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RECENT DECISION OF THE COMPTROLLER GENERAL

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PAY AND ALLOWANCES—Deductions of civilian pay earned in instances where the Board for Correction of Naval Records (BCNR) corrects a service member's record to show active duty instead of discharge. Deductions of civilian pay earned during the period covered by the BCNR action must be in the gross amount vice the net amount.

● Pursuant to a decision of the BCNR, a member's records were corrected to indicate that he was retained on active duty under valid extensions of enlistment until 9 June 1969 and then placed in the Fleet Marine Corps Reserve instead of being discharged under honorable conditions by reason of unfitness on 18 September 1967. The BCNR also recommended that the Department of the Navy pay the member all military pay lawfully found to be due. The member's civilian earnings for the period of time from 18 September 1967 to 9 June 1969, grossed $10,186, and after tax deductions, his net earnings were $6,943.

Reference was made to Comptroller General decision B-160800 of April 2, 1970, and 48 Comp. Gen. 580 (1969), stating that back pay and allowances found to be due a member or former service member by reason of a correction of his military or naval records pursuant to 10 U.S.C. 1552, should be subject to a deduction of earnings received from civilian employment during a corresponding period. Reference was also made to 37 C.F.R. 723.10(c)(1) which directs that, in the settlement of claims by the Department of the Navy in cases arising under 10 U.S.C. 1552, earnings received by a member from civilian employment during any period for which active duty pay and allowances are payable will be deducted from the settlement. The question presented to the Comptroller General was whether, under pertinent decisions and regulations, the gross or net amount of civilian earnings should be deducted from the gross amount of military pay and allowances due the service member. The difference between the gross and net civilian earnings consisted entirely of federal and state taxes, aggregating $3,243.

The Comptroller General asserted that to limit the deductions from the member's back pay and allowances to civilian earnings after taxes would be tantamount to refunding the income and other taxes concerned, and the question of whether those taxes, or any part thereof, should be refunded is a matter under the cognizance of tax officials. Accordingly, the Comptroller General determined that the regulations require the deduction of the gross civilian earnings of $10,186 from military pay due the service member as a result of the BCNR action. (Comp. Gen. Decision B-170395 of September 30, 1970.)

INTRODUCTION TO THE 1971 ISSUE ON LAW OF THE SEA

CAPTAIN JOHN R. BROCK, JAGC, USN

Assistant Judge Advocate General of the Navy
(Civil Law)

THERE IS A cry in the international community for public order, yet many nations consider it a right to make whatever unilateral claims into the high seas area that may for the moment meet a domestic political goal. The common use of the seas is being endangered by the continued exaggerated unilateral national claims to expansive ocean areas.

World public order cannot prevail in this atmosphere where many nations are making their own rules concerning claims to large areas of the high seas. Generally these claims are expansive and without benefit of law or accepted precedent.

On the other side of the coin, in law of the sea matters there must also be a balancing of the general world community interest against the legitimate needs of many nations, including coastal, landlocked, developing and maritime nations.

This issue of the JAG Journal is dedicated to a review of efforts toward solutions to these problems through international treaty arrangements which will be designed to formulate and codify international law so as to achieve fair and reasonable balance among those needs and interests in areas traditionally recognized as high seas.

Current efforts are moving forward for solutions to these problems by a series of proposed conventions where hopefully there may be agreement in codified form on the following items:

a. Breadth of territorial sea and questions of international straits and fisheries
b. Continental shelf boundary and seabed rights including protection of the marine environment
c. Limitations on emplacing weapons of mass destruction on the seabeds

The first two topics will be considered in detail by members of the International Law Division in this issue. An article on the third is planned for a later edition. These articles will be presented against the following background.

Perhaps the number one priority of world community interest in the law of the sea is arriving at a definite demarcation of a breadth of the territorial sea coupled with an agreement for guaranteed rights of transit through straits. This is of paramount urgency in order to terminate national jurisdictional claims into the high seas areas.

The continental shelf and the seabed areas must be further defined and rules agreed upon to assure the recovery of the natural resources from this last potential source to which the increasing world population can look for support.

The general understanding concerning emplantment of nuclear weapons or other weapons of mass destruction on the seabed must be carefully considered in relation to the other enumerated matters stated above.

Finally, the word, ecology, quickly became popular the world over with the awakening awareness of the urgency in pollution control. Unfortunately at least one nation has been moved by this emotion charged concept to assert control of a large area of the Arctic. Canada

has made broad unilateral claims in the Arctic area which are premised upon ecological protection. International pollution control will be discussed in detail in one of the articles.

A mark of the times so far as individual state action is concerned in the law of the sea was clearly reflected at the March 1970 meeting of the Canadian-United States Interparliamentary Group. Senate Document 91-105 reports the events of this meeting. It is stated in part at page 8 of this document as follows:

> . . . Canadian delegates noted that the Canadian Government had for many years laid claim not only to the islands but also to the waters of the Arctic Archipelago. U.S. delegates expressed the view that they anticipated no difficulty in reaching agreement between the two Governments on the measures necessary for controlling the danger of pollution. But they did not expect the U.S. Government to accede to arrangements which would involve U.S. recognition of Canadian claims to all the waters of the Arctic Archipelago. The concern was not over U.S. access to arctic waters, but fear of the implications for freedom of passage in other confined waters. In this exchange the Canadian side stressed the unique character of arctic waters because of the fact that ice cover prevents free movement, with a consequent need for special navigational aids and icebreaker support.
>
> It was recognized on both sides that regulations to control pollution must be internationally accepted. U.S. delegates emphasized the importance of proceeding by international agreement rather than by unilateral Canadian action. Several members of both delegations thought that, while initial contacts might be bilateral, it would be important to convene a conference of interested governments to work out regulations which would gain international acceptance.

In an effort to discourage extravagant unilateral actions in the high seas areas as well as the seabed areas, the United States has made a far-reaching proposal in the form of a statement of U.S. policy for the seabeds issued on May 23 of this year by the President of the United States. The President stated it was his proposal "that all nations adopt as soon as possible a treaty under which they would renounce all national claims over the natural resources of the seabed beyond the point where the high seas reach a depth of 200 meters and would agree to regard these resources as the common heritage of mankind."

The Presidential proposal in the form of a draft convention was presented by the United States at the August 1970 seabeds meeting in Geneva. The discussions on this draft will be carried over for further study at several preliminary meetings called by the United Nations in 1971 and 1972.

In the Saturday Review of September 26, 1970 professor Clark M. Eichelberger summed up the progress and reaction at the Geneva meeting as follows:

> What was the reaction of other delegates to the U.S. plan?
>
> Few would accept it without change. Indeed, the U.S. delegation has made it clear that the draft was a working paper to be changed after suggestions from other states. Basically, however, there was deep appreciation for the initiative shown by the United States and wide recognition that the plan will form the basis of a regime for the sea.

Not to be confused with the international seabeds area proposal of the President (May 23 policy statement), is the status of the long standing negotiations concerning seabed arms control. It has long been the position of the United States that the resolution of the United Nations creating the Seabeds Committee and reserving the area beyond national jurisdiction for "peaceful purposes" is not an authorization for the Seabeds Committee to engage in detailed disarmament discussions. The United States and the Soviets have consistently said that the complex nature of disarmament should be handled in a specialized forum. This position has been widely accepted internationally. In light of this, it is wise to emphasize that the issue of seabeds disarmament is separate and apart from the general question of the international seabed area, the President's ocean proposal, and any subsequent U.S. implementation of the Presidential proposal.

The unwarranted unilateral actions of some nations make it incumbent on the world community to collectively agree on all of these matters in the common interest, balancing the "freedom of the seas" interests against legitimate coastal state interests. Surely the next few years will see great achievement in international agreements in these several areas concerning law of the sea.

The discussions which follow are dedicated to increasing the general understanding, and that of naval personnel in particular, of these recent legal developments which are so important to the environment in which our Navy must operate. While there is some duplication of historical material in these discussions, it is essential to the full understanding of each topic that its development include relevant historical background.

TERRITORIAL SEA AGREEMENT—

KEY TO PROGRESS IN THE LAW OF THE SEA

COMMANDER WILLIAM R. PALMER, JAGC, USN*

Although the concept of the territorial sea has long been recognized in international law, there has been a failure in the world community to reach agreement on the breadth of the territorial sea. Commander Palmer traces the history of the territorial sea breadth question and suggests there is an urgent need to resolve it at a new law of the sea conference. He concludes that while the breadth of the territorial sea is only one of several problems which should be addressed by the conference, its resolution is perhaps the most pressing and could result in an expeditious settlement of other issues.

FROM ANTIQUITY, man has utilized the oceans for navigation, fishing, trade, and as a base of military power. Over many centuries a significant body of rules evolved to regulate such traditional uses. Recognition of the common right of all men to the free use of the sea has been traced to the laws of the Roman Empire and was probably first codified in the sixth century in the Code of Justinian.[1] These liberal views were not apt to be refuted, in light of Roman domination of the known world, and the fact that uses of the seas were extremely limited.

With the emergence of the nation-state, jurists attempted to apply the prescriptions of territorial sovereignty to the sea. Numerous theories were formulated during medieval times to support assertions of extensive authority over large ocean areas by the rising sea powers.[2] Such claims of total sovereignty over the oceans did not prove viable and were once again replaced by the concept of freedom of the seas expounded in 1609 by Hugo Grotius. The proponents of the modern doctrine of the freedom of the high seas were a far cry from early Roman jurists who had been dealing with a theoretical concept. Grotius and his contemporaries were advocates, motivated by practical considerations. Grotius' classic "Mare Liberum" was written to uphold Dutch navigation rights in the Indies in the face of Portugese claims of monopolistic ocean sovereignty. In it he stated: ". . . what ever therefore cannot be . . . seized or enclosed is incapable of being made a subject of property. The vagrant waters of the ocean are thus necessarily free. . . ." [3]

The attempt to identify the major reasons for international acceptance of the shared use doctrine embodied in freedom of the sea has long fascinated scholars of public international law.[4] No attempt will be made to enter the lists of this scholarly debate. Suffice it to say that this history of trial and error evolution which reaffirmed the doctrine of freedom of the high seas

*Commander Palmer is currently serving as Head of the Law of the Sea Branch, International Law Division, Office of the Judge Advocate General. He holds an A.B. Degree in Political Science from the University of Illinois, an LL.B. Degree from the University of Illinois College of Law, and a Master of Laws Degree in Public International Law from The George Washington University. Commander Palmer is admitted to practice before the Bar of the State of Illinois and the U.S. Court of Military Appeals.

1. Fenn, *Justinian and the Freedom of the Sea*, 19 A.J.I.L. 716, 716–20 (1925).
2. Swarztrauber, *The Three Mile Limit of Territorial Seas: A Brief History*, 20–37 (1970) (hereafter cited at Swarztrauber). A brief history of ocean claims by various maritime nations during the medieval period is set forth at the above noted pages.
3. Quoted in Colombos, *The International Law of the Sea*, 62–63 (6th rev. ed. 1967).
4. For example *see* the critical discussion of the basic reasoning of Grotius in his enunciation of the principle of freedom of the high seas and the substitution of an "international highway" theory as a basis for the same conclusion. I Oppenheim, *International Law* 593–94 (8th ed. Lauterpacht 1955).

cannot be ignored in attempts to find solutions for current unresolved law of the sea questions.

A logical corollary to a concept of general freedom of the high seas was the development of a complementary concept of "territorial seas." A concept of territoriality of adjacent seas emerged first in the writings of the twelfth century Glossators. The reference to "territorial seas" as a recognized area of coastal state jurisdiction seems to have been clearly formulated and come into common usage around 1600.[5] While the concept of territorial waters was thus early developed, international agreement as to the breadth of such a marginal belt continues to be one of the persistent unresolved problems in the law of the sea.

Many theories have been put forth to rationalize varying widths for territorial sea claims. These range from ancient territorial sea claims extending offshore "a stones throw" [6] to the recent claim of Brazil to a 200-mile territorial sea.[7] Included in any historical summary would certainly be the familiar "cannon shot rule" as well as other theories.[8]

Whatever its historical origins, there is no doubt that the three-mile limit for territorial seas began its ascendency in the late eighteenth century.[9] Notable in the early development of the three-mile territorial sea limit was the initial cautious adherence to that limit by the United States. Secretary of State Jefferson, in writing to the British Minister in 1793, identified the U.S. claim ". . . for the present . . . [as] three . . . miles from the seashores." [10] The three-mile territorial sea developed into a generally recognized limit in the following 130 years, due in large part to its being consistently championed by the United States and Great Britain. Indeed, as Professor Jessup observed at the end of the first quarter of the twentieth century: "Upon a consideration of all the evidence, therefore, the present writer is of the opinion that the three-mile limit is today an established rule of international law." [11]

Prior to World War II, three miles was still the limit acknowledged by a majority of nations. However, the question of maximum permissible breadth and the rights of coastal states to establish such limits was becoming a matter of international debate. An indication of the erosion of unanimity was the failure of the Hague Conference of 1930 to reach agreement on the maximum breadth of territorial waters. This international law codification conference clearly brought into focus growing international questions as to the three-mile limit of territorial waters.[12]

Certain pronouncements were made by neutral nations immediately prior to the outbreak of World War II which were designed to exclude hostile acts by belligerents within wide high seas areas off their coasts.[13] In addition, the United States after entry into the war declared several extensive Maritime Control Areas around strategic portions of the U.S. continental coast, the Panama Canal, and of Alaska.[14] These actions were considered by some as contributing to the decline of the three-mile territorial sea limit.[15] The significance of these extraordinary war time acts to the international status of the three-mile territorial sea limit is open to question, particularly in view of the fact that the Maritime Control Areas were discontinued by the United States in 1945 and 1946.[16]

One unilateral act by the United States following the Second World War clearly impacted dramatically on the general law of the sea and the stability of the breadth of the territorial sea in particular. This was the well known Truman Proclamation on the continental shelf. This pronouncement was promulgated in 1945 together with a somewhat less widely noted companion proclamation on conservation policies of

5. Fenn, *Origins of the Theory of Territorial Waters*, 20 A.J.I.L. 465, 481–82 (1926); *See also* Swarztrauber, 46–49.
6. Swarztrauber, 98–99.
7. The Brazilian Decree Law promulgated on March 26, 1970 is probably the most comprehensive pronouncement of offshore sovereignty of any of the Latin American claims. Article 1 states: "The territorial sea of Brazil encompasses a belt 200 nautical miles in breadth, measured from the low-water line of the Brazilian continental and insular coast, adopted with reference to the Brazilian nautical charts." Department of State Division of Language Services translation, doc. LS No. 1577 R-XX/R-XVII.)
8. Swarztrauber, Chapters 3, 4, and 5, 46–99. In these three chapters the author discusses the history and evolution of the cannon shot rule, the line of sight doctrine, and the marine league.
9. *See generally*, Swarztauber, Chapter VI; I Oppenheim, *International Law* 490 (8th ed. Lauterpacht 1955).
10. I Moore's International Law Digest 702–08 (1906).
11. Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* 66 (1927).
12. Reeves, *The Codification of the Law of Territorial Waters*, 24 A.J.I.L. 486 (1930).
13. Declaration of Panama, *Laws and Regulations on the Regime of the High Seas* 44–46, U.N. Legislative Series, ST/LEG/SER.B/I Jan. 1951 (hereafter cited as Laws and Regulations on the Regime of the High Seas).
14. The Maritime Control Areas are listed and described in U.S. Naval War College, *International Law Documents*, 169–76 (1948–49).
15. Swarztrauber 281–88.
16. Naval War College *International Law Documents* supra note 14 at 169.

the United States with respect to coastal interests in certain high seas fisheries.[17]

An examination of the specific language of the Truman Proclamation clearly shows that its drafters intended it to be a highly specialized and limited jurisdictional claim. The proclamation extends United States jurisdiction and control only to: ". . . 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. . . ." The proclamation was not intended as a general extension of territorial sovereignty since it provided that: "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." Any intent to extend the U.S. territorial sea was specifically negated in the Department of State press release which accompanied the proclamation.[18]

No protests were made by other governments to the Truman Proclamation on the continental shelf. A scant thirteen years later the essential elements of the United States proclamation were embodied in the 1958 Geneva Convention on the Continental Shelf.[19]

In fairness to the drafters of the Truman Proclamation, it must be said that the adverse impact on continued acceptance of the three-mile limit for the territorial sea did not result from other nations exactly imitating the United States action. Rather, the U.S. proclamation served as a catalyst for extensive offshore claims which made little or no effort to restrict the scope of the sovereign rights claimed. One year after the Truman Proclamation the Government of Argentina, noting the U.S. and subsequent Mexican continental shelf pronouncements, passed a decree which declared that the ". . . Argentine *epicontinental sea* and continental shelf are subject to the sovereign power of the nation. . . ." (Emphasis added.)[20] The following year witnessed the first of the now well-known 200-mile claims. In June of 1947 Chile promulgated a Presidential Declaration which extended "Protection and control . . . over all the seas contained within the perimeter formed by the coast and the mathematical parallel projected into the sea at a distance of 200 nautical miles from Chilean territory."[21] Within the next five years three more Latin American nations joined the "200-mile club." Such claims seem to have been motivated initially by the desire to extend exclusive control over offshore fisheries. The 200-mile distance would generally encompass the fish rich Humbolt Current.[22] The language used in the various decrees was not precise. Often it utilized terms which left it unclear as to the exact extent of control being asserted.[23] However, insofar as these decrees attempted to declare jurisdiction in some fashion over the superjacent water column, such claims exceeded the limited continental shelf claim of the Truman Proclamation.

By 1952 a broader juridical basis for such claims began to crystallize. At the First Tripartite Conference, Chile, Ecuador, and Peru formulated the Declaration of Santiago on the Maritime Zone which contained the following statement of maritime policy:

> The Governments of Chile, Ecuador, and Peru therefore proclaim as a principle of their international maritime policy that each of them possesses sole sovereignty and jurisdiction over the area of sea adjacent to the coast of its own country and extending not less than 200 nautical miles from the said coast.[24]

The 200-mile claims have consistently been the subject of diplomatic protest by the United States and most other maritime nations. However, this did not prevent seizures of U.S. tuna boats off the west coast of South America by Peru and Ecuador.[25] The United States has been unable, either domestically[26] or internation-

17. Presidential Proclamation No. 2667 on the continental shelf, 59 Stat. 884; 10 Fed. Reg. 12303 (1945). (This proclamation will hereafter be referred to as the Truman Proclamation.); Presidential Proclamation 2668 on fisheries conservation, 59 Stat. 885; 10 Fed. Reg. 12304 (1945).
18. 13 *Dep't State Bull.* 485 (1945).
19. 15 U.S.T. 471, T.I.A.S. 5578 (1964).
20. Decree No. 14,708, Laws and Regulations on the Regime of the High Seas 4–5.
21. Presidential Decree Concerning the Continental Shelf, 23 June 1947, Laws and Regulations on the Regime of the High Seas 6–7.
22. Hull, *The Bountiful Sea*, 88–89 (1964).
23. Extensions of offshore jurisdiction were made in the following years: Peru (1947), Costa Rica (1949), and El Salvador (1950). Country laws proclaiming such offshore jurisdiction may be found in Laws and Regulations on the Regime of the High Seas, at the following pages: Peru 16, Costa Rica 8–10, and El Salvador 300.
24. Whiteman, 4 *Digest of International Law*, 1089–90 (1965).
25. For a brief description of tuna boat seizures by Peru, *see* Wolff, *Peruvian-United States Relations Over Maritime Fishing:* 1945–1969 8–9, Law of the Sea Institute Univ. of R.I. Occasional Paper No. 4 (March 1970).
26. The first formal congressional reaction to such seizures was passage in 1954 of the Fishermen's Protective Act, 22 U.S.C. 1971–76 (7954). This act called for the Secretary of State to take action to obtain the release of seized vessels and crewmen, provided for reimbursement of boat owners for any fine paid, and called for the Secretary of State to ". . . take such action as he may deem appropriate to make and collect on claims against a foreign country for amounts expended by the United States . . . because of the seizure of a United States vessel. . . ." This act was amended in 1968 by what is commonly referred to as the Pelly Amendment, 22 U.S.C. 1973, 1975, 1977 (Supp. V. 1970) amending 22 U.S.C. 1971–1976 (1954). This amendment expanded owner reimbursement provisions and repeated the re-

ally,[27] to adequately resolve the problems raised by such seizures. The abrasive effect of this problem on U.S./Latin American relations is a compelling current example of the potential for confrontation inherent in the proliferation of extravagant offshore jurisdictional claims.

Primary proponents of the 200-mile claims now assert that these concepts have evolved from maritime policy into basic principles of the law of the sea. A concentrated effort is presently being made by its advocates to encourage wider acceptance of this position. In the recent Declaration of Montevideo on the Law of the Sea, the signatory states declared as a basic principle of the law of the sea that coastal states have:

> The right to delimit their maritime sovereignty and jurisdiction in conformity with their own geographic and geological characteristics and consonant with factors that condition the existence of marine resources and the need for national exploitation; [28]

Similar language is contained in the declaration produced by the Lima Conference on the Law of the Sea held in August of 1970.[29]

It is difficult to envision any logical outer limit of coastal state competence in claiming offshore jurisdiction under these broad principles. Assuming that the specifically enumerated criteria have some inherent maximum limitation, the ". . . need for national exploitation" is an open ended subjective test.

During its early development, the idea of total coastal state competence to declare the limits of national offshore jurisdiction was taken seriously by only a handful of Latin American nations. However, the concept that the coastal state has unlimited power to make such claims is an easily understood theory which appears to accommodate most national goals and policies. The proponents of this doctrine are now actively seeking to promote its acceptance among many of the developing nations of the world. To date, this inherently dangerous theory of unilateral coastal state competence has not managed to gain substantial adherents anywhere other than in Latin America.[30] Little comfort can be taken from this fact nor does it allow those concerned with achieving harmony and equity in the law of the sea the luxury of adopting a wait and see attitude. Two recent events preclude taking this stance. The 200-mile territorial sea decree of Brazil in March 1970, has been noted.[31] This action by the largest and potentially most powerful nation on the South American continent places great pressure on other moderate Latin American states to adhere to the 200-mile concept, or at least to abstain from taking a contrary international position.

A second event of possibly greater significance was the recent passage by Canada of certain law of the sea legislation. This legislation claimed a twelve-mile territorial sea, recited competence to establish a 100-mile "pollution control zone" in the waters surrounding all Canadian lands, including islands, above 60 degrees north latitude, and authorized the drawing of extensive "fisheries closing lines" primarily in the Gulf of St. Lawrence and the Bay of Fundy.[32] This assertion of offshore competence is not limited so as to exclude control over superjacent waters as was the Truman Proclamation. It asserts the right of Canada to unilaterally regulate many high seas activities—including navigation. This is the first such claim by a major maritime nation in modern times.

Simultaneously with announcement of this legislation, Canada entered a reservation to the compulsory jurisdiction of the International Court of Justice with regard to:

> disputes . . . concerning jurisdiction or rights claimed . . . by Canada in respect of the conservation, management or exploitation of the living resources of

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26—Con'd
quirement for the U.S. to make a claim to recover compensatory payments made under the act. However, it added the provision that if the foreign country failed or refused to make payment in full within 120 days after the U.S. claim, ". . . the Secretary of State shall withhold . . . an amount equal to such unpaid claim from any funds programmed . . . for assistance to the government of such country. . . ." Similar provisions for withholding aid or limiting military sales to countries seizing U.S. vessels have been inserted as amendments in various Foreign Assistance and Foreign Military Sales Acts. These latter constraints on sales of military equipment have been recently applied against Peru. However, overall foreign policy considerations have precluded extensive use of these statutory powers and they have not been effective in resolving the situation. *See also* the discussion of U.S. congressional reaction to fishing vessel seizures in the article by Wolff, *id.* at 9–13.

27. The U.S. met with the governments of Chile, Ecuador and Peru in September of 1955 in an attempt to resolve the fishing vessel seizure problem. *See* the article by Wolff, *supra* note 25 at 14. This conference did not work out the *modus vivendi* hoped for by the U.S. The United States met with these three nations again in September of 1969 and 1970 in Buenos Aires, Argentina, but these recent discussions also failed to produce any acceptable compromise agreement.

28. 9 *Int'l Legal Mats.*, 1081–83 (Sept. 1970). This conference was attended by numerous nations as participants or observers. However, the signers of the Law of the Sea Declaration were limited to the following states all of which presently have some type of 200 mile claim: Argentina, Brazil, Chile, Ecuador, El Salvador, Panama, Peru, Nicaragua, and Uruguay.

29. U.N. Doc. A/AC.138/28 of 14 Aug. 1970.

30. There is some indication that developing nations of Africa are becoming more acutely aware of the Latin American claims. The isolated and unique 130 mile territorial sea claim of Guinea made in 1964 (Presidential Decree No. 224 of 1 July 1964) has now been joined by the extension of territorial waters from 12 to 25 miles by Gabon (Council of Ministers Decree of 12 Aug. 1970).

31. *Supra* note 7.

32. 9 *Int'l Legal Mats.*, 543–54 (May 1970).

> the sea, or . . . the prevention or control of pollution or contamination of the marine environment in marine areas adjacent to the coast of Canada.[33]

Thus, with regard to the pollution control and fisheries aspects of the legislation, Canada has precluded a binding international adjudication as to the legality of her actions.

The Canadian Government has stated with regard to the pollution control legislation that it is based on ". . . the overriding right of self-defense of coastal states to protect themselves against grave threats to their environment." In Canada's view, traditional principles of international law which are based primarily on ensuring freedom of navigation to shipping states now engaged in large scale oil transportation by sea ". . . are of little or no relevance . . . if they can be cited as precluding action by a coastal state to protect [the] environment." [34]

The Canadian Prime Minister indicated with regard to this legislation that the Canadian Parliament may authorize measures to ensure that danger to the Arctic ecology is prevented. Prime Minister Trudeau stated further that ". . . there is no international . . . law applying to the Arctic seas . . . we are prepared to help it develop by taking steps on our own. . . . We just want to make sure that the development is compatible with our interests as a sovereign nation, and our duty to humanity to preserve the Arctic against pollution." [35] The stated legal rationale for the Canadian action is uncomfortably reminiscent of early Latin American justification for 200-mile jurisdictional claims.

Faced with ever increasing unilateral coastal state claims of offshore jurisdiction, the need for affirmative action seems obvious. International agreement on the territorial sea breadth is the logical starting point for such efforts. A brief examination of past multilateral attempts to resolve this problem will illustrate that it is not without difficulty.

The 1930 Hague Convention was the first modern international convention which attempted to resolve the question of the breadth of the territorial sea. The diversity of national views at the Hague was so great that no proposal on territorial sea width ever came to a vote.[36] Later concentrated efforts to establish the maximum permissible breadth of the territorial sea were made at the 1958 and 1960 Geneva Conferences on the Law of the Sea.

The 1958 Law of the Sea Conference was preceded by consideration of various law of the sea issues by the International Law Commission over a period of almost nine years.[37] The preparatory work of the International Law Commission cannot be underestimated. Yet, certain facts must be remembered. This distinguished group of jurists was a standing organization of the United Nations. As such, the Commission was charged with many other responsibilities in addition to law of the sea matters. During the extensive preparatory period, members of the Commission worked individually on specific law of the sea items which necessarily led to a certain lack of continuity in consideration of such matters. In addition, there appeared to be a lack of coordination between those working on one aspect of the law of the sea and individuals concerned with other related issues. Finally, the project was undertaken primarily as an exercise in legal scholarship so that strongly held political positions of governments may not have been adequately reflected in the Commission's work. All of these factors appear to have reduced the effectiveness of the work of the Commission.[38]

The General Assembly of the United Nations in February of 1957 called for a conference of its members to

> . . . examine the law of the sea, taking into account not only of the legal but also of the technical, biological, economic, and political aspects of the program, and to embody the results of its work in one or more international conventions. . . .

The conference was convened on February 24, 1958 and adjourned on April 28, 1958.[39]

There was a diversity of national positions on each of the topics addressed by the Conference. The issue of the breadth of the territorial sea was early identified as a primary focal point for political division. The Soviet Union was attempting to gain international recognition for her long-standing twelve-mile claim, while the U.S. was still championing the three-mile limit. There were significant blocs of nations aligned

33. *Id.* at 598–99.
34. Summary of Canadian Note of April 16 to the United States, *supra* note 32 at 610–11.
35. Canadian Prime Minister's Remarks on the Proposed Legislation, *supra* note 32, 600 at 601–08.
36. *Supra* note 12 at 492.
37. Swarztrauber, 379–88. The author includes a well documented description of the work of the International Law Commission as it related to the issue of the territorial sea.
38. McDougal and Burke, *The Public Order of the Oceans* 526–28 (1962) (hereafter cited as McDougal and Burke).
39. Dean, *The Geneva Conference on the Law of the Sea: What was Accomplished*, 52 A.J.I.L. 607 (1958). The author was the chairman of the U.S. Delegation at both the 1958 and 1960 Geneva Conferences on the Law of the Sea.

with the positions of the two super powers. The Arab states bordering the Gulf of Aqaba, still remembering recent hostilities with Israel, cast their vote with the Communist Bloc. Some of the newly emerging nations voted for broadened territorial sea limits as an anti-colonial gesture. Aligned with the U.S. were most of the NATO nations—Canada and Iceland being the exceptions—plus certain other traditionally Western leaning countries. The Latin American 200-mile supporters were a generally isolated minority. The proposal which had the greatest support, although well short of the necessary two-thirds majority, was the United States sponsored compromise proposal of a six-mile territorial sea with the right of the coastal state to regulate fishing for an additional six miles, subject to certain historical fishing rights of foreign nations in such waters. Impressive progress was made in other areas such as the codification of customary international law in the High Seas Convention, and the enunciation of the doctrine of the continental shelf in the Convention on the Continental Shelf. Yet, no agreement was reached on the critical issue of the breadth of the territorial sea.[40]

In light of the relatively narrow failure to agree on a territorial sea breadth in 1958, it was not surprising that there was significant international pressure for a further effort at an early date. The General Assembly acted quickly and called for another conference in early 1960. The conference was convened in March of that year. Its mandate was much more limited than the 1958 conference. It was to deal with the two related issues of the width of the territorial sea and fishery zone limits.[41]

With the more limited agenda, it early became apparent that the decisions at the 1960 conference would polarize, even more clearly than in 1958, around a power struggle between the United States and the Soviet Union. Swirling and eddying around this basic dichotomy were many regional considerations, and emotional issues of great importance to particular states. However, only in the sense that these factors influenced a nation to opt for the basic U.S. preference for three miles or the Soviet desire for twelve miles were such considerations determinative of the outcome of the conference.[42]

A nearly successful effort at the 1960 conference was the joint U.S./Canadian proposal. Essentially a compromise, the proposal called for a six-mile territorial sea and a six-mile fishing zone within which historical fishing rights would be respected for an agreed number of years. This proposal differed from the one offered by the United States at the 1958 conference in that it provided for fisheries within twelve miles of the coast to be ultimately under the exclusive control of the coastal state. This modification allowed Canada to co-sponsor this proposal and gained support for it among several other nations primarily concerned with obtaining recognition of exclusive coastal state control of fishing out to twelve miles. In a dramatic finale to the 1960 conference this proposal was defeated by a single vote.[43]

Several points should be noted following the 1958 and 1960 conferences. The major single reason for failure to agree on a breadth for the territorial sea was the clearly opposed positions of the Soviet Union and the United States. The Latin American 200-mile claims were twice put forth, but gained no greater acceptance. There were numerous other special interest situations claimed by coastal states. Major substantive arguments put forth in favor of the twelve-mile limit were the need for exclusive coastal state control of offshore fisheries and the greater measure of security which that limit would afford to coastal states from the major naval powers. Because of limited technological knowledge, questions concerning the continental shelf, beyond codification of the doctrine, were largely still theoretical. This allowed a higher degree of accord without significant political pressures blocking progress. Neither the three-mile nor twelve-mile limits for territorial seas were confirmed. Leaving this question open proved to be an invitation for coastal states to solve special interest problems by the simple expedient of extending their territorial sea limits. Failure to reach agreement on a territorial sea breadth at two successive conferences weakened the resolve of many nations to continue efforts to gain international accord on this issue.

In the years following the two Law of the Sea Conferences, extensions of offshore jurisdiction have increased at an alarming rate.[44] The rationale underlying the Latin American claims has

40. *Id.* at 607–16.
41. McDougal and Burke, 539–40.
42. *Id.* at 554–55; *see also* Powers and Hardy, *How Wide the Territorial Sea, Part I, The Background and the Vote—1960 Conference*, 87 U.S. Naval Institute Proceedings 68–78 (1961).
43. Dean, *The Second Geneva Conference on the Law of the Sea: The Fight for Freedom of the Seas*, 54 A.J.I.L. 751 at 772–82 (1960); *see also* McDougal and Burke 540–48.
44. A chronological evolution of claims beyond three miles taking place after the 1958 and 1960 Law of the Sea Conferences up to 1965 can be found in the chart appearing in Whiteman, 4 *Digest of International Law*, at 21–38 (1965).

been broadened. It is becoming more and more common for the national security of the coastal state to be included as a justification for a 200-mile territorial sea. The recent Canadian offshore claims are publicly justified by a desire to protect the Arctic from pollution. Reasoning of this type to justify ever increasing offshore control infers that freedom of the high seas is no longer a necessary concept in international law.

For a variety of other reasons many coastal nations have extended their territorial sea to twelve miles. Often this was done in an effort to protect the ability of coastal fishermen to exist in the face of increasingly efficient and mobile distant water fishing fleets. Concern for protecting the coastal fishing industry resulted in passage by the United States in 1966 of legislation creating a twelve-mile contiguous fishery zone.[45] This action on the part of the United States was no more than a recognition of what was by that date widespread international practice. It, however, has been interpreted by some nations as a movement by the United States away from its traditional three-mile territorial sea limit.

The United States has made a reappraisal of what steps can be taken with regard to international agreement on the breadth of the territorial sea and closely related issues. Intensive discussions of these problems both within the U.S. Government and between the United States and a large number of nations have taken place over the last three years.[46] Once historical positions and points of national pride were discounted, two facts became evident in these discussions. First, given the present and future state of military technology, limited extensions of the territorial sea by a coastal state as a protective security measure are largely irrelevant.[47] Second, on a worldwide basis, fisheries would be best served by a relatively narrow territorial sea. Maximum fisheries productivity and corresponding maximum human benefit can better be served by internationally agreed measures scientifically directed at species of fish and which take into account specialized behavioral patterns, than by simply encircling broad offshore areas for exclusive coastal state use or control.[48]

The current discussions of the United States have, however, disclosed two very real problems. Although there is no general necessity to extend exclusive coastal state control of fisheries beyond twelve miles, there remains a legitimate need to give some coastal state preferences in high seas fisheries beyond that limit. Such measures are necessary to insure the viability of coastal fisheries in countries where such fisheries are essential to the economic well-being of entire regions or even the nation. General conservation plans, though they should be a part of any new international agreement, may not offer sufficient protection for this type fishery from efficient and highly mobile distant water fishing fleets.[49] If there is international agreement on a twelve-mile territorial sea breadth, many important international straits would thereby be fully overlapped by territorial sea. This would mean that ships could only transit such straits in innocent passage. Added to this is the fact that there is no established right of innocent passage for aircraft. Many nations view this situation as unsatisfactory. From the standpoint of both military and general navigation interests, therefore, it remains necessary to provide for a reliable right of passage through international straits in any international agreement to extend the territorial sea to twelve miles.[50]

After a careful analysis of all these factors the United States announced its view in February of last year that the time was right for the conclusion of a new international treaty on the territorial sea. Such an agreement should set the limit of the territorial sea at twelve miles, but only if it provided for freedom of transit through and over international straits. In addition, such agreement should establish certain coastal state-

45. The United States exclusive fisheries zone extending nine miles beyond her territorial sea was established by Pub. L. 89–658, 16 U.S.C. 1091–92 (1966). In 1968 provision was made to prohibit *inter alia* foreign vessels from engaging ". . . in activities in support of a foreign fishery fleet. . . ." 78 Stat. 194, 16 U.S.C. 1081 (1964) as amended 82 Stat. 445, 16 U.S.C. 1081 (Supp. IV 1969). This act was in response to extensive activities of foreign "factory ships" off U.S. coasts. These ships off load and process the catch from fishing trawlers which allows the latter to continue to fish distant fishing grounds for much longer periods of time.

46. The first detailed public announcement of the U.S. initiative was contained in a speech by John R. Stevenson, the Legal Advisor of the Department of State, delivered to the Philadelphia World Affairs Council and the Philadelphia Bar Association on Feb. 18, 1970. The speech entitled: Law of the Sea: Statement of U.S. Policy, is contained in 9 *Int'l Legal Mats.*, 434–40 (Mar. 1970). The speech will hereafter be cited as Stevenson Speech, with reference to the page number of the Int'l Legal Mats. Vol.

47. McDougal and Burke 489.

48. *Id.*

49. Stevenson Speech at 437–38.

50. Stevenson speech at 437. The right of innocent passage is treated in Articles 14 through 23 of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone. 15 U.S.T. 1606, T.I.A.S. 5639 (1964). For a brief discussion of the right of innocent passage, *see* Harlow, *Legal Aspects of Claims to Jurisdiction in Coastal Waters*, Vol. IV The Future of the Fishing Industry in the United States, Univ. of Wash. Pub. 310 at 313–15 (1968); *see also*, Walker, *What is Innocent Passage?*, Naval War College Review 53 (Jan. 1969).

preferences in high seas fisheries beyond the new limit.[51] This announcement was not a departure from the historic U.S. claim to a three-mile territorial sea. Rather, it indicated a U.S. willingness to accept a twelve-mile territorial sea limit in the context of a widely accepted international treaty which also appropriately provided for passage rights through international straits. Additionally, the United States considered that such treaty should attempt to accommodate interests of coastal states in high seas fisheries beyond twelve miles.

At the same time that the United States announced its views as to a new territorial sea convention, certain other procedural observations were made:

1. The 1958 Geneva Law of the Sea Conventions should not be reopened. This would only cause confusion and delay;

2. Real progress is possible if law of the sea issues are dealt with in "manageable packages." That is to say, agreement on the vital, but less technically complex, questions of the territorial sea breadth, passage through straits, and preferential fishing rights should not be unnecessarily delayed awaiting possible international agreement on a regime for the seabeds beyond national jurisdiction and the boundary of such a seabeds area. These matters, though of great importance, still involve many complex questions which require extensive study.[52]

This important statement of U.S. law of the sea policy was in part prompted by adoption by the General Assembly of the United Nations in December of 1969 of a broadly worded resolution. The resolution requested the Secretary-General to canvass member states as to their views on the desirability of convening at an early date a new law of the sea conference(s) for the purpose of reviewing:

> . . . the regimes of the high seas, the continental shelf, the territorial sea and contiguous zone, fishing and conservation of the living resources of the high seas, particularly in order to arrive at a clear, precise and internationally accepted definition of the area of the sea-bed and ocean floor which lies beyond the limits of national jurisdiction, in the light of the international regime to be established for that area;[53]

The reasoned approach of its February policy statement was still embodied in the United States response to the Secretary-General's canvass. A certain additional degree of flexibility, however, had been introduced into the U.S. position. The U.S. response was less specific in singling out the need to take separate steps on a territorial sea conference and did not preclude the possibility of a conference or conferences addressing the seabed regime and its boundary at the same time.[54] This slight shift in the U.S. position was no doubt the result of two factors:

1. A desire to await views of other nations which would be expressed in their replies to the Secretary-General;

2. The public announcement on May 23, 1970 by President Nixon of a dynamic new "Oceans Policy" for the United States.[55]

The Presidential ocean policy statement included a United States position with respect to a precise limit of coastal state jurisdiction over resources of the seabed and a general description of an international regime for the seabed area beyond such limit. Many competing national interests had been considered in arriving at the difficult decisions necessary to formulate this policy. Having announced a general national position with respect to seabeds matters, the United States could take a somewhat more liberal approach to the scope of a future law of the sea conference. The United States was thus in a position to await the views of other nations as to the most desirable content of a conference.

Responses of other nations to the Secretary-General's canvass indicated a recognition of the importance of resolving the breadth of the territorial sea and the closely related issues of straits transit and coastal fisheries. However, there was also a general international disposition to address at the same time the question of the precise limit of national jurisdiction over

51. Stevenson Speech 438.

52. Stevenson Speech 439–40.

53. General Assembly Res. 2574A. Reproduced in 9 *Int'l Legal Mats.*, 419 (Mar. 1970). Resolution 2574 had four distinct resolutions A through D. The other three resolutions dealt with various seabed issues.

54. U.S. Position on Convening an International Conference on Law of the Sea, 9 *Int'l Legal Mats.*, 833–37 (Jul. 1970).

55. 62 *Dep't State Bull.* 737 (1970). The Presidential statement called for adoption of an international treaty in which all nations would: renounce national claims over natural resources of the seabed beyond 200 meters, with resources beyond such limit being considered the common heritage of mankind; establish an international regime for exploitation of resources beyond such limit; establish an international "trusteeship zone" between 200 meters and the edge of the continental margin in which coastal states would be authorized by the international community to act as trustees; and proposed that the regime for the international seabeds area provide for revenues realized to be used for international community purposes, particularly economic assistance to developing countries.

the ocean floor and the nature of an international seabeds regime beyond.[56]

On August 3, 1970 the United States submitted a Draft U.N. Convention on the International Seabeds Area to the United Nations Committee on the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction.[57] This document fulfilled the promise made by President Nixon in his May 23 Ocean Policy statement: "The United States will introduce specific proposals at the next meeting of the United Nations Seabeds Committee to carry out these objectives." [58]

Submission of this detailed draft treaty as a working paper for discussion purposes did much more than simply meet an earlier commitment. It responded in a meaningful fashion to the clearly expressed international interest in resolving outstanding questions involving the seabeds. The draft treaty is a complex document but several of its features are clear. It provides a 200 meter isobath seaward limit for the area of the seabeds under national jurisdiction. It places potentially vast seabeds resources beyond that limit under continuing international regulation. At the same time, it specifically assures that the revenues from the exploitation of such resources will be equitably divided among the community of nations with special emphasis on economic aid to the developing countries.[59] Truly, this document represents a ". . . new and bold departure in the law of the sea." [60] Its preparation and submission is a clear indication by the United States of a sincere desire to make progress in seabeds matters, but cannot be interpreted as a manifestation of a diminished desire on the part of the United States to press forward in resolving the questions surrounding the breadth of the territorial sea.

The agenda of the United Nations 25th General Assembly included items 25a through d which encompassed current law of the sea matters. These four items called for:

a. A report of the Seabeds Committee;

b. A report of the Secretary-General on marine pollution which might arise as a result of exploitation of natural resources of seabeds beyond national jurisdiction;

c. The report of the Secretary-General on the desirability of calling a conference on the law of the sea at an early date;

d. The question of the breadth of the territorial sea and related matters.[61]

These items were discussed by the General Assembly in the context of reports and recommendations received from the Seabeds Committee and the First (Political) Committee.

On December 17, 1970, the General Assembly adopted Resolution 2750. This resolution, which has been informally referred to as the "conference" resolution, provided among other things for a conference on the law of the sea to convene in 1973. This conference is to deal with a broad spectrum of law of the sea matters, among which are ". . . the territorial sea (including the question of its breadth and the question of international straits) . . . fishing and conservation of the living resources of the high seas (including the question of the preferential rights of coastal states) . . ." The resolution enlarged the Seabeds Committee by 44 members and designated it as a preparatory committee for the conference. The new preparatory committee was charged with beginning its work in Geneva in March of 1971 with a subsequent meeting scheduled for July of that year. The resolution also provides that the General Assembly will review the reports and work of the committee at its 26th and 27th sessions. If the 27th General Assembly determines that insufficient progress has been made in the preparation work of the committee, it may decide to postpone the Conference.[62]

Many considerations were taken into account in the final formulation of the conference resolution. Among them must have been the realization that inaction in the law of the sea area was unwise. Failure to call for a conference could have resulted in existing national positions further solidifying, which would in all probability have decreased the likelihood of a successful conference. A less definitive referral of these matters to a special commission or the International

56. As of 1 Sept. 1970, 64 replies had been received from member nations. Introduction to the Annual Report of the Secretary-General on the Work of the Organization, Vol. VII No. 9 U.N. Monthly Chronicle, 40, 49 (Oct. 1970). An illustrative group of national responses is contained in Addendum to Report of the Secretary-General, U.N. Doc. A/7925/Add. 1 of 27 August 1970.

57. Draft United Nations Convention on the International Seabeds Area, 9 *Int'l Legal Mats.* 1046–80 (Sept. 1970).

58. Presidential Statement *supra* note 55.

59. *See* statement by U.S. Ambassador Christopher Phillips, 63 *Dep't State Bull.* 210; a summary of the U.S. Draft Convention follows at 218–18.

60. Ambassador Phillips statement *supra* note 59 at 211.

61. 63 *Dep't State Bull.* 461 (Oct. 1970).

62. General Assembly Resolution 2750 (XXV) addressed all four topics contained in the U.N. General Assembly agenda item on law of the sea matters. It was adopted by a vote of 100 to 7 with 6 nations abstaining.

Law Commission without a specified schedule could have created a situation akin to that of the International Law Commission in 1949—where the useful work of legal scholars was dissipated by the passage of time and lack of political motivation to complete their work. The present resolution seems clearly to recognize the need for an early law of the sea conference.

If the new law of the sea conference proceeds as is envisioned in the conference resolution, it appears that genuine progress on other law of the sea issues will depend primarily on whether agreement can be reached on the territorial sea limit. With respect to the territorial sea issue certain questions must be answered. What are the new factors present which could contribute to success? Are there changed situations which must be taken into account? What are the probable ingredients for a solution to this persistent problem?

It appears to be a historically proven fact which still accords with present world needs that freedom of the high seas must be preserved. The modern world is an interdependent whole. Its prosperity and security will continue to be best served by an inclusive doctrine of general ocean use. To ensure retention of a meaningful doctrine of freedom of the high seas, there must be agreement on the maximum breadth of the territorial sea. It is unrealistic to envision general agreement on a specialized jurisdictional limit for seabed resources and an international regime beyond, except in the context of prior or simultaneous agreement on a reasonable territorial sea breadth.

The major obstacle to agreement on the issue of the territorial sea in 1958 and 1960 was the political polarization around the three- and twelve-mile figures put forth respectively by the United States and the Soviet Union. This East-West dichotomy should not be a major problem in a future conference. The United States has reappraised its position so that with the necessary assured passage rights through and over international straits she can now support a twelve-mile limit. The Soviets, on the other hand, strongly espoused the twelve-mile limit at the earlier conferences. This was not the result of any genuine desire to see a limit fixed. Not being a maritime nation, the USSR at that time viewed agreement on a territorial sea breadth in a negative fashion. Insofar as agreement on this issue enhanced the freedom of the high seas, it benefited the United States and other Western maritime nations. This position is no longer compatible with Soviet national goals. For better or worse, the Soviet Union has become a major naval, merchant marine, and fishing nation.[63] This change in maritime status has brought home to the USSR the full realization of the need to preserve traditional high seas freedoms. The primary political split which spelled failure in 1958 and in 1960, therefore, will not be present at a new law of the sea conference.

The positions of the Latin American nations have broadened in scope and become more inflexible. In the specialized area of pollution control the theory of unilateral coastal state competence over high seas areas has found favor with Canada. Other special interest situations such as Iceland's near total economic reliance on her offshore fisheries and the archipelago claims of island nations such as the Philippines and Indonesia must be taken into account. These are difficult problems but they must be faced now. Such specialized national positions tend to become less flexible with the passage of time. It does not appear that these nations or a foreseeable group of such nations at present can block general agreement. This is due in no small measure to the restraint which has been exercised by many developing nations.

Questions involving the continental shelf have moved beyond the theoretical to a place of prominence in the law of the sea. Many nations feel with justification that the resources of the seabed beyond national jurisdiction must be preserved as the common heritage of mankind. These issues must be recognized and genuine progress in this area must be made. The United States draft treaty for the international seabeds area is a realistic step toward meeting such international community goals. Seabeds issues are of much greater current importance than were such matters at the earlier conferences. Nevertheless, with the necessary will, these problems should not be insurmountable nor should their solution be inconsistent with establishing a reasonable breadth for the territorial sea. It truly appears that the community of nations has another opportunity to ". . . abide by the wisdom of Grotius. . . ." [64] and establish a widely accepted breadth for the territorial sea which is the key for unlocking solutions to other law of the sea problems.

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63. *See* Swarztrauber 312–20, with comparative tables showing Soviet naval and merchant marine strength 1946–1969; McNulty, *Soviet Seapower; Ripple or Tidal Wave* 96 U.S. Naval Institute Proceedings 19 (1970); Oetting, *The Soviet Union's Far-Flung Nets*, 96 U.S. Naval Institute Proceedings 49 (1970), *and see* following pictorial, Soviet Fishing Fleet: Designed to Sweep the Seas, at 58–69.

64. McDougal and Burke 503.

THE NEW QUEST FOR ATLANTIS:

PROPOSED REGIMES FOR SEABED RESOURCES

LIEUTENANT W. FRANK NEWTON, JAGC, USNR*

Relatively overnight technological developments have alerted the nation states of the world community to the vast seabed resources of the continental shelf and ocean floors. As a consequence heretofore largely academic pronouncements on ownership of ocean space have been fervently reexamined. Highlighting activity in the area President Nixon in May issued a statement setting forth the United States policy for the seabed. In this article Lieutenant Newton examines significant seabed developments focusing primarily on the recently submitted United States Draft Convention and subsequent British and French working papers, the three of which he concludes provide a substantial basis for international resolution of the seabed resource problem.

INTRODUCTION

TODAY THE OCEANS of the world are popularly recognized as offering a new arena of human challenge.[1] These challenges—which can no longer be ignored—may be handled with varying degrees of adeptness. It is the purpose of this article to examine broadly the challenges offered by the potential of the seabeds for resource exploitation and the attempts to date to handle this challenge.[2]

INTERESTS IN SEABED RESOURCES

One of the concomitants of man's recent technological advancement has been a realization that the seabed is a source of mineral riches.[3] Appreciation of the immediate potential of the seabed for production of oil led to the so-called doctrine of the continental shelf.[4] This doctrine

*Lieutenant Newton is currently serving as Law of the Sea Counsel in the International Law Division, Office of the Judge Advocate General. He received the A.B. Degree and the J.D. Degree from Baylor University and the LL.M. Degree from New York University.

1. Discussion of the physical content and geographical make-up of the oceans and ocean floors of the world and the potential which they offer mankind is beyond the scope of this article. However, it does appear safe to say that there exists vast potential for human benefit not unlike in degree the oceans' importance in terms of the percentage of our planet which they cover.
2. Additional challenges created by use of the oceans are treated in the other articles which appear in this volume.
3. Prior to man's interest in mineral resource exploitation, ocean space was used primarily for surface navigation and fishing. Rules designed to accommodate these interests, as well as a nation's interest in its territorial integrity, were developed and became generally accepted. *See* Palmer, *supra* at p. 69 this volume.
4. Small portions of continental shelves off the coasts of Ceylon and Bahrein were historically exploited as sedentary fisheries grounds. In addition to these pearl and chank fisheries, the 1800's witnessed attempts to extend land-based mines into the subsoil of continental shelves in England, Australia, Chile, Japan and Canada. However, these uses of the continental shelf did not extend past the states' territorial seas or if they did, they were grounded in a special historical recognition and thus furnished no basis for a "shelf" policy. In 1942 the United Kingdom and Venezuela signed a treaty dividing the Gulf of Paria, a narrow expanse of sea between Venezuela and Trinidad, with the obvious intent of allowing for petroleum production. 1 U.N. Legislative Series 44–47, Gr. Brit. Treaty Ser. No. 10 (1942). For several reasons, including the fact that it was only a bilateral treaty obligating each party not to assert a "claim to sovereignty" over certain areas next to the coast of the other, this treaty was an instrument of passing interest to third parties and little more. *See* Vallat, *The Continental Shelf*, 23 Brit. Y.B. Int'l L. 336 (1946).

of the continental shelf started [5] with the issuance by President Harry S. Truman of a Presidential Proclamation on the 28th of September 1945.[6] Present in this Presidential Proclamation were certain facts and associated interests offered in support of an international legal rule directly responsive to seabed mineral production.[7] Two important facts were set forth: first, that the effective utilization and conservation of continental shelf [8] mineral resources depends on the cooperation and protection of the littoral state; [9] and second, that the continental shelf is a geographic extension of the land mass of the coastal state even as the continental shelf resources themselves may be extensions of pools or deposits underlying the territory of the coastal state. Coupled with these facts are the coastal state's interests in protecting its territorial integrity and exploiting those resources which are more "appurtenant" to it than anyone else. In brief, the doctrine of the continental shelf—as initiated by the Truman Proclamation—is an assertion of a special interest in favor of the coastal state.

The Truman Proclamation found quick international acceptance.[10] This is hardly surprising since the Proclamation clearly embodied the essence of reciprocity. Under its thesis the United States not only exercised jurisdiction and control over the natural resources of its own continental shelf, it also recognized the rights of other nations to exercise jurisdiction and control over the natural resources of their shelves. Such a recognition involved an implicit denial of any rights in those nation's continental shelves for the United States and its nationals.[11]

During the decade following 1945 there were multilateral as well as unilateral actions dealing with the establishment and exact definition of the continental shelf doctrine. When the International Law Commission began its work with respect to codification of the law of the sea in 1949 its agenda included the subject of the continental shelf.[12] From 1949 until 1956 the Commission did extensive groundwork, and then in 1956 it recommended to the General Assembly of the United Nations that there be convened an international conference on the law of the sea.[13] Acting on this recommendation the General Assembly called such a conference and it met in Geneva, Switzerland.[14]

One of the four separate conventions produced there was the Convention on the Continental Shelf.[15] This convention represents a consensus on such questions as the type and nature

5. Even though there was no internationally accepted doctrine giving coastal states control over interests not connected with surface navigation prior to the mid-1940's, there were many specialized rules applicable to surface transit. These domestic statutes came to be known as "Hovering Acts" and they were aimed primarily at the prevention of smuggling. *See generally* Masterson, *Jurisdiction in Marginal Seas* (1929).
6. Presidential Proclamation No. 2667, September 28, 1945, 59 Stat. 884, 10 Fed. Reg. 12303 (1945). It should be noted that President Truman also issued a fishery proclamation on the same day.
7. A new legal rule was necessary because the existing rules could not be readily applied to the seabed. It is true that within the confines of the territorial sea the coastal state was recognized as having sovereignty over the resources of the seabed. 4 Whiteman, *Digest of International Law* 7–13 (1965). But past this area great confusion existed. Since the doctrine of freedom of the seas was functionally grounded, any extensive analysis of its theoretical basis seemed largely unnecessary. Debate as to whether the proper theoretical basis lay in the concept of *res nullius* (property of no one) or *res communis* (property of all) was resolved in favor of *res communis* as far as the high seas themselves are concerned. The same is not true of the seabed. 1 Oppenheim, *International Law* 582–87, 628–29 (8th ed. Lauterpacht). Professor Louis Henkin has said: "I do not know what is the international law as to the rights of States to dig for mineral resources in the deep sea, although I have written about it. No one can say with confidence what the law is. In the past, it was never more than a hypothetical, academic question, and whether general propositions by different Latin labels were pronounced in those days don't really decide this question." *Hearings Before the Special Subcomm. on Outer Continental Shelf of the Senate Committee on Interior and Insular Affairs*, 91st Cong., 1st and 2d Sess. at 185. Today the political pressure in favor of using the resources of the deep ocean floor for the benefit of developing nations has made the concept of *res communis* more acceptable than the concept of *res nullius*.
8. As indicated by President Truman's Proclamation, the continental shelf is that underwater landmass which is a prolongation of the above-water landmass. For a graphic illustration of the continental shelf, see appendix A.
9. This fact is not as true today as it was in 1945. Not only is it possible today for states to carry out activities involving fixed installations far from their shores, it is conceivable that in the near future mobile equipment will be used to vacuum up manganese nodules from the ocean floor. Covey, *Ocean Mining System Completes Tests*, Under the Sea Technology 22 (October 1970).
10. In terms of form there has been some debate as to whether the Truman Proclamation represents an expression of existing international law (Waldock, *The Legal Basis of Claims to the Continental Shelf*, 36 Transactions of the Grotuis Society 138–39 (1950)) or an expression of international legislation (Slouka, International Custom and the Continental Shelf 74–75 (1968)). That discussion has been rendered largely academic by the rapid acceptance of the general terms of the Truman Proclamation.
11. Contained in the Presidential Proclamation itself is the statement that "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." This provision for fixing boundaries amounts to an express recognition of other states' exclusive rights to mineral resources which are on their continental shelves.
12. 1 Y.B. Int'l L. Comm'n 43, U.N. Doc. A/CN.4/SR5 (1949).
13. Int'l L. Comm'n, Report, 11 U.N. GAOR, Supp. 9, at 3, U.N. Doc. A/3159 (1956).
14. G.A. Res. 1105, 11 U.N. GAOR, Supp. 17, at 54, U.N. Doc. A/3572 (1957).
15. Convention on the Continental Shelf [hereafter cited as the Shelf Convention] 15 U.S.T. 471, T.I.A.S. 5578. This Convention was adopted on the 29th of April 1958 and entered into force

of the rights of coastal states in their continental shelves, the type and nature of the rights of other states in these areas and an indication of the limits of the coastal state's rights in its continental shelf.[16] A coastal state is described as having control over the continental shelf only for the purpose of exploring for and exploiting natural resources.[17] In this sense the 1958 Continental Shelf Convention represents an acceptance of the narrow creation of rights as initially set forth in the Truman Proclamation.[18] While the control of the coastal state is limited, that control which is given to the coastal state is exclusive.[19] Only the coastal state can authorize exploration or exploitation and there must be such an authorization before activities may be conducted. The coastal state's rights are characterized as "sovereign rights" and are not dependent on occupation, control, or express proclamation.[20] Certain inclusive rights inuring to the benefit of non-coastal states were also set forth. Rights of states to use the superjacent waters as high seas and the airspace above these waters is expressly not affected by the continental shelf doctrine.[21] With respect to the rights of both coastal and non-coastal states, there exists a recognition of the required accommodation of uses and users.[22]

The 1958 Shelf Convention also sets out, in rather imprecise form, the delimitation of the continental shelf. The Shelf Convention's definition starts with a recognition of a coastal state's sovereignty over its territorial seas.[23] Outside of the territorial sea, the area over which a coastal state has the special rights previously discussed includes that area where (1) the depth of superjacent waters does not exceed 200 meters, (2) or beyond the 200 meter depth to the point where exploitation of the area's natural resources is possible. The elasticity of this test is more obvious today than it was in 1958. All parties who participated in the process which ultimately resulted in the 1958 Shelf Convention were aware that they were not setting a definitive limit. Their failure to do so was fostered by a tacit agreement to avoid examination of the true nature and effect of a special rights regime over seabed resources in favor of the coastal state. The transparence of the definition in terms of its accommodation of conflicting views is demonstrated by the fact that nations with little or no geographical continental shelves [24] were mollified along with those who did not want to limit the very national interest which they were formalizing by this instrument. All participants in the drafting of the Shelf Convention definition were aware that the fundamental requirement of any international principle—the establishment of a basis for predictability—would be seriously prejudiced if the delimitation of the continental shelf were rendered illusory. Looking forward in 1958, however, the best judgments indicated that it would be many, many years before exploitation in depths of over 200 meters would be possible. Premised on this view, an open-ended delimitation seemed an acceptable compromise. Underlying the downfall of the assumption that exploitation beyond 200 meters was far removed in time was the geometric advancement of technology.

While the vague formula employed in the Shelf Convention does create special problems which augur of conflict, it must be noted that the basis for the outer limit of a state's continental shelf is tied to exploitation and not exploration. Some states appear to have adopted the view that exploration and exploitation are one and the same.[25] Clearly exploration must precede exploitation, but it is the exploitation which

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on the 10th of June 1964. For general information on the convention, its legal implications, and development in the area in the years preceding its adoption *see* Amador, *The Exploitation and Conservation of the Resources of the Sea* (1959), Anninos, *The Continental Shelf and Public International Law* (1963), Oda, *International Control of Sea Resources* (1963), and Mouton, *The Continental Shelf* (1952).

16. Although only approximately one-third of the nations of the world have ratified the Convention on the Continental Shelf, the writings of scholars and jurists and actions of States indicate that the terms of the convention are accepted as binding customary international law. Report of the National Petroleum Council, *Petroleum Resources under the Ocean Floor* 147–56 (1969) and American Bar Association Committee on Deep Sea Mineral Resources, *Interim Report* IX (19 July 1968).
17. *Supra* note 15, Article 2(1). Natural resources are defined as the mineral and other non-living resources of the seabed and subsoil together with the living organisms belonging to sedentary species.
18. Some writers apparently saw little difference between claims to control over the seabed and claims to control of the natural resources of the seabed. *See, e.g.,* Lauterpacht, *Sovereignty Over Submarine Areas,* 27 Brit. Y.B. Int'l L. 376 at 388–89 (1950) and Vallat, *The Continental Shelf,* 23 Brit. Y.B. Int'l L. 333 at 336–37 (1946).
19. *Supra* note 15, Article 2(2).
20. *Id.* Article 2(3).
21. *Id.* Article 3.
22. *Id.* Articles 4 and 5.
23. This right of sovereignty on the part of the coastal state is limited by or subject to the right of innocent passage.
24. Chile, Ecuador and Peru are good examples of states with very narrow continental shelves.
25. Many states have issued permits for what amounts to exploration of areas where the depth is over 200 meters. Unless the areas covered by such an exploratory permit were within the continental shelf of that state, there would appear to be no need

is determinative. Further, it is possible to interpret the criteria of exploitability and 200 meter depth as being qualified by a requirement of adjacency.[26] While there is no concrete definition of adjacency, the rule of reason indicates that the Shelf Convention circumscribes global extensions.

But even if there were complete agreement as to the meaning of the adjacency and even if there were an overt and real recognition of the need for exploitability as opposed to exploration, there would remain a significant problem. If it were possible to define concisely the limit of states' continental shelves in a fashion which did not encompass all of the ocean floors, who would control exploitation of the remainder of the seabed?

Several observations with respect to the doctrine of the continental shelf appear appropriate. First, in a period of less than two decades the continental shelf doctrine came to be an accepted fact. Second, the failure to place a clear limit on the extent of the continental shelf, when coupled with recent scientific advances, became a source of concern and festering conflict. Third, the same scientific advances which kept the issues of a lack of delimitation of the continental shelf relevant also began to thrust forth a completely new set of interests. No longer was there simply a problem of exclusive and inclusive interests.[27] Now both the former exclusive and inclusive interests were themselves subject to a balancing in terms of the exclusive/inclusive dichotomy. The combination of those factors which gave rise to the need for a continental shelf doctrine and the development of the continental shelf doctrine proved to be the catalytic agent which initiated a reexamination of the law of the sea.[28]

NEW REGIMES FOR SEABED RESOURCES

The current chapter in the continuing development of the continental shelf doctrine might be said to have had its beginning on August 17, 1967, when Ambassador Arvid Pardo of Malta requested, by a *note verbale* addressed to the Secretary-General of the United Nations, the inclusion on the agenda of the Twenty-Second Session of the General Assembly the following item: "Declaration and treaty concerning the reservation exclusively for peaceful purposes of the sea-bed and of the ocean floor, underlying the seas beyond the limits of present national jurisdiction, and the use of their resources in the interests of mankind." [29] A catalytic agent in its own right, the proposed agenda item and its subsequent discussion, especially the moving speech made by Ambassador Pardo in the First Committee,[30] led to a veritable plethora of material concerning the issue of seabed resources.[31] From this deluge of material arose the proposed new regimes for seabed resources.

Before turning to a consideration of various proposals for seabed regimes, it is appropriate to briefly set forth and identify the general goals

25. (Cont'd) for such authorization, nor should a state issue such an authorization. Even though the deepest exploitation probably extends all states' continental shelves, to date the deepest producing well is in water less than 350 feet deep. Thus no state's continental shelf should presently go further than the 200 meter isobath.
26. The intent of the framers appears to support this view although their thoughts were primarily that the deep ocean floor was simply beyond reach, and hence their concern did not directly address this issue. 1 Y.B. Int'l L. Comm'n 135–37 (1956), remarks of Professor Scelle, Sir Gerald Fitzmaurice, and Dr. Garcia-Amador. *Also see* Burke, Towards a Better Use of the Ocean 27–28 (1969) and Young, *The Legal Regime of the Deep-Sea Floor*, 62 A.J.I.L. 641 at 644 (1968). *But see* Oda, *International Control of Sea Resources* 167–68 (1963) where it is argued that whatever may or may not have been intended, an objective interpretation of the provision shows that it indeed divides all seabeds of the world among the coastal states.
27. For a general discussion of the interplay of exclusive and inclusive interests in zones contiguous to the coast *see* McDougal and Burke, *The Public Order of the Oceans* 565–729 (1965).
28. One occurrence which was stimulated by the Truman Proclamation and subsequent development of the continental shelf doctrine, and which was reflective of the broad scope of changes so characteristic of the mid-1900's, was the appearance of "creeping jurisdiction." (Statement by Department of State Legal Adviser John R. Stevenson, 63 *Dep't State Bull.* 209 at 210 (August 24, 1970).) This "creeping jurisdiction", or proclivity of states to assert more extensive claims both in terms of area and degree of control, was most evident in cases where states felt that their particular special interests were not being met. Sometimes the nations unhappy with their lot tied their actions to precedent (for example President J. L. Bustamante Rivero of Peru by a Presidential Decree dated 1 August 1949 proclaimed sovereignty over the epicontinental waters covering Peru's shelf out a distance of 200 miles and in so doing cited declarations made by the President of the United States, Mexico, Argentina and Chile) and sometimes they eschewed precedent on the grounds that they had no part in its creation. Whether one's interests caused "creeping jurisdiction" to be viewed with alarm or delight, the existence of "creeping jurisdiction" had an unsettling influence on the law of the sea. For a list of claims and some discussion thereof, *see* Young, *The Legal Status of Submarine Areas Beneath the High Seas*, 45 A.J.I.L. 225 at 228 (1951). Also of interest in this respect are the "Declaration of Santiago" (4 Whiteman, *Digest of International Law*, 1089–90 (1965), and the "Declaration of Montevideo" (9 *Int'l Legal Mats.* 1081 (1970)).
29. U.N. Doc. A/6695 (1967).
30. U.N. Doc. A/C.1/PV. 1515 and 1516 (1967).
31. The record of the seabeds debate in the United Nations alone amounts to over 4000 pages. At least twice that many pages have been written by scholars and government agencies. *See* Koers, *The Debate on the Legal Regime for the Exploration and Exploitation of Ocean Resources: A Bibliography for the First Decade*, 1960–1970, for a general listing of writings in this area.

to be achieved by the various suggested regimes.[32] Because it involves all nations of the world in an area where these nations' interests touch and overlap, the primary goal must be one of conflict minimization. It is axiomatic that all states would ultimately lose unless conflict can be controlled. Further, there exists a growing recognition that deference must be afforded certain basic interests shared by the world community. Beyond this general but very important goal lies the more limited goal of maximization of the use of the mineral resources of the ocean floor.[33] In light of current developments, maximization of the use of the mineral resources of the ocean floor now involves a consideration of types of uses of ocean space as well as the national or international identity of the users.[34]

A bewildering variety of proposals have been advanced as offering the best basis for achieving these general goals. All proposals have their strong points and limitations, and all contribute to an awareness of the problems which must be solved before the appropriate goals can be achieved. Many of these proposals suggest viable methods of achieving these goals. As a unit, the literature relating to proposed seabed regimes is important and voluminous. Consideration in this article will be limited to exemplary points along a broad spectrum of proposals.[35] By definition this categorization of proposals is a somewhat arbitrary yet necessary aid in restricting this discussion to manageable limits.

The following are four exemplary stances in the continuum of proposals for a seabeds resource regime—[36]

(A) Enforce a vacuum as to areas outside of state jurisdiction

(B) Allow extension of national sovereignty to encompass the entire ocean floor

(C) Allow appropriation on a first-come-first-serve basis

(D) Provide for international control of seabed resources.

A. ENFORCED VACUUM

A regime involving an enforced vacuum would simply mean that no state could explore or exploit seabed mineral resources in areas outside of state jurisdiction, nor would a state be accorded recognition of any new claims. By prohibiting exploitation and claims beyond present state jurisdiction, this proposal accentuates the problem of fixing the continental shelf boundary without answering it.

Enforcement of this type of moratorium with regard to seabed resources is premised on the general feeling that not enough is known about the potential of the seabed as a source of mineral production.[37] Coupled with this is a growing awareness of the complex interconnection between mineral interests and other uses of ocean space. At best, this approach represents a limited and temporary regime.[38] In the most general sense it may be said to accomplish the goal of conflict minimization by forestalling, temporarily, any direct confrontations. It also may be said to satisfy the goal of maximization of resource production by preventing the adoption of rules which are not based on a proper understanding of applicable technology. Failure to forecast properly scientific advances at the time of the 1958 Convention on the Continental

32. This article does not attempt to formally follow the scheme so successfully employed by Professors McDougal and Burke in *The Public Order of the Oceans* and by Burke in *Towards a Better Use of the Ocean* although its validity in any exhaustive analysis is beyond question.

33. For a slightly different formulation of goals *see* the address by the Honorable John R. Stevenson before the Philadelphia World Affairs Council and Philadelphia Bar Association of February 18, 1970. 9 *Int'l Legal Mats.* 434–35 (March 1970).

34. Recognition of this fact has led to a great deal of Navy interest with respect to the subject of the seabeds. For instance *see* Hearn, *The Fourth Dimension of Seapower—Ocean Technology and International Law*, 22 JAG J. 23 (Sep–Oct–Nov 1967), Harlow, *Contemporary Principles of the International Law of the Sea*, 22 JAG J. 27 (Sep–Oct–Nov 1967), Craven, *The Challenge of Ocean Technology to the Law of the Sea*, 22 JAG J. 31 (Sep–Oct–Nov 1967), Brock, *Mineral Resources and the Future Development of the International Law of the Sea*, 22 JAG J. 39 (Sep–Oct–Nov 1967), and Robertson, *A Legal Regime for the Resources of the Seabed and Subsoil of the Deep Sea: A Brewing Problem for International Lawmakers*, 22 Naval War College Review 61 (Oct. 1968).

35. Since only a few of the ideas or proposals of scholars can be set out in this article, many valuable and interesting approaches will not be discussed or cited. One interested in a more exhaustive study will, however, find the discussion in this article a helpful starting point. It should also be noted that since the proposals set forth in this article represent a type of abstraction, citations under these categories to various authors should not be taken as an indication that the author's idea is reflected by the proposal as set forth in this article.

36. For other formulations of this type *see* Friedheim, *Understanding the Debate on Ocean Resources*, The University of Denver Social Science Foundation and Graduate School of International Studies Monograph Series in World Affairs (1969), Burke, *Towards a Better Use of the Ocean* 30–61 (1969), the *Interim Report of the Economic and Technical Sub-Comm. of the United Nations Seabeds Committee*, U.N. Doc. A/AC.138/SC2./L6 (Appendixes I to VI 1970). *See also* report of the Secretary-General in U.N. Doc. A/AC.138/23 (1970) as to proposed types of international machinery.

37. Young, *The Legal Regime of the Deep-Sea Floor*, 62 A.J.I.L 641 at 653 (1968); U.S. Congress House Comm. on Foreign Affairs, *The Oceans: A Challenging New Frontier*, 90th Cong., 2d Sess. (Oct. 1968), recommendations 396–97.

38. This is in essence the idea contained in G.A. Res. 2574D (XXIV), 9 *Int'l Legal Mats.* 422–23 (March 1970). For the position of the United States with respect to this issue *see* the exchange of letters between Senator Metcalf and Mr. John R. Stevenson, Legal Adviser, Department of State in 9 *Int'l Legal Mats.* 831–32 (July 1970).

Shelf is forceful precedent for the view that in addition to the dangers of improper utilization, such an error can engender future conflict. Weighing against this alternative are several distinct factors. First, the exercise of political self-restraint in the face of growing national interest is difficult if not impossible. In spite of a General Assembly resolution urging a moratorium on exploitation beyond the limits of national jurisdiction,[39] discussions in the United Nations have tended to reflect a general consensus in favor of movement toward a permanent resolution of the problem of the exploitation of the mineral resources of the ocean floors. Second, it is argued that resolutions of pending problems can best be achieved internationally when there exist no already vested interests. The Outer Space Treaty [40] and the Antarctic Treaty [41] are cited as examples of the propriety of handling issues before states attach individual interests.[42] Third, practice has shown a tendency on the part of states to continue to act unilaterally regardless of the propriety of any proposed moratorium. Even if these unilateral actions relate to interests other than the production of minerals, the demonstrated connection of uses causes repercussions in this area. Even though it appears that a "moratorium regime" will not be considered appropriate as a positive state of affairs, the very real probability of the lapse of a period of time before any agreement is reached on a positive regime makes the nature of the present "temporary regime" vital in the eventual resolution of the seabeds resources question.

B. NATIONAL LAKES

A second point on the continuum of proposed seabed regimes is one exemplified by the term "national lakes." [43] Under this approach all coastal states would extend their continental shelf boundaries until they met the boundaries of their opposites at a point an equal distance from both.[44] Of course, only coastal states would enjoy rights in mineral exploitation under this concept.[45] Momentary reflection on the problems of boundary establishment and the kaleidoscopic allocation of mineral rights shows that neither the goal of conflict minimization nor the goal of prudent resource utilization is satisfied by this proposal.

C. FLAG-STATE

Third on the list of exemplary proposals is one which would allow national appropriation on a first-come-first-served basis.[46] At least as to mineral resources, a state would be allowed to lay claim to a portion of the seabed. Such a claim would need a type of effective occupation in the sense of successful exploitation. Once this occurred the state, or when exploitation is not carried out by the state directly, the state having sovereignty over the exploiting entity, would have exclusive control over resource production in that area. Arguably, exclusive control of mineral production under such a plan would allow control as long as there existed mineral production. Variables under this plan include the question of whether all minerals would be included or only the one being produced and what rights a state would have to protect its mineral production. In its extreme form this proposed regime promises conflict creation instead of conflict minimization. Common sense and past experience indicate that the potential for conflict under this flag-state approach is great both in terms of establishment of areas of control and their boundaries and in the exercise of control in the designated areas.[47] Additionally, appropriation based on exploitation

39. *Id.*
40. 18 U.S.T. 2410, T.I.A.S. 6347.
41. 12 U.S.T. 794, T.I.A.S. 4780.
42. *But see* Burke *supra* note 26 at 46 and Young *supra* note 26 at 642 for the idea that there are already a great many vested interests in ocean space and thus it is not a *tabula rasa* and hence the proffered analogy is invalid.
43. Friedheim *supra* note 36 at 740, and Bernfeld, *Developing the Resources of the Sea—Security of Investments*, 2 The International Lawyer 67 (1967).
44. The equal distance formulation is set out in Article 6 of the Shelf Convention *supra* note 15.
45. Strict adherence to an equal distance division would give islands control over areas of the ocean disproportionate with their land territory. Charts showing the effect of such a division can be found at the following places: Christy, *A Social Scientist Writes on Economic Criteria for Rules Governing Exploitation of Deep Sea Minerals*, 2 The International Lawyer 224 at 234 (1968) and the *Washington Post*, November 19, 1967, at B5.
46. This approach is also called the flag state approach, Ely, *American Policy Options in the Development of Undersea Mineral Resources*, 2 The International Lawyer 215 at 222 (1968) or the "right of first discovery", *International Law Problems of Scientific Investigation of the High Seas*, translation of U.S.S.R. Government document annexed to the *Report of the United States Delegation to the Fifth Session, Intergovernmental Oceanographic Commission* 154–57 (1967). *See also* Brockett, chairman, *Petroleum Resources Under the Ocean Floor*, An Interim Report 11, National Petroleum Council Committee on Petroleum Resources Under the Ocean Floor (1968).
47. Professor L.F.E. Goldie has proposed a type of registry system which would allegedly avoid a first-come-first-served distribution by having states adopt an administrative agency scheme based on the Plenipotentiary and Administrative Conferences of the International Telecommunications Union. Under this plan states would be allowed to bargain for zones of special jurisdiction. *The Contents of Davy Jones's Locker—A Proposed Regime for the Seabed and Subsoil*, 22 Rutgers L. Rev. 1–66 (Fall 1967).

does little to encourage prudent utilization since states would be encouraged to produce as a means of gaining control without regard to normal allocative factors.

D. INTERNATIONAL CONTROL

Finally, there is the proposal of international control of the seabed resources. As the term international control implies, the seabed resources would be administered jointly by all nations. International control would preclude acquisition of unlimited or sovereign interests by states in the resources of the seabed. Necessarily a part of this international control would be a type of international administration. If one goes no further than the general statements offered thus far with respect to international control it appears that conflicts would be minimized and that the basis for establishing a rational utilization of the resources would exist. Clearly this formulation oversimplifies the issue by jumping over the how or implementation aspect which is crucial to any characterization of this proposal as a viable alternative. More complete attention will be given to this area in the following discussion.

All of these proposals and many others have been studied and considered in domestic and international forums in recent years. While the initial impetus leading to an in-depth and active examination of seabed mineral exploitation came in an international setting, it quickly spread to national forums. Within a month of the introduction of the *note verbale* on seabed resources by Ambassador Pardo, numerous resolutions addressing the subject matter were introduced in the United States Congress.[48] Senator Claiborne Pell of Rhode Island introduced a resolution indicating the need to establish rules governing exploration and exploitation of the seabeds [49] and later he even submitted, in the form of increasingly detailed resolutions, a type of model treaty.[50] The House Committee on Foreign Affairs and the Senate Committee on Foreign Relations bore the brunt of this initial flurry of activity. None of the initial resolutions was reported out of the Committees, but domestic public attention had focused on the issue.[51] Perhaps the most important revelation made evident by a perusal of the records of Congressional consideration of seabed resource production is the multifacited nature of any meaningful resolution of the problem of seabed resource exploitation. Of course there is a basic type of narrow nationalism which manifests itself generally in the various debates.[52] General concern for the protection of United States interests assumes new dimensions, however, when it becomes evident that a pursuance of interests in seabed mineral production can easily lead to a derogation of the interests of free navigation. Projection of special interests with different national bases into ocean space is thus limited when these specific interests become exclusive as to each other.[53] Superimposed on this consideration is the ever present issue of methods of implementation. Because they tend to think more in terms of their constituents' problems as being subject to domestic solution, and because international control is often wanting or nonexistent, many congressmen view with distaste any program which involves international implementation on an issue as vital nationally as seabed mineral production. Naturally, such aversion to international control and implementation varies inversely with the degree of positive international control.[54]

Although its importance as a national forum is paramount, the official halls of government are not the only domestic forum for meaningful

48. H. Cong. Res. 558, 576, 580, 90th Cong., 1st Sess. (1967); H.J. Res. 816, 817, 818, 819, 820, 821, 822, 823, 824, 828, 829, 830, 834, 835, 839, 840, 843, 844, 854, 855, 856, 857, 865, 876, 881, 916, 90th Cong., 1st Sess. (1967); S.J. Res. 111, 90th Cong., 1st Sess. (1967).

49. S. Res. 172, 90th Cong., 1st Sess. (1967).

50. S. Res. 186, 90th Cong., 1st Sess. (1967) and S. Res. 263, 90th Cong., 2d Sess. (1968).

51. Any of the following hearings will give some idea of the nature of Congressional investigations: "The Oceans: A Challenging New Frontier," *Report and Hearings on H. Res. 179 Before the Subcomm. on International Organizations and Movements of the House Comm. on Foreign Affairs*, 90th Cong., 2d Sess. (1968); *Hearings on S. Res. 33 Before the Subcomm. on Ocean Space of the Senate Comm. on Foreign Relations*, 91st Cong., 1st Sess. (1969); *Interim Report on the United Nations and the Issues of Deep Ocean Resources and Hearings on H. Res. 179 Before the Subcomm. on International Organizations and Movements of the House Comm. on Foreign Affairs*, 90th Cong., 1st Sess. (1967); *Hearings on S.J. Res. 111, S. Res. 172, and S. Res. 186 Before the Senate Comm. on Foreign Relations*, 90th Cong., 1st Sess. (1967); *Hearings Before the Special Subcomm. on the Outer Continental Shelf of the Senate Comm. on Interior and Insular Affairs*, 91st Cong., 1st and 2d Sess., ser. 1, pt. 1 (1970).

52. For a detailed discussion of early Congressional debate and early consideration in the United Nations *see* Weissberg, *International Law Meets the Short-Term National Interest: The Malta Proposal on the Sea-Bed and Ocean Floor—Its Fate in Two Cities*, 18 Int. and Comp. L.Q. 41 (1969).

53. This problem of incompatibility can be seen by comparing the diverse approaches and recommendations made by the Commission on Marine Science, Engineering and Resources *Our Nation and the Sea, A Plan for National Action* (1969) and the National Petroleum Council *Petroleum Resources under the Ocean Floor* (1969).

54. This aversion is undoubtedly present in other nations also.

debate on the issue of seabed exploitation.[55] As might be expected, many private groups have addressed this general problem area.[56] Basically these groups fall into two categories: academic and private industry. Interaction between them and Congress is frequent, and the same individuals often participate extensively in all three chambers of discussion.[57]

Contemporaneous consideration has also been afforded seabed exploitation in international forums. As a result of Ambassador Pardo's request for an additional agenda item,[58] debate on seabed resource exploitation began in the First Committee of the Twenty-Second General Assembly. An ad hoc committee commenced consideration during the Twenty-Second and Twenty-Third Assembly plenary sessions. At the Twenty-Third Session, the General Assembly created a Permanent Committee to Study the Peaceful Uses of the Sea-Bed and Ocean Floor Beyond the Limits of National Judisdiction.[59] As a body, the United Nations seabed debates represent the most current and authoritative information on the nature and status of international positions on the question of seabed resources.[60] Work within the Permanent Committee to Study the Peaceful Uses of the Sea-Bed and Ocean Floor Beyond the Limits of National Jurisdiction, the Seabeds Committee, will shape the nature of the new regime for ocean floor resources. It is probable that the final convention will be produced by a specially convened international conference, but the all important groundwork will be hammered out in the Seabeds Committee.[61]

Starting last May there occurred a series of acts which jointly represent an amalgamation of various domestic positions into national positions. Detailed outlines of these domestic positions provide a type of sounding agent or focal point for fixing the status of current international consideration of seabed regimes and thus these domestic positions will be considered in turn.

On May 23, 1970, President Nixon issued a statement setting forth the United States policy for the seabed.[62] Recognizing the importance of the seabeds problem, President Nixon identified conflict minimization and an equitable use of ocean floor resources as necessary goals and indicated that failure to achieve these goals promised universal losses. The President's statement must be considered a new point of departure in the development of seabed law, not only because of its basic logic but also because it sets the tone for further developments. The difficult problem of forging solutions which meet his guidelines is not resolved by a mere enunciation of goals. But no problem is solved until its dimensions are recognized; and such recognition is itself a step toward solution. Since the United States has come down squarely and plainly behind an accurate and realistic definition of the problem and the goals to be sought, it becomes difficult for other nations to procrastinate in reaching this first plateau on the road to a new seabed regime. In this sense, President Nixon's adoption of a United States position on the seabeds was a positive act of international leadership.

The policy announcement of May 23rd also gave general outlines for achieving the desired goals. President Nixon proposed the use of a multilateral treaty with a primary purpose of fixing deep ocean resources as the common heritage of mankind. National mineral production would be exclusive out to a depth of 200 meters.

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55. While the line between the private and governmental sector is not as clear in all nations, it is likely that the interplay between various governmental agencies closely parallels what has occurred in the United States.
56. *See e.g., Uses of the Sea,* The American Assembly, Columbia University (Gullion ed. 1968); Law of the Sea Conference of the Law of the Sea Institute, University of Rhode Island (Alexander ed. 1967, 1968, 1969 and 1970 issues); Conference on Law, Organization and Security in the Use of the Ocean, Ohio State University (1967, 1968); Wilkey, *The Role of Private Industry in the Deep Ocean,* Symposium on Private Investments Abroad, Southwestern Legal Foundation (Jun. 1969).
57. Indeed some of these individuals have acted on the international level as private experts. For instance, a drafting committee of the World Peace Through World Law Center, chaired by Aaron L. Danzig of New York drafted a "Treaty Governing the Exploration and Use of the Ocean Bed." The Center for the Study of Democratic Institutions, Santa Barbara, California under the directorship of Elizabeth Mann Borgese, has published a model statute, "The Ocean Regime," and sponsored an international symposium on the frontiers of the sea held in Malta during June of 1970. The Stockholm International Peace Research Institute held an international symposium in Stockholm from June 10th to June 14th, 1968. (This symposium is reported in Burke, *Towards a Better Use of the Ocean* (1969).)
58. *Supra* note 29.
59. G.A. Res. 2467, U.N. Doc. A/RES 2467 (XXIII) (1969); 8 *Int'l Legal Mats.* 201 (Jan. 1969).
60. Many of the seabed debates in the United Nations are contained in the following documents: U.N. Doc. A/C.1/PV.1524-39 (1967); U.N. Doc. A/AC.135/1-28 (1968); U.N. Doc. A/AC.135/WG.1/SR.1-SR.14 (1968); U.N. Doc. A/AC.135/WG.2/SR.1-SR.11 (1968); U.N. Doc. A/C.1/PV.1588-1605 (1968); and U.N. Doc. A/AC.138/SR.12-16 (1969) (summary record).
61. The 25th Session of the United Nations General Assembly increased the size of the Seabeds Committee by forty-four members and expressly gave the Committee the responsibility of drawing up draft articles for a seabed regime and for related regimes to deal with other ocean space issues. Such drafts are to be ready in time for a general conference in 1973. U.N. Doc. A/C.1/L.562 (1970).
62. White House press release issued on May 23, 1970. 62 *Dep't State Bull.* 737 (June 15, 1970).

Beyond that there would be international control with special rights granted by the Convention to the coastal state with respect to exploration and exploitation in the area between the 200 meter isobath and the end of the continental margin, or area between the edge of the continental shelf and the deep ocean floor.[63] These special rights would derive from international treaty. Beyond the continental margin there would be complete international control of seabed resources. Mention was made of the need to accommodate other interests and a promise was made to advance a detailed proposal in the next meeting of the United Nations Seabeds Committee.[64]

The promise was fulfilled when the United States submitted a detailed draft convention at the August meeting of the Seabeds Committee in Geneva.[65] Clearly the draft convention is a more detailed description of a proposed regime for the seabeds and thus a better instrument to examine in an attempt at understanding the nature and relative strength of this proposed regime.

Chapter I of the Draft Convention deals with basic principles. All areas of the seabed and subsoil of the high seas [66] adjacent to a sovereign land mass seaward of the 200 meter isobath are described as the "International Seabed Area." [67] This International Seabed Area is made the common heritage of all mankind.[68] While the phrase "common heritage of all mankind" is not formally defined, under the Draft Convention it encompasses the delegation of control to the world community (to the extent that it is comprised of contracting parties) over the resources of the area as provided for by the Convention.[69] Even though control of seabed resources is placed in the world community, the area is made open to use for peaceful purposes [70] by all states, except as provided for in other portions of the Draft Convention.[71] In order to make it clear that this control includes only seabed resources, Article 6 of the Draft Convention states that nothing contained in the Convention shall affect the legal status of the superjacent waters as high seas, or that of the airspace above those waters.[72] Under the terms of Article 5, revenues derived from the exploration and exploitation of the mineral resources of the seabed area would be used for the benefit of all mankind with particular emphasis on the promotion of the economic advancement of the developing states which are contracting parties.[73] Articles 7, 8 and 9 express the view that there must be an

63. See Appendix A.
64. President Nixon's promise was formally transmitted to Ambassador Hamilton Shirley Amerasinghe (Ceylon), Chairman of the Seabeds Committee, by letter from Christopher H. Phillips, United States Representative on the Seabeds Committee. 62 Dep't State Bull. 741 (June 15, 1970).
65. United States Draft of U.N. Convention on International Seabed Area, 9 Int'l Legal Mats. 1046–80 (September 1970). This Draft Convention, as well as the Presidential statement of May 23, 1970, reflect many of the views and suggestions earlier made by scholars and governmental commissions.
66. Use of the term "high seas" assumes that the difficult problem of fixing limits on territorial sea claims has been or will be solved.
67. *Supra* note 65, Article 1(2).
68. *Id.* Article 1(1).
69. *Id.* Article 2.
70. "Considering that the term 'peaceful purposes' does not preclude military activities generally, we believe that specific limitations on certain military activities will require the negotiation of a detailed arms control agreement. Military activities not precluded by such an agreement would continue to be conducted in accordance with the principle of freedom of the seas and exclusively for peaceful purposes." Statement of Ambassador Wiggins in Committee I on October 29, 1968, reproduced in 59 Dep't State Bull. 554, 556 (Nov. 25, 1968).
71. *Supra* note 65, Article 3.
72. In spite of very narrowly drawn international control under the Draft Convention, it is arguable that the degree of effective control under any functioning system would tend to become more extensive. The political scientist of the functionalist school advances the thesis that form follows function, and thus under the process of change there occurs spill over. Both in economic and political terms, spill over means that in the case of ocean resources one should expect the international body which initially exercises limited control to exercise more control both with respect to the area initially affected and with respect to new uses of the area. (For a general explanation of the functionalist approach and an application thereof *see* Mitrany, *A Working Peace System* (1966).) Indeed the initial basic principle set forth in the Draft Convention makes the International Seabed Area the common heritage of all mankind. Even though the control given ISRA is limited to seabed resources, because Article 2 prohibits state claims to sovereignty or sovereign rights over any part of the International Seabed Area or its resources, it would not be surprising to see ISRA assume more control if the vacuum created by a lack of control over other activities in the seabed area needed to be filled. Theoretically these additional uses of the seabed area would be made by all nations on a free and equal basis, but it is unrealistic to predict the continued viability of this approach in light of the obvious need to allocate what are essentially exclusive interests. Or even if ISRA did not expand to the extent of exercising control over the entire area, it is still possible that the type of control exercised in furtherance of seabed resource exploitation would become so established that this special use would be given a favored position over emerging uses. While those uses of the ocean space already recognized under international law are largely inclusive in nature, emerging uses will tend to be exclusive simply because of access and control problems. In this situation it is likely that the established interest, although made subject to the requirement of not unjustifiably interfering with other uses (Article 8), would in practice yield to other uses only when there was general international agreement in favor of the new use in any case involving some derogation of seabed resource interests. If not impetus, at least fertile ground for the type of development here outlined was laid when the 25th General Assembly of the United Nations adopted a "principles" resolution [U.N. Doc. A/C.1/L.544 (1970)] which speaks of the seabed area (seabed, ocean floor and subsoil thereof beyond the limits of national jurisdiction) as well as the resources of this area.
73. Note that the granting of rights to contracting parties by definition indicates that only contracting parties are entitled to enjoy such rights thus encouraging universal acceptance.

appropriate accommodation of various users and uses, including those interests not directly related to the seabed area, and that all uses must be conducted with adequate safeguards for the protection of human life and the life of marine environment. Finally, the Draft Convention provides for exploration and exploitation to be conducted through the various states which are parties to the convention.[74] A contracting party, or group of contracting parties or any natural or juridical person under its or their authority or as approved and allowed under such authority, would carry out activities in the seabed areas subject to the enforcement of rules by the authorizing state.[75] This formulation retains, for the purposes of the suggested regime, the idea of states as the only proper parties under international law.[76]

Chapter II of the Draft Convention deals with the general rules for exploration and exploitation of mineral resources, exploitation of the living resources of the seabed, the protection of the marine environment, the exercise of safety in conducting activities in the seabed area, and the establishment of international marine parks and preserves. Of primacy among these rules are those relating to exploration and exploitation of mineral resources. Since control of the mineral resources of the seabed is given to the world community under the Draft Convention, licensing flows initially from the authority set up to administer the International Seabed Area.[77] Under the Articles of the Draft Convention and several of its suggested appendixes, the method of licensing, the activities permitted, and the areas affected are set forth in some detail.[78] In general the program set forth is largely reflective of the current practice with respect to offshore oil production. Unlike current practice, however, provision is also made for exploitation of different minerals in the same area at the same time.[79] Present knowledge indicates that it is possible to exploit an area for oil and manganese nodules at the same time without undue interference. Non-exclusive licenses are appropriate to the extent that this basic assumption is true and if the licensees do not unjustifiably interfere with each other's respective activities.

Since the contracting parties would have responsibility for compliance with the terms of the Draft Convention, they are given primary control over the inspection of activities carried out under their auspices.[80] This primary control is subject to the right of the international agency to inspect on its own initiative or at the request of any interested contracting party any seabed operation.[81] Expropriation of investments or unjustifiable interference with activities, except as provided for in cases where Draft Convention articles are violated, is prohibited.

Under Article 22 the exploitation of the sedentary living resources of the seabed area, subject to such conservation measures as are necessary to protect the living resources of the area, is open to all contracting parties.[82]

Scientific research is to be encouraged and rules are to be prescribed to protect the life and property of parties participating in the seabed area and the life of the seabed environment.[83] Provision is also made for establishing international marine parks and preserves.[84]

One of the more interesting aspects of the United States Draft Convention is the proposed creation of an international trusteeship. The five articles of Chapter III set out a plan which would afford the coastal state special control over activities in the seabed area between the 200 meter line and the base of the continental slope.[85] As earlier indicated, control (of a type similar to sovereignty over minerals) is given to the world community. Yet here in the same instrument which vests control over seabed resources in the world community, a type of special control is granted to the coastal state over the continental slope and rise. Within this international trusteeship area the coastal state is responsible for:

74. *Supra* note 65, Article 10.
75. *Id.* Article 11. A group of states acting together would be jointly and severally liable under this article.
76. The other alternative is that exemplified by Intelsat. Agreement Establishing Interim Arrangements for a Global Commercial Communications Satellite System, 2 U.S.T. 1705, T.I.A.S. 5646, Special Agreement, 2 U.S.T. 1745, T.I.A.S. 5646. For a presentation of the unique aspects of this approach *see* Chayes, Ehrlich, and Lowenfeld, *International Legal Process* 632–704 (1968).
77. *Supra* note 65, Article 13.
78. *Id.* Appendixes A, B, and C. For a summary of Appendixes A, B, and C *see* 63 *Dep't State Bull.* 216–17 (August 24, 1970).
79. *Supra* note 65, Article 15.
80. *Id.* Article 19.
81. *Id.* Such inspection is to be made with the cooperation of the trustee or sponsoring party according to this article.
82. *Id.* Article 22. In the trusteeship area the trustee party has the same discretionary rights as in the case of non-living resources.
83. *Id.* Articles 23 & 24.
84. *Id.* Article 25.
85. *Id.* Article 26. The same type of problem faced in trying to fix a limit to the continental shelf also exists with regard to the continental margin. The Draft Convention does not offer a solution other than to suggest that a surface gradient ratio be used and that it should be determined by experts taking into account such things as ease of determination, the need to avoid dual administration, and the avoidance of including excessively large expanses in the trusteeship area. Mention is also made of the fact that special consideration will have to be given to the problems raised by enclosed and semi-enclosed seas.

a. Issuing, suspending and revoking mineral exploration and exploitation licenses;
b. Establishing work requirements, provided that such work requirements shall not be less than those specified in Appendix A;
c. Ensuring that its licensees comply with this Convention and, if it deem it necessary, applying standards to its licensees higher than or in addition to those required under this Convention. . . .;
d. Supervising its licensees and their activities;
e. Exercising civil and criminal jurisdiction over its licensees, and persons acting of their behalf, while engaged in exploration or exploitation;

* * * * *

h. Determining the allowable catch of the living resources of the seabed and prescribing other conservation measures regarding them;
i. Enacting such laws and regulations as necessary to perform the above functions. . . .[86]

In exercising the control just outlined, the coastal state, or Trustee Party, may:

a. Establish the procedures for issuing licenses;
b. Decide whether a license shall be issued;
c. Decide to whom a license shall be issued, without regard to the provisions of Article 3. . . .[87]

The trustee party is also responsible for collecting all payments or fees required by the Draft Convention.[88] In addition to collecting and transferring payments, the trustee party is allowed to retain a portion of all fees and payments required under the Draft Convention.[89] To cover administrative expenses the trustee party may collect and retain additional fees and may also retain a portion of other additional fees related to the issuance or retention of a license.[90] Given the current status of the doctrine of the continental shelf, it appears unrealistic to suggest that any regime for seabed resources would be internationally acceptable without recognizing some special status for coastal states.[91] At the same time, it is also unrealistic to ignore the inchoate rights of the world community in ocean space, including rights to seabed resources. The United States Draft Convention seeks an accommodation of both of these interests. Use of a trusteeship zone in which the international authority would have ultimate control but the coastal state would have the right to add additional discriminatory regulations is the proposed accommodation. Through shared revenues the world community would benefit while coastal states would have great latitude with respect to the resources of the seabeds in this area. Also the potential problem of unilateral "creeping jurisdiction" is obviated in the area seaward of the 200 meter line since no state may obtain sovereign rights in this area.[92]

In any regime the operating agency is of crucial importance. The operating agency under the Draft Convention would be called the International Seabed Resource Authority.[93] This International Seabed Resource Authority, or ISRA, would be made up of an assembly, a council and a tribunal. The assembly would be made up of all the contracting parties and would meet at least once every three years. Each state would have one vote and, except as otherwise provided, decisions would be made by a majority of the members present and voting.[94] These decisions include taking action on matters referred to it by the council, approving budgets proposed by the council, electing the members of the council, making recommendations to the council or contracting parties and approving proposals by the council for changes in the allocation of the net income, subject to the limits contained in the Draft Convention.[95]

Twenty-four contracting parties would comprise the council.[96] These twenty-four members would include two categories of states: one category is to include the six most industrially advanced contracting parties [97] and the other category is to include eighteen elected states, with at least twelve of them developing countries. At least two of the twenty-four council members would be landlocked or shelflocked countries.

86. *Id.* Article 27.
87. *Id.* Article 28.
88. *Id.* Article 27.
89. *Id.* Article 28. The suggested figure range for retention by the trustee state is 33⅓ to 50%.
90. *Id.*
91. Under the present doctrine of the continental shelf, as set forth in the 1958 Shelf Convention, coastal states have exclusive rights to seabed resource exploitation out to 200 meters. Thus it is unrealistic to expect coastal states to agree to any new regime which would be less generous. Further, the Shelf Convention allows for coastal state exploitation past the 200 meter depth if exploitation is possible and the area is adjacent. Some recognition of this already existing right is also necessary for coastal state concurrence. Since civil law countries have no exact counterpart to trusteeship, this method of recognizing vested rights may present some problems.
92. Of course it would then be possible for a type of international "creeping jurisdiction" to occur. *See* note 72.
93. *Supra* note 65, Article 31. Under Article 33 ISRA would have the same legal capacity, privileges and immunities as those defined in the Convention on the Privileges and Immunities of the Specialized Agencies of the United Nations.
94. *Id.* Article 34. A majority of the contracting parties would be required for a quorum.
95. *Id.* Article 35.
96. *Id.* Article 36.
97. *Id.* Appendix E. According to Appendix E, the six most industrially advanced contracting parties would be those who are both developed and have the highest gross national product.

Decisions made by the council would require approval by a majority of all members, including a majority in each of the two major categories.[98] The council would submit proposed budgets to the assembly, submit proposed changes in the allocation of net income to the assembly, issue emergency orders to prevent serious harm to the marine environment, and appoint the commissions.[99]

The three commissions to be appointed by the council include the Rules and Recommended Practices Commission, the Operations Commission, and the International Seabed Boundary Review Commission.[100] The Rules and Recommended Practices Commission would be charged with the initiation of annexes.[101] These annexes would provide operational outlines for ISRA. Annexes would come into effect only after adoption by the council and in the absence of disapproval by one-third or more of the contracting parties.[102] Issuance of licenses and general supervision of operations of licensees, in cooperation with the trustee or sponsoring party [103] where appropriate, would be conducted by the Operations Commission.[104] Coordination of the delineation of boundaries would be conducted under the auspices of the International Seabed Boundary Review Commission, which is to be manned by members with suitable qualifications and experience in marine hydrography, bathymetry, geodesy and geology.[105]

Finally, there would exist a tribunal as the third major component of ISRA under the United States Draft Convention.[106] This tribunal would pass on the legality of measures taken under the convention in terms of the "constitutional" limitations provided by the convention, pass judgment on disputes between parties relating to the interpretation and application of the convention, and exercise compulsory jurisdiction with respect to complaints of failure to fulfill obligations under the Convention.[107]

Preexisting claims are also treated in the Draft Convention. Titled "Transition," Chapter VI deals with two situations: (a) authorizations for exploitation granted prior to July 1, 1970, and (b) investments made prior to the coming into force of the Convention but after July 1, 1970. With respect to the latter category there is simply a broad statement that there be due protection of the integrity of investments. In the case of the former category, there is a "grandfather clause" which would protect activities as long as they continued under an authorization made prior to July 1, 1970.[108] In essence this treatment of the question of on-going exploitation pending the adoption of a seabed regime represents a rejection of a total moratorium on all activities in the seabed area while still attempting to prevent unilateral actions from creating insurmountable future obstacles.

Any amendment to the Draft Convention or its appendixes would require approval by the council, a two-thirds vote of the assembly, and ratification by two-thirds of the contracting parties including each of the six most industrially advanced states.[109] Withdrawal from the Convention would be allowed upon written notification addressed to the Secretary-General and would take effect one year from the date of the receipt by the Secretary-General of such notification.[110]

Other proposals were also submitted at the August 1970 Meeting of the Seabeds Committee. One such document was submitted by France and the other by the United Kingdom.[111] These working papers give some indication of the approach considered appropriate by the French and British Governments.

Neither the French nor British working paper is as detailed as the United States Draft Convention. Nonetheless, there are some basic similarities in all three documents.[112] Two basic requirements are set forth as important in the French working paper: economic efficiency and international equity.[113] Economic efficiency is

98. *Id.* Article 38.
99. The Council is also responsible for appointing the Secretary-General of the Authority and carrying out other general administrative functions. *Id.* Article 40.
100. *Id.* Article 42.
101. *Id.* Article 43.
102. *Id.* Article 67.
103. A "Sponsoring Party" is defined as a contracting party which sponsors an application for a license or permit for ISRA. *Id.* Article 75.
104. *Id.* Article 44.
105. *Id.* Article 45.
106. *Id.* Article 56.
107. If a state fails to comply with a judgment issued by the tribunal, the council decides on the appropriate measures to be taken. These measures may include a temporary suspension of rights under the Convention. *Id.* Article 58.
108. *Id.* Article 73.
109. *Id.* Article 76 Amendments would not apply retroactively.
110. *Id.* Article 77.
111. 7 UN Monthly Chronicle No. 8, 40–43 (August-September 1970).
112. It might be argued that the United States, United Kingdom and France are nations with such similar interests that it would be surprising only if their proposals were different. To the extent that this statement is accurate, and it is accurate at least in part, we must expect to see changes as other nations are heard.
113. "Proposals Concerning the Establishment of a Regime for the Exploration and the Exploitation of the Seabed" (submitted by France) U.N. Doc. A/AC.138/27 (1970) Section I.

said to be important because seabed exploitation involves considerable financial investment and advanced technical skill. International equity is said to demand contribution from the revenues derived by exploitation of resources not belonging to any country *per se* to the development of the underprivileged countries in the world community. Any scheme which would lead to a complete appropriation by states of the seabed is at once rejected as being in contravention of international equity and any scheme which would lead to the exercise of all phases of exploration and exploitation by an international organization is likewise rejected since it is said to be basically incompatible with economic efficiency.

Like the United States, France indicates through its working paper that the successful solution of the seabed resources issue must be contained in a general convention.[114] Although no specific details are set forth, the French proposal envisions this convention as containing basic principles, the main outlines of a regime, and the structure of an international organization.[115] Because exploitation of seabed resources involves two different types of equipment and technique, it is suggested that there be in essence two types of regimes under this proposed general convention. Exploitation conducted with mobile equipment, such as the dredging or vacuuming of maganese nodules, would be allowed on a free basis after registration with the international body. No exclusive rights would be created by this registration. On the other hand exploitation carried out by the use of fixed equipment, such as is the case with hydrocarbons, would be controlled through an international body.[116] Various areas would be allotted to member states for given periods of time, and the states would in turn grant the right of exploitation within the area designated. In order to avoid having the economically developed nations outbid all others for grants of seabed areas, France suggests that there be established grounds for assuring a balanced distribution in line with the basic French requirement of international equity.[117] Unlike the United States, France does not suggest special rights for coastal states in an area over which the world community would be given control. However, like the United States, France contemplates control over seabed operations through states. Finally, while France recognizes the fact that royalties should go to help states which are less privileged, her system would require the exploiting state to contribute a certain amount but would allow that state control over the dedication of those funds.[118]

The British Working Paper is composed of a series of thirteen general statements each followed by an appropriate explanation.[119] The United Kingdom suggests that some type of international agreement embodying a regime for seabed resources is necessary and appropriate. All mineral resources of the seabed beyond national jurisdiction would be subject to international control through an international body established for that purpose.[120] Several statements in the British Working Paper indicate the propriety of expressly recognizing and providing for other uses, especially those already established under international law.[121] Like both the United States and French Working Papers, the British Working Paper would provide allocation of various areas to states which would in turn authorize actual exploitation. While no specific test is set forth, it is recognized that some formula would be necessary to guarantee an equitable distribution of "blocks" [122] of the seabed to various nations. Under the British Working Paper only a certain portion of the seabed would be licensed for exploitation during successive fifteen year periods.[123] Again the now familiar concept of state responsibility for exploitation is suggested along with the idea of a distribution of royalties designed to assist developing countries. The British Working Paper also includes statements concerning the types of licensing, operating rules, verification, and liability for damage caused by exploitation.

PROBLEMS AND PROGNOSTICATIONS

The interplay between the changes in man's way of life and changing legal rules for that life has always furnished a connecting link for generations and groups in organized societies. In the case of the oceans, man's initial interest was effectuated under the doctrines of freedom

114. *Id.* Section II.
115. These recommendations are keyed to the Seabeds Committee and its Legal and Economic and Technical Sub-Committees.
116. *Supra* note 113, Section III.
117. *Id.* Section V.
118. *Id.* Section IV.
119. "International Regime" (Working Paper presented by the United Kingdom) U.N. Doc. A/AC.138/26 (1970).
120. Those minerals suspended in the sea water itself are to be treated differently. These minerals would be regarded as pertaining to the high seas. *Id.* No. 2.
121. *Id.* Nos. 4 & 5.
122. *Id.* No. 8.
123. These blocks would not be restricted to any particular geographical location. *Id.*

of the seas and territorial waters. Later, a new interest in mineral exploitation demanded a new doctrine. The chain of events started by the Truman Proclamation in 1945 and marked by the 1958 Shelf Convention has established the Continental Shelf Doctrine under which the coastal state is given the right to explore for and exploit the mineral resources of its continental shelf. Having gone this far, it is clear that the future of seabed resource development will always recognize special rights for coastal states on their continental shelves. But today new scientific advances have raised new problems.

Conflict minimization and prudent resource allocation have already been suggested as the appropriate goals to consider in seeking a resolution of the seabeds resource problem. Yet even if one assumes that there is world wide agreement on the general goals, particular formulations under these goals promise to be disturbingly diverse. Nonetheless there is movement toward a resolution of the problem, and in light of that movement the following observations appear appropriate.[124] First, there are limits to a state's continental shelves. Even though the exact geological delimitation of the continental shelf remains obscure, it is apparent that there is a deep ocean floor not subject to the doctrine of the continental shelf. Second, the ultimate resolution of the seabed resource issue must be made internationally. Some type of general convention is required. Third, control over the deep ocean floor resources should be exercised by the world community. Present formulations of international control recognize special benefits for developing states. Fourth, some type of international body is needed to administer control over seabed resources.

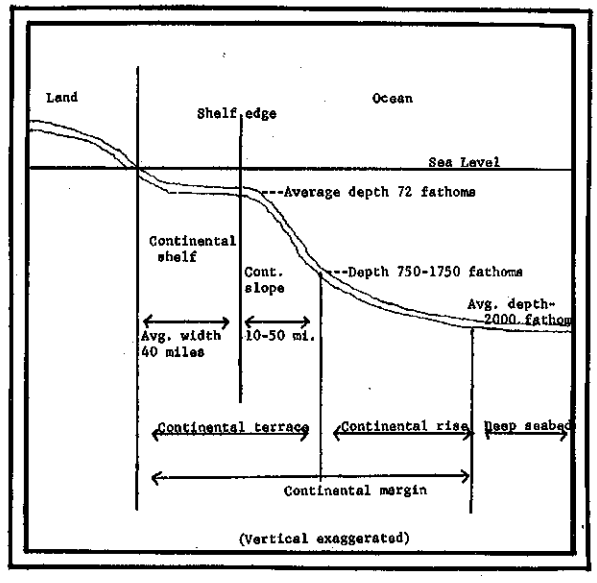
All of the observations just made are nothing more than prognostications. They are based on the present trends of thought as indicated by the previous discussion. Hopefully the outline set forth will be followed in an international resolution of the seabeds resource problem. But before this broad outline can be internationally implemented, many specific problems must be solved. For instance, many of the nations of the world which supply raw materials are concerned about the effect that deep sea resource production will have on their domestic industries. The developing nations are anxious to obtain the technical skills necessary for exploitation. There still remains the problem of nations with narrow continental shelves. Ever present also are the problems of the nature of the international control body, the actual division of control over resources, and the benefits to be derived therefrom, and the accommodation of other uses of ocean space.[125] Even though these specific problems are addressed in varying degrees by the three working papers, their general thrust and the basic policy statement of President Nixon show room for compromise. If all nations are willing to compromise and negotiate in good faith, then perhaps within the next few years we will see a successful conclusion to the new quest for Atlantis.[126]

124. At the 25th Session of the United Nations General Assembly a seabed "principles" resolution was adopted. It generally supports the views and trends pointed out in this article. U.N. Doc. A/C.1/L.544 (1970).

125. These problems and their proposed solutions by various nations present a fascinating and complex political subject area. Based on the interests considered vital by the various nations, it is possible to discern certain patterns. From these patterns one may project the type of problem resolution which will ultimately occur. For a discussion of this general subject *see* Gerstle, The Politics of UN Voting: A View of the Seabed from the Glass Palace, Occasional Paper No. 7 of the Law of the Sea Institute, University of Rhode Island (1970), Friedheim, Factor Analysis as a Tool in Studying the Law of the Sea, Law of the Sea at 44–70 (Alexander ed. 1967); Friedheim *supra* note 49, Friedheim, Kadane, and Gamble, *Quantitative Content Analysis of the United Nations Seabed Debate: Methodology and a Continental Shelf Case Study*, 24 Int'l Organization 479–502 (1970).

126. If the timetable contained in the recent U.S. "conference" resolution [U.N. Doc. A/C.1/L.562 (1970)] is met, a convention on the seabed will come out of this 1973 conference.

APPENDIX A



INTERNATIONAL CONTROL OF MARINE POLLUTION

LIEUTENANT COMMANDER NORMAN A. WULF, JAGC, USN*

Americans as well as many other world citizens have suddenly awoke to the realization that concern over environmental pollution is long overdue. In recent years international interest has particularly focused on marine pollution. In this article Lieutenant Commander Wulf identifies some activities which pollute the marine environment, recognizing that such pollution may affect all users of the world's oceans. Analyzing the efforts to control oil pollution, he concludes that the existing regime provides significant protection against this form of marine pollution but views further protection of the marine environment from oil and other forms of marine pollution as being dependent upon the acquisition of knowledge about the effects of such pollution.

MAN'S ACTIVITIES on land and at sea pollute the marine environment. From land, pollution of the ocean results from such activities as dumping of municipal sewage into the sea, disposal of industrial wastes into rivers and streams, and use of DDT and other chemical agents which are borne through the air to the sea. At sea, exploration for and exploitation of the mineral resources of the seabed and the release of substances from vessels contribute to pollution of the marine environment. Even though land activities can affect the marine environment at distances far from the coastal state, such activities taking place within the confines of a sovereign state traditionally have not been the subject of international control. Presently, however, these activities are becoming the object of increasing international scrutiny.[1] On the other hand, marine activities conducted on the high seas, beyond the territory of a state, are not insulated from the concern of the international community by concepts of territorial sovereignty and thus customarily have been subjected to some international control.

Pollution from seabed exploration and exploitation in high seas areas is treated explicitly in the 1958 Geneva Convention on the High Seas.[2] That Convention calls upon every nation to draw up regulations to prevent pollution of the seas resulting from the exploration and exploitation of the seabed and subsoil taking into account existing treaty provisions on the subject. Since no major multilateral treaties exist for the control of pollution from seabed activities, reliance is placed upon the coastal nation to prevent pollution.[3]

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*Lieutenant Commander Wulf is currently assigned to the International Law Division, Office of the Judge Advocate General. He received the B.A. Degree from Iowa Wesleyan College, the J.D. Degree from the University of Iowa, and the L.L.M. Degree from the University of Miami.

1. *See, e.g.*, G.A. Res. 2566, 24 U.N. GAOR Supp. 30 at 38, U.N. Doc. A/7630 (1969); Trail Smelter Case (United States v. Canada), 3 U.N.R.I.A.A. 1905 (1938).

2. Article 24, 13 U.S.T., 2312 T.I.A.S. No. 5200 (1962).

3. In the United States the Water Quality Improvement Act of 1970, 84 Stat. 91, reprinted in U.S. Code Cong. and Ad. News at 539 (1970), sets forth regulations for the prevention of pollution from exploitive activities within the territorial sea. Similar activities conducted outside of the territorial sea on the U.S. continental shelf are subject to regulations issued pursuant to the Outer Continental Shelf Lands Act of 1953, 43 U.S.C. 1331–1343. These regulations are set forth in 34 Fed. Reg. 13544 (1969).

Note that the United States working paper on the international seabed area (*see* discussion by Newton, *supra* p. 79) calls upon the proposed International Seabed Resource Authority to prescribe rules and recommend practices to ensure protection of the marine environment against pollution resulting from seabed activities. Art. 23(1)(a), 9 *Int'l Legal Mats.* 1046, 1053 (Sept. 1970).

The High Seas Convention deals with oil pollution caused by vessels in a like manner, but, unlike exploitative activities, a separate international treaty exists for controlling this source of oil pollution. Additionally, two other treaties dealing with this form of marine pollution have been signed by eighteen countries, but thus far have not achieved sufficient ratification to enter into force. Since oil pollution from ships is the area where most international activity has concentrated, examination of international efforts to control marine pollution will be limited to this area.

A. THE OIL POLLUTION PROBLEM

Approximately sixty percent of the annual world production of oil, or some 1,000 million metric tons, is transported by sea, and approximately one million metric tons of it is annually released into the sea.[4] Oil can be released onto the waters of the sea by non-casualty discharges, primarily as a result of deballasting,[5] or by spills resulting from maritime casualties which cause breaches in the integrity of the ship.[6] Released oil can be carried by winds and currents to pollute the shoreline of coastal states. It has been estimated that major oil pollution of beaches in the Long Island or Los Angeles area could create losses of revenue from recreational spending of approximately $30 million and $51 million, respectively.[7] Apart from this damage to beach amenities, it is generally accepted that while pollution by crude oil is not significantly harmful to marine fauna and flora, it is very destructive of seabirds.[8] However, the long-range effects of oil pollution on living organisms are only now being studied and may be found to be significantly harmful.[9] A populace concerned by the damage to beach amenities, the destruction of seabirds and by other real or imagined harms generates demands that released oil be prevented from polluting coastlines and that oil already ashore be removed. Pollution damage can be costly as evidenced by the British and French claims following the *Torrey Canyon* incident which were $8.4 million and $7.68 million, respectively.[10]

From this brief examination of oil pollution from ships, the problem can be conveniently divided into two categories: prevention of discharges, non-casualty and casualty; and compensation for oil pollution damage.

B. PREVENTION

1. *Non-Casualty Discharges*

Oil pollution became a major concern in the 1920's as use of oil for fuel increased. Great Britain in 1922 and the United States in 1924 sought protection of their territorial sea and harbors by enacting legislation making it an offense for a vessel to discharge or allow the escape of oil into navigable waters.[11] By 1956, almost all maritime countries had laws or regulations prohibiting the discharge of oil into their

4. Annual Report of the President to the Congress on Marine Resources and Engineering Development, together with the Report of the National Council on Marine Resources and Engineering Developments 21 (1970), *Marine Science Affairs—Selecting Priority Programs.*
5. When an oil tanker discharges its cargo, it thereafter rides very high in the water exposing portions of its rudder and propellers. To lower the tanker into water where it will be more stable and amenable to navigational control, sea water is pumped into the empty oil tanks. Oil residues remaining in those tanks combine with the sea water to form an oil water emulsion which is often disposed of by discharge into the sea prior to taking on new cargo.
6. This classification is drawn from a paper entitled "International Regulation of Oil Pollution" prepared by Prof. T. A. Clingan and R. Springer for the International Law Panel of the President's Commission on Marine Science, Engineering and Resources [hereafter cited as Clingan & Springer]. Substantial portions of this paper are embodied in the Report of the International Law Panel, 3 *Panel Reports of the Commission on Marine Science, Engineering and Resources* VIII-84—VIII-90 (1969) and in Clingan, *Oil Pollution: No Solution*, 95 U.S. Naval Inst. Proc. 64–75 (May 1969).
7. A Special Study by the Secretary of Interior and the Secretary of Transportation, *Oil Pollution, A Report to the President* 4 (1968). Although the experience of the tourist industry after the *Ocean Eagle* split in two in San Juan Harbor indicates that this figure may be somewhat inflated, it is nonetheless true that many revenue producing tourists will remain away from coastal resort areas where significant oil pollution is present.
8. "Pollution by the *Torrey Canyon* was found to have little biological effect apart from the tragic destruction of seabirds." A Report by the Plymouth Laboratory of the Marine Biological Association of the United Kingdom 174 (J. E. Smith ed. 1968): *Torrey Canyon Pollution and Marine Life. And see* the testimony of P. DeFalco of the U.S. Federal Water Quality Administration regarding the Santa Barbara spill: "Data from the chemical and biological studies to date have indicated minimal acute effects have been experienced thus far by sea life. Planktonic, intertidal plants and invertebrate animals have maintained their abundance and variety; no fish kills have been observed as yet and the kelp beds are reasonably healthy." *Hearings on S.7 and S.554 Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 91st Cong., 1st Sess., at 808 (1969) [hereafter cited 1969 *Senate Hearings*].
9. Testimony of Max Blumer, 1969 *Senate Hearings* 1488.
10. Cowan, *Oil and Water: The Torrey Canyon Disaster* 195, 203 (1968).
11. 12 & 13 Geo. 5, c. 39 (1922), 33 U.S.C. 433 (1964). Previously the United States in 1886 had enacted legislation prohibiting the dumping of any ballast in New York Harbor which was superseded by Act of June 29, 1888. 33 U.S.C. 441 (1964). In 1889, the United States enacted the Refuse Act which prohibited the dumping of any refuse into the navigable waters of the United States. 33 U.S.C. 407 (1964). This Act subsequently was interpreted to apply to oil discharged from ships. United States v. Standard Oil, 384 U.S. 224 (1966); The La Merced, 84 F.2d 444 (9th Cir. 1936).

territorial seas.[12] It was early recognized, however, that oil discharged beyond the territorial sea on the high seas could also pollute the territory and territorial sea of the coastal nation. The United States Congress in 1922, by joint resolution, noted the damage done by the discharge of oil on the high seas and requested the President to call a conference of maritime countries to consider the adoption of effective measures to prevent these discharges from polluting navigable waters.[13] As a result of this Congressional initiative, an Inter-Governmental Conference of Major Maritime Nations met in Washington in 1926. Representatives of thirteen governments signed a convention which was not subsequently ratified by any signatory state primarily because many of the private shipowners subsequently entered into voluntary "gentlemen's agreements" to refrain from discharging oily waters within fifty miles from any coast.[14]

Although further international efforts were undertaken,[15] no significant results were achieved until the international conference on oil pollution held in London on April 26, 1954. Thirty-two nations, including the United States, attended this conference which produced the Convention for the Prevention of Pollution of the Sea by Oil, 1954; however, only twenty nations were signatories to the Convention.[16] The United States, which previously had indicated that it did not believe international action was necessary,[17] did not sign the Convention because of the "shortness of time for preparation and difficulties of reconciling conflicting domestic views." [18] The Convention entered into force on July 26, 1958, twelve months after the date on which the tenth government became a party to the Convention.[19] The United States subsequently overcame its domestic difficulties and ratified the Convention which entered into force for the United States on December 8, 1961.[20] In April, 1962, amendments to the 1954 Convention were adopted by the contracting governments. These amendments entered into force in May and June, 1967.[21]

In general, the Convention, as amended, prohibits the discharge of oil or oily mixtures from a ship within any prohibited area.[22] The prohibited zones extend fifty miles from the coasts of all countries with certain specified exceptions, some extending as far as one hundred miles. For example, the zone on both the Atlantic and Pacific coasts of Canada extends one hundred miles from her territorial sea baseline. The prohibition of discharges within these zones does not apply to naval ships nor to discharges resulting from damage to any ship subject to the Convention.[23] Oil released as a result of a maritime casualty, therefore, would not be a violation of this Convention.

Every ship to which the Convention applies is required to maintain an oil record book in which the discharge of oil must be recorded. Further, the ship operator is required to record actions which could result in the spillage of oil or oily mixtures, such as deballasting and cleaning. State parties may board any ship to which the Convention applies while that ship is within its ports in order to inspect the oil record book.

The owner or master of any ship which violates the Convention shall be punished under the laws of the flag state. Any party to the Convention may furnish evidence of a violation to another party whose flag ship has contravened

12. The International Law Commission in their commentary to their final draft proposal on the high seas convention stated: "Almost all maritime States have laid down regulations to prevent the pollution of their internal waters and their territorial seas by oils discharged from ships." 2 *Y.B. Int'l L. Comm'n* 285–86 (1956).
13. 42 Stat. 821 (1922).
14. 4 Whiteman, *Digest of Int'l Law* 696 (1965). *And see* Mann, *The Problems of Sea Water Pollution*, 29 Dep't State Bull. 775–76 (1953).
15. Mann, *supra* note 14 at 777.
16. 327 U.N.T.S. 322–25 (1959).
17. U.N. Doc. No. E/CN.2/100 (1950); U.N. Doc. No. E/CN.2/134 (1952).
18. *Hearings of the Senate Foreign Relations Comm. on Ex. C.* 86th Cong., 2d Sess., at 2 (1960). The Chairman of the U.S. delegation at the Conference announced that American ships voluntarily would observe the zones in which the Convention prohibited the discharge of oil. *Id.* at 9.
19. 327 U.N.T.S. 3 n. 1 (1959).
20. 12 U.S.T. 4900; U.S. T.I.A.S. 4900. On February 15, 1960, the Convention was transmitted to the U.S. Senate for its advice and consent. *Hearings Before the Senate Foreign Relations Comm. on Ex. C*, 86th Cong., 2d Sess., at 1 (1960). At that time, Belgium, Canada, Denmark, Finland, France, Germany, Ireland, Mexico, the Netherlands, Norway, Sweden and the United Kingdom had formally adopted the Convention without reservations. *Id.* at 5. On May 16, 1961, the U.S. Senate gave its advice and consent to ratification of the 1954 Convention subject to an understanding, two reservations and five recommendations. 107 Cong. Rec. 7416–17 (daily ed. May 15, 1961).

    To implement provisions of the Convention, the U.S. Congress enacted the "Oil Pollution Act 1961." 33 U.S.C. 1001–1015 (1964). This Act specifies that nothing therein modifies or amends the Oil Pollution Act of 1924. 33 U.S.C. 1014 (1964). On December 8, 1961, the 1954 Convention entered into force and the Oil Pollution Act, 1961, also became effective on that date.
21. 9 *Int'l Legal Mats.* 1 (Jan. 1970). The Oil Pollution Act of 1961 was amended in 1966 to conform with the 1962 amendments to the 1954 Convention. 33 U.S.C. 1001–1015 (1964).
22. Oil is defined to include crude oil, fuel oil, heavy diesel oil and lubricating oil. An oily mixture is a mixture which contains one hundred parts or more of oil in one million parts of the mixture.
23. Also excepted are discharges of solid sediments and residues of fuel oil and lubricating oil resulting from purification or clarification. Amendments adopted in 1969 by the IMCO Assembly would delete this exception. *Senate Ex. G.*, 91st Cong., 2d Sess., at 31 (1970).

the Convention. If satisfied that sufficient evidence is available to warrant prosecution under its law, the flag state shall institute proceedings against the violator. Thus, if a ship registered in Liberia discharges oil into a prohibited zone off the coast of the United States, only Liberia may take action against the ship for that offense. The penalties imposed by a flag state for a discharge in a prohibited zone shall not be less than the penalty imposed by that state for a discharge within its territorial sea.

The Convention reserves to the coastal state the competence to deal with discharges in that part of the prohibited zone constituting the territorial sea of a party to the Convention by stating that nothing in the Convention shall derogate from the powers of any state party "to take measures within its jurisdiction in respect of any matter to which the Convention relates." [24] The right of a coastal state to prohibit discharges in its territorial sea was affirmed in the 1958 Convention on the Territorial Sea and the Contiguous Zone which requires foreign vessels exercising the right of innocent passage to comply "with the laws and regulations enacted by the coastal state in conformity with these articles and other rules of international law." [25] The International Law Commission in their 1956 commentary to this section listed "the protection of the waters of the coastal State against pollution of any kind caused by ships" as an example of the regulations with which a foreign vessel must comply.[26] Clearly, a coastal state may prohibit the discharge of oil by foreign ships within its territorial sea.[27]

As of May, 1970, forty countries, including the major maritime countries, were parties to the 1954 Convention.[28] Despite widespread acceptance of the Convention, difficulties in the enforcement of its provisions have rendered the Convention less than effective. For example, the vastness of the prohibited zone and its use for transit by many ships make detection and proof of violations a serious problem. Unless the offending vessel is caught in the act of discharging oil, it is very difficult to determine and assign responsibility for an observed slick. Further, most discharges occur under cover of darkness rendering detection virtually impossible.[29] As an example of the problem detection poses, one need look only to the fact that the first prosecution of a British ship for violating Great Britain's 1955 legislation implementing the 1954 Convention occurred in August, 1969.[30]

Even if a violator is detected, successful prosecution poses an almost insurmountable hurdle. Because of the Convention's definition of prohibited oily mixtures, the prosecution must prove that the discharge contained one hundred parts or more of oil in one million parts of the mixture. Actual photographs of ships dumping oily wastes have not constituted sufficient evidence. A bottle of liquid with other supporting evidence has been required.[31] Further diminishing the Convention's effectiveness is the lack of uniform sanctions. Enforcement of violations under the Convention is by the flag state. If that state does not prescribe effective penalties in its legislation and apply them, a vessel under its flag, although cited for discharging oil in a prohibited zone, would not be penalized.

In May, 1967, the Intergovernmental Maritime Consultative Organization (IMCO) [32] instituted a complete review of the 1954 Convention. This review resulted in nine recommended amendments to the Convention which were

24. The ratification of the Convention by the United States was subject to an understanding that "offenses in U.S. territorial waters will continue to be punishable under U.S. laws regardless of the ship's registry." 107 Cong. Rec. 7416–17 (daily ed. May 15, 1961).

25. Article 17, 516 U.N.T.S. 205 (1964).

26. It should be noted that in April 1970 the United States enacted legislation establishing rules regarding non-casualty discharges within the twelve-mile contiguous zone. Water Quality Improvement Act of 1970, 84 Stat. 91, U.S. Code Cong. & Ad. News 589 (1970). Article 24 of the Convention on the Territorial Sea and the Contiguous Zone allows a state "in a zone of the high seas contiguous to its territorial seas" to exercise the control necessary to "prevent infringement of its . . . sanitary regulations." 15 U.S.T. 1606, 1612 (1964). *And see S. Rep. No.* 91–351, 91st Cong., 1st Sess., at 66 (1969). The Convention specifically limits the breadth of this contiguous zone to twelve miles from the coastline.

Subsequent to enactment of the U.S. legislation, Canada, in a claim mixed with sovereignty, nationalism and pollution control, introduced legislation claiming competence to exercise comprehensive control over all shipping in waters above the 60th parallel of north latitude seaward one hundred miles from the nearest Canadian land. This legislation, as introduced, is set forth in 9 *Int'l Legal Mats.* 543 (May 1970). It was subsequently enacted with one minor amendment. The United States has vigorously protested this legislation, stating that international law provides no basis for this unilateral extension of jurisdiction over vast areas of the high seas. *U.S. Dept. of State Press Release No.* 121, reproduced in 9 *Int'l Legal Mats.* 605 (May 1970).

27. 2 *Y.B. Int'l L. Comm'n* 278–74 (1956).

28. *Senate Ex. G*, 91st Cong., 2d Sess. at 7 (1970).

29. Clingan & Springer 24–25.

30. *Marine Pollution Bull.* No. 14, at 22 (1969).

31. Report of International Panel, III *Panel Reports of the Commission on Marine Science, Engineering and Resources* VIII–87 (1969).

32. A convention establishing IMCO was concluded in 1948, but its functioning was delayed until 1958 when sufficient ratification was achieved to bring the convention into force. 1958 *Yearbook of the United Nations* 501 (1959). IMCO's function is to provide machinery for cooperation among governments in regulations affecting international shipping and to encourage the adoption of the "highest practicable standards in matters concerning maritime safety and efficiency of navigation." *U.N. Maritime Conference, Final Acts and Related Documents* Art. 1, at 29 (1948).

adopted in October, 1969.[33] On May 20, 1970, these amendments were transmitted by the President of the United States to the Senate for its advice and consent.[34] The principal change resulting from these proposed amendments is that prohibited zones are abolished and all discharges of oil are prohibited, subject to certain exceptions. Any discharge from a ship (other than tankers) of oil or oily mixtures is prohibited except when *all* the following conditions are met: (1) the ship is proceeding enroute; (2) the instantaneous rate of discharge of oil content does not exceed sixty liters per mile; (3) the oil content of the discharge is less than one hundred parts per one million parts of the mixture; and (4) the discharge is made as far as practicable from land. As to tankers, the first two provisions are the same, but the third provision limits the discharge of oil on a ballast voyage to 1/15,000 of the total cargo-carrying capacity, and the fourth provision requires that the tanker be more than fifty miles from the nearest land. However, there is no prohibition of the discharge of ballast "from a cargo tank which, since, the cargo was last carried therein, has been so cleaned that any effluent therefrom if it were discharged from a stationary tanker into clean waters on a clear day, would produce no visible traces of oil on the surface of the water." [35]

As to ships other than tankers, these amendments could facilitate prosecution if sixty liters per mile never results in a visible sheen.[36] However, if such a discharge is visible, it will be as difficult to prove that a discharge did exceed sixty liters per mile as it is to prove that a discharge contained one hundred parts or more of oil per one million parts of the mixture. Prosecution of polluting tankers should be facilitated since any visible discharge of oil within fifty miles of a coast is prohibited. The amendments will not solve the problems of detecting unlawful discharges or assigning responsibilities for an observed slick. Nor will the amendments insure the application of uniform sanctions.

2. *Casualty Discharges*

Discharges resulting from damage to a ship, which are exempted from the 1954 Convention, came under intensive study after the spectacular *Torrey Canyon* incident. Canada, in 1969, and the United States, in 1970, enacted legislation authorizing immediate governmental intervention when a maritime casualty in the territorial sea poses a pollution hazard to its territory by actual or threatened discharge of large quantities of oil.[37] This right to intervene encompasses not only the right to remove the ship or its cargo, but also the right to destroy either. In view of the unsatisfactory results achieved by the British in their attempts to prevent pollution by bombing the *Torrey Canyon* thus insuring the release of all oil, it would appear that destruction of a stricken vessel would be advisable only in the rarest of circumstances.

The *Torrey Canyon* incident also stirred IMCO to undertake a major study of the problems posed by a massive spill. The *Torrey Canyon* went aground ten miles from the nearest territory of Great Britain, outside of Britain's three mile territorial sea.[38] Oil released by the stranded vessel not only affected the Cornish coast fifteen miles away, but also the French coast of Britanny over one hundred and ten miles from the casualty.[39] Since a massive spill on the high seas may affect significantly the territorial sea and territory of the coastal state, the IMCO Legal Committee drafted a convention dealing with the right of the coastal state to intervene on the high seas when a tanker accident threatened that state.[40] As a result of IMCO's activities, the International Legal Conference on Marine Pollution Damage convened in Brussels on November 10, 1969, with fifty-four countries

33. Letter submitting two conventions and amendments relating to pollution of the sea by oil from the Secretary of State to the President, May 7, 1970, in *Senate Ex. G*, 91st Cong., 2d Sess., at 5 (1970).

34. *Senate Ex. G*, 91st Cong., 2d Sess., at 1 (1970). On the same date these amendments were transmitted to the Senate, the President announced that since these amendments may not go into effect for some time he was instructing U.S. authorities to bring the provisions of these amendments into effect with respect to American vessels as soon as implementing legislation further amending the Oil Pollution Act of 1961 was adopted. The President also announced that there would be an increase in offshore surveillance in the areas of highest spill potential. *H.R. Doc. No.* 91-340, 91st Cong., 2d Sess. (1970).

35. *Id.* at 31. This new article and the other eight amendments are set forth in 9 *Int'l Legal Mats.* 1-19 (Jan. 1970). The 1969 Brussels Conventions on intervention on the high seas and liability for oil pollution damage also are located in this publication.

36. In April, 1970, the U.S. Coast Guard conducted metered tests in the Gulf of Mexico of various types of oil to determine their characteristics at sixty liters per mile. The test results are under evaluation. (Informal discussion with Coast Guard officials.)

37. 17 & 18 Eliz. 2, c. 53, § 24 (1969); 84 Stat. 91, U.S. Code Cong. & Ad. News 539 (1970).

38. The Times (London), March 29, 1967, at 1, col. 1, quoted in Utton, *Protective Measures and the Torrey Canyon*, 9 B.C. Ind. & Com. L. Rev. 613, 619, n.41 (1968).

39. Cowan, *Oil and Water: The Torrey Canyon Disaster* 162 (1968), Some *Torrey Canyon* oil traveled as far as two hundred and seventy-five miles before polluting the beaches at Normandy. Sweeny, *Oil Pollution of the Oceans*, 37 Fordham L. Rev. 155, 158 (1968).

40. Report of the U.S. Delegation to the International Legal Conference on Marine Pollution Damage, Brussels, Belgium, Nov. 10-29, 1969 in *Senate Ex. G.*, 91st Cong., 2d Sess., at 36-37 (1970).

represented. This conference produced the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, hereafter referred to as the Intervention Convention,[41] which was signed by eighteen countries.[42] The United States signed the Convention and has taken steps toward ratification.[43]

The Intervention Convention provides that, following a maritime casualty, a state may take such measures on the high seas as may be necessary to prevent, mitigate or eliminate "grave and imminent danger to their coastline or related interests" from pollution or the threat of pollution of the sea by oil. A maritime casualty is defined as a collision of ships, stranding or other incident of navigation or other occurrence resulting in material damage or imminent threat of material damage to a ship or cargo. Related interests which may be protected in addition to the coastline include (1) maritime coastal, port or estuarine activities, including fishing, which constitute an essential means of livelihood of the persons concerned; (2) tourist attractions of the area concerned; and (3) the health of the population and the well-being of the area concerned, including conservation of living marine resources and of wildlife. The right to intervene against a maritime casualty on the high seas does not extend to warships or government ships on noncommercial service.

Prior to taking any action, a coastal state must consult with interested states, particularly the flag state. Furthermore, the coastal state should notify any person, physical or corporate, who reasonably can be expected to be affected by those measures. However, in cases of extreme emergency, the coastal state may take the action rendered necessary by the situation without prior notification or consultation.

Any measures taken by the coastal state must be proportionate to the damage, actual or threatened. To determine whether the measures are proportionate to the damage, account will be taken of (1) the extent and probability of imminent damage if those measures are not taken; (2) the likelihood of those measures being effective; and (3) the extent of damage which may be caused by such measures. A coastal state taking actions in contravention of the Convention causing damage to others shall pay compensation to the extent of the damage caused by measures which exceed those reasonably necessary. In the event of disagreement as to whether compensation is due or as to the amount thereof, the dispute shall be submitted to conciliation or, if necessary, to arbitration upon the request of any interested party. The failure of a claimant to exhaust remedies under the domestic law of an intervening coastal state shall not entitle that state to refuse conciliation and arbitration.

A coastal state, therefore, can prevent threatened pollution or abate further pollution from a maritime casualty by intervening in its territorial sea or, after this Convention enters into force, on the high seas. The view has been expressed that the Intervention Convention codifies existing international law.[44] Under this view, a threatened coastal state already has the right to intervene against a maritime casualty on the high seas.

C. COMPENSATION

Obtaining compensation for pollution damage from an offending vessel can be extremely difficult. If the only asset owned by the polluter is the now valueless ship lying on the bottom of the sea, or, if the foreign owner of a polluting vessel has no assets in the coastal state, effective application of coastal state liability laws may be impossible. Britain and France were fortunate that the Bermuda corporation which owned the *Torrey Canyon* also owned two other tankers. Although neither tanker put into British or French territory, thus precluding application of their liability laws, both countries were able to utilize the laws of foreign countries to levy claims totaling $16.08 million against the owners.[45] Subsequent negotiations between the owners and officials of both countries led to settlement of their claims for $7.2 million.[46] It is doubtful that negotiations would have achieved

41. This Conference also produced the International Convention on Civil Liability for Oil Pollution Damage, discussed *infra*. Both Conventions are set forth in 64 A.J.I.L. 471 and 481 (1970) and in 9 *Int'l Legal Mats.* 25 and 45 (Jan. 1970).

42. Belgium, Cameroon, Republic of China, West Germany, France, Ghana, Guatemala, Iceland, Italy, Ivory Coast, Malagasy Republic, Monaco, Poland, Portugal, Switzerland, United Kingdom, United States and Yugoslavia signed both the Intervention and Liability Conventions. Indonesia signed only the Liability Convention and Korea signed only the Intervention Convention. 9 *Int'l Legal Mats.* 20–31 (Jan. 1970).

43. On May 20, 1970, the Convention was submitted to the Senate for its advice and consent to ratification. *Senate Ex. G*, 91st Cong., 2d Sess., at 1 (1970).

44. Mendelsohn, *Maritime Liability for Oil Pollution—Domestic and International Law*, 38 Geo. Wash. L. Rev. 1, 28 (1968).

45. Britain attached one of the sister ships in Singapore. After posting a bond, it was released and subsequently attached by France while in Amsterdam. Cowan, *Oil and Water: The Torrey Canyon Disaster* 193–203 (1968).

46. 9 *Int'l Legal Mats.* 633–35 (May 1970).

even this level of success if the Bermuda corporation had owned no ship other than the *Torrey Canyon*.

The IMCO study initiated after the *Torrey Canyon* incident considered, in addition to intervention, the liability of a polluting vessel for damages. The resulting International Convention on Civil Liability for Oil Pollution Damage, hereafter referred to as the Liability Convention, was signed by eighteen states at the 1969 Brussels Conference.[47] Canada, which cast the only vote against the proposed convention, did not sign it. The United States, which was a signatory, has initiated steps leading to ratification.[48]

The Convention deals only with the liability of ships carrying oil in bulk as cargo (tankers). It provides that the owner of a tanker is liable for any pollution damage caused by oil which has escaped or been discharged from the ship subject to three narrow exceptions.[49] Exempted from the Convention are discharges from warships and other public vessels not on commercial service. Liability for pollution damage under the Convention includes not only the costs of preventive measures, but also whatever further damage such preventive measures may cause. It also extends to private claims and to claims by governments. Compensable damages under the Convention are limited to pollution damage caused on the territory or territorial sea of a coastal state.

A tanker owner is entitled to limit his liability for any one incident to an aggregate amount of one hundred and thirty-four dollars for each ton of the ship's tonnage, not to exceed fourteen million dollars,[50] except there is no limitation on liability when the incident occurred as the result of the actual knowledge or fault of the owner. To avail himself of the benefit of this limitation, the tanker owner must constitute a fund for the total amount of his liability with the authorities of the state in which pollution damage to the territory or territorial sea has occurred. If the fund has been properly constituted, no person claiming pollution damage is entitled to levy against any other assets of the owner in respect to the claim, and authorities of the coastal state must order the release of any ship or property of the owner which has been arrested or any security which has been deposited. No claim for compensation for pollution damage against the owner is allowed except in accordance with the Convention.

To insure that the owner of a vessel subject to the Convention has adequate assets to meet his potential liability, the Convention requires the owner of a ship carrying more than two thousand tons of oil in bulk as cargo to maintain insurance or other financial security in an amount equal to the limit of his liability. Any claim for pollution damage may be brought directly against the person providing financial security for the owner's liability. The person providing financial responsibility is entitled to constitute a fund under the same conditions and with the same effects as if constituted by the owner. Thus, assets would be available to a coastal state which has suffered pollution damage, even though the polluting vessel may now lie valueless on the bottom.

To enforce the required financial responsibility, no state shall permit any ship under its flag which is required to maintain financial liability to trade unless a certificate has been issued by the state attesting that the requisite financial responsibility has been established. Further, each state must ensure that all ships, wherever registered, carrying over two thousand tons of oil in bulk as cargo are insured or covered by other security before allowing them to enter or leave either a port in its territory or an offshore terminal in its territorial sea.

CONCLUSION

If all major maritime nations were parties to the 1954 Convention and to the two 1969 Conventions, significant protection of the interests of coastal states would result. The 1954 Convention with the 1962 and 1969 amendments, if vigorously enforced by all parties, would deter many non-casualty discharges of oil. The problem of detecting such discharges would

47. *Supra* note 40.

48. On May 20, 1970 the Liability Convention and that relating to intervention were submitted by the President to the U.S. Senate for its advice and consent. *Senate Ex. G*, 91st Cong., 2d Sess., at 1 (1970). Because of conflicts between the Liability Convention and the Water Quality Improvement Act, hearings have been conducted on the Convention by the Senate Public Works Subcommittee on Air and Water Pollution. *B.N.A. Environment Reporter, Current Developments* 303 (1970).

49. If the owner can prove the damage (1) resulted from an act of war or an act of God; (2) was wholly caused by the act or omission done with intent to cause damage by a third party; or (3) was wholly caused by the negligent or wrongful act of any government or other authority responsible for the maintenance of navigational aids in the exercise of that function, then he is not liable under the Convention.

50. To meet objections by some delegations that these limits might not be sufficient to provide full and adequate compensation for pollution damage, a resolution was adopted directing IMCO to study the idea of an international fund and to convene, not later than 1971, a conference for consideration of the fund proposal. The international fund would be constituted by a levy on the carriage of oil and would be available to compensate victims for any damage suffered beyond the limits of the ship's liability. *Senate Ex. G*, 91st Cong., 2d Sess., at 36, 44–46 (1970).

remain as the major deficiency in the protection of the marine environment from this form of oil pollution. As to casualty discharges, the Intervention Convention would allow the coastal state to take remedial measures against a ship when threatened with pollution from a maritime casualty. The Liability Convention ensures that the coastal state will be compensated for pollution damage by establishing the vessel's liability for damages and by requiring financial responsibility to meet that liability. Advancement toward the goal of preventing maritime casualties may result from the requirement of financial responsibility as shipowners guard against pollution in order to obtain reduced premiums for their insurance.

Although the existing regime for the control of marine pollution from ships may provide adequate protection of coastal interests, further controls may be required if oil pollution is found to be significantly harmful to the general marine environment. These controls would envisage prevention of all discharges of oil into the ocean, not just those discharges which can affect adversely the coastal state. Attainment of this total prohibition on discharges would require international standards on construction and operation of vessels to preclude non-casualty discharges. Prevention of casualty discharges will require numerous international standards designed to prevent the occurrence of maritime casualties. These standards would be technical in nature and would require continuing revision as technology advances. IMCO, which recently has demonstrated a greater willingness to cope with the problems of marine pollution, has the technical expertise and the practical knowledge to promulgate effective and realistic standards. The 1973 IMCO Conference, preceded by accelerated study of the effect of oil pollution and of the best techniques to avoid discharges of oil, would appear best equipped to deal with the problem of pollution of the sea by oil from ships.

Pollution of the marine environment from seabed activities is similar in nature to pollution from ships. The major pollutant from such activities is oil, which has its most dramatic impact on the coast. The present regime for control of pollution from seabed activities leaves to the coastal state the determination of standards and the means of their enforcement. If one assumes that oil will be the only significant source of pollution from seabed activities, or if one assumes that such pollution damages only the adjacent coastal state, the present regime may be viewed as adequate. If, however, either of these premises is invalid, promulgation of international standards and establishment of methods of enforcement may be necessary. The United States response to the Secretary-General's survey of member views on the desirability of convening a conference on the law of the sea [51] expressed the view that such a conference should include the establishment of an international regime for exploitation of the seabed beyond the limits of national jurisdiction.[52] The regime to be established for the seabed beyond national jurisdiction might include adequate standards and controls for dealing with seabed pollution. The controls thus established should also be useful for controlling pollution from seabed activities conducted in areas within national jurisdiction.

Land-based polluting activities can create an adverse impact upon uses of the sea by other states and, therefore, may justifiably be considered an appropriate subject of international attention. However, these polluting activities are conceptually unrelated to the law of the sea. The impending Conference on the Problems of Human Environment to be held in Stockholm in 1972 could appropriately fashion principles to deal with this difficult problem.

Rational decision on the rules to be designed to protect the marine environment requires a sound basis in fact. For example, if no other nation is affected adversely by pollution from seabed activities conducted solely on the U.S. continental shelf, it would be unnecessary to attempt formulation of an international regime for control of such pollution. However, if scientific study supports the conclusion that this pollution adversely affects the total marine environment, it makes little sense to leave the formulation of standards for control of seabed pollution solely to the adjacent coastal state. The Rome Conference of the Food and Agricultural Organization on the effects of marine pollution on living organisms, held in December 1970, is an example of the type of activity which can lead to acquisition of knowledge upon which can be erected a viable regime for the international control of marine pollution.

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51. This survey was conducted pursuant to General Assembly Resolution 2574 A (XXIV) of 15 December 1969.

52. 9 *Int'l Legal Mats.* 833 (July 1970). The U.S. response addresses the issue of protection of the marine environment as follows: "The problem of protecting the ocean environment arises in the context of many issues, and should be carefully examined in connection with each issue. At the same time, the United Nations and its specialized agencies might proceed with their work in this field, certain aspects of which could be more appropriately dealt with separately, from the more general problems of the law of the sea." *Id.* at 836.

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