University of North Carolina

School of Law

Sea Grant Publication

Attitudes Regarding A Law Of The Sea Convention To Establish An International Seabed Regime

ATTITUDES REGARDING A LAW OF THE SEA CONVENTION TO ESTABLISH AN INTERNATIONAL SEABED REGIME

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INTRODUCTION

These papers on the Law of the Sea were submitted by students of International Law at the School of Law of the University of North Carolina in the 1971 fall semester. Their common core is an examination of various national and special interest attitudes toward a seabed regime as these relate to the proposed Draft Convention on the International Seabed Area submitted to the United Nations in August 1970 by the United States Government.[1] The papers attempt to accomplish the difficult purpose of an objective evaluation of some of the factors and policies most likely to determine the outcome of the extensive transnational effort now in progress to achieve by a 1973 Conference a new and expanded conventional Law of the Sea, and particularly a law for the deep seabed. The topics presented are only a representative selection and do not purport to exhaust the subject.

The concerted effort of the United Nations and a number of its member states to create an international climate conducive to productive negotiation and enlightened concensus, culminating in a widely-accepted Convention, is the most vital current development

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[1] DRAFT UNITED NATIONS CONVENTION ON THE INTERNATIONAL SEABED AREA, Working Paper. Washington, Department of State, 3 August 1970, mimeograph; U.N. Doc. A/AC. 138/25. See Department of State Bulletin, Vol. LXII, No. 1616, June 15, 1970, pp. 737-8.

in the Law of the Sea. As such, it has been a focal point for the Legal Research Project of the North Carolina Sea Grant Program.

An expressed policy of the Office of the Legal Adviser of the United States Department of State is to encourage widespread consideration of the working paper submitted by it to the United Nations in the belief that a broad base of understanding of the practical problems presented, and the extensive involvement of legal scholarship, will combine to aid in achieving acceptance of an appropriate and effective Convention. The modest hope is that this publication may become a drop in a vast ocean of constructive international legal thought.

Particular appreciation is due to Dr. John Lyman, Director of the North Carolina Sea Grant Program, for his understanding interdisciplinary interest in the legal portion of the coordinated Sea Grant Program and for making this publication possible. The capable assistance of Robert L. Fuerst, a member of the class, in accomplishing editorial details is thankfully acknowledged.

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JAPAN'S POSITION ON A SEABED REGIME CONVENTION AND TERRITORIAL WATERS

C. David Benbow

THE BASIC ISSUE

> The legal status of the ocean bed is a question of far more than legal interest. It will affect the economic balance of the world and the very structure of international relations. The basic issue is between the preservation of at least the most important aspects of freedom of the seas -- the single most important achievement of the law of nations -- and the progressive appropriation of the ocean bed by states, and its exploitation by competing economic interests. Inevitably, such a development will increasingly erode the freedom of navigation and fisheries, and immensely add to the dangers of the pollution of the oceans. [1]

FOCUSING ON JAPAN -- A MARITIME NATION

> Historically, Japan has been the foremost fishing nation in the world, producing as much as 50 to 70 percent of the total world catch. The Japanese islands are

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[1] Andrassy, International Law and the Resources of the Sea (1970) [hereinafter cited as Andrassy], quoted from Foreword by Wolfgang Friedman, Professor of International Law; Director, International Legal Research, Columbia University Law School.

> advantageously situated in a zone of convergence and mixing of two great water masses -- the cold waters of the northwestern Pacific and the warm-surfaced water of the Japanese current -- a situation which produces abundant resources. This natural productivity of the waters surrounding Japan, a long coastline, and the urgent need to exploit all available sources of food have combined to encourage an active fishing industry.[2]

Japan must import a wide range of raw materials for her industries and to support her export trade. She must also import basic food stuffs for her large population.[3] Since Japan's very existence depends upon the sea, she wishes to play a major role in the formation and control of any international ocean regime. Viewed with a eye toward Japan's extensive use of the sea and her advanced deep-sea technology, relative to the use and technological status of other nations, Japan should play a leading role in any international ocean regime.[4] It should be remembered that in an investigation of

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[2] Investment in Japan - Basic Information of United States Businessmen, United States Department of Commerce 16-17 (1956).

[3] Japan's 1969 imports in order of importance were as follows: crude oil, lumber, iron ore, nonferrous metal ores, chemical products, coal, raw cotton, raw wool, and petroleum products. Japan's 1969 exports, also in order of importance were as follows: iron and steel products, ships, chemical products, other metal products, automobiles, cotton and synthetic fabrics, radio and television, and fish and shellfish. Information Guide for Doing Business in Japan, (Price Waterhouse and Company) (1971).

[4] Borgese, The Ocean Regime No. 5, A Center Occasional Paper 38-39 (1968). "The following charts, taken from the Secretary-General's Report of April 24, 1968, may be helpful in conveying an idea of the role different nations are likely to play in the Regime." (SEE TABLES 1 and 2) Because of the relative price levels in different countries, the number of professional scientists employed

of a country's positions on a seabed regime and territorial waters it is imperative to determine as closely as possible the reasons for the country's various positions -- for just as the tides of the oceans are determined by the pull of the moon's gravity, so are the national positions of an individual country on a seabed regime and territorial waters determined by the country's individual best interests in her use of the sea.

THE SEABED AND THE OCEAN FLOOR

Japan supports the concept that the seabed and the ocean floor beyond the limits of national jurisdiction should be preserved from appropriation by nations and that the exploitation of their resources should "benefit all nations." It is becoming increasingly important to preserve the limited resources of the seabed and the ocean floor from activities which would harm mankind's common interests.[5] Japan wishes to emphasize that the U. N. Ad Hoc Committee to Study the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction should confine its study to seabed and ocean floor and not include the waters above the

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in oceanographic studies is in many respects a better index of the magnitude of national oceanographic efforts than the total monetary support figures (SEE TABLE 3).

[5] Ambassador Tsuruoka of Japan, on March 22, 1968 at the 5th meeting of the Ad Hoc Committee to Study the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction, A/AC. 135/SR. 5, p. 33 [hereinafter cited Tsuruoka].

seabed and ocean floor. Freedom of the high seas (including freedom of fisheries on the high seas) should not be lessened from that position which was laid down by the 1958 Geneva Convention on the High Seas.[6] Exploration of the seabed and the ocean floor and exploitation of their resources should be allowed to be carried on by States even though the seabed and the ocean floor should be used for the "benefit of all mankind."[7]

The reasons for Japan's placing such great importance on the division of the seabed and ocean floor from the high seas are obvious. Japan does not wish to have her high seas fishing territories lessened in any way . . . nor does Japan want her exploration/exploitation limited.

OUTER LIMIT OF THE CONTINENTAL SHELF

The 1958 Geneva Convention on the Continental Shelf states, "the term 'continental shelf' is used as referring . . . to the seabed and subsoil of the submarine areas adjacent to the coast . . . to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas."[8] By this definition all the submerged lands of the world are necessarily parts of the continental

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[6] Tsuruoka at 33.

[7] Id. at 33.

[8] Geneva Convention on the Continental Shelf, Article 1, signed at Geneva, 29 April 1958.

shelf, and are divided among the coastal States at the deepest trenches.[9]

Professor Shigeru Oda, Professor of International Law, Tohoku University and a member of the Japanese Delegation to the 1958 and 1960 U. N. Conference on the Law of the Sea calls for a revision of the Continental Shelf Convention as soon as possible, in order to release deep sea areas from coastal State control before claims under the Convention are asserted over deep sea areas in exploitation terms. Professor Oda states, "[T]he regime of the ocean floor of the deep sea should be distinct from that of the continental shelf, thus releasing deep sea areas from the exclusive control of the coastal States which they adjoin. In other words, coastal submarine areas should remain under the control of the coastal State as elements of the continental shelf, but the deep sea areas beneath the ocean should be treated differently."[10]

Oda argues that the delegates to the Continental Shelf Convention were mistaken about the provision on "exploitability" as meaning the coastal State could exploit submarine resources even though the depth of the superjacent waters exceeded 200 meters.

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[9] Burke (ed.), Towards a Better Use of the Ocean 198 (1969), comment by Shigeru Oda, Professor of International Law, Tohoku University; member of Japanese Delegation to the 1958 and 1960 U. N. Conference on the Law of the Sea [hereinafter cited as Oda].

[10] Id. at 198.

At no point, however, does this convention prohibit exploitation of the submarine areas beyond the continental shelf.[11]

The 1958 Convention on the Continental Shelf states, "The rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters as high seas."[12] In respect to this article Professor Oda asks: if we grant separate national rights to coastal States over the seabed, how do we help but also grant rights to superjacent waters above the beds? Professor Oda's answer to this apparent dilemma is a proposal to give superjacent waters of the continental shelf the same status as the contiguous zone.[13]

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[11] "The concept of exploitability embodied by the Convention stems from an incorrect belief that exploitation of submarine resources, though not heretofore allowed, became permissible only in terms of the concept of the continental shelf." Id. at 198.

[12] Geneva Convention on the Continental Shelf, Article 3, signed at Geneva, 29 April 1958.

[13] Oda, Some Observations on the International Law of the Sea, 11 Japanese Annual of International Law 37, 41 (1967) [hereinafter cited Oda, Observations].

In the contiguous zone, the coastal state may exercise the control necessary to (a) prevent infringement of its customs, fiscal, immigration or sanitary regulations within its ... territorial sea; (b) punish infringement of the above regulations committed within its ... territorial sea." Geneva Convention on the Territorial Sea and the Contiguous Zone, Article 24, signed in 1964.

TERRITORIAL AND CONTIGUOUS FISHING ZONES

Many States are moving unilaterally to increased territorial and contiguous fishing zones.[14] Japan is the only major fishing State which supports the three-mile fishery jurisdiction. Professor Oda suggests that the United Nations attempt to halt the expansion of fishery jurisdiction by many coastal States by limiting the fishery zone to twelve miles. Although Japan would prefer as narrow a fishery jurisdiction as possible (i.e., a three mile limit), obtaining a twelve mile zone is more realistic. States which favor greater fishery interests off their own coasts will, of course, favor a wider extension of the territorial seas, thus excluding foreign fishing from their off-shore areas. Japan, which has advanced techniques and far ranging fishing interests spread over oceans around the world, is concerned with keeping the territory as narrow as possible.[15]

FISHERY RESOURCES -- THE HIGH SEAS

The problem of resources involves the distribution of a finite amount of fish resources among the nations of the world while attempting to protect the fish from extinction. There are two opposite policies that are conceivable in allocating fish resources

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[14] Alexander, The Law of the Sea - Offshore Boundaries and Zones 41-42 (1967); from a paper prepared by Neblett, The 1958 Conference on the Law of the Sea: What was Accomplished? (See Table 4).

[15] Oda, Observations, supra, pp. 44-46.

of the high seas:

1) Free competition -- where all States are free to compete among themselves within limits set by conservation.

2) Artificial Quota (Allocation) -- where some States get preferential shares due to their being a coastal State or their history of fishing titles or their need.[16]

Japan to some extent has favored the quota system in her major fishing treaties.[17] Complete free competition may not be the most ideal solution because the demands of each nation do not necessarily coincide with its ability. An artificial quota may not be the answer either because there is no conceivable way to enforce a quota nor are there any guaranteed portions of the benefit on any reasonable basis in terms of the general interest of the world community.[18]

The Geneva Convention on the High Seas Fisheries states, "[S]ome delegates confused the concept of conservation with fishing rights . . . [T]he provisions concerning unilateral measures

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[16] Oda, supra, pp. 204-5.

[17] North Pacific Fisheries Convention of 1952 with Canada, the United States and Japan; Northwest Pacific Fisheries Convention of 1956 with U. S. S. R. and Japan; recent arrangements on Antarctic whaling; Fur seals under the North Pacific Treaty; Oda, Observations, supra, p. 47.

[18] "We do not live in an age where there is a common consensus among nations on the general interest of the world community, or where each State is ready to sacrifice its own interest for the benefit of the world community." Oda, supra, p. 205.

were drafted to require fishing States to apply to their own nationals, in certain exceptional cases, conservation measures unilaterally prescribed by the coastal State. Nevertheless, these provisions are undoubtedly beneficial to the coastal States and place the traditional high seas fishing State (i.e., Japan) at a considerable disadvantage."[19] The Convention should not be interpreted in a way to give coastal States preferential fishing rights, nor does the Convention entrust the coastal State with any power to regulate nationals of other fishing states.[20]

FISHERY RESOURCES -- CONTINENTAL SHELF

The 1958 Convention on the Continental Shelf states that continental shelf resources consist of 1) mineral resources (oil and natural gas, for example), and 2) certain sedentary fish resources. Sedentary fisheries are defined as certain "living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil."[21] This definition lends itself to different interpretations by countries who have different interests. For example, there is a problem with the king crab, which moves

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[19] Oda, supra, p. 204.

[20] Id.

[21] Geneva Convention on the Continental Shelf (1958).

while still in contact with the seabed. How is this species to be treated? The problem is magnified when some States (Japan, for one) consider the king crab to be a high seas fishery resource and other States (United States, for one) consider the king crab to be a natural resource of the continental shelf over which the bordering State has exclusive rights and control of exploitation.[22] Japan is deeply concerned with the exploitation of sedentary fisheries in the Pacific Ocean due to her proximity to the largest pearl and shell beds in the world off Australia's northern coast. These beds produce the finest trochus and trepang (beche-de-mer) specimens.[23] Australian statutes regulate these beds which, in some cases, extend more than one hundred miles from Queensland's shore.[24] These regulations were not agreeable to Japan who argued that they were contrary to the established rules of international law concerning continental shelf resources. Japan said that continental shelf resources were originally contemplated as consisting of mineral resources, such as oil, not fish resources. "Inclusion of sedentary fisheries in the concept of the continental shelf would lead to restriction of the freedom of the seas . . . the resources living in

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[22] Oda, Observations, supra, p. 38.

[23] Colombos, The International Law of the Sea 353 (1959)

[24] Id. at 134.

the sea ought to be covered by a general regime of fishing."[25]

THE SEABED AND THE ARMS RACE

Article 9 of the Constitution of Japan renounces war and Japan states a principle of permanent pacifism. "Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes. In order to accomplish the aim of the preceding paragraph, land, sea, and air forces as well as other war potential, will never be maintained. The right of belligerency of the states will not be recognized."[26] Japan's position has become one of "permanent pacifism (which) is innate with or exactly means the positive non-armament, perpetual neutralism."[27] The basic national policy of Japan is not to possess any military nuclear capability. Japan's Basic Atomic Energy Law of 1955 restricts atomic research and development in Japan to peaceful purposes. Japan argues that the possibility of nuclear war increases as the number of States possessing nuclear weapons increase. It necessarily follows that Japan desires to limit spread of nuclear weapons and has

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[25] Oda, Observations, supra, p. 38. cf. Garcia Amador, The Exploitation and Conservation of the Resources of the Sea 127-8 (1959).

[26] Article 9 of the Constitution of Japan, signed Nov. 3, 1946, as translated by Koshi, The Japanese Legal Advisor 172 (1970).

[27] Tabata, On Perpetual Neutrality of Japan, 5 Doshisha Law Review 35, 41 (1962).

expressed this desire by signing the Treaty on the Non-Proliferation of Nuclear Weapons.[28] Ambassador Tsuruoka has stated that the seabed and ocean floor should be permanently excluded from the arms race.[29] The testing of nuclear weapons on the high seas where it does not infringe upon fishing interests, navigation, etc., is not prohibited. The testing State can establish a danger zone in the test area in order to exempt itself from the liability of damnum emergens, provided that lucrum cessans is paid for other legitimate interests, such as navigation and fishing in the danger zone.[30]

U. N. RESOLUTION CONCERNING THE SEABED AND THE OCEAN FLOOR -- JAPAN'S POSITION

At the 25th Session of the U. N. General Assembly, the Secretary-General made the following report:

> In accordance with operative paragraph 1 of General Assembly resolution 2574 (XXIV) of 15 December 1969, the Secretary-General, by a note verbale of 29 January 1970, asked Member states to express their views on the desirability of convening at an early date a conference on the law of the sea to review the

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[28] Yatabe, A Note on the Treaty on the Non-Proliferation of Nuclear Weapons: The Japanese Point of View, 14 Japanese Annual of International Law 17 (1970).

[29] The Antarctic Treaty and the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space constitute valuable precedents. Tsuruoka, supra, p. 34.

[30] Oda, supra, p. 206.

> regimes of the high seas, the continental shelf, the territorial sea and contiguous zone, fishing and conservation of the living resources of the high seas, particularly in order to arrive at a clear, precise and internationally-accepted definition of the area of the seabed and ocean floor which lies beyond the limits of national jurisdiction, in the light of the international regime to be established for that area.[31]

Japan's reply may be summarized as follows: Japan, as a maritime nation, is keenly interested in the development of the law of the sea and is always ready to support any international effort contributory to this end. But Japan feels G. A. resolution 2574 (XXIV) is too broad. Japan advocates investigation and agreement on specific issues which were neither resolved nor mature enough to be dealt with by the Geneva Conferences of 1958 and 1960. First, a consensus of nations on the basic issue of the breadth of the territorial sea is needed. At present, there is a serious problem of exorbitant unilateral claims of jurisdiction by States over the high seas. Japan emphasizes the urgency of considering this problem. Second, a definition of the seabed and ocean floor which lies beyond the limits of national jurisdiction needs to be clearly stated and internationally accepted. The problem of regulation must be faced. Needed is an international regime and the "machinery" which would govern the exploration and exploitation of the seabed resources of the area beyond the continental shelf. The U. N. Committee on the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction does not have enough

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[31] A/7925, 3, 16 June 1970.

power to solve these pressing problems.[32]

Japan is one of the few supporters of the Maltese proposal[33] which would establish an international agency which will have "jurisdiction over the ocean space, will regulate and supervise all activities, and ensure that they conform to the principles and provisions which might be applicable." The Maltese proposal states that submarine areas outside national jurisdiction are a common heritage of mankind, not subject to appropriation by any State, and that the exploitation of the resources therein should be with a view toward safeguarding the interests of mankind.[34]

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[32] A/7925, 22-23, 16 June 1970.

[33] Explanatory Memorandum dated Aug. 17, 1967, A/6695.

[34] Andrassy, International Law and the Resources of the Sea 155 (1970).

TABLE I

DISTRIBUTION OF OCEANOGRAPHIC RESEARCH VESSELS

Country	Number of Research Vessels (15m. and larger)
United States	188
U. S. S. R.	110
Japan	42
United Kingdom	28
Canada	22
France	18
Federal Republic of Germany	17
South Africa	12
Denmark	11
Argentina	10
Portugal	10

TABLE II

COUNTRIES REPORTING ANNUAL RESEARCH SUPPORT

EXCEEDING $500,000

Country	Annual Budget (dollars)
United States	$438,000,000
Canada	38,550,000
United Kingdom	25,000,000
France	24,000,000
U. S. S. R.	18,000,000
Japan	10,000,000
Federal Republic of Germany	8,000,000
Netherlands	3,780,000
Australia	2,200,000
South Africa	2,100,000
Thailand	2,090,000

TABLE III

COUNTRIES REPORTING EIGHTY OR MORE MARINE SCIENTISTS ENGAGED IN RESEARCH

Country	Number of Scientists
United States	2,000
Japan	1,600
U. S. S. R.	1,600
United Kingdom	650
Canada	509
France	475
Federal Republic of Germany	300
Chile	113
Netherlands	95
Norway	95
Australia	85
China	81

TABLE IV

TERRITORIAL AND CONTIGUOUS FISHING ZONES CLAIMED BY STATES

	Conservative Position	Middle Position	Radical Position
States holding territorial sea, including fishing, from 3 to 10 miles	19	. .	. .
States adhering to the 12 mile territorial sea, including fishing	. .	26	. .
States adhering to the territorial sea of 3 to 10 miles but claiming 12 miles for fishing	. .	29	. .
States claiming 200 miles	. .	. .	12
TOTAL	19	55	12

CANADA AND THE PROPOSED INTERNATIONAL SEA-BED CONVENTION: A CHALLENGE TO INTERNATIONAL LAW

W. Thomas White

The purpose of this paper is to examine the attitude of the Canadian government as reflected in recent statements by government officials and other sources concerning the proposed international sea-bed treaty, to be formulated in 1973. In addition, recent enactments of the Canadian House of Commons will be analyzed for their effect on Canada's possible adherence to such a treaty.

I.

Canada's leaders have long recognized the need for some international supervision of the seabed. Without such supervision it is feared there will be a new "colonial scramble" for the seabed as well as the extension of the arms race to the seabed.[1] General principles of international law must apply to such a seabed regime, but this does not mean that the seabed will have the status of the high seas and that the principle of freedom of the seas will apply to the seabed. The 1973 Conference must develop "new concepts

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[1] Address by Mitchell Sharp, Secretary of State for External Affairs to the International Law Association, Toronto, November 5, 1969. Made available by the Canadian Embassy, Washington, D. C.

beyond national jurisdiction" for the seabed in the same way as was done for the continental shelf.[2] Mr. Mitchell Sharp, the Canadian Secretary of State for External Affairs, has stated:

> The Canadian Government's position on these matters is still developing. We agree that there is an area of the seabed beyond national jurisdiction. We want this area to be reserved for peaceful purposes. We consider that a workable legal regime must be developed if the seabed is to be exploited in an effective, equitable, and orderly manner. And we assume that some form of international machinery should be required. In our view, the seabed regime and machinery should provide some revenue for international community purposes, while protecting the legitimate interests of entrepreneurs and coastal states. We intend to be flexible and open-minded in examining all possible systems, but we have serious reservations about the more extreme proposals for international ownership and control.[3]

The Canadian representative, Mr. R. Kaplan, to the First Committee of the United Nations General Assembly stated that no nation should have sovereignty or jurisdiction over the international seabed area. On November 5, 1968, he proposed the following guiding principles which he hoped would be embodied in a declaration by the General Assembly:[4]

> 1. There is an area of the seabed and ocean floor and the subsoil thereof, underlying the high seas, which lies beyond the limits of national jurisdiction.
>
> . . .

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[2] Id.

[3] Id.

[4] Reprinted in 7 Can. Yb. Int'l. L. 309, 313-314 (1969).

> 2. Taking into account relevant dispositions of international law, there should be agreed a precise boundary for this area.
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> . . .
>
> 3. There should be agreed, as soon as practicable, an international regime governing the exploitation of this area.
>
> . . .
>
> 4. No state may claim or exercise sovereign rights over any part of this area, and no part of it is subject to national appropriation by claim of sovereignty, by use or occupation, or by any other means.
>
> . . .
>
> 5. Exploration and use of this area shall be carried on for the benefit and in the interests of all mankind, taking into account the special needs of the developing countries.
>
> . . .
>
> 6. This area shall be reserved exclusively for peaceful purposes.

It is clearly understood that one of the largest obstacles will be the delimitation of the seabed area which is to be affected, since countries have claimed different breadths for their territorial seas. Mr. Kaplan also stated that in working out the solution to this problem, the nations of the world must not let themselves be shackled by "preconceived concepts nor hobbled by fears of the unknown."[5] The next year Mr. Kaplan went even further. Again urging the development of new concepts to the First Committee, he stated that if the guiding principle is the concept that the seabed is the "common heritage of mankind," a certain percent of the seabed should be set aside for the use of mankind. This would provide a yardstick by which matters could be discussed.[6]

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[5] Id. at 312.

[6] Statement reprinted in 8 Can. Yb. Int'l. L. 350-1 (1970).

On March 21, 1969, Mr. D.G. Crosby, Canadian representative to the Economic and Technical Subcommittee on the Seabed and Ocean Floor, identified several economic matters which must be considered. The Canadian view, he said, is that whatever regime is established for exploitation of the seabed beyond national jurisdiction, there must exist adequate economic incentive to attract capital. On the other hand, the interests of the international community must be protected. Grants to exploit the seabed in a particular area should be for a specific period of time in order to maintain control. Also, the grants must be devoid of political or other discrimination, i.e., the determination of who should receive a grant should be determined strictly on the merits of the proposal. Finally, "holders of a grant must either actively pursue resource development programmes or give them up."[7]

The most important impediment to an international seabed regime recognized by Canada is the delimitation of territorial waters. Because the definition of what constitutes territorial waters is not definite -- it ranges from three miles to 200 miles -- a conference should be called to fix definite limits so that it will be known what area is to be covered by a seabed convention. Mr. Mitchell Sharp, Secretary of State for External Affairs, has stated that the 1958 Geneva Convention on the Continental Shelf is inadequate because it left the legal definition with elastic inner and outer limits. He also stated that a "redefinition of the continental

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[7] Id. at 349-350.

shelf must recognize coastal-state rights over the 'submerged continental margin,' which consists of the continental shelf and slope and at least part of the rise. Any arbitrary distance-plus-depth formula which disregarded existing international law, geography, and geological factors would be unacceptable to Canada . . . "[8] Indeed, it is in delimiting the area of the territorial sea and the area over which countries may assert limited jurisdiction that Canada may force the nations of the world into action.

II.

In 1970 the Canadian Parliament passed the Arctic Waters Pollution Prevention Act (AWPPA).[9] This act, along with an amendment to the Territorial Sea and Fishing Zones Act of 1964[10] which had extended Canada's territorial sea from three to twelve miles and established exclusive fishing zones beyond twelve miles, propelled Canada headfirst into one of the most turbulent waters of

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[8] Sharp supra note 1. Article I of the 1958 Convention on the Continental Shelf, 15 U.S.T. 471 defines the continental shelf as follows: "(a) seabed and subsoil of submarine areas adjacent to the coast but outside area of 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 seabed and subsoil of similar submarine areas adjacent to coasts of islands."

[9] Arctic Waters Pollution Prevention Act, 18-19 Eliz. 2, c. 47 (Can. 1970). The act is printed in 69 Mich. L. Rev. 38 (1972). The bill is reproduced in 9 International Legal Materials 543 (1970).

international law. The AWPPA was designed to extend Canadian jurisdiction 100 nautical miles toward the north pole from the northernmost reaches of the North American archipelago between the sixtieth parallel of north latitude and the one hundred and fifty-first meridian of longitude.[11] The act prohibits the deposit of waste in the above mentioned waters[12] and provides for fines up to $100,000 for violators.[13] "The immediate stimulus for . . . the AWPPA . . . was the historic voyage in the summer of 1969 of the United States tanker S. S. Manhattan through the waters and ice of the Northwest Passage . . . The voyage was designed to demonstrate the feasibility of utilizing ice-breaking supertankers on this route for the large-scale transportation of oil from the developing oil fields of Alaska's North Slope."[14] Indeed, when the Manhattan was put in drydock, several large holes were found in her hull. Luckily, however, she was carrying only water, not oil.[15] Canada's actions, however, raise serious questions of international law which could lead to problems in her relations with other countries.

The question arises, how may Canada assert jurisdiction over

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[11] AWPPA, 18-19 Eliz. 2, c. 47 & 3 (Can. 1970).

[12] AWPPA, 18-19 Eliz. 2, c. 47 & 4 (Can. 1970).

[13] AWPPA, 18-19 Eliz. 2, c. 47 & 18(Can. 1970).

[14] Bilder, The Canadian Arctic Waters Pollution Prevention Act: New Stresses on the Law of the Sea, 69 Mich. L. Rev. 1, 3 (1970).

[15] Id. at 4, fn. 8.

100 miles of territorial sea in the face of contrary international law? First of all, Canada withdrew jurisdiction of the matter from the International Court of Justice.[16] The United States immediately rejected the Canadian action as having no basis in international law, and exhorted Canada to help develop international agreements to control such matters. The U. S. claimed that such assertions interfere with the freedom of the seas and navigation rights heretofore established.[17] Canada rejected the U. S. rejection on a number of grounds:[18] Canada regards the waters of the Arctic archipelago as Canadian and will accept no suggestion that they be internationalized; the Northwest passage is not an international strait, and indeed, before the ice-breaker it could not be used as a strait; the area is covered with ice premanently in many places and the people use it as an extension of the land; and since "traditional

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[16] On April 7, 1970, Canada presented to the United Nations a reservation to Canadian acceptance to the jurisdiction of the I. C. J. which stated that Canada retains jurisdiction over "disputes arising out of or concerning jurisdiction of rights claimed or exercised by Canada in respect of the conservation, management or exploration of the living resources of the sea, or in respect of the prevention or control of pollution or contamination of the marine environment in marine areas adjacent to the coast of Canada." Printed in 9 International Legal Materials 598, 599 (1970).

[17] U. S. Dept. of State Press Release No. 121 in 9 International Legal Materials 605 (1970).

[18] Canadian Reply to the U. S. Government, 9 International Legal Materials 607 (1970).

principles of international law concerning pollution of the sea are based in the main on ensuring the freedom of navigation to shipping states, which are now engaged in large scale carriage of oil and other potential pollutants,"[19] the traditional concepts are irrelevant to the unique Arctic area.

In reply to attacks that Canada is violating international law, Secretary Sharp replies that international law is continually being modified by unilateral actions which are later accepted. Canada has done this and will continue to help develop international law.[20] Others have seen the action as an expression of a new nationalism and independence from the United States.[21]

Prime Minister Pierre Trudeau makes clear that Canada's assertion is not an assertion of sovereignty but is an attempt to prevent pollution and disruption of the ecological balance of the area.[22] He stated that international law now in force" . . . does not sufficiently protect countries on the pollution aspect of international waters. And it is important for Canada to take forward

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[19] Id. at 610.

[20] Article by Mitchell Sharp in Sept. 18, 1968, issue of Toronto Globe and Mail reproduced in 8 Can. Yb. of Int'l. Law 344 (1970).

[21] New York Times, April 19, 1970, p. 9, col. 1 and April 26, & 4, p. 3.

[22] Press Conference April 8, 1970, printed in 9 International Legal Materials 600 (1970. (hereinafter cited as Press Conference).

steps in this area to help international law to develop."[23] Any country that objects to Canada's acts must take it up with Canada on a bilateral basis, but all are on notice until international law develops that Canada intends to preserve the area for mankind.[24]

Canada is hoping to modernize international law. The laissez faire doctrine of freedom of the seas is a concept which developed when navigation was the main and almost only use of the sea. Then, freedom of navigation did not threaten coastal states and if anyone objected, the shipping states had the power to prevail. Today, however, one oil spill can pollute hundreds of square miles of ocean and do irreparable damage to the surrounding area. Recognizing this, one commentator believes Canada's actions should gain acceptance.[25] Another point in Canada's favor is that whenever international law has changed, it has usually been at the initiative of an affected or interested state, e.g., President Truman's proclamation concerning the continental shelf. Also, it is clear that if Canada wishes to "make new law, it cannot agree to litigate under old law."[26]

As to the waters within the archipelago, Canada claims that they have always been considered internal waters of Canada and

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[23] Id.

[24] Id. at 601.

[25] Comment, Arctic Anti-Pollution: Does Canada Make-or Break-International Law, 65 Am. Jr. Int'l. L. 131, 132 (1971)

[26] Id. at 132.

that there has been no objection to this claim.[27] In fact, Canadian government maps published in 1904 extended Canadian sovereignty to the North Pole. In 1925 the government passed legislation requiring permits for investigation of arctic areas. This was done for the purpose of exerting sovereignty over the Arctic areas.[28] Until 1954 the only ships which sailed in the Arctic waters belonged to the Canadian government.[29] Writers have cited other reasons to substantiate Canada's claim:[30] the formation of the archipelago is unitary in appearance, the Anglo-Norwegian Fisheries Case could be the basis for drawing baselines around the whole area, and ice is an extension of the land mass about which international law is silent. The status of the claim to the waters of the archipelago will be a foremost consideration in determining Canadian acceptance of a seabed convention.

A number of theories exist which could be used to establish Canada's claim. Before Canada changed the breadth of its territorial waters, it recognized the three mile limit. This meant that the islands of the Arctic further than six miles apart were separated by high seas over which Canada had no jurisdiction. If

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[27] Press Conference at 601.

[28] Pharand, Innocent Passage in the Arctic, 6 Can. Yb. of Int'l. L. 3, 51 (1968). Originally Canada seems to have relied on the sector theory for its claim.

[29] Id. at 43-44, 50. Actually, there are only two months in the year when the whole Northwest Passage is passable.

[30] Id. at 55-56.

the twelve mile limit gains acceptance,[31] there will be few areas which will be considered high seas since most of the islands are less than 24 miles apart. This would enable Canada to establish effectively regulations governing the passage of ships.

As regards the seabed in the archipelago, Canada's claim may not depend on possession of the waters. Prime Minister Trudeau bases his claim on the Geneva Convention on the Continental Shelf[32] which, he says, "provides that the coastal state exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources. The sovereign rights do not depend on occupation or any express proclamation."[33]

Canada has embodied the straight baselines concept in its legislation. The co-ordinates from which the baselines are to be determined will be established by the Governor in Council.[34] The

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[31] Canada has agreed to litigate the breadth of its territorial sea. Press Conference at 601. Also, the United States on August 3, 1971, accepted twelve mile territorial seas conditioned on the right to transit through international straits. New York Times, Aug. 4, 1971, p. 9.

[32] 49 U. N. T. S. 311.

[33] Statement in the House of Commons, May 15, 1969, printed in 8 Can. Yb. Int'l. L. 343 (1970). Also see Art. II, Paras. 1 & 3 of the Continental Shelf Convention (supra note 32). Art. II, Para. 2 provides that the rights of the coastal-state "are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities, or make a claim to the continental shelf, without the express consent of the coastal state."

[34] Act to Amend the Territorial Sea and Fishing Zones Act, 18-19 Eliz. 2 c. 68 & 3 (Can. 1970).

law is in effect an acceptance of the provisions of the Geneva Convention on the Territorial Sea and the Contiguous Zone,[35] concerning baselines. The critical phrase in Article 4, Paragraph 1 of that Convention is "a fringe of islands along the coast in its immediate vicinity." Also, Paragraph 2 of Article 4 states that the baselines "must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters."

Canada has signed but not ratified the Convention. However, since the provisions are essentially a codification of international law, it can be said that they apply to Canada, especially since the relevant provisions were determined in the Anglo-Norwegian Fisheries Case.[36] The Fisheries Case established three criteria which must be applied to specific facts: 1. The baselines must follow the general direction of the coast. 2. Sea areas on the landward side of the baseline must be so closely linked with the land that they are considered internal waters. 3. There should be peculiar economic interests evidenced by long usage. No particular length for the baselines was stated so it is assumed that very long baselines

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[35] 516 U.N.T.S. 205. Art. IV, Para. 1 provides: "In localities where the coast line is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baselines from which the breadth of the territorial sea is measured."

[36] United Kingdom v. Norway 1951 I.C.J. Rep. 116. (Hereinafter referred to as the Fisheries Case.).

would be acceptable if the other criteria are met.[37]

As to the first criterion, it is clear from the map that the baselines on the Arctic Archipelago vary greatly with the general direction of the Canadian mainland. But the Fisheries Case also held the coastline of Norway consisted of the skjaergaard, or archipelagic configuration.[38] So the "general direction" test applies liberally to the archipelago as well as the mainland. Canada, therefore, fulfills this test.

The court is somewhat vague in defining the "link to the land" test. It is believed by some that this is a

> reference to the possible coastal need for control over access. Indeed, this interpretation logically follows from the main distinguishing feature of internal waters, the non-existence of the right to innocent passage, i.e., control over access. It is exactly this needed control which prompts Canada's concern. This control over access is a necessity if Canada is to prevent pollution and exploitation of her northern provinces.[39]

This would indicate that the second criterion is satisfied.

The third test, economic interest evidenced by long usage, is the most difficult to apply. Since the S. S. Manhattan was the first

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[37] The following analysis of the validity of the Canadian baselines claim in light of the Anglo-Norwegian Fisheries Case is taken from Comment, International Law: Implications of the Opening of the Northwest Passage, 74 Dick. L. Rev. 678 (1969-70). (Hereinafter cited as Northwest Passage.) Opposite conclusions were reached in Byrne, Canada and the Legal Status of Ocean Space in the Canadian Archipelago, 28 Faculty of L. Rev. 1, 8 (1970).

[38] Fisheries Case at 128.

[39] Northwest Passage at 688.

commercial vessel to make it through the Northwest Passage, it cannot be said that there is any long standing economic interest in the area. The economic potential of the area has only recently been discovered and plans for its exploitation are only now being made. So it cannot be said that this criterion is met.[40]

If the 1958 Convention is applied, however, the result is different since Paragraph 4 of Article 4 states "account may be taken, in determining particular baselines, of economic interests peculiar to the region concerned . . . "[41] (emphasis added). It appears that the "economic interest test" is of secondary importance and no longer a strict requirement. It seems to be just one of a number of factors to be taken into consideration.[42]

If the foregoing analysis is correct, the question then arises as to whether the 1958 Convention applies to Canada. Several writers cite the North Sea Continental Shelf Cases[43] as authority for saying that it does.[44] There the International Court of Justice stated that a nation could be estopped from denying acceptance of a convention if past acts and statements showed acceptance and other nations relied on these to their detriment. Also, the court stated that there are certain rules which have equal force for all and the fact that they are contained in a treaty does not make them inapplicable

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[40] Id. at 689.

[41] 516 U.N.T.S. 205.

[42] Northwest Passage at 689.

[43] 8 International Legal Materials, 340 (1969).

[44] See Northwest Passage at 685 and Byrne supra note 37 at 12.

to non-parties.[45]

If world reaction to Canada's action is such that no progress will be made either in establishing definite territorial seas or formulating a seabed convention, a compromise solution may be needed.[46] One suggestion is that Canada draw two belts of territorial waters. One would be south of the Parry Channel (this includes Lancaster Sound, Barrow Strait, Viscount Melville Sound, and McClure Strait). The second would be on the north side of the Parry Channel and would encircle all of the Queen Elizabeth Islands. Parry Channel would remain high seas and international commerce there would not be proscribed.

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[45] This paper has tried to discuss Canada's claim as the Canadian Government would discuss it so as to cast light on Canada's attitude toward an international seabed convention. Canada has used other theories in the past. These and others are discussed in the following articles: Pharand, Innocent Passage in the Arctic, 6 Can. Yb. of Int'l. L. 3 (1968); McConnell, The Legal Regime of the Archipelagoes, 35 Sask. L. Rev. 121 (1971); and Bilder, The Canadian Arctic Waters Pollution Prevention Act: New Stresses on the Law of the Sea, 69 Mich. L. Rev. 1 (1971).

[46] Pharand, The Waters of the Canadian Arctic Islands, 3 Ottawa L. Rev. 414 (1968-69).

POSITIONS THAT THE CENTRAL AMERICAN STATES, MEXICO, AND CUBA MAY TAKE CONCERNING THE INTERNATIONAL SEABED CONFERENCE

Jan H. Samet

In January 1970, the United Nations General Assembly adopted a resolution requesting:

> the Secretary-General to ascertain the views of Member States on the desirability of convening at an early date a conference on the law of the sea to review the regimes of the high seas, the continental shelf, the territorial sea and the contiguous zone, fishing and conservation of the living resources of the high seas, particularly in order to arrive at a clear, precise and internationally accepted definition of the area of the seabed and ocean floor which lies beyond (the limits of) national jurisdiction, in the light of the international regime to be established for that area. [1]

At present, this conference on the law of the sea is projected to begin in 1973. What the final outcome of this ambitious undertaking will be is impossible to predict. One thing, however, is certain. The international economic and social forces which united in the United Nations to insure passage of this resolution will also insure a great

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[1] U. N. Doc. A/Res/2574 (1970) quoted in Schaefer, Some Recent Developments Concerning Fishing and the Conservation of the Living Resources of the High Seas, 7 San. D. L. Rev. 371 (1970).

deal of reexamination of the international law of the sea.

One of the most animated sources of this reexamination will be the Central American States, consisting of Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, Panama and the nations of Mexico and Cuba. The positions which these nations will take in the Conference is, at best, speculative. There are, however, certain realities that these states will take into consideration in the formulation of their positions on the various aspects of the international seabed regime.

The purpose of this paper is to examine the realities that will contribute to the formulation of the positions of these countries on the various issues to be discussed at the conference. In order to pursue this objective, this paper is divided into three sections. The first section will attempt to examine the natural resources and the economic motivations that are indigenous to the individual nations and which may have some effect in shaping policies and positions on fishing zones, depth and breadth of territorial seas and contiguous zones, and jurisdiction over continental shelves. The second section will attempt to catalogue the political documents, treaties and agreements that have been made by the various countries in relation to the issues of the International Seabed Regime. The third seeks to predict whether the announced positions of the various countries delineated in section two and examined in the light of the national interests presented in section one will be maintained at the 1973 conference or whether these positions are likely to change.

I.

GEOGRAPHIC, ECONOMIC, AND OCEANOGRAPHIC REALITIES WHICH THE CENTRAL AMERICAN STATES, MEXICO AND CUBA WILL CONSIDER IN FORMULATING THEIR POSITIONS ON THE INTERNATIONAL SEABED REGIME

The Central American States, Mexico, and Cuba are not equally endowed with marine resources. The width of their continental shelves vary radically. The richness of fishing beds in territorial seas and in contiguous zones also varies greatly. The existence and availability of undersea mineral wealth, though most speculative at the moment because of lack of scientific research, will also probably vary.

In terms of physical configuration there are two primary types of continental shelves in the western hemisphere. The first type is the wide, shallow shelf. The second type is the narrow, deep shelf. Narrow shelves exist off the coasts of Chile, Ecuador, and Peru. The larger shelves exist off certain parts of Mexico, Cuba, Nicaragua, Honduras, and most of the Central American area.[2]

The larger shelves that exist off most of the coasts of the Central American countries are fertile fishing grounds. The shelves off Mexico, Costa Rica, Guatemala, Nicaragua, Honduras, and

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[2] B. Auguste, The Continental Shelf 248 (1960).

Panama are extremely rich in fish. The shelf off Cuba is considered a potentially rich fishing area. While the shelves off Haiti and the Dominican Republic are considered to have minimum commercial importance as fisheries.[3]

Mineral resources of the continental shelves of Central America, Mexico, and Cuba are for the most part untouched and unexploited.

> Primarily, the extraction of minerals from the subsoil of the Shelf has not proved as economical or practical as fishing in the sea. The reasons lie in the need of technical skill, large capital, and appreciable reserves.[4]

Because of the technological and economic problems in developing the mineral resources of the shelf, the Central American countries have tended to ignore this aspect of development of the sea and concentrate on fishing. This oversight can not be considered permanent. In the relatively near future the Central American countries can be expected to begin to explore for and exploit the virgin mineral resources that lie beneath their territorial seas and under the subsoil of the continental shelf.

Though the Central American Countries, Mexico, and Cuba have thus far not attempted to develop the economic potential of their

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[3] Id. at 339.

[4] Id. at 340.

respective shelves in terms of mineral resources, most are aware of the large part these shelves now play and will play in future economic development of this region. This awareness is attested to by the growing concern of the various States to maintain control over these areas. Legislation in the various States concerning the shelves witnesses this growing realization.

> In particular the analysis of the States' economic positions reveals the existence of groupings that illustrate the close relation of legislation to national and/or economic interests. In this case it is submitted that the legislations have to a large part been determined by the economic interests (fishery) of the States which determine their policies, and this in turn has caused the promulgation of legislations (sic) closely allied to what these States regard as national interests.
>
> (a) in the Central American area there are three different groups:
>
> (i) Colombia and Haiti: due to the geological structure of their 'shelves', and the lack of fishery and mineral resources in the adjacent sea areas, have not legislated on the Continental Shelf as such, or the regulations have not been specifically concerned with natural resources as they were non-existent.
>
> (ii) Cuba and the Dominican Republic: Cuba delayed her legislation on the 'Shelf': when it was promulgated it coincided with the discovery of virgin fishing grounds and other mineral resources. The Dominican Republic seemed to be of a similar opinion.
>
> (iii) Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Panama, Nicaragua and Venezuela all have extensive regulations concerning the Continental Shelf, and particularly for the development and protection of the fishing industries; Mexico and Venezuela, in view of the presence and importance of minerals in their 'Shelf' areas are also concerned with

aspect of natural resources.[5]

Thus differing ocean resources and interests have produced in the various States a divergence of internal legislation relating to the protection of these interests. It is these economic interests which comprise the realities that will play a major part in the formulation of the positions these States will take in the International Seabed Conference in 1973.

Since fishing is the biggest economic interest, it will play a large part in what the States do and say about issues such as the breadth of territorial seas, fishing zones and conservation zones.

> Needless to say, it is those states whose fishing industry holds the greatest promise who have made the most extensive claims. National fishing interests have developed and of course bring pressure to bear on governmental policy. But it is not simply the relatively few who are directly concerned with fishing industries who matter. More important is the conviction of Latin American nationalists that exploitation of their marine resources may be a significant element in their national economic development. Strongly nationalistic, convinced that economic development holds the key to national salvation, the growing middle sectors thus tend to feel that this is a matter of vital concern.[6]

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[5] Id. at 341-42.

[6] C. Ronning, Law and Politics in Inter-American Diplomacy 118 (1963).

II.

CONVENTIONS AND RESOLUTIONS OF THE CENTRAL AMERICAN STATES, MEXICO, AND CUBA CONCERNING ISSUES RELATED TO THE INTERNATIONAL SEABED CONVENTION

We now turn to some of the international conventions and resolutions which the Central American States, Mexico and Cuba have signed. Just as the sizes of the continental shelves and the richness of the off shore fisheries varied, so membership in international conventions varies. The reason for this variance becomes obvious upon examination of a study made in 1969 by the United Nations Food and Agriculture Organization of the "Limits and Status of the Territorial Seas, Exclusive Fishing Zones, Fishery Conservation Zones, and the Continental Shelf."[7] The Dominican Republic, for example, claims a territorial sea of three miles and control over the continental shelf to a depth of two hundred meters or to a depth which permits exploitation, while El Salvador claims a territorial sea of two hundred miles. Two such divergent positions, are not likely to be accomodated by any single convention, treaty, or agreement concerning issues of the territorial seas of the continental shelf.

Though the positions are different, a pattern has evolved. Examination of the signatories to the Convention on the Continental

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[7] See Appendix A infra.

Shelf and the Convention on the Territorial Sea and the Contiguous Zone[8] which was a part of the Geneva Convention on the Sea in 1958 reveals a consistent group of States as signatories and non-signatories. The essence of these two conventions was to limit inferentially the territorial seas to twelve miles and the right of exploration and exploitation of the continental shelf to a depth of two hundred meters.

El Salvador, Honduras, and Nicaragua did not sign either of the two conventions. Costa Rica, Cuba, and Panama signed both conventions but did not ratify them. The Dominican Republic and Mexico signed and ratified both conventions; Guatemala signed and ratified the Convention on the Continental Shelf and signed, but has not ratified, the Convention on the Territorial Sea and the Contiguous Zone.

The significance of this pattern is conjectural. The reason why three Central American States did not sign either of these two conventions may be attributed to the lack of a decision at that time concerning a national policy. It is interesting to note, however, that one of the three States, El Salvador, is clearly committed to a two hundred mile territorial sea and that another of the states which did not sign, Nicaragua, seems to be leaning in the direction of at least a two hundred mile exclusive fishing zone. The rest of the States that signed and/or ratified these conventions, seemed, at least in 1958, to favor the moderate position that territorial seas be twelve miles or

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[8] See Appendix B infra.

less and that the sovereign right to exploitation of the continental shelf be limited to a depth of two hundred meters.

The years since 1958 have produced other declarations, conventions, and resolutions from the Central American States, Mexico, and Cuba. The year 1965 saw the third non-signatory of the two conventions mentioned above, Honduras, decide to limit her territorial sea to twelve miles. In 1967 Panama changed her stance on the issue of territorial seas and claimed a two hundred mile limit. 1970 and 1971 were perhaps the busiest years in terms of conventions and resolutions published and signed by these states.

On May 8, 1970, El Salvador, Panama, and Nicaragua, the most militant of the Central American States, joined with several other South American countries in The Declaration of Montevideo on the Law of the Sea. This document declared certain rights:

> (1) The right of littoral states to exercise control over the natural resources of the sea adjacent to their coasts and of the seabed and subsoil thereof in order to achieve the maximum development of their economy and to raise the living standard of their peoples;
>
> (2) The right to delimit their maritime sovereignty and jursidiction in conformity with their own geographic and geological characteristics and consonant with factors that condition existence of marine resources and the need for national exploitation;
>
> (3) The right to explore, conserve, and exploit the living resources of the sea adjacent to their territory and to control fishing and aquatic game hunting operations;
>
> (4) The right to explore, conserve, and exploit natural resources of their respective continental shelves out to where the depth of the superadjacent waters admit of exploitation of said resources;

> (5) The right to explore, conserve, and exploit the seabed and the subsoil of the ocean floor out to where the littoral state claims jurisdiction over the sea;
>
> (6) The right to enact regulatory measures to achieve the aforecited goals applicable within zones of their maritime sovereignty and jurisdiction without prejudice to freedom of navigation and to the passage of vessels and overflight by aircraft of any flag.[9]

The Latin American Meeting On Aspects of the Law of the Sea held at Lima, August 4-8, 1970, closely paralleled the Montevideo Declaration in its treatment of the rights of States to exercise control and jurisdiction over natural resources of the sea. Its primary contribution to the existing declarations defining positions of Central and South American States was to include the right of States to control pollution and the right of States to share in any scientific research activity.

> (4) The right of the coastal State to prevent contamination of the waters and other dangerous and harmful effects that may result from the use, exploration or exploitation of the area adjacent to its coasts.
>
> (5) The right of the coastal State to authorize, supervise and participate in all scientific research activities which may be carried out in the maritime zones subject to its sovereignty or jurisdiction and to be informed of the findings and the results of such research.[10]

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[9] 9 International Legal Materials 1081 (1970).

[10] 10 International Legal Materials 207 (1971).

The most important published legal material, however, is the Working Paper on the Regime For the Seabed and Ocean Floor and Its Subsoil Beyond the Limits of National Jurisdiction submitted by El Salvador, Guatemala, Mexico, Panama, and other South American countries in August of 1971. For our purposes an edited edition of this working paper is in order.

Chapter I

Article 1. The seabed and ocean floor and its subsoil beyond the limits of national jurisdiction are the common heritage of mankind.

Article 2. The area and its resources shall not be subject to appropriation by any means whatsoever by States or persons natural or juridical and no State shall claim or exercise sovereignty over any part of the area and its resources, nor shall it claim or exercise any rights except as herein provided.

Article 4. The benefits obtained from exploitation of the resources of the area shall be distributed equitably among all states irrespective of their geographical location, giving special consideration to the interests and needs of developing countries whether coastal or landlocked.

Article 5. Exploitation shall be in a rational manner so as to minimize fluctuation in prices of minerals and raw materials from the sea which may effect developing countries.

Chapter II

Article 11. Membership shall be open to all States.

Article 14. The International Seabed Authority, hereby established is empowered to:

A. Provide for the orderly and safe development and rational management of the area and its resources for the benefit of man;

B. To undertake scientific research in the area
D. To provide for the equitable sharing of benefits deriving from the exploration of the area and the exploitation of its resources, taking into account the special interests and needs of the developing countries, whether landlocked or coastal, in accordance with precise criteria to be established by the Assembly.

Article 16. In order to ensure the participation of developing countries on terms of equality with developed countries in all aspects of the activities carried out in the area, the Authority:

A. Shall establish oceanographic institutions on a regional basis for the training of nationals of developing countries in all aspects of marine science and technology;
B. Shall provide to developing countries on request technical assistance and experts in the field of oceanographic exploration and exploitation;
C. Shall adopt all appropriate measures to ensure the employment of qualified personnel from developing countries in all aspects of the activities carried out in the area;
D. Shall give priority to the location in developing countries of processing plants for the resources extracted from the sea;
E. Shall, in conclusion of contracts and the establishment of joint ventures, give due consideration to entities from developing countries; shall make adequate plans to promote the creation and development of such entities and reserve zones within the area for preferential exploitation by such entities.[11]

In terms of published official documents, most of the conventions, resolutions, and declarations of a multilateral nature that bear on the positions that these States have taken are included here.

[11] Id. at 1003.

III.

EVALUATION OF CONVENTIONS, RESOLUTIONS, AND DECLARATIONS OF THE CENTRAL AMERICAN STATES, MEXICO, AND CUBA. SPECULATION ON WHAT THE FINAL POSITION ON LIMITS OF TERRITORIAL SEAS, CONTROL OF CONTINENTAL SHELF, AND LIMITS OF TERRITORIAL SEAS, AND LIMITS OF EXCLUSIVE FISHING ZONES OF THESE STATES WILL BE

In the first section of the paper, it was noted that most of the Central American States, as well as Mexico and Cuba, possessed to a greater or lesser extent large continental shelves. It was also noted that for the most part these countries shared fairly rich fishing areas. The lack of development planning for undersea mineral resources, except in the case of Mexico, was noted due to lack of capital and technology. In spite of these seeming similarities in geography and resources, the positions of these States on certain aspects of the law of the sea, as evidenced by the 1958 Geneva Convention, was quite diverse. Take, for example, the claims made concerning the limits of territorial seas of Mexico and Guatemala as compared to the claims of such countries as Panama and El Salvador. Mexico and Guatemala claim nine and twelve miles respectively. Panama and El Salvador both claim territorial seas of two hundred nautical miles.

It would seem that never the twain should meet. The appearance would be false, however. The twain have met. The results of this meeting of the two seemingly divergent points of view was the Working Paper on the Regime for the Seabed and Ocean Floor. The tone of the Working Paper, considered in the light of the common interests of these four countries, presents a clue to the final position these nations and the rest of the Central American States may follow in the Seabed Conference in 1973.

The dominant theme of the Working Paper is the development of the seabed regime with the cooperation and for the benefit of the "developing" nations. Chapter I Articles 4 and 5 and Chapter II articles 14-D and Article 16 in its entirety deal with the special considerations that should and shall be made concerning the "developing" nations in the formulation of any plans for the Seabed Regime, and the development of the new International Law of the Sea.

This theme is not new. Peru has been espousing this attitude for many years.

> The Peruvian delegate, in his statement before the First Committee of the General Assembly, offered the official version of this theme. An appreciable part of international law, he asserted, had in the past been created unilaterally, in the interest of the great powers; some part of international law ought, therefore, to be created through the initiative and action of the small states who invoke natural and legitimate interests, not political and pecuniary ones. He then turned to an old argument which has become equally familiar; with the old type of colonial domination over territory disappearing, it would be inadmissible to allow a new type over the high seas even if it is defended in the name of freedom of the seas. These are arguments

> that have great appeal in Latin America and the rest of the undeveloped world. This explains why, even among some of the Latin American States without any direct interest in extending jurisdiction into the high seas, there is considerable support for the extensive claims of other Latin American States.[12]

This theme, though not new in either Central or South America, has certainly never been presented with such multilateral support from States whose positions on the International Law of the Sea were so divergent.

The meeting of these two points of view, as reflected in the Working Paper, is probably the trend of the future in respect to international negotiations concerning the Law of the Sea by the Central American States, Mexico, or Cuba. It is impossible to predict at this moment whether the two hundred mile territorial seas position will be adopted by all Central American States. It seems safe to assume that the Central American States, Mexico, and Cuba will, in realization of their common geographic and economic interests, close ranks before or during the 1973 Conference on the International Seabed Regime. They are part of a growing number of developing nations who are no longer content to take back seats in the arena of international politics and law. Their point of view will be heard in 1973.

These politically developing States are also aware of their own potential for economic development. It would be unrealistic

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[12] Supra note 6, at 118.

to assume that these States would be willing to support any position at the Conference in 1973 which would interfere in the development of the continental shelves off their coasts. It is possible that the whole of Central America, Mexico, and Cuba will finally decide to claim territorial seas of two hundred miles. It is certain that these States will attempt to promulgate the formulation of laws of the sea and of a Seabed Regime which will afford them maximum sovereignty and jurisdiction to develop their maritime resources.

APPENDIX A

LIMITS AND STATUS OF THE TERRITORIAL SEAS, EXCLUSIVE FISHING ZONES, FISHERY CONSERVATION ZONES, AND THE CONTINENTAL SHELF *[13]

NATION	TERRITORIAL SEAS	EXCLUSIVE FISHING ZONE	FISHERY CONSV. ZONE	CONTINENTAL SHELF
Costa Rica	in accord with International Law	200 miles (1949)		to whatever depth found
Dominican Republic	3 miles (1952)		12 miles (1952)	200 meters or to depth which permits exploration
El Salvador	200 miles (1950)			200 miles including sovereignty over superadjacent waters
Cuba	3 miles (1942)			
Guatemala	12 miles (1934)			200 meters or to where depth admits of exploitation of seabed and subsoil only (1961)
Honduras	12 miles (1965)			200 meters or to where depth admits of exploitation of seabed and subsoil only (1965)

APPENDIX A (Cont'd):

NATION	TERRITORIAL SEAS	EXCLUSIVE FISHING ZONE	FISHERY CONSV. ZONE	CONTINENTAL SHELF
Mexico	9 miles (1941)	12 miles (1966)		not effect free right of navigation
Nicaragua		200 miles (1965)		sovereignty over superadjacent waters (1950)
Panama	200 miles (1967)			sovereignty over superadjacent waters (1967)

*Compiled by Food and Agricultural Organization of United Nations

[13] 8 International Legal Materials 516 (1969).

APPENDIX B

CONVENTION ON THE TERRITORIAL SEA AND THE CONTIGUOUS ZONE*[14]

This convention does not deal with maximum breadth of the territorial sea. It provides a 12 mile limit to zones contiguous to the territorial sea. (It may be inferred under this convention that territorial seas should not exceed 12 miles.)

Countries Who Have Signed	Countries Who Ratified
Costa Rica	
Cuba	
Dominican Republic	August 11, 1964
Guatemala	
Mexico	September 21, 1964
Panama	

Countries Who Have Not Signed

El Salvador

Honduras

Nicaragua

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* Went into force September 10, 1964.

[14] 8 International Legal Materials 540 (1969).

APPENDIX C

CONVENTION ON THE CONTINENTAL SHELF*[15]

This convention provides "the coastal states may exercise the sovereign right of exploring and exploiting the natural resources in the seabed and subsoil of submarine areas adjacent to its coast, but outside area of territorial sea to a depth of 200 meters or beyond that limit, to where the depth of superadjacent waters admits of the exploitation of such natural resources. This convention does not effect the legal status of superadjacent water as high seas."

Countries Who Have Signed	Countries Who Ratified
Costa Rica	
Cuba	
Dominican Republic	August 11, 1964
Guatemala	November 27, 1961
Mexico	September 21, 1964
Panama	

Countries Who Have Not Signed

El Salvador

Honduras

Nicaragua

*Went into effect June 10, 1964.

[15] 8 International Legal Materials 545 (1969).

THE LEGAL REGIME OF BRAZILIAN TERRITORIAL WATERS

Robert L. Fuerst

In the past, the nations in Latin America have tended to be generally lethargic in matters dealing with their coastal waters. For the most part, these Latin American nations have permitted foreign nationals to exploit the wealth off their coasts without receiving any of the benefits for themselves. However, in the relatively short time since the Truman Proclamation of 1945, many Latin American countries have enacted strong national legislation in an attempt to thwart future exploitation.[1] Brazil is one of these nations.

Brazil's claims in regard to the extent of her territorial waters have been, to say the least, a bit erratic over the past century. In an ordinance adopted in 1850, Brazil, along with many European nations, decided that her territorial sea would extend only the distance that a cannon could reach. This distance was subsequently fixed at three miles for the purposes of neutrality during World War I. In a fishing code promulgated in 1934, Brazil once again reinforced her claim to three miles. The terms, however,

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[1] L. L. Leonard, International Regulation of Fisheries, Monograph no. 7, 151 (1944).

were a bit unclear and many Brazilian nations interpreted them as providing Brazil with a national fishing zone of up to twelve miles.[2]

The proclamation made by President Truman in regard to the rights which the United States held over her continental shelf opened a "Pandora's box" as far as Latin America was concerned.[3] In this proclamation, the United States claimed jursidiction over an undefined area of the continental shelf and offshore oil deposits, thereby setting the precedent for other unilateral decisions in this field.[4] Soon after the Truman Proclamation, claims which were limited to the seabed and its subsoil were made by numerous nations, including Brazil. A decree signed on November 8, 1950, stated:

> The submarine shelf, which borders the continents and islands and extends into the high seas, is in reality submerged territory and, with the lands to which it is adjacent, constitutes a single geographic unit; that the interest of states in a declaration of sovereignty or of control and jurisdiction in such an accretion to their national territory has been growing . . . and that the Brazilian government should make a similar declaration as have other countries in South America ; . . . and that it would be advantageous to the interests of Brazil to participate in new conventions or to enact new laws on the

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[2] A. Riesenfeld, Protection of Coastal Fisheries Under International Law, Monograph no. 5, 241, 242 (1942).

[3] W. Bishop, Jr., International Law: Cases and Materials 637 (1962). (Hereinafter cited as Bishop).

[4] M. L. Gerstle, The U. N. and the Law of the Sea: Prospects for the United States Seabeds Treaty, 8 San D. L. Rev. 575 (1971). (Hereinafter cited as Gerstle, U. N.).

subject of fishing .[5]

Pursuant to this decree, the Brazilian government claimed twelve miles for her territorial sea, not affecting navigation or fishing rights.[6]

During the late 1940's and early 1950's, various Latin American nations extended their maritime jurisdiction to a distance of 200 miles from shore.[7] The earliest examples of these unilateral extensions came in 1947 when Chile and Peru, by Presidential decrees, extended their sovereignty 200 miles into the sea. It should be remembered that the west coast of South America does not have an extensive continental shelf.[8] Later, on August 18, 1952, Chile, Peru, and Ecuador proclaimed that each country was possessed of "sole sovereignty and jurisdiction over the area of the sea, the subsoil and the seabelt adjacent to their coastlines and extending to a line parallel to, and not less than 200 nautical miles

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[5] Dr. J. T. Nabuco and Dr. I. Zanotti, A Statement of the Laws of Brazil in Matters Affecting Business, Pan American Union, General Secretariat 291, (1961).

[6] Food and Agriculture Organization of the United Nations, Limits and Status of the Territorial Sea, Exclusive Fishing Zones, Fishery Conservation Zones and Continental Shelf 5 (1969). (Hereinafter cited as Limits).

[7] Proceedings of the Fifth Annual Conference of the Law of the Sea Institute, 5 The Law of the Sea: The United Nations and Ocean Management 347 (June 15-19, 1970). (Hereinafter cited as The Law of the Sea). See also Bishop at 642.

[8] Id.

from the said coastlines."[9] This proclamation, referred to as the 1952 Santiago Declaration of Maritime Zones, was further reinforced by an additional agreement between the countries on December 4, 1954, to the consternation of the United States.[10] The reasons given for the extension of the breadth of the territorial seas were: "The necessities of national defense, the necessities of economic defense, and in consideration of the extension of the sea which bathes their coasts."[11] Brazil took no part in either of these proclamations.

However, Brazil was present at the 1956 meeting of the Inter-American Council of Jurists which passed a resolution, by a vote of fifteen to one (United States), stating that: "The distance of three miles as a limit of territorial waters is insufficient and does not consittute a general rule of International Law."[12] In addition, this meeting resolved that "each state is competent to establish its territorial waters within reasonable limits, taking into account geographical, geological, and biological factors, as well as the economic needs of the population, and its security and defense."[13] However, the delegates came to no conclusion as to what the reason-

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[9] Limits at 5. See also Bishop at 642.

[10] Bishop at 643.

[11] J. J. Santa-Pinter, Latin American Countries Facing the Problems of Territorial Waters, 8 San D. L. Rev. 606 (1971). (hereinafter cited as J. J. Santa-Pinter).

[12] Bishop at 597.

[13] Id.

able extent of territorial waters should be, other than the decision that it could extend over three miles.

Following this meeting in 1956, Brazil participated in the Geneva Conventions of 1958 and 1960. The Conference of 1958 drafted conventions on "the law of the high seas, the continental shelf, conservation of fisheries, and the regime of territorial waters."[14] Unfortunately, the Conference in 1958, as well as its successor in 1960, was not able to establish the breadth of the territorial sea.[15]

Interestingly, according to a table of laws and regulations in force in each state compiled by the Secretariat at the Geneva Conference, Brazil was claiming only three miles as a limit to her territorial sea.[16] In an article written for the Faculty of Law of the University of São Paulo in 1963, Gilda Maciel Correa Meyer Russomano explains Brazil's position at the Geneva Conference:

> Our tradition has been to fix the limits of our territorial sea at three miles. However, in order to arrive at an international solution to the problem, we will accept a limit of six miles.[17]

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[14] Id. at 593.

[15] The Law of the Sea at 344.

[16] Bishop at 594.

[17] G. M. Correa Meyer Russomano, Zona de Pesca, 58 Revista da Faculdade de Direito 118 (1963).

The same author analyzes the Geneva Convention deadlock on the extent of the territorial sea in two ways. First, there is the problem of the territorial sea, which is essentially a political question. Secondly, there is the problem of the extent of the fishing zone, which is essentially an economic question. Accordingly, the author feels that each country's position is relatively easy to analyze, including that of Brazil. As for Brazil's position, the Brazilian ambassador to the Conference, Gilberto Amado, said:

> Our political and economic interests, from a strictly national point of view, amount to very little. For us, the zone of fishing should not extend over twelve miles.[18]

It appears that at the time Gilberto Amado made his statement, Brazil had no intention to join in the claims of Chile, Ecuador, and Peru.

Shortly after Maciel Correa's article was published, Brazil enacted decree-law number 44 of November 18, 1966. In this decree-law, Brazil stated that she "increased to six nautical miles the territorial waters of Brazil and that she reserves exclusive fishing rights in an additional area of six nautical miles."[19] Later, on April 25, 1969, Brazil decree-law 553, altered the delimitation of the territorial sea of Brazil. In this decree, the president, Costa E. Silva, ordered that:

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[18] Id. at 117.

[19] Diario Oficial of Federal Republic of Brazil, Jan. 20, 1967. See also R. C. Allison, Recent Legal Developments in Latin America, 2 The International Lawyer 262 (1967-1968).

> The territorial sea of the Federal Republic of Brazil comprises all waters that bathe the coastline of the Nation, from Cape Orange at the mouth of the Oiapoque River to the Chiu Rivulet, in the state of Rio Grande do Sul, extending in a belt twelve nautical miles in breadth measured from the low water mark, adopted with reference to Brazilian nautical charts.[20]

This position Brazil adhered to until 1970.

At last, in 1970, Brazil joined a list of other Latin American nations in adhering to the establishment of a 200-mile jurisdiction; Chile and Peru (1947), Costa Rica (1949), El Salvador (1950), Ecuador (1952), Nicaragua (1965), Argentina (1966), Panama (1967), and Uruguay (1969).[21]

The Montevideo Declaration on the Law of the Sea (May 9, 1970) followed Brazil's announcement that she would adopt the 200-mile territorial jurisdiction position.[22] This declaration was a re-affirmation, by nine nations which had adopted the 200-mile rule (including Brazil), of the right of coastal states to conserve and dispose of their natural resources as well as establish the limits of their territorial waters. The nine countries attending declared that the following were to be the basic principles of the sea:

1. The right of coastal states to avail themselves of

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[20] Diario Oficial of the Federal Republic of Brazil, April 28, 1969. See also 8 Am. Sec. of Int'l Law 989 (1969).

[21] The Law of the Sea at 347. See also J. J. Santa-Pinter at 613.

[22] J. J. Santa-Pinter at 615. See also 9 Latin American Countries Affirm Coast Rights, New York Times 14, col. 4 (Sun., May 10, 1970).

> the natural resources of the sea adjacent to their coasts and of the soil and subsoil thereof. . . ;
> 2. The right to establish the limits of their maritime sovereignty and jurisdiction in accordance with their geographical and geological characteristics and with factors governing marine resources . . . ;
> 3. The right to explore, to conserve the living resources of the sea adjacent to their territories, and to establish regulations for fishing and aquatic hunting;
> 4. The right to explore, conserve, and exploit the natural resources of their continental shelves . . . ;
> 5. The right to explore, conserve, and exploit the natural resources of the soil and subsoil of the seabed . . . ;
> 6. The right to adopt for the aforementioned purposes, regulatory measures applicable in areas under their maritime sovereignty and jurisdiction, without prejudice to freedom of navigation by ships and overflying aircraft of any flag.[23]

The Declaration of Montevideo is designed to have a distinct appeal to Latin American nations in that it does not purport to establish a specific territorial sea of 200 miles on its face.[24] In addition, the Declaration assures that the freedom of navigation by ships or aircraft will be recognized.

Less than two months after the Montevideo Declaration, another Latin American meeting took place in Lima, Peru. From this meeting of August 4-8, 1970, came the Declaration of the Latin American States on the Law of the Sea.[25] This time, in addition to the original nine nations which signed the Montevideo Declaration,

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[23] The Law of the Sea at 368.

[24] Id. at 348.

[25] 10 International Legal Materials, no. 1, 207-214 (January 1971). (Hereinafter cited as 10 International Legal Materials.).

five more Latin American nations became signatories. The Lima declaration contains among other things the following principles:

> 1. The right of the coastal state to exploit resources of the sea adjacent to its shore in order to develop the economy of its inhabitants and to raise their standard of living.
> 2. The right of the coastal state to establish the limits of its maritime sovereignty and jurisdiction according to reasonable criteria, keeping in mind its geographical, geological, and biological characteristics as well as the necessities of the rational utilization of its resources.
> 3. The right of the coastal state to supervise and protect is waters from contamination.
> 4. The right of the coastal state to regulate the above mentioned principles without prejudice of the freedom of navigation.[26]

Following the Lima Declaration, Brazil, in decree-law 68, 459 of April 1, 1971, set about to regulate fishing off her coasts with a view to the use and conservation of the living resources of her territorial sea. The president, Emilio Garrastazu Medici, declared that the fishing zones and territorial sea were to be as follows:

> 1. A zone contained within 100 nautical miles, measured from the low water mark at the continental and island coast of Brazil, used as a reference on Brazilian nautical charts.
> 2. Beyond this zone specified under 1 up to a limit of 200 nautical miles.
>
> a. In the zone referred to in item 1 ... fishing activities shall be conducted by Brazilian fishing vessels.
> b. In the zone referred to in item 2 ... fishing activities may be conducted by Brazilian and foreign fishing vessels.

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[26] J. J. Santa-Pinter at 616. See also 10 International Legal Materials 207-14.

> c. The exploitation of crustacea and other living resources, which are closely dependent on the seabed under the Brazilian territorial sea, is reserved to Brazilian fishing vessels.[27]

The decree-law further defines the zone specified under item 2, and gives a procedure by which foreign vessels must be licensed in order to operate legally in this zone.

On September 10, 1971, the Inter-American Juridical Committee, meeting in Rio de Janeiro, passed a resolution on the rights of the sea. The purpose was to bring into the open the relevant positions that the majority of American nations adhere to in the field of International Maritime Law. The resolution was passed by a vote of fifteen to one. As was expected, the only vote in opposition to the resolution was that of William S. Barnes, the representative of the United States. The resolution did not establish a territorial sea of 200 miles, but it did reaffirm each state's right to establish its own zone reasonably felt necessary in view of its particular geographical, ecological, economic, social, and cultural factors.[28]

Whatever one may think of the 200-mile jurisdiction rule, that is Brazil's claim, a claim which she holds in general with numerous countries throughout Latin America. Why does Brazil make such a claim in view of the relatively new position which this

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[27]Diario Oficial of the Federal Republic of Brazil, April 2, 1971.

[28]Vicento Rao to Galo Plaza, September 17, 1971, Washington, D. C.

theory holds in the international community, and why would she want up to 200 nautical miles for her territorial sea? Brazil, along with other Latin American nations, takes the position that the original three-mile limit was not international law at all, but was pure Anglo-Saxon propaganda.

In the Latin American position it is easy to detect the influence of the famous Fisheries Case (United Kingdom v. Norway), decided in 1951 by the International Court of Justice.[29] The court in this case mentions principles such as:

> 1. Only the coastal state is competent to undertake the delimitation of its sea areas;
> 2. It is the land which confers upon the coastal state a right to the waters off its coasts;
> 3. Geographical configuration;
> 4. Certain economic interests peculiar to the region; and
> 5. Traditional rights reserved to the inhabitants of a country, founded on the vital needs of the population . . . may legitimately be taken into account in drawing a line.[30]

However, it can be pointed out that the Fisheries Case provides as many arguments against the Latin American position as it does in favor of it. Possibly the Latin American position, including that of Brazil, is based to a large degree on pressing the claim as hard as possible in the international community in the hope that if pressed long enough, a good case for international custom will emerge.

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[29] United Kingdom v. Norway 1951 I. C. J. Rep. 116.

[30] J. J. Santa-Pinter at 612.

An analysis of Brazil's reasons for extending her territorial limits to 200 miles is extremely difficult, due to the fact that she has not been as vocal as perhaps Chile, Ecuador, or Peru. However, several important reasons are evident. The last two decades have seen great progress in the field of scientific and technological development. This rapid advance has enticed countries such as Brazil to view the sea and the seabed as a "pot of gold" which can be used to alleviate some of their social and economic problems. Due to the increasingly international character which fishing has assumed, Latin American coastal nations have felt impelled to protect their natural resources from foreign powers. Resolution 2574D passed by the twenty-fourth General Assembly of the United Nations in December, 1969, is an excellent indication of the position taken by developing nations such as Brazil. "Resolution 2574D states that pending the establishment of an international regime, states and persons are bound to refrain from all activities of exploitation of the resources of the area of the seabed beyond the limits of national jurisdiction."[31] Brazil voted for this resolution as expected; the developed countries such as the United States and the Soviet Union voted against it.[32]

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[31] M. L. Gerstle, The Politics of U. N. Voting: A View of the Seabed From the Glass Palace, 7 Law of the Sea Institute, U. of Rhode Island 2(July, 1970). (Hereinafter cited as Gerstle, Politics).

[32] Id. at 4.

A desire to protect living natural resources in her territorial sea, and the importance of fishing as a factor in Brazil's development may be overshadowed by a new development. Both Brazil and Argentina are "engaged in extensive oil exploration so that the interest of east coast Latin nations in broad shelf claims may be reinforced by actual interest in oil recovery as well as by the value of the jurisdictional claims as a negotiating tactic for the Latin bloc as a whole."[33] In fact, crude oil production in Brazil, in part from wells just offshore, increased 24% from 1965 to 1966.[34]

Another important variable exists which concerns Brazil's reasons for claiming a 200-mile territorial sea limit, that of emerging nationalism. This new nationalism is not exactly like the classical European nationalism; instead, it is unique to Latin America. According to Edmundo Vargas:

> It is the natural reaction made by diverse economic and political problems that Latin America has had to face . . . which has resulted in the reaffirmation of the Latin American's political sovereignty . . . and their right to benefit from their natural resources.[35]

While the 200-mile claim may be seen as a crippling of international law and a reprisal against developed nations (particularly the United

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[33] Id. at 9.

[34] E. Murphy, Jr., Oil Operations in Latin America: The Scope for Private Enterprise, 2 The International Lawyer 464 (1967-1968).

[35] The Law of the Sea at 345.

States), this writer prefers to view it as simply a countermovement by a group of developing nations who have devoted their efforts to blocking any arrangements made by the developed nations, either de jure or de facto, which would exclude them from their fair share of sea wealth. Under this view, Brazil's reasons for entering the movement are strengthened by a desire to mount a common front against the developed countries so that she will not lose out in her race for the ocean's riches and will be able effectively to protect the resources off her coast.

Whether or not, and to what extent, Latin America's counter-movement will be successful against the developed nations is conjectural. The developed nations advocate the establishment of universal rules which would allow them the freedom to use the sea and exploit its resources. The Latin American view, on the other hand, recognizes that the conditions and characteristics of each country are different, and through this recognition feels that the coastal states have the right to extend their jurisdiction to protect and exploit the resources in their environment.[36] The Latin American position appears to be gaining momentum in Latin America, itself, and it may well represent more countries than the fourteen present at the Lima convention. Other Latin American nations may be allied with those claiming a 200-mile territorial sea in spirit if not actually willing to make the decision themselves (with the obvious exception of the landlocked nations).

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[36] The Law of the Sea at 342.

But Latin America may not be enough of a force to establish a 200-mile territorial sea, "though it increasingly appears that Latin votes and interests in fishing rights hold some important keys to the kingdom of the underwater world."[37] According to Margaret Lynch Gerstle, United Nations politics in many areas is presently characterized by fissures between developing and developed nations.[38] An important emergent question concerns the direction which the Afro-Asian bloc in the United Nations will take.

> Many Afro-Asian nations, encouraged by the Latin bloc, have asserted variously extensive territorial sea claims as an attempt to insure their bargaining position and to protect them from the possibility that their common heritage may yet turn out to be a mess of pottage.[39]

It appears reasonable to say that the problems involved in deciding on the delimitation of a nation's territorial sea may not be solved by a Law of the Sea Conference in 1973. As for Brazil, her interests are now allied with Latin America. A claim of 200 miles for the breadth of her territorial sea, once made, would obviously be difficult to retract even though Brazil's past claims for jurisdiction over the sea were most erratic. Possibly if a solution is to be found,

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[37] Gerstle, Politics at 7.

[38] Id. at 2.

[39] Gerstle, U.N. at 580.

it must be reached while the location and quality of the mineral wealth of the seabed is still relatively unknown.[40]

[40] S. Bernfold, Developing the Resources of the Sea -- Security of Investment, 2 The International Lawyer 67 (1967-1968).

THE PROBABLE NATIONAL POSITIONS OF GREAT BRITAIN AND IRELAND ON THE ESTABLISHMENT OF AN INTERNATIONAL SEABED REGIME

Keith Douglas Lembo

The nations of Great Britain and Ireland (Eire), although polarized politically, nevertheless maintain economic ties which are so unalterably linked that in an economic sense at least, they may be discussed as a single unit. Whether this singular relationship will remain with the forthcoming membership of the two in an enlarged European Economic Community remains to be seen, but for the present their respective positions on such an economically motivated proposal as an international seabed regime are likely to be similar if not identical.

It does seem a valid conclusion that the various seabed proposals do derive their motivational force from the economic sector. The mineral resources of the sea, so long barred to mankind by insufficient means of exploration and exploitation, are suddenly within striking distance, and alarm at a self-destructive "rush" for these assets seems likely to spur the movement towards stability via the mechanism of some sort of internationalization. Certainly one must presume that in spirit there is general agreement that such potential riches could and perhaps should be used for world-wide benefit, but beyond this vague committment it is

difficult to find any sort of accepted consensus.[1] Richard Young, in his article "The Developing Law of the Deep Seabed: American Attitudes",[2] cites two problems which could hinder further agreement. First, and most obvious, is the idea that abandonment of potentially significant national assets would have grave political repercussions; repercussions which many a government would be reluctant to provoke. Secondly, the structure of such a world body, if based on the model provided by the presently constituted United Nations, would produce doubt as to the competence of such a body to carry out what would most certainly be difficult managerial tasks. Great Britain, by reason of her standing as one of the world community's most advanced and highly developed members, could profit greatly through exploitation of seabed resources. Her reluctance to sacrifice such potential wealth would be most understandable. It would also seem that Britain, so frequently humiliated by the United Nations, particularly in the area of de-colonization, and specifically at the time of the Suez crises of 1956, would cast a dubious eye at yet another international body affecting and limiting potential British sovereignty. Mr. Young goes so far as to indicate that even in the event of an international regime, the great powers, among which

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[1] Young, The Legal Regime of the Deep Sea Floor, 62 Am. J. Int'l. L. 641 (1968).

[2] Young, The Developing Law of the Deep Seabed: American Attitudes, 5 Texas Int'l. L. Forum 235 (1969).

Britain must be numbered, would engage in a bidding war for resources, based not so much on need as political consideration, with the effect of retarding, rather than advancing, the development of the area.

The possible conflicts inherent in the establishment of any seabed regime are numerous. Foremost is the eternal "East-West" confrontation dating from the end of World War II and intensified during the prolonged "cold war" period. Transcending this primarily political conflict, however, are the relatively new economic conflicts between the developed and developing nations, and the land-locked and sea-coast nations. Obviously Britain is counted among the developed western nations. More interesting than these oft-mentioned problem areas however, is a legal conflict interestingly explored by Elizabeth Mann Borgesse in her article "Towards an International Ocean Regime."[3] She believes the future order of the sea is actually developing along two courses. The first course is through an extension of the law of the land, a type of development illustrated by the International Countinental Shelf Act of 1958. This act, which in essence extends national sovereignty over the continental shelf to a 200 meter depth, seems to contain a loophole which allows a further extension when the adjacent areas are

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[3] Borgese, Toward an International Ocean Regime, 5 Texas Int'l. L. Forum 205 (1970).

capable of development.[4] Developed nations such as Britain could actually increase their areas of jurisdiction as their technology advanced. Needless to say, the development of this type of law works greatly to the advantage of advanced nations, while adding virtually nothing to the development of the "have-not" nations.

The second potential course is the projection of the general law of the sea, that is, strictly speaking, applying the principle of the high seas as international territory to the area of the seabed as well. The present author believes if general acceptance of international ownership of living assets of the sea prevails, the same acceptance should be forthcoming toward the non-living assets as well. Unfortunately, the interest groups concerned with seabed exploitation are largely land law oriented, but it seems patent that in the long run, one type of law for the seas themselves and another type for the seabed area cannot be tolerated. Which type will prevail remains highly speculative.

This second course, extention of the law of the sea to the seabed, is eloquently stated by the island nation of Malta in her 1967 proposal to the United Nations:

> Preservation of international character of the seabed and ocean floor and of the subsoil, underlying the high seas beyond the limits of national jurisdiction, not as a res omnium communis, usable for any convenient purpose and the resources of which are in-

[4] Creamer, Title to the Deep Seabed: Prospects for the Future, 9 Harvard Int'l L. Journal 205 (1970).

> discriminently and competitively exploitable, but through the acceptance by the international community of the principle that these vast areas of our planet have a special status as a common heritage of mankind and as such, should be reserved exclusively for peaceful purposes and administered by an international agency in the name of and for the benefit of all people and of present and future generations.[5]

Malta's representative to the United Nations, Arvid Pardo, expresses similar personal views. He believes the present uncertainties regarding the seabed can only lead to a competitive scramble for minerals, an increase in the arms race, and a subsequent general increase in world tensions.[6] Malta has concluded only an international government can fill the legal vacuum in the area, a vacuum which has not been aided by the supposed problem solving 1958 Geneva Conference. Apparently, the conference produced an ambiguity, in that a significant minority supposed a mandate for increased jurisdiction by coastal states through exploitation, while the majority understood the spirit of the conference as establishing definite geographic limits. Britain must be linked with the minority group on this issue. The Conference, while primarily dealing with the continental shelf, reveals attitudes which may well prevail in the seabed area as well.

Pardo believes if these major nations are to overcome their

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[5] U.N. Doc. A/AC 135/W.G. 1/S.R. 2 (July-August 1968).

[6] Pardo, An International Regime for the Deep Seabed: Developing Law or Developing Anarchy?, 5 Texas Int'l L. Forum 204 (1969).

reluctance to override national interests, the eventual international body must be regarded by all nations as impartial and more effective than the present United Nations.[7] In view of British sensitivity toward previously mentioned United Nations "snubs", the latter point is particularly well taken in regard to a future British view on the matter. Other writers, however, seem less eager to discount the effectiveness of the United Nations itself to administer a seabed regime. Richard Creamer, speaking via the Harvard International Law Journal[8], cites several advantages the United Nations would possess as opposed to a multi-nation treaty or convention. He sees the advantages of: (1) flexability to meet changed circumstances, (2) solutions to disagreements over coastal sovereignty, (3) allowing underdeveloped nations to share in the wealth of the sea, and (4) providing the United Nations with an independent source of income. Creamer also concludes the United States is gravitating towards this position, which would have an obvious effect on British views, despite their probable aversion to United Nations control.

Any United States position would likely be followed by Britain, or at least tend to have a significant effect on that position, but as the United States remains largely uncommitted, at least

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[7] Id.

[8] Creamer, note 4, supra.

officially, the eventual result remains obscure. The United States has advocates of various positions ranging from ultra-nationalism to the most internationalistic of attitudes.[9] An example of the former might be the National Petroleum Council Report, "Petroleum Resources Under the Ocean Floor (1969)". This industry association adopts the attitude that the "exploitability test" extends potential sovereignty to the abyssal ocean floor.[10] The problem with such an attitude is obvious. If the United States were to adopt such an official policy, it would be bound to concede the same privilege to other nations as well. If these other nations did not confine their claims to the ocean floor, but rather extended them to include gigantic portions of the high seas as well, movement of sea borne defense forces could be severely curtailed. Britain's petroleum industry might well adopt the attitude of the National Petroleum Council, particularly in view of vast new deposits discovered in the North Sea adjacent to Britain, and potential discoveries elsewhere. The British government, however, in view of Britain's traditional role as a great maritime power, would be loath to encourage any possible shrinkage of the open high seas shipping routes.

In 1955, the United Kingdom advocated "freedom of research, experimentation and exploration" as a fifth freedom to be inserted

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[9] Young, note 2, supra.

[10] Id.

in Article 2 of the International Law Commission draft articles on a Regime of the High Seas. Some would hold that such attitudes are changing, and would say perhaps both the United States and Britain have now reversed themselves to favor policies of national exclusivity on the sea.[11] If so, it would represent a major departure for Britain in the area, Britain being perhaps the last major holdout for the old three mile limit of the territorial sea. Perhaps Britain's staunch stand met its real end at the 1958 Geneva Conference, which although failing to solve the problem of the territorial sea nevertheless destroyed the possibility of continuation of the old limit.[12] Although attitudes on the sea itself and the seabed might be dissimilar yet compatable, the proposition that Britain is easing its traditional position on increased control of the oceans by national states could well indicate her acceptance of the proposition that jurisdiction over the seabed should be that of national states rather than of an international body.

What are the long term prospects for British participation in an international seabed regime? From the available evidence, one must conclude it is most unlikely Britain would exercise any sort of leadership role in the establishment of such an organization.

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[11] Goldie, Davey Jones Locker, 22 Rutgers L. Rev. 1 (1967).

[12] Jessup, The United Nations Conference on the Law of the Sea, 59 Columbia L. Rev. 234 (1959).

Despite possible moral leanings among some members of government which would dictate the necessity of stablization in the area, it appears the potential loss to Britain negates any advantages she might gain through active participation. The economic interest groups standing to benefit through purely national exploitation seem at the moment too powerful to be overcome by the British internationalists.

Britain is by no means the only nation in a like position. It seems likely that each of the major powers would be hesitant to support a seabed regime with more than lukewarm enthusiasm. Despite the existence of both United States and Soviet Union draft proposals, it is by no means certain that these proposals would be acceptable within those specific countries. Any international body structured on the "one nation-one vote" principle is bound to have a majority of smaller underdeveloped nations, with interests incompatable with the interests of the major states. While the major states enjoy great advantages socially, militarily, and economically, these advantages would be neutralized or at least minimized by an international regime. In the United Nations, the great powers possess the power of veto in the Security Council, which, although not often exercised, does ease possible anxiety over potentially unacceptable decisions. Without similar latent power within an international seabed regime, it seems unlikely that Britain would sacrifice her own interests for the benefit of others.

Britain has, by her own decision, entered a new phase of her history. By joining the Common Market, she has rejected her traditional isolation and joined hands with the Continental nations

she so often disdained. In addition, the ties with the Commonwealth have been loosened, and it is doubtful Britain would have made such a precedent shattering decision without fully realizing the consequences. The consequences are obvious. By joining the Common Market, Britain must realize that some national interests must be sacrificed in the name of European interest and unity. Some observers have even predicted that this primarily economic union will eventually evolve into a loosely knit political union as well. The future may find Britain unable to exercise an independent national position without regard to the concerns of her European sister states. One might argue that none of the Western European nations fit the definition of underdeveloped state, but conversely only a few of them are numbered among the major powers. It is certainly within the realm of possibility that a majority of the Market members, including Britain's neighbor Ireland, would find it advantageous to support an international seabed regime. Certainly if the expected confrontation between a United States and a United Europe for world economic domination takes place, the European nations could visualize an international seabed regime as an effective barrier to United States expansion in the area. It must be concluded that the United States would stand to profit in excess of European exploitation of the sea's wealth. Under that set of circumstances, Britain would probably follow Europe rather than be influenced by the United States.

Ultimately, it seems inevitable that an international regime will emerge. At the present, there is room for national expansion without immediate danger of confrontation by claims of other states. Expansion is primarily governed by technology, and the rate of expansion will be determined by the rapidity of technology's advance. At some indefinite future time there will be a meeting of conflicting claims and an international regime will by necessity come into being to solve the problems. If such an organization were actually formed now, Britain would probably prefer a relatively weak organization like the United Nations, if she indeed were forced to make a choice. In the future, Britain might join other nations in advocating a stronger, more efficient organization. What Britain eventually does depends largely on the efficiency of her integration into a larger European community and the magnitude of her future reliance on the United States.

FISHING TREATIES AND PRACTICES: POSITION OF ICELAND ON A SEABED REGIME CONVENTION

R. Michael Pipkin

Iceland is a nation heavily dependent upon the sea for its existence. The country is barren and has no mineral resources or forests. The coastal fisheries are the foundation of Iceland's economy, and Iceland is more dependent on this single resource than any other state. Fish and marine products account for approximately ninety per cent of the state's exports and represent one-fifth of the gross national product.[1] In the shallow waters of the state's continental shelf are found ideal conditions for spawning areas and nursery grounds, and this area has for centuries been recognized as one of the world's richer fisheries.

Since the Seventeenth Century, Iceland's fishing jurisdiction has varied from thirty-two miles down to four miles, and was set unilaterally in 1958 at twelve miles. The present government has announced in a resolution passed on April 7, 1971, that it would issue new regulations extending the fisheries jurisdiction to fifty nautical miles, and the pollution jurisdiction to one hundred nautical

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[1] Government of Iceland, Fisheries Jurisdiction in Iceland 9-11 (July 1971).

miles from baselines, not later than September 1, 1972. The fifty nautical mile limit roughly approximates the four hundred meter isobath surrounding the island, and includes what has previously been claimed as comprising the continental shelf and some superjacent waters. Iceland has not hesitated in the past to protect unilaterally its interest in this area, but generally its actions have been enlightened and based on pressing national requirements.

Iceland's position regarding any convention on the seabed simply stated is that any agreement must include fisheries as a resource to be reserved to the coastal state, at least to the extent necessary to preserve their economic and national intersts. Stated another way, Iceland regards coastal fisheries as a part of the national resources of the coastal state, with the needs of the state paramount to any effort on the part of another state to exploit these resources. Iceland has demonstrated little interest in a seabed convention except as it may influence her fishing interests.

The most important question to Iceland is the sharing of fishing resources with other nations. At present Iceland is harvesting approximately one-half the total catch from surrounding waters, whereas it is capable of utilizing the entire catch. The basic principle sought to be established is that to the extent the coastal state is willing and able to utilize its coastal fishery resources it should be allowed to do so. The claim apparently does not go so far as to exclude foreign fishing per se, but makes it clear that even traditional fishing rights should give way to coastal state interests, and that any rights allowed a foreign state must be agreed to by the coastal

state.[2] This is a reversal of past custom where territorial and fishing interests of the coastal state were restricted in order to provide more free "high sea" area to all nations.

The Icelandic position is to some degree in accord with the changing attitude of other states, although only a few have proposed that exclusive fishing rights extend appreciably past twelve miles. The United States now claims a Contiguous Twelve Mile Fishing Zone[3] in respect of fisheries, but subject to the continuation of traditional fishing by foreign states. The European Fisheries Convention of 1964[4] provides for exclusive fishing by the coastal state within six miles of the baseline, and for fishing by the coastal state together with other parties whose vessels have habitually fished in that belt between 1953 and 1962 from six to twelve miles from the baseline.

In addition to protecting the economic interests of the country, Iceland cites an urgent need to conserve the fish stocks in surrounding shelf waters which supply the Atlantic Ocean and North Sea fisheries. Primarily as a result of overfishing, the herring, cod and haddock catches have fallen nearly sixty per cent

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[2] From a statement by Icelandic Ambassador Hans G. Anderson before the United Nations Committee on the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction, Palais des Nations, Geneva (6 Aug. 1971).

[3] 80 Stat. 908 (1966).

[4] Conveniently found in Bowett, The Law of the Sea 92 (1967).

since 1966.[5] This situation is brought about to a great extent by efficient, modern fishing fleets of other countries, primarily Great Britain and Russia, which are able to travel over wide areas taking fish where they are found. Iceland argues, rather forcefully, that historically such operations have not been concerned with depletion of stocks or conservation measures, finding it generally easier to proceed to another area where fishing is more profitable, rather than to be concerned with conservation. Hence, Iceland maintains that the responsibility to conserve and protect fisheries falls heavily on the coastal state, and that they in turn should have a preferential position as to exploitation. Clearly, they say, a nation whose existence is dependent upon a continuing supply must act to protect that supply, and this is to the benefit of all fishing interests.[6]

There is little meaningful conservation done on an international level. Most efforts at preservation of fisheries are initiated as a result of a national interest, such as Iceland's although some progress has been made through conventions. The Icelandic government has been cooperative in regional and international efforts to set standards of conservation, protection, and rational utilization of fish stocks, and has often adopted more rigorous standards within Icelandic fishing limits than the regional standards adopted for the

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[5] Fisheries Jurisdiction in Iceland, supra note 1, at 12-14.

[6] From the statement by Ambassador Anderson, supra note 2.

area outside. A case in point is the Faxa Bay question.[7] Faxa Bay, located at the tip of southwestern Iceland, is one of the most valuable nursery grounds in the world, and in 1946 the International Council for the Exploration of the Sea recommended that it be closed to trawling. On the basis of this recommendation the Icelandic government convened a conference for determination of the question, which had to be cancelled as Great Britain, the outside party most concerned, refused to participate. Iceland, therefore, acted unilaterally to close the bay, both to Icelandic and foreign fishermen, a step which has been of great value to conservation in that area.

The Convention on Fishing and Conservation[8] adopted by the United Nations Conference in 1958, and of which Iceland is a signatory, notes in Article 6 the special interest of the coastal state in its territorial waters and the adjacent seas and provides further in Article 7 that a state may adopt unilateral measures of conservation within these areas provided negotiations have not been successful. Iceland, apparently, feels that these provisions do not adequately protect her interests as any dispute under these

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[7] Memorandum: The Icelandic Fishery Question, Submitted by the Gov. of Iceland to the General Assembly of the United Nations (Sept. 1968).

[8] Convention on Fishing and Conservation of the Living Resources of the High Seas, 52 Amer. J. Int'l. L. 851 (1958). (Hereinafter cited as Fishing and Conservation).

Articles is to be submitted for settlement under Article 9 to a commission of five members. Iceland regards its dependency on the sea coupled with the strong interests of other nations to exploit the adjacent fisheries as unique. Other nations in the past, they argue, have not seen fit to give much weight to the Icelandic position, and concededly a unilateral approach has historically been necessary to protect her interests.

The Icelandic government recognizes the widely accepted principle stated in Article 2, paragraph 1, of the Convention on the Continental Shelf of 1958[9] proclaiming that "The coastal state exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources." The International Court of Justice has upheld this principle in the recent North Sea Continental Shelf Cases,[10] when it stressed the fact that the continental shelf is a natural prolongation of the State's territory. The International Court of Justice also indicated in the Anglo-Norwegian Fisheries case[11] that it is the land which confers upon the coastal state a right to the waters off its coast. And this is particularly true regarding fisheries. A look at phytoplankton maps shows many coastal states endowed with this necessary ingredient

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[9] Id. at 858.

[10] I. C. J. Rep. 3, digested in 63 Am. J. Int'l. L. 591 (1969).

[11] United Kingdom v. Norway 1951 I. C. J. Rep. 116.

to fisheries. It is a part of their natural environment, and is therefore a natural prolongation of their territories.

A logical consequence of the foregoing elements of International Law is that the coastal fisheries form a part of the natural resources of the coastal state. Paragraph 4, Article 2 of the Convention on the Continental Shelf for 1958[12] enumerates the natural resources over which the coastal state has sovereignty on the continental shelf as being minerals, and other non-living resources of the seabed such as oil, gas, and metals, and living organisms belonging to sedentary species such as crabs and shellfish.

From the Icelandic point of view, it is quite illogical and inequitable to exclude fisheries in the superjacent waters from the sovereignty of the coastal state. The sea, its living resources, whether swimming, crawling, or sedentary, as well as the continental shelf and the seabed, arguably form one organic unity, which is a part of the resources of the coastal state.

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[12] Fishing and Conservation at 629.

THE SOVIET POSITION ON A SEABED REGIME

Lawrence U. L. Chandler

In recent years, the vast potential of the floor of the oceans has become prominent in the minds of Soviet scientists and politicians. The government of the U. S. S. R. has encouraged scientific investigation of the ocean bed and her scientists have optimistically reported "deposits of iron and manganese nodules, as well as phosphates, . . . oil and gas deposits on the continental shelf, (and) deposits of sulphur, coal, and other valuable, useful minerals."[1] Metallurgical tests by these Soviet scientists reportedly demonstrate the effectiveness of processing nodules and possibly obtaining an almost complete extraction of manganese and other metals.[2] On numerous occasions, Soviet newspapers have reported Soviet experiments similar to the United States' "Sealab" experiments, to test man's capabilities in an environment under the ocean's surface. It is obvious to the Soviets as well as to most other nations that the bottoms of the seas represent vast potential and a new frontier for man.

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[1] W. Butler, The Soviet Union and the Law of the Sea 157 (1971). (Hereinafter cited as Butler).

[2] Id.

The Soviet Union has made a concerted effort, beginning in the early 1960's, to become a maritime power second to none. Today, Russian naval fleets are in every part of the globe and American naval experts are understandably nervous due to this large, powerful and ultra-modern navy. The efficiency of her ubiquitous "trawler" fleet is well known and her merchant marine fleet is modern and growing. These factors, among others, suggest that the Soviet Union has technological knowledge, skill,and capability on and below the seas surpassed, perhaps, not even by the United States.

Although the Soviet attitude toward a seabed regime is complex and subject to change in order to reflect its national interest, a preview of its evolving position can be gleaned from its moderate, deliberate approach to the continental shelf question at the 1958 Geneva Conference on The Law of The Sea. The Soviet position was to recognize the sovereign rights of coastal states over their shelf but not to superjacent waters.[3] This was the eventual position taken by the conference and the Soviet Union ratified the Convention on the Continental Shelf in 1960.[4] As seen later, this gives them sovereignty over their own shelf which is vast,[5] and freedom to obtain interests

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[3] Id. at 142.

[4] Id. at 144.

[5] Gerstle, The United Nations and the Law of the Sea: Prospects for the United States Seabeds Treaty, 8 San D. L. Rev. 8 (1971). (Hereinafter cited as Gerstle).

in the remainder of the seabed, other than the shelves belonging to other nations. However, there is yet no international agreement as to the limits of the continental shelf. The Soviet position here is unclear but they are apparently willing to negotiate.[6]

The Soviet Union has exhibited a great fear that the seabed will be used for military purposes. They have incessantly pressed for treaties which would prohibit all military uses but so far have managed to agree with the United States prohibiting only nuclear devices.[7] This pre-occupation with military use of the seabed has created a convenient side-issue in international agreement on a seabed regime and probably neither evidences a fear of inferiority in this respect nor a genuine desire to limit "cold war" competition on the seabed.[8] This military issue is again raised in the Soviet Draft, and presumably can be used as a source of disagreement.

In 1967, the Permanent Mission to the United Nations from Malta put before the General Assembly a proposal to examine the question of a seabed regime. A subsequent memorandum explained that the seabed be reserved for peaceful purposes, and resources

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[6] Provisional Draft Articles of a Treaty on the Use of the Seabed for Peaceful Purposes. 10 International Legal Materials 955 (1971). (Hereinafter cited as USSR Draft Articles).

[7] Draft Treaty Prohibiting Nuclear Weapons on the Seabed. 9 International Legal Materials 534 (1970).

[8] USSR Draft Articles, Art. 9 and Art. 6 at 995.

from it be used for the interests of mankind with emphasis on helping developing nations.[9] At that time, the Soviet Union had no established legal position on the seabed, and no Soviet jurist or public official appears to have remarked on the legal status of the deep seabed.[10] Since that time, the Soviet attitude toward a regime for the seabed has been one of extreme caution characterized by the use of delaying tactics.[11] Clark Eichelberger commented upon one Soviet argument used as a delaying tactic:

> One of the arguments commonly advanced by those who refuse to grasp the greatness of the opportunity before the nations is that little should be done in the way of adopting principles until more is known of the sea and its possibilities. This doctrine is an invitation to the capable maritime powers to take as much of the seabed as they can, expecting the national flag to protect them. Once having established their claims and having made large investments for exploration and exploitation, it is hard to imagine their voluntarily pulling back for an international regime.[12]

Following the Maltese proposal, an Ad Hoc Committee of 35 members, including the Soviet Union, was formed to prepare a study

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[9] U. N. Doc A/Res/6995 XXII (1967).

[10] Butler at 156.

[11] Gerstle at 578.

[12] Eichelberger, The United Nations and the Bed of the Sea, 7 San D. L. Rev. 348 (1971).

for the General Assembly detailing accomplishments, activities, existing agreements and means to promote uses of the seabed. This committee, later to become the Permanent Seabed Committee, has been continually used as a means of delay by the Soviets. As one writer put it:

> The Permanent Seabed Committee was given a mandate from the 24th Assembly to present to the 25th Assembly a set of principles to govern the regime of the seabed and the machinery to accompany it. The committee failed to agree but reconvened on the eve of the 25th General Assembly and all members agreed except the Soviet Union and Bulgaria. The chairman shelved the policy of unanimity and reported the principles to the General Assembly as having been adopted by his committee.[13]

While creating indecision, disunity and delay in the Ad Hoc (later Permanent) Committee, the Soviets voted against calling a third United Nations Conference on the Law of the Sea to be held in 1973.[14] Their position, as explained by letter on 25 May, 1970, was that the principles set out in Geneva in 1958 were well-founded and any attempt to revise them could only lead to disputes and friction. However, a few individual questions needed to be answered such as boundaries of continental shelves and widths of territorial waters and these could be dealt with without reviewing the regimes established

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[13] Eichelberger, The Seabed Question in Context: One of Many Issues Massing for the 1973 Conference, 8 San D. L. Rev. 653 (1971).

[14] H. Knight, The Draft United Nations Conventions of the International Seabed Area: Background, Description and Some Preliminary Thoughts, 8 San D. L. Rev. 459 (1971).

in 1958.[15]

It would appear that the Soviets have been delaying on the seabed issue in order to develop a doctrine that can reconcile their image of leader of the poor nations with their new-found capability to benefit disproportionately from seabed resources. In this connection, Margaret Gerstle suggests that only the prospect of again being isolated and doing important damage to its self-proclaimed image as champion of the poor, would induce even minimal concurrence in a seabed proposal.[16]

In order to ascertain the Soviet position as it has evolved and as expressed in their Provisional Draft Articles of a Treaty on the Use of the Seabed for Peaceful Purposes, it becomes necessary to review the possible regimes that Russia has already expressly disapproved. One writer, William E. Butler, proved to be especially prophetic when he suggested that the Soviets historically have been wary of international mechanisms but might accept an international organization with limited authority. He referred to various statements of Soviet officials expressing distrust of an international authority.[17] Mr. Butler also states that he doubts the Soviets would ever accept continual extension of the continental shelf boundaries

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[15] U. N. Doc. A/Res/7925, Add. 1 (25 May, 1971) at 36.

[16] Gerstle at 578.

[17] Butler at 163.

seaward, as they feel this policy would lead to internation tension.[18] Nor, Mr. Butler feels, will they accept the principle of res nullius, or the right of effective occupation, since that principle best applies to continental shelves which invite coastal state sovereignty and which do not interfere with freedom of the high seas.[19]

By process of elimination, Mr. Butler concludes that the Soviets will advocate a regime for the seabed that is analagous to the "high-seas" doctrine adopted by the 1958 Geneva Conference on the Law of the Sea. This is the "Theory of Common Use" doctrine which, simply stated, means that the seabed is for the common use of all and that questions of ownership do not need to be considered at this time.[20]

It is apparent that the Soviet Union has attempted, in its seabed draft proposals, to reconcile purported leadership of developing nations with a determination to exploit the seabed without an international regime, or at least with an organization so limited as to be ineffectual. Generally speaking, their draft is a collection of platitudes, form without substance. Article I says that the seabed shall be open to use peacefully by all states without discrimination.[21] Article V(2) seems to rule out ownership or leases by any corporation,

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[18] Id. at 162.

[19] Id.

[20] Id. at 165.

[21] USSR Draft Articles, Art. I at 995.

state, or organization.[22] Presumably, this would prevent United Nations ownership. Article VIII mentions the needs of the developing countries but nowhere is there mentioned any means of securing sea benefits.[23] Article IX simply leaves open the question of licenses while Article XIV leaves open for discussion the extremely important question of benefits.[24] Articles XI and XII condemn pollution and military uses.[25] At this point, it is obvious that practically nothing has been accomplished since the important provisions of licenses and benefits are reserved for later agreement.

Article XVII begins the process of establishing the international Seabed Resources Agency composed of a Conference of States, an Executive Board, and a Secretariat.[26] It should be noted that the organizational structure very closely resembles that of the United Nations. However, the Executive Board while being analagous to the Security Council, would have a total of thirty members. The import of this is that it should be very difficult to obtain agreement necessary for the Board to act. Incredible as it may seem, Article XXIII requires unanimity on questions of substance -- a totally unlikely

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[22] Id. Art. V at 995.

[23] Id. Art. VIII at 996.

[24] Id. Art. IX and XIV at 996 and 998.

[25] Id. Art. XI and XII at 997 and 998.

[26] Id. Art. XVII at 999.

event.[27] So as it eventuates, this proposed Agency, devoid of meaningful powers, must achieve unanimity within the Executive Board composed of thirty members, five each from the socialist countries, the Asian countries, the African countries, the South American countries, and Western European and other countries not specifically mentioned. As though the aforementioned articles were not enough to insure that this agency would never function, Article XXVI is included to guarantee it. A complete quotation is justified since it illustrates the Soviet attitude so well:

> None of the provisions of this Treaty or the rights granted to the International Seabed Resources Agency or its organs, and similarly none of the functions exercised by the Agency or its organs shall mean that the Agency has jurisdiction over the seabed and the subsoil thereof or shall give the Agency rights or legal grounds to consider the seabed and the subsoil thereof as owned, possessed or used by it, or at its disposal.[28]

In summary, it is difficult as well as naive to conclude that the Soviet Union has a genuine interest in trying to arrange for any type of international agency to be created that could deal effectively with the resources of the seabed. In fact, the exact opposite interest has been shown. While putting forward a countenance of international cooperation, in reality they have used every available means to delay, obstruct, and divide the forces sincerely working

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[27] Id. Art. XXIII at 1001.

[28] Id. Art. XXVI at 1001.

for the betterment of mankind in the vast, untapped potential of the seabed. Their attitude will depend upon whether they believe they can gain more by sharing and cooperation or by competition.

COMMUNIST CHINA AND THE SEABED REGIME

James Morrow

Prior to the admission of the People's Republic of China (hereafter referred to as China) to the United Nations in 1971, much of Chinese policy was never outlined for westerners. Whether the United Nations' seat will change this remains to be seen, but the silence that meets inquiry is often deafening. The conclusions of this paper are of necessity the result of the examination of secondary sources and analogies derived from them.

In 1973, the Third United Nations Conference on the Law of the Sea will be held according to Resolution of the General Assembly 2750C, XXV (1970). Although China (Peking) was not seated in the United Nations when this resolution was passed, it will undoubtedly now participate in the Conference and will be in a unique position for reasons that will be explained below. At the 1973 meeting, the scope of permissible agenda items includes:

> the regimes of the high seas, the continental shelf, the territorial sea (including the question of its breadth and the question of international straits) and contiguous zone, fishing and conservation of living resources of the high seas (including the question of preferential rights of coastal States), the preservation of the marine environment (including inter alia the prevention of pollution), and scientific research.[1]

[1] U. N. Doc. A/Res/2750 XXV (1970).

These broad areas of interests will be narrowed somewhat by the 86 member United Nations Committee on the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction (Seabed Committee) which is mandated to consider the range of problems as it prepares the draft convention in light of the expressed wishes of the General Assembly in G. A. Res. 2749 XXV (1970). This resolution directs the committee to use the following principles:

> (1) that the seabed and its resources beyond the limits of national jurisdiction are the "common heritage of mankind,"
> (2) that this area "shall not be subject to appropriation by any means by States or persons . . . and no State shall claim or exercise sovereignty or sovereign rights over any part thereof,"
> (3) that no State or person may claim, exercise, or acquire rights in the area unless compatible with the international regime to be established and the other principles of the declaration, and
> (4) that the regime to be adopted shall "ensure the equitable sharing by States in the benefits derived (from seabed exploration), taking into particular consideration the interests and needs of the developing countries, whether landlocked or coastal.[2]

In outlining these principles, the General Assembly has put its hand directly on the major problems that face the Seabed Regime: first, how to define and delimit the area of actual national jurisdiction and, second, how to balance the interests of the haves and have-nots (developed versus developing nations and coastal versus landlocked nations). Obviously each state has particular and peculiar interests and the compromises must be major if the Seabed Regime

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[2] H. Gary Knight, The Draft United Nations Conventions on the International Seabed Area: Background, Description and Some Preliminary Thoughts 8 San D. L. Rev. 461 (1971).

is ever to exist.

The basic conflict is between those nations that possess a comparative advantage with regard to the seabed and those nations that do not have such a capability. For instance, there are many interests in the United States that would prefer that the seabed be open to claims based upon exploration and use because our technology is such that we would be able to take possession and exert sovereignty over more than the other countries and would probably more quickly produce the technological advances that would allow us to take the bulk of the difficult remainder as well.[3] But the United States has compromised, as is shown by the oft-quoted statement of President Lyndon Johnson at the Commissioning of the oceanographic research vessel "The Oceanographer" in 1966.

> Under no circumstances, we believe, must we ever allow the prospects of rich harvest and mineral wealth to create a new form of colonial competition among the maritime nations. We must be careful to avoid a race to grab and to hold the lands under the high seas. We must ensure that the deep seas and the ocean bottoms are, and remain, the legacy of all human beings.[4]

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[3] Stever, The "Race" for the Seabed: The Right to Emplace Military Installations on the Deep Ocean Floor, 4 International Lawyer 563 (1969-70). (Hereinafter cited as Stever).

[4] The President's Remarks at the Commissioning of the New Research Ship, the "Oceanographer," July 13, 1966, 2 Wkly. Comp. Pres. Docs. (No. 28) 930, 931 (July 18, 1966).

This statement by the Chief Executive of the United States brought the American policy into line with the generally accepted United Nations policy as first stated by Ambassador Arvid Pardo, representative of the Permanent Mission of Malta to the United Nations, and one of the prime movers for a seabed regime. Ambassador Pardo's memorandum pointed out the dangers of national competition for the deep seabed and ocean floor in terms of an arms race and arms deployment, exploitation and waste of resources, and the inequality that will result if regulations are not employed.[5]

Against this background Mainland China has entered the United Nations and will in the future be adding her problems to those already under discussion.

Basically China presents a set of competing interests. Geographically an immense landmass with relatively little access to the sea, historically her sea-faring neighbors and imperialist foreigners have carried her sea trade for her. China's technology constitutes another riddle. She is a developing nation, but not in the conventional sense. Though far from her potential it cannot be said that China is not one of the world's powerful nations. In 1949 as China was establishing the Communist Regime, her fishing fleet

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[5]U. N. Doc. A/Res/6695, reprinted in Interim Report on the United Nations and the Issue of Deep Ocean Resources, 90th Cong., 1st Session, 1967 (House Report No. 999) at 7 R.
H. Gary knight, op. cit. at 477, 478.

numbered a few more than 200 trawlers and sailboats and less than 50,000 old-fashioned wooden craft. Only a few were seaworthy. In addition, fishery production, which had been 1,500,000 tons in 1936, was only 45 tons in 1949. Since 1949 the Chinese have been building up their fishing fleet, but it still compares poorly with Japan and other sea-going nations. Their fishery production did increase to over 5,000,000 tones in 1959.[6] China is just now beginning to use the sea. In 1949 the shipping fleet of China barely existed -- 14 ships, most of which were American surplus. It had no shipyards and only severely damaged harbors. Now the harbors are repaired and since 1959 the Chinese merchant fleet has been swiftly expanding.[7]

The logical conclusion of this analysis is that China is expansive in her policy and wants as much as she can get. On the other hand, China would not wish to have the big sea-grab (Ambassador Pardo analogized it to the race for Africa) at the present time because she is not prepared for it and would be little better off than a landlocked nation. China might prefer that the big grab be put off as long as possible because she is catching up fast. Or China might prefer to play it safe and see that there is no big grab at all and in the process end up with no more than anyone else. The conflict is evident. A state is under two basic pressures. It must

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[6] Tao Cheng, Communist China and the Law of the Sea, 63 Am. Jour. Int'l. L. 48-50 (1969). (Hereinafter cited as Tao Cheng).

[7] Id. at 50-52.

exert itself and try to get all it can now because there is the possibility that all the nations will be able to keep what they explore and occupy. And it must work in the opposite direction at the same time to try to curb the "sea" rush that appears to be reaching ridiculous proportions.[8]

In this selection of alternatives, the Communist Chinese attitude toward international law begins to seep through. The Chinese government seems to have rejected the dichotomous view of simultaneously existing "bourgeois" and "socialist" international law. Moreover a later view of international law based on "agreement(s), between states, reached in the process of struggle, cooperation, compromise and consultation" is not particularly favored. What remains is the idea of "a general international law over and above, as well as distinct from, the bourgeois body of law" and this seems to be the "semiofficial position of Communist China."[9] All things considered, it is not too far from the western view of international law but it is a long way from the Soviet Union's strict positivistic approach.

If one examines the actual practices of the Peking government, it becomes apparent that the Chinese view on international law is not necessarily from one particular mold. It is possibly, at times, inconsistent with the generally accepted principles that even Peking has argued for in the past. The reason for this "flexibility" is

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[8] Stever at 560.

[9] Hsiung, Peking's Attitudes Toward International Law, 3 Chinese Law and Government 3 (1970-71).

that the Chinese position will ultimately depend upon political rather than legal considerations.[10] The Communists in China have adopted an international stance that "views international law as a political instrument for states to utilize in adjusting their relations and implementing their foreign policy objectives."[11] Not only is the abstract international law a political tool, but China served notice that even treaties were so considered; and when Peking came to power in 1949 it did not annul all former treaty obligations but stated that all treaties would be reviewed and either recognized, abrogated, revised, or renewed according to their contents.[12] Thus they could claim the Chinese United Nations seat but avoid the less favorable existing treaties.

In recent years, the Communist Chinese have become a nuclear power[13] and concerned with nuclear disarmament treaty possibilities. Her stance throughout the negotiations has consistently been one that maximized her own strengths and minimized those of the Soviets and the United States. For instance, the Chinese strongly urge the complete ban of all use of nuclear arms. But they will not consider conventional arms limitations. What this amounts to is demanding that any future wars be fought on her terms and with

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[10] Hungdah Chiu, Communist China's Attitude Toward the United Nations: A Legal Analysis, 62 Am. Jour. of Int'l. L. 50 (1968).

[11] Shao-chuan Leng, Communist China's Position on Nuclear Arms Control, 7 Va. Jour. of Int'l. L. 101 (1966-67). (Hereinafter cited as Shao-chuan Leng).

[12] Id. at 103.

[13] Since October, 1964.

her rules since China is a relatively weak nuclear power but superior in terms of sheer manpower. Thus, the Chinese vigorously advocate nuclear disarmament "to benefit all mankind," but adopt a steadfast position not to accept any terms that will halt their nuclear development being careful to state that they will not be the first to use nuclear force.[14] The conclusion is that political considerations will dictate the Chinese position in negotiations and that China will act in what she conceives to be her own best interests. Regarding a seabed regime what does this mean?

In 1958 China issued a statement that read in part, "The breadth of the territorial sea of the People's Republic of China shall be 12 nautical miles. This provision applies to all territories of the People's Republic of China, including the Chinese mainland and its coastal islands, as well as Taiwan and its surrounding islands . . ."[15] Peking has offered well-based arguments that territorial seas are not restricted to three miles but are, in common international practice, more than three miles, even in the United States because of the Continental Shelf and contiguous zone doctrines.

The adoption of the 12 miles limit, the use of the straight-baseline measurement technique, and the establishment of contiguous zones[16] tend to show that China is concerned with international

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[14] Shao-chuan Leng at 116.

[15] From Declaration on China's Territorial Sea, Peking Review, No. 28, 21 (Sept. 9, 1958).

[16] Id.

norms and is willing to abide by reasonable measures. But in general, she is expansive and sensitive to encroachment,[17] and very concerned that she will need territory at some time in the future and not have it. The result is that China will declare her possession of all that international law will permit even if she cannot presently use it due to her status as only an emergent sea power.

In the negotiations for a deep seabed regime it must be concluded that China will be adamant in demanding that its territorial waters be fully excluded for the seabed definition. Concerning the method of administration of the seabed, prior to 1971 China would probably have opposed the creation of an international body, and would certainly have opposed the use of the United Nations, as an administrator. Since her admission to the United Nations, she may be more receptive to such a proposal. However, at present China would most likely prefer complete freedom to use the seabed thus leaving her maximum options available for the future.

Whatever agreement is reached, if China does not become a party signatory to it, her views are clear; "an international agreement made without the participation and signature of China's representative will have no binding force whatsoever on China."[18]

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[17] Tao Cheng at 73.

[18] Statement made by Chou En-lai on April 10, 1960, as reported in the New York Times, April 11, 1960, p. 7, col. 3 and noted Shao-chuan Leng, op. cit. at 105.

SPECIAL PROBLEMS OF LANDLOCKED COUNTRIES RELATING TO THE EXPLORATION AND EXPLOITATION OF THE SEA BEYOND THE LIMITS OF NATIONAL JURISDICTION

Dillon Smith Freeman

Resolution 2750 B (XXV) was adopted by the United Nations General Assembly on December 17, 1970, pursuant to the proposal of the First Committee on the Seabed.

In that committee's considerations, the right of landlocked states in the development of the resources of the seabed beyond national jurisdiction was generally recognized.[1] That landlocked states should be able to participate in the administration of the regime to be set up on the extra-territorial seabed was also recognized. The difficulty, as pointed out by representatives of landlocked countries, was to give practical effect to this stated, yet still theoretical, equality.[2]

One speaker of the First Committee pointed out that for the landlocked countries to be assured of equality with coastal states

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[1] United Nations, General Assembly, Committee on the Peaceful Uses of the Seabed and Ocean Floor Beyond the Limits of National Jurisdiction, Study of the Question of Free Access to the Sea of Land-locked Countries and of the Special Problems of Landlocked Countries Relating to the Exploration and Exploitation of the Resources of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction, A/AC. 138/37, 10 (June 11, 1971).

[2] Id. at 11.

in relation to their access to the seabed and to any exploitation of seabed resources it would be necessary to give special treatment.[3] This is obvious. What this special treatment must be, as considered by interested parties of the international community, is the subject of this paper.

Since there are no practices or prior treaties to draw on, and few concrete proposals or official positions of nation states, findings of this paper are tentative and based on a few studies of the United Nations, most notably the June 1971 report of the Secretary-General on special problems of landlocked countries relating to the seabed.

From Resolution 2750 B (XXV) the Committee on the Peaceful Uses of the Seabed and Ocean Floor Beyond the Limits of National Jurisdiction had, in part, a mandate from the General Assembly to "include the particular needs and problems of those (countries) which are landlocked" in its considerations.

Justification for this special treatment for landlocked nations was offered by representatives of landlocked states, during the March 1971 session of the Seabed Committee. Those representatives declared that, under the concept of the seabed as the "common heritage of mankind",[4] landlocked countries were entitled to participate in the

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[3] Id. at 12.

[4] U. N. Doc. A/Res/2749 XXV (1970).

determination of how the seabed resources should be exploited and how the benefits obtained should be used.

Landlocked nations, as all others may be categorized as either developed or developing. The developed landlocked nation is, of course, in a relatively better position to take advantage of exploitation rights in the seabed than a landlocked country with an economy at a less advanced stage of development.

Both categories of landlocked states, however, lack the necessary shipping industry and industrial infrastructure to enable them to undertake such an ambitious venture as seabed exploitation. Both categories, in differing degree, lack the trained manpower to explore and exploit the seabed. Due to insufficient capital most of the developing landlocked nations are in no position to obtain the necessary shipping transport, trained manpower, and ocean industry expertise on their own. To emphasize, the group of experts report of the United Nations Committee for Trade and Development, stated, ". . . as a matter of empirical observation it is found that most of the landlocked developing countries would seem to belong to the category of the least developed."[5]

Another category of landlocked countries is that of producers of minerals which may also be produced from the seabed. Countries which export these materials will possibly be affected by variations

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[5] United Nations, UNCTAD Group of Experts, Special Measures in Favour of the Least Developed among the Developing Countries (TD/B/288).

commodity prices once extraction from the sea of large quantities of the same material is underway. This would be especially crucial for those developing countries whose economies are largely dependent on the production of such minerals.

Landlocked nations are severely handicapped in sharing seabed benefits because of the law of the territorial sea which deems the resources within those limits to be exclusively under the control of the coastal state. The larger the area under the jurisdiction of the coastal state, the smaller the area remaining where landlocked nations might expect to share on equal terms in "the common heritage of mankind." The large proportion of mineral resources that are economically and practically obtainable lie near the coast. If not already under a coastal nation's jurisdiction as "territorial sea," much of such minerally rich seabed area comes under the jurisdiction of coastal nations through the Convention on the Continental Shelf.[7]

By Article 1 of that Convention, the term "continental shelf is used as referring to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 meters, or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas."

Article 2 of that Convention specifies that the coastal state exercises over the continental shelf "sovereign rights for the purpose

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[7]United Nations, Treaty Series, vol. 499, No. 7302.

of exploring it and exploiting its natural resources."

During the 1960's, technology advanced to such an extent that today exploitation and exploration to depths considerably greater than 200 meters is possible,[8] which draws attention to the definition in the Convention of "continental shelf." How is it be be interpreted? If the outer limit of the continental shelf is to be defined as far as the technology will take it, then as a practical matter, landlocked nations are ruled out of sharing in the exploitation of any accessible mineral resources of the seabed.

The limits of national jurisdiction must be decided before the prospective seabed regime can benefit landlocked nations as a source from which to exploit minerals.

The June 1971 report of the Secretary-General on the sharing of proceeds and other benefits from the seabed[9] seems to admit of no actual physical participation by landlocked countries in the exploitation of the seabed, but rather suggests direct distributions of proceeds with particular allocations to specific international programs

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[8] United Nations, General Assembly, Committee of the Peaceful Uses of the Seabed . . . , op. cit., 75.

[9] United Nations, General Assembly, Committee on the Peaceful Uses of the Seabed . . . , Possible Methods and Criteria for the Sharing by the International Community of Proceeds and Other Benefits Derived from the Exploitation of the Resources of the Area Beyond the Limits of National Jurisdiction (A/AC. 138/38).

for developing countries.[10]

It was suggested by a representative of a coastal state, speaking to Sub-Committee One of the Seabed Committee, that the spirit of the Declaration of Principles[11] could best be implemented if sharing of "benefits" was related to need and based on an agreed scale whereby the least developed nation would receive the most and the most developed would receive the least.[12] Though "benefits" as used here was not defined it is assumed that they would consist of some levies or licensing taxes paid by the exploiting nations for the use of an area of the seabed. The Secretary-General's report on sharing of benefits takes a similar stance: "The international community might deem it appropriate to assign a certain proportion of proceeds for direct distribution to the least developed among developing countries, before the general sharing to all countries."[13]

Difficulty arises in determining what arrangements should be made under the concept of the "common heritage of mankind" so that landlocked states may actually exercise the rights involved. What participation should there be of these countries in the international machinery of and in the exploration and exploitation under the new

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[10] Id. at 12.

[11] U. N. Doc. A/Res/2749 XXV (1970).

[12] United Nations, General Assembly, Committee on the Peaceful Uses of the Seabed . . ., op. cit. (A/AC. 138/37), 80.

[13] United Nations, General Assembly, Committee on Peaceful Uses of the Seabed . . . , op. cit. (A/AC. 138/38), 22.

seabed regime. There has been no specific proposal by the Secretary-General regarding the way in which representation and voting might be arranged within a possible institution for the seabed. The only concrete proposals regarding the question of international machinery are in the four papers which have thus far been submitted by individual states.[14]

All four papers provide for one plenary body in which all contracting states would be equally represented and various other bodies of more restricted membership, one of which would act as the executive authority.

The Republic of Tanzania proposes a council which is to consist "of 18 members elected by the Assembly" to include "not less than three landlocked states." The United States draft provides for an assembly and for a council of twenty-four members which is to include at least two "landlocked or shelflocked countries." The two other papers do not specifically provide for landlocked country representatives on an executive council.

Interests of landlocked nations under these proposals are not adequately represented. It would seem that the better solution

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[14] By France, the United Kingdom, the United Republic of Tanzania, and the United States. The proposal by Tanzania is contained in document A/AC. 138/33; the other papers are annexed to the report of the Seabed Committee to the Twenty-fifth session of the General Assembly, Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 21 (A/8021).

in view of the expressed principles of equality would be to have the executive body reflect the actual proportion of member states which are landlocked or shelflocked. Such a recommendation was made by a delegate of the Seabed Committee in August, 1970, in his expression of dissatisfaction with the particular provision in the United States draft convention.[15]

The papers submitted have assumed that the opportunities for engaging in seabed activities would be open to all. None of the proposals, however, deals specifically with the question of landlocked countries wishing to engage themselves in actual exploitation and exploration. In fact, proposals and some United Nations studies make the assumption that the landlocked nations, especially the developing landlocked nations, will participate in the seabed regime only indirectly by sharing the benefits after others have extracted them.[16]

The question of a system of allocation is crucial to any direct or actual participation by landlocked nations in the exploitation of the seabed. There are two broad alternative systems introduced in the Secretary-General's report on special problems of the landlocked countries.

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[15] United Nations, General Assembly, Committee on Peaceful Uses of the Seabed . . . , op. cit. (A/AC. 138/37), 83.

The first system, if accepted, would effectively preclude almost all landlocked countries, certainly the developing ones, from any actual participation in exploitation of seabed resources. That system would grant licenses to areas of the seabed on the basis of a state's initiation of activities in an area. It is assumed that the activities would be financed by the initiating state.[17]

The extreme disadvantages of such a system are apparent. As noted earlier in this paper landlocked nations do not presently have the transportation and industrial infrastructure, nor the trained manpower in most instances, to engage in seabed exploitation. On a first-come first-licensed basis, the landlocked nations would lose out on acquiring commercially valuable areas. Such a system would have a multiplier effect; that is, the rich get richer while the poor are left without participation.

Unfortunately, the Secretary-General's report on the sharing of benefits accepts this condition of nonparticipation in exploitation by countries not equipped for such exploitation. That report, states: "For some time to come, the handling of physical output is likely to be concentrated to a large extent in the hands of the advanced industrial countries."[18]

The second and more favorable system of allocation would designate to states of a region a seabed area before the initiation

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[17] United Nations, General Assembly, Committee on the Peaceful Uses of the Seabed . . . , op. cit. (A/AC. 138/37), 85.

[18] op. cit. (A/AC. 138/38), 10.

of exploitative activities. In this system with areas allocated beforehand, a "gold-rush" with those best prepared and naturally able to get there first would be avoided, or at least curtailed. A landlocked state would have opportunity to acquire commercially valuable areas. Under this system it is possible to devise a scheme whereby landlocked states would be in the same region with coastal states. Cooperation with coastal states could solve the landlocked nation's operational dilemma. Studies conducted by UNCTAD and those made by ECA and ECAFE have all, to some degree, pointed to the need for regional and subregional allocations.[19]

If landlocked states are to prosper from a seabed regime, regional and subregional arrangements must be resorted to for transport and processing of seabed materials, in cooperation with coastal states. Only in this manner may these nations gain direct benefits from seabed exploitation.

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[19] op. cit. (A/AC. 138/37), 89.

INTERESTS OF NATIONAL SECURITY IN FORMULATING AN INTERNATIONAL SEABED REGIME

William A. Christian

This paper focuses on the special interests involved with national security of the United States in connection with the establishment of an international seabed regime. Due to the nature of the material and security classifications of official positions on the part of the Department of Defense, conclusions here reached are inferrential, based for the most part on what present known interests exist on the part of the respective branches of the military. Results proffered, while speculative, are logical conclusions when mirrored against the realities of national security.

In the long-run, we may assume military objectives go hand in glove with the formulation of foreign policy agreements by the Executive and by the State Department and that national defense considerations will play a major role in the formulation of proposals in regard to expanding the territorial sea limits, Continental Shelf operations, and creating a new regime for the use and exploitation of the vast expanses of seabed extending beyond the Continental Shelf. By exploring these interests of national defense we can perhaps project the future course of American policy in regard to a seabed regime.

Prior to the last two decades, there had been no need for restrictions on seabed use since for practical purposes it was an inaccessible area of the globe. Cognizant of present and future technological development, mankind now seeks to protect itself from his own abuse of this newly found frontier. Recognizing the problem, international law must now formulate restrictions upon the uses of the seabed. Delimitation of its area and limitation of its uses should promptly become a part of the Law of the Sea.

One of the primary problems in establishing a seabed regime is determining at what depth or geographical distance from the shore baseline the contracting states will establish the area of control. There are two approaches in present proposals.

One is the twelve mile limit coincident with the Contiguous Zone, which would, in effect, serve to limit a portion of the Continental Shelf as established in the 1958 Geneva Convention on the Continental Shelf. This is applied in the Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof.

The other approach is for the limit to extend seaward from the 200 meter isobath as the general concept of the outer limit of the Continental Shelf area. There have been no attempts to limit seabed use further inland than the 12 mile contiguous zone limit, say for example the 3 or 4 mile limit, for the obvious reason that states do not wish to limit their sovereignty over this area, whereas in the sea areas in which no absolute right exists, states are

more prone to enter into treaties restricting seabed use.

It is important to remember the subject matter of the two different treaties; the first being the control of nuclear weapons and the latter the regulated exploration and exploitation of the seabed. This accounts for the varying result as to the breadth of seabed area. National security was the prime factor in the first treaty. A more restricted geographical area for nuclear weaponry was a controlling factor in establishing the twelve mile limit. With the latter convention, military interests are not so pressing and the State Department recognizes a greater interest on the part of American industry to preserve as much as possible of the Continental Shelf for America's exclusive exploitation and control. In the former convention, civilian vested interests are non-existant and conversely, in the latter draft convention military interests are outweighed by civilian interests.

What effect will these two different approaches have upon the ultimate definition of the international seabed in international law? Presumably, the different approaches may have no effect at all. There is a strong probability that international law will evolve the concept of the "seabed" as being the ocean floor not included within the present regime of Territorial or Continental Shelf ocean floor. Any other result would be too disruptive of the 1958 Geneva Convention and its resulting sea regime structure. However, this would not limit further restriction by treaty as done in the seabed nuclear ban convention.

The use restriction upon the seabed will be more difficult to achieve than geographical delimitation. This is an area in which national security interests will play a major role and in the end will be determinative of U. S. positions upon the seabed regime. For this purpose let us examine what present interests exist and reflect how use restrictions would enhance or jeopardize these interests.

Naval operations are presently framed within a basic five part structure of the sea regime. This structure consists of inland waters (harbors and ports), territorial waters (included within the 3-mile territorial limit), the Contiguous Zone (a 12-mile limit over which the Navy and Coast Guard exercise a more limited control), the Continental Shelf, and the yet unregimented seabed and superjacent waters extending seaward from the Continental Shelf.

In dealing with a seabed regime, the focus is not upon the classification and restriction of use upon the superjacent waters of the oceans, but is concerned with the actual use of the seabed and the minerals, soils and subsoils. As such no present uses of surface waters would be adversely affected. For the most part, conventional submarine use would not be affected by restrictions on the seabed. However, this area deserves some scrutiny to determine what effect seabed use restrictions might have upon future developments that are now in naval research, development and engineering stages.

The period of the late 1950's and 1960's evoked a changing attitude towards methods of national defense. The navy undertook studies to investigate the technical feasibility of transferring nuclear

capability and deterrent force to naval systems operating in hydrospace. Hydrospace is an all inclusive term representing that portion of the globe extending vertically downward from the air/sea interface including water, seabed and subsoil thereof extending from land outward into the deep oceans.[1]

The systems come under four categories; missile systems, both operating from nuclear submarines and from permanent seabed installations; exploratory submersibles (more limited in function than conventional or nuclear submarines); bottom installations; and manned deep-ocean installations. Each category will be considered and various ramifications explored as to the effect of seabed restrictions upon the system's operation.

The thrust of the missile program is based upon the development of an advanced Undersea Long-range Missile System (ULMS). The means of program implementation would be the basing of medium to long range Intercontinental Ballistic Missiles on nuclear submarines capable of depths of 1,000 feet to 11,000 feet.[2] This migration of ICBM systems from land-based silos to mobile launch platforms hidden within the ocean depths is for the purpose of insuring more adequate survival capability of strategic nuclear weapons in case of enemy attack and thereby serving as a greater deterrent force against a would-be aggressor.

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[1] E. D. Brown, Arms Control in Hydrospace: Legal Aspects 1 (1971). (Hereinafter cited as Brown).

[2] Hirdman, Weapons in the Deep Sea, 13 Environment No. 3, 29 (1971).

In 1969-70 FY the Department of Defense received ten million dollars for the implementation of this project and is seeking another 44 million for research and development. An expected two billion dollars will be required for operational deployment.[3]

This submarine-based system could hardly be effected by any present proposals for seabed regulation due to its operative environment in superjacent waters. Seabed restrictions would have no adverse effect on naval submarine strategy.

Perhaps this explains why in the early stage of development of ULMS, developers opted for submarines for a missile platform as opposed to a shallow missile underwater barge system. It had been proposed to place ICBM systems on a series of slow-moving barges stationed on the Continental Shelf. The plan had inherent weaknesses as well. The barge platforms lacked their own evasive mobility and would have required much closer security against submarine sabotage.[4] There were even some questions as to the right to protect this area and to exclude a foreign power's submarines from hovering in the vicinity of such an installation. In effect, a foreign power would be operating in international waters. This would be tantamount to proclaiming a degree of exclusive sovereignty over a portion of international waters.

The barge system may have been adversely effected by a seabed use restriction. However, it can be argued that even the

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[3] Id. at 31.

[4] Id.

use of mobile barges could still conform to a seabed use regime since they are not permanently attached structures but are mobile instrumentalities moving through superjacent waters but supported upon the seabed.

Aside from the conventional concept of the submarine, great sums of money are geing spent on advanced deep-diving submersibles. The actual role of these instrumentalities is clouded. Perhaps these are testing vehicles for future combat weapon systems. They also perform work in conjunction with fixed bottom installations. Some theorists say that these type vehicles can be used as support ships for submarines which would never have to surface. These submersibles could transport material from surface ships to permanent undersea storage stations from which similar nuclear submarines could operate as a fixed supply base.[5]

Important non-military uses of submersibles are oceanographic research, object recovery, work on offshore oil rigs, and various tasks connected with exploitation of the seabed.[6]

While seabed restrictions would not effect the use of submersibles per se, it may defeat the ultimate purpose, i.e., the servicing of deep water permanent military installations. This is assuming, of course, that permanent military installations will be a natural target for future seabed use restrictions. Since Article I,

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[5] Id. at 32.

[6] Id. at 33.

Section 1 of the Draft Convention on the International Seabed Area refers to the seabed as the common heritage of mankind and the Treaty on the Prohibition of the Emplacement of Nuclear Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof, in the opening statements of recognition proclaims that the treaty is a step towards the exclusion of the seabed and the ocean floor from the arms race, it is only the next natural extension to see limitations placed on any permanent military installations in the seabed area. American national security would be adverse to such a proposition.

At first blush, the thought of permanent bottom installations smacks of Jules Verne's, Twenty Thousand Leagues Under the Sea, but in truth is one of National Defense's top priorities. Specific military requirements exist for underwater command centers, bottom surveillance systems for anti-submarine detection and location, operations stations for deep submergence vehicles and submerged port facilities on the Continental Shelf.[7] This further points up the reluctance of the military to accede to the ban of military installations on the seabed. Bottom-based nuclear weapons are a valid restriction in the eyes of the military -- probably because it was not feasible or strategically advantageous due to lack of protective mobility to implement such a system. Here is an example of "giving up" a right which never had strategic possibilities anyway.

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[7] Id. at 35.

These bottom stations include manned station operations as well as anti-submarine surveillance systems. These two different operations are designed to function hand in hand. The Seascope project, designed for manned operation at 6,000 feet depths has as its objectives the acquisition of expertise to support the navy in missions of strategic deterrence, anti-submarine warfare, anti-shipping warfare, underwater reconaissance, search, location, rescue, and recovery.[8] Project Rocksite calls for a series of tunnels in the seabed, access to which is obtained terrestrially from adjacent land sites. The purpose is to service submersibles by way of a seafloor shaft entrance. The strategic advantage would be in-accessibility for destruction.[9]

Since manned undersea installations are yet in the future, it is much more important to consider present bottom surveillance systems and relate the vested interests in national security to any proposed seabed use limitations.

Although generally unknown to the public, bottom-based sonar or similar monitoring devices have encircled the coast of the United States for some twenty years.[10] The purpose is to pick up the sounds of submarine traffic, interpret the "signature" or the particular characteristics of the craft and transfer the information

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[8] Id. at 37.

[9] Id. at 39.

[10] Id. at 40.

to ship or ground installation where computers print out the location and type of vessel.

These systems operate in two manners; passive and active. Passive systems pick up whatever emissions are in the vicinity by way of hydrophones. Active systems emit their own signals which, when relected by passing submarines, are picked up by other listening devises.[11] As is readily evident, either system requires extensive seabed coverage in the form of permanent installations.

The Ceasar program deploys passive receptions in a line at a depth of 100 fathoms along the Continental Shelf. A further refinement is the Colossus system which is a system of hydrophones or upward looking sonar heads, five to fifteen per mile, connected by undersea cables and linked with land-based computers.[12]

With the technology gained with Ceasar and Colossus systems, the navy has expanded its development to areas outside of the Continental Shelf. Sea Spider is a portable, self-contained and powered hydrophone capable of being anchored in areas sensitive to national security. The system could be employed to protect missile submarines or other deep submersibles in the open areas of the seas in the same fashion as radar protects land sites.[13] These systems, due to their own self-contained resources can be deployed any-

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[11] Id.

[12] Id.

[13] Id. at 41.

where in the oceans of the world and can provide strategic information.

The idea that United States bottom installations may spread from the Continental Shelf into the depths of the sea is a present fact and not mere conjecture. Active detection systems such as Artemis are in current operation. Primarily, a long-range submarine detection system, it utilizes very low frequency transmitters and pick up stations on the ocean seabed and surface. The VLF transmitter operates within a converted tanker which circulates on station, throughout the open Atlantic. Returning signals are received at certain unknown sites, but probably include Argus Island off Bermuda, flipping platforms FLIP and SPAR, other passive detection systems, ships, aircraft and submersible craft.[14]

Other similar projects are under consideration for general surveillance of open sea areas. NATO is in the process of establishing a Fixed Accoustical Range in the Azores probably operating from the underwater sea mountains west of Santa Maria Island, Azores. Other systems may be in place in natural barrier areas of the open seabed such as between Greenland and Scotland and between Japan and Alaska.[15] If this is true, national security is becoming dependent upon operating installations utilizing global seabed areas.

Considering the role of nuclear submarines with ICBM capability in the defense policy of the United States, it is reasonable

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[14] Id. at 41.

[15] Id.

to assume that opposite forces are utilizing the same concepts. As such, it is becoming more imperative to detect and trace the path of these opposing weapon systems by means of underwater surveillance systems. Presently United States navy expenditures are in the area of 400 million dollars for submarine tracking and detection devices on the ocean floor.[16]

Where does all this leave the United States in its role in regulating the use of the seabed? As far as national security interests are concerned, there is little to be gained by seabed use restrictions. Expecially when the restrictions are formulated in terms of "for peaceful use only" and for "nonmilitary purposes." In light of present threats to national security and our valid need for seabed military installations, it is relatively certain that military influence will prevent the United States from entering into stringent international conventions on the use of the seabed area.

As to the geographical delimitation of the to-be-established seabed regime, present technology has for practical purposes conquered the Continental Shelf. Since the military has extensive access to Continental Shelf seabed, it will not want to relinquish control of uses of this particular portion of the seabed. This would gravitate toward seabed restrictions and delimitation to be placed exterior to the Continental Shelf, and then only for limited use restrictions not associated with military objectives. The Department of

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[16] Id.

Defense is in favor of a narrow Continental Shelf, specifically extending no further than the 200 meter isobath. This will "provide maximum freedom of movement throughout the world to keep ourselves in a position where we can fulfill our military obligations and maintain as wide a breadth of movement throughout the world outside of the land masses in existing countries."[17]

To point up the role of national security in formulation of policy in regard to a seabed regime, compare the results in the two earlier mentioned draft conventions, The Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof and in the Draft U. N. Convention on the International Seabed Area. In the former convention, with military objectives paramount, the only actual limitations on seabed use are prevention of emplanting on the seabed nuclear weapons or other weapons of mass destruction, or supporting facilities for storing, testing, or using such weapons outside of the twelve mile limit coincident with the Contiguous Zone. This is indeed a narrow scope of restricted use. The treaty would not effect permanent seabed submarine facilities, installations of underwater surveillance systems, or installations for conventional weapons.[18] The limited scope of the treaty evidences the strong influence of national security considerations upon foreign policy formulation.

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[17] Brown at 96.

[18] Id.

In the Draft International Seabed Area Convention the focus is entirely different. Its thrust is to reserve the use of the seabed to the benefit of all mankind, preventing the exercise of exclusive sovereignty, and establishing a framework for exploitation of mineral resources from the seabed. Lacking in military objectives, the treaty will be somewhat less influenced by military pressures. Article 6 specifically excludes control over superjacent waters and air space above the waters. Article 4 could conceivably present national defense problems. It calls for a reservation of the seabed exclusively for peaceful purposes. This can probably be circumvented and present programs continued as self-defense measures, especially in the area of underwater surveillance operations. It does constitute an area of national security sensitivity.

In some respects the treaty will indirectly promote military objectives. For instance, since the seabed is to be rendered incapable of exclusive sovereignty this should promote the cessation of the motion of creeping sovereignty as evidenced in the Continental Shelf regime. By so doing, this increases the mobility of naval forces throughout the world since no restrictions as to passage can be asserted in the deep seabed area.

National security is paramount in international negotiations and the military is the instrumentality of national security. Military objectives, present and future, will significantly shape the mold in which the seabed regime will be cast.

ATTITUDES OF PETROLEUM, ANTI-POLLUTION AND ECOLOGY INTEREST GROUPS TOWARD A SEABED REGIME CONVENTION

Robert W. Pitts

Conservation and petroleum interest groups have for many years had divergent ideas about man's interaction with his environment. In fact, in the last few years the two groups have often met head-on with contentions which were not just different, but antagonistic. The battle over the Alaskan pipeline is just one of many conflicts inwhich the petroleum and ecology groups have found their interests divergent.

The proposed 1973 Conference on the Law of the Sea which will include discussions on the establishment of an international regime for the seabed called forth the same type of enthusiastic advocacy which these groups had shown before. Initially it was anticipated that a comparison of the two interests' positions could be made in regard to specific items which have been proposed in the form of draft treaties by various nations or possibly by comparing the groups' positions without reference to proposed drafts. To a large extent, this has not been possible. The anti-pollution and ecology groups which have been contacted have done little towards formulating specific positions on the type of seabed regime which could aid in the fight against environmental pollution. In contrast, various

petroleum interest groups have put forth a considerable amount of material explaining their positions on the establishment of a seabed regime. For the most part, these latter views have taken the form of opposition to certain items contained in the United States Draft Convention of August 3, 1970.

I.

PETROLEUM GROUP ATTITUDES

The petroleum interest groups have responded vigorously to the 1970 United States Draft Convention and this response discloses their general attitude toward a seabed regime. In addition to the 1970 United States working paper, draft treaties were submitted at the 1971 summer session of the Seabed Committee by the Soviet Union, Tanzania, the Latin States, and Malta.[1] The petroleum interests, however, have thus far concentrated mostly on aspects of the United States working paper. There have been several emanations from the petroleum concerns and interests regarding the seabed regime but probably the most extensive publication has been by the National Petroleum Council. The National Petroleum Council is an industry advisory body representing most sections of the United States oil and gas industries. Also represented on various National Petroleum Council committees are members from the United States

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[1] U. N. Seabed Committee Considers Draft Treaties, Oceanology International, 26 (September 1971).

Department of the Interior. The purpose of the Council is to advise the Secretary of the Interior on matters concerning petroleum and the petroleum industry. In March, 1971, in response to a request from the office of the Secretary of the Interior, the National Petroleum Council published a Supplemental Report to Petroleum Resources Under the Ocean Floor. Petroleum Resources Under the Ocean Floor was published in March of 1969 and dealt extensively with the general subject of petroleum accumulations under the seabed.[2] The 1971 Supplemental Report clearly outlines the National Petroleum Council's objections to certain parts of the United States August 3, 1970, draft. Most objectionable, appears to be Article 1(2) which designates all areas seaward of the 200 isobath as the International Seabed Area.[3] In the Summary of Conclusions and Recommendations in the Supplemental Report the National Petroleum Council says: "It would unnecessarily compel coastal states to yield their existing rights to the seabed resources of the submerged continent seaward of the 200-meter isobath, for which they would receive in return under

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[2] Supplemental Report to Petroleum Resources Under the Ocean Floor: The National Petroleum Council, 1 (1971). (Hereinafter cited as Supp. Report).

[3] Draft United Nations Convention on the Internation Seabed Area, Working paper. Washington, Department of State, 3 Aug. 1970. Mimeograph; U. N. Doc. A/AC. 138/25. See Department of State Bulletin, Vol LXII, No. 1616, June 15, 1970, pp. 737-8.

the treaty the uncertain and ill-defined status of 'trustee' of those resources;"[4] Article 28 of the United States working paper gives the Trustee the discretion of deciding whether a license will be issued and also the party to whom it will be issued.[5] Therefore in considering the International Trusteeship Area off the coast of the United States it is unlikely that domestic oil companies have to fear the possibility of being uprooted by a foreign petroleum concern simply because the United States will be determining who is to receive the licenses. What then is bothering the National Petroleum Council? The Supplemental Report to Petroleum Resources Under the Ocean Floor speaks of the rights of the United States under the proposed plan as being derived from a group of nations whose interests and goals are possibly in conflict with those of the United States.[6] The Supplemental Report goes on to say:

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

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[4] Supp. Report, supra, note 2, at 5.

[5] Aug. 3 Draft, supra, Note 3, at 15, 16.

[6] Supp. Report, supra, Note 2, at 16.

> would not rectify the basic deficiency of renouncing all rights in the outer continental margin and vesting residual powers as to that area in an international agency.[7]

The petroleum interests feel that this "continental margin" area is well worth fighting to retain. In a staff paper issued by the American Petroleum Institute, a note discusses the vast continental margin out to a depth of 2,500 meters which the United States should claim.[8] It states:

> The area of the U.S. Continental Margin between the 200-meter isobath and the seaward edge of the Continental Rise, alone, contains an estimated 867 billion barrels of oil, 68 billion barrels of natural gas liquids, and 2,045 trillion cubic feet of natural gas. Not all this will prove recoverable, of course, but it would be folly to cast away these needed resources.[9]

Two other fundamental objections which the National Petroleum Council has to the August 3 Draft are: 1. The work requirements defined in the appendices of the Draft Treaty are unrealistic; 2. Operations during the interim period, July 1, 1970, to the date when the treaty comes into effect, are subject to uncertainties.[10]

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[7] Id.

[8] National Jurisdiction Over Seabed Resources -- The Need for a Sound U.S. Position. Staff Paper by the Committee on Public Affairs of the American Petroleum Institute, 5 (May 1971). (Hereinafter cited as Seabed Resources).

[9] Id.

[10] Supp. Report, supra, Note 2, at 16.

Apparently the N. P. C. feels that the provisions in Article 73 (Transition), of the August 3, Draft, are such that they may discourage developers now contemplating exploitation of the seabed.[11] Article 73 of the Draft begins with an assurance that the integrity of investments made before the Convention will be protected but later paragraphs fit prior authorizations into the general Convention plan.[12] The N. P. C. appears to be attacking the Draft for items which on their face appear harmless but arguably could be used to the detriment of the petroleum interests in the future.

All is not negative in the N. P. C. Supplemental Report. The National Petroleum Council endorses certain points which were made in the President's statement of May 23, 1970, on United States Oceans Policy and Developments.[13] The Supplemental Report states:

> The N. P. C., while opposed to the renunciation by the U. S. of its rights to the mineral resources of the seabed of the submerged continent beyond the 200-meter isobath, does endorse the following five principles enunciated in the President's Statement . . . :
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> '. . . (1) the collection of substantial mineral royalties to be used for international community purposes, particularly economic assistance to developing countries . . . (and the establishment of) general rules
> (2) to prevent unreasonable interference

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[11] Id.

[12] Aug. 3 Draft, supra, Note 3, Chapter VI, Art. 73.

[13] Department of State Bulletin, Vol. LXII, No. 1616, 737 (June 15, 1970).

with other uses of the ocean,
(3) to protect the ocean from pollution,
(4) to assure the integrity of the investment necessary for such exploitation, and
(5) to provide for peaceful and compulsory settlement of disputes.[14]

The N. P. C. goes on to say that the foregoing principles could be accomplished by letting the continental margin remain in the hands of the coastal state but subjecting this control to agreed upon international rules concerning pollution, safeguards against expropriation, and other matters.[15]

Other petroleum groups have taken the same view of the August 3 Draft. On September 23, 1970, Luke W. Finlay, Chairman of the American Petroleum Institute's Ad Hoc Committee on Mineral Resources Beneath the Seas, testified before a U. S. Senate Special Subcommittee on the Outer Continental Shelf. Finlay expressed his concern about the lack of provisions protecting the rights of states wishing to withdraw from the treaty. He thought the situation was potentially dangerous since a state would previously have irrevocably renounced its rights to the continental shelf beyond the 200-meter isobath.[16]

The American Petroleum Institute in general apparently goes along with the points covered in the National Petroleum Council's

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[14] Supp. Report, supra, Note 2, at 6.

[15] Id.

[16] Seabed Resources, supra, Note 8, at 8.

Supplemental Report to Petroleum Resources Under the Ocean Floor. The preface of their National Jurisdiction over Seabed Resources says: "A. P. I.'s Board of Directors, at its April 2, meeting, adopted a resolution giving A. P. I.'s 'full endorsement and support' to the conclusions and recommendations of the National Petroleum Council (N. P. C.) study . . . ."[17]

II.

ANTI-POLLUTION AND ECOLOGY GROUPS ATTITUDES

The response of the anti-pollution and ecology groups to the Conference on the Law of the Sea has been much less assertive and definitive than that of the petroleum interests. An accurate assessment of the situation was given in a letter received from Eugene V. Cohen, Assistant to the Executive Director of the Sierra Club, which stated: "[Y]ou will probably find that most environmental groups have not heard of this meeting (the proposed 1973 Conference on the Law of the Sea) and probably none have yet developed opinions."[18] Mr. Cohen's evaluation of the efforts of conservation/ecology groups' work in this area is basically correct although there are some individuals and organizations with ideas about an international regime for the seabed. However, it is difficult to locate a conservation group which at this time has established a definite position on this issue.

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[17] Id. at Preface.

[18] Letter from Eugene V. Cohen to Robert M. Pitts, 28 Oct. 1971.

This is not to say, however, that no work has been done in this area by conservation groups. Some people are quite conscious of the tremendous importance that anti-pollution measures in the ocean areas will play in the world-wide conservation effort. There is a growing literature on the general subject of ocean pollution, expecially the pollution caused by petroleum products. One of the best legal approaches to the subject is by Stephen J. Vasek. He speaks of the earth as "a single, closed ecological system" where the physical effects of pollutants are not limited to the area where the action occured.[19] He opts for strict international control of ocean pollution because if each nation is allowed to decide for itself whether to dump or to drill they will probably decide to commence the activity. The expected benefit to the home state will likely outweigh the harmful ecological effects which to some extent will be shouldered by all of the earth.[20] The author does address himself directly to the United States Working Paper and finds it inadequate in some respects:

> Unfortunately the authority given the proposed International Seabed Authority is inadequate for the regulation of the cumulative effects of widespread pollution . . . . [B]ecause the Authority is only

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[19] Vasek, International Environmental Damage Control: Some Proposals for the Second Best of All Possible Worlds, 59 Ken. L. J. 673, 678 (1970-71).

[20] Id. at 699.

> given power to 'prescibe rules and recommended practices' in the International Seabed Area'. To be effective in preventing all types of environmental damage to the marine environment, the Authority should be given power to regulate all activities in or on the high seas and power to take action against any State which permits activity which . . . presents a threat to the International marine environment.[21]

George F. Kennan discusses the inability of presently existing world organizations effectively to come to grips with the problem of pollution. The article calls for an "International Environmental Agency"[22] made up of the ten leading industrial powers of the world. In response to a request for his position on the Seabed Regime Convention, Mr. Kennan wrote:

> I continue to be very strongly of the opinion that what is needed for combatting both the dangers of present pollution and the possibility of something worse in the future, on the high seas, is not just a stricter set of rules but a genuine international authority, and that this authority should dispense over a sort of pocket navy, not heavily armed but with sufficient armaments to give some authority to its vessels . . . . The international authority to which these units would be subordinated would be ones set up with U. N. blessing and with as wide a spectrum of international support as could be obtained, but in any case, with the support and collaboration of the leading maritime and industrial powers. This authority should either be given the power to lay down rules on its own initiative and discretion for the construction and handling of vessels with dangerous cargoes on the high seas (this includes oil), or it should at least be regarded as the initiating party of internation treaty agreement

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[21] Id. at 715.

[22] Kennan, To Prevent a World Wasteland, 48 Foreign Affairs 401, 411 (1970).

on these subjects as well as on such subjects as the use of the seabed for extractive purposes . . . [23]

Others, such as Elizabeth Mann Borgese, associated with the Center for the Study of Democratic Institutions, would expand an environmentally based or guided ocean regime into a world community system. A nation would receive in inverse proportion to its territorial boundary claim area the share of the revenue from the oceans. Anti-pollution measures would be applied equally on both sides of the territorial boundary.[24]

It is apparent that much work has been done in this area by entities which cannot be labeled as strictly environmental groups. A fair question at this time would be: Why haven't the anti-pollution and ecology groups done more towards laying a solid foundation for the environmental protection view at the 1973 Conference on the Law of the Sea? By necessity, the environmentalists have long had an "anti" posture -- anti-pipeline, anti-drilling, anti-air pollution. Perhaps this established outlook makes it difficult to formulate positive approaches. Also it may be quite unfair to compare the efforts of the environmental/ecology people with the petroleum interests at this point. The billions of barrels of oil located in the outer continental margin are important enough to the petroleum

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[23]Letter from George F. Kennan to Robert M. Pitts, 29 Oct. 1971.

[24]Borgese, Elizabeth, The World Communities, 4 The Center Magazine 10-18 no. 5, (September/October 1971).

people that they are willing and able to marshal vast resources towards influencing those who could affect policy at the Convention. On the other side, many conservation groups are hampered by a lack of funds and a multitude of issues which draw their attention. At the present time, some environmental groups are spending much of their time with the Ocean Dumping Bill which is before Congress. There are some indications that the anti-pollution groups will attempt a recovery from their slow start. The Sierra Club co-sponsored a meeting on the Law of the Seas with the World Affairs Committee of San Francisco and the San Francisco Bar Association in December 1971.[25]

Anti-pollution and ecology groups, like other interest groups, may feel that it is best to concentrate locally before beginning world-wide efforts. This may be especially so inthe United States where extensive industrialization and other factors have led to high concentrations of pollutants in many areas. Involved also is the knowledge of the conservationists that in many areas of the world they would not be popular. This point of view was expressed at the Pacem in Maribus Convocation, which took place at Malta from June 29 to July 5, by Dr. Vladimir Pavicevic of Yugoslavia. Dr. Pavicevic said: "We cannot cure one evil -- pollution -- without bearing in mind the existence of another and even greater one: hunger and poverty. The developing nations need more pollution,

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[25] Letter from Eugene V. Cohen to Robert M. Pitts, 28 October 1971.

not less."[26] It is quite possible that the developing nations would be hostile to conservation measures to be inserted in a seabed treaty which they believed would be detrimental to their share of the returns from the oceans. Knowing this, anti-pollution forces may be somewhat reluctant to establish a rigid position on the Seabed Regime at this time.

There are many facets of a seabed regime concerning which environmentalist planning would be appropriate. These include rules for disposal of waste at sea, prescribing liability of licensees for damages in the international seabed area, requirements and the formulation of safety regulations applicable to seabed area exploration and exploitation. The environmentalists might well be requesting a representative number of seats on a seabed governing body and the provision of funds derived from the exploitation of the seabed to be applied to environmental research and environmental protective and monitoring equipment.

III.

CONCLUSION

It is submitted that there exists at this time a disparity between efforts made by the petroleum interests and those made by the anti-pollution and ecology forces towards influencing the 1973 Conference on the Law of the Sea. The petroleum interests have focused on those items which could affect their activities and have

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[26] Report on Pacem in Maribus II, Center for the Study of Democratic Institutions (November 19, 1971).

methodically advanced arguments for retention, deletion, or modification of certain articles in the United States Draft Convention.

In contrast, the environmentalists have not yet established a cohesive position which could be effective at the 1973 Convention. Tremendous possibilities exist under the proposed seabed regime to achieve much needed regulation of polluting activities in ocean areas where few such regulations now exist. The anti-pollution and ecology forces should take advantage of these possibilities.