Supreme Court unanimously overruled The Harrisburg[2] and created a cause of action under general maritime law for wrongful death due to unseaworthiness.[3] Previously, such a cause of action had not been recognized in admiralty by either English or American courts. This position was reinforced by a similar rejection of a land-based cause of action for wrongful death under the common law. In the United States, recovery for maritime wrongful death was limited to the remedies provided by the Jones Act,[4] the Death on the High Seas Act,[5] and in certain cases state wrongful death statutes.

Moragne left undecided several questions as to the exact nature of the new cause of action. The most important of these was the proper measure of damages to be applied in a wrongful death action; however, the Court was not entirely silent on the point. It suggested possible sources for guidance in determining the proper measure. On the one hand, the Court stated that the:

> Death on the High Seas Act and the numerous state wrongful-death acts have been implemented with success for decades. The experience thus built up counsels that a suit for wrongful death raises no problems unlike those that have long been grist for the judicial mill.[6]

However, the Moragne Court did not limit possible damages standards to those provided by federal and state legislation. The Court further suggested that:

> Our decision does not require the fashioning of a whole new body of federal law, but merely removes

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[1] 398 U.S. 375 (1970).
[2] 119 U.S. 199 (1886).
[3] 398 U.S. at 409; Unseaworthiness is a stringent concept of liability in the maritime law. A ship is liable to an injured seaman any time such injury is caused by the owner's failure to provide a "seaworthy ship" and "seaworthy appurtenances" regardless of whether or not there was negligence on the part of the owner or the seaman. Mahnick v. Southern S.S. Co., 321 U.S. 96 (1944).
[4] 46 U.S.C. § 688 (1970); The Jones Act allows for seamen a recovery for wrongful death based on the negligence theories of the Federal Employers Liability Act, 45 U.S.C. §§ 51-60 (1970).
[5] 46 U.S.C. §§ 761-68 (1970); The DOHSA applies to death beyond a marine league from shore when caused by wrongful act, negligence, or unseaworthiness.
[6] 398 U.S. at 408.

> a bar to access to the existing general maritime law. In most respects the law applied in personal-injury cases will answer all questions that arise in death cases.[7]

The Court discussed the basic nature of the "general maritime law" at length in its opinion:

> [I]t is not apparent why the Court in The Harrisburg concluded that there should not be a different rule for admiralty from that applied at common law. Maritime law had always, in this country as in England, been a thing apart from the common law. It was, to a large extent, administered by different courts; it owed a much greater debt to the civil law; and, from its focus on a particular subject matter, it developed general principles unknown to the common law. These principles included a special solicitude for the welfare of those men who undertook to venture upon hazardous and unpredictable sea voyages . . . . These factors suggest that there might have been no anomaly in the adoption of a different rule to govern maritime relations, and that the common-law rule, criticized as unjust in its own domain, might wisely have been rejected as incompatible with the law of the sea.[8]

Thus, the Court urged that maritime law should be liberally construed in order to effectuate the policies and to solve the problems peculiar to the maritime regime. Admiralty courts should not be constrained by common law principles not fully relevant to the situation at hand. The general maritime law applied by such courts should also encompass legal principles of its own creation and principles of the civil law. This conception of maritime law provided a basis for the Court's overruling of The Harrisburg and the creation of the new cause of action for maritime wrongful death. The same conception can also influence future judicial decisions as to the proper measure of damages for maritime wrongful death.

This article will examine briefly the status of the damages question in litigation subsequent to Moragne and then discuss the general maritime and civil law sources which, as suggested in Moragne, can provide guidance as to an appropriate damages standard for maritime wrongful death actions.

Lower courts have not been uniform in their development of such a standard since Moragne. Essentially, two lines of cases have arisen. In the first line, the courts, relying in part on the Moragne Court's reference to statutory wrongful death schemes, have limited damages recoverable in a wrongful death action to the restricted measures of damages allowed by the

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[7] Id. at 406.
[8] Id. at 386-87.

Jones Act[9] and the Death on the High Seas Act (DOHSA).[10] The rationale of these courts is that the standard developed under these statutes must be applied to the new cause of action in order to assure uniformity in the application of the maritime law throughout the country.[11]

Under the DOHSA, the damages awarded are expressly limited to the beneficiaries' pecuniary losses. Similarly, the Jones Act provisions have been interpreted to restrict recovery to injuries capable of pecuniary valuation.[12] Following this pecuniary standard, damages have been allowed by some post-Moragne courts only for the loss of decedent's support, services, and the nuture and education of his children.[13] Furthermore, the Jones Act, but not the DOHSA, allows the decedent's personal representative to recover for decedent's pain and suffering before death in addition to the beneficiaries' pecuniary losses.[14]

The courts that have invoked the Jones Act and DOHSA standards have thus rejected claims for compensation for the loss of consortium, comfort, protection, society and companionship on the part of the widow, claims for compensation for sorrow, bereavement, and emotional distress resulting to the survivors from the loss of the decedent, claims for compensation to the survivors for the loss of their expected inheritance from the decedent, and claims for compensation to the estate for the loss of the enjoyment of decedent's life or of the future expectation of life.[15] Surprisingly, funeral expenses, a seemingly pecuniary loss, have also been held not to be allowed as damages under either the Jones Act or the DOHSA.[16] Several of these rejected claims for compensation are allowed under state wrongful death statutes.[17] The courts that have relied on the Jones Act and DOHSA standards, however, have done so largely to the exclusion of state law standards as well as of those asserted under general maritime law.[18] They have chosen to ignore the other possible sources of law suggested in Moragne in the interests of certainty and uniformity.

But, other courts have taken a broader approach to the damages question left by Moragne. Looking to general trends in state law concepts

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[9]46 U.S.C. § 688 (1970).
[10]46 U.S.C. §§ 761-68 (1970).
[11]Ramp, Admiralty-The Broadening Scope of Damages Awardable for Wrongful Death in Admiralty, 6 Vand. J. Trans. Nat. L. 224, 225 (1972) [hereinafter cited as Ramp].
[12]Michigan Central R.R. v. Vreeland, 227 U.S. 59, 73 (1913).
[13]See e.g., United States Steel Corp. v. Lamp, 436 F.2d 1256 (6th Cir. 1970); Mascuilli v. United States, 343 F. Supp. 439 (E.D. Pa. 1972); Mungin v. Calmar S.S. Corp., 342 F. Supp. 479 (D. Md. 1972); Petition of Canal Barge Co., 323 F. Supp. 805 (N.D. Miss. 1971); Strickland v. Nutt, 264 So. 2d 317 (Ct. App. La. 1972).
[14]See Moore-McCormack Lines, Inc. v. Richardson, 295 F.2d 583 (2d Cir. 1961), cert. denied, 368 U.S. 989 (1962); Brown v. Anderson-Nichols & Co., 203 F. Supp. 489 (D. Mass. 1962).
[15]See cases cited note 13 supra.
[16]See e.g., Cities Service Oil Co. v. Launey, 403 F.2d 537 (5th Cir. 1968); First Nat'l Bank v. National Airlines, 171 F. Supp. 528 (S.D.N.Y. 1958).
[17]Ramp note 11 supra at 229-230.
[18]See e.g., cases cited at note 13 supra; Cf. Mascuilli v. United States, 343 F. Supp. 439 (E.D. Pa. 1972).

and to the general maritime law as well as to federal statutory precedent, several courts have allowed recovery under general maritime law for funeral expenses, the survivors' emotional distress, and the survivors' loss of love and affection in addition to the damages allowed under the federal statutes.[19] The rationale of the cases permitting such recoveries has been that the Moragne decision in fact created a new and independent cause of action under maritime law and did not merely extend the provisions of the DOHSA to within the territorial waters of the United States.[20] Consequently, policy considerations as to the proper nature of damages for maritime wrongful death should govern the choice of a damages standard rather than the Congressional mandate behind substantively more limited statutory remedies.

Moragne stressed the "special solicitude for the welfare" of seamen embodied in the principles of the general maritime law and implied that such principles were worthy of legitimate consideration by the judiciary in its development of a damages standard. Particularly, the Court felt that the general maritime law for personal injury would be helpful.[21] Furthermore, Moragne indicated that the principles of the maritime law had an international character and extended beyond the land-locked boundaries of the American and the English common law. Moragne acknowledged the debt owed by the maritime law to the civil law.[22]

However, even the liberally oriented courts have been reluctant to investigate the full potential of this Moragne dicta. A study of the maritime law as it has existed through the ages and of relevant portions of foreign civil law will help to suggest possible rational resolution of the current conflict of authorities on the damages question.

The origins of the maritime law are old and remote. Despite the extensive seafaring of the Greek and Roman civilizations, no law of the sea has survived from them.[23] Some evidence indicates that a formal maritime code was promulgated by the Mediterranean Island of Rhodes as early as 900 B.C., but there is no knowledge of its contents.[24] With the rise of the great Italian city-states around 1000 A.D., came the development of the earliest recorded sea-codes. Maritime commerce prospered during this era. To settle resulting disputes, special tribunals sat in the Mediterranean port towns, and this judicial activity led to the codification of existing customary rules and unwritten usages

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[19]Dennis v. Central Gulf Steamship Corp., 323 F. Supp. 943 (E.D. La. 1971) rev'd in part, 453 F.2d 137 (5th Cir. 1972); Gaudet v. Sea-Land Services Inc., 463 F.2d 1331 (5th Cir. 1972); in re Sincere Navigation Corp., 329 F. Supp. 652 (E.D. La. 1971); in re Farrell Lines, Inc., 339 F. Supp. 91 (E.D. La. 1971); Smith v. Allstate Yacht Rentals, Ltd., 293 A.2d 805 (Del. 1972).

[20]Ramp, supra note 11 at 238-39; but see Petition of M/V Elaine Jones, 480 F.2d 11 (5th Cir. 1973). This recent Fifth Circuit decision adopts a strict pecuniary damages standard and undercuts severely those broader decisions from the Fifth Circuit cited previously at note 20 supra.

[21]398 U.S. at 406.

[22]Id. at 386.

[23]G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 3 (1957) [hereinafter cited as GILMORE & BLACK].

[24]GILMORE & BLACK at 4.

by which seamen and the courts considered themselves bound.[25] The creation of maritime courts and the codification of the maritime law were part of the more general development of the law merchant or lex mercatoria.[26] Shipping and commerce were virtually synonymous during this period, and thus the maritime law was intrinsically bound to the commercial law.

The sea-codes, being derived from the general maritime customs of the Mediterranean area, enjoyed respect and authority beyond the ports where they were promulgated. They did not derive their force from territorial sovereigns but from the already existing customary law of the sea.[27] Two of the most influential Mediterranean sea-codes were the Tablets of Amalfi from the Naples area[28] and the Libro del Consulado del Mar of Barcelona.[29]

As maritime activity spread to the Northern Atlantic and Baltic regions of Europe, new sea-codes were promulgated by the port towns of Britain and the European mainland and acquired the names of these towns. Their nature and influence was much the same as the Mediterranean sea-codes. Three of the northern European sea-codes were The Laws of Wisby,[30] The Laws of the Hansa Towns,[31] and The Rules of Oleron.[32] Of these, The Rules of Oleron was the most influential and, as it was introduced into England by Richard the Lionhearted, of particular importance for the maritime law of England. Indeed, it is the most frequently cited of all the medieval maritime codifications.[33]

Maritime commerce increased again during the Renaissance, and maritime law drew the attention of the Continental legal scholars of that period.[34] These academicians were rewriting and adapting to that era the Roman or civil law. Using the framework of the civil law, they wrote treatises and commentaries about the maritime law which later acquired status as "classic systematizations of the subject."[35] The civil law writers thus added their influence and perspective to the already existing body of maritime law.

With the rise of the modern nation states in Europe, the international maritime law, as represented by the medieval codes and the writings of the civil law scholars, was in many cases assimilated into

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[25] Id.
[26] Id.
[27] Id. at 5.
[28] Id.; M. NORRIS, THE LAW OF SEAMAN 1 (3rd ed. 1970) [hereinafter cited as NORRIS].
[29] GILMORE & BLACK at 5; NORRIS at 1.
[30] GILMORE & BLACK at 6; NORRIS at 2.
[31] GILMORE & BLACK at 6; NORRIS at 2.
[32] GILMORE & BLACK at 6; NORRIS at 2.
[33] GILMORE & BLACK at 7; See 1 HOLDSWORTH, A HISTORY OF ENGLISH LAW 559 (3rd ed. 1922).
[34] GILMORE & BLACK at 7.
[35] Id., See STORY, LITERATURE OF MARITIME LAW, IN MISCELLANEOUS WRITINGS (1858).

national law.[36] In France, the general maritime law was restated in authoritative codifications, the most important being the Ordonnance de la Marine of Louis the XIV,[37] promulgated in 1681. In England, the application of the maritime law became the province of a separate Admiralty Court.[38] It performed its judicial duties much like a civil law court, including sitting without a jury. The Black Book of the Admiralty[39] was a compilation of the old sea-codes and other sources of maritime law. This book first appeared in the reign of Edward III and was regarded as high authority in actions before the Admiralty Court.

The general maritime law was assimilated into the United States by Article III, Section 2 of the United States Consitution which extends the federal judicial power to "all cases of admiralty and maritime jurisdiction." This provision assumes the preexistence of a general maritime law since there could be no cases of "admiralty and maritime jurisdiction" in the absence of law under which they could arise.[40]

At least some of the above-mentioned sources of the general maritime law have dealt with maritime personal injury and maritime death. The medieval sea-codes are to be noted for their development of the concept of maintenance and cure. This legal doctrine is summed up in the Tablets of Amalfi:

> [I]f any of the seamen or associates...be taken with any infirmity, let him have his lawful expenses and medical treatment in addition to his aforesaid share; and if it should happen that he should be wounded in defending the ship, let him have his food, his necessary expenses and medical treatment beyond his aforesaid share.[41]

Most of the other medieval sea-codes, including the Rules of Oleron,[42] contain similar declarations of the rights of injured seamen. The ship is to provide the incapacitated mariner with medical care, food, and other necessary expenses. Furthermore, he is to receive his full wages for the voyage. Another sea-code, the Gotland Sea-Laws,[43] provides additionally that if the injured seaman be put ashore, the ship should secure lodging for the seaman and hire a person to care for him until his recovery. The compensation for personal injury allowed seamen under the doctrine of maintenance and cure was significantly more generous than that which was allowed injured workmen on shore. It was provided regardless of the fault of the ship owner. Even modern day workmen's compensation statutes often do not provide employees with as much, especially full wages for an extended period of time. The maintenance and cure doctrine still remains a viable remedy in the general maritime law and is recognized in the United States.

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[36]GILMORE & BLACK at 8.
[37]Id.
[38]GILMORE & BLACK at 8; NORRIS at 3.
[39]GILMORE & BLACK at 9; NORRIS at 2.
[40]NORRIS at 3.
[41]BLACK BOOK OF THE ADMIRALTY 2, 13 (Twiss ed. 1876) [hereinafter cited as BLACK BOOK].
[42]See 1 BLACK BOOK 94 (Twiss ed. 1876).
[43]4 BLACK BOOK at 55, 73-74.

The sea-codes also contain legal provisions concerning the death of seamen. According to the Laws of Wisby,[44] the Gotland Sea-Laws,[45] and other sea-codes, the full wages of the voyage due a seaman shall be paid the wife or heirs of the deceased seaman regardless of the point of time in the voyage at which he died and undiminished by expenses incurred by the ship as a consequence of his injury and death. The medieval sea-codes go no further, however, and make no provision for the recovery by decedent's survivors for future loss of support, inheritance, nurture, nor for emotional pain.

Despite the liberality of the maintenance and cure remedy for maritime personal injury, life itself was valued rather cheaply at the time of the creation of the sea-codes. Indeed, it could be argued that the limited compensation provided was quite progressive for the era. In later years the civil law developed a broader view of the worth of life and its value to those left behind. The civil law conception of the damages recoverable for wrongful death is expressed in three tenets of the law of France. The first is that "[e]very act whatever of human agency which causes damages to another obliges the person by whose fault that damage has occurred to repair it."[46] The second is that damages recoverable under the civil law are grounded not in the dependency of the claimant but in his legal relationship to the deceased.[47] The third is that all damages are recoverable whether or not they are susceptible to exact evaluation.[48] Consequently, the civil law of France allows recovery for the survivors' loss of love and affection and for wounded feelings as well as for pecuniary losses.[49] However, damages allowed in civil law countries generally are small when compared to comparable common law awards.

As discussed previously, the civil law has enjoyed great influence on the maritime law. Admiralty courts have often followed the civil law as evidence of the general maritime law.[50] It can be argued that the civil law concept of expanded damages should be invoked as the rule for maritime wrongful death cases. However, none of the above quoted sources are binding on the courts of any nation. General maritime law is binding only insofar as it is adopted by the courts or legislatures of individual nations. Furthermore, the vitality and relevance of the older concepts and sources of maritime law are always open to question, and their meanings to interpretation.

Neither the medieval sea-codes nor the French civil law are cited here as gospel. They should not be accepted by themselves but analyzed in light of the policies behind the creation of a special body of law to govern injuries to seamen. As stated in Moragne, a basic consideration

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[45]4 BLACK BOOK at 55, 75.
[46]FRENCH C. CIV. art. 1382.
[47]6 M. PLANIAL & G. RIPERT, TRAITE PRACTIQUE DE DROIT CIVIL FRANCAIS § 546 (2d ed. 1952) [hereinafter cited as PLANIAL & RIPERT].
[48]PLANIAL & RIPERT §§ 549-52.
[49]Note, Admiralty-Damages-Award Allowed for Emotional Distress of Surviving Spouses and Children, or Parents, under General Maritime Law, 5 Vand. J. Transnat. L. 245, 249 (1971).
[50]GILMORE & BLACK 9.

of maritime law is "a special solicitude for the welfare of those men who undertook to venture upon hazardous and unpredictable sea voyages . . .,"[51] a feeling that the law could maintain a different standard for men who risked so much and were so essential to commerce. With this preface, the Moragne decision allowed lower courts to look to the general maritime law, its attendant policies, and its historical perspective as aids in determining admiralty damages questions relating to death cases. While the adoption of a broad, non-pecuniary damages standard for wrongful death cases is not required by Moragne, nor arguably by the history of the general maritime law, the decision as to the proper measure of damages in post-Moragne maritime wrongful death actions ought to be made only after a thorough investigation and consideration of the principles of general maritime laws in their historical and multi-national context.

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[51] 398 U.S. at 387.

STATE SURVIVAL STATUTES IN ADMIRALTY:

DO THEY APPLY TO TORTS AT SEA?

Stephen E. Foreman

The United States Constitution provides that the "judicial Power shall extend to...all cases of admiralty and maritime jurisdiction."[1] The Constitution seems to imply that there is a substantive maritime common law in force and administered by the federal courts, the purpose of which is to promote harmony and uniformity in U.S. sea law, much in the same manner that the Interstate Commerce Clause attempts to promote economic harmony and uniformity in trade operations. However, earlier courts interpreted this grant of power rather restrictively and concluded that if common law recognized no substantive right of action, admiralty courts were also precluded from granting it.[2] Thus it was held that general maritime law did not recognize a right of action for wrongful death or survival.[3] In order to afford a recovery, courts resorted to state statutes to fill the void and Congress enacted remedial legislation.[4] The net result of this activity was a confusing patchwork of law directly contrary to the initial constitutional purpose of harmony and uniformity.

The landmark decision of Moragne v. States Marine Lines[5] purported to restore a measure of uniformity to the general maritime law by providing that federal admiralty recognizes a claim for wrongful death due to unseaworthiness. Although it initiated a novel right of action (a common-law death action for wrongful conduct) the Moragne decision

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[1]U.S. CONST., Art. III, § 2.

[2]The Harrisburg, 119 U.S. 99 (1886).

[3]Id. (general maritime law did not recognize a right of action for wrongful death). Just v. Chambers, 312 U.S. 383, 387 (1941) (the general admiralty rule is that a victim's cause of action will die with him). See also Holland v. Steag, 143 F. Supp. 203 (D. Mass. 1956) and comment, The Application of State Survival Statutes in Maritime Causes, 60 Colum. L. Rev. 534, fn. 4 (1960) [hereinafter cited as Application].

[4]State wrongful death statutes were used to provide a recovery absent general maritime law recognizance. Western Fuel Co. v. Garcia, 257 U.S. 233 (1921); The Hamilton, 207 U.S. 398 (1907). State survival statutes were also used: Just, supra note 3 at 385; Dugas v. National Aircraft Corp., 438 F.2d 1386 (3d Cir. 1970).

In 1920 Congress passed the Jones Act and the Death on the High Seas Act to fill existing voids in the general maritime law. The Jones Act provides for wrongful death or survival recovery when seamen are injured, either on the high seas or in state territorial waters, by negligent conduct of their employers. 46 U.S.C. § 688 (1970). The Death on the High Seas Act allows for a wrongful death action when any person dies as a result of a wrongful act, neglect, or default on the high seas. 46 U.S.C. §§ 761-768 (1970).

[5]398 U.S. 375 (1970).

failed to outline the remedy indicated by this right, it suggested instead that the remedy should be provided in future decisions by reference to existing maritime law, acts of Congress and state statutes.[6] Many questions were left unanswered, including the status of survival actions. This study will explore the continued validity of state survival actions in maritime law after Moragne. Focal points of analysis will include the authority for application of state survival statutes, the present law of survival actions, the policies for and against a general maritime law of survival actions, and the applicability of Moragne reasoning to survival claims.

In order to analyze survival statutes a clear understanding of their operation is necessary. In general, survival actions are brought by the decedent's estate and include the right to tort recovery which a deceased would have had if he had lived to bring the claim. Possible claims include damages for medical expenses, pain and suffering, and loss of wages. Survival actions also encompass the situation where defendant dies prior to the time that an action is brought and plaintiff is allowed to bring his claim against the decedent defendant's estate.[7] In comparison, the wrongful death action inheres in the dependents of the deceased for their own loss (loss of support, grief, loss of consortium). If there are no dependents, no wrongful death action will lie.[8] The distinction between wrongful death and survival actions is easily confused. One element of confusion emanates from the statutory nature of the rights: the wrongful death statutes of many jurisdictions include remedies which are traditionally survival remedies, such as pain and suffering.[9] Like any other statutory right both survival actions and wrongful death actions show great variation from one jurisdiction to another.[10] As will be seen later, this variance is of significance in admiralty.

Unlike wrongful death statutes, survival actions have not received much attention in admiralty.[11] As was seen supra, nineteenth century decisions held that the general maritime law did not recognize survival actions. Federal enactments and state statutes have filled the void.[12] Federal statutes are of limited application. The only class

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[6]Id. at 405-409.

[7]For a discussion of survival and wrongful death see W. Prosser, HANDBOOK OF THE LAW OF TORTS 898, 903 (4th Ed. 1971) [hereinafter cited as PROSSER].

[8]Id. at 903. See also In re Cambria S.S. Co., 353 F. Supp. 691 (N.D. Ohio 1973); Futch v. Midland Enterprises, Inc., 344 F. Supp. 324 (M.D. La. 1972); In re Farrell Lines, Inc., 339 F. Supp. 91 (E.D. La. 1971).

[9]See Dennis v. Central Gulf S.S. Corp., 453 F.2d 137 (5th Cir. 1972), where items of damage under discussion were pain and suffering--traditional survival claims. The court in a somewhat confused opinion awarded damages for these items under a "wrongful death" remedy. For a case pointing out the distinction between survival and wrongful death see Gaudet v. Sea Land Services, Inc., 463 F.2d 1331, 1332 (5th Cir. 1972).

[10]PROSSER, supra note 7 at 114. Application, supra note 3 at 552.

[11]Application, supra note 3 at 535.

[12]See notes 2-4 supra, and authorities there cited.

of plaintiffs who may maintain a survival action under federal law are survivors of seamen who could have maintained an action against their employer for negligent injury at sea.[13] State survival statutes are operable when non-seamen are injured on the high seas (and one of the parties is a resident of a state with a survival statute) or when the injury occurs within the territorial waters of a state with a survival statute, and the injured party or the defendant dies before an action can be brought. Given the supremacy of federal law with its underlying premise of uniformity, various reasons have been advanced for application of state statutes. The most prevalent view is that use of state statutes in this area is not prejudicial to general maritime law and does not destroy its basic uniformity.[14] The state law merely fills a void in the maritime law and Congress has expressed no intent to preclude the use of state law. A second and less frequently argued basis for application of state law is that each state has a peculiar interest in a matter which is local in character. Where a maritime tort has been committed within its territory, or one of the parties is a domiciliary of the state and subject to the regulatory provisions of its legislature,[15] the state has an important interest in the resolution of the dispute. A third reason is that advanced by Justice Holmes in The Hamilton. The saving clause in the Judiciary Act of 1789 preserved not only state common law, but also state statutes.[16] Each of these theories is subject to criticism.[17] An unstated but perhaps overriding justification for giving state survival statutes effect in maritime tort situations is that presented with a choice between imposing liability on a tortfeasor or denying recovery to the estate of an injured victim (merely because the injured party died between the injury and the lawsuit) a court will select the former. If either plaintiff or defendant must receive a windfall, recovery by plaintiff is preferred. This policy was enunciated in Moragne: "where death is caused by breach of a duty imposed by federal maritime law, Congress has established a policy favoring recovery in the absence of a legislative direction to except a particular class of cases."[18]

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[13]Though enacted to fill a void in maritime law, the Jones Act and the Death on the High Seas Act are of limited value. The Death on the High Seas Act contains no survival provision at all. M. NORRIS, THE LAW OF SEAMEN (1970) discussing 46 U.S.C. § 762 Death of Litigant Pending Action. The Jones Act only applies to actions where a seaman has been injured by his employer's negligence and fails to allow an action based on unseaworthiness. In addition, the survival provision in the Jones Act is the FELA provision (incorporated by reference). This provision 45 U.S.C. § 59 (1970) provides only a limited list of beneficiaries--in fact the survival action does not accrue to the estate. Therefore the only case in which a survival action may be maintained in federal law is that of a seaman's survivors who sue his employer for negligent injury--a case which is a survival action in name only.

[14]Just, supra note 3 at 392 (uniformity is only required where "essential features of federal jurisdiction are threatened" and torts are not essential features of general maritime jurisdiction). See also Dugas, supra note 4 at 1391.

[15]Western Fuel Co., supra note 4 at 242.

[16]The Hamilton, supra note 4 at 403.

[17]See, e.g., D. ROBERTSON, ADMIRALTY AND FEDERALISM 240 (1970) (criticising uniformity approach and Holmes' argument); Application, supra note 3 at 540-41 (criticising uniformity and local interest arguments).

[18]Moragne, supra note 5 at 393.

When faced with a maritime tort case in which one of the parties has died, a review of the range of applicable laws is indicated to find which ones may properly be exercised. If state statutes are concerned, the court may be faced with a variety of survival statutes. Unlike wrongful death actions, there is a notable disagreement among states over granting of this right of action. Some states allow survival actions only for injury to tangible personal property and most allow survival for non-personal injury such as deceit, but only half allow personal injury to survive the death of either party. In a small number of jurisdictions only actions actually pending at the time of death survive. If survival is given to either party it is usually allowed to the other, but this is not always true.[19] To apply federal law, the court must decide if application of the Jones Act is called for by the fact situation. Here, the most severe limitation is the narrow class of persons who may prevail, for this statute applies only to seamen. The Death on the High Seas Act fails to extend survival rights to any litigants. In addition, the scope of the survival right granted by the Jones Act is not a traditional survival action.[20] A third possibility to which a court may refer is that of state common law survival actions. These rights arise in only four jurisdictions.[21] The justification for exercise of state survival statutes[22] should apply equally to use of state common law of survival claims. A fourth source of law is federal common law (or the general maritime law) as provided in the Constitution and case law.[23] Before Moragne it was generally assumed that the general maritime law did not recognize a survival action, but since that decision, in which the scope of admiralty was extended to wrongful death actions, a tribunal must consider if the general maritime law has now been extended to grant a like survival recovery.[24] A final choice available to the court in some cases is foreign law. Numerous cases have held that in certain fact situations (such as a collision where both ships fly the flag of the same nation) the tribunal will apply the law of that nation which more closely governed the conduct of the parties.[25] Generally, most foreign jurisdictions

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[19]PROSSER, supra note 7 at 900-901.

[20]See note 13, supra. The power of Congress to formulate admiralty policy through statute stems from The Daniel Ball, 77 U.S. (10 Wall.) 557 (1870). The grant of power to Congress to regulate interstate commerce would seem to require this result.

[21]PROSSER, supra note 7 at 900.

[22]See notes 14-16, supra for the basis of state law in admiralty and authorities there cited.

[23]See note 1 supra. For cases purporting to use maritime common law; see, e.g., Moragne, supra note 5; Dennis, supra note 9; Spiller v. Thomas M. Lowe, Jr. & Assoc., Inc., 466 F.2d 903 (8th Cir. 1972); Marsh v. Buckeye S.S. Co., 330 F. Supp. 972 (N.D. Ohio 1971).

[24]Spiller and Marsh, supra note 23, both advocate recognition of a general maritime law survival action. (See discussions infra of the policy advocating this and application of Moragne reasoning to this right of action). Spiller and Marsh state that uniformity principles applied to the right of survival actions would require that admiralty recognize this claim.

[25]For cases which have applied foreign law in U.S. tribunals, see, e.g., Lauritzen v. Larsen, 345 U.S. 571 (1952); La Bourgogne, 210 U.S. 95 (1908); Admur v. Zim Israel Navigation Co., 310 F. Supp. 1033 (S.D. N.Y. 1969). But see Hellenic Lines, Ltd. v. Rhoditis, 398 U.S. 306 (1970) (sufficient U.S. contacts to apply the law of the forum).

recognize survival of actions[26] (in contrast to United States admiralty law) and if a plaintiff is able to achieve use of foreign law he will be able to maintain a survival action.[27]

Once the court scans the range of applicable laws and finds that more than one is workable, it may be presented with a fantastically complex choice of law problem. Generally the court will employ the law of the forum, the law of plaintiff's domicile, the law of the place of the tort, the law of the vessel (law of the flag or the defendant's domicile or principal place of business) or the law concerning the employment contract (the place where the contract was signed, or the law stipulated to be applied in the contract, which in most fact situations, if there is no adhesion, will be applied by the court considering the fact situation as another contact element).[28] A few common principles are illustrated by choice of law cases in maritime torts. In general, the law of the flag governs torts aboard ships on the high seas (while the law of the state or nation in which the act takes place, governs torts aboard ships within territorial waters).[29] In collision cases, the law of the forum will govern a tort when vessels of different nations collide, but if the vessels are both from the same nation, the law of that nation will govern. (Again if the collision occurs within the territorial waters of a state, local law applies.)[30] In cases of federal-state law conflicts federal maritime law is supreme and will override a state statute.[31] In a choice between two competing state laws, the court will balance competing contacts.[32] When resolving any conflicts problem in the maritime area, the overriding concern is the balance of significant contacts test.

> Maritime law has attempted to...resolve conflicts of competing laws by ascertaining and valuing points of contact between the transaction and the states or

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[26]A. TUMAC, INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, Chap. 9 Personal Injury and Death 76 (1970) (the only modern jurisdictions which do not allow survival which could be found were Bahama and Dominica, apart from various states of the U.S.).

[27]In terms of foreign law, it could be argued that the Constitutional grant of authority meant to apply international customary law rather than English common law. In fact some early court decisions spoke in terms of international law rather than state common law in measuring the scope of the general maritime law principles: See, e.g., The Harrisburg, supra note 2; The Buenos Aires, 5 F.2d 425, 436 (2d Cir. 1924) (right is so common among leading maritime powers that it is considered a part of the general maritime law); The President Wilson, 30 F.2d 466 (D. Mass. 1929) (since the laws of most other nations allow recovery there is no good reason for not recognizing it as general maritime law).

[28]See, e.g., Lauritzen, supra note 25; Hellenic Lines, supra note 25; Application, supra note 3 at 543.

[29]See generally, 15 C.J.S. § 12(2) Conflict of Laws; Lauritzen, supra note 25 at 584-86; Application, supra note 3 at 543. See also, Rundell v. La Compagnie General Transatlantic, 100 F. 655 (7th Cir. 1900).

[30]Id. See also, The Belgenland, 114 U.S. 355, 362 (1885).

[31]Lindgren v. United States, 281 U.S. 38 (1930); Chelentis v. Luckenbach S.S. Co., 247 U.S. 372 (1918).

[32]Application, supra note 3 at 544.

> governments involved. The criteria appear to be arrived at from weighing of the significance of one or more connecting factors between the shipping transaction regulated and the national interest served by the assertion of authority.[33]

According to one noted authority, the proper choice of law should afford: (1) Predictability of result. (2) Regard for international and interstate order. (3) Simplicity of application. (4) Uniformity of results, and advancement of governmental interests. (5) Application of the better rule of law.[34] Confronted with a survival action for a maritime tort, a United States court must do the best it can to achieve equitable and proper results. The nature of the problem and the great variation in applicable survival statutes may make this nearly impossible.

In addition to inherent complexity, employment of present survival principles may produce illogical and irrational results. The paradoxes may be illustrated by two simple fact situations: (1) State A provides for survival of actions while neighboring State B does not. Plaintiff's decedent was injured two miles off the coast. If decedent was injured off the coast of State A plaintiff may recover, if injured off the coast of State B he may not. (Assuming that decedent was not a seaman and was injured by tortious conduct). (2) Seaman and Passenger are both injured when the ship they are aboard sinks five miles off the U.S. coast. Both are rescued and die from other causes before a tort claim can be brought. The ship was registered in State B, where defendant corporation does most of its business. Here seaman's survivors may recover under the Jones Act, but passenger's survivors cannot recover unless the law of the forum or the law of plaintiff's domicile provide for survival actions. Not only is there lack of uniformity, among state laws, but there is no rational basis for the variance in these and other fact situations. There is no reason why a plaintiff should recover if he was injured off one state and not recover if injured in the territorial waters of a neighboring state. There is no basis for distinguishing between seamen and passengers who are injured due to tortious activity on a ship yet these results flow from the uneven treatment accorded survival actions by the combination of federal and state statutory law used at present. Since the Moragne decision has declared that general maritime law will recognize a right of action for wrongful death, the question may be posed, should the general maritime law recognize a survival claim, as it now recognizes a wrongful death action, in an attempt to provide some uniformity and simplify use of admiralty law?

Basic policies behind any tort recovery are those of compensating injured victims and providing a deterrent to wrongful conduct of tortfeasors.[35] The policy for giving a wrongful death recovery to dependents of injured persons is rather strong since both elements are present: compensation for dependents and deterrence to tortfeasors. However, the policy

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[33]Lauritzen, supra note 25 at 582; Hellenic Lines, supra note 25 at 308-09; Rankin v. Atlantic Maritime Co., 117 F. Supp. 253 (S.D. N.Y. 1953).
[34]R. LEFLAR, AMERICAN CONFLICTS LAW 245 (1968).
[35]PROSSER, supra note 7, Chapter I.

in favor of survival actions is somewhat less persuasive.[36] When the deceased's estate is plaintiff in a survival action, recovery is allowed for decedent's loss--not plaintiff's actual loss. Thus even though there is wrongful conduct on the part of defendant, it may be hard to show actual damage to the plaintiff. The trier of fact must choose to grant a windfall to plaintiffs (awarding a recovery where there is no demonstrable loss) or provide a windfall to defendant (allowing him to escape payment of damages, when he would have been liable had deceased lived.)[37] The reverse situation, where defendant dies before an action can be brought, presents stronger policy arguments in favor of allowing a survival recovery against the estate of the defendant. Here plaintiff has provable injuries and there will be no windfall to him by restoring him to his former position. In addition, if survival is not allowed, there will be a windfall to defendant's beneficiaries in the form of an increased inheritance over what would have accrued to them had judgement been rendered before decedent's death. It is most likely this latter situation which has tipped the balance in favor of allowing a survival action in jurisdictions which grant it and has persuaded the advocates of the extension of survival actions.[38]

There are other arguments for and against granting survival remedies. Smaller ship owners argue that they are in a competitive industry where foreign governments subsidize competition. To hold them liable across the board, even where the victim of the tort has died (especially where the tort was unintentional) would place them at a competitive disadvantage. The counter-argument is that an activity should pay the price for any toll it takes on human beings and if a given concern cannot afford the consequences of its acts, it should not be permitted to remain in business at the cost of its human assets, absent legislative direction to the contrary. In addition, it must be recognized that an overwhelming majority of foreign jurisdictions provide for survival of actions. This is evidence of the strong policy in favor of allowing the action. In fact, the practice of allowing survival actions is so widespread, it could be argued, that it may be a denial of justice for a nation to deny such an action to an alien's executor who brings a survival claim in a United States court.[39]

The Moragne decision used six principal arguments to overrule existing federal maritime law and find that a cause of action for wrongful death was cognizable in admiralty. The court noted that although the ancient doctrine of felony-merger may have provided the basis for non-recognition of wrongful death claims at common law, there was no present basis for denial, since this doctrine has long since been abandoned. The court then noted that there is precedent for applying a different rule in admiralty than was used at common law. Most significantly, the Court found

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[36]Application, supra note 3 at 552.

[37]Id.

[38]See, e.g., PROSSER, supra note 7 at 901; Application, supra note 3 at 553; George & Moore, Wrongful Death and Survival Actions Under the General Maritime Law: Pre-Harrisburg Through Post-Moragne, 4 J. Maritime Law and Commerce 1, 24 (1972) [hereinafter cited as George].

[39]See note 26 supra, (all but two nations other than the United States provide for survival of actions. For a discussion of the duty of a nation to aliens and denial of justice as the basis for an international claim, see W. BISHOP, JR., INTERNATIONAL LAW CASES AND MATERIALS, Chap. 9, State Responsibility and International Claims 742-851 (3d ed. 1971).

wholesale abandonment of the common law illustrated by the existence in every state of a wrongful death statute. Since the common law is subject to change and since statutory developments are evidence of the direction of the change which courts may recognize, the Moragne decision found that admiralty law would recognize the change and that admiralty would grant a wrongful death action, absent any contrary intent expressed by Congress, or compelling reasons of stare decisis for disallowing such a change. The Moragne court proceeded to find that Congress had given no affirmative indication of any intent to preclude judicial allowance of a remedy for wrongful death and found that principles of stare decisis (informed conduct planning, public confidence in stability of court decisions, and judicial economy from freedom of continual relitigation of settled issues) failed to provide a strong countervailing consideration against change in the general maritime law. Finally, the court noted that strong objectives of uniformity would be advanced by granting a general maritime law cause of action for wrongful death.[40] Are these justifications equally applicable to the survival claim?

Some commentators note with little accompanying analysis that Moragne will surely be extended to survival actions since the bases for decision in that case apply equally to survival actions.[41] Since the writers fail to explain their conclusions and since other scholars find that the policy behind survival claims is not as strong as that favoring wrongful death actions[42] a further inquiry into this area is warranted. Survival actions, like wrongful death claims were denied at common law on the basis of the felony-merger rule.[43] The reasoning of the Moragne court, that the common law rule has no modern basis, is as apt in considering survival as it was in analyzing wrongful death. The logic in favor of employing a different rule in admiralty applies equally to wrongful death and survival. The argument that Congress intended to allow operation of state statutes and favors recovery even without a statute extends to both rights.[44] The conclusion that the three tiers of stare decisis--public confidence in the judiciary, conduct planning, and relitigation avoidance--will be undisturbed by the planned change in the general maritime law is as consistent when survival is considered as when wrongful death is viewed. (Perhaps the stare decisis argument is actually weaker here with survival claims since greater diversity in applying state statutes necessarily results in decreased confidence in the judiciary--greater inability to plan conduct--and the continuing need to reconsider the question of survival claims in the general maritime law). Unlike wrongful death, state survival actions have not indicated

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[40]Moragne, supra note 5 at 382-86 (felony-merger discussion), 386-87 (variance of common law and admiralty), 388-90 (every state has abandoned the common law rule by statute), 393 (Congressional intent), 403-04 (stare decisis), 401 (uniformity).

[41]George, supra note 38 at 12; Gorman, Wrongful Death on State Waters; Remedy Under General Maritime Law, 44 Temple L. Q. 292, 308 (1971).

[42]Application, supra note 3 at 553.

[43]PROSSER, supra note 7 at 898.

[44]Although there is some discussion of Congressional intent to limit extension of survival statutes and actions because the Death on the High Seas Act failed to provide a recovery for survival, while such a right was granted to seamen in the Jones Act passed at the same time, the consensus is that the discrepancy is due to mere oversight (see Application, supra note 3 at 537). If Congress had intended not to allow survival actions it would have prevented the courts from applying state statutes in the fifty-year interval since the passage of the Jones and Death Acts.

a wholesale abandonment of the common law rule, although a trend in this direction has been indicated.[45] In this respect the Moragne wrongful death decision does not parallel survival claims. Perhaps more important, however, is the total absence of uniformity among state survival statutes, as compared to wrongful death statutes (of which each state has one). Although the diversity indicates no wholesale abandonment of the common law rule, it does indicate a lack of uniformity. If the main purpose of the maritime grant of authority by the Constitution is to promote harmony and uniformity in admiralty law, and if the Moragne decision is an indication of a renewed desire by the federal courts to effectuate this purpose,[46] then it would be logical to continue its development by granting a general maritime right of action to survivors of maritime tort victims, regardless of the provisions of federal or state statutes.[47] In short, most of the arguments in favor of granting survival in admiralty flow from the Supreme Court's recent decision to allow wrongful death claims as part of the federal common law.

Therefore it has been shown that wrongful death actions derive from the same source and are capable of similar analysis as survival claims. While wrongful death actions are distinguishable from survival actions, the fact that general maritime law has provided a claim for wrongful death and has not yet afforded a survival action is somewhat paradoxical. The present state of survival of maritime torts is confused and nearly devoid of uniformity. This situation has been enhanced rather than aided by the Moragne decision. Some courts have reasoned that since survival is a remedy (not a right) and that Moragne implied that only statutes will be the basis for developing the general maritime law remedy--that the only survival which will be allowed is that found in federal statutes. Other courts have continued to apply both state and federal statutes in the previous hodge-podge manner. Still others have concluded that because of the liberal remedy language in Moragne, survival actions can be extended into the general admiralty law. The complex choice of law problem remains, and the illogical results continue. The theoretical justification for applying state statutes remains rather weak (except for the fact that they may provide the only basis for recovery which is truly valid at this point) and arguments for affording such an action in admiralty on policy grounds carry significant weight. The reasoning used by the Moragne decision is, in most respects, equally applicable (perhaps more applicable) to survival than to wrongful death. Uniformity and fairness should compel a definitive reconsideration of the admiralty law of survival at this point.[48] Even if the Supreme Court rejects the cause of action after analysis, a close look at the problem seems to be in order, especially since the intervening decisions since the Moragne case have been unable to resolve the question of application of the general maritime law to survival of actions in maritime torts.

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[45]PROSSER, supra note 7 at 900 (only half of the states give survival).

[46]Note, General Maritime Law Finally Accorded Remedy for Wrongful Death in State Territorial Waters, 24 Ark. L. Rev. 526 (1971); Ramp, The Broadening Scope of Damages Awardable for Wrongful Death in Admiralty, 6 Vand. J. Trans. L. 224, 240 (1972) [hereinafter cited as The Broadening Scope].

[47]For a few cases which have already so held see, Spiller, supra note 23, Dennis supra note 9, and Marsh, supra note 23.

[48]See, e.g., Application, supra note 3 at 553; The Broadening Scope, supra note 46 at 240; Wrongful Death, Moragne v. States Marine Lines, Inc., 12 Wm. & Mary L. Rev. 432 (1970).

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