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seabed regimes and the limits of national jurisdiction

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Seabed Regimes and the Limits of National Jurisdiction

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PREFACE

The Sea Grant Colleges Program was created by Congress in 1966 to stimulate research, instruction, and extension of knowledge of marine resources of the United States. In 1969 the Sea Grant Program was established at the University of Miami.

The outstanding success of the Land Grant Colleges Program, which in 100 years has brought the United States to its current superior position in agricultural production, was the basis for the Sea Grant concept. This concept has three objectives: to promote excellence in education and training, research, and information service in the University's disciplines that relate to the sea. The successful accomplishment of these objectives will result in material contributions to marine oriented industries and will, in addition, protect and preserve the environment for the enjoyment of all people.

With these objectives, this series of Sea Grant Technical Bulletins is intended to convey useful research information to the marine communities interested in resource development.

While the responsibility for administration of the Sea Grant Program rests with the Department of Commerce, the responsibility for financing the program is shared by federal, industrial and University of Miami contributions. This study, Seabed Regimes and the Limits of National Jurisdiction was made possible by Sea Grant support for the Ocean Law Program.

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INTRODUCTION

The continuing demands of an industrialized world with an ever increasing population make it necessary to exploit the seabed for new sources of mineral resources. Industrial strength and growth requires a continuing supply of mineral resources. In the past these resources have come from the land and as a result land reserves have been depleted. Now there is evidence that the seabed contains a wide variety of mineral resources but little is known of their quantity, quality, distribution or location. These minerals are covered by the ocean which comprises seventy percent of the earth's surface, or about 139,000,000 square miles.[1] For this reason man's knowledge regarding seabed mineral resources is limited. However, it is estimated that the resource potential of the continental shelves, which comprise about

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[1] See, e.g., H. Menard and S. Smith, Hyposemetry of Ocean Basin Provinces, 71 J. of Geophysical Research 4305, 4315 (1966).

10,422,000 square miles[2] is the same as an equivalent area of land.[3]

Now that advanced technology has enabled man to begin to exploit the mineral wealth of the seabed, nations are making divergent claims of competence to exercise jurisdiction over seabed resources. These divergent claims could ultimately result in international conflict, for historically disputed boundaries and property rights have been a major source of conflict between nations. To avoid such conflicts while at the same time encouraging the development of deep seabed resources, a number of proposals have been made for the establishment of a deep seabed regime. Because the boundaries between national jurisdiction and the deep seabed are linked to the kind of regime that will ultimately be adopted, the various proposals have dealt with two essential questions. First, what regime should control the exploration and exploitation of the seabed resources beyond the limits of national jurisdiction?

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[2] Id.

[3] Panel Reports of the Commission on Marine Science, Engineering and Resources, Vol. 3, Panel VII, p. 100 (1969).

And second, what is the seaward limit of national jurisdiction?[4]

The purpose of this paper is to analyze the various regimes and limits proposals in an effort to determine which is most likely to be the basis for international agreement at the 1973 Conference on the Law of the Sea.[5] The analysis will be from an international perspective with the emphasis on minimizing the effects of geographic and technological inequities among nations.

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[4]N. Ely, American Policy Options in the Development of Undersea Mineral Resources, 2 Int'l Lawyer 218 (1968).

[5]G. A. Res. 2750 C, U.N. Doc. A/C. 1/562, 10 Int'l Legal Materials 221 (1970).

I. TYPES OF SEABED REGIMES

In considering what kind of seabed regime should be adopted, the proposals may be generally categorized into five representative types, which advocate varying degrees of national or international control: National Lakes, Res Communis, Flag Nation, United Nations Ownership, and the International Regime.

A. National Lakes

The National Lakes proposals would allow coastal nations to extend their jurisdiction over seabed resources towards the middle of the ocean till all areas of the deep seabed are subject to national jurisdiction.[6] The equal distance principle of Article 6 of the 1958 Convention and the Continental Shelf would be used to delineate boundaries between nations.[7] To avoid inequities the seaward limits of an island's jurisdiction

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[6] S. Bernfeld, Developing the Resources of the Sea--Security of Investment, 2 Int'l Lawyer 67 (1967).

[7] See, e.g., L. Alexander (ed.), The Law of the Sea: The Future of the Sea's Resources (1968). Appended Map shows the deep ocean floor boundaries of coastal nations based on the equal distance principle.

would be limited in some proportion to its land mass. An interesting variation on this concept is the International Lakes proposal which would allow coastal nations to manage such areas for the international community.[8]

B. Res Communis

The Res Communis proposals hold that the seabed area, not subject to national jurisdiction, is ownerless territory which belongs to mankind as a whole and is not subject to competitive appropriation by anyone.[9] Res Communis as used here is consistent with the ancient concept of freedom of the seas and can be analogized to fishing where the rule of capture is employed. This approach is in opposition to the argument that the seabed is res nullius, ownerless territory which belongs to no one and is subject to competitive appropriation by anyone.[10] Proponents of this approach typically hold the view that the existing legal structure regarding the

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[8] L. Henkin, Law for the Sea's Mineral Resources 64 (1968).

[9] See, e.g., M. Wilkey, The Deep Ocean, its Potential Mineral Resources and Problems, 3 Int'l Lawyer 34 (1968).

[10] Id.

oceans is sufficient for the near term. This reasoning is based on the premise that knowledge and technology regarding seabed resources is limited and premature legal action could be inimical to future development.[11]

C. Flag Nation

Under the Flag Nation proposals seabed resources beyond the limits of national jurisdiction would be open to appropriation and exploitation under the law of the flag of the discovering expedition.[12] The first discoverer would have the right to stake a claim to a segment of the seabed and subject it to the jurisdiction of the flag nation. A significant variation on this approach would provide for claims registration with an international registry agency having minimum administrative powers.[13] Such an agency would prevent claim grabbing, record claim limits, and charge recording fees to defray administrative costs.[14]

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[11] Id. at 32.

[12] Supra note 5 at 222.

[13] Supra note 5 at 222.

[14] L. Goldie, A Symposium on the Geneva Convention and the Need for Future Modifications, The Law of the Sea: Offshore Boundaries and Zones, 284 (ed. L. Alexander, 1967).

D. U.N. Ownership

The U.N. ownership proposals favor vesting title to the natural resources of the seabeds beyond the limits of national jurisdiction in the United Nations.[15] The U.N., through one of its agencies, would promote exploration and exploitation, issue permits and leases, and collect and distribute revenues.[16] Typically, the revenues would be used to pay administrative expenses with the balance being deposited in an international fund. The fund would be used to support the programs of the U.N., particularly aid to developing nations.

E. International Regime

The International Regime proposals favor the concept that seabed resources beyond the limits of national jurisdiction are a common heritage of mankind[18]

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[15]See, e.g., R. Creamer, Title to the Deep Seabed, Prospects for the Future, 9 Harv. Int'l L.J. 205 (1968).

[16]Id.

[17]Report of the Commission on Marine Science, Engineering and Resources, Our Nation and the Sea, 149 (1969) /hereinafter cited as the Stratton Commission Report/.

[18]Common heritage of mankind is a concept not yet fully defined, but seemingly akin to yet transcending the concept of res communis, referring to the duties and rights of all men, as members of the international

and their exploration and exploitation should be subject to administration by a specialized international agency for the benefit of mankind as a whole.[19] Such an agency would issue licenses, and collect and distribute revenues in accordance with the terms of an international convention. Typically, the revenues would be used to pay administrative expenses and establish an international fund.[20] The fund would be used to support the programs of the international community, particularly aid to developing nations. Under this proposal, title technically is not vested in either the international agency or the coastal nations.[21]

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community, to preserve and share the wealth of the resources beyond the limits of national jurisdiction. See, e.g., G.A. Res. 2749, U.N. Doc. A/C.1/ 544, 10 Int'l Legal Materials 221 (1970) and its predecessors referred to therein.

[19] See, e.g., E. Borgese, The Ocean Regime, An Occasional Paper of the Center for the Study of Democratic Institutions (1968).

[20] Id.

[21] Id.

II. CLAIMS REGARDING THE LIMITS OF NATIONAL JURISDICTION

The various proposals for a seabed regime generally indicate a preference for one of two interpretations of the width of the continental shelf, hence the limits of national jurisdiction, or as a third alternative a compromise by treaty.

A. Wide Shelf Interpretation

The wide shelf interpretation holds the seaward limits of the Continental Shelf as defined by Article 1 of the 1958 Convention of the Continental Shelf (hereinafter referred to as the Shelf Convention) will ultimately extend to the continental margin.[22] Proponents of this interpretation argue that the exploitability clause read together with the adjacency clause connotes an expanding boundary ultimately limited by adjacency, and that adjacency means the "natural

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[22]Report by the Special Subcommittee on Outer Continental Shelf, 91st Congress, 2d Sess. 7 (1970) /hereinafter cited and referred to as the Metcalf Committee Report/.

prolongation"[23] of the submerged land continent. This interpretation assumes the coastal nations' future technological ability to exploit great depths carries with it the inherent right to exploit the entire submerged continental prolongation.[24] This interpretation disregards as not relevant the fact that the geographical limit of the Continental Shelf does not include the slope or the rise.[25]

B. Narrow Shelf Interpretation

The proponents of a narrow shelf interpretation have at least three different arguments to use to achieve their goal. First, the juridically defined continental shelf corresponds to some extent to the geographical shelf.[26] The flexible exploitability test is ultimately limited to the depth of the deepest shelf

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[23]North Sea Continental Shelf Cases, 1969 I.C.J. 3.

[24]Supra note 22 at 10.

[25]The continental shelf extends from the low water line to the depth at which there is a marked increase of slope to a greater depth. The slope is the declivity from the edge of the shelf into greater depths. The rise is the area of granitic sediments at the base of the slope. 1 Y.B. Int'l L. Comm'n 131 (1956).

[26]2 Y.B. Int'l L. Comm'n 253, 297 (1956).

edge, approximately 200 fathoms or 400 metres.[27] The equality of nations principle[28] extends to all nations sovereign rights to the same depth as long as the area claimed is adjacent to the coast. Second, new customary international law, consistent with a wider international community's expectations and evidenced by U.N. resolutions,[29] may rise to defeat the contingent future interest of coastal nations in shelf areas beyond 200 metres or the depth of exploitability on the date evidence of new customary international law is manifested. Third, the Article 1 definition of the continental shelf is so vague and uncertain that it should be redefined establishing internationally agreed boundaries, typically 200 metres in depth or 50 nautical miles in distance from the baseline of the

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[27] 1 Y.B. Int'l L. Comm'n 131 (1956).

[28] See, e.g., Summary Records, VI U.N. Conference on the Law of the Sea, Fourth Committee (Continental Shelf) 44 (1958).

[29] G.A. Res. 2749, U.N. Doc. A/C.1/544, 10 Int'l Legal Materials 221 (1970). Declaring the resources of the seabed beyond national jurisdiction to be the common heritage of mankind and not subject to appropriation by States or persons. No state or person shall acquire rights in the area incompatible with the international regime to be established.

coastal nation's territorial sea, whichever gives the greater area.[30]

C. Intermediate Zone Concept

The intermediate zone concept is a compromise between the wide shelf interpretation and the narrow shelf interpretation. The concept was first formally introduced in the Stratton Commission Report, which calls for the creation of a zone extending from the 200 metre-isobath or 50 nautical miles from the coastal nation's territorial sea, whichever gives the greater area, to the 2500 metre-isobath or 100 nautical miles from the coastal nation's territorial sea, whichever gives the greater intermediate zone area.[31] An international proposal by the United States using this concept calls for the creation of a trusteeship zone extending from the 200 metre depth to the base of the Continental Slope.[32] This zone would be treated like

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[30] Supra note 17 at 145-146.

[31] Supra note 17 at 151.

[32] Draft United Nations Convention on the International Seabed Area, United States Working Paper of August 3, 1970, Art. 1 and 26(1), 9 Int'l Legal Materials 1046 (1970) /hereinafter cited and referred to as U.S. Working Paper/.

the seabed area beyond, except the coastal nations would act as administrators and law makers inside the zone for an international regime established to control the interests of the international community in seabed resources.[33] The coastal nations would have the authority to restrict access to licensees of its choosing; collect license, rental and production fees in accordance with the convention; retain 1/3 to 1/2 of the revenues collected and forwarding the remainder to the International Authority; enact laws to give effect to the convention, such laws and regulations may impose higher standard than required by the convention.[34] The result is the intermediate zone would give coastal nations administrative as well as security control over the zones adjacent to their coasts while allowing other nations, particularly developing land-locked and narrow shelf nations, to share the wealth of the seabed resources beyond a depth of 200 metres. This proposal is subject to many variations by shifting the balance of competence in various areas or functions between the coastal nations and the international regime.

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[33] Id. at Art. 27.

[34] Id. at Arts. 27 and 28.

III. CONTROL OVER SEABED REGIMES

In analyzing the merits of the various proposals for a seabed regime, it is essential to consider the underlying objectives of their proponents. These objectives are generally a reflection of the proponent's preference for national or international control over the seabed resources. Therefore, the proponents of the various regimes may be classified, for purposes of analysis, as internationalist or nationalist.

A. International

The internationalist would like to have authority over seabed resources to an international organization that could in some measure control the behavior of nations with respect to the exploitation of deep seabed resources. Their hope is that an international regime with control over seabed resources will have a "spill-over effect"[35] of ultimately promoting world peace

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[35] J. Sewell, Functionalism and World Politics, 11 (1969).

through greater world government.[36] The internationalist generally take one of two approaches with respect to the establishment of a seabed regime; the functional or the political.

1. Functional Internationalist

The functional internationalist[37] advocates a systems approach to deal with tasks which have consequences across national boundaries. Functional internationalists are concerned with the means to efficiently accomplish the task and less with the ultimate reform of the system to international control. Functional internationalist look at the special characteristics of the oceans, who uses them (fishermen, sailors, scientists, industrialists, etc.) and how in determining what means should be used to achieve maximum utility. The ultimate hope of the functional internationalist is that the system will be so successful that it will be extended to related areas creating a "spillover effect."

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[36] Supra note 22 at 4.

[37] R. Friedheim, Understanding the Debate on Ocean Resources, Occasional Paper No. 1, Feb. 1969, University of Rhode Island, Law of the Sea Institute 1, 23 (1969). The analytical tools developed by Mr. Friedheim in his fine article are merely restated.

2. Political Internationalist

The political internationalist[38] would internationalize the seabed resources as as adjunct to world peace. Their approach would vest title in the United Nations as part of the "grand design"[39] to solve the larger problems of the world. To the political internationalist, the authority to control the allocation and development of seabed resources is a means to contribute to world peace, understanding and prosperity. The inductive reasoning of the political internationalist holds that there must be a world political community established, capable of dealing with international conflicts or nationalism will ultimately cause international chaos. The political internationalist hope to establish a new order in the world, a kind of super-sovereign.

B. National

The nationalists want to insure that their right of self determination is undiminished by the creation of a super-sovereign. They prefer that nations police

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[38] Id. at 46.

[39] D. Mitrany, A Working Peace System, 138 (1966).

themselves under international law, including any new laws regarding recourse development, in the traditional manner. The nationalist can also be subdivided into two approaches, the functional or the political.

1. Functional Nationalist

Functional nationalist[40] hold that a systems approach to solving problems requiring the use of political and economic power is best handled by national institutions that have proven themselves through past performance. Functional nationalist seek a practical solution to problems on a functional level using existing nations systems to the greatest extent possible. They view national institutions as more stable than visionary reforms of an untried and unproven international system. Although nationalistic in form, advocates of this approach are functional in substance. They maintain that to solve immediate problems regarding seabed resources stable proven national institutions with their defined territory, experience, administrative and legal structure are needed. They seek to avoid premature and irreversible actions that go beyond immediate needs.

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[40] Supra note 37 at 14.

2. Political Nationalist

The political nationalists[41] want national sovereignty extended as far as possible with respect to seabed resources. They take the position that the coastal nations deserve the seabed resources and the easiest, most immediate method for meeting those needs while avoiding conflicts and at the same time, encouraging resource development is to extend national jurisdiction to its ultimate limit. Political nationalists think the demand for the seabed resources will be greater than the supply and what is gained by one nation is lost by others. They know that national institutions are well developed and in the game of power politics they will have a substantial influence in the kind of seabed regime adopted.

The classification of the various proponents as nationalist or internationalist is usually obviated by an examination of the proponent's preference for a wide or narrow continental shelf interpretation. Clearly the wide shelf proponents endeavor to insure as much national control over seabed resources as possible, while the narrow shelf proponents endeavor to insure

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[41] Supra note 37 at 3.

as much international control over the seabed resources as possible. This issue of national control versus international control or mixtures of the two is the essence of the different regimes.

Many of the developed nations who have prospered under traditional concepts of international law which permit complete national autonomy may be reluctant to accept a regime that would give an international organization broad powers over seabed resources. Such an international regime might be more responsive to the interests of the majority of developing nations to the detriment of a minority of developed nations. The powers of such an organization could grow through the spill-over effect and its control or influence over the behavior of nations could significantly diminish national autonomy. In brief what may be good for the international community as a whole may not be good for individual nations as a part.

Many developing nations, on the other hand, would find a regime that gave an international organization broad powers over seabed resources immanently satisfactory. Their influence over the exploitation of seabed resources, as a voting majority in the

international community, would be substantially increased. They might reshape some aspects of international law, which they had little or no part in shaping, so that it is more responsive to their interest through the hoped for spill-over effect. Their lack of political or economic influence as individual nations would be offset. In brief the have not nations could more equitably share in the resources the have nations must have.

IV. APPRAISAL OF CLAIMS REGARDING LIMITS OF NATIONAL JURISDICTION

What are the limits of national jurisdiction and what regime will govern the exploitation of the minerals beyond those limits are generally considered to be interdependent questions. Coastal nations are anxious to insure the mineral resources of the seabed are available for exploitation on a reasonable basis. Therefore, any regime that would rigidly control mineral resource development and availability may be met by adamant claims of wide jurisdictional competence by coastal nations. On the other hand, a regime that insures accessibility of seabed resources to all nations on a reasonable basis and minimum control over development may meet with more modest claims of jurisdictional competence by coastal nations. These claims are particularly important with respect to the generally richer, mineralogically speaking, continental slope and rise which cover as much area as the geomorphic shelf, approximately 10,500,000 square miles.[42] Whether or

[42] *Supra* notes 1 and 3.

not coastal nations have jurisdictional competence over this area under existing international law requires an analysis of the relevant portions of the Shelf Convention and the claims regarding their interpretation.

A. Shelf Convention

One of the most significant aspects of the Shelf Convention with respect to the limits of national jurisdiction is that Articles 1, 2 and 3 are considered by some jurists to be codifications of pre-existing or emerging customary international law and binding on all nations.[43] Although the International Law Commission had abandoned all attempts to specify which provisions of the Shelf Convention represented codification and which progressive development,[44] nations party to the Shelf Convention could not make reservations to Articles 1, 2 or 3.[45] The International Court of

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[43]Compare A. D'Amato, Manifest Intent and the Generation by Treaty of Customary Rules of International Law, 64 Am. J. Int'l L. 892, 895 (1970). Concluding customary international law may be generated by treaty when the "manifest intent" is a "norm-creating" character, with R. Baxter, Treaties and Custom, 129 Academie De Droit Int'l 31, 45-46 (1970 I).

[44]2 Y.B. Int'l L. Comm'n 253 (1956).

[45]Convention on the Continental Shelf, U.N. Conference on the Law of the Sea, June 30, 1958, 15

Justice dealing with this question in the North Sea Continental Shelf Cases gave specific recognition to the fact that treaty provisions can form new rules of customary international law.[46] The court said such provisions must be of a "fundamentally norm-creating character" and went on to cite the first three articles of the Shelf Convention as having a fundamental norm-creating character.[47] Elsewhere in the opinion the Court held:

> . . . these three articles being the ones which, it is clear, were then regarded as reflecting, or as crystallyzing, received or at least emergent rules of customary international law relative to the continental shelf, amongst them the question of the seaward entitlement; the nature of the rights exercisable; the kind of natural resources to which these relate; and the preservation intact of the legal status as high seas of the waters over the shelf and of the superjacent airspace.[48]

As will be discussed later in this paper the effect of holding Articles 1, 2 and 3 to be evidence

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U.S.T. 471; T.I.A.S. 5578; 449 U.N.T.S. 311 /hereinafter cited as Shelf Convention/.

[46]North Sea Continental Shelf Cases (1969), I.C.J. 4, 40 /hereinafter cited as North Sea Cases/.

[47]*Id*. at 39.

[48]*Id*. at 39.

of customary international law has a significant impact on non-parties and hence the importance of shelf width interpretation.

The most difficult substantive legal question to resolve with respect to the adoption of any seabed regime is the seaward limits of national jurisdiction. The basis of national jurisdiction is the Shelf Convention which defines both the limits and nature of the coastal nations' rights. However, Article 1, which governs the limits of national jurisdiction, is imprecise and subject to different interpretations when legal principles are applied. Some find support for the argument that the juridical continental shelf defined by Article 1 will ultimately extend the jurisdictional competence of coastal nations over seabed resources to the continental margin. Others find support for arguments defining the continental shelf more narrowly. While some find the definition of the juridical continental shelf so uncertain and imprecise as to require redefining.

In order to evaluate the merits of the various arguments regarding the limits of national jurisdiction it is necessary to examine first the basis and the nature of national jurisdiction.

1. Basis of Continental Shelf Jurisdiction

Claims of competence to exercise national jurisdiction over seabed resources first arose as a unilateral claim by the United States. In 1945 the Truman Proclamation declared:

> Having concern for the urgency of conserving and prudently utilizing its natural resources, the Government of the United States regards the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control. In cases where the continental shelf extends to the shores of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles. The character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected.[49]

Clearly the proclamation was motivated by the need to protect the petroleum resources of the continental shelf beyond the territorial sea, which new technology had recently made accessible, and to establish the United States' right to exploit these resources to the exclusion of others.

After the Truman Proclamation other coastal nations made divergent claims to the resources of the

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[49] Presidential Proclamation No. 2667, Sept. 28, 1945, 10 Fed. Reg. 12303 (1945).

continental shelf and lent credence to a claim that was contrary to existing international law.[50] The territory claimed had previously been considered res communis. The Truman Proclamation was a claim to appropriate a res nullius, and only unoccupied dry land was unquestionably res nullius.[51] There was no corpus or physical occupation of the claimed territory. The claim could not be analogized to the territorial sea, which had been a compromise between two valid principles, freedom of the seas and control over coastal waters, because the shelf claim was contrary to established law.[52]

The declared bases of the continental shelf claim was contiguity of territory, effective jurisdiction and control, and self defense.[53] However, self defense has no bearing on title to territory and contiguity was rejected as a basis for title to territory in the

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[50] C. Waldock, The Legal Basis of Claims to the Continental Shelf, 36 The Grotius Society 115, 142-144 (1951). Concluding that in the absence of Convention title must be based on a new doctrine of customary international law mixing a claim ipso jure with the doctrine of contiguity and recognizing this as a reversal of existing customary law.

[51] Id. at 115 and 128.

[52] Id. at 142.

[53] Id. at 137.

Island of Palmas Case,[54] in which the United States raised the issue. Nevertheless, the new doctrine of the continental shelf was accepted as vesting ipso jure rights to the seabed resources of the continental shelf in the coastal nations based on contiguity.[55]

In 1958 the Shelf Convention was adopted. It provided a legislative basis for jurisdiction while at the same time clarifying the nature of the rights of coastal nations and insuring uniformity with respect to claims.

2. Nature of Continental Shelf Jurisdiction

National jurisdiction over the continental shelf is limited to something less than full sovereignty. Both Article 2 and the Travaux preparatoires make that clear. Article 2 provides:

> 1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.
>
> 2. The rights referred in in paragraph 1 of this article are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its

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[54] Island of Palmas Case (Netherlands v. United States) 2 U.N.R.I.A.A. 845 (1928).

[55] Supra note 50 at 143.

> natural resources, no one may untertake these activities, or make claim to the continental shelf, without the express consent of the coastal State.
>
> 3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.
>
> 4. The natural resources referred to in these articles consist of the mineral and other non-living resources of the seabed and subsoil together with 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.56

In the travaux preparatoires of the Fourth Committee on the Shelf Convention there was a great deal of discussion on the nature of the rights of the coastal nations. The committee considered several proposed formulations to describe the rights of coastal nations; sovereignty, sovereign rights, jurisdiction and control, and exclusive rights.[57] It was apparent to the committee that all the proposals were subject to interpretation and in fact could be interpreted to mean about the same

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[56]Shelf Convention, supra note 45 at Art. 2.

[57]Summary Records, VI U.N. Conference on the Law of the Sea, Fourth Committee (Continental Shelf) U.N. Doc. A/CONF. 13/42 (1958) /hereinafter cited as Fourth Committee/.

thing. The committee's solution was to reject the term sovereignty, with its generally well understood meaning in international law, in favor of the term sovereign rights, the nature of which was determined by the ojects of the rights as spelled out in the Shelf Convention.[58]

Article 2 and the travaux preparatoires permit two tenable arguments on the nature of "sovereign rights" that could have an impact on delimitation. The first is that sovereign rights are limited to the object of the Shelf Convention, recognizing the limited rights of coastal nations to explore and exploit the natural resources of the continental shelves. The second is that sovereign rights means sovereignty subject only to specific limitations agreed to in the Shelf Convention.

The first argument is based on the proposition that acquisition by treaty or custom of sovereign rights to explore and exploit the natural resources of the continental shelf do not fit any of the previously recognized forms of territorial acquisition; occupation, prescription, cession, accession or accretion, nor

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[58] Id.

subjugation.[59] Also, with respect to the long recognized rules on acquisition of territory the coastal nations do not meet the requirements of animus and corpus. Therefore, coastal nations do not exercise dominium or imperium over the continental shelf but have limited competencies created by the Shelf Convention to effectuate certain specific objectives. Under this "Competence Theory"[60] the nature of the coastal nations' "sovereign rights" are limited to only those competencies necessary to effectuate the objectives of exploration and exploitation of the natural resources of the continental shelf. Hence, non-extractive uses of the shelf would be subject only to the limitation of reasonable regard for the interest of others exercising their rights to the freedom of the high seas.[61]

The counter argument is based on the fact that the coastal nation may exclude all others from the use

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[59]See, e.g., supra note 50.

[60]See, H. Lauterpacht, Private Law Sources and Analogies of International Law 93 (1970). Discussing the legal nature of territorial sovereignty.

[61]Convention on the High Seas, Art. 2, U.N. Conference on the Law of the Sea, June 30, 1958, 13 U.S.T. 2312, 2314; T.I.A.S. 5200.

of the seabed and subsoil of the continental shelf subject only to specifically agreed limitations. Any contact with the seabed of the self may be considered exploration. Therefore, non-extractive uses would require the expressed consent of the coastal nation. Also, the coastal nation may build underwater habitats, artificial islands, and military installations (excluding the installation of weapons of mass destruction[62]) on the shelf and prescribe and apply laws thereto.

The case of U.S. v. Ray[63] tends to support the latter position. In the Ray case the defendants intended to create an island empire by constructing commercial buildings on coral reefs four and one half (4-1/2) miles off the Florida coast and outside the United States Territorial Sea. The United States brought action to prevent the construction. The Federal Circuit Court of Appeals held, inter alia; "that the structures herein involved interfere with the exclusive rights of the United States under the

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[62]Seabed Disarmament Treaty, opened for signature Feb. 11, 1971, 10 Int'l Legal Materials 674 (1971).

[63]United States v. Ray, 423 F.2d 16 (1970).

Convention to explore the Continental Shelf and exploit its natural resources."[64] The court went on to decide that the Government had been improperly denied injunctive relief in the District Court on grounds of trespass, holding,

> Although the complaint is inaccurately framed in terms of trespass in count one, the Government repeatedly stresses that it is not claiming ownership of the reefs. We do not question the District Courts conclusion that the Government's interest, being something less than fee simple, cannot support a common law action for trespass quare clausum fregit. But we do not understand that claim to seek such remedy (damages) despite the language in which the petition is couched. Damages an inseparable element in the common law action for trespass, are not sought here, and the only relief requested is restraint from interference with rights to an area which appertains to the United States and which under national and international law is subject not only to its jurisdiction but its control as well.65

The court concluding holding neither ownership nor possession was a necessary requisite for the granting of injunctive relief as opposed to damages. Clearly the Ray case involves a conflicting non-extractive use. However, the Court, though it did not specifically mention it, may have relied on that section of

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[64] Id. at 20.

[65] Id. at 22.

Article 2, paragraph 2, that precludes anyone from making a "claim" to the continental shelf, without the consent of the coastal nation.

Also supporting the second argument, under the laws of the United States, is the legislation on the Outer Continental Shelf Lands Act[66] and the case law thereunder. The act extended the Laws of the United States to the seabed of the Outer Continental Shelf. The case law based on the Act made it clear that federal law, supplemented by state law, vice admiralty law is to be applied to drilling rigs on the shelf.[67]

Therefore it seems reasonable to conclude that "sovereign rights" means sovereignty with respect to the shelf subject to specifically agreed limitations. Because Articles 3, 4 and 5 limit the exercise of full sovereignty, Article 3 provides that "the rights of the coastal nation over the continental shelf do not affect the legal status of the superjacent waters as high seas, or that of the airspace above those waters.[68] Article 4 precludes impeding the laying

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[66] 43 U.S.C. § 1331 (1953).

[67] Rodrigue v. Aetna Cas. & Sur. Co., 395 U.S. 352, 23 L. Ed. 2d 360 (1968).

[68] Shelf Convention, <u>supra</u> note 45 at Art. 3.

or maintenance of submarine cables or pipe lines as well as any unreasonable measures of exploration or exploitation.[69] Article 5 precludes unjustifiable interference with navigation, fishing or conservation of living resources of the sea, or any interference with scientific research intended for open publication.[70]

From the standpoint of limiting the exercise of full sovereignty over the continental shelf by coastal nations Article 3 is most important. Article 3 "is intended to ensure respect for the freedom of the seas in face of the sovereign rights of the coastal State over the continental shelf."[71] The purpose it serves is to preclude coastal nations expanding their jurisdictional competence beyond the object of the Shelf Convention to the water and airspace above the shelf.

There are legitimate fears that unilateral claims of coastal nations will lead to creeping

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[69] Id. at Art. 4.

[70] Id. at Art. 5.

[71] Supra note 44 at 298.

national jurisdiction.[72] Evidence of the propensity toward creeping national jurisdiction can be seen in the Canadian Arctic Waters claim[73] and more distinctly in the 200 mile territorial sea claims of the Latin-American countries.[74] The rationale behind such claims appears to be based largely on the Truman Proclamation wherein the United States chose to untilaterally claim jurisdiction and control over resources of its continental shelf to protect its special interests in hydrocarbons. Now other coastal nations feel justified in making unilateral claims to protect their special interest (environment, fishing, etc.) in their offshore areas in the hope that they may be subsequently recognized by the international community. Claims

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[72]The Continental Shelf Doctrine will lead to claims expanding the competence of coastal nations both upward to the superjacent water and outward to new territory. See, e.g., S. Oda, International Control of Sea Resources 169 (1963); J. Stevenson, The Search for Equity on the Seabeds, Dep't State Bull LXIV, No. 1660, April 19, 1971, p. 533.

[73]Canadian Legislation on Arctic Pollution and Territorial Sea and Fishing Zones, 9 Int'l Legal Materials 543 (1970).

[74]The Declaration of Montevideo on the Law of the Sea, 9 Int'l Legal Materials 1081 (1970).

such as these also derive some support from the Anglo-Norwegian Fisheries Case holding that only the coastal nation is competent to declare the limits of its off-shore jurisdiction but the validity of the delimitation depends on international law.[75]

3. Juridical Continental Shelf

The limits of national jurisdiction are defined in Article 1 as follows:

> For the purpose of these articles, the term "continental shelf" is used as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said area; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.[76]

This definition gives coastal nations presently and unconditionally sovereign rights over the natural resources of the seabed and subsoil of the submarine areas adjacent to their coast to a depth of 200 metres but beyond that depth jurisdiction is conditioned

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[75] Anglo-Norwegian Fisheries Case (1951) I.C.J. 125, 132.

[76] Shelf Convention, <u>supra</u> note 45 at Art. 1.

on two factors, the area must be adjacent to the coast and technology must be advanced enough to permit exploitation of the area. What these two clauses mean is subject to wide differences of opinion but an attempt to define the terms will prove helpful.

Adjacent means lying near or close; not widely separated but not touching; contiguous.[77] Exploitation means more than exploration; it apparently includes availability, accessibility, and profitability or continuous extraction.[78] But to what type of recovery procedures it applies; dredging manganese nodules, drilling for hydrocarbons, or harvesting sedentary organisms is unspecified.[79] It may apply to each specific resource and its particular recovery technique in turn. However it is generally thought to apply to hydrocarbon recovery which was the primary reason for the initial continental shelf claims. In any case it is this area beyond the depth of 200 metres,

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[77]See, North Sea Cases, supra note 46 at 30.

[78]J. Andrassy, International Law and the Resources of the Sea 78 (1970).

[79]Id.

where the adjacency clause and the exploitability clause apply, that is subject to conflicting views or interpretations.

B. Wide Shelf Interpretation

A preference for a wide shelf interpretation of Article 1 of the Shelf Convention may be considered a nationalist approach in the sense that its proponents want to insure as much of the natural resources of the seabed as possible are subject to national control and conversely as little as possible left to international control. The proponents of this interpretation claim that the exploitability and adjacency clauses of Article 1 when read together connote an expanding boundary whose outer limit is determined by adjacency.[80] They maintain that coastal nations may ultimately extend their jurisdiction to the seaward limit of the natural prolongation of the submerged land continent, which includes the shelf, slope and the landward portion of the rise.[81] In support of this position

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[80] Metcalf Committee Report, supra note at 16. See National Petroleum Council Report, Petroleum Resources under the Ocean Floor, 56 (1969). See also Supplemental Report (1971).

[81] Id.

the proponents, even though maintaining Article 1 is "sufficiently precise,"[82] turn to the travaux preparatoires and the North Sea Cases to substantiate their claim.

The travaux preparatoires of the International Law Commission (hereinafter referred to as I.L.C.) shows that the term "continental shelf" as used in Article 1 varies from the geological concept of the term.

> (7) While adapting, to a certain extent, the geographical test for the "continental shelf" as the basis of the juridical definition of the term, the commission therefore in no way holds that the existence of a continental shelf, in the geographical sense as generally understood, is essential for the exercise of the rights of the coastal State as defined in these articles. Thus, if, as in the case in the Persian Gulf, the submarine areas never reach the depth of 200 metres, that fact is irrelevant for the purposes of the present article. Again, exploitation of a submarine area at a depth exceeding 200 metres is not contrary to the present rules, merely because the area is not a continental shelf in the geological sense.83

The I.L.C.'s draft was adopted without change by the Fourth Committee but with the addition of subsection (b) which insured "submarine areas adjacent to islands"

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[82] Id.

[83] Supra note 44 at 297.

were included.[84] Therefore, despite many diverse criticisms by individual members of the Fourth Committee it may be presumed the Committee as a whole was in general agreement with the commentary as well as the draft of the I.L.C. But, does this mean that the legal effect of Article 1 is to give coastal nations sovereign rights to the entire submerged land mass?

Article 1 of the Shelf Convention seems anything but precise. The fact that the proponents of the wide shelf interpretation look to the travaux preparatoires suggests that the meaning is ambiguous or obscure, otherwise the plain meaning of the words would control the interpretation. Even when the wide shelf proponents select those parts of the travaux preparatoires they feel most favor their position the meaning of Article 1 remains ambiguous or obscure. For example, the sentence in the I.L.C.'s commentary authorizing exploitation at depths greater than 200 metres in areas not a continental shelf in the geological sense is more than a little ambiguous when read in context. Its apparent purpose is to apply Article 1 to areas that geologically are not continental shelf in a

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[84] Supra note 57 at 47.

technical sense, such as the Persian Gulf and islands.[85] The Persian Gulf is more like an inland sea and some islands rest on basaltic rock as opposed to granitic rock bases. The other language cited by the wide shelf proponents indicates the I.L.C. adopted "to a certain extent the geographical test for the continental shelf as the basis of the juridical definition of the term." "Adopting to a certain extent" clearly does not mean to ignore geographical limits altogether or to extend jurisdiction to geologically different areas.[86] Mr. Munch, a member of the Fourth Committee, made the following comment with respect to Article 1, which was then under consideration as draft Article 67:

> The Committee was aware of what Article 67 has been designed to convey because the Commission had explained its view in the relevant commentary. From the point of view of the law of nations, however, the commentary would be of little validity and future lawyers might find great difficulty in deciding precisely what had been envisioned.[87]

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[85] Fourth Committee, supra note 57 at 38.

[86] L. Henkin, A Reply to Mr. Finlay, 64 A.J.I.L. 62, 68 (1970). Contra, L. Finlay, The Outer Limit of the Continental Shelf, 64 A.J.I.L. 42 (1970).

[87] Fourth Committee, supra note 57 at 44.

Unfortunately, the North Sea Case was not concerned with the question of delimitation of the outer limits of national jurisdiction but with the question of lateral boundaries between adjacent nations and the applicability of the equidistance concept expressed in Article 6, paragraph 2 of the Shelf Convention.[88] However, in discussing the case the court did make some general comments on other aspects of the Shelf Convention. The wide shelf proponents cite paragraph 19 as supporting their position.

> . . . the rights of the coastal state in the respect of the area of continental shelf that constitutes a natural prolongation of its territory into and under the sea exist ipso facto and ab initio, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short, there is here an inherent right.[89]

The wide shelf proponents interpret the use of the phrase "natural prolongation" to mean the basically granitic geological rock structure common to the shelf slope and landward portion of the rise as opposed to

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[88]E. Brown, The North Sea Continental Shelf Cases, 23 Current Legal Problems 187 (1970).

[89]North Sea Continental Shelf Cases (1969) I.C.J. 4, 22.

the basically basaltic geological rock structure of the ocean floor beyond the continental margin.[90] They take the position that the basis for national jurisdiction is contiguity and it extends ipso jure to the slope and rise as well as the shelf as a part of the natural prolongation of the continental land mass. But what of volcanic islands, does their jurisdiction extend across the great basaltic expanses of the ocean floor or is the natural prolongation doctrine limited?

The North Seas Case reference to the continental shelf area as a "natural prolongation" of the coastal nations land territory does not necessarily make the meaning of Article 1 more lucid or the wide shelf interpretation of it international law. The fact that the continental shelf is a "natural prolongation" of the land mass does not mean the continental shelf includes the entire submerged land mass. As Professor Henkin points out, "High seas are a natural prolongation of territorial sea, and outer space is a natural prolongation of airspace, and Canada is in many places a natural prolongation of the United States; natural

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[90] L. Finlay, The Outer Limit of the Continental Shelf, 64 Am. J. Int'l L. 42 (1970).

prolongation never gave any state propriety rights."[91] Article 1 still limits national jurisdiction over the natural prolongation to continental shelf areas adjacent to the coast to a depth of 200 metres or beyond to depths that permit exploitation. The court in paragraph 41 noted the imprecise nature of various terms including "adjacent to" and said "by no stretch of imagination can a point on the continental shelf situated say a hundred miles, or even much less, from a given coast, be regarded as 'adjacent' to it, or to any coast at all, in the normal sense of adjacency, even if the point concerned is nearer to some one coast than to any other."[92] As Professor Burke observed:

> Whatever the scope of the Court's statements on adjacency, there is a very clear implication that in the Court's view the present limit on the shelf does not necessarily embrace the slope and rise; i.e., if the slope and rise are part of the "natural prolongation" of the continental land mass, as they seem to be, it does not follow that they are part of the legal shelf. If every part of this "natural prolongation" were automatically within

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[91] Supra note 86 at 70.

[92] North Sea Cases, supra note 46 at 30.

> the shelf, there would be little of significance in the Court's remarks about adjacency.[93]

Nothing in the Travaux preparatoires or the North Sea Cases show conclusively that the "Legal Shelf" extends to the continental margin. The I.L.C. as well as those who subsequently adopted Article 1 knew the technical differences in the terminology being used yet they chose to use "continental shelf" and specifically rejected amendments using other terms, such as "submarine areas," "continental terrace," "550 metres depth," etc.[94] Article 1 could easily have been drafted or amended to include the slope by using the term continental terrace or the slope and rise by using the term continental margin. Of course this was not done, in fact the Panamanian proposal substituting the continental terrace criteria was rejected in the I.L.C. Fourth Committee, receiving

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[93] W. Burke, Law, Science and the Ocean, 3 Natural Resource Lawyer 195, 219-220 (1970).

[94] Fourth Committee, supra note 57 at 47. Yugoslavia, among others, proposed the use of the term submarine areas. Panama proposed the use of the term continental terrace. India proposed a 550 metres depth test. M. Whitman, Conference on the Law of the Sea: Convention on the Continental Shelf, 52 A.J.I.L. 634 (1958).

only four affirmative votes.[95] In the North Sea Cases the Court's statements regarding shelf limits are made without reference to the practice of nations and are therefore dictum. Also, the Court's pronouncements regarding "adjacency" and the "natural prolongation" doctrine are at least as ambiguous as Article 1 because the legal shelf is apparently not coextensive with the natural prolongation.[96]

In addition to the legal arguments opposing a wide shelf interpretation of Article 1, there are two practical objections to giving effect to this interpretation which are particularly important in later analysis. First, it is an inequitable allocation of seabed resources favoring nations with substantial coast lines and broad shelves. Second, national claims over the resources of the seabeds of the continental shelf could lead to expanded claims of competence to exercise national jurisdiction over the water column and perhaps ultimately the air space above it.[97]

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[95] Id.

[96] See supra note 93.

[97] Supra note 72.

At this point it seems appropriate to question why Article 1 is ambiguous. The drafters as well as the parties to the Convention recognized that Article 1 was imprecise[98] but nevertheless it was adopted. Article 1 could easily have been made more precise and less complicated but amendments proposed to accomplish that goal were defeated. Perhaps this was because Article 1 had to be widely accepted if it was to serve as evidence of emerging customary international law and only an elastic definition would appeal to both wide and narrow shelf interests. Apparently, Article 1 was a compromise intended to be open ended so that it could be adopted to future developments and expectations. If this is so what methods can be used to give legal effect to a particular interpretation?

A wide shelf interpretation would be given legal effect if it was shown to be consistent with the international community's expectations.[99] Such expectations

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[98]See supra note 57 at 44; see G.A. Res. 2574 A, U.N. Doc. A/7834, 9 Int'l Legal Materials 419 (1970).

[99]International community's expectations is merely a label used to identify the binding force of customary international law which substitutes for the positivist concept of sovereignty. See, McDougal and Burke, The Public Order of the Oceans 48 n. 125 (1962). Expectations of uniformity and rightness is what we call

could be evidenced by an Advisory Opinion of the International Court of Justice; a revision of Article 1 under Article 13; a multilateral treaty establishing jurisdiction of the deep seabed regime over basaltic based areas, thereby leaving granitic based areas to the jurisdiction of coastal nations; a widely adopted U.N. resolution. Of course these same methods, or some of them, could be used to give effect to other shelf width interpretations and each presents its own particular problems.

The problems connected with the various methods of manifesting the expectations of the international community will be analyzed under appropriate sections of this chapter. The first to be dealt with, an advisory opinion of the I.C.J. is considered in the following paragraph. Amendment under the provisions of Article 13 of the Shelf Convention or by subsequent treaty is dealt with under section (C)(2), Policy Preference, p. 61. The last, a widely adopted U.N. resolution, is dealt with under section (C)(3), Contingent Future Interest, p. 77.

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relevant factors by authoritative decision makers in terms of community criteria that determines reasonableness.

The I.C.J. may render an advisory opinion on any "legal question" when requested by a duly authorized organ.[100] However, if the question is not a legal one the I.C.J. must decline to give the opinion requested. Also, the court may decline to render an opinion on a legal question in exercise of its judicial discretion.[101] The difference between the Court declining on the ground the question is not a legal one and declining in exercise of its judicial discretion is one form rather than substance.[102]

Applying these principles to a request for an advisory opinion on the limits of national jurisdiction under Article 1 of the Shelf Convention it is difficult to determine whether or not the Court would render an opinion. The Court can answer any legal question put to it by the General Assembly and the fact that it is an abstract question does not mean the Court may not answer the question.[103] But will the Court apply this

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[100]Article 65, Statute of the I.C.J., 59 Stat. 1063 (1945).

[101]S. Rossene, The Law and Practice of the International Court, 702 (1965).

[102]*Id*.

[103]*Id*. at 703.

doctrine of abstract form to an advisory opinion on a "moot" question? In the Interhandel Case the Court declined to adjudicate a moot question.[104] And clearly the ultimate limits of national jurisdiction are related to the exploitability test and present technology does not exist for subsoil exploitation in depths greater than 200 metres.[105] Therefore, the question would be based on facts and rights not presently in existence which raises a serious question of propriety.[106]

C. Narrow Shelf Interpretations

A preference for a narrow shelf interpretation of Article 1 of the Shelf Convention may be considered an internationalist approach in the sense that the proponents endeavor to insure as much international control over the seabed as possible. To accomplish this goal the proponents take various approaches to

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[104] Interhandel Case (1959) I.C.J. 26.

[105] Advisory Opinion on Admissions to the United Nations (1950) I.C.J. 7.

[106] In March, 1968, the Bureau of Mines, Wash., D.C. released statistics showing a successful oil well in 349 feet of water was completed off the coast of Louisiana. See, J. Andrassy, International Law and the Resources of the Sea, 23 n. 19 (1970).

the interpretation of Article 1. Notwithstanding the Metcalf Committee Report[107] conclusion that narrow shelf interpretations are based on "policy preference" as opposed to "legal doctrine" there are at least two arguments based on legal doctrine favoring a narrow shelf interpretation. In addition there is a third argument calling for an amendment to Article 1 because of its ambiguity, which for the lack of a better label, shall be referred to as the policy preference. The first two arguments shall be referred to as depth equality and contingent future interest, respectively.

1. Depth Equality

In 1952, the International Committe on the Nomenclature of Ocean Bottom Features adopted the following definition for the continental shelf:

> The zone around the continent, extending from the low water line to the depth at which there is a marked increase of slope to a greater depth. Where this increase occurs the term shelf edge is appropriate. Conventionally its edge is taken as 100 fathoms (200 metres) but instances are known where the increase of slope occurs at more than 200 or less than 65 fathoms. When the zone below the low water line is highly irregular, and includes depths well in

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[107] Supra note 65 at 15.

> excess of those typical of continental shelves, the term Continental Borderland is appropriate.[108]

The Shelf Convention as well as Article 1 had primary reference to this shelf definition or concept. However, there were several good reasons why the I.L.C. could not strictly adhere to this geological concept of the shelf. Most of them stem from the ubiquitous but ill defined concept of equality of nations. Having given all coastal nations jurisdiction to a depth of 200 metres when some shelf areas end at 130 metres put the limits of national jurisdiction beyond the geomorphic shelf. Therefore, the opportunity to define the shelf on a strictly geographical basis was lost. This was most unfortunate because contiguity as a new basis for jurisdiction needed reasonable limitations which could have been supplied by the natural shelf edge boundary. As a consequence the I.L.C. had to define the juridical continental shelf in purely political terms. In doing this the I.L.C. had to consider the fact that the edge of the shelf is not a sharp break, as the name implies, but a zone where the shelf and the slope gradually merge and that this zone edge is in some areas at

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[108] *Supra* note 25.

depths greater than 200 metres.[109] Also to be considered was the fact that some coastal nations have no continental shelf in the geological sense yet every sovereign must have equal rights under the equality of nations principle. The I.L.C.'s commentary regarding this matter noted,

> The mere fact that the existence of a continental shelf in the geological sense might be questioned in regard to submarine areas, where the depth of the sea would nevertheless permit exploitation of the shelf, could not justify the application of a discriminatory legal regime to these regions.[110]

To deal with these problems the I.L.C. resorted to the exploitability and adjacency clauses. The exploitability clause would permit coastal nations to exploit their shelf areas to whatever depth beyond 200 metres the shelf edge zone extended. The adjacency clause would preclude coastal nations from claiming submarine areas removed from their coast but not deeper than the deepest shelf edge under the equality of nations principle. This would mean that the ultimate limits of national jurisdiction, applying the equality of

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[109] *Id.*

[110] 2 Y.B. Int'l L. Comm's 297 (1965).

nations principle, would be the depth of the deepest continental shelf edge, or about 200 fathoms (400 metres).

In relation to total seabed area 7.5 percent of the ocean floor is between mean sea level and 200 metres, 8.8 percent between 200 and 2,000 metres, 8.5 percent between 2,000 to 3,000 metres, 20.9 percent between 3,000 to 4,000 metres, 31.7 percent between 4,000 to 5,000 metres and 21.2 percent between 5,000 to 6,000 metres.[111] Therefore, an increase in depth from 200 metres to 400 metres, which represents only about a 1.1 percent increase in area, would still result in a relatively narrow shelf.

Support for a narrow continental shelf interpretation of Article 1 is found in the travaux preparatoires and the North Seas Case some of which was discussed previously under the wide shelf interpretation. In addition to these comments it should be noted that the I.L.C. used the "geographical test" for the "continental shelf" as the basis of the "juridical definition" but extended the concept to areas that were not continental shelf in the

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[111] Supra note 78 at 14.

geological sense,[112] such as islands, continental borderlands, the Persian Gulf and coasts where the continental land mass drops sharply to great depths. This was clearly necessary under the equality of nations principle because the I.L.C. "could not justify the application of a discriminatory legal regime to these areas." Therefore, with respect to islands the I.L.C. said: "The term 'continental shelf' does not imply that it refers exclusively to continents in the current connotation of that word. It also covers the submarine areas continguous to islands."[113] With respect to continental borderlands the I.L.C. said:

> In the special cases in which submerged areas of a depth less than 200 metres, situated fairly close to the coast, are separated from the part of the continental shelf adjacent to the coast by a narrow channel deeper than 200 metres, such shallow areas could be considered as adjacent to that part of the shelf. It would be for the State relying on this <u>exception</u> (emphasis added) to the general rule to establish its claim to an equitable modification of the rule.[114]

With respect to areas not continental shelf in the geological sense the I.L.C. made specific reference to

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[112] <u>Supra</u> note 110.

[113] <u>Id</u>.

[114] <u>Id</u>.

the Persian Gulf, which is like an inland sea not having ocean bottom contours and being only 130 metres deep. As for other such areas the I.L.C. said: "Again, exploitation of a submarine area at a depth exceeding 200 metres is not contrary to the present rules, merely because the area is not a continental shelf in the geological sense."[115]

The travaux preparatoires, to a certain extent, reflects the predisposition of the international community to limit the depth of exploitability to something approximating the depth of the deepest shelf edge zone and allow all coastal nations to exploit to that depth under the equality of nations principle. The Indian amendment which proposed a precise and stable 500 metres depth test received more favorable votes than any of the other rejected amendments; 21 for, 31 against, with 16 abstentions.[116] Also of some relevance to this interpretation is a portion of Mr. Mouton's comments on the equality of nations principle,

> The equality of States, on which many speakers had dwelt, had been one of the main considerations in the minds of the sponsors

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[115] Id.

[116] Fourth Committee, supra note 57 at 47.

> of the United Kingdom-Netherlands proposals, who had been particularly anxious to safeguard the rights of States without a shelf. . . . With regard to the contention that, if any State should exploit at a certain depth, all States should be entitled to claim soverign rights over submarine areas lying at an equal depth beneath the surface, he said that recognition of such a principle might raise important issues of evidence.[117]

Mr. Oxman concluded after his detailed study of the travaux preparatoires relating to Article 1 of the Shelf Convention that, "Article 1 was not intended to embrace areas at a substantial distance from the shore lying beyond the point where the waters become deep."[118]

The North Sea Case concerns itself with an extensive discussion of the adjacency clause of Article 1 and this demonstrates that the legal shelf and the natural prolongation are not coextensive. If this were not so and the two were coextensive, that is the legal shelf could ultimately extend to the continental margin, the court's discussion of the adjacency clause would be meaningless. If the legal shelf is the natural prolongation of the submerged land mass then

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[117] Fourth Committee, <u>supra</u> note 57 at 44.

[118] B. Oxman, The Preparation of Article 1 of the Convention on the Continental Shelf, Clearinghouse for Federal Scientific and Technical Information, PB-182-100, 74, 150 (1968).

it is unnecessary to look to the adjacency clause for the ultimate limit of national jurisdiction, that limit already being the natural prolongation. Certainly the Court would not spend so much time discussing adjacency as an integral part of the legal shelf definition if the natural prolongation concept made such a discussion meaningless.

This narrow shelf interpretation shares a common difficulty with the wide shelf interpretation. The drafters as well as those subsequently responsible for adoption of Article 1 could easily have found more precise language to accomplish the result sought by this interpretation, but instead they left the limits open-ended. Therefore, this narrow continental shelf interpretation, which would ultimately give the coastal nations sovereign rights to the natural resources of the seabed and subsoil adjacent to their coast to a depth of approximately 400 metres (the deepest geological continental shelf edge zone), must be shown to be consistent with the expectations of the international community. This could be done by a revision of Article 1, a multilateral treaty, or a widely adopted U.N. resolution. The problems and

effects connected with the use of these methods are discussed under sections (C)(2) and (C)(3).

2. Policy Preference

This approach avoids arguments on the width of the shelf based on legal doctrine and states a preference for a political boundary based on a political settlement. A typical proposal is for 200 metres in depth or 50 miles distance from the baseline, whichever gives the coastal nation the greater area.[119] The proponents of this approach say that Article 1 of the Shelf Convention is so vague it impedes the development of the seabed resources and should be redefined. They argue that any interpretation of Article 1, even if widely accepted, is indefinite and subject to change and this defect can only be remedied by an internationally agreed boundary.[120] This approach is all the more interesting when considered in the light of another of Mr. Oxman's conclusions,

> In the last analysis, if one is to speak of legislative intent; the collective

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[119] Stratton Commission Report, supra note 17 at 146.

[120] T. Carter, The Seabed Beyond the Limits of National Jurisdiction, 4 Stan. J. Int'l L. 1, 17 (1969).

> intent of those who compromised on Article 1 was to affirm coastal state jurisdiction over the natural resources of the seabed and subsoil to a depth of 200 metres, and to leave the question of a permanent limit aside until such time as a practical question of exploitation was raised and states had an opportunity to assess their options . . .[121]

The primary difficulty with this approach is that the distance limitation has no relationship whatever to the original legal basis on which the continental shelf doctrine was founded. As was indicated previously, this new competence to exercise jurisdiction over the resources of the seabed and subsoil of the continental shelf arose ipso jure in the coastal nations based on contiguity. Under the Truman Proclamation the seabed area claimed was an extension of the land mass and thus naturally appurtenant. Under the Shelf Convention the seabed area claimed must be adjacent. Under the North Sea Cases the continental shelf doctrine was linked with the natural prolongation concept. Therefore, seaward distance limitations bearing no relationship to the natural prolongation of the submerged land mass would be contrary to current legal principles. Of course this does not mean that existing international

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[121] *Supra* note 118.

law cannot be changed, but such a distance boundary could extend the jurisdiction of some nations beyond the natural boundary between granitic based seabed areas and basaltic based seabed areas. Also, a seaward distance limitation could disporportionately increase the jurisdiction of islands. Finally, giving narrow shelf nations sovereign rights over seabed resources for a distance of 30 to 50 miles or more does not create equality with the richer seabed resources of the broad shelf nations.

There are two methods available for redefining the continental shelf. One method is provided by Article 13 of the Shelf Convention, with permits any party after the Convention has been in force for five years to request a revision.[122] The other method is the modern practice of amending multilateral treaties by subsequent multilateral treaties.

Redefining the continental shelf under the provisions of Article 13 raises several questions: How extensive can a revision be? What procedure is followed with respect to action on a request for a revision? What is the effect of a revision on non-parties? What

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[122]Shelf Convention, supra note 45, Art. 13.

is the effect of the revision of an Article recognized as customary international law? The word revision, as used in Article 13, is synonomous with amendment, as used in Article 40 of the Convention on the Law of Treaties.[123] The term covers "both amendments of particular provision and a general review of the whole treaty."[124] Unless the provisions of the treaty provide otherwise the procedure for revision is governed by Article 40 of the Convention on the Law of Treaties.[125] Article 40 provides for a formal agreement to modify the treaty between all of the parties based on procedures similar to those used to amend treaties by subsequent treaties. Therefore, the remaining questions regarding the problems and effects of reopening the Shelf Convention for redefining the continental shelf are basically the same for amendment by revision or by subsequent treaty.[126]

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[123] 2 Y.B. Int'l L. Comm'n 232 (1966).

[124] Id.

[125] Convention on the Law of Treaties, opened for signature May 23, 1969, 8 Int'l Legal Materials 679, 695 (1969). Although not yet effective and intended to operate in futuro, the Convention applies to existing treaties to the extent it is declaratory of existing law. See R. Baxter, Treaties and Custom, Academe De Droit Int'l (1970) 53.

[126] Id. see Art. 30 at 691 and Art. 40 at 695.

There are several good reasons why the Shelf Convention should not be reopened for amendment. The U.N. has already scheduled a Conference on the Law of the Sea for 1973 and formal action to amend Article 1 would certainly be precipitous. The prospects for a satisfactory amendment are remote without also determining what regime will control the allocation of seabed resources beyond the limits of national jurisdiction. Reopening the Shelf Convention for amendment would make the whole treaty subject to review. Accommodation of the various interests of the coastal nations, while adhering to the equality of nations principle, might require redefining sovereign rights as well as the continental shelf. If sweeping changes were made the special interest of the broad shelf nations in hydrocarbons might take a back seat to other interests, such as fishing, pollution, security etc. Taken to a logical extreme amendment could result in a much wider quasi territorial sea to the detriment of land locked nations, maritime interests, and internationalism. Agreement on any amendment would be unlikely and the result could be greater uncertainty regarding the law of the continental shelf.

Assuming arguendo that an amendment of Article 1 in terms of a finite depth or distance boundary could achieve wide acceptance its effect of non-signatories would be a problem. Because, with respect to a party to both treaties and a party to only one of the treaties, the treaty to which both are parties govern as between them.[127] Therefore, non-parties to the amendment could continue to claim sovereign rights over the resources of the continental shelf under Article 1 and the question of their juridictional limits are no less uncertain. With respect to nations that are non-parties to any treaty on the continental shelf their rights are governed by customary international law. As noted above Article 1 is said to be declaratory of customary international law. Therefore, even if Article 1 was changed by amendment nations not party to any continental shelf treaty could claim their rights under what has been declared norm-creating customary international law. This would mean that the limits of national jurisdiction for those countries would still be complicated by the uncertainty of Article 1. The only answer to this problem would

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[127] Id. Art. 30(4)(b) at 691.

appear to be a recognition of the fact that changes in customary international law effect norm-creating declaratory treaty provisions. In this way a widely adopted declaratory amendment could be considered norm-creating and supplanting lex lata based on current expectations of the international community. In this connection Professor Baxter made the following observation:

> The multilateral treaty is, it cannot be emphasized too heavily, a reflection of the State practice of the parties to it and constitutes an expression of their attitude toward customary international law, to be weighed together with all other consistent and inconsistent evidence of the State of customary international law. If a State does not become a party to a codification treaty in the strict sense, its conduct means one less vote in favour of the norms of the treaty as rules of customary international law. Its reservation has that effect limited to the article as to which the reservation applies. Denunciation of the treaty can indicate a change of heart about the acceptability of the view of international law incorporated in it. It is a withdrawal of the vote cast in favour of the norms of the treaty. So also, a request for revision of the treaty indicates that a State is no longer satisfied with its contents.[128]

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[128] R. Baxter, Treaties and Custom, Academie De Droit Int'l (1970I) 31, 52.

This approach to the solution of the problem will be analyzed in more detail under the contingent future interest argument.

The one amendment that might circumvent the problems discussed above would be a simple deletion of the exploitability clause. It could be argued that the exploitability clause is not norm-creating because of its prospective effect and the conflicting claims regarding its interpretation. If this amendment was widely adopted it could be considered norm-creating and binding on all parties as a clarification of customary international law. However, it is difficult to determine whether such action would be widely accepted. The narrow shelf nations, representing 56 of the current 124 voting members of the U.N.,[129] may want to use the exploitability clause to bargain for distance vice depth limitations. The developed broad shelf nations might resist such action in light of the uncertainty regarding the regime that would control the resources beyond 200 metres.

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[129] M. Gerstle, The Politics of U.N. Voting: A View of the Seabed from the Glass Palace, Law of the Sea Institute, Occasional paper No. 7, 1 (1970) /hereinafter cited as U.N. Voting/. Narrow Shelf is defined as less than 50 miles in breadth.

3. Contingent Future Interest

A detailed and precise analysis of the law of future interests is beyond the scope of this thesis. It will suffice to note that jurisprudence gives wide recognition to the legal concept of future interests. It is this concept as opposed to a specific classification which is dealt with here. As some jurists have observed, "no classification could be suggested which would include all possible future interests and limitations should not be ignored simply because they do not conform to any of the fixed types."[130]

With respect to Article 1 of the Shelf Convention the international community by legislative act created a contingent future interest on behalf of coastal nations in seabed resources adjacent to their coasts in depths beyond 200 metres by means of the exploitability clause. Since national jurisdiction is rolling down the shelf with advances in technological capability the extent of the vesting of national jurisdiction is dependent on three factors; time, technology (economic feasibility) and the international

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[130]L. Simes and A. Smith, The Law of Future Interest 335 (2d ed. 1956).

community's expectations. Therefore, the vesting of national jurisdiction over seabed resources in depths greater than 200 metres is subject to two conditions. One, technology must permit exploitation in depths greater than 200 metres at some future point in time. Two, international law creating the contingent future interest and based on the international community's expectations must remain constant. In other words, new customary international law based on new expectations must not arise to terminate or defeat the contingency.

Support for the contingent future interest argument is found in private law analogies and the Shelf Convention.

Private law analogies have long been recognized in international law. In this regard Professor Holland noted: "The Law of Nations is but private law writ large. It is an application to political communities of those legal ideas which were originally applied to relations of individuals."[131] Analogies have historically been an important tool in framing international law as a science and in the

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[131] T. Holland, Studies in International Law 152 (1898).

interpretation and construction of treaties. As Professor Lauterpacht observed:

> For after all has been said on the dangers of analogy, and on the difference of interests protected by the two spheres of law, the fact remains that, with regard to some of the most essential and most urgent questions of international law, it is in the approximation to the analogous general rules of private law that we so embodied the principles of legal justice and of international progress. The author believes that, amongst others, it is also on the realization of this fact that the success of future attempts at creative juristic activity in the domain of international law depends.[132]

It is unnecessary to go beyond the language of Article 1 to show that the extension of national jurisdiction beyond a depth of 200 metres is conditional. Likewise, the fact that Article 13 provides for revision of the Convention needs no amplification except to point out that this does not preclude the use of other methods to accomplish the same goal.

How does this add up to a contingent future interest? The natural resources of the seabed and subsoil did not spring into existence with the Truman Proclamation. Prior to the recognition of coastal nations' claims to the resources of the shelf such

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[132] H. Lauterpacht, Private Law Sources and Analogies of International Law, xi (1927).

areas were considered res communis. When the international community gave recognition to claims to the seabed resources of the continental shelf it vested title to a possessory interest in coastal nations. Article of the Shelf Convention subsequently provided a legislative basis for national jurisdiction and ensured uniformity by giving all coastal nations vested rights to exploit the resources off their coast to a depth of 200 metres. However the exploitability clause of Article 1 operates as a condition precedent, "to take effect upon a dubious and uncertain event,"[133] vesting soverign rights to the resources in greater depths when the condition is fulfilled. Of course until the condition, while in existence, is fulfilled the resources in depths beyond 200 metres or the depth of exploitability at a given point in time remain res communis. This condition precedent is analagous to what common law countries term a contingent future interest and civil law countries term "fideicommissary substitutions" or "Nacherbfolge."[134]

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[133] Supra note 130 at 93.

[134] See generally M. Rheinstein, Some Fundamental Differences in Real Property Ideas of the Civil Law and the Common Law Systems, 3 U. Chi. L. Rev. 626

It might be argued that Article 2 of the Shelf Convention operates to vest a future interest, creating a condition subsequent vice a condition precedent, in the coastal nation. Article 2 gives the coastal nation exclusive rights to explore and exploit the continental shelf and precludes others from such activities unless the coastal nation consents. Because of this exclusive right the resources of the continental shelf beyond the depth of exploitability cannot be considered res communis. Therefore, the resources of the continental shelf beyond the depth of exploitability are already impressed with an interest which is subject only to a condition subsequent. This argument would ultimately lead to the conclusion that coastal nations ipso jure have a vested right, to be enjoyed in the future, to the resources of the seabed and subsoil of the submerged land mass based on contiguity. However, the counter argument seems more persuasive. Because under the equality of nations principle, when one nation's technology permits exploitation of the defined area the rights of all nations are automatically extended to that depth. Therefore,

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(1935-36). Social Law concepts do not recognize private ownership of real property. J. Hazard, Soviet Property Law, 30 Corn L. Rev. 466 (1944-45).

since Article 2 is applicable only to areas defined by Article 1 the rights of all coastal nations are either fully vested or contingent on the occurrence of a condition precedent. In this situation there is no preceding estate that must determine before the coastal nations interest vest.[135]

Drawing a distinction between these two types of future interests may be extraneous because the result could be the same regardless of whether the interest is classified as vested or contingent.[136] Both interest may be destroyed by failure of the condition, condemnation, legislation, etc. The important point with regard to this analogy based on current legal doctrine is that a contingent future interest is not the property of the holder, it may be property in the future, but it is not property until the contingency is met.[137]

A contingent future interest interpretation of Article 1 could result in a narrow juridical continental

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[135] See generally supra note 133 at 206. A future interest is contingent if subject to a condition precedent, other than the termination of the preceding estate.

[136] See generally supra note 133 at 111.

[137] See generally supra note 133 at 117.

shelf. The limits of national jurisdiction defined by Article 1 are open ended to permit changing circumstances and expectation to control delimitation. Emerging customary international law based on a wider international community's expectations appear more consistent with a narrow shelf interpretation, because General Assembly Resolution 2749 and its antecedents show a wide acceptance of the "common heritage" doctrine and a corresponding propensity to limit national jurisdiction.[138] Therefore, a manifestation of such new expectations by an authoritative decision maker would interpret Article 1 and destroy the contingent future interest of the coastal nations. In other words the now wider international community's current expectations[139] could combine the res communis area subject to the contingency with the res communis deep seabed area and include both in the international regime. Under these circumstances there could be no valid claim of expropriation of vested rights;[140] the boundaries

[138]See G. A. Res. 2749, U.N. Doc. A/C.1/544, 10 Int'l Legal Materials 221 (1970).

[139]An authoritative decision based on community criteria. Supra note 18.

[140]See generally supra note 133 at 117. A statute which destroys a contingent future interest does not violate guaranties because it is not a vested interest.

for the seabed regime not being inconsistent with Article 1 could be considered merely a clarification of customary international law and binding on all nations. To arrive at this conclusion two questions must be considered. Can emerging customary international law, de lege ferenda, replace or change customary international law, lex lata? If so, what evidence is necessary to show a change?

Customary international law, which is grounded in the expectations of the international community, is subject to change. This fact has been recognized in the writings of some jurists, in the Island of Palmas Arbitration, and in the I.L.C.'s commentary on the Law of Treaties. Professor Baxter observed in a most recent and relevant article,

> . . . requests for changes in treaty obligations may result from modifications in the views of the parties about the law or from a change in customary international law itself. Since the treaty is only one element of the evidence of customary international law, that body of law may change notwithstanding the static, restraining influence of the treaty. The parties may thus become aware that the law they initially found acceptable has changed with the passage of time and that the dead hand of the treaty must be removed or that the treaty must be amended. Or political, economic, social, or technological change may point to the unsatisfactory character of what is

> admittedly still the state of customary international law. The demand will then be for the creation of new legal norms de lege ferenda to replace lex lata.[141]

In the Island of Palmas Arbitration Judge Huber following the principle of the so-called "inter-temporal law" said,

> The same principle which subjects the art creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of the law.[142]

The I.L.C. initially proposed that this concept be included in the Convention on Treaties, 1964 Draft Article 68(c), because "in the application of a treaty account must at any given time be taken of the 'evolution of the law.'"[143] Paragraph (c) of Article 68 would have allowed for the modification of a treaty

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[141] Supra note 128 at 53. But see A. D'Amato, Manifest Intent and the Generation by Treaty of Customary Rules of International Law, 64 Am. J. Int'l L. 892, 901 (1970). Concluding that certain treaties are more than evidence of customary international law and in fact generate customary rules of law.

[142] Island of Palmas Case (Netherland v. United States) 2 U.N.R.I.A.A. 845 (1928).

[143] 2 Y.B. Int'l L. Comm'n 198, 199 (1964).

by the emergence of a new rule of customary international law affecting the operation of its provisions.[144] However, in 1966 the I.L.C. deleted Draft Article 38(c), the former 68(c), because the question would depend on the particular circumstances in each case and the general topic of the relationship between customary norms and treaty norms was too complex to deal with.[145]

It is perhaps worthy of mention that Article 64 of the Convention on Treaties makes void treaty provisions in conflict with newly emerged peremptory norms of general international law (jus cogens).[146] The jus cogens concept is based on natural, positive or higher law and thus far has been limited to universally recognized prohibitions against treaties to promote aggression, slavery, piracy, genocide, etc. However, it is not inconceivable that the widely accepted principle that certain territory is the "common heritage of mankind" and not subject to national appropriation could emerge as a peremptory norm. This principle may

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[144] Id.

[145] 2 Y.B. Int'l L. Comm'n 236 (1966).

[146] Id. at 261.

be destined for wider applicability in both inter and outer space.

There are two methods by which the international community's expectations could be evidenced so as to destroy the contingency. The first would be to adopt a multilateral treaty establishing an international regime whose limits would overlay the area subject to the contingency. Of course such a treaty would have to be declaratory of customary international law and would therefore require wide acceptance. The second method would be to adopt by an overwhelming majority vote, a U.N. resolution with the declared purpose of destroying the contingency. Under both methods the Shelf Convention would remain unaltered but the effect of the exploitability clause would be negated.

The major difficulty with the treaty method is the time delay in the preparation and adoption of a multilateral treaty. In view of the divergent national and international interests in the area the complexities regarding the nature of the regime could only delay progress on the question of limits. Given today's science and rapid rate of technological growth the condition precedent may be met and title to the limits

of the area defined by Article 1, vested before a new treaty could be adopted, because such a treaty would have to deal with the nature, operation, and administration of the seabed regime as well as its limits. Of secondary concern is the question of applicability of Article 30 of the Convention on Treaties, which applies to successive treaties relating to the same subject.[147] The obvious but perhaps too simple argument is the treaty on the seabed regime is not on the same subject as the Shelf Convention. Therefore, if the treaty on the seabed regime was declaratory and created new customary international law the problems discussed above regarding Article 30 would be negated.

A U.N. resolution has legal significance and would be the easiest method for destroying the contingency or giving effect to a specific interpretation of Article 1. The universally accepted practice of nations is the basis of customary international law and since resolutions constitute national practice

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[147] Convention on the Law of Treaties, opened for signature May 23, 1969, 8 Int'l Legal Materials 679, 691 (1969).

they are formal evidence of the law.[148] When the practices or views of nations are in conflict regarding the interpretation of an international agreement a resolution will have a decisive bearing on the ultimate decision maker.[149] Also, nations are generally more willing to adopt declaratory resolutions because they are general statements which do not circumscribe the activities of states as much as detailed treaty provisions.[150] Resolutions do not imply the permanent commitment characteristic of treaties and this suppleness is desirable in areas of rapid change. Whether characterized as declaration or agreement, resolutions may be formulated in legal term and when realistically conceived and widely approved taken as evidence of agreed law.[151] This form of law-making is probably more significant in the area of science and technology because rapid changes are commonplace and broad

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[148] O. Asamoah, The Legal Significance of the Declarations of the General Assembly of the United Nations 46 (1956).

[149] Id. at 51.

[150] O. Schachter, Scientific Advances and International Law Making, 55 Calif. L. Rev. 423, 426 (1967).

[151] Id.

principles stating general objectives leave room for future development.[152] Under this method immediate action could be taken to limit national jurisdiction while deferring the complex question of the nature of the seabed regime. In the interim the area beyond the limits of national jurisdiction would remain res communis.

The propensity of the international community toward limiting national jurisdiction and reserving the seabed, ocean floor and resources of the area as the common heritage of mankind is reflected in a series of U.N. resolutions. The most interesting of these was the so called Moritorium Resolution.[153] Resolution 2574A specifically states,

> . . . the definition of the continental shelf contained in the Convention on the Continental Shelf of 29 April 1958 does not define with sufficient precision the limits of the area over which a coastal State exercises sovereign rights for the purpose of exploration and exploitation of natural resources, and that customary international law on the subject is inconclusive.[154]

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[152] Id.

[153] G.A. Res. 2574, U.N. Doc. A/7834, 9 Int'l Legal Materials 419 (1970).

[154] Id. 2574A at 419. Vote was 65 for, 12 against, with 30 abstentions.

Resolution 2574D admonishes all nations to refrain from exploitation of the resources, beyond the limits of national jurisdiction, pending the establishment of an international regime.[155]

It could be argued that the effect of the provisions of Resolution 2574D was to destroy the contingency as of the date of the resolution, December 15, 1969. However, this position is difficult to maintain without showing wide acceptance, clear intent, and observance by actual state behavior.[156] With regard to these matters it should be noted that the vote on Resolution 2574D was 62 in favor, 28 against, with 28 abstentions. However, on December 17, 1970 the General Assembly adopted Resolution 2749, which although couched in somewhat different language references 2574, by a vote of 108 in favor, 0 against, with 14 abstentions.[157]

The intent to limit national jurisdiction within present bounds is clearly implied if not expressed in

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[155] Id. 2574D at 423. Vote was 62 for, 28 against, with 28 abstentions.

[156] Supra note 148.

[157] G.A. Res. 2749, U.N. Doc. A/C.1/544, 10 Int'l Legal Materials 221 (1971).

these resolutions. On a near term basis actual practice by nations will be aided by the lack of present technology and uncertainty regarding rights of exclusive tenure. The difficulty with this argument is no U.N. resolution, including 2574D, has specifically stated the limits of national jurisdiction or presumed to interpret Article 1.

D. Intermediate Zone Concept

There are significant differences between the two proposals advocating utilization of the intermediate zone concept, which is generally considered to be a compromise between the wide and narrow shelf interpretations. Under the zone envisioned by the Stratton Commission the coastal nation's jurisdiction over seabed resources of the juridical continental shelf would be, as noted above, based on political compromise vice contiguity in most narrow shelf areas. Broad shelf nations would rely on the 200 metre-isobath depth limitation, while narrow shelf nations would rely on the 50 nautical miles distance limitation. This would mean that substantially more seabed area than the geological shelf comprises would be subject to national jurisdiction. The average width of the continental

shelf is only 30 miles[158] so giving narrow shelf nations 50 nautical miles would be relinquishing areas of the ocean floor to national jurisdiction. The 2500 metre-isobath depth or 100 nautical miles distance limitations regarding the intermediate zone, in which access is restricted to the coastal nation or its licensees, is subject to a similar criticism. Under the zone described in the U.S. Working Paper the coastal nation's jurisdiction over seabed resources of the juridical continental shelf would be based on continguity. The limits of national jurisdiction would only extend to a depth of 200 metres and would be the same for all nations. A 200 metre depth limitation would mean that a smaller percentage of the total seabed area would be subject to national jurisdiction. Likewise the trusteeship zone, which would extend slightly beyond the base of the continental slope and be subject to restricted access, would cover a relatively smaller area of the total seabed.

The trusteeship zone advocated by the U.S. Working Paper has several advantages. National jurisdiction

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[158] Sverdrup, Johnson, and Fleming, The Oceans, 21 (1957).

can be based on a recognized legal concept. The boundaries suggested would be strengthened somewhat by the close proximity of natural boundaries. The jurisdiction of isolated islands would be less disproportionately increased. The more narrow the limits of national jurisdiction, the less coastal nation gain at the expense of inland nations because of geographic inequality.[159] However, it will not effectively deal with the desire of the 56 narrow shelf nations to achieve equality with the 26 broad shelf nations.[160]

A significant problem regarding the intermediate zone concept stems from the fact that the only method for giving it effect is a multilateral treaty. The zone requires the creation of operative international machinery. Such a convention would have to deal with the interdependent questions of the limits of national jurisdiction and the nature and operation of the seabed regime. Unquestionably such a complex treaty, involving long term or permanent commitment, will make agreement

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[159] R. Neild, Alternative Forms of International Regime for the Oceans, Towards a Better Use of the Oceans 190 (ed. by SIPRI 1968).

[160] <u>Supra</u> note 129.

more difficult to reach and foster delays. Also the problem regarding the effect of the convention on non-signatories under Article 38(c) of the Convention on Treaties and non-parties under customary international law, discussed above, would be revitalized.

There are several inherent problems with the zone concept. Coastal nations would exercise civil and criminal jurisdiction over zone licensees who may be foreign nationals and disputes with them would amount to disputes between sovereigns.[161] The zone creates additional political boundaries across which duties and obligations change substantially and without uniformity, the laws of the various coastal nations differing in substance, procedure or both.[162] Coastal nations could and indubitably would act as administrators for the international regime in the zone.[163] This would mean there would be three types of jurisdiction over seabed resources, national, international and mixed. Underlying these three broad problem areas

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[161]See U.S. Working Paper, supra note 32. See Art. 27 at 1054.

[162]Id.

[163]Id. See Arts. 27, 28 and 29 at 1054-1055.

are many technical legal problems regarding rights and duties, taxes, depletion, allowances, import quotas, etc.

As a compromise between the wide and narrow shelf interpretations the intermediate zone concept should be eliminated as an unnecessary and burdensome price to pay to make the international regime more acceptable to coastal nations that are not in fact relinquishing any vested interests in the seabed resources beyond 200 metres.[164] In his analysis of Article 1 Mr. Oxman concluded,

> To say that the exploitability test covers the continental slope, and that a lesser limit involves giving away inchoate national patrimony, is to say that the most seaward limit proposed won. This is simply not true . . .[165]

However, the intermediate zone concept may be useful and even essential in achieving an acceptable balance of competence between coastal nations and the international regime. If so the intermediate zone should

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[164]The maximum water depth for commercial hydrocarbon production is 340 feet (104 metres). National Petroleum Council: Petroleum Resources Under the Ocean Floor 8 (1969).

[165]<u>Supra</u> note 118.

be bargained for on the basis of balancing competence between national and international authority and not as a compromise between wide and narrow shelf interpretations of Article 1.

V. APPRAISAL OF DEEP SEABED REGIMES

The purpose of establishing a deep seabed regime is to reduce the potential for international conflict over rights to exploit the seabed resources beyond the limits of national jurisdiction. To accomplish this goal the regime must achieve wide acceptance among the nations of the world, assure access to the resources of the deep seabed to all nations on reasonable terms, reduce the potential for creeping national jurisdiction, and narrow the gap of wealth and knowledge between developed and developing nations. Since wide acceptance is dependent on a satisfactory compromise of both current and anticipated conflicting national claims to jurisdictional competence over seabed resources, the limits of national jurisdiction must be considered in the appraisal of the various regimes. Obviously coastal nations are more likely to compromise their jurisdictional claims if the nature of the regime serves their interests.

The proponents of the various regimes can be broadly classified as favoring either national or international control of the regime based on a functional or

political approach. The nationalist approach would keep resource development open for exploitation by any nation on a first-come first-served basis while insuring national autonomy, subject only to international law and specific agreement. The internationalist approach would create a new authority that would exercise, to some degree, control over the behavior of nations exploiting the seabed resources beyond the limits of national jurisdiction.

The nationalist proposals offer many advantages in certain respects. The exploitability test could be extended to the natural prolongation of the subjerged land mass. The ultimate limits of national jurisdiction could be based on and strengthened by natural boundaries within the framework of existing legal structure. Seabed resources would be immediately allocated. Immediate development would be encouraged because rights and duties would be defined under existing national laws. Well defined and experienced national institutions could administer development. There would be an opportunity for widespread competitive bargaining with coastal nations for seabed resources as opposed to the prospect of dealing with a single,

powerful international regime. A race between nations to register claims under international record, registry or licensing systems could be avoided. Laws governing shore installations and services would be more compatible with offshore operations. Economic effectiveness would be realized on a near term basis.[166]

The internationalist proposals offer many advantages in differing respects. A larger portion of the seabed resources would be allocated to the international community as the "common heritage of mankind." The risk of creeping national jurisdiction would be diminished. Developers would have increased access to areas where coastal nations might otherwise exclude them. International control would lead to uniformity of administration outside the jurisdictional limits of coastal nations. The threat of nationalization of the developer's property and investment would be diminished. National institutions would be under competitive pressure to insure developers of treatment as favorable as that afforded by the international regime. Flexible administration could meet changing conditions without major revisions of the international legal structure.

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[166] *Supra* note 37 at 46.

Impediments to oceanographic scientific research would be diminished. Uniform laws respecting the seabeds and oceans beyond national jurisdiction could be prescribed by the international regime. The prospect of world peace through world government could be enhanced.[167]

Different distributions of national and international control may result in different advantages and disadvantages with different degrees of acceptability to different interests. Most likely either type is made more acceptable if modified by elements of the other. National regimes will be more acceptable to internationalist if they provide some role and revenues for international organizations. International regimes will have more appeal to nationalists as national autonomy is increased and international control restricted.[168]

A. National Lakes

The National Lakes proposals are political nationalist approaches. The proponents advocate a division of the entire seabed among the coastal nations by

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[167] Supra note 37 at 21-26.

[168] L. Henkin, Law for the Sea's Mineral Resources, 60 (1968).

applying the median line principle of Article 6 of the Shelf Convention.[169] This regime would preclude international control over seabed resource development. Such a regime has little chance of wide acceptance because it magnifies the two basic objections inherent in the wide shelf interpretation. It is an inequitable allocation of resources generally considered to be the common heritage of mankind. The wider the limits of national jurisdiction, the greater the inequity for inland and shelf locked nations and the greater the windfall for isolated islands. An outward expansion of national jurisdiction would encourage upward expansion of national claims for purposes other than seabed resource development such as fishing, military operations, scientific research, transportation, anti-pollution, etc.

A significant variation on the lakes concept is the international lakes approach,[170] which is a functional internationalist approach. The median line principle would be used to divide the seabed areas into

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[169]Shelf Convention, <u>supra</u> note 45.

[170]<u>Supra</u> note 168.

international lakes in which the coastal nations would act as administrators for the international community. The coastal nations would use their developed institutions for administration, law enforcement, and development inside their respective areas. The coastal nations would pay a resource tax to an international organization whose purpose would be to collect and disburse revenues, resolve disputes, and control the implementation and modification of internationally agreed rules.

This plan is a substantial improvement on the lakes concept but it is subject to some serious objections. Article 1 of the Shelf Convention clearly does not extend national jurisdiction to mid ocean. Island domains would make allocation difficult and inequitable. Freedom of the Seas might be impaired, particularly the right to carry on military operations.

B. Res Communis

The Res Communis proposals are functional nationalist approaches. The proponents advocate a laissez-faire approach to deep seabed resource development. The difficulty with the Res Communis approach is it lends itself to creeping national jurisdiction

and inequitable allocation of resources. Under this regime national claims would ultimately extend to the natural prolongation of the submerged land mass under the wide shelf interpretation of Article 1. Even assuming the Res Communis regime limited national jurisdiction to 200 metres such a limit would prove unstable in the long run, because Res Communis would greatly favor those few developed nations with the technology and capital to exploit the resources of the seabed beyond 200 metres. Therefore, developing nations in hopes of receiving a more equitable share of the seabed resources would inevitably have to claim that customary international law gives them jurisdiction over the seabed resources of the submerged land mass ipso jure on the basis of contiguity or claim wider territorial seas.

Res Communis has one additional serious drawback, it does not provide for exclusive tenure for the discoverer or exploiter.[171] Without exclusive tenure exploiters may not exclude others from the area and this could lead to serious conflict when valuable

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[171] F. Christy, Marine Resources and the Freedom of the Seas, 8 Natural Resources J. 424, 432 (1968).

resources are discovered. If conflict is to be avoided rights and duties must be defined to insure order and encourage capital expenditures for seabed resource development.

The present status of the seabed and subsoil beyond the limits of national jurisdiction is res communis.[172] Anyone may explore the area, as long as such activity does not interfere with freedom of the high seas. Current economic and technological conditions do not permit exploitation of the deep seabed in depths beyond 200 metres.[173] However, technological and economic conditions are changing[174] and what today may be generally considered res communis may prove to be res nullius under changing technology and international law.[175] This trend is apparent from recent claims to the resources of the shelf, exclusive fishing rights,

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[172] See Stratton Commission Report, supra note 17 at 146.

[173] L. Alexander, National Jurisdiction and the Use of the Sea, 8 Natural Resources J. 371, 389 (1968).

[174] J. Andrassy, International Law and the Resources of the Sea 22-26 (1970). A discussion of recent technological developments.

[175] G. Fitzmaurice, General Principles of International Law, 92 Academie De Droit Int'l 151 (1957 II).

Arctic waters, and wider territorial seas. Obviously ever increasing demands for resources will ultimately eliminate concepts of ownerless territory in one way or another.[176] Nonetheless, res communis as the present controlling legal principle with respect to exploration of the deep seabed will be the default winner should the 1973 Convention on the Law of the Sea[177] fail to adopt some other specific proposal.

C. Flag Nation

As initially conceived the Flag Nation proposal was a functional nationalist approach which improved on Res Communis only in that it provided for exclusive tenure, under certain conditions, over specifically claimed or developed areas and resources beyond the limits of national jurisdiction.[178] Typically the proponents of this approach advocated a wide shelf interpretation,[179] which is subject to two major

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[176]See supra note 171.

[177]See Stratton Commission Report, supra note 17 at 146.

[178]N. Ely, A Case for the Administation of Mineral Resources Underlying the High Seas by National Interests, 1 Natural Resources Lawyer 78 (1968).

[179]Id.

objections; inequitable allocation of the richer resource areas and potential for creeping national jurisdiction. Beyond the submerged land mass first discoverers could claim specific limited areas for specific types of exploitation under the law of the flag nation. The claims of nations would be recorded by notice to other nations and observed through reciprocity.[180]

This approach has some adverse aspects under both shelf width interpretations because it greatly favors developed nations with deep ocean technological capability. The extent or nature of the flag nation's powers are not defined. Exploiters could resort to the use of flags of convenience with its many attendant problems.[181] Nations would rush to make claims to areas and resources of economic potential, simulating exploitation activities to acquire priority rights.[182]

Later Flag Nation proposals attempting to eliminate various adverse aspects of the plan have mixed national and international authority so that it is difficult to classify them. Most of these plans

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[180] *Id.*

[181] *Supra* note 174 at 132.

[182] *Supra* note 174 at 132.

call for recording of claims by international agencies with nations paying recording fees. The extent of the recording agencies regulatory powers vary as does the fee. Some are given the power to inspect, fix area limits, fix time limits, establish production quotas, etc.[183] With regard to the amount of the fee it may be small to simply cover administrative cost or large to cover cost and aid developing nations. Some of the more elaborate plans with complex mixtures of national and international authority may have considerable appeal especially if they are successful in making it appear that the political problem of allocation of resources can be reduced to a mere administrative procedure.[184]

D. U.N. Ownership

The U.N. Ownership proposals are political internationalist approaches. The proponents advocate vesting sovereign rights to exploit the resources of the deep seabed in the United Nations on the legal theory that res communis property belongs to the whole of mankind and should be exploited for the benefit of

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[183] Supra note 37 at 31.

[184] Supra note 37 at 29.

mankind as a whole.[185] This regime has little chance of wide acceptance because it would be a clean break with the traditional approach to solving international problems to establish a new order in the world.[186] The prospect of making the fledgling and unpredictable United Nations or any other international organization a self sufficient super sovereign is remote. Control over the resources of the vast deep seabed, with its relatively unknown potential, could give the regime an economic power base that would significantly effect national autonomy. The "spill over" effect from such a regime could be termed creeping international jurisdiction.

The latest political internationalist proposal was put before the Committee on the Peaceful Uses of the Sea-Bed on March 23, 1971.[187] This plan, although not specifically advocating U.N. ownership, calls for the creation of a new international order with control over all ocean space beyond the jurisdiction of coastal

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[185] 2 Y.B. Int'l L. Comm'n 16 (1953).

[186] Supra note 37 at 52.

[187] Address of Malta's U.N. Ambassador Pardo before the Committee on the Peaceful Uses of the Seabed, March 23, 1971.

nations. The jurisdiction of coastal nations would extend 200 miles seaward from the coast but their jurisdiction in this area would be subject to several limitations. The coastal nations would have to strictly observe the rights of innocent passage and over flight (freedom of transit), prevent pollution, permit freedom of research, and pay a graduated tax on the revenues from the resources exploited within their zone of jurisdiction. The graduated tax would be 25% of the revenues from resources beyond 100 miles from the coast, 50% beyond 150 miles, and 75% beyond 175 miles. Presumably the resources beyond 200 miles will be subject to some revenue sharing, unless they are reserved for the new order, but it is not mentioned. After payment of administrative expenses, 25% of the net revenues would be used for improving the marine environment, 25% for the improvement of the environment of land locked nations, and 50% for enabling developing coastal nations to exploit their own ocean space.

E. International Regime

The International Regime proposals are functional internationalist approaches. The proponents advocate the creation of an international agency which would

record claims and issue licenses for deep seabed resource development to contracting parties in return for a share of the revenues. Under these proposals sovereign rights would not vest in either the coastal nations or the international agency. Only national claims to specific resources from specific areas licensed by the International Regime would be given full faith and credit by contracting parties. The revenues collected by the regime would be used to pay administrative costs and further the interests of mankind as a whole. Under this regime experienced well developed national institutions would control exploitation, subject to agreed regulations, and the international agency would control administrative acts of allocation. The International Regime would protect the rights of the first discoverer but permit developing nations to share in the wealth of deep seabed resources through the international fund, thereby counterbalancing technological inequities.

A regime of this sort is most likely to achieve wide acceptance because it can mix national and international functions and competence so that many of the best qualities of both are incorporated in the regime. The fact that functions and competence can be

interchanged makes the international regime proposal subject to many variations which can aid in compromising various special interests. However, the degree of authority given to the international agency could be a significant factor in determining the limits of national jurisdiction.[188]

The influential developed broad shelf nations would be more amenable to an international regime with minimum authority if the limits of national jurisdiction are to be narrowly defined.[189] Under such a regime national institutions would enforce international regulations concerning seabed resource development and would also determine the regimes share of the revenues. The developed nations interests in insuring freedom of the high sea while at the same time permitting them to take advantage of their superior techological capability would be better served by limiting the international regime's power and extending its area coverage.

The developing land locked, shelf locked and narrow shelf nations, would benefit from a narrow shelf

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[188]Supra note 120 at 19.

[189]Supra note 120 at 21.

interpretation and an international regime with broad powers. Under such a regime developing nations would receive a larger share of the wealth from seabed resource development.[190] The shelf locked and narrow shelf developing nations generally do not have large rich seabed resource areas off their coasts and their territorial sea or the 200 metres depth limitation will cover most if not all of such areas they do have. An international regime with broad powers covering a wider area would collect more revenues that would benefit developing nations through the international fund. Hence, these nations would share in the resource wealth of richer granitic based seabed areas, while giving up little if any jurisdiction over their own granitic based seabed mineral resources.

The developed land locked, shelf locked and narrow shelf nations would be little affected by a narrow shelf interpretation from a territorial standpoint and could benefit from having access to more seabed resources. However, an international regime with broad powers over a large rich resource area could impose regulations regarding access, operations, revenues, etc. that would

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[190] Supra note 120 at 25.

discourage or limit resource development to the detriment of industrialized societies. Clearly, the developing nations of the world far out number the developed and could control the international regime if they voted as a block. Of course they are not likely to vote as a block unless they share a common interest but such common interest could soon emerge. Professor Forrester recently completed a computerized study on the world's ecological crisis which concludes that in spite of all efforts to reduce pollution a population collapse is inevitable unless resource use is cut by 75 percent and population generation by 50 percent.[191] The study also indicates that highly industrialized societies may be self extinguishing from resource exhaustion or international strife over resource rights and pollution.[192]

The problems regarding the establishment of an international regime with either minimum powers or broad powers will have to be compromised. Establishing an effective seabed regime is not merely a question of majority vote, such a regime must be so widely accepted as to be norm-creating or the regime is likely to be

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[191] J. Forrester, World Dynamics (1971).

[192] Id.

unstable and a source of international conflict. If influential developed nations or a sizeable group of developing nations did not consent to the establishment of the regime it could prove unstable and would not serve its purpose.

Perhaps the most comprehensive international regime proposal yet submitted for consideration to the U.N. is the U.S. Working Paper. It declares the International Seabed Area to be the common heritage of mankind. Under this proposal title to the deep seabed, which extends seaward from the 200 metre isobath, is not vested but is open to use by all nations. U.N. membership is not required, only national status and registration are necessary to become a member of this universal organization. The contracting parties would sponsor their nationals in all matters relating to the exploration and exploitation of the deep seabed resources. The contracting parties would enforce their civil and criminal laws as well as the regulations of the International Seabed Resource Authority with respect to their nationals in areas beyond the trusteeship zones.[193] Beyond the zones the sponsoring party would

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[193] U.S. Working Paper, supra note 32 at Art. 11.

also collect license fees, rental fees, and production payments from its nationals in accordance with the agreed regulations. The sponsoring party would retain a percentage (1/3 to 1/2) of such revenues to defray administrative costs, etc. and forward the balance to the Authority.[194] In the trusteeship zones the trustee nation could restrict access to licensees of its choosing but beyond that it has no greater rights in the zone than any other party.[195] However, from a control standpoint the trustee nation would perform all the functions of the sponsoring party with respect to its licensees both foreign and domestic and would retain 1/3 to 1/2 of all revenues collected to defray administrative costs, etc.[196] The Authority, after payment of its administrative expenses, would distribute the net income from revenues to promote the economic advancement of developing nations with a portion being used to promote marine environmental research, safety, conservation, and protection. The Authority would be divided into three branches; the Assembly, the Council,

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[194] Supra note 32 at Annex 3.

[195] Supra note 32 at Art. 27.

[196] Supra note 32 at Art. 27.

and the Tribunal. The Working Paper defines the rights and duties of the Authority and the Contracting Parties in detail, providing for inspections, work plans, area allocation, etc. The Working Paper attaches the Rules and Recommended Practices governing exploration and exploitation as annexes so that financial details can be easily revised in negotiations or subsequently amended by the authority in compliance with pertinent Articles.

From the standpoint of broad objectives the trusteeship zone, extending from the 200 metre isobath to beyond the base of the slope, is most controversial. As was previously discussed such a zone as a compromise between broad and narrow shelf claims based on legal arguments does not seem justified. However, if this is a compromise between the developing nations desire for a regime with broad powers and the developed nations desire for a regime with minimum powers, which is more logical, it should be bargained for and considered on that basis.

A new and interesting proposal of this type would make the international regime applicable to the entire

ocean space.[197] This proposal calls for the establishment of an intermediate zone extending from the seaward edge of the territorial sea to a distance of 200 miles or to a depth of 200 metres whichever is further.[198] Such an intermediate zone would accommodate the interests of coastal nations not only in hydrocarbons and other seabed resources adjacent to their coasts but in fishing, security, conservation and pollution. The plan also provides a method for keeping straits open in anticipation of the recognition of claims to wider territorial seas.[199]

The major difficulty with this plan is the intermediate zone would negate the Continental Shelf Doctrine, which is recognized as customary international law. It is unlikely that such a widely accepted principle would be so quickly discarded especially in view of national commitments and territorial jealousies. The establishment of such a zone would require some coastal

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[197] J. Knauss, Factors Influencing a U.S. Position in a Future Law of the Sea Conference, Law of the Sea Institute, Occasional Paper No. 10 p. 24 (1971).

[198] *Id.*

[199] *Id.*

nations to surrender vested territorial interest over rich seabed resources to an international regime with considerable political and economic power. This international regime's jurisdictional competence would not only be extended outward to richer coastal areas but upward to other resources.

The U.S.S.R. recently submitted a proposed draft treaty to the Committee on the Peaceful Uses of the seabed calling for the creation of an international Seabed Authority to administer the exploration and exploitation of deep seabed resources.[200] The treaty would be applicable to the seabed of the high seas beyond the limits of the continental shelf, which is not defined.[201] In those areas where there is no continental shelf it would apply beyond negotiated boundaries.[202] The proposal leaves open for negotiation other essential questions such as the procedures and mechanics of issuing licenses, collection and

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[200]Draft Treaty of the U.S.S.R. on the International Seabed Area, LS. No. 24058 T-C/R-XVIII, Russian (Aug. 1971).

[201]*Id.* at Art. 2.

[202]*Id.* at Art. 3.

distribution of revenues.[203] The proposal emphasizes prohibiting the use of the area for military purposes,[204] preventing pollution,[205] insuring freedom of navigation, fishing, scientific research, and other reasonable uses of the high seas.[206] The treaty would have universal character yet promote the purposes and principles of the U.N. Charter and use Article 33 of the Charter for peaceful settlement of disputes.[207] The regime proposed would have two organizational branches, the Assembly and the Executive Council. All parties would be members of the Assembly[208] but the Executive Council, which supervises and coordinates implementation of the treaty, would consist of 30 nations, five nations from each of the following five groups of countries: Socialist, Asian, African, Latin American, and all others.[209] The Executive

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[203] *Id*. at Arts. 9 and 14.

[204] *Id*. at Arts 1 and 6.

[205] *Id*. at Art. 11.

[206] *Id*. at Art. 4.

[207] *Id*. at Art. 22.

[208] *Id*. at Art. 18.

[209] *Id*. at Art. 21.

Council clearly favors Socialist influence.

The Russian proposal avoids a definite position on most of the essential and controversial aspects of establishing an international regime by leaving them open to negotiation. The proposal seems more intent on ensuring the regime will be compatible with existing international laws, which are restated or referred to in the proposal.

SUMMARY

A wide shelf interpretation of Article 1 of the Shelf Convention cannot be conclusively supported by the travaux preparatoires, the North Sea Cases, or other methods of judicial interpretation. On the other hand it cannot be denied that a narrow continental shelf is inherently within the provisions of Article 1. Therefore, the intermediate zone concept can hardly be considered a compromise between wide and narrow shelf interpretations of Article 1. This so-called compromise would give undue weight to what at best might be considered an interest in property but cannot be considered property. Narrow shelf proponents, whose claims are supported by Article 1, would yield exclusive property rights to wide shelf proponents, whose claims are unsupported by Article 1 and are apparently contrary to the expectations of the international community. The right of the coastal nation, under the intermediate zone concept, to exclude all but its licensees from exploitation of seabed resources of its submerged land mass or to a distance of 200 miles from its coast would

be a property right, but the conditional right of the coastal nation created by the exploitability clause is a mere interest in an undefined area. Such a compromise would clearly be one sided and an unnecessary concession to wide shelf proponents.

Not only is the narrow shelf interpretation conclusively within the definition of Article 1 it is objectively preferable to the wide shelf interpretation. The wider the limits of national jurisdiction the greater the inequity for inland and shelf locked nations and the more disporportionate the territorial gain of isolated islands. A narrow shelf interpretation would help preserve international freedoms by halting creeping national jurisdiction. The narrow shelf interepretation would be more compatible with the goals of the deep seabed regime.

Conceding that Article 1 presently defines a narrow continental shelf, the difficulty with Article 1 arises from the fact that it does not establish finite limits on national jurisdiction. Therefore, when technological advances permit exploitation in greater depths increasing demands for seabed resources will lead to expanding national claims, unless international machinery exists that will permit exploitation without

the necessity for expanding national jurisdiction. Consequently, it is essential that finite limits of national jurisdiction be determined and a deep seabed regime be established to administer exploitation of seabed resources beyond those limits in order to prevent boundary disputes and international conflicts.

The best approach to the problem of adopting a deep seabed regime treaty is to isolate the complex question of administration from the question of boundaries. Preparing a draft treaty for a deep seabed regime will require lengthy preparations and negotiations and ultimately the treaty might not achieve wide acceptance. This would create serious problems because every year that passes the area beyond the limits of national jurisdiction shrinks. Once national interests have vested in an area considered res communis and economic, military,or political commitments have been made,divestiture is exceedingly difficult. Therefore, a prior determination of the limits of national jurisdiction would serve to simplify and expedite negotiations for a regime, while at the same time ensuring international freedoms are undiminished.

The question of boundaries is considered interdependent with the regime question for the purpose of

negotiating a multilateral treaty but the fact remains that the limits of national jurisdiction can be determined by means other than a multilateral treaty. The limits of national jurisdiction are already defined by Article 1 of the Shelf Convention, the definition is merely imprecise because of the open ended exploitability clause. This problem can be dealt with by an authoritative decision interpreting Article 1 in accordance with community criteria.

A widely adopted U.N. resolution interpreting Article 1 in specific terms would evidence the expectations of the international community and decisively affect the limits of national jurisdiction. The difficulty with this approach lies in the belief that many coastal nations would not support any effort to limit national jurisdiction without being in a position to bargain away their assumed rights in return for the type of seabed regime that would serve their particular interests.

Regardless of opposition by some nations the U.N. should promptly seek to adopt a declaratory resolution formulated in legal terms and stating its clear intent to interpret Article 1 of the Shelf Convention as limiting national jurisdiction to the depth of the

deepest geological continental shelf edge, approximately 400 metres, or as terminating the contingent future interest of coastal nations in seabed resources in depths beyond 200 metres. Such a resolution, under existing circumstances, would decisively affect other authoritative decision makers such as the I.C.J. Of course there are those who will argue that a U.N. resolution is not binding and point to the Moritorium Resolution. The answer to that argument is, not all resolutions are intended to have the effect of law and the Moritorium Resolution was not formulated in legal terms interpreting Article 1 or declaring specific limits of national jurisdiction.

The fact that there is a Conference on the Law of the Sea scheduled for 1973 might make action by U.N. resolution appear precipitous and could make it difficult to get the resolution before the General Assembly. Those opposing such a resolution would seek to have the proposed action on the resolution referred to the Seabed Committee where it could be delayed indefinitely. Nonetheless, a concerted effort should be made to adopt such a resolution because, not only would such action facilitate negotiations on a seabed regime treaty but should the conference fail to negotiate a treaty it

could limit further expansion of national jurisdiction over seabed resources.

In attempting to determine what regime is most likely to be adopted to administer deep seabed resource exploitation primary consideration has been given to regimes that minimize geographical and technological inequities in the belief that other developed real world interests are embodied in existing international law. New interests necessitate new laws but established interests are reflected in existing international law. This is the most important reason why whatever regime is adopted should be, so far as possible, compatible with the existing framework of international law.

Many types and variations of deep seabed regimes can be conceived depending on the interests to be served and the degree of national or international control to be exercised under the regime and all such proposed regimes will be given careful consideration by the international community. But at present the regime with the best chance of wide acceptance apparently is an international regime similar to the U.S. Working Paper proposal, with or without the intermediate zone. If the intermediate zone is adopted it should be for the purpose of balancing national and

international competence not to compromise wide and narrow shelf interpretations of Article 1. The international regime proposed by the U.S. Working Paper is compatible with the existing framework of international law. It would ensure access to the resources of the deep seabed to all nations on reasonable terms. It would diminish the effects of geographic and technological inequalities among nations through the international fund, which would also serve to narrow the gap of wealth and knowledge between developed and developing nations. It would reduce the potential for conflict by allocating deep seabed resources, arbitrating disputes, and implementing international agreed regulations. It could mix national and international competence to achieve many of the advantages of both types of authority. It would effectively limit creeping national jurisdiction. It is flexible and would permit wide ranging compromises of special interest.

The 1973 Conference on the Law of the Sea hopefully will result in the adoption of a deep seabed regime, and other laws to accommodate the conflicting uses of the marine environment, which will encourage maximum economic use of the resources of the seabed

by all nations on a reasonable and equitable basis, minimizing conflicts, reducing the gap of wealth and knowledge between nations, and halting creeping national jurisdiction. This will not be easy because determining the type of regime and the limits of national jurisdiction necessary to accomplish these goals is not just a matter of majority vote. There must be overwhelming support for both, if the laws are to be stable and effective and such support is possible only if avarice and suspicion exaggerated by nationalism can be overcome by objectivity, knowledge, and sincerity of purpose.

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