THE HAWAIIAN ARCHIPELAGO

Defining the Boundaries of the State

Robert G. Schmitt
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WORKING PAPER NO. 16

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SEA GRANT COLLEGE PROGRAM

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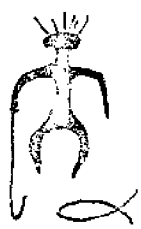

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TABLE OF CONTENTS

INTRODUCTION

During the summer of 1972, the University of Hawaii Sea Grant Program began research into the development of a legal regime for the ordered development and conservation of the resources of the Hawaiian Archipelago. The chain of Hawaiian Islands is an integrated geophysical and biophysical configuration with most of its biological and mineral resources in international waters, as currently defined by the 1958 Convention on the Law of the Sea and as further limited by the jurisdictional claims of the United States.

The uncontrolled exploitation or interference with the ocean resources of the Hawaiian Archipelago which are currently in international waters will threaten that portion of the resources within the jurisdiction of the state of Hawaii and may endanger the environment and economy of the state.

The territory of the state stretches virtually the full length of an archipelago extending nearly 1500 miles from the "Big Island" of Hawaii to the northernmost Kure Island. The islands are volcanic seamounts along the back of the raised Hawaiian Archipelago. The youngest volcanoes are in the southern portion of the chain with Kilauea on the island of Hawaii still active. Subsidence has caused the northern seamounts to sink so that many, such as the French Frigate Shoals, are completely submerged. Consequently, quite identical pieces of the geophysical mass are either part of the land mass of the United States, part of the "continental shelf" of the United States, or part of the international seabed, the jurisdiction dependent solely on the location of an arbitrary water boundary line.

The distribution of both living and mineral resources throughout this chain is the result of or dependent upon the geophysical events and structure of the entire Hawaiian Archipelago. Some examples of resources under development illustrate the potential problems of a future jurisdictional dispute.

Precious coral is a resource that has been actively developed and researched in the past 15 years. The "angels breath" pink coral, which is of a particularly valued quality and color, is found throughout the island chain at depths of 300 to 400 meters. The current world market for coral jewelry, primarily necklaces and brooches, is $10 million per year. However, the market potential has not yet been fully developed and there is good reason to believe that coral jewelry will increase in popularity.

It takes from 60 to 75 years for a coral fan to grow to harvestable size. Previous harvesting techniques, most notably dredging, have been both crude and destructive. With the use of small, manned submersible vehicles, selective harvesting is now possible. Since precious coral grows throughout the Hawaiian chain, a Hawaiian producer will be faced with competition between his more costly conservation-oriented harvesting technique and other nations' destructive harvesting from reefs in international waters. Such destructive harvesting has already taken place with its consequential harmful effects on the precious coral market.

As the precious coral market increases in size, pressure will exist for placing the entire Hawaiian resource under one jurisdiction for purposes of conservation and exploitation. That strong pressure will be to make this jurisdiction that of the state of Hawaii, or minimally, that of the United States.

Manganese deposits in the Hawaiian Islands are a second possible resource needing a single manager. In contrast with the manganese nodules in the broad areas of the Pacific, manganese deposits in the vicinity of the islands are more frequently in the form of a thick pavement or crust. Of greater significance is that, due to some not as yet understood volcanic interaction, the chemical composition may be different from that of the broad ocean nodule. Samples have indicated that the crust has a higher percentage of cobalt, platinum, and other rare, valuable elements than do the broad ocean nodules. The crusts are located in such water depths and distances from the Hawaiian Islands so as to now be considered as international waters. Studies of the economics associated with processing of the crusts or nodules indicate advantages of processing at or near the source of mining. Hawaii is therefore in a geographically advantageous position to benefit from a mining operation. However, also inherent in either the mining or processing operations is the possibility of ocean pollution. A strong case then exists for placing the management of this resource which is peculiar to the geology of the Hawaiian chain under a single, preferably state, jurisdiction.

Other living resources of the Hawaiian Islands have a closely linked interaction with the entire Archipelago: the green sea turtle which spawns in the vicinity of French Frigate Shoals and migrates to Kauai, the dolphin which adjusts its life habits to the lee shores of islands and reefs, and the reef fishes--opakapaka, ulua, and aweoweo--which interact with neighboring reefs in a way not yet understood. The control of the *Acanthaster* starfish, the preservation of coral communities, and the harvest of opihi shellfish all have economic, ecologic, sociologic, and political dependencies which are unique and entire to the Hawaiian Archipelago. Single jurisdiction for the management of these resources is inevitable and this report suggests that jurisdiction should be vested in the state of Hawaii.

Under the direction of John P. Craven, Dean of Marine Programs, University of Hawaii and Marine Affairs Coordinator, State of Hawaii; V. Carl Bloede, Contracts Officer, University of Hawaii; and George M. Sheets, Chief Investigator, this project examines the historic and legal precedent which is relevant to Hawaii's claim as an archipelagic state. Further, the policy considerations of both the state of Hawaii and the federal government which conflict over this claim are examined. Finally the implications for various levels of government--state, federal, and international--if such a claim for archipelagic status is accepted--are predicted.

The research and preparation of the project were initiated by four research assistants: Linda K.C. Luke, Georgetown University Law Center; Edwina Yee, University of Hawaii; Robert E. Strand, University of Virginia Law School; and Carter Kerns, Yale University. Editing and

updating were done in 1974-1975 by Robert G. Schmitt, University of Hawaii School of Law. Funding for the project was made available by the Sea Grant Program of the National Oceanic and Atmospheric Administration, Department of Commerce under Grant No. 04-3-158-29.

EXPANDING THE BOUNDARIES

I. OCEAN CLAIM THEORIES

A. Alternative Methods

Claims by sovereign states to ocean territory and resources have traditionally been based on two criteria:

1. A measurement from the sea coast or baseline following the coast of the state seaward some specified distance to form a boundary line at sea which follows the relative contours of the coast.

2. A measurement or reference to the ocean bottom using a depth contour (isobar) or some geological feature that typically indicates the sea bottom is a natural extension of the state's land mass.

The first theory describes the territorial sea, a concept that is recognized by every nation of the world with access to the sea and has been codified in international law by the Convention on the Territorial Sea and the Contiguous Zone. This was ratified by 61 nations in 1958 and put into effect in 1964. It says in part:

> Article 1 - 1. The sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea....
>
> Article 2 - The sovereignty of a State extends to the air space over the territorial sea as well as to its bed and subsoil.[1]

The Convention also provides for a contiguous zone, not to exceed 12 miles, for the purpose of the enforcement of customs, etc.[2]

The Convention has left many problems as yet unsettled and the result has been that in the time between 1960 and 1972 an increasing number of nations have extended their claims over the territorial sea from the original distance of 3 miles to 12 miles and beyond. This has resulted in an increase of 33 percent in numbers of nations claiming a 12-mile or greater territorial sea since the Convention.[3]

In addition to the territorial sea, a zone of complete sovereignty, there have been additional claims to zones of various widths of less than complete sovereignty - for example, the "patrimonial sea" or "economic resource zone." These are typical zones in which a state asserts competence over the resources of the water column or seabed. The zones have also been called functional control zones since their purpose is the exercise of a major function such as exclusive fishing, fisheries conservation, or pollution control. The zones have also been delimited by some distance measurement from the seacoast and a number of nations have asserted jurisdiction for various purposes in these zones for distances up to 200 miles from their coasts.[4]

A more complete description of the territorial sea and a functional zone, exclusive fishing, may be seen in Table 1.

The second basic delimiting theory for claiming jurisdiction in the sea is the reference to some feature of the ocean bottom. The initial proponent of this theory was the United States which, in the Truman Proclamation of 1945, established the theory of the continental shelf, an extension of the North American continent.[5] The theory has found favor in the international community; the 1958 Geneva Convention on the Continental Shelf enunciates similar principles.[6] A characteristic which distinguishes the claim theories based on distance from those based on bottom profile was originally the purpose of the claim. The territorial sea is concerned with state security; the continental shelf theories are concerned with resources:

> [H]aving concern for the urgency of conserving and prudently utilizing its natural resources, the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control....[7] (Truman Proclamation)

and from the Convention on the Continental Shelf:

> Article 2 - 1. The coastal state exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.[8]

Both of these claim theories are discussed in greater detail in section V.

But it is important to note that of the 148 nations which took part in the 1974 Caracas Conference on the Law of the Sea, only 27 can be termed "island" nations. Additionally, the principles of both a distance-measurement theory or a sea-bottom reference theory have been the product of nations who would benefit the most in view of extensive coastlines or well-defined continental shelves, e.g., the United States. Either theory is then, by design, not ideally suited to an island nation. For a multi-island nation seeking secure "borders," a territorial sea measured around each island could easily leave gaps from a total border viewpoint. The continental shelf claim theories find little favor for mid-oceanic island nations, since a "continental" shelf is a semantic impossibility.[9]

Island nations have then developed in recent years a third concept of ocean claim--the archipelagic claim theory.

TABLE 1. BREADTH OF TERRITORIAL SEAS AND OTHER JURISDICTIONS CLAIMED BY SELECTED COUNTRIES

Country	Territorial sea (miles)	Fishing Limit (miles)*	Jurisdictions
Albania	12	12	
Algeria	12		
Argentina	200	200	Sovereignty is claimed over a 200-mile maritime zone but the law specifically provides that freedom of navigation of ships and aircraft in the zone is unaffected. Foreign vessels licensed 12-200 nautical miles (nm).
Australia	3	12	
Bahamas	3	3	
Belgium	3	12	
Brazil	200	200	
Bulgaria	12	12	
Burma	12	12	
Cambodia	12	12	Continental shelf claimed to 50 m, including sovereignty over superjacent waters.
Cameroon	18		Fishing zone to be fixed by decree
Canada	12	12	
Chile	50†	200††	
China	12	12	
China (Taiwan), Rep. of	3	3	12 fishing zone "in practice"
Colombia	12	12	
Congo	12	12	Unconfirmed report 15 nm claimed
Costa Rica	12		"Patrimonial Sea" of 200 nm for conservation of living resources
Cuba	3	3	
Cyprus	12	12	
Dahomey	12	12	100-mile mineral exploitation limit
Denmark	3	12	
Dominican Republic	6	12	Conservation of other natural resources
Ecuador	200	200	
El Salvador	200	200	
Ethiopia	12	12	
Fiji	3	3	Claims waters within archipelago as territorial waters, innocent passage unrestricted
Finland	4	4	
France	12	12	

*Fishing boundary not mentioned where country has not made special claim
†200 mile maritime zone
††200 mile protection and control zone

Country	Territorial sea (miles)	Fishing Limit (miles)	Jurisdictions
New Zealand	3	12	
Nicaragua	3	200	Continental Shelf including sovereignty over superjacent waters
Nigeria	30	30	
Norway	4	12	
Pakistan	12	50	
Panama	200	200	Continental Shelf including sovereignty over superjacent waters
Peru	200	200	
Philippines	3		Archipelago concept baselines. Waters between these baselines and the limits described in the Treaty of Paris, December 10, 1898, the United States-Spain Treaty of November 7, 1900, and United States-United Kingdom Treaty of January 2, 1930, are claimed as territorial sea.
Poland	6	12	
Portugal		12	6 nm territorial sea presumed
Romania	12	12	
Saudi Arabia	12		
Senegal	12	110	Beyond 12 nm sea
Sierra Leone	200		
Singapore	3	3	
Somali Republic	200	12	
South Africa	6	12	
Spain	6	12	
Sri Lanka	12		
Sudan	12		
Sweden	4	12	
Syria	12	12	Contiguous zone--an additional 6-mile area to control security, customs, hygiene, and financial matters
Tanzania	50	12	
Thailand	12	12	
Togo	12	12	
Tonga			Rectangular "picture frame" ocean jurisdiction
Trinidad and Tobago	12	12	
Tunisia	12	12	50-m isobath (maximum)
Turkey	6/12	12	
U.S.S.R.	12	12	
United Arab Republic	12	12	
United Kingdom	3	6	
United States	3	12	
Uruguay	200	200	Freedom of navigation of ships and aircraft beyond 12 miles is

Country	Territorial sea (miles)	Fishing Limit (miles)	Jurisdictions
Gabon	100	30	
Gambia	50	18	
German Demo. Republic	3	3	
Germany, Fed. Rep. of	3	12	
Ghana	30	12	Undefined protective areas may be proclaimed seaward of territorial sea, and up to 100 miles seaward of territorial sea may be proclaimed fishing conservation zone.
Greece	6		
Guatemala	12		
Guinea	130	12	
Guyana	3		
Haiti	12	15	
Honduras	12		
Iceland	4	50	
India	12	18	Plus right to establish 100 miles conservation zone
Indonesia	12	12	Archipelago concept baselines
Iran	12	50	
Iraq	12		
Ireland	3	12	
Israel	6	6	
Italy	6	12	
Ivory Coast	6	12	
Jamaica	12	12	
Japan	3	3	
Jordan	3	3	
Kenya	12	12	
Korea, N.	12		
Korea, Republic of	20	200	Geographic limits for state control "not to interfere with ... free navigation"
Kuwait	12	12	
Lebanon		6	
Liberia	12		
Libya	12	12	
Madagascar	50	12	
Malaysia	12	12	
Maldives	3-55	100	Rectangular boundaries
Malta	6	12	
Mauritania	30	12	
Mauritius	12		
Mexico	12		
Morocco	12	70	Exception--12-70 mile fishing zone for Strait of Gibraltar by special arrangement
Nauru	12	12	
Netherlands	3	12	

Country	Territorial sea (miles)	Fishing Limit (miles)	Jurisdictions
			unaffected by the claim. Licensing required for fishing between 12-200 nm.
Venezuela	12	12	
Vietnam, N.	12	20km	
Vietnam, Republic of	3	50	
Western Samoa	3		
Yugoslavia	10	10	

B. Footnotes

1. Convention on the Territorial Sea and the Contiguous Zone, Geneva, April 29, 1958, Article 24, reprinted in Lay, Churchill, Nordquist, *New Directions in the Law of the Sea, Volume I* (1973) p. 8. (Hereinafter referred to as *Law of the Sea - I.*)

2. *Ibid.*

3. E.D. Brown, "Maritime Zones: A survey of Claims," *New Directions in the Law of the Sea, Volume III* (1973) p. 176.

4. See generally section V; *Ibid.*, p. 162; Andres Aguilar, "The Patrimonial Sea," from *Proceedings of the Seventh Annual Conference of the Law of the Sea Institute* - 1972.

5. Presidential Proclamation No. 2667 on the "Policy of the United States with Respect to the Natural Resources of the Subsoil and Seabed of the Continental Shelf" (hereinafter referred to as *The Truman Proclamation*), September 28, 1945, reprinted in *Law of the Sea - I*, p. 106.

6. Convention on the Continental Shelf, Geneva, April 29, 1958, reprinted in *Law of the Sea - I*, p. 101.

7. *The Truman Proclamation*, p. 106.

8. Convention on the Continental Shelf, Geneva, April 29, 1958, reprinted in *Law of the Sea - I*, p. 101.

9. Although there is no geological continental shelf for the Hawaiian Islands, concurrent with statehood, the provisions of the Outer Continental Shelf Lands Act were statutorily applied to the State of Hawaii (*XXXXXXXXXX*). For the Outer Continental Shelf Lands Act, see generally 43 USCA 1331-1343. The Act was made applicable to Hawaii in 48 USCA prec. §491 note.

II. TREATIES AND INTERNATIONAL ORGANIZATIONS--SETTING PRECEDENT FOR AN ENLARGED SEA JURISDICTION

Subsequent sections will deal with nations acting unilaterally to claim a larger oceanic jurisdiction. This section will examine some cooperative actions of two or more states acting together to established extended jurisdiction over oceanic resources. Quite obviously, there is an abundance of bi- and multilateral treaties for a variety of maritime purposes--fishing rights, fisheries conservations, shipping regulations, and continental shelf delimitations being just a few--but literally covering all possible uses of the oceans. Also of recent prominence has been United Nations activity in Caracas in the summer of 1974 to attempt the extension of international law over the heretofore *mare liberum*.

More particularly, this section will deal with two narrower topics that have, or soon will have, a direct effect on the resources of the Hawaiian Archipelago. These two narrower, multi-national agreements are:

1. Fisheries--as managed by treaties executed between the United States and Japan and the United States and Brazil.

2. Manganese resources--management theories that have been developed in the United Nations Seabed Committee.

A. Fisheries Agreements

Since the nominal policy of the United States towards the oceans is dominated by the theme of "freedom of the seas," the treaties of the United States that have dealt with fisheries, on first appearance, agree with this policy and purport to only control fisheries within the 12-mile contiguous zone. Typical of this type of treaty would be an agreement between the United States and Japan to limit certain types of fishing in specific areas of the "West Coast" of the United States.[1]

Included in this agreement is the tuna of Hawaii caught within 12 miles of the islands. Outside the 12-mile contiguous zone is, of course, international waters. It is the fact that this agreement limits itself to certain *species* that is more significant than the distance limit or breadth of the fishing zone.

A unique treaty which illuminates the issue of the *scope* of a fishing zone is an agreement between the United States and Brazil to limit shrimp fishing.[2] Since Brazil claims a 200-mile territorial sea (see section V), the agreement is nearly a *de facto* recognition by the United States of this claim, although the language of the treaty explicitly attempts to avoid this recognition:

> *Note also* the position of the Government of the United States of America that it does not consider itself obligated under

> international law to recognize territorial sea claims of more than 3 nautical miles nor fisheries jurisdiction of more than 12 nautical miles....[3]

The treaty further states that it was to be an "interim solution" to the problem of resolving the claim differences of Brazil and the United States, pending an "international solution."[4] The treaty also provides for the payment of $200,000 annually for the license to fish in the waters claimed by Brazil and a payment of $100.00 per vessel per day when such vessels are found to be violating the fishing regulation of the treaty.[5]

The avowed policy of the United States most recently has been to concentrate on a theory of *species* management, since this theory avoids the thorny problem of reconciling the desires of the long-distance fishermen with the more important U.S. policy of preserving freedom of the high seas. This theory has been refined in the past few years in order to match the corresponding international sentiment that favored an exclusive economic zone. In other words, the United States policy could clearly reconcile itself to "the best of both worlds":

> Overall three-quarters of the worlds marine fish catch is composed of coastal and anadromous species. Effective management and conservation of these species may be provided by granting coastal States clear and effective control over all such species, in the context of protecting other uses of the high seas.... The control exercised by the coastal States would follow such stocks as far offshore as the stock ranges. The coastal State would reserve to itself that portion of the allowable catch that it could utilize.... The extent to which the coastal State preference should diminish traditional distant water fisheries - or vice versa - would be dealt with under a reasonable compromise provision in the treaty....[6]

The Brazilian Shrimp Agreement has thus been seen by some commentators as "a concrete application of the American approach."[7] This same approach--concentrating on species management--was also used in two other agreements executed with the Japanese government concerned with fishery resources of the Alaskan coast,[8] but there again a distinguishing twist in the agreement on salmon, an anadromous fish, in that a combination of the EEZ concept and a species approach allows total control of this fish which uniquely has the sedetary characteristics of a coastal fish at times and the migratory or wide-ranging characteristics of pelagic species such as tuna. The conclusion that can be drawn is that the United States is ready with a theory or group of theories that will protect a particular *resource* for American fishermen.

There is additionally a trend towards international regulation of fisheries to replace, in some manner, the multitude of bi- and multilateral agreements that currently are prevalent international practices. Since the net effect of the current agreement is to divide up fisheries

among "traditional" fishing nations, nations which are not "traditional" fishers have agitated for the right to move in these potentially "closed" areas. A prediction of this trend has been made:

> The exclusive jurisdiction of coastal states over fishing will extend farther than it has, perhaps in an exclusive economic zone; but such a zone will not be as wide as a mining zone might be. The jurisdiction of coastal States to impose conservation measures may extend farther than its exclusive right to fish. Beyond national jurisdiction, freedom to fish will apparently continue, subject to group arrangements governing particular species. In a long time, perhaps, the concept of the common heritage might extend also to fish but that direction is not now apparent.[9]

Therefore the actions of the United States and other nations are entirely consistent with this prediction and the overwhelming characteristic of these treaties and agreements has been *extended jurisdiction over resources* by one manner or another. This then is another link to the "resource oriented" justification that is universally used to strengthen the case for an archipelago.

B. United Nations Seabed Committee

The 1958 and 1960 United Nations Conferences on the Law of the Sea did not deal with the forms of jurisdiction to be exercised over the "deep seabed," the area beyond the continental shelf, and currently a *mare liberum*. It was to be manganese resources and Ambassador Arvid Pardo of Malta who would bring the issue of the seabed to the attention of the United Nations. In 1967, Dr. Pardo requested the following to be included on the agenda of the U.N. General Assembly:

> Declaration and treaty concerning the reservation exclusively for peaceful purposes of the seabed and the ocean floor underlying the seas beyond the limits of present national jurisdiction and the use of their resources in the interests of mankind.[10]

The U.N. responded to this request when Dr. Pardo estimated that the seabed held the potential for developing billions of dollars of income for the U.N. that could be used for aid to developing nations. On December 21, 1968, the U.N. General Assembly established the U.N. Seabed Committee as a regular standing committee. It was instructed to:

> 1. Study the elaboration of legal principles and norms which would promote international cooperation in the exploration and use of the sea-bed and the ocean floor and the subsoil thereof beyond the limits of national jurisdiction and to ensure the exploitation of their resources for the benefit of mankind, and the economic and other requirements which such a regime should satisfy in order to meet the interests of humanity as a whole;

2. Study the ways and means of promoting the exploitation and use of the resources of this area, and of international cooperation to that end, taking into account the foreseeable development of technology and the economic implications of such exploitation and bearing in mind the fact that such exploitation should benefit mankind as a whole;

3. Review the studies carried out in the field of exploration and research in this area and aimed at intensifying international cooperation and stimulating the exchange and widest possible dissemination of scientific knowledge on the subject; and

4. Examine proposed measures of cooperation to be adopted by the international community in order to prevent the marine pollution which may result from the exploration and exploitation of the resources of this area.[11]

The following year the U.N. adopted a Moratorium Resolution, which stated that pending the establishment of an international regime:

(a) States and persons, physical or juridical, are bound to refrain from all activities of exploitation of the resources of the area of the sea-bed and ocean floor, and sub-soil thereof, beyond the limits of national jurisdiction;

(b) no claim to any part of that area or its resources shall be recognized.[12]

This resolution was a further effort by the U.N. to preserve the seabed resources for developing nations by attempting to prevent the more technically advanced nations from gaining a monopolistic position regarding oceanic seabed resources. The United States tacitly agreed with this position as evidenced by a statement by President Nixon on seabed policy (see section VI). A further Declaration of Principles produced by the Seabed Committee in 1970 was very similar to President Nixon's speech and previous U.N. policy, the major theme remaining that the seabed was to be "the common heritage of mankind."[13]

The work of the Seabed Committee still had left many questions unresolved, and these have been summarized as the following issues:

1. Where are the limits of national jurisdiction beyond which an international regime is to apply?

2. What is the legal status of the international area?

3. What type of administrative structure will be created to handle the international regime? What will be its powers and functions?

4. What would the impact be of alternative regimes on the interests of individual countries and groups of countries?[14]

Quite obviously, the question of seabed resources would have an effect on many other previously "settled" law of the sea issues. The 1970 Declaration of Principles was then followed by another General Assembly resolution of the U.N. which declared an intent to convene a future conference on the law of the sea.[15] The Seabed Committee had then become, in effect, a preparatory committee for this future conference. It had also grown in size from the original 33 members of the Ad Hoc Committee to a committee that included nearly 100 nations.[16]

The Seabed Committee work since 1970 thus has more implications for Hawaii than those dealing purely with potential manganese resources; in fact, the committee, through Subcommittee II, accepted draft treaty articles and draft conventions concerned with archipelagic theory limitations. But to discuss generally the work of the Seabed Committee prior to any eventual U.N. conference agreement is to discuss the entire scope of the law of the sea and therefore we will concentrate on this committee's original focus--the legal regime to manage potential manganese resources.

C. Staking Out the Seabed

The waters of the Kauai Channel, where manganese deposits were first surveyed in the Hawaiian Islands, are international beyond the traditional 3-mile limit. And although it is unlikely, a potential Japanese or German manganese nodule miner could set up a dredging operation almost within sight of the island of Kauai and be in accord with international law, save only the U.N. Moratorium Resolution which has questionable force in prohibiting such operations. The seabed still remains open to the first taker in spite of the four years of study, discussion, and negotiation that has taken place both in the United Nations and the U.S. Congress.

The actions of the U.S. Congress, mentioned briefly in section VI, has been in the form of bills in both the House of Representatives and the Senate which would, pending the establishment of an international regime, license out blocks of surface seabed areas, collect license and production royalty fees, hold in trust a percentage of these fees for "developing reciprocating states," and insure participating companies against loss through the actions of an international regime.[17] These bills in the face of the Moratorium Resolution, have caused a great deal of controversy among the developing nations which feel that the United States is ignoring the "common heritage of mankind" principle and will be, through these unilateral acts of legislation, practicing a new form of "colonialism" on the seabed.[18]

The proponents of these bills have defended these charges with a general theory that it is unwise to stop technological development and the adoption of this legislation will act as a spur to the international community to agree on some form of international regulatory body.[19] Whether this in fact has happened to any degree cannot be judged, since the international community has not made significant progress towards

agreement on a regime of oceanic management for seabed resources and a further split on the international regime itself between the policy of the United States and much of the international community is still evident.

Following the oceans policy speech by President Nixon in 1970, the United States submitted to the United Nations a draft proposal which comprehensively formulated a regime to license the use of the seabed.[20] The draft created an international seabed area outside of the 200-meter isobath that would be open to use by all states with revenues used to aid developing nations. The draft further created an International Seabed Resources Authority composed of three bodies that would issue exploration and exploitation licenses.[21] The draft was criticized domestically by those interests, primarily petroleum producers, which felt the United States was giving away potentially huge oil reserves by yielding the seabed outside of the 200-meter isobath.[22] And although the concept of licensing the seabed received support from the United Kingdom, Japan, France and the U.S.S.R.,[23] almost the entire remainder of the international community supports the concept of an international authority that will control all aspects of exploration, technology sharing, exploitations, and revenue distribution.[24] Such authority is, of course, unacceptable to the industrialized developed nations which would be called on for the technology needed and the actual mining operations with little expectation of a share of the revenues.[25]

Although there has been little progress on either domestic legislation or an international regime to manage the seabed, it is clear that it will be an eventuality that will certainly arrive. One factor that might hasten action in both areas is the independent operations of Summa Corporation, a Howard Hughes company that is operating the *Glomar Explorer* in the development and actual mining of manganese nodules in the vicinity of the Hawaiian Archipelago.[26]

These then are at least three different forces that will soon be asserting a claim to manganese seabed resources and this has several implications for any extended jurisdiction claim of Hawaii to oceanic resources. (1) While it is probably true that any independent operator such as Hughes will avoid nearby operations in Hawaiian waters to escape potential notoriety, such operations are not very much unlike fishing in Hawaiian waters by foreign nationals and like fishing, are needful of legal regulation. Under the present statutes and court decisions, Hawaii does not have the jurisdiction to license or regulate these operations. (2) In the event congressional legislation is accepted, the United States would be in a position very similar to that of Peru in its controversy with the U.S. over tuna. Such legislation is, after all, a unilateral claim to extended jurisdiction. (3) Finally, the adoption of an international management regime is predicated on first delimiting the boundary that would separate the coastal state waters from the international area. This brings us full-circle to the issue of extended jurisdiction for Hawaii through an archipelagic concept or exclusive resource zone. This issue again removes itself from a theoretical or academic character and, because of the forces that are arrayed to exploit the resources of the archipelago, demands to be discussed, negotiated, and settled.

D. Footnotes

1. "Agreement concerning Certain Fisheries off the Coast of the United States, with Agreed Minutes," signed at Tokyo, December 11, 1970, in force December 11, 1970.

2. Agreement Between the Government of the Federative Republic of Brazil and the Government of the United States Concerning Shrimp, May 9, 1972.

3. *Ibid.*

4. *Ibid.*

5. *Ibid.*

6. E.D. Brown, "Maritime Zones: A Survey of Claims," *Law of the Sea III*, p. 179.

7. *Ibid.*, p. 180.

8. See generally "Agreement relating to Salmon Fishing in the Waters Contiguous to the United States Territorial Sea, with Agreed Minutes," signed at Tokyo, December 11, 1970 and "Agreement regarding the King and Tanner Crab Fisheries in the Eastern Bering Sea, with Agreed Minutes," signed at Tokyo, December 11, 1970.

9. L. Henkin, "Old Politics and New Directions," *Law of the Sea III*, p. 9.

10. U.N. Doc. A/6695 in L. Alexander, "Future Regimes: A Survey of Proposals," *Law of the Sea III*, p. 119.

11. G.A. Doumani (Science Policy Research Division, Congressional Research Service, Library of Congress), *Exploiting the Resources of the Seabed* 48 (July 1971). Prepared for the Subcommittee on National Security Policy and Scientific Development, H.R. Committee on Foreign Affairs. (Hereinafter referred to as *Doumani*) p. 54.

12. Resolution 2574 D of the General Assembly of the United Nations, 1969.

13. L. Alexander, "Future Regimes: A Survey of Proposals," *Law of the Sea III*, p. 120.

14. *Ibid.*

15. General Assembly of the United Nations Resolution 2750 C (XXV).

16. *Alexander*, p. 120.

17. "Deep Seabed Hard Mineral Resources Act," S. 2801 (S. 1134 of the 93rd Congress). Hearings were again continued on this bill in the Second Session of the 93rd Congress. See generally, U.S. Congress, Senate, Subcommittee on Minerals, Materials and Fuels of the Committee on Interior and Insular Affairs, *Mineral Resources of the Deep Seabed: Hearings on Amendment No. 946 to S. 1134*, 93rd Cong., March 5, 6 and 11, 1974.

18. "The Oceans: Wild West Scramble for Control," *Time*, July 29, 1974, p. 53.

19. *op. cit.*

20. Draft United Nations Convention on the International Seabed Area, U.N. Doc. a/AC. 138/25, 9 Int'l. Legal Materials 1046 (1970). Hereinafter referred to as *U.N. Draft*.

21. *Ibid.*

22. *Time*, p. 53.

23. *Alexander*, p. 125.

24. *Ibid.*, p. 126

25. *Ibid.*

26. The spectacular revelation in March 1975, that the *Glomar Explorer* had been constructed by the CIA to recover a sunken Soviet submarine north of Hawaii has cast doubt on the ability of the ship to recover manganese nodules effectively. Mining industry sources, including potential competitors of Summa, remain convinced of the great potential of the vessel as a mining platform. *Business Week*, April 7, 1975, pp. 26-27.

III. THE MID-OCEANIC ARCHIPELAGO

A. Description

An archipelago has been described by the dictionary as "a sea studded with islands" but, as the term is now commonly used, it is the islands and their seas on which the attention is focused.

It is important to note initially that the discussion of an "archipelago" claim theory will produce no single unique such theory. A further complication is that *no* claim theory of a mid-oceanic archipelago has yet received any international recognition. In fact, a study of the history of the archipelago leads one to draw the conclusion that discussion of this problem has been actively avoided by the leading nations of the international community. But proponents of the archipelago theory have recently become more vocal and little is to be gained by the hope that ignoring the claims of the island-states would settle the issues.

The first western law cognizance of an archipelago problem may have been that concerned with the coastal islands or cays off the coastlines of Florida, Cuba, Bermuda, and the Bahamas. Both Great Britain and the United States recognized cays and reefs as being a part of the "exterior coastline" (U.S.) or:

> Great Britain appears to have always attached great importance to the maintenance of a complete jurisdiction over the whole reef, as well as that part of it designated as the Bermudas.[1]

The issues of the jurisdiction over the seabed or waters between the isles and reefs were not dealt with although parts of the aforementioned reef were submerged.

An early case that was directly concerned with the resources of the waters between islands was that of the pearl fisheries of the Merguiz Archipelago in the Indian Ocean. In a dispute between the Government of Burma, which had jurisdiction over the islands, and Australia, both the Advocate General and the Standing Counsel to the Government of India, and later the Law Officers of the Crown ruled that jurisdiction could only be extended as far as the territorial sea from each island and not to the waters or seabed beyond 3 miles.[2]

The issue of the mid-oceanic archipelagic claims arose after World War I, as the Institut de Droit International and the American Institute of International Law advocated treating islands as a *unit* with the former adopting the criteria that the "distance between the islands should not exceed twice the breadth of the territorial sea."[3] The Institut made somewhat of a distinction between islands near a coastal state and those not so situated:

> ...while a 'group of islands' referred to what might be called a "mid-ocean archipelago"...the Article provided the group should be considered as a unit when the distance between each island on the circumference does not exceed double the breadth of the territorial sea....[4]

The Harvard Draft on the Law of the Territorial Sea of 1929 suggested that islands and archipelagos should have their own territorial sea, and for archipelagos:

> ...if the outer fringe of islands is sufficiently close to form one complete belt of marginal sea, the waters within such a belt should be considered territorial....[5]

The Hague Codification Conference of 1930 had defined the issues regarding islands in the following categories:

> An island near the mainland. An island at a distance from the mainland. A group of islands; how near must islands be to one another to cause the whole group to possess a single belt of territorial waters?[6]

The conferees were unable to settle on any single criteria, but the United States adopted the position of opposing the archipelagic claim theory:

> Each island...is enveloped by its own belt of territorial waters, measured three nautical miles outwards from the coast thereof.[7]

Further academic debate after the Hague Conference centered primarily on formulas which attempted to apply distance measuring and geometric formulas to theories that would determine if an island met the theoretical criteria as an "archipelago." The theories were not accepted and, in fact, provided only arbitrary standards while masquerading as logic.[8]

The issue which caused difficulty of any settlement on the archipelagic claim theory was part of the larger issue of dominion over the oceans. At the extremes the sea was either *mare clausum* ("sea held to be appropriated by particular nations") or *mare libetum* ("sea under no sovereignty but free and open to all for all purposes").[9] As each (archipelago) nation sought to advance its national interests in preserving political unity, security, or economic welfare through a claim theory which removes from the "high seas" waters to an "internal" jurisdiction, there would be a clash with other nation who sought to preserve their historic interests in free transit or fishing rights. The United States was consistent in its demands for traditionally accepted freedom of the seas even in the treatment of its own possessions, the then Territory of Hawaii.[10]

A major treatment of the problems posed by archipelagos occurred in 1951 when the International Court of Justice handed down its decision in the *Anglo-Norwegian Fisheries* case.[11] This case, although it nominally treated coastal archipelagos, decided that the islands lying off the coast of a mainland would cause a baseline to be drawn on the seaward side of the islands that would extend the width of Norway's territorial sea. But the reasoning of the court, holding that it was the economic links between

the islands and the mainland that justified such an extension, would make the same principles applicable to mid-oceanic archipelagos:

> It is difficult to believe that these interests are less with respect to the waters between islands of a mid-ocean archipelago than they are in the case of attenuated coastlines, and the reality of such interest is perhaps more likely to be evidenced by long usage in archipelagic than in many coastal waters. To concede exclusive right to a coastal state in respect of its local maritime resources and to deny it to archipelagic states would appear to be not only unfair discrimination but an artificially selective application of the considerations which motivated the court.[12]

The International Law Commission in 1956 refrained from presenting any specific provisions concerning archipelagos:

> The Commission had intended to follow up this article with a provision concerning groups of islands. Like the Hague Conference...of 1930 the Commission was unable to overcome the difficulties involved. The problem is similarly complicated by the different forms it takes in different archipelagos. The Commission was also prevented from stating an opinion, not only by disagreement on the breadth of the territorial sea, but also by lack of technical information on the subject....[13]

In preparation for the 1958 United Nations Conference on the Law of the Seas, the following definition of an archipelago was offered:

> a formation of two or more islands (islets or rocks) which geographically may be considered as a whole. It is called "coastal archipelago" if situated so close to the mainland that it is reasonably considered part and parcel of the mainland. Whereas an outlying "mid-ocean archipelago" is situated out in the ocean at such a distance from the coasts of firm land as to be considered as an independent whole.[14]

The Conference failed to consider the issue of archipelagos, postponing it as too complex, and only a reference to islands in the Convention on the Territorial Sea and Contiguous Zone was a result of many proposals of alternative theories:

1. An island is a naturally formed area of land, surrounded by water, which is above water at high-tide.

2. The territorial sea of an island is measured in accordance with the provisions of these articles.[15]

The Second United Nations Conference on the Law of the Sea in 1960 again failed to take action on proposals for archipelagic claims by both the delegates from the Philippines and Indonesia.[16] But the position

of the United States remained consistent with earlier objections to archipelagic claim theories:

> If you lump islands into an archipelago and use a straight baseline system connecting the outermost points of such islands and then draw a twelve-mile area around the entire archipelago, you unilaterally attempt to convert into territorial waters or possibly even internal waters vast areas of the high seas formerly freely used for centuries by the ships of all countries.[17]

The failure to resolve the problems of archipelagos in these international forums was the impetus that caused a number of nations, most notably Pacific area nations, such as the Philippines, Indonesia, and Fiji, to make unilateral claims for archipelagic states.[18] The problem again began to receive at least some academic attention, perhaps to overcome the "lack of technical information." Hodgeson and Alexander proposed certain criteria and formulas for determining whether or not islands could meet standards of "adjacency" and thereby qualify as archipelagos. Claiming to follow the principles of the *Anglo-Norwegian Fisheries* case, their proposal supposedly derives both mathematical and economic need criteria from this case:

> *Rationale for the Proposal:* The system suggested here is designed to afford archipelago areas an opportunity, under certain prescribed conditions, to assert (economic competence over their inter-island waters....
>
> The various restrictions noted here would apply only in the case of delimitation based on the principles of adjacency. If special circumstance exist, either on the ground of history or economic need, some adjustments in delimitation restrictions may be necessary. There are many situations in which special competence of the coastal country over activities well away from its coast can, in theory at least, be justified. But under no conditions should freedom of navigation and overflight for purposes of transit beyond the twelve-mile territorial limits be compromised.[19]

The proposal says that the maximum closing lines of the baselines between the islands should be 40 to 48 nautical miles to determine the adjacency of the archipelago so that "all areas of insular waters must be within twenty-four miles of these seaward limits, or the basepoints themselves."[20] As with the mathematical theories concerning archipelagos proposed 40 years earlier, there was no justification for the distances selected other than that they relate (12 miles) to the widely accepted territorial sea or the longest baseline (40 miles) used in the *Fisheries* Case.

A second recent work by Hodgeson, *Islands: Special and Normal Circumstances*, specifies some criteria for an archipelago:

--Areal dispersion of many islands over two or more axes (longitudinal and lateral);
--Adjacency of islands among themselves with special reference to the length of the line about the perimeter; and
--A land/water or territorial sea/insular sea ration contained within the ultimate archipelagic baseline system.[21]

This work makes a very real attempt to accommodate the position of the Philippines and Indonesia by showing how they would qualify as archipelagos under various formulas and ratios, but rejects, without any real rationale, the economic/historic relationships brought out in the *Fisheries* case:

Discarded concepts:
--Historical/economic factors. Any state may point to historical or economic reasons for unity and/or control of communication lanes. The same reasoning could be applied by the United States (or any geographically divided country) to explain why it should control, for example, the area between the U.S. and Hawaii. Worse still, it is the ultimate reason for claiming all intervening areas in any insular area....[22]

Hodgeson ignores the point made in the *Fisheries* case concerning the economic and historic links *between* islands of an archipelago and his criteria for an archipelago are somewhat arbitrarily chosen. Overall, he advocates "strict" criteria for an archipelago definition that will satisfy only "certain" of the archipelago states.[23] This will certainly not produce a solution that will solve future claims. But he proposes alternatives for various zones of interest, such as the "continental" shelf and the seabed, that determine a sphere of influence by flexible criteria such as island size, position, and population.[24] So while Hodgeson takes an inflexible point of view towards preserving traditional "high seas" concepts with rigid criteria for granting expanded territorial and internal seas areas to archipelagos, he is willing to compromise on resource-oriented claims such as the seabed. This viewpoint probably characterizes the current, though unspoken, position of the United States.

In another recent, definitive work on the issues, D.P. O'Connell in *Mid-Ocean Archipelagos in International Law* presents a very non-partisan summary of the problems:

...it would be unreasonable to suppose that resistance to archipelagic claims can be successfully persisted in over a long period in face of successful assertion and widespread political support. The only progressive approach then, is to integrate the archipelagic principle in existing international law in such a way as to accommodate the interests of the archipelagic State without disproportionately affecting the interests of other States and of the world at large.

The problem is that the conceptual structure of the Law of the Sea is too rigid to take account of the diversity of situations, the complexity of interests and the range of

> apprehensions. The threefold division of the sea into high seas, territorial seas and internal waters, is too simplistic, while the arithmetical approach of fixed limits and the geographical approach of general definitions works to the advantage or disadvantage of States in too arbitrary a fashion to be tolerable. The archipelago doctrine has failed to gain more than...cursory examination at international conferences, because it is the difficult case which exposes the inadequacies of existing rules....A more flexible structure of doctrine is required, comprising perhaps special, and not necessarily spatially overlapping, regimes concerning fishery conservation, mineral exploitation, pollution control and shipping rights; and a range of potentially competitive interests must be reconciled if maritime activity is to be rationalized.[25]

O'Connell is therefore optimistic that the archipelago problem can be resolved when the question of transit of the seas is simultaneously discussed and the solution is to be found in a flexible view towards the resources that the archipelagic states seek to protect. Although the 1974 Caracas Conference on the Law of the Sea was unable to settle this issue, the widespread acceptance of the 200-mile economic zone (including the U.S.) could point the way for an agreement on archipelagic claims. The selection of 200 miles as a distance is relatively arbitrary and any such distance should be flexible enough to accommodate the resource-oriented claims of the mid-oceanic islands. There should be no essential difference in effect whether straight baselines are drawn around a group of islands calling them an "archipelago" or 200-mile circles are scribed, calling it an "economic resource zone." Future agreements should be accommodating enough to accept either term and when "transit" is viewed as a resource by maritime powers, negotiation should be possible.

The recent positions and claims made by Pacific archipelagic states are further presented in section IV and reinforce the need for an open-minded viewpoint towards the problems presented by mid-oceanic islands.

B. Footnotes

1. D.P. O'Connell, "Mid-Ocean Archipelagos in International Law," *British Yearbook of International Law* - 1971, p. 2.

2. *Ibid.*, p. 3.

3. J. Evensen, *Certain Legal Aspects Concerning the Delimitation of the Territorial Waters of Archipelagos*, Preparatory Document No. 15, A/Conf. 13/18 Nov, 1957, pp. 7, 9.

4. *O'Connell*, p. 6.

5. *Nationality, Responsibility of States, Territorial Waters*, Harvard Research in International Law, 276 (1929).

6. L.N. Doc. C.74, M.39, 1929 V.2, p. 48, quoted in *O'Connell*, p. 9.

7. L.N. Doc. C.351 (b) M.145 (b), 1930 V.16, p. 200, quoted in *O'Connell*, p. 10.

8. *O'Connell*, pp. 11-13.

9. See generally, C.B. Klein, "The Territorial Waters of Archipelagos," 26 *Federal Bar J.* 317, (1966).

10. See generally section VII; *O'Connell*, pp. 42-45.

11. "*Anglo-Norwegian Fisheries* case," *I.C.J. Pleadings*, 1951, vol. 1. See also *The Problems of Delimitations of Base Lines for Outlying Archipelagos*, 9San Diego L.R. 733, 738 (1972).

12. *O'Connell*, p. 15.

13. *Evensen*, p. 15.

14. United Nations Conference on the Law of the Sea, 1958, Official Records, vol. 3. See also *O'Connell*, pp. 20-22 and the various claim theories proposed to the convention by Indonesia and the Philippines in section IV.

15. Convention on the Territorial Sea and the Contiguous Zone, Geneva, April 29, 1958, Article 10, reprinted in Lay, Churchill, Nordquist, *New Directions in the Law of the Sea - Volume I*, (1973) p. 6.

16. *O'Connell*, pp. 21-22.

17. U.S. Delegation to the U.N. Conference on the Law of the Sea, Press Release No. 3, 11 March 1958.

18. See generally section IV; *O'Connell*, pp. 25-50.

19. R. Hodgeson and L. Alexander, *Towards An Objective Analysis of Special Circumstances: Bays, Rivers, Coastal and Oceanic Archipelagos and Atolls*, Law of the Sea Institute, University of Rhode Island (1972), p. 49.

20. *Ibid.*

21. R. Hodgeson, *Islands: Normal and Special Circumstances*, Bureau of Intelligence and Research, Research Study RGES-3, December 10, 1973, pp. 27-28.

22. *Ibid.*, p. 34.

23. *Ibid.*, p. 33.

24. *Ibid.*, pp. 47-70.

25. *O'Connell*, p. 75.

IV. THE PACIFIC ARCHIPELAGOS: VOCAL PROPONENTS

The study of claims made by the Philippines, Indonesia, Fiji, and Tonga illuminates well some of the issues that make an archipelagic claim very controversial. The claims of Indonesia and the Philippines especially have evoked the most reaction from the international community. Certainly they are at least the largest island groups making such claims currently:

> Indonesia extends for more than 3,000 miles east and west and roughly 1,300 miles north and south across the equator between Asia and Australia; and is composed of 3,000 or more islands. The Philippine Islands consist of about 7,000 islands lying about 500 miles off the Southeast coast of Asia. The islands extend North and South about 1,152 miles and East and West about 688 miles.[1]

The size and location of these islands are at least two features that should distinguish the claims of these nations from that of Hawaii. Their location is across some major trade routes and their claim actions have changed the nature of transit through some straits and passages which were formerly considered to be "high seas." Hawaii, like the archipelagic Galapagos Islands, is in a less heavily transited and controversial position. International law has sought to devise a uniform rule that would fit all circumstances; a study of these other Pacific nations will demonstrate the problems of trying to draft such a rule.

A. The Philippines

The Philippine Islands, 7,104 in number, sit on a common geological platform and their government, desiring to strengthen the unity of these islands, promulgated the first of the controversial archipelagic claims. The legislature of the Philippines declared that the boundaries of the island group were to be drawn around the entire set of islands, using an archipelagic theory to justify a series of "straight baselines" for the purpose of delimiting a territorial sea with the following effects:

> The baseline system, in effect, closes the important Surigao Strait, Sibutu Passage, Balabac Strait and Mindoro Strait as well as the more "internal" passages through the Philippine Islands. The largest body of water enclosed is the Sulu Sea, but other significant seas, the Moro, Mindanao, Sibuyan, etc., are also within the system....
>
> While the straight baseline system connects the outermost points of the islands, and by definition follows the "general trend", the effect of the system can be best illustrated by area figures. The approximate land area of the Philippines is 115,600 square (statute) miles....The area contained

> within the straight baselines 328,345 square miles... The enclosure system therefore increases the nationl "territory" approximately 2.8-fold.[2]

The act which delimited this territory was passed by the legislature in 1961 and was, in part, as result of the 1958 and 1960 Conferences on the Law of the Sea essentially ignoring the positions made on archipelagic theory by the representatives of the Philippine government. The act cited as precedent the Treaty of Paris of 1898 and 1900, in which Spain ceded sovereignty over the islands to the United States. In the Treaty, the islands were described as those being between certain latitudes and longitudes.[3] These delimitations describe an area of 530,239 square miles, more than double the area currently claimed by the Philippines under the straight baselines.[4]

This interpretation of the Treaty of Paris and other treaties entered into regarding the Philippines by the United States has been rejected by the legal theoreticians of the international community and the Philippines now bases its claim on reasons of primarily of security and economic need.[5]

The first reference to an archipelagic claim was in a *note verbale* by the President of the Philippines to the Secretary General of the United Nations in 1955 which claimed:

> All waters around, between, and connecting different islands belonging to the Philippine Archipelago, irrespective of their width or dimension, are necessary appurtenances of its land territory, forming an integral part of the national or inland water subject to the exclusive sovereignty of the Philippines... for purposes of protection of its fishing rights, conservation of fishery resources, enforcement of its revenue and anti-smuggling laws, defense and security...[6]

The representative of the Philippines gave the following reasons for this claim at the 1960 U.N. Conference on the Law of the Sea:

> (i) security, which required a state to have exclusive control of approaches to its shores;
>
> (ii) furtherance of a commercial, fiscal and political interests, which necessitate a close supervision of ships entering or leaving coastal seas;
>
> (iii) the exclusive enjoyment of the products of the sea near to the shores, which is essential for the existence and welfare of the coastal population.[7]

These declarations were given constitutional status in 1973; for the Constitution of the Philippines now ordains:

> The waters around, between, and connecting the islands of the archipelago, irrespective of their breadth and dimensions, form part of the internal waters of the Philippines.[8]

The claim has been characterized as one that rests primarily on the reasons of security and resource preservation. The Philippine government has stated the importance of the fishing industry in the now enclosed "internal" waters to the 41 million population, stating that the resources are not sufficient to meet both the needs of the Philippines and those of foreign fishermen. No statistics have been offered to substantiate this claim however.

The importance of state security as a reason for making an archipelagic claim has not been challenged in the case of the Philippines. The condition of martial law that now exists in the islands was originally rationalized by acts of rebellion in various parts of the islands. The control over all the waters that bound these islands should imply a better ability to control rebel transit, arms smuggling, or third party intervention. But the control now exerted over the "internal" waters has not been investigated to see if it has any real practical effect on the ability of the Philippine government to exercise this control.

As the Department of State's International Boundary Study states, the primary concern of the United States and other maritime powers has been the loss of free transit in a number of passages and straits, primarily those that link Singapore with Australia (Balabac Straits and Sibutu Passage):

> The effect of the Philippines' insistence upon prior authorization, which has been refused when the Philippine Government believed that passage would be inadvisable, has been to close to foreign shipping some of the major sea routes between Australia and South East Asia. Accordingly, there is no free passage from latitude 4 degrees to latitude 21 degrees, or from longitude 117 degrees to longitude 127 degrees.[9]

The Philippine delegation to the Third United Nations Conference on the Law of the Sea held in 1974 stated however:

> And as an archipelagic state our economy is largely dependent on overseas trade. International navigation therefore vitally affects our country as well as other maritime states. In connection with passage through straits used for international navigation but forming part of the territorial sea, my delegation supports the regime of innocent passage.[10]

However, innocent passage, as interpreted, closes these waters to foreign warships without prior approval of the Philippine government. This led to several incidents between Great Britain, New Zealand, Australia, and the Philippine government in 1958.[11] And although the recent mention at Caracas of innocent passage in "territorial" waters affirmed that right, it still leaves open the question of passage in "internal" waters. Aside from the issues of warship transit, the problems of oil tanker passage can be expected to arise if the Philippine government perceives the possibility of a massive oil spill as a danger to their fishery resources.

The Philippines have asserted the most controversial and long standing claim to an archipelagic status. The controversy especially is an indicator of the magnitude of problems that Hawaii might face when asserting a similar claim. The issues of state security and interference with transit routes are not present in Hawaii's situation and the transit issue alone has been the major cause of controversy.

B. Indonesia

The claims of the Philippines' nearest neighbor, Indonesia, are very similar, with a greater emphasis on the resources being protected rather than state security. The problem of interference with free transit is potentially more severe:

> The Republic of Indonesia has established straight baselines based upon the so-called archipelago theory.... The system extends for over 8,000 nautical miles about the outermost points of the Indonesian outer islands and encloses approximately 666,100 square nautical miles of internal waters and 98,000 square nautical miles of territorial sea....
>
> The entire Indonesian straight baseline system extends for 8,167.6 nautical miles. The system encloses...the (Java, Flores, Molucca, Banda, Savu, Flores) seas and the important straits of Sunda, Sumba, Lombok, Ombai, Molucca, and Macassar as well as numerous internal passages within the Indonesian archipelago.[12]

The principles of this claim were first promulgated in a declaration which contained three major points:

1. The territorial sea was extended from 3 to 12 miles.

2. It was to be measured from straight baselines drawn from the outermost islands of the archipelago.

3. Waters within the straight baselines would be internal waters, but with innocent passage of foreign ships allowed.[13]

These points were codified by the government and published as Act No. 4 in 1960.[14]

The impetus for the move towards the archipelago was interpreted as a means of reinforcing state security, since the islands of South Molucca, Celebes, and Java were in various states of rebellion with outside aid and the Soekarno government found it expedient to secure the waters and air space of this island nation.

The importance of the fishing industry to the population, inter-island communication and transit via the sea, and the newly discovered

oil and gas reserves were soon to assume more importance as rationales for the claims.

Finally, the government has asserted cultural unity as a reason particularly for claiming the waters in between the islands. As expressed by the representative of Indonesia at Caracas in 1974:

> It might be interesting for the conference to know that the Indonesian language equivalent for the word "fatherland"... is "tanah-air", meaning "land-water", thereby indicating how inseparable the relationship is between water and land to the Indonesian people. The seas, to our mind, do not separate but connect our islands. More than that, these waters unify our nation.[15]

The claims made by Indonesia have been vigorously protested by the major maritime nations who seek to preserve the complete freedom of shipping between the Pacific and Indian Oceans. The leader of the Indonesian delegation at Caracas, H.E. Prof. Mochtar Kusumaatmadja, has sought to refine the concept of freedom of transit in an attempt to assuage the fears of the United States, Great Britain, Japan, and the U.S.S.R.:

> More than any other countries which are concerned about the unimpeded passage for the ships under the archipelagic concept, Indonesia's own and vital dependence upon international shipping makes it imperative for her to insure the smooth, speedy and safe passage of all merchant ships, under whatever flag, through its waters. It is no less important to insure that ships transversing through Indonesian archipelagic waters from one part of the high seas to another part of the high seas should be assured of a safe, and speedy passage. It is with this in mind...that the archipelagic states explicitly recognize innocent passage through their archipelagic waters.[16]

The proposal further elaborates on a concept of different degrees of freedom on transit for different types of vessels. Merchant vessels are to have essentially unrestricted navigational rights through the waters, while warships, including submarines, which must navigate on the surface, would be restricted to transit within designated sea lanes.

This latest refinement of Indonesia's position on the archipelago concept also presents a novel distinction among archipelagos that could potentially affect Hawaii:

> There is also the problem of an archipelago which belongs to a State but does not form an independent State in itself, thus not constituting an "archipelagic State". Our concept is not intended or designed to cover such a case, and while appreciating the need for its consideration, we submit it should be treated as an issue distinct and separate from the concept of an archipelagic state.[17]

This can be interpreted as a move by Indonesia to disassociate itself from an archipelagic claim made by Hawaii. Indonesia has apparently felt that Department of State opposition to Hawaii's claim has been the cause for United States opposition to their claim. There has been, however, no evidence to substantiate this theory.

Indonesia has not only claimed increased territory and resources through an archipelagic claim theory, but also has claimed seabed resources under a continental shelf claim theory. In a treaty negotiated with Australia, extensive areas between the two countries have been divided and Pertamina, the Indonesian national oil authority, has mapped out areas for lease in both the areas covered by the archipelagic claim theory and the continental shelf claim theory.[18] Indonesia and Malaysia have also entered a treaty that divides the continental shelf between the two countries along a line that also divides the Strait of Malacca.[19] This has caused a great deal of apprehension among maritime nations as have a variety of other proposals of these two countries to manage the transit of the strait. There is a fear that the strait will become a "canal" and transit will become very tightly controlled.

Obviously, the many issues that have sprung forth from the claims of Indonesia still need study and will remain topics for negotiation in future conferences. Again, it should be clear that no single "archipelago rule" can be expected to cover even the unique problems of a single country such as Indonesia.

C. Fiji

The relatively newly independent island nation of Fiji, though a party to the Conventions on the Territorial Sea and Contiguous Zone and on the Continental Shelf, is also an advocate of the archipelago principle, using straight baselines around the islands of the group to delimit their territorial sea. Fiji, with Indonesia and the Philippines, has proposed:

> 1. An archipelagic State, whose component islands and other natural features form an intrinsic geographical, economic, and political entity and have historically have or may have been regarded as such, may draw straight baselines connecting the outermost points of the outermost islands and drying reefs of the archipelago from which the extent of the territorial sea of the archipelagic State is, or may be determined.
>
> 2. The waters within the baselines, regardless of their depth or distance from the coast, the seabed and the subsoil thereof and the superadjacent airspace as well as all their resources belong to and are subject to the sovereignty of the archipelagic State.[20]

Fiji's claim on historic reasons is dated from 1874, when the chiefs and king transferred territory to Britain between certain parallels of latitude and longitude using the words: "the said islands, and waters, reefs and other places...,"[21] After the United Kingdom lost the decision in the *Anglo-Norwegian Fisheries* case, the definition of Fiji was changed in 1966 to read "all islands," omitting all references to waters. With independence, Fiji again began to press a claim for the waters and their resources. This claim is primarily based on the geology of the group and the strong economic dependence on the resources from the sea. Fiji has taken the criteria used by the court in the *Fisheries* case and focused on the "intrinsic relationship" of the islands and formulates a simple test for whether a group of islands should be considered an archipelago:

> The Fiji proposal...being based on principle of intrinsic relationship, the test...is simply: do the islands form an intrinsic geographic, economic and political entity? The term "geographic" as used in this context is in a geomorphological context.
>
> Fiji is a classic archipelago...if the rules don't fit the classic archipelago, then there is something wrong with the rules and new rules must be devised to accommodate them.
>
> The whole of the Fiji proposal...is based on merely an extension of the rules of international law as promulgated by the International Court of Justice for coastal archipelagos.[22]

Fiji, then, has become a chief spokesman for an alternate interpretation of the *Fisheries* case. As Hodgeson and Alexander have focused on criteria of adjacency and have developed formulas and distances to determine adjacency, Fiji has focused on the unity of the island based on more subjective criteria. This is, of course, consistent with the positions taken by the Philippines and Indonesia and other nations that have joined the island nations in their proposals.

D. Tonga

Tonga, using a "picture frame" theory to claim extensive water and island areas, actually has the most novel and extensive claim that has attracted very little attention from the international community.

> The Kingdom of Tonga consists of about 365 islands with a total land area of 269 square miles....The whole seems to represent a unitary geomorphological phenomenon.
>
> On August 24, 1887 King Tubou I issued a Royal Proclamation defining the boundaries of the Kingdom, as follows:

> Whereas it seems expedient to us that we should limit and define the extent and boundaries of Our Kingdom, We do hereby erect as Our Kingdom of Tonga all islands, rocks, reefs, foreshores and waters lying between the fifteenth and twenty-third and a half degree of the south latitude and between one hundred and seventy-third and the one hundred and seventy-seventh degree of west longtitude from the Meridian of Greenwich.
>
> The area thus designated amounted to 115,770 square miles.[23]

The claim of Tonga has never been challenged and, with some exploration for oil in their territory, the Tongan legislature affirmed their claims in 1968 and 1969 with the following definition of "land":

> "Land" includes all submerged lands, lying within the extent and boundaries of the Kingdom as defined by the Royal Proclamation of 11 June 1887, namely between 15th and 23½ degrees of south latitude and between the 173rd and 177th degrees of west longitude.[24]

The Government of Tonga has also communicated this territorial claim by letter to the Secretary-General of the United Nations and no government has yet commented or challenged the claim.

The land-to-water ratio claimed inside of the "picture-frame" designated by the latitude and longitude markers is 1 to 430. This high water-to-land ratio and the unique latitude-longitude delimiting theory are potential elements of a great deal of controversy should other nations use Tonga as a precedent for similar claims. But at least one observer finds this claim to have distinctly a Polynesian character: "Tongans considered as their own the seas from which they derived much of their subsistence, and around which they spent much of their lives."[25] If such a claim is found to have a distinct "Polynesian" character by the international legal community to distinguish it from claims made in other areas of the world, it will then strengthen the case for Hawaii's "Polynesian" archipelago.

E. Conclusions

There are, then, several elements which emerge from a discussion of these Pacific archipelagic nations which sould be useful to Hawaii's case:

1. States making archipelagic claims have focused on the elements of "intrinsic relationship" and the economic necessity as they interpret the criteria used by the Court in the *Fisheries* case. They have ignored formulas and distance-measuring criteria.

2. Potential interference with shipping has been the major reason for objection by other nations to archipelagic claims.

3. "Historical" reasons have been advanced by the archipelagic states as a starting point for a claim but play a minor part in any current claim.

4. Each island state represents some unique characteristics of an archipelagic claim; it is therefore unrealistic to expect a single rule or formula to cover either the present or future claims.

These elements, when applied to Hawaii's situation, show that there is a good case to be made for archipelagic status since the single element of major objection--interference with transit--is not present in any significant degree in the Hawaiian Archipelago.

F. Footnotes

1. C.B. Klein, "The Territorial Waters of Archipelagos," 26 *Fed. B.J.* 317 (1966).

2. *International Boundary Study: Limits in the Seas - The Philippines*, issued by the Geographer, Department of State, No. 33, March 22, 1973, p. 8. (Hereinafter referred to as *I.B.S. No. 33.*)

3. D.P. O'Connell, "Mid-Ocean Archipelagos in International Law," *British Yearbook of International Law* - 1971, p. 26. (Hereinafter referred to as *O'Connell.*)

4. *I.B.S. No. 33*, p. 8.

5. *O'Connell*, p. 26.

6. *O'Connell*, p. 28.

7. *Ibid.*, p. 29.

8. Statement by the Honorable Vicente Abad Santos, Secretary of Justice, Philippine Delegation to the Third United Nations Conference on the Law of the Sea, 8 July 1974, p. 5. (Hereinafter referred to as *Philippine statement.*)

9. *O'Connell*, p. 36.

10. *Philippine statement*, p. 8.

11. *O'Connell*, pp. 32-36.

12. *International Boundary Study: Limits in the Seas - Indonesia*, issued by the Geographer, Department of State, No. 35, July 20, 1971, p. 7. (Hereinafter referred to as *I.B.S. No. 35.*)

13. M. Kusumaatmadja, "The Legal Regime of Archipelagos: Problems and Issues," *Proceedings of the Seventh Annual Conference of the Law of the Sea Institute* - 1972, p. 174.

14. *O'Connell*, p. 39.

15. Statement by H.E. Prof. M. Kusumaatmadja, Minister of Justice and Leader of the Indonesian Delegation to the Third United Nations Conference on the Law of the Sea, 15 July 1974, p. 3.

16. *Ibid.*, p. 5.

17. *Ibid.*

18. *O'Connell*, p. 42.

19. *International Boundary Study: Limits in the Seas - Continental Shelf Boundary-Indonesia-Malaysia*, issued by the Geographer, Department of State, No. 1, January 21, 1970, p. 1.

20. Arvid Pardo, A statement on the *Future Law of the Sea in Light of Current Trends in Negotiations*, 1. Ocean Development & International Law, 317, 1974.

21. *O'Connell*, p. 48.

22. Statement of Donald McLoughlin, Legal Consultant to Fiji, *Proceedings of the Seventh Annual Conference of the Law of the Sea Institute* - 1972, p. 198.

23. *O'Connell*, p. 45.

24. *Ibid.*, p. 46.

25. *Ibid.*

V. UNILATERAL STATE CLAIMS TO EXTENDED JURISDICTION

The Truman Proclamation of 1945 is generally agreed to have been the catalyst that touched off the unilateral claims to increased ocean jurisdiction that continues today. The proclamation by Chile on June 23, 1947 of a 200-mile territorial sea served as a model for subsequent other Latin American claims. But the wider reaching implication of both these unilateral claims was to set a precedent for the claims of other nations seeking to protect their ocean resources.

Unilateral claims in excess of the "traditional" limits can be generally divided into two types:

1. Claims for complete sovereignty in the sea; and extended territorial sea.

2. Claims to regions or zones of less than complete sovereignty, i.e., a functional control zone, a "patrimonial" sea, pollution control zones.

Table 1, which gives the current territorial sea and fishing zone claims for the world's nations, can demonstrate the variety of distances claimed. This section will examine the development of typical extended unilateral claims of some sample nations. As will be seen, these extended claims, as are the claims of the archipelagic states, are largely resource oriented.

A. Extended Territorial Seas

Four Latin American countries have claimed exclusive sovereignty over 200 miles of territorial seas. They are:

1. Ecuador - under the Ecuadorian Decree 1542 of November 10, 1966

2. Panama - under Panamaian Law 31 of February 2, 1967

3. Brazil - under Brazilian Law-Decree 1098 of March 25, 1970

4. El Salvador - under Constitution Article 7 of September 14, 1950

These have been characterized by F.V. Garcia-Amador as follows:

> Not only do these legal instruments use the term "territorial sea", but none of them recognizes, explicity or implicitly, any rights other than innocent passage. In the case of the Ecuadorian Decree, however, since it provides for the establishment of 'different zones of territorial sea by executive decree ...[which] shall be subject to the regime of free maritime navigation or of innocent passage for foreign ships,' in that event the claim would not have the same nature or scope.[1]

The claims of Ecuador have especially generated a great deal of friction with the United States over the seizure of fishing boats and the statement of the representative of that country to the United Nations Seabed Committee in 1972 is an indication of the strong position that country has taken:

> Ecuador would not be able to negotiate any changes in its position (on its claim to a territorial sea of complete sovereignty to 200 miles)...as long as the United States continued to apply sanctions to his country....[2]

The fact that the United States has reimbursed the U.S. fishermen for fines paid after the seizure of their vessels by one of these countries has been taken to mean a *de facto* recognition of these claims by some observers.[3] A contrary opinion holds that customary international law requires a "relatively uniform behavior and a compatible flow of words by many parties over a considerable period of time" to make such a recognition.[4] Ecuador, for its part, considers that the non-recognition of its claim by the United States is irrelevant.

A second group of extended territorial sea claims has been made by several African countries. These newly emerging nations feel justified in extending their claims to whatever limits they judge necessary to preserve their natural resources and correct an imbalance they perceive in the utilization of the seas.[5] The largest such claim is that of Sierra Leone of 200 miles, followed by Guinea claiming 130 miles, Gabon claiming 100 miles, and a number of other countries, as seen on Table 1, claiming distances in excess of 12 miles and ranging up to 50 miles.

The third group of extended claims represents a more widely accepted movement of claims from the traditional 3 miles. The failure to agree on a territorial sea width at Geneva in 1958 and 1960 brought on an increase of 25 percent in numbers of nations moving from a 3-mile to a 12-mile claim. The trend has been summarized:

> 50 States (47 percent of recorded claims) now claim a territorial sea of 12 miles and a further 13 States (12 percent) claim between 18 and 200 miles. Nevertheless, 44 States (41 percent) still maintain claims to less than 12 miles and, of these, 27 States (25 percent) claim only three miles. The 3-milers include such important maritime States as Australia, Japan, the Netherlands, the United Kingdom, and the United States.[6]

This data was tabulated in 1973 and since there was no agreement on a 12-mile territorial sea at Caracas, we can expect a further move towards 12-mile or greater claims unilaterally as nations seek to protect their own self interest.

There is another group of territorial sea claimants of extended jurisdictions who do not fit the above descriptions. For example, Argentina and Uruguay have claimed a 200-mile "territorial" sea,[7] but

explicity allow freedom of navigation and overflight as distinct from the usual right of innocent passage in a territorial sea. The net effect resembles the other type of claim, the functional control zone.

B. Other Extended Oceanic Claims

Paralleling the development of extended claims for the territorial sea has been a series of claims for resources, usually under the title of functional control zone, exclusive economic zone, or petrimonial sea. This development can be traced to both of the Truman proclamations of 1945 which claimed not only the resources of the seabed (the Continental Shelf Proclamation) but also reserved the right to establish exclusive fishery conservation zones. Beginning with Chile in 1947, two factors have caused extended fishery and other resource claims:

1. States such as Chile, "victims" of geography and geology, had little to gain under the continental shelf theory;

2. Some of these same States were unable to compete with the well-developed fishing fleets of the industrial nations and saw their living resources being depleted by these other countries.

Fishery preservation was the first concern of these unilateral decrees, but the concept has now developed into a claim that seeks generally to protect all the resources of a specified zone. Typical of such claims is the concept of the patrimonial sea which was first advocated by several Latin American nations. This concept has been formalized in several declarations of these nations; one is the Declaration of Santo Domingo of the Specialized Conference of the Caribbean Countries, Concerning the Problems of the Sea, June 9, 1972. Andres Aguilar, the Ambassador of Venezuela to the United States summarizes some of the features of the patrimonial sea:

> ...coastal states would have sovereign rights over renewable and nonrenewable natural resources which are found in the waters, in the seabed and in the subsoil of an area adjacent to the territorial sea called the patrimonial sea.
>
> In this zone...ships and aircraft of all states...would have the right of freedom of navigation and overflight, with no restrictions other than those resulting from the exercise by the coastal state of its rights in the area.
>
> The Declaration does not lay down any precise and uniform breadth for this zone, but it does set forth the following two principles: (a) The breadth of this zone shall be the subject of an international agreement, preferably of a world-wide scope; (b) The whole of the area of both the territorial sea and the patrimonial sea, taking into account geographic circumstances, should not exceed a maximum of 200 miles.

> ...The purpose behind the establishment of this zone is... a purely economic one rather than a political or strategic one.[8]

This concept has received a great deal of acceptance in the international community, especially among the developing nations. A defender of the concept under the title of an exclusive economic zone (EEZ) has said:

> ...the economic zone concept offers a good basis for resolving the impasse between those who believe in a narrow and those who believe in a broad belt of the territorial sea. Basically, the purpose of the exclusive economic zone concept is to safeguard the economic interests of the coastal States in the waters and seabed adjacent to their coasts without unduly interfering with other legitimate uses of the sea by other States.[9]

It has also been noted that the extended claims to functional zones up to 200 miles in breadth by some countries are actually claims to an exclusive economic zone in effect. The Latin American countries of Chile,[10] Mexico, Nicaragua, and Peru, although claiming a 200-mile functional zone, allow for freedom of navigation and overflight and are concerned with the resources of the areas, not absolute sovereignty.

The patrimonial sea also has a provision for scientific research:

> The coastal State has the duty to promote and the right to regulate the conduct of scientific research within the patrimonial sea, as well as the right to adopt necessary measures to prevent marine pollution and to ensure its sovereignty over resources of the area.[11]

This provision, surprisingly, proved to be a stumbling block at Caracas when it was carried over to discussions regarding the exclusive economic zone. The Soviet Union, for reasons that some have interpreted as protecting its clandestine surveillance activities, has opposed the regulation of its scientific research and consequently no agreement on this extended jurisdiction was reached. The Peoples Republic of China has, however, not only supported the concept of the EEZ but also the right of any nation to extend jurisdiction to the limits they feel necessary:

> The Chinese Government and people resolutely support the struggle initiated by the Latin American countries and peoples to defend their rights over the 200 mile territorial sea and to protect the resources of their respective countries.[12]

C. Pollution Control Zone

A claim of a different nature was made in June 1970 as the Canadian Parliament approved the Arctic Waters Pollution Prevention Act,[13] asserting Canada's jurisdiction to regulate shipping in zones up to 100 miles off its Arctic coasts to guard against that region's coastal and

marine resources. The voyage of the tanker *Manhattan*, seeking to open up a "Northwest Passage" for future oil transit, was seen as the event that triggered this act.

Along with this unprecedented pollution control move, Canada acted to remove the possibility of a world court challenge by adding a reservation which in effect withdrew its traditional acceptance of the International Court of Justice's compulsory jurisdiction. The implication was that Canada realized it did not have "legalistic" grounds for this claim.[14] Canada had, instead of claiming absolute sovereignty in the zone, based the act on a contiguous zone theory that would protect coastal zones from pollution arising "from shipping, from land-based installations, from commercial activities, such as oil drilling, carried out on the Canadian Continental Shelf."[15]

The resulting United States reaction, as seen through the eyes of a Canadian was:

> The United States have seen in these measures an infringement of the principle of the freedom of the seas. In a Press Release ...the American Government declared that it could "neither accept or acquiesce" in the establishment of such a zone, lest the Canadian law should be taken as a precedent in other parts of the world. Washington say[s] that it is "acutely aware" of the peculiar ecological nature of the Arctic region, but that this area concerns all nations in "its increasing significance as a world trade route."
>
> Canada replied to that criticism saying that the United States themselves had had no hesitation in extending their jurisdiction seawards when they had deemed it necessary to do so and that the new law constituted "a lawful extension of a limited form of jurisdiction to meet particular dangers, and is of different order from unilateral interferences with the freedom of the high seas such as, for example, the atomic tests carried out by the United States and other States...."[16]

But unlike the unilateral claims of the Latin American countries, Canada admits its claims are in either "an area of non-law" or "on the very edge of international law."[17] The nature of the act has also been characterized as preventive rather than remedial; this in part justifying its extended claim area.

The fact that the act seeks to achieve a specific purpose--the control of pollution--makes it similar in concept to other extended claims that seek control of limited functions, resources for example. In both cases, efforts to preserve and conserve natural resources of adjacent regions were made, notwithstanding the lack of a strong case based on traditional international law concepts.

D. Conclusions

As it can be seen, there is a strong similarity in the effect of such concepts as the exclusive economic zone and the claims to archipelagic status by island nations. In fact, there has been strong support among the countries advocating such claims for each other's proposals. The United States has expressed its willingness to negotiate acceptance of a 200-mile economic zone:

> ...[W]e are prepared to accept, and indeed we would welcome general agreement on a twelve-mile outer limit for the territorial sea and a 200-mile outer limit for the economic zone provided it is part of an acceptable comprehensive package.[18]

The concern of the United States remains, of course, an "acceptable comprehensive package" with freedom of transit of prime importance. But as pointed out in section VII, transit is not a stumbling block to unique Hawaiian archipelagic claims. The concern for Hawaii remains to be resources, including pollution control. It is only a small step then from economic zones to archipelagos.

E. Footnotes

1. F.V. Garcia-Amador, "Latin America and the Law of the Sea," *Proceedings of the Sixth Annual Conference on the Law of the Sea Institute* - 1971, p. 104. Mr. Garcia Amador at the time was Director, Department of Legal Affairs, General Secretariat of the Organization of American States. (Hereinafter referred to as *Proceedings* - 1971.)

2. Press Release SB/70 July 27, 1972, reprinted in "New Directions in the Law of the Sea-Collected Papers-Volume III," (hereinafter referred to as *Law of the Sea III*.)

3. J.P. Craven, "Options Open to the United States in the Event of Nonagreement," *Proceedings* - 1971, p. 46.

4. Remarks of M.S. McDougal during discussion on "The Consequences of Nonagreement," *Proceedings* - 1971.

5. M.A. Ajomo, "Third World Expectations," reprinted in *Law of the Sea III*, p. 306.

6. E.D. Brown, "Maritime Zone: A Survey of Claims," reprinted in *Law of the Sea III*, p. 162.

7. *Limits in the Seas - National Claims to Maritime Jurisdictions*, the Geographer, Office of the Geographer, Bureau of Intelligence and Research, No. 36, 1974.

8. Andres Aguilar, "The Patrimonial Sea," from *Proceedings of the Seventh Annual Conference on the Law of the Sea Institute* - 1972, p. 162. (Hereinafter referred to as *Proceedings* - 1972.) Mr. Aguilar is the Ambassador of Venezuela to the United States.

9. Njenga, *Asian-African Report* (1972), reprinted in *Law of the Sea III*, p. 162.

10. In March 1974, a spokesman for the ruling military juanta of Chile renounced the traditional claims of Chile and indicated that Chile would consider claiming a "Sea of Chile" which would roughly form a triangle with the extremities of that country and Easter Island.

11. Declaration of Santo Domingo, June 9, 1972.

12. Statement made in the United Nations General Assembly on November 15, 1971. (A/PV. 1983, p. 97) from *Law of the Sea III*, p. 319.

13. 18-19 Eliz. 2, c.47 (Can. 1970).

14. See generally *N.Y. Times*, April 9, 1970, p. 13, col. 5 or 9 International LEGAL MATERIALS 598 (1970).

15. Richard Bilder, "The Canadian Arctic Waters Pollution Prevention Act: New Stresses on the Law of the Sea," 69 *Mich.L.Rev.* 8 (1970).

16. J.Y. Morin, "Some Regional Approaches - Canada," *Law of the Sea III*, p. 250.

17. *Ibid.*, 251.

18. Opening statement of John R. Stevenson, U.S. Chief Delegate to the U.N. Conference on the Law of the Sea held at Caracas, 1974.

VI. UNITED STATES OCEANIC CLAIMS: 1790-1974

At the United Nations Conference on the Law of the Sea held in Caracas in 1974, the United States expressed its willingness to accept a 12-mile territorial and coastal nation jurisdiction over an "economic zone" extending to 200 miles. Agreement was not reached on these proposals during the 1974 meeting, but this shift in U.S. policy from the traditional concepts of the 3-mile limit is not, as some observers would have it, revolutionary. Rather, this is but another evolution of U.S. policy of "creeping jurisdiction" towards the ocean and its resources. Since the major obstacle to Hawaii's needs for managing the resources of the Archipelago has been foreign policy dictates of the Department of State, a study of the evolution of U.S. claims will demonstrate that Hawaii's desires for increased jurisdiction are no more "revolutionary" than actual U.S. practice.[1]

A. Eighteenth Century Claims

One of the earliest jurisdictional claims to ocean space occurred with the passage of the first revenue statute of the United States in 1790.[2] That act introduced the four-league (12-mile) limits of the British hovering statutes into American law. Ships bound to ports in the United States were required to obtain proper authorization for the unloading of goods within four leagues and penalties, including forfeiture of unauthorized cargos, could be levied.[3] The four-league limit was confirmed in the Revenue Act of 1799 which imposed duties on imports and tonnage and similar penalties for unauthorized loading.[4]

The United States adopted a uniform one-league zone for purposes of neutrality in 1793.[5] This 3-mile distance was reiterated in a neutrality statute passed in 1794 which gave federal district courts jurisdiction "in cases of captures made within the waters of the United States, or within a marine league of the coasts or shores thereof."[6]

B. Judicial Recognition of the Three-Mile Territorial Sea

The first recognition by an American court of the right of a nation to enforce her laws in a contiguous area of the ocean came in *Church v. Hubbart* in 1804.[7] The case involved the seizure of the Brigantine *Aurora* by Portuguese authorities four or five leagues off the coast of Brazil. In commenting upon the legality of the seizure outside of a 3-mile limit from the coast, Chief Justice Marshall stated:

> The seizure of a vessel within the range of its cannon by a foreign force is an invasion of that territory and is a hostile act which is its duty to repel. But its power to secure itself from injury, may certainly be exercised beyond the limits of its territory. Upon this principle the right of a belligerent to

search a neutral vessel on the high seas for contraband of war, is universally admitted, because the belligerent has a right to prevent the injury done to himself by the assistance intended for his enemy; so too a nation has a right to prohibit any commerce with its colonies. Any attempt to violate the laws made to protect this right, is an injury to itself which it may prevent, and it has a right to use the means necessary for its prevention. These means do not appear to be limited within any certain marked boundaries, which remain the same at all times and in all situations. If they are such as unnecessary to vex and harrass foreign lawful commerce, foreign nations will resist their exercise. If they are such as are reasonable and necessary to secure their laws from violation they will be submitted to.[8]

But the U.S. Supreme Court did not pronounce upon the legality of the seizure or a specific distance as the limit of a state's territorial sea. It was then to be an English prize court which would first take notice of and uphold the 3-mile neutrality zone of the United States.

In *The Anna,*[9] a ship under American colors bound from the Spanish Main to New Orleans was captured by an English privateer near the mouth of the Mississippi River. The court upheld the 3-mile neutrality zone:

> We all know the rule of law on the subject is "terrae dominium finitur ubi finitur armorum vis", and since the introduction of fire arms, that distance has usually been recognized to be about three miles from shore.[10]

Finding that the capture took place within 3 miles of islands under the dominion of the United States, the English court released the ship.

The Supreme Court returned to the application of the doctrine of extraterritorial jurisdiction to insure territorial security in a series of cases decided after *Church* v. *Hubbart*. The first case, *Rose* v. *Himley*,[11] concerned the seizure of a vessel under the United States flag by a French privateer more than 10 leagues from the coast of Santo Domingo. The vessel, allegedly engaged in prohibited trades with rebels, was seized and sold by her captors. While granting France the right to enforce her laws within her claimed jurisdiction of two leagues, the Court held that the French condemnation tribunal lacked jurisdiction on the high seas beyond that limit.

Limitations on the extent of the territorial sea were clarified by the Court in *Hudson* v. *Guestier*,[12] also decided in 1808. The case was distinguished from *Rose* v. *Himley* by the fact the vessel seized was within the two-league territorial sea of Santo Domingo and the seizure was upheld. On appeal, the Court validated the decision even though it determined the seizure was outside of French territorial jurisdiction. The decision was apparently motivated by the fact that the vessel was not on the "high seas."[13]

The 3-mile claim of the United States was addressed by the federal courts in the case of *The Ann*, decided in 1812.[14] The vessel was seized for customs violations while anchored within 3 miles of the Massachusetts coast. Justice Story *delimited* the jurisdiction of the United States and spoke of a territorial sea generally:

> All the writers upon the public law agree that every nation has exclusive jurisdiction to a distance of a cannon shot, or marine league, over the waters adjacent to its shores,.... Indeed such waters are considered as part of the territory of the sovereign.[15]

C. 19th Century: Anglo-American Agreement

American attempts at diplomatic recognition of the territorial sea first met with failure in 1807 when England refused to ratify a neutrality zone 5 miles in width off the American coast.[16] The treaty was signed the previous year, but both parties did not ratify it. However, in 1818 Great Britain agreed to a 3-mile fishing limit off the coast of her North American territories in a treaty.[17]

Fisheries regulation was again the issue in 1891 as the Supreme Court recognized a 3-mile territorial sea in *Manchester* v. *Massachusetts*:[18]

> We think it must be regarded as established that, as between nations, the minimum limit of the territorial jurisdiction of a nation over tide-waters is a marine league from its coast.[19]

The Court reiterated the views of earlier decisions regarding jurisdiction beyond the 3-mile limit:

> The open sea within this limit is, of course, subject to the common right of navigation; and all governments for the purpose of self-protection in time of war or for the prevention of frauds on their revenue, exercise an authority beyond this limit.[20]

D. 20th Century: Wars and Bootleggers

In the 20th century a series of legislated oceanic claims ranged from a 3-mile limit for sanitation purposes in 1924 to a 300-mile "security zone" put forth in the Declaration of Panama prior to America's entry into World War II.

It was World War I that precipitated increased claims by the United States for security purposes. Congress authorized the establishment of Defensive Sea Areas in 1917; these were to be designated by the President and the federal courts were given jurisdiction over violations of the regulations governing the areas.[21] Thirty-three zones were delimited in 1917 but the concept was discontinued in 1919.[22]

Statutory interpretation of the revenue laws by the Supreme Court in 1927 in *Maul* v. *U.S.* resulted in another judicial sanction of seizure beyond the 3-mile limit for violations of local law.[23] The seizure of the vessel in this case occurred on the high seas, 34 miles off the coast. The Court found the vessel subject to seizure "by reason of definite and accomplished violations of the law under which she was enrolled and licensed"[24] and validated the seizure:

> The high seas is common to all nations and foreign to none; and every nation having vessels there has the power to regulate them and also to seize them for a violation of its laws.[25]

The Court in *Maul* v. *U.S.* harmonized two statutes, one of which set 12 miles as the limits of customs jurisdiction and Coast Guard authority. The 12-mile limit had been included in the Tariff Act of 1930 which extended the jurisdiction to this distance over "customs waters."[26]

Customs enforcement areas under the 1935 Anti-Smuggling Act were defined to extend up to 50 nautical miles from the outer limits of the 12-mile customs water zone. Under that statute the President was given broad discretion to declare portions of the high seas as customs enforcement areas as the result of their usage for this illicit activity.[27]

At the time of World War II's outbreak in Europe in 1939, the United States and its Latin American neighbors were officially neutral. To protect that neutrality and to avoid a repetition of maritime incidents similar to those during America's early World War I neutrality, these nations established a 300-mile neutrality zone by the Declaration of Panama.[28] Approved in October 1939, the statement declared the right of the American republics to maintain the waters adjacent to the continent free from the hostile acts of non-American belligerents. The declaration also called for mutual consultation and collective measures to secure the observation of its provisions.[29] The neutrality zone concept, first proclaimed by Jefferson in 1793, now reached its farthest limits and the United States claimed its broadest jurisdiction limits to adjacent ocean waters.

E. Modern Oceanic Claims

Until 1945, the oceanic claims of the United States had closely followed traditional international practice. But the Truman proclamations of that year, claiming jurisdiction over the natural resources of the seabed of the continental shelf beneath the high seas contiguous to the United States,[30] produced an international series of unilateral claims to "non-traditional" jurisdictions. The resources claimed were put under the control of the Secretary of the Interior.[31]

Although the proclamation claimed the resources, it did not specify the exact boundaries of the area claimed. A press release accompanying the proclamation described a 100-fathom (600-foot) depth contour line which would be, in most areas off the American coast, beyond the 3-mile

territorial sea.[32] The concurrent executive order preserved the shelf rights of the states and the federal government inside and outside the 3-mile limit:

> Neither this order nor the aforesaid proclamation shall be deemed to affect the determination by legislation or judicial decree of any issues between the United States and the several states, relating to the ownership or control of the subsoil and the sea bed of the continental shelf within or outside of the three-mile limit.[33]

A second proclamation issued at the same time asserted the right of the United States to establish a fisheries conservation zone in areas of the high seas contiguous to the coast.[34] The Department of State and the Department of the Interior were charged with the responsibility of recommending specific areas for designation by the President as fishery conservation zones.[35] The United States claimed no monopoly over fisheries and conceded the right of other nations to establish conservation zones off its shores. The Continental Shelf Proclamation made no mention of other countries' rights to make similar claims.

The Continental Shelf Proclamation of 1945 was revoked in 1953 by an executive order which set aside the submerged seabed as a naval petroleum reserve.[36] Since it was limited to oil and gas resources, the order was made subject to "valid existing rights," particularly those asserted by California and settled in a Supreme Court case.[37]

Federal-State Ownership Conflicts

Both the 3-mile territorial sea and the Truman proclamations went unchallenged in the international community. But domestically the situation was quite different and individual states challenged federal ownership of the submerged lands between the low water mark and the 3-mile limit.

California began leasing portions of land within the 3-mile zone to oil companies, authorizing them to exploit oil, gas, and other mineral deposits in return for rents and royalties.[38] The United States filed a complaint which asked the Supreme Court to determine which government had paramount rights in the submerged lands. The Court found for the federal government in *U.S.* v. *California.*[39] The Court reasoned against California's ownership claims:

1. There was no historical support for the view that the thirteen original colonies acquired ownership of the three-mile zone despite gaining elements of sovereignty previously held by the English Crown through their revolution against it;

2. Acquisition of the three-mile belt had been accomplished by the Federal Government, and the protection and control

over it was a function of national external sovereignty.

3. Judicial deference must be given to the assertion of dominion over the three-mile area by political agencies of the Nation; and

4. The exercise by the State of local police power functions in the area did not detract from the Federal Government's paramount rights.[40]

An earlier Supreme Court decision giving the states some authority in these areas was distinguished on the grounds that it only involved fishery regulations, and more importantly, fishery rights within a state's own territory and not the high seas.[41]

Louisiana and Texas soon followed California in claiming the marginal sea area and lost their cases before the Supreme Court.[42] Louisiana claimed a gulf boundary 27 miles from the coast by virtue of a 1938 statute[43] and Texas claimed a 9-mile boundary by legislation passed by the Republic of Texas in 1836.[44] In line with the *California* case, the marginal sea was found to be an area of national concern and state's rights were to be subordinate to the paramount rights of the federal government.[45]

Submerged Lands Act

Congress ended the conflict in the courts by passing the Submerged Lands Act in 1953.[46] The act granted to the states, "title to and ownership of the lands beneath the navigable waters"[47] within their respective boundaries. The term "boundaries" was to include the boundaries existing when a state entered the Union or as subsequently approved by Congress, but no farther than 3 miles from the coast in the Atlantic and Pacific, or beyond 3 leagues in the Gulf of Mexico.[48] The ownership of the submerged land and the resources of the land and waters was transfered to the states. A companion statute, the Outer Continental Shelf Lands Act, preserved federal jurisdiction and control over the areas outside the state boundaries, to the limit of the continental shelf.[49]

The flexible definition of boundaries in the Submerged Lands Act led to litigation in the U.S. Supreme Court by states claiming in excess of 3 miles. Five gulf states made such claims: Louisiana (9 miles) through its Admission Act of 1812, Texas (9 miles) based on the boundaries of the republic, Mississippi and Alabama (18 miles) based on their admission acts, and Florida (9 miles) through a post-Civil War constitution which specified gulf claims of 3 leagues. The Court upheld the claims of Texas and Florida and decided in favor of the United States in the other claims.[50]

Nuclear Tests in the Pacific

The United States, self-proclaimed champion of the doctrine of freedom of the high seas, deviated again from this policy during the post-war period while conducting nuclear bomb tests in the waters surrounding Bikini and Eniwetok atolls. At various times when the tests were conducted, up to 400,000 square miles of "high seas" were sealed off. The penalty for violation of this interference with navigation was potentially severe:

> These "danger zones" although isolated and temporary, nevertheless constitute a rather severe violation of the principle of freedom of the high seas, since a breach of the United States enclosure during the conduct of a bomb test potentially carries with it the irrevocable penalty of death.[51]

But commentators have justified the policy as being part of a "flexible" set of rules that must govern the ocean areas, with the most relevant guideline for such rules is "simply the test of reasonableness."[52]

United Nations Conference on the Law of the Sea

International accord on the width of the territorial sea and other claims to ocean resources was approached at the United Nations Conference on the Law of the Sea held in Geneva in 1958. The governments of 86 nations were represented at the conference. Four law of the sea conventions were promulgated:

1. The Convention on the Territorial Sea and Contiguous Zone
2. The Convention on the High Seas
3. The Convention on Fishing and Conservation of Living Resources of the High Seas
4. The Convention on the Continental Shelf.

The participants were unable to agree on a uniform width for the territorial sea in 1958 and also in the second conference in 1960.[53] The United States was willing to extend the breadth of the territorial sea to 6 miles, but the vote failed and a "contiguous zone" of up to 12 miles in width was authorized by the convention.[54] As mentioned in Section I, the Convention of the Continental Shelf agreed upon a vague limit delimited by the 200-meter isobar or beyond, limited by exploitability. Neither the Convention of the High Seas or Fishing and Conservation of Living Resources of the High Seas limited jurisdiction by a distance measuring formula and a number of nations made unilateral claims to increased jurisdiction soon after the conventions. Section V dealt with these unilateral state claims.

The "creeping jurisdiction" started by the United States in 1945 was now a feature of international accord.

Post-Geneva

The failure to agree on fishing limits at Geneva led the United States to enter a number of bilateral agreements covering fisheries and other living resources of the sea. These agreements maintained the territorial sea and contiguous zone, but allowed reciprocal utilization of these areas by the fishermen of other nations.[55] The "limit," soon to be 12 miles in the case of the United States, was recognized eventually to extend to a distance of 200 miles as the United States agreed upon in a treaty with Brazil. But by the definition of a territorial sea, U.S. claims remained at 3 miles.

However, the concept of exclusive fisheries jurisdiction, introduced by the Truman Proclamation in 1945, received legislative recognition in 1966 with the passage of a statute in which Congress established an exclusive zone 9 miles in width beyond the limit of the territorial sea. Natural resources were not claimed in the act and the 9-mile distance was flexible to avoid conflicts with similar zones of other countries.[56]

The control of pollution emerged as a national concern and Congress responded with amendments to the Federal Water Pollution Control Act in the Water Quality Improvement Act of 1970.[57] Both the Oil Pollution Act of 1924[58] and the Federal Water Pollution Control Act dealt with coastal or interstate waters within the 3-mile limit but the 1970 legislation aligned jurisdictional control with the contiguous zone, 12 miles in width.

The trend of these treaties and legislation was clear; although the United States remained steadfast in claims of a 3-mile territorial sea, it was willing to extend control over the seas to further distances when national policy required it.

Post-Geneva Judicial Actions

After the conventions of Geneva produced definitions to delimit the territorial sea and as technology made more undersea resources available for exploitation, the dispute between California and the United States reopened in the Supreme Court. In *United States* v. *California*,[59] the issue was where the maritime boundaries of the state were to be drawn. With the passage of the aforementioned Submerged Lands Act and the Outer Continental Shelf Lands Act, the state was to be allocated the resources within the territorial sea, but this left unsettled the establishment of the "coast" line from which the territorial sea was to be measured since California argued that seven segments of the coast were "historic bays" and property of the state. One segment, for example, included the waters extending 22 miles to Catalina Island. California argued that these were

internal waters, not to be delimited by international agreements. Further, the disposition of the lands under the sea should be in accordance with the previously mentioned statutes. The Court held that Congress intended the Court to define "inland waters" and that such a definition must necessarily follow the provisions of the Convention on the Territorial Sea and Contiguous Zone; hence, California's claim was defeated. The Court also decided that absent special provision, as was in the case of the gulf states, the allocation of undersea areas was to be 3 miles in width, again measured from a coastline as defined by the Convention. The Court sought to preserve a compatability between state and national claims; clearly this was the same rationale to be used in the *Island Airlines* case (see section VII).

The Supreme Court affirmed federal ownership of the resources of the Continental Shelf outside of three miles in *U.S.* v. *Maine* et al., decided by the Court on March 17, 1975. Although Maine and other Atlantic coastal states argued for rights in these resources based on grants from the English crown, the Court, in essence, looked at developments of only the past thirty years:

> We are quite sure that it would be inappropriate to disturb our prior cases, major legislation, and many years of commercial activity by calling into question, at this date, the constitutional premise of prior decisions.[60]

This decision, in view of the conflict over recent Atlantic and southern California oil lease sales, will again continue the state-federal ownership conflicts and the only arena left for state action will be the U.S. Congress.[61]

Domestic Seabed Policies

The issue of seabed resources, left unsettled at the 1958 and 1960 conferences, again received United States attention in a statement by President Nixon in 1970:

> ...[T]herefore, I am proposing today that all nations adopt as soon as possible a treaty under which they would renounce all national claims over the natural resources of the sea beyond the point where the high seas reach a depth of 200 meters (218.8 yards) and would agree to regard these resources as the common heritage of mankind.
>
> The treaty should establish an international regime for the exploitation of seabed resources beyond this limit. The regime should provide for the collection of substantial mineral royalties to be used for international community purposes, particularly economic assistance to developing countries.[62]

The statement further proposed that, before an international regime was established, an interim policy managed by the coastal states would allow

exploration and exploitation "subject to the international regime agreed upon." But since the intervening years have produced no international regime, the United States has, through domestic legislation, taken preliminary steps to license the exploitation of the deep seabed. A number of bills in both the U.S. House and Senate have put forth detailed provisions for the granting of licenses, collecting of fees, and the insuring of operators against conflicting international regulation.[63] The publicity given to these actions of Congress has brought forth a good deal of controversy in the international community, since the United Nations has adopted a resolution providing for a moratorium on such actions until an international regime is established. The resources of manganese nodules at stake have now become a matter of national concern and the United States has again appeared willing to extend jurisdiction of increasing oceanic areas.

Caracas and Geneva

Although the United Nations conferences at Caracas in 1974 and Geneva in 1975 adjourned without any conclusive agreements, the pattern of United States current policy again indicated increased control of the seas. Only the issue of transit over areas that the U.S. now regards as high seas seems to stand in the way of eventual agreement on the 12-mile territorial sea and the 200-mile economic zone. Agreement on the mining of resources on the ocean floor appears to be farther away. The trend of these conferences was developed in section II, but it is clear that this deviation from the "traditional" limits espoused by the United States really represents an official recognition of the policies that have been developing in this country over many years. The national interest has always depended heavily on free transit over the seas and the moves towards increased jurisdiction have not conflicted with this interest until recently as other countries have adopted similar increased oceanic jurisdictions. The United States now seeks to separate resource control zones from absolute sovereignty zones (such as the territorial sea) in order to continue to maximize its control over transit and resources. But national policy will come into increasing conflict with the policies of other countries seeking similar ends and future zones of control can be expected to be settled through multilateral agreements.

F. Footnotes

1. See generally, B.G. Heinzen, "The Three-Mile Limit: Preserving the Freedom of the Seas," 11 *Stan.L.Rev.* 597 (1959); E.D. Dickinson, "Jurisdiction at the Maritime Frontier," 40 *Harv. L. Rev.* 1 (1926); A.M. Gross, "Maritime Boundaries of States," 64 *Mich. L. Rev.* 639 (1966); Note, "Power of a State To Extend Its Boundaries Beyond the Three Mile Limit," 39 *Colum. L. Rev.* 317 (1939).

2. Act of Aug. 4, 1790, ch. 35 ss 13-14, 1 Stat. 145, 157, 158 (1790).

3. *Ibid.*, s. 13, 1 Stat. 157.

4. Act of March 2, 1799, ch. 22, ss 27, 28, 1 Stat. 627, 648 (1799).

5. See note from Secretary Jefferson to British Minister, Nov. 8, 1793 in 1 Moore, Digest of International Law 702-703 (1906), also reprinted in H. Ex. Doc. No. 324, 42d Cong., 2d Sess. (1872) 553-554. In discussing the extent of United States claims, Jefferson says in part:

> The greatest distance to which any respectable assent among nations has been the extent of the human sight, estimated upwards of 20 miles, and the smallest distance I believe, claimed by any nation whatever is the utmost range of a cannon ball, usually stated at one sea league....Reserving, however, the ultimate extent of this for future deliberation, the President gives instructions to the officers acting under his authority to consider those heretofore given them as restrained for the present to the distance of one sea league or three geographical miles from the seashores. This distance can admit of no opposition, as it is recognized by treaties between some of the powers with whom we are connected in commerce and navigation, and it is as little, or less, then is claimed by any of them for their own coasts.

   Jefferson's 3 mile claim was maintained by his successors, in that office, Secretaries of State Pickering in 1796, Madison in 1807, Buchanan in 1849, and Fish in 1875, all catalogued in 1 Moore, *supra*, 702-706.

6. Act of June 5, 1794, ch. 50. s. 6, 1 Stat. 384 (1794).

7. 2 Cranch 187 (1804).

8. 2 Cranch p. 234.

9. 5 C Robinson 373, 385c, 165 Eng. Rep. 809, 814 (High Ct. of Adm. 1805).

10. *Ibid.*, p. 385b.

11. 4 Cranch 241 (1808).

12. 4 Cranch 293 (1808).

13. 6 Cranch 281 (1810).

14. 1 Fed. Cas. 926 (No. 397) (C.C.D. Mass. 1812).

15. 1 Fed. Cas. pp. 926-927.

16. Riesenfeld, *Protection of Coastal Fisheries Under International Law* 138 (1942).

17. Convention with Great Britain Respecting Fisheries, Boundary and the Restoration of Slaves, Art 1, Oct. 20, 1818, reprinted in Treaties, Conventions, etc., Between the United States of America and other Powers, Vol 1, 1776-1909, Sen. Doc. 357 (1910).

18. 139 U.S. 240 (1891). See also *Cunard Steamship Co.* v. *Mellon*, 262 U.S. 100, 122 (1923) where the court said in part:

> It is now settled in the United States and recognized elsewhere that the territory subject to its jurisdiction includes the land areas under its dominion and control, the ports, harbors, bays and other enclosed arms of the sea along its coast and a marginal belt of the sea extending from the coastline outward a marine league, or three geographical miles.

19. 139 U.S. p. 257.

20. *Ibid.*

21. Act of March 4, 1917, ch. 180, 39 Stat. 1194 (1917).

22. N.J. Padelford, *Public Policy for the Seas*, 31 (rev. ed. 1970).

23. 274 U.S. 501 (1927). See also, National Prohibition Act, 41 Stat. 305 (1919). Regulations issued pursuant to the Act authorized the policing of territory including "a marginal belt of the sea extending from the low water mark outward a marine league, or three geographical miles" constituting the "territorial waters of the United States." U.S. Treas. Reg. 2, s2201 (1927) reprinted in *Research in International Law*, 23 A.J.I.L. 249, 250 (supp. 1929).

24. 274 U.S. p. 504.

25. *Ibid.*, p. 511.

26. Act of June 17, 1930, ch. 497, 46 Stat. 590. 19 U.S.C. s 1401(j) (1970).

27. Act of August 5, 1935, ch. 438, 49 Stat. 517, 19 U.S.C. ss 1701-11.

28. 5 For. Rel. U.S. 36-39 (1939).

29. *Ibid.*, p. 37, article 3.

30. Proc. 2667, 3 C.F.R. 67-68 (1945).

31. Ex. Ord. 9633, 3 C.F.R. 437 (Supp. 1957).

32. XIII *Bulletin*, Department of State, No. 327, Sept. 30, 1945, pp. 484-485, reprinted in M.M. Whiteman, *Digest of International Law*, Vol. 4, pp. 757-758.

33. 3 C.F.R. 437 (1957).

34. Proc. 2668, 3 C.F.R. 68-69 (1945).

35. Ex. Ord. 9634, 3 C.F.R. 437 (Supp. 1957).

36. Ex. Ord. 10426, 3 C.F.R. 924-925 (Supp. 1958).

37. *Ibid.*, ss 1(a), 2. See also, discussion of *United States* v. *California*, *infra*.

38. California relied partly on their 1849 Constitution which included a belt extending three English miles from the low water mark, less than three nautical miles claimed by the Federal Government, Cal. Const. Art. XII (1849).

39. 332 U.S. 19 (1947).

40. *Ibid.*, p. 31-36.

41. See text and notes, *Manchester* v. *Massachusetts*, *supra*, pp. 6-7.

42. *United States* v. *Louisiana*, 339 U.S. 699 (1950); *United States* v. *Texas*, 339 U.S. 707 (1950).

43. 6 Dart., La. Gen Stats. (1939) ss 93.11.1-93.11.4.

44. On December 19, 1836, the Congress of Texas passed an act defining the southern boundary as follows: "beginning at the mouth of the Sabine river, and running west along the Gulf of Mexico three leagues from land, to the mouth of the Rio Grande." 1 Laws, Rep of Texas, p. 133.

45. 339 U.S. p. 704, 339 U.S. p. 719.

46. 67 Stat. 29 (1953), 43 U.S.C. s 1301 *et seq.* (1964).

47. *Ibid.*, p. s 1311(a).

48. *Ibid.*, p. 1301(b).

49. 43 U.S.C. s 1331 *et seq.* (1964).

50. *United States* v. *Louisiana*, 363 U.S. 1 (1959) deciding the claims of Louisiana, Texas, Mississippi, and Alabama; *United States* v. *Florida*, 363 U.S. 121 (1959), deciding the claims of Florida.

51. J. Nafziger, "Air Service Over Hawaii's Interisland Channels Subject to CAB Jurisdiction," 7 *Harv. Int. L.C. Jour.* 143, 147 (Winter, 1965).

52. McDougal, "Hydrogen Bomb Tests and the International Law of the Sea," 49 *Am. J. Int'l L.* 356, 357 (1955).

53. Convention on the Territorial Sea and Contiguous Zone, Art. 24, ss 1-2, reprinted in Ex. Rep. No. 5, 86th Cong., 2d Sess., (1970).

54. Statement of April 28, 1958, 38 Dept. State Bull. 1110-11 (1958), which said in part:

> Our offer to agree on a 6-mile breadth of territorial sea, provided agreement could be reached on such a breadth, under certain conditions, was simply an offer and nothing more. Its non-acceptance leaves the pre-existing situation intact...
>
> Furthermore, we have made it clear that in our view there is no obligation on the part of states adhering to the 3-mile rule to recognize claims...to a greater breadth of territorial sea.

55. See generally section II and *Treaties and Other Agreements on Oceanographic Resources, Fisheries and Wildlife to Which the United States is a Party*, Committee on Commerce, U.S. Sen., 91st Cong., 2d Sess. (1970).

56. Pub. L. 89-658, 88th Cong., S.2218; 80 Stat. 908 (1966).

57. Pub. L. 91-224, Title I, s101, April 3, 1970, 84 Stat. 91.

58. Oil Pollution Act of 1924, 33 USCA ss 431-437.

59. *United States* v. *California*, 381 U.S. 139 (1965).

60. *U.S.* v. *Maine et al.*, No. 35, Original decision reported in 43 Law Week 4359.

61. A brief summary of the legislative activity of the 93d Congress is contained in *Development of Oil and Gas on the Continental Shelf*, Report to the Committee on Commerce, U.S. Senate, 1974.

62. President Nixon statement on U.S. Oceans Policy, May 23, 1970.

63. See generally text in section II, footnote 17.

VII. HAWAIIAN OCEAN CLAIMS: ELEMENTS OF AN ARCHIPELAGIC CLAIM

Island nations currently making archipelagic claims have made their case on several elements: the historic boundaries, economic dependence on ocean resources, the need for state security, and the need to promote unity by placing connecting seas--routes of transit and communication--under state jurisdiction. One element of a potential Hawaiian archipelagic claim, the historic boundaries of the state, has received attention in a federal district court.

A. Historical Hawaiian Claims

In *Island Airlines* v. *CAB*,[1] the historic claims of the kingdom of the state of Hawaii to the channel waters of the island chain beyond the 3-mile territorial sea were examined by the Court of Appeals of the Ninth Circuit which concluded that no binding claim existed. The dispute in the *Island Airlines* case arose when the airline began cut-rate "sky-bus" flights between the islands under the authority of the State Public Utilities Commission and the flights were stopped by an injunction granted to the Civil Aeronautics Board which claimed that air transportation between the islands was "interstate" commerce properly within its authority as granted by the Federal Aviation Act.[2] This act defines interstate air transportation to include travel between places in the same state if it takes place in air space over any place outside of the state. Interisland flights, of course, leave the jurisdiction of the 3-mile territorial sea traditionally claimed by the United States; thus, the airline company sought to show, through historical documents, that there was to be some precedent for the state of Hawaii exercising jurisdiction over the channel waters.

The first historical document cited by Island Airlines was the second act of Kamehameha III passed in 1846 which states:

> SECTION I. The jurisdiction of the Hawaiian Islands shall extend and be exclusive for the distance of one marine league seaward, surrounding each of the islands of Hawaii, Maui, Kahoolawe, Lanai, Molokai, Oahu, Kauai and Niihau; commencing at low water mark on each of the respective coasts of said islands.
>
> The marine jurisdiction of the Hawaiian Islands shall also be exclusive in all the channels passing between the respective islands, and dividing them; which jurisdiction shall extend from island to island.
>
> SECTION II. It shall be lawful for his Majesty to defend said closed seas and channels, and if the public good shall require it, prohibit their use to other nations, by proclamation.

> SECTION III. All captures and seizures made within said channels or within one marine league of the coast, shall be deemed to have been made, and shall be deemed to have entered in His Majesty's waters. The civil and criminal jurisdiction shall be coextensive with the one maritime league, and interisland channels herein defined. And the right of transportation and trans-shipment from island to island, shall exclusively belong to Hawaiian vessels duly registered and licensed to the coasting trade, as in the two succeeding articles prescribed.[3]

A second document submitted was a confirmation of this interisland sovereignty in a Privy Council resolution of August 29, 1850:

> Resolved, that the rights of the king as sovereign extend from high water mark a marine league to sea, and to all navigable straits and passages among the Islands, and no private right can be sustained, except private rights of fishing and of cutting stone from the rocks as provided and reserved by Law.[4]

In the 1854 Neutrality Proclamation, the jurisdiction was again affirmed:

> Be it known, to all whom it may concern, that we, Kamehameha III, King of the Hawaiian Islands, hereby proclaim our entire neutrality in the war now pending between the great maritime Powers of Europe; that our neutrality is to be respected by all belligerents, to the full extent of our jurisdiction, which by our fundamental laws is to the distance of one marine league surrounding each of our islands of Hawaii, Maui, Kahoolawe, Lanai, Molokai, Oahu, Kauai, and Niihau, commencing at low-water mark on each of the respective coasts of said islands, and includes all the channels passing between and dividing said islands from island to island; that all captures and seizures made with our said jurisdiction are unlawful; and that the protection and hospitality of our ports, harbors, and roads shall be equally extended to all the belligerents, so long as they respect our neutrality.[5]

The lower federal district court found a conflict between these documents and section 1491 of the Hawaiian Civil Code of 1859,[6] which expressly repealed the second act of Kamehameha III; an early case which overlooked the Second Act;[7] and the Neutrality Proclamation of 1877, which defined the territory of the Kingdom as: "all its ports, harbours, bays, gulfs, skerries and islands of the seas cut off by lines drawn from one headland to another."[8] Further, another Hawaiian Supreme Court case[9] and the Hawaiian Organic Act of 1900 confused the effects of any claims to the waters between the islands by the kingdom. The Organic Act defined the Territory of Hawaii as "the islands acquired by the United States."[10]

In addition to the Organic Act, the court looked at other legislative actions which surrounded the annexation of the Kingdom of Hawaii to the United States. In these enactments, no mention of a territorial claim wider than 3 miles was found. The resolution of the Senate of Hawaii, which provided for annexation in 1898 stated:

> The Republic of Hawaii hereby cedes absolutely***to the United States of America all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands***
> Article II. The Republic of Hawaii also cedes and hereby transfers to the United States the absolute fee and ownership of all public lands, public buildings***ports, harbors*** and all other public property of every kind and description belonging to the government of the Hawaiian Islands, together withevery right and appurtenance thereto appertaining.[11]

The joint resolution of the United States Congress which accepted the cessation of territory made no mention of the particulars of the Republic's holdings, but merely placed them under the sovereignty of the United States.[12]

The court said that the issue of boundaries again arose during the 1953-1954 hearings before the Committee on Interior and Insular Affairs of the United States Senate on the Statehood Bills.[13] The Committee questioned the claims of the Constitutional Convention of the State of Hawaii in 1951 which stated that the channels were included in the Territory of Hawaii.[14] But the delegates of the Hawaiian Statehood Committee denied these claims: "all three jointly and severally stated positively and unequivocally that Hawaii made no claim for control of ocean waters beyond the traditional three mile limit."[15] The committee then reported to Congress that the territorial waters of Hawaii were in agreement with United States policy.[16]

The Court found these claims to be in conflict and looked to the decision of the *Anglo-Norwegian Fisheries* case to see if Hawaii's claim could be met by a definition of "historic waters."[17] The Court determined that a theory of such historic waters rested on the principle of "acquisitive prescription." The prescriptive claim then had three factors:

1. The exercise of authority over the area by the state claiming the historic right
2. A continuity of this exercise of authority
3. The attitude of foreign states [18]

The Court further stated that such a claim represented an exception to the traditional rules of international law delimiting territorial claims and therefore the state of Hawaii would have the burden of proof to substantiate these claims.[19] Since the claims of Hawaii did not meet this formulation of the Court, it was held that the boundaries of the state were to be the traditional 3 miles around each island.

But this decision is not without its critics. Since the policy of the United States is to ensure freedom of the "high seas," it is felt that courts have deferred to this policy in order to strenghten this policy as promulgated by the Department of State.[20] In a 1964 Memorandum from Secretary of State Rusk to Attorney General Kennedy which pre-dated the decision, Rusk said:

> It is the traditional position of the United States that its territorial sea is three nautical miles in breadth measured from the low-water mark along its coasts. An island has its own territorial sea measured from the same baseline. It is therefore the Department's position that each of the islands of the Hawaiian Archipelago has its own territorial sea, three miles in breadth measured from low-water mark along the coast of the island. It is our view that the waters seaward of these belts of territorial sea are high seas over which no State exercise sovereignty.[21]

As one commentator says of this judicial deference:[22]

> The trend in the Supreme Court since 1947 has been in the direction of subordinating the rights of the States to determine their frontiers to the 'paramount' rights of the United States as the embodiment of national sovereignty at the international level. Where United States policy is favorable to maritime claims, the Courts will defer to an executive indication as the District Court did in respect of the coastal archipelago of Cuba: 'I take judicial notice that the site at which the ship was loaded is in a well-defined archipelago and that the line of keys forming this archipelago is part of Cuban territory.'[23]

Other criticisms of the decision concentrate on the logic of the above mentioned criteria applied by the court to Hawaii's claim. The opinion is that the Court, seeking to agree with Department of State policy, was not rigorous and comprehensive in examining international practice towards the concept of historic waters.[24] For example, the principle of "continuous usage" was accepted by the Court as a required element of the claim. But this criteria has more than a single dimension:

> The International Law Commission suggested that the geographical configuration of a coastal area may of itself justify a claim to the maritime area, even in the absence of a continuous manifestation of activity in the area. Although this argument has been typically restricted to mainland coastal waters and to a delimitation of bays -- such as the Delaware and the Chesapeake -- it has been accepted in the *Fisheries* case as applied to coastal islands, and its extension to an outlying and isolated but politically unified cluster of islands such as Hawaii appears reasonable. Indeed, the rule -- referred to as the "archipelago theory" is that an archipelago or island group should be treated as a unit with an outer circumference from which the belt of territorial waters is to be measured.[25]

In view of the archipelagic claims currently being made by island-nations and the rationale offered to support these claims, the decision in the *Island Airlines* case now appears to be standing on a less than firm foundation. At most, it settled only *some* historic claims, but drew wide-sweeping conclusions.

B. Alternative Archipelagic Issues

As was detailed in section IV, the historical aspects of nations now making archipelagic claims form only a starting point. A renewed claim by Hawaii for jurisdiction over the waters and their resources between the islands must then look to the other elements of an archipelagic claim. For example, the historical dependence of the state of Hawaii on the resources of the nearby waters and the need to promote political unity through state management of the transit between the islands can be elements of a future claim. Both of these elements have been proposed by Indonesia in an archipelagic claim theory.[26]

The importance of resources from the seas to the economy of Hawaii may now be returning to historical importance. To the Polynesians of Hawaii, the fish caught in the open ocean and cultivated in fishponds formed an integral, important staple in their economy. Local fishing rights were allocated by a system called konohiki; some portions of land were granted by Royal Patents that extended jurisdiction out to the reefs--i.e., an ahupuaa--ceded land to a chief that consisted of an entire valley, narrow in the mountains and widening to include water rights where the valley met the ocean:

> ...[I]n ancient Hawaii, the division of land known as an ahupuaa generally ran from the sea to the mountains. Such a division enabled a chief and his people to obtain fish and seaweed from the ocean, and fuel, canoe timber and mountain birds and the right-of-way to obtain these things.[27]

The lesser chiefs of Hawaii, the konohiki, had exclusive fishing rights which were a part of the original grant of the ahupuaas from the King. Legislation still recognizes these rights:

> Sec 188-4. Konohiki rights. The fishing rights from the reefs and where there happen to be no reefs, from the geographical mile seaward to the beach at the low water mark, shall, in law, be considered the private property of the konohiki, whose lands, by ancient regulation, belong to the same; in the possession of which private fisheries, the konohiki shall not be molested, except to the extent of the reservations and prohibitions hereinafter in this chapter set forth.[28]

The general theme to be gathered from the concepts of ahupuaa and konohiki is that the sea and the importance of its resources were well recognized in ancient Hawaiian law and custom. It is interesting to

note that in two recent cases before the Hawaii supreme court, under an "Hawaiian custom and usage" exception in the statutes,[29] there have been principles adopted that are somewhat contrary to the English common law, but are firmly rooted in Hawaiian custom.[30]

As evidenced in section X, the fishing industry is only recently gaining significant economic viability. It is, however, the manganese resources from the Hawaiian waters which, as their commercial value is demonstrated, may again show the importance of ocean resources to Hawaii's economy and thereby form an element for an archipelagic claim.

Finally, the visitor industry depends greatly on the proper management of the water quality surrounding the islands. Tourism remains the largest single element in the private sector contributing to the economy of the state of Hawaii and, more than any other state, the welfare of the ocean waters should remain a top priority. For this reason alone, the sea has a unique relationship with the remainder of the state that should qualify Hawaii for unique boundaries and control of the surrounding waters.

Another element of a potential archipelagic claim is the need to exercise jurisdiction by a single manager over transportation and communication lines in the state to promote political and cultural unity. The seven populated islands of Hawaii have always depended on the sea for transit and cultural communications and the links by air transportation are merely another dimension to the need for a single control of this "highway." The decision of the *Island Airlines* case now subjects the state to federal regulation of air transit; thus in a sense, treating each island as a separate "state" to the detriment of political unity. The court in the *Island Airlines* case recognized this problem and recommended one type of solution:

> ...[O]ur ruling today should hasten congressional consideration of whether Hawaii should be excepted from federal permits to operate island to island.[31]

Further, the implications of the eventual acceptance by the United States of a 12-mile territorial limit may further confuse the jurisdiction over the transportation links. Current state jurisdiction extends to the 3-mile limit, since this has been the recognized U.S. territorial sea. A larger territorial sea would probably be matched by a move of the coastal states for control over a similarly enlarged area, i.e., 12 miles. Such an eventuality would put all the island channels, except Kauai and Alenuihaha, under state control. This mixed jurisdiction, though speculative, is not desirable.

The conclusion that must be is that there are many elements and issues of an archipelagic claim that are far from settled. In many respects, an archipelagic claim by the state of Hawaii, as it is in the international community, remains in the formative state. The position of the United States towards traditional concepts of "high sea" cannot remain inflexible in view of the vocal claims made by other nations. As the United States recognizes increased jurisdiction over the sea by other countries, it would seem equitable to recognize the legitimate claims of Hawaii for the management of its oceanic resources.

C. Footnotes

1. 235 F. Supp 990 (d. Haw. 1964), aff'd 352 F.2d 735 (9th Cir. 1965).

2. 49 U.S.C. s 1301 *et seq.*

3. Statute Laws of 1846, Vol. I, Chap. VI, Art. I, Sections I, II, and III.

4. Resolution of the Privy Council of the Kingdom of Hawaii of August 29, 1850.

5. W.R. Crocker, *Extent of the Marginal Sea,* (1919 ed.), pp. 595-596.

6. Section 1491 of the Hawaiian Civil Code of 1859 expressly repealed the Second Act of Kamehameha III.

7. *King* v. *Parish,* I Haw. 58 (1849), The Chief Justice applied Hawaiian law to the theft of a whaleboat from a ship within three miles of Lahaina, but no mention was made of the Act of 1846 to use a "channel" theory.

8. Neutrality Proclamation of 1877; W.R. Crocker, *supra* note 5, p. 596:

> Now, therefore, we, Kalakaua, by the grace of God, King of the Hawaiian Islands, do hereby declare and proclaim the neutrality of this Kingdom its subjects, and of all persons within its territory and jurisdiction, in the war now existing or impending between the Great Powers of Europe; that the neutrality is to be respected by all belligerents to the full extent of our jurisdiction including not less than one marine league from the low-water mark on the respective coasts of the islands composing this Kingdom, and also all its ports, harbors, bays, gulfs, estuaries, and arms of the sea cut off by lines drawn from one headland to another; and that all captures and seizures, enlistments, or other acts in violation of our neutrality within our jurisdiction are unlawful.

9. *The Territory of Hawaii* v. *Liliuokalani,* 14 Haw. 88 (1902) held that the Privy Council had no authority other than advising the King.

10. Hawaiian Organic Act, H.R.S. v. 1, pp. 23-76 (1968).

11. Resolution of September 9, 1897, R.L.H. 1955, Vol. I, p. 15.

12. The Joint Resolution of the United States Congress, No. 55 of July 7, 1898 (R.L.H. 1955, Vol. I, p. 13).

13. Statehood bills, Hearings before the Committee on Interior and Insular Affairs, U.S. Senate, 1953-1954.

14. Report of the Constitutional Convention Standing Committee 56, p. 259:

> The words 'territorial waters' are meant to include those rightful areas as incurred in the Hawaiian Organic Act... which include not only the three mile limit but the territorial waters between the named islands.

15. U.S. Senate 83rd Congress, Hearings of the Committee on Interior and Insular Affairs, Part 2, pp. 46, 47, 51, 121, 132, 265.

16. 84th Congress, H.R. No. 88 on H.R. 2535.

17. *Island Airlines, Inc.* v. *C.A.B.*, 352 F.2d 735 (1965), pp. 738-741.

18. *Ibid.*, 740.

19. *Ibid.*, 741.

20. D.P. O'Connell, "Mid-Ocean Archipelagos in International Law," *British Yearbook of International Law* - 1971, p. 45. Also, J. Nafziger, "Air Service Over Hawaii's Interisland Channels Subject to CAB Jurisdiction," 7 *Harv. Int. L.C. Jour.* 143, 147 (1965).

21. M.M. Whiteman, *Digest of International Law*, Vol. 4, p. 281.

22. *O'Connell, supra* note 20, p. 45.

23. *Banco Nacional de Cuba* v. *Sabbatino*, 193 F. Supp. 375 (1961) p. 379.

24. *Nafziger, supra* note 20, pp. 147-149.

25. *Ibid.*, p. 148.

26. Second United Nations Conference on the Law of the Sea, Official Records, p. 51.

27. *Palama* v. *Sheehan*, 50 Hawaii 298, 300; 440 P.2d 95, 97 (1968).

28. Hawaii Rev. Stat. s 188-4 (1968).

29. *Hawaii Revised Statutes* s 1-1. Common Law of the State; exceptions. The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases except as otherwise expressly...fixed by Hawaiian judicial precedent or established by Hawaiian usage... s. 1-1 is derived from L.1892, C.57, s 5, approved 25 November, 1892 and effective 1 January 1893.

30. In *Application of Ashford* 50 Hawaii 314, 440 P.2d 76 (1968) it was held, contrary to common law practice, that the boundary of the state's jurisdiction on the seashore is marked by the "upper reaches of the wash of the waves" rather than the mean high water marks.

In *McBryde Sugar Co., Ltd.* v. *Robinson,* 54 Hawaii 174, 504 P.2d 1330 (1973) the state was declared owner of water in a river and no private owner can adversely acquire a right to "surplus" water.

31. 331 f.2d 207 p. 208.

EFFECTS OF EXPANSION

VIII. STATE GOVERNMENT: CONTROL OVER THE ARCHIPELAGO

Currently, the boundaries of the state of Hawaii over oceanic jurisdiction begin at the "high wash of the waves" or vegetation line and extend 3 miles seaward. Federal jurisdiction continues 9 more miles out through the "contiguous zone." An increase in the jurisdiction of the state, either through acceptance of an archipelagic claim on through congressional action that would extend boundaries in line with a wider "economic zone," would not drastically alter any of the current segments of Hawaii's government, but it would mean a need for increased state emphasis on areas now largely under federal control such as intrastate transportation, pollution control, and exploitation and management of seabed resources. This section will then deal with the spheres of influence exerted by some state divisions and departments in the marine environment and predict some future concerns for these governmental sections.

A. Office of the Governor

> Each principal department shall be under the supervision of the governor and, unless otherwise provided in this constitution or by law, shall be headed by a single executive. Such single executive shall be nominated and, by and with the advice and consent of the Senate, appointed by the governor and he shall hold office for which the governor was elected, unless sooner removed by the governor.[1]

This provision of the state constitution gives the governor considerable discretion in the direction he wishes to lead the state. Hawaii, in 1969, under the leadership of Governor John A. Burns, published *Hawaii and the Sea: A Plan for State Action.* This was a comprehensive report that made a number of recommendations for a five-year action plan on marine topics that ranged for research to recreation.[2] This five-year plan was evaluated in 1974 with the publication of *Hawaii and the Sea--1974*. The report says in part:

> The 1969 report contained a list of 22 major recommendations for State action in marine affairs, plus a larger number of subordinate recommendations....
>
> ...Until recently, Hawaii's support of the Marine activities has been outstanding. All but 4 of the 22 major recommendations have resulted in some degree of action....[3]

The conclusions that can be drawn from both the 1969 and 1974 reports are that it is the Office of the Governor, with great discretion in funds administration in recent years of lagging state finances, that controls the emphasis given programs and recommendations concerning the oceanic environment. It is therefore the Office of the Governor which will be the major policy and decisionmaking unit in the state government.

B. Marine Affairs Coordinator

The position of Marine Affairs Coordinator (MAC) was established in response to a 1969 recommendation and was housed within the Office of the Governor in 1970. The legislature appropriated $870,000 in addition to other staff funding in 1973 for the office which acts as an advisor to the Governor in marine affairs, a promoter of Hawaii's growth in marine areas outside of the state, a developer of plans to increase the state's economic development of sea resources, and a solicitor of federal and private funds to benefit marine programs and research. *Hawaii and the Sea--1974* described the accomplishments of this office as follows:

> We believe that Hawaii's Marine Affairs Coordinator has performed in an outstanding manner since that office was created more than three years ago. He has ably represented the State's marine interests locally, in Washington and in several foreign countries. He has brought a number of important, highly visible marine technology projects to Hawaii, notably the diving physiology program and the "Floating City" program, both at the University of Hawaii. Through his second position as Dean of Marine Programs, he has had a major beneficial impact on marine education in the State, especially in educating the student destined for non-marine professions.[4]

MAC, then, provides the guiding direction the state must have to formulate marine policy. It is from this office that basic research and data is expected to come to aid in the decisionmaking process. And since it is decisions on strategy for the management of new state boundaries and increased resources that would have to be made as the state's marine jurisdiction increased, the Marine Affairs Coordinator must plan for the future with the several possible boundary contingencies. In his other capacity as Dean of Marine Programs, the role of marine education for all levels in Hawaii would also have greater responsibility as population awareness of the ocean territory, potentially more vast than land resources, would be vital to efficient oceanic use.

C. Office of Environmental Quality Control

Established in 1970 by the legislature, the Office of Environmental Quality Control (OEQC) operates within the Office of the Governor. The director of OEQC is also chairman of the Environmental Council. The council is composed of not more than 15 members representing a cross-section of the public. Its function is to:

> ...[S]erve as a liaison between the director and the general public by soliciting information, opinions, complaints, recommendations and advice concerning ecology and environmental quality through public hearings or any other means.[5]

The director's prime function is to coordinate the various state agencies in the area of environmental quality. In this respect, OEQC is closely allied with the Department of Health and its environmental office. The present goal of OEQC is to ensure that standards of environmental quality established by the federal government are met. Therefore, a territorial expansion of the state would imply more control by the state over standards and enforcement of environmental regulations. A number of decisions would have to be made concerning assigning responsibility for setting the standards and consequential enforcement. The substance of the job now assigned to OEQC would not change, but the scope of its influence would widen considerably.

D. Department of Land and Natural Resources

Traditionally, land and water are interwoven in the Hawaiian lifestyle. So it is with the Department of Land and Natural Resources (DLNR) which administers both. The chairman of DLNR is the coordinator for six divisions which make up DLNR.[6] The chairman is also a member of the Governor's cabinet and serves as a liaison for the functions of the Department with the Governor and the legislature and serves as an ex-officio member of the State Board of Agriculture and Land Use Commission.[7] The board is responsible for classifying public lands and may also sell, license, permit, or dispose of the lands by any suitable means. The department also processes the applications for use of lands that are designated as conservation by the Land Use Commission.

The number of applications to DLNR for land use permits has been on a sharp increase since the early 1960's. Since there are only a few corporations that are capable of exploiting marine resources, future activity in this field cannot be judged by numbers of applications. But the impact of only a few decisions in the marine resource area of manganese nodules, for example, would be very great throughout the state. An expanded ocean jurisdiction for Hawaii that puts this and other resources under state control therefore adds a new dimension to the meaning of "public lands" and DLNR must prepare to make carefully researched, thoughtful decisions.

Some of the potential impacts of these decisions were recognized in *Hawaii and the Sea--1974* and many recommendations are directed specifically at DLNR. An increased jurisdiction will give these recommendations greater priority. At least one step towards increased emphasis on these potential problems is:

> A Division of Marine Resources should be created within the Department of Land and Natural Resources. Further, the Division should be established with the intent of eventually expanding into a Department of Marine Resources as an independent State agency.[8]

DLNR - Planning Office

The Planning Office is the advisory arm to the chairman and board of DLNR. Under the supervision of a Planning Program Coordinator, this office processes applications for use of conservation districts and notifies other state agencies of the proposed use and evaluates the response. Additionally, the Planning Office assists in plans for development and utilization of state-owned resources and assists DLNR in formulating ecological input.[9]

Obviously, this office will be the focal point initially for any use of state seabed resources. For example, the lease of sections of channel seabeds for manganese exploitation requires the approval of this office. Since the responsibility of the Planning Office includes plans for development, it is vital that this office be "on top" of the rapidly developing ocean mining industry in order to make informed recommendations.

DLNR - Fish and Game

The Division of Fish and Game is responsible for the conduct and administration of DLNR programs which relate to developing, managing, and preserving the fish and wildlife of the state.[10]

The fisheries branch deals with the commercial and recreational utilization of aquatic resources and does research in the areas of improving the physical and biological environments. The branch also conducts biological studies to gain the information necessary for the regulation of specific fisheries, the establishment and protection of underwater sanctuaries, the management of public fishing areas, and the research and development of new commercial and sports fisheries. Fisheries is in charge of issuing permits and licenses to fishermen.

Currently, the branch works closely with the U.S. Fish and Wildlife Service which administers the Hawaiian Islands National Refuge (the Northwestern Hawaiian Islands from Nihoa to Pearl and Hermes Reef).[11] The following recommendation has been made concerning this area:

> The Department of Land and Natural Resources, in a Joint venture with the University of Hawaii and the National Marine Fisheries Service, should complete an intensive fishery survey of the Northwestern Hawaiian Archipelago over the next three years.[12]

A further recommendation:

> The DLNR should request that any Federal declaration of the Northwestern Hawaiian Islands as a "natural wilderness area" should follow, and be based upon, a survey of the fishery and precious coral resources in those islands. As a fall-back position, the Department should request a stipulation in any such declaration that carefully selected areas of such a preserve can be opened to controlled resource utilization.[13]

Of course, if the jurisdiction of the state covers these now federally administered areas, the state would have the sole responsibility for the above actions. Additionally, since DLNR has also been recommended to study and adjust its licensing scheme,[14] an increased jurisdiction would bring in a larger group of foreign fishermen who would interact with any licensing scheme. The effects on both the living resources and the revenues to the state are issues that must be given attention by the fisheries branch.

E. Department of Health

The Department of Health is generally concerned with coastal water quality:

> Prompted by Federal water quality legislation, the Hawaii Legislature in 1965 broadened the jurisdiction of the State Department of Health over water quality from a narrow aspect of public health to a more general concern for public welfare. Standards applicable to coastal waters and a permit system applicable to wastewater discharges to coastal waters were established in 1968....
>
> In 1972 the Federal Water Quality Act was completely revised....
>
> This Act expressed a policy which leaves the primary responsibilities to control pollution in the hands of the states....Nevertheless, the effect of the Act has clearly been to transfer power for the control of coastal water quality from the states to the Federal government.[15]

The conflict between state and federal control of water quality standards and discharges will be more fully developed in section IX but an expansion of jurisdiction by state over the sea should strengthen the argument that Hawaii has a unique need to set its own standards, especially for sugar waste discharge. Recommendations from *Hawaii and the Sea--1974* concerning the Department of Health are primarily concerned with making a rational choice of standards, based on adequate research and careful judgments of cost/benefit to the economy and general state welfare. An interaction between this needed research and increased jurisdiction can be predicted that should bear directly on the issue of standard setting. The interaction should lead to the conclusion that a "single manager" is the best choice for the research, decisionmaking, and enforcement of water quality regulations.

F. Department of Transportation

As was developed in section VII a most probable effect of Hawaiian control over the interisland waters would be to bring interisland transportation under state control. Currently, people must travel by air

between the islands, but there are at least four proposals to provide alternative sea-going transport. These various systems of travel would need state control:

> The Governor should appoint a Hawaii State Transportation Committee, similar in function to the Oahu Transportation Policy Committee, to assist the Department of Transportation in planning a total State Transportation system.[16]

But even more than planning, the Department of Transportation can be expected to have the responsibility for promulgating regulations, fares, etc., that are currently under federal control. These decisions would have a major impact on the state's population dispersal plans, the tourist industry, neighbor island agriculture, and any potential manganese support and/or processing industry. Clearly the management and regulation of the transportation system throughout the state would mean a significant increase in the influence of the Department of Transportation.

G. Land Use Commission - Department of Planning and Economic Development

The Land Use Law of 1961 empowers the Land Use Commission to designate all the lands of the state into one of four categories and to regulate the use of lands within the resulting districts. In 1970, the legislature amended the law to include the shoreline setback up to 20 to 40 feet above the mean high-water mark. Since the current definition of public lands includes submerged land, the jurisdiction for any increase in land under state control would initially fall to the Land Use Commission before going to DLNR.[17]

Therefore not only would the Land Use Commission have a greater territory to control, it would also have the responsibility of coordinating actions closely with DLNR in the case of lease of seabed lands for a potential mining industry.

Currently, the recommendations of *Hawaii and the Sea--1974* are specific on decisions regarding the precious coral industry and the manganese nodule potential:

> The Department of Planning and Economic Development should engage a consulting firm to research and write a manganese industry report similar to the *Ocean Potential for Hawaii* report made in the '60's. The report should look at the total mining industry system from research, development and exploration, through recovery of the ore and processing, to considerations of by-products and of potential economic revenues.
>
> The Department of Planning and Economic Development should begin to investigate and evaluate alternative processes and

> sites which might be used by the onshore manganese processing plants. These assessments should include environmental, social and economic impacts. They should consider not only the processing plant, but supporting plants for power and chemicals. The major companies involved might be invited to Hawaii to confidentially discuss their plans and sufficiently disclose their processes, allowing such assessments to be made.[18]

It is therefore within the responsibility of this department to not only do the research necessary for the impact of such an industry, but also the department will have, if the jurisdiction of the state is enlarged, the responsibility for initial decisions that will either encourage or discourage a manganese industry.

H. Attorney General

The Attorney General "shall administer and render legal services, including furnishing written legal opinions to the Governor, Legislature, and such state departments and officers as the governor may direct."[19] Of the 35 to 40 attorneys on the staff, two devote part of their time to the marine environment as part of their work for DLNR.

It is the Attorney General who must make the case for eventual expansion of Hawaii's jurisdiction and also evaluate needed statutes to fill the void left by the absence of federal jurisdiction. Section IX will outline some areas of tort and criminal law which will be affected by increased state control over the Archipelago. Further, a recommendation to the Attorney General from *Hawaii and the Sea--1974* was specific about the need for legal guidance about ownership of the resources of the Hawaiian Islands.[20] Since there are a number of potential alternative jurisdictions that may come about as a result of law of the sea conferences, further court actions, and congressional action, the issues that must be explored by the Attorney General and presented to the other decisionmaking agencies of the state are complex and of great potential impact. Advanced planning and strong staff support by the Attorney General will be vital to bring the state through this difficult legal regime.

I. Summary

There are, of course, many other problems that increased state jurisdiction will bring; for example, enforcement of this jurisdiction, especially over the far-flung Northwestern Hawaiian Islands, would mean the creation of a suitable arm of government, such as the state police, that the state of Hawaii does not have. But more than any single problem, the need for close cooperation and the development of a "master" plan to guide the various state agencies seems vital. The

control of the inter-channel waters should also bring about at least a psychological unity between the islands of a different order than is now present. And proposed new transportation systems should increase interchange of people and products throughout the islands. Clearly, there are many more implications than purely legal ones and strong state interest in these issues is necessary to plan for and resolve these problems.

J. Footnotes

1. Hawaii State Constitution, Article IV, Sec. 6, p. 103.

2. *Hawaii and the Sea--1974*, State of Hawaii, Department of Planning and Economic Development, 1974, p. 1. (Hereinafter referred to as *Hawaii and the Sea--74*.)

3. *Ibid.*, p. 1-3.

4. *Ibid.*, p. 2-10.

5. S.B. 1132-70 Act. 132, S.L.H. 1970; see also Sec. 6, p. 250.

6. HRS Title 12, Subtitle I - Chapter 171.

7. HRS Title 12 Chapter 171-189, 505-502.

8. *Hawaii and the Sea--74*, p. 3-1.

9. HRS Title 12, Subtitle 4 - Chapter 184.

10. HRS Title 12, Subtitle 5 - Chapters 187-192.

11. Islands or island groups in the refuge include Nihoa, Necker, French Frigate Shoals, Gardner Pinnacles, Laysan, Lisianski, and Pearly and Hermes Reef. The intervening reefs and shoals are also included. The Wildlife Refuge was established in 1909 by the Executive Order (1019) of President Theodore Roosevelt. The refuge covers approximately 200,000 acres with land area being only 2,000 acres, the remaining area including surrounding lagoons within traditional territorial sea limits.

12. *Hawaii and the Sea--74*, p. 6-4.

13. *Ibid.*

14. *Ibid.*, p. 6-3.

15. *Ibid.*, p. 4-7.

16. *Ibid.*, p. 8-7.

17. HRS Title 13, Chapter 205.

18. *Hawaii and the Sea--74*, p. 7-10.

19. HRS Title 4, Chapter 28 and HRS Title 4, Chapter 26, Sec. 7, p. 296.

20. *Hawaii and the Sea--74*, pp. 3-4; 7-10.

IX. RESOLVING STATE-FEDERAL CONFLICT

The expansion of Hawaii's jurisdiction over the seas will cause some conflict in three areas where the federal government presently maintains controls. They are:

1. Conflict with agencies and departments and the law and regulations that are administered by these federal organizations.

2. Conflict with federal tort law as it controls tortious actions on the seas.

3. Conflict with federal criminal law that currently controls maritime criminal actions.

This section then will describe the agencies and laws that may come into conflict with their Hawaiian counterparts.

A. Federal Agencies

Federal Agencies that may come into conflict with state counterparts can be categorized as follows:

1. Agencies that will have a direct conflict with the present jurisdictional domains through a boundary extension (for example, the Civil Aeronautics Board, the Interstate Commerce Commission)

2. Agencies that currently have concurrent jurisdiction in maritime administration *vis a vis* their state counterparts (e.g., Environmental Protection Agency, Fish and Wildlife Service)

3. Agencies whose functions will be unchanged by an expansion of Hawaii's territorial sea, but are still of vital concern to the state of Hawaii (e.g., Coast Guard, Bureau of Customs, Corps of Engineers)

Potential areas of conflict with these agencies and their policies are briefly discussed in the following sections.

Department of State

Aside from opposing Hawaii's claim to archipelagic status on the aforementioned policy grounds, the Department of State's primary function--to execute foreign policy--currently indirectly affects the resources of the archipelago. The policy established by the United States and implemented in international organizations such as the U.N. or through bilateral agreements such as fishing treaties has been the policy that now establishes the status of fisheries and manganese

resources within archipelagic limits.[1] Further, as seen in court decisions such as the *California* cases, this foreign policy has been translated as effectively controlling state-federal jurisdictional disputes.

A change in Hawaii's jurisdiction will then most likely come through an acquiescence of Department of State policy, but a dispute over federal-state boundaries over the seas, even if Hawaii were accorded archipelagic status, can be predicted. The waters of the archipelago are now under three jurisdictions: state, federal, and, imprecisely speaking, international. A *single* management of resources has been deemed most desirable, but this state of control cannot automatically be expected to come about under either an archipelagic theory or an economic resource theory.

Civil Aeronautics Board

The jurisdiction of the Civil Aeronautics Board (CAB) was the issue in the *Island Airlines*[2] cases. It has resulted in a less-than-desirable federal control over intrastate transport that even the court in these cases recommended be solved by statutory exemption. Removing "international waters" from the "places" over which the airlines currently fly by some jurisdictional extension will remove the statutory justification from the current CAB control:

> [T]he carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between...:
>
> (a) a place in any State of the United States...and a place in any other State of the United States...or *between places in the same State of the United States through the airspace over any place outside thereof*....[3]
> (emphasis added)

Department of the Interior

The Department of the Interior now has jurisdiction over oceanic waters for fish and wildlife management and, more importantly, it manages the leasing and exploiting of undersea resources of the "continental shelf" established by the Submerged Lands Act[4] and the Outer Continental Shelf Lands Act.[5] An extension of Hawaii's jurisdiction with them obviously conflict with this federal authority. Further, since the proposed bills in Congress which have sought to lease manganese nodule mining to private industry have tentatively given this authority to the Department of the Interior,[6] there would be another area of conflict over the management of Hawaii's manganese resources.

Within the Department of the Interior, the following agencies may also clash with state authority:

1. United States Fish and Wildlife Service[7]
2. Bureau of Outdoor Recreation[8]
3. Office of Water Resources Research[9]

Interstate Commerce Commission

The authority of the Interstate Commerce Commission, which comes from statutory language that is similar to that giving authority to the CAB in defining transportation:

> [W]holly by water...from or to a place in the United States to or from a place outside the United States.[10]

also can potentially clash with state authority should all inter-channel waters be under state jurisdiction.

Environmental Protection Agency

Amendments under the 1970 Water Quality Act have expanded the authority of the Environmental Protection Agency (EPA) to include the contiguous zone established by Article 24 of the Convention on the Territorial Sea and Contiguous Zone. The agency now sets the standards for discharges into the waters of this zone.[11]

The state now has the power to legislate against the discharges into state waters and an expansion of the waters under state control of course may create a conflict of enforcement authority. The state also has the authority to set pollution standards, so long as they do not exceed federal standards. Several recommendations of *Hawaii and the Sea--1974* are concerned with the ability of the state to set standards that will meet water quality standards that are unique to both a large tourist industry and agricultural needs.[12] Clearly an enlarged state territory strengthens the case for Hawaii's needs to manage a unique pollution control program.

Conclusions

Clear conflict with federal agencies seems to be limited to a few areas if Hawaii's jurisdiction expands. The initial problem to overcome is foreign policy as established by the Department of State which clearly blocks Hawaii's bid for archipelagic status. The next problem is a new determination of state-federal boundaries under the enlarged jurisdiction. If Hawaii increases its territory through the archipelagic theory, then this would be most appropriately done through a congressional exception to the Outer Continental Shelf Lands Act. This would then remove the limitations of "interstate" from transportation and commerce regulations and put these functions clearly under state control. But agencies with unchanged functions after a territorial expansion, such as the Coast Guard and Customs Bureau, will essentially increase in importance to the state since they will make any *de facto* boundary. Therefore, even though there is potential for state-federal conflict, it is in the best interests of the state to plan for an orderly transition of authority from the affected agencies and identify and cooperate with other agencies whose authority will expand.

B. Federal Tort Maritime Laws

Federal personal injury and property damage remedies for torts at sea and on the shore in sea-connected activities have been gradually expanded by legislative enactment and judicial interpretation to include recovery in a variety of situations and locations.[13] Federal jurisdiction in maritime affairs come from the admiralty jurisdiction clause of the Constitution:

> The Judicial Power shall extend...to all Cases of admiralty and maritime jurisdiction....[14]

and the Judiciary Act of 1789, which says in part:

> ...the District Courts shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction....[15]

The jurisdiction extends to all bodies of water of the United States, including artificial ones which are capable in fact of being used in interstate or foreign commerce.

Maritime torts are similar to ordinary torts in that they involve damage to property or injuries to persons. They may be unintentional, such as negligence, or intentional, such as assault or false imprisonment. However, for admiralty jurisdiction to apply, there must be an admiralty *situs* or relationship, which usually requires activity on navigable waters, a maritime connection, or both.[16] Additionally, Congress passed the Admiralty Extension Act in 1948[17] which extended the maritime jurisdiction of the federal courts to cover actions in which vessels caused damages that were consummated on land.[18]

Personal Injury Recovery Laws - Seamen

Seamen occupy a special place under the federal scheme of personal injury recovery and may claim relief under the common law theory of maintenance and cure,[19] unseaworthiness,[20] the Jones Act,[21] or Death on the High Seas Act (DOHSA).[22]

The right to maintenance and cure comes from an individual's employment contract and a shipowner is liable for any injury or illness which manifests itself while a seaman is "under articles." It need not result from or be in any way causally related to his shipboard duties. An expansion of Hawaii's jurisdiction would have no effect on this tort remedy.[23] Using a theory of unseaworthiness requires a shipboard setting and, again, expanding state jurisdiction does not affect this admiralty remedy theory.

The Jones Act provides a theory of recovery to "any seaman" who is injured "in the course of his employment" due to the negligence of his employer.[24] Federal court jurisdiction applies to a seaman's injuries

irregardless of the location of the injury, the only qualification being injury occurring during the course of employment. There is no conflict between these provisions of the Jones Act and extended state jurisdiction.

Congress extended the reach of the federal courts with the passage of the Death on the High Seas Act, which provides a remedy to any person, seaman or not, if the death occurs more than 3 miles from shore.[25] This distance corresponds with the current limit of state jurisdiction. Expanding Hawaii's jurisdiction, under an archipelagic theory for example, would, in theory, change the applicability of DOHSA. An amendment to the act would be necessary to re-define "high-seas" from its present beginnings at 3 miles or to provide an exception in the case of the Hawaiian Archipelago. Unless this would be done, there would exist a conflict of authority granted by DOHSA to the federal courts and the authority of the state courts.

Personal Injury Recovery Laws - Longshoremen

Although longshoremen may qualify as "seamen" by task under the doctrine of the Jones Act or the doctrine of unseaworthiness, the original intent of Congress was to take these workers under the federal wing via the Longshoremen's and Harbor Workers' Compensation Act (LHWCA).[26] This statute covers accidental disability or death arising from "an injury occurring upon the navigable waters of the United States (including any dry dock)," provided that recovery is not available through a state workmen's compensation system. In a practical sense, longshoremen usually work and are injured on the "navigable waters" of a port or harbor within the 3-mile limit. Expanding Hawaii's jurisdiction would then only have a theoretical effect on the actual scope of LHWCA. One important exception to the general rule holds that harbor workers injured on navigable waters with the maritime activity of a "local concern" focus will recover solely under a state compensation system.[27] It is therefore possible that longshoremen in Hawaii now engaged in "inter-state" transportation might be deemed to be working under the "local concern" exception if the state exercises jurisdiction over inter-channel waters. Court interpretation and an analysis of each situation would be necessary to determine individual cases and a future general rule for the compensation of longshoremen.

Effects of the Outer Continental Shelf Lands Act

Some predictions of the resolution of federal-state jurisdictional conflicts can be made from a study of the Outer Continental Shelf Lands Act (OCSLA). OCSLA makes applicable certain civil and criminal laws of each adjacent state to the waters seaward to the outer margin of the continental shelf. The statute also makes the provisions of LHWCA applicable to employees injured while engaged in activities more than 3 miles offshore on the outer continental shelf.[28]

Although OCSLA was made applicable to Hawaii by the Hawaii Statehood Act, the Hawaiian Archipelago, by definition, has no continental

shelf. Therefore the offshore activities that were envisioned by the drafters of OCSLA cannot be brought under the civil and criminal jurisdiction of the state of Hawaii. The federal statute appears to have little application in Hawaii in federal tort areas. An extension of state control to the seabed would then remove potential federal jurisdiction over torts it now has through OCSLA and the resulting applicability of LHWCA.

Conclusions

An extension of Hawaiian waters to the limits of the Archipelago would increase the "navigable" waters of the United States and the scope of federal tort jurisdiction in some instances. The larger boundary would have no effect on the personal injuries of seamen and the remedies of maintenance and cure, unseaworthiness, and recoveries under the Jones Act. A re-definition of "high-seas" appears necessary to remove ambiguities under the Death on the High Seas Act. Either judicial interpretation or legislative attention would be necessary to clarify the role of the federal Longshoremen's and Harbor Workers' Compensation Act under the enlarged jurisdiction of the state in Hawaiian waters.

C. Federal Criminal Law - Maritime

The Constitution

Federal criminal statutes and the jurisdiction of the federal courts over maritime activities emanate from two sections of the Constitution--the commerce clause:

> The Congress shall have the power...to regulate Commerce with foreign nations, and among the several States....[29]

and the admiralty jurisdiction clause:

> The judicial power shall extend...to all Cases of admiralty and maritime jurisdiction....[30]

Title 18 of the United States Code

Criminal statutes found in Title 18 of the United States Code reflect, through various wordings, the origins through the commerce clause and the admiralty jurisdiction clause.

The statutory wordings used in Title 18 can be grouped into five categories, each needing analysis to determine the effect of an expanded Hawaiian jurisdiction on the present scope of federal control. These categories are therefore treated individually in the following sections.

"Interstate"; "foreign"; "interstate and foreign commerce"

Title 18 provides several definitions of interstate commerce which are consistent in their intent to define transit beyond a state's boundaries. "Interstate" has then been defined to include "commerce between one State...and another State,"[31] "commerce between any place in a State and any place outside of that State,"[32] and "commerce between points in the same state through another state or through a foreign country...."[33] Case law interpreting the precise requirements of Title 18 sections is sparse, but it has been held that the crossing of state line constitutes transportation from one state to another.[34]

The term "interstate" has also been defined in the *Island Airlines* cases in section VII the ruling being that transit outside the 3-mile state jurisdiction is "interstate" in the context of the Federal Aviation Act.[35]

Those sections of Title 18 which make certain interstate actions criminal also prescribe those actions for foreign commerce. Foreign commerce is defined in Title 18 as including "commerce with a foreign country"[36] but the courts have not addressed themselves to the question of whether transit outside a state's 3-mile limit would be defined as "foreign commerce."

The expansion of Hawaii's jurisdiction over the interisland water would most likely eliminate Title 18 criminal statutes' present authority over these waters, as movement between islands would no longer be "interstate." The expanded territorial sea would also most probably re-define the line where "foreign commerce" would become applicable.

"Special maritime and territorial jurisdiction"; "admiralty and maritime jurisdiction"

Approximately 22 sections of the federal criminal code rely on admiralty jurisdiction for their application. Title 18 provides a definition for the "special maritime and territorial jurisdiction of the United States" which encompasses the high seas and all other waters within the admiralty and maritime jurisdiction of the United States and outside of the jurisdiction of any one state.[37] The reference to state jurisdiction has not been interpreted literally by the courts, rather concurrent federal/state jurisdiction has been found to lie for offenses committed within the 3-mile state territorial sea[38] and in Honolulu Harbor.[39]

"High seas"; "sea"

Although Title 18 is silent with respect to the definition of "high seas," 19th century case law has interpreted the term to mean any waters

on the seacoast which are outside the low-water mark.[40] But the term more commonly now means those waters beyond one marine league (3 miles) from shore, and one federal statute, the Death on the High Seas Act,[41] explicitly adopts this 3-mile standard.

If the more liberal definition of the *Ross* decision were adopted, federal jurisdiction would begin at the low-water mark and extend to any new state boundaries. More likely, the 3-mile standard would start federal jurisdiction at this limit, with state authority within 3 miles. The adoption of an archipelagic theory would of course be an entirely novel element in the United States legal system and it could also be expected that special legislation would re-define "high-seas" to meet the new, Hawaiian circumstances.

"Jurisdiction of the United States"; "territorial waters"

Although the United States has long been an active advocate of the traditional 3-mile territorial waters limits, Title 18 is silent on an exact definition of the territorial sea; presumably "territorial waters" would coincide with current Department of State definitions. However, since the territorial sea of the United States would expand as the limits of the state of Hawaii would under an archipelagic theory, it can be assumed that federal criminal jurisdiction would expand to cover new territorial sea limits.

"Not within the jurisdiction of any State"

This terminology, used sparingly throughout Title 18, has not yet been interpreted by the courts. These sections extend federal jurisdiction to those areas under the control of the United States, but outside a particular state's territorial jurisdiction, as well as conferring concurrent federal jurisdiction within a state's territorial waters.[42]

Therefore extending the limits of Hawaiian control over the seas will both increase state and federal jurisdiction and expand federal authority under these sections to the limits of the new Hawaiian seas, bringing under federal control some waters that were international.

D. Summary

This section, rather than a definitive prediction of state-federal conflicts if Hawaii's oceans jurisdiction expands, is an introduction to some of the problems that might arise in this area of control. Clearly, the problems range from simple ones that may be solved by a change of definitions to very farreaching ones, such as the re-casting of Department of State policy. It is especially this problem of Department of State policy which has the most widespread potential consequences, not

only in the area of state-federal relationships generally, but also throughout the international community.

Hawaii's bid for archipelagic status is completely *contra* to United States foreign policy at the present time, but quite in step with trends of other island-nations throughout the Pacific. It would therefore be tempting for the state of Hawaii to reject, in a sense, U.S. policy and adopt a "Pacific" theory of ocean jurisdiction and policy. But if nothing else, it should be clear from this section that expanded boundaries can bring many problems and it will only be with the aid of and close cooperation with the relevant federal agencies that Hawaii will be able to eventually usefully exercise state authority throughout the Archipelago.

E. Footnotes

1. Department of State Public Notice 358, 37 *Fed. Reg.* 11906 (1972). The notice was based on the Convention on the Territorial sea and the Contiguous Zone of the 1958 Geneva Conference on the Law of the Sea and Public Law 89-658, 80 Stat. 908 (1966).

2. *Island Airlines, Inc.* v. *Civil Aeronautics Board*, 331 F.2d 207 (1964); *Civil Aeronautics Board* v. *Island Airlines, Inc.*, 235 F. Supp. 990 (1964); *Island Airlines Inc.* v. *Civil Aeronautics Board*, 352 F.2d 735 (1965).

3. 49 U.S.C. s 1301 (20)(a)

4. 67 Stat. 29 (1953), 43 U.S.C. 1301 *et seq.*

5. 43 U.S.C. s 1331 *et seq.*

6. 43 U.S.C. s 1334.

7. 70 Stat. 1119 (1956), 16 U.S.C. s 742 (b) *et seq.*

8. 16 U.S.C. s 4601-12.

9. 78 Stat. 329, 80 Stat. 129 (1964); 42 U.S.C. s 1961.

10. 24 Stat. 379, 383 (1887) 49 U.S.C. s 1, s 902 (3).

11. 33 U.S.C. s 1161 (a) (9), (b)(1), (b)(2).

12. *Hawaii and the Sea--74*, pp. 3-4; 4-7.

13. For general discussion of the history and development of maritime personal injury remedies and admiralty tort jurisdiction, see Gilmore and Black, *The Law of Admiralty*, Chapters I, VI (1967); Norris, *Maritime Personal Injuries* (2d ed. 1966, Supp 1972).

14. United States Constitution, Article III, section 2. "The Judicial Power shall extend...to all Cases of admiralty and maritime jurisdiction..."

15. Section 9 of that Act provided in part "that the District Courts shall also have exclusive original cognizance of all civil cases of admiralty and maritime jurisdiction...." These provisions are now codified at 28 U.S.C. s 1333 (1970) with a slightly modified wording.

16. See Note, "Admiralty--Tests of Maritime Tort Jurisdiction," 44 *Tulane L. Rev.* 166, 167 (1969).

17. 46 U.S.C. s 740 (1970). The Act states in part that the "admiralty and maritime jurisdiction of the United States shall extend to and

include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

18. See generally Benedict, *The Law of American Admiralty*, s 128 (6th ed., Supp 1971).

19. Norris, *The Law of Seamen*, ss 538-611 (3rd ed., Supp 1971); Baer, *Admiralty Law of the Supreme Court*, s 1 (1969, Supp 1971); Gilmore and Black, *supra* note 13, s 6-6 *et seq.*

20. Norris, *supra* note 13; Gilmore and Black, *supra* note 13; Note, "Single Negligent Act by Fellow Longshoreman Does Not Render Vessel Unseaworthy," 2 *Journal of Maritime Law and Commerce* 871 (1971); Kolius and Vickery, "Maritime Employee's Remedies Against Employers," 23 *Ark. L. Rev.* 192 (1969). While unseaworthiness originally excluded recovery for death within a state's territorial waters, the Supreme Court, in *Moragne* v. *States Marine Lines*, 398 U.S. 375 (1970) expanded federal maritime jurisdiction to cover fatal injuries incurred by maritime workers as a result of unseaworthiness within the three-mile territorial sea. See also, Note, "Maritime Wrongful Death after Moragne: The Seaman's Legal Lifeboat," 59 *Geo. L.J.* 1411 (1971); Waldron, "The 'Unseaworthiness' Doctrine and Its Application to Longshoremen," 22 *U. Miami L. Rev.* 937, 940 (1968).

21. 46 U.S.C. s 688 (1970). See also Kolius and Vickery, *supra* note 20, pp. 197-201 for a discussion of the problems surrounding the question of who qualifies as a seaman.

22. 46 U.S.C. s 761-67 (1970). See also, Norris, *Seamen*, *supra* note 19, s 650 *et seq.*

23. The liability of a vessel's owner for injuries suffered as a result of unseaworthiness originally extended to "seamen" in the traditional sense as that term was understood under maintenance and cure, excluding longshoremen and stevedores. Harbor workers injured while working on board ship in navigable waters, and doing the work of seamen, are now entitled to the protection of this remedy. *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85, 90 (1946); *Ryan Stevedoring Co., Inc.* v. *Pan Atlantic S.S. Corp.*, 350 U.S. 124 (1956); Ellmann, "Instant Unseaworthiness: Mascuilli Revisited," 1 *Jour. of Maritime Law and Commerce* 573 (1970).

24. 46 U.S.C. s 688.

25. 46 U.S.C. s 761.

26. 33 U.S.C. ss 901-50 (1970). See also, Comment, "Jurisdictional Problems of Maritime Tort Claims: Application of State and Federal Remedies," 6 *San Diego L. Rev.* 470, 475 (1969).

27. *Davis* v. *Department of Labor*, 317 U.S. 249 (1942); *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205 (1917); *Garrissey* v. *Westshore Marina Associates*, 2 Wash App. 718, 469 P.2d 590, 594 (1970).

28. 43 U.S.C. 1331 *et seq.* (1970); Section 1331 (a) defines the "outer Continental Shelf" to exclude submerged lands including the subsoil and the seabed three miles offshore, which passed to the States via the Submerged Land Act, 43 U.S.C. s 1301 *et seq.* (1970).

29. United States Constitution, Article 1, section 8, clause 2. "The Congress shall have the power...to regulate Commerce with foreign nations and among the several States...."

30. United States Constitution, Article III, section 2. "The Judicial Power shall extend...to all cases of admiralty and maritime jurisdiction...."

31. 18 U.S.C.A. s 10 (Supp 1972).

32. 18 U.S.C.A. s 842 (B) (Supp 1972).

33. 18 U.S.C.A. s 831 (Supp 1972).

34. *Mortensen* v. *United States*, 139 F.2d 967, 970 (8th Cir. 1943), rev'd on other grounds, 322 U.S. 369 (1944). The court considered the language found in 18 U.S.C.A. 8, 397 *et seq.*, and held that a trip from Nebraska to Utah and then back to Nebraska constituted "transportation in interstate commerce" within the meaning of the White-Slave Act.

35. 49 U.S.C.A. s 1301 *et seq.* (Supp 1972).

36. 18 U.S.C.A. s 10 (Supp 1972).

37. 18 U.S.C.A. s 7 (Supp 1972).

38. *Murray* v. *Hildreth*, 61 F.2d 483, 484-5 (5th Cir. 1932).

39. *Wynne* v. *United States*, 217 U.S. 234, 245 (1910).

40. *United States* v. *Ross*, 27 Fed. Cas. No. 16, 196, pp. 899, 900 (1813).

41. 46 U.S.C.A. s 761 *et seq.* (Supp 1972).

42. *Miller* v. *United States*, 242 F. 907, 909 (3rd Cir. 1917), cert. denied 245 U.S. 660; *Murray* v. *Hildreth*, *supra* note 38; *Wynne* v. *United States*, *supra* note 39.

X. RESOURCES OF THE HAWAIIAN ARCHIPELAGO: EFFECTS OF A CHANGING JURISDICTION

Since it has been the resources from the ocean that have, in many archipelagic states, caused the demand for recognition of the legal regime based on archipelago theory, it is useful to survey the sea-based resources of the Hawaiian Islands and predict some effects of granting archipelago status to the state of Hawaii. Public interest in the potential deposits of manganese nodules, precious coral, and the potential for energy from the ocean have focused more attention on the ocean surrounding the islands. Renewal of passenger service between the islands by the Kentron hydrofoil and prospects within a few years of a state-operated ferry system should continue to increase public awareness of the role that the sea can play in the state's economy.[1]

This potential for multiple-use of Hawaii's seas, now under the differing regimes of state, federal, and international jurisdiction, could produce conflict that would be reduced were the oceans under a single, preferably state, manager.

A. Living Resources

Fisheries

The fishing industry in Hawaii, in spite of frequent governmental support and funding from both state and federal sources, remains one of unrealized potential.

In recent years, the state has aided the industry through the support of the construction of modern fishing vessels (Hawaii Vessel Loan Program), through an educational program on commercial fishing in the community colleges, and through the support of research into the biology of baitfish and commercially attractive species of fish. These programs have aided the growth of the industry, most notably in the past five years, but problems still remain that make the prediction of future growth difficult.[2]

The fish species that dominates the Hawaiian market is skipjack tuna, "aku" (*Katsuwonus pelamis*), which generally holds a 75 percent share of both the market tonnage and dollar value.[3] Research indicates that it is Hawaii where the fish attains its greatest size and is the endpoint of a migration that begins near Baja California. Our waters may then have the potential for the most prolific catch of the entire Pacific and estimates of a catch have ranged from 140,000 to 1,190,000 tons.[4] The demand for this species steadily increases and the price per pound has doubled in recent years.

The Hawaiian fisherman must compete on a market dominated by the Japanese demand for frozen tuna and this sets the local price, with only transportation costs usually making the difference between the Tokyo and

Honolulu prices.[5] Profitability of a commercial fishing venture is additionally linked to local labor, operating, and processing costs. It is the uncertainty of profitability which has caused slow growth in fishing.

The Law of the Sea conferences in Geneva and Caracas have recognized the vulnerability of the fishing industry to modern technological advances which have the potential for wiping out entire species of fish. Clearly, fish have been a resource that have caused coastal states to demand increased jurisdiction over the oceans, either through the Exclusive Economic Zone theory or archipelagic theory. Such demands have not come from nations solely, but the state legislatures of Oregon, Massachusetts, and Maine have either explored the possibility or actually passed legislation extended their jurisdictions to distances ranging from 50 to 200 miles.[6]

There have been some recommendations for increased action by the state of Hawaii to further the fishing industry:

1. The state should carefully examine the implications of current federal fisheries policies to see if they meet Hawaii's needs and should develop alternative plans, especially including increased jurisdiction to the limits of the archipelago.[7]

2. The Department of Land and Natural Resources should review licensing of commercial fishermen; such fees could play a larger revenue role as the number of fishermen increases through more state-based distant water fishing or state control over more (archipelagic) offshore waters.[8]

3. Resources of the northwestern Hawaiian Islands between Kauai and Kure Island should be surveyed and such resources should be considered by the federal government prior to the designation of this area as a natural wilderness area.[9]

4. Basic research should be done on the reef and nearshore species of fish and the Kona crab to determine the market potential of these areas.[10]

Hawaii has not yet considered the type of legislation that other states have considered, largely because of the small role that fishing now plays in the state's economy. But as the potential for a fishing industry becomes more clear and other fishing grounds throughout the world become depleted, more competition for the fish resources of Hawaii's waters can be expected and legislative protection of this resource can be predicted. Increased jurisdiction by the state should be based on the archipelagic theory, rather than the distance measuring formulas that are more appropriate to a continental coastal state.

Mariculture and aquaculture

State interest has periodically focused on the controlled cultivation of certain species of fish and shellfish, usually oysters, shrimp,

prawns, and mullet. Catfish are currently raised on Maui and commercially marketed and oysters are soon expected to return to the market.[11]

The cultivation of fish in fishponds was, of course, part of the Hawaiian culture and many ponds constructed by the Hawaiians remain as evidence of the role that cultivated fish played in their diet.[12]

Species selected for aquaculture have heretofore been relatively easily identified as to prove ownership. Mullet and catfish can be enclosed in artificial ponds; oysters and other shellfish are sedentary and remain in known locations. Future planning holds for the probability that free-swimming species of fish, such as tuna or salmon, will be capable of being "identified" by technological advances and similar claims of ownership will be asserted. If ownership can be evidenced and legally recognized, then the incentive exists to subject these species to a mariculture system. Such a "ranching" system represents a fundamental change from the "hunting" of fish that is done presently and this advance would make new demands on the legal regime of the oceans.[13]

Living resources from the sea can therefore be expected from inland, coastal, and offshore Hawaiian waters in the future and the administration of these waters, now under differing state, federal, and international legal regimes, would seem to be more efficiently accomplished under a single, archipelagic manager.

Precious coral

In the last 15 years, the precious coral industry in Hawaii has grown to one that employs 500 people and has retail sales of $7.5 million annually. The pink variety of precious coral has been harvested off Makapuu Point, Oahu at a depth of 1,200 feet.[14] Again, this illustrates a technological advance which has caused some ambiguity in the current law of the sea. The Convention on the Continental Shelf considered 200 meters to be the limit of commercial exploitability of resources in 1958:

> ...[T]he term "continental shelf" is used as refering (a) to the seabed and subsoil of the submarine areas adjacent to the coast, but outside the area of the territorial sea, to a depth of 200 meters or, beyond that limit, to where the depth of the superadjacent waters admits of the exploitation of the natural resources of the said areas: (b) to the subsoil of similar submarine areas adjacent to the coasts of islands.[15]

The ownership of the precious coral was unilaterally settled by the United States in a 1971 amendment to the Bartlett Act which declared the coral to be a resource of the U.S. continental shelf. This law should enable the United States to prohibit foreign vessel exploitation of the northeastern Hawaiian island coral resources, but as yet there has not been an instance of confrontation.[16]

Precious coral illustrates the potential for damage to an industry through weak or divided jurisdiction. The industry in Hawaii now supplements its harvests with purchases of pink coral from Japan. Often this

is coral which has been dredged from the sea near Midway Islands--a part of the Hawaiian Archipelago now in international waters. Destructive dredging by the Japanese in 1967 glutted the world market and depressed the price of the coral jewelry industry. Regulation of the precious coral is therefore desirable both to control the supply of coral and to ensure that harvesting will not take place by destructive methods in excess of the replacement rate.

Much basic research concerning precious coral has been done at the University of Hawaii under the Sea Grant College Program and high priority has been assigned to a complete survey of the entire archipelagic resource. This survey is essential to determine future economic potential and annual sustainable yield.[17]

The single-jurisdiction management of coral by the state would therefore enable Hawaii to protect its investment in basic research into the biology and harvesting technology of coral.

B. Non-Living Resources

Manganese nodules

A resource that has attracted great public interest in the last five years is the manganese nodule. Although named for the manganese which is 30 percent of the nodule by weight, they are economically important for the 3 percent of copper and nickel they contain. The nodules are formed by an accretion process around a nucleus, such as a grain of sand, and, in the deep seabed (in excess of 15,000 feet), their linear accretion rate is from 1.7 to 8.7/10^6 years.[18]

Commercial attention has focused on the deep seabed nodules which lie in an area between 600 and 1,000 miles southeast of Hawaii. Numerous Japanese, European, and American consortiums have been formed to develop techniques that allow recovery from these great depths of water. For these deep seabed resources, Hawaii's importance is as a potential processing site or center for support.

The manganese resources in the Hawaiian Archipelago can take on a different form from the nodule, usually either that of a crust or pavement 2 mm to 5 cm on thickness. The accretion level is much higher, up to 30 mm/10^6 years.[19] These crusts may be economically attractive for two reasons which distinguish them from the deepsea nodules. First, they can be found at much shallower depths, as little as 2,500 feet in the Kauai Channel. Extensive deposits have also been found in the Gardner Pinnacles between 1,200 and 3,500 feet.[20] Second, the crust may have an elemental composition which includes cobalt, titanium, platinum and other rare metals.[21]

Research and surveying of these resources in the Archipelago has been done by the University of Hawaii, which has become a leading center

in the investigation of the nodules. The University's Manganese Research Project was initially funded by the National Science Foundation's Office of the International Decade of Ocean Exploration (IDOE). Thus Hawaii has benefited from the manganese nodules indirectly through the influx of research funds and commercial investment is expected eventually. The German Valdiva Manganese Exploration Group sponsored a major conference on the nodules in 1973 in conjunction with the Hawaii Institute of Geophysics and other state agencies; such conferences enhance Hawaii's reputation as a research center and contribute to the economy of the state.[22]

The international law on deep seabed mining is in a state of change and U.S. investors in this activity have sought guarantees on their investments through U.S. legislation. Mining interests have lobbied several years for legislation that would grant them exclusive licenses to tracts on the seabed and provide insurance for their investments in the event of a conflicting international law.[23] The manganese deposits in the vicinity of the Hawaiian Islands now can be viewed as being under state, federal, or international jurisdiction and the resolution of their ownership through the archipelagic theory could result in licenses to the mining consortiums by the state of the type they seek under tenative U.S. legislation.

Other factors concerning the attractiveness of the manganese nodule resource to the state of Hawaii have not yet been resolved. Important questions regarding the polluting potential of the mining operation, the nodule drying at sea, or a land-based processing plant and the disposal of waste products have not been answered.

The processing of the nodules into marketable metals will probably be a hydrometallurgical method of metal reduction.[24] This process is still in the prototype stage and only two small plants are in operation. Preliminary indications are that this processing will use large amounts of energy, hydrochloric acid, and water and will be of a nature that is foreign to Hawaii. Much research should therefore be done not only into the potential value of the manganese nodules *in situ*, but also of the effects of a processing industry on the economy, ecology, and population growth in the state. Hawaii also has a favorable location for offering support to a mining industry, with processing being done elsewhere. There are then several alternatives for the state:

1. Based on jurisdictional control of the Archipelago by the state, encouragement could be offered to the industry by means of, seabed leases and support facilities for ships, research, and administrative offices. The nodules could be shipped elsewhere for processing and the industry would remain relatively "clean" with little demand on Hawaii's resources or environment.

2. The state could additionally encourage the siting of a processing plant within the state by offering harbor and docking facilities, land sites, tax incentives, and favorable zoning regulation. This would imply also the construction of chemical and power plants and would have a major impact on the economy and population growth.

The demands for the metals of the manganese nodules will largely control the time-frame in which this industry will develop; it is clear, however, that the legal system should anticipate the demands that will be placed on the seabed, surface waters, and nearby coasts when the nodules are mined and settle questions of control and jurisdiction. As in the case of precious coral, the manganese deposits of the Archipelago come under state, federal, or international jurisdiction. Clearly, a single manager would be a more efficient administrator.

Energy from the sea

One of the results of the energy crisis of 1974 has been a search for alternative energy sources. For Hawaii, the possible alternative are solar, geothermal, and ocean thermal energy.[25]

Extracting power from the temperature difference between surface and deep ocean waters has been tested by Columbia University's Lamont-Doherty Geological Observatory in the Virgin Islands. More recently, visits to Hawaii by executives from Lockheed Missile and Space Company to Keahole on the Big Island seemed to place Hawaii in competition with Florida as the site for an ocean thermal energy conversion (OTEC) plant that could receive up to 1.4 billion in federal funds. Both Lockheed and TRW have been hired by the newly named Energy Research and Development Administration to investigate the feasibility of alternative energy sources.[26] Additionally, the University of Hawaii recently received a $160,000 research grant from the National Science Foundation to conduct experiments in connection with the OTEC concept.[27]

Hawaii's very deep water relatively close to the coast is an advantage that Florida, with a shallow continental shelf, does not have. This deep water implies that a OTEC plant would most probably be located within state waters, but the possibility of another demand on ocean space clearly requires foresight in planning a legal regime.

C. Summary

There are many other demands placed on the waters of the archipelago for passenger and freight transit, as an outfall for sewage, for oceanographic research, and as a primary attraction of the visitor industry. Integrating these demands with increased levels of commercial fishing, with a manganese nodule industry, or with a thermal power plant, or even the offshore appearance of floating platforms for industry or habitation requires a well-ordered legal regime that will anticipate and reduce conflict.

The present disputes between various federal agencies and the coastal states over the petroleum and other resources of the Outer Continental Shelf should serve as an example of conflict induced by an imprecise allocation of jurisdictional control. Recognition of the archipelagic boundaries of the state of Hawaii by the world community and designation by the federal government of the state as the manager of the waters and resources of this archipelago would remove legal uncertainty and promote efficient use of resources.

D. Footnotes

1. The resources of the Archipelago have been recently described in *Hawaii and the Sea--74*.

2. Support for the fishing industry has again increased. The Rockefeller Foundation has based a "think" center in Hawaii that will investigate aku in the Pacific. The International Center for Living Aquatic Resources (ICLARM) will operate on a first year budget of $300,000. "Fish Center Sets First Goals," *Honolulu Star-Bulletin*, B-1, March 6, 1975. The Pacific Tuna Development Foundation is also studying the potential of skipjack tuna, "Isles, Western Pacific Tuna Get Closer Look," *Honolulu Star-Bulletin*, E-5, May 7, 1975. The National Marine Fisheries Service, a branch of the National Oceanic and Atmospheric Administration, has returned the *Cromwell* to Honolulu to do fisheries research, "Oceanic Research," *Honolulu Star-Bulletin*, A-20, July 22, 1975.

3. *Hawaii and the Sea--74*, p. 6-4. See also *Hawaii and the Sea: A Plan for State Action*, Department of Planning and Economic Development, State of Hawaii (1969). (Hereinafter referred to as *Hawaii and the Sea--69*.)

4. *Hawaii and the Sea--69*, p. 76.

5. *Hawaii and the Sea--74*, p. 6-5.

6. As an example of a 50-mile conservation zone for fisheries, see Oregon Revised Statutes, 506.755.

7. *Hawaii and the Sea--74*, p. 6-5.

8. *Ibid.*, p. 6-3.

9. *Ibid.*

10. *Hawaii and the Sea--74*, p. 6-7. The Kona crab has been judged by some biologists as being especially needful of careful management, but the current Penguin Banks area of fishing is beyond Hawaii and U.S. jurisdiction.

11. *Ibid.*, pp. 6-8 to 6-9. See also "Aquaculture Plan Alive," *Honolulu Star-Bulletin*, A-8, March 22, 1975.

12. For a study of the current legal regime that would apply to aquaculture and the ancient Hawaiian law and custom, see generally, Trimble, *Legal and Administrative Aspects of an Aquaculture Policy for Hawaii*, Department of Planning and Economic Development, State of Hawaii, and Resources Development Internship Program, Western Interstate Commission for Higher Education, December 1972.

13. See generally, Bouchez and Kaijen, *The Future of the Law of the Sea*, Martinus Nijhoff, *The Hague*, 1973.

14. *Hawaii and the Sea--74*, p. 6-5.

15. Convention on the Continental Shelf, Geneva, April 29, 1958, Article 1, reprinted in *Law of the Sea - I*, p. 101.

16. *Hawaii and the Sea--74*, p. 7-4.

17. *Ibid.*

18. Morgenstein and Felsher, 1971. "The Origin of Manganese Nodules: A Combined Theory with Special Reference to Palagonitization," *Pacific Science* 25:301-307.

    For a general view of the mining, processing, and some legal aspects of manganese nodules, see also *Manganese Nodules in the Pacific, Symposium/Workshop Proceedings*, Honolulu, Hawaii, 1972, State Center for Science Policy and Technology Assessment, Department of Planning and Economic Development, State of Hawaii; Horn, *Ferromanganese Deposits on the Ocean Floor: Papers From a Conference*, Harriman, N.Y., Office of the International Decade of Ocean Exploration, National Science Foundation, Washington, D.C.; Morgenstein, *Papers on the Origin and Distribution of Manganese Nodules in the Pacific and Prospects for Exploration*, Honolulu, Hawaii, 1973, Valdiva Manganese Exploration Group and the Hawaii Institute of Geophysics.

19. *Hawaii and the Sea--74*, p. 7-7.

20. *Ibid.*

21. *Ibid.*, p. 7-9.

22. *Ibid.*, p. 7-5,7.

23. See generally section III, footnote 61.

24. *Hawaii and the Sea--74*, p. 7-8.

25. *Ibid.*, p. 7-11.

26. See generally, "Sea-Power Plant Eyed," *Honolulu Star-Bulletin*, B-10, May 2, 1975 and "Serious on Sea Energy, *Honolulu Advertiser*, A-1, May 4, 1975.

27. "UH Given Research Grant," *Honolulu Star-Bulletin*, A-12, July 11, 1975.