

## University of Miami Law School Institutional Repository

---

University of Miami Inter-American Law Review

---

2-1-1977

# The Oceans

Benedict P. Kuehne

Kathleen M. O'Donnell

Follow this and additional works at: <http://repository.law.miami.edu/umialr>

---

### Recommended Citation

Benedict P. Kuehne and Kathleen M. O'Donnell, *The Oceans*, 9 U. Miami Inter-Am. L. Rev. 192 (1977)

Available at: <http://repository.law.miami.edu/umialr/vol9/iss1/10>

This Report is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Inter-American Law Review by an authorized administrator of Institutional Repository. For more information, please contact [library@law.miami.edu](mailto:library@law.miami.edu).

## THE OCEANS

BENEDICT P. KUEHNE\*  
KATHLEEN M. O'DONNELL\*

### LAW OF THE SEA CONFERENCE

The third United Nations Conference on the Law of the Sea (UNCLOS) completed its fourth substantive session in mid-September of 1976. While moderate progress was made on some of the pressing issues, the Conference failed to reach agreement on key economic aspects of future legal provisions.

The format of the Conference emphasized informal negotiations on outstanding questions in the three main committees. Dispute settlement was reviewed by the plenary in order to prepare a revised dispute settlement text. The bases of discussion continued to be the Revised Single Negotiating Text (RSNT) issued at the end of the spring session by the committee chairmen, and a separate text on dispute settlement prepared by the President of the Conference.

The RSNT represents a consensus on a large number of issues which include the 12-mile territorial sea, unimpeded passage of straits, the establishment of coastal state resource and other rights in the 200-mile economic zone, the protection of navigation rights, and marine pollution. The goal at the conclusion of the next session, to be held in New York in May, 1977, is to elevate the RSNT to the status of a draft convention. However, several critical issues have yet to be resolved. Among these are deepsea mining of the ocean floor, the legal status of the proposed economic zone and access to the sea by land-locked and geographically disadvantaged states.

*Committee I*—The first Committee devoted substantially all of its time to the question of the system of exploitation of the deep ocean floor and an evaluation of the proposed system of access to the minerals

---

\*J.D. Candidates, University of Miami School of Law.

thereon. The RSNT provisions establish a parallel system of exploitation by both the Enterprise (the working arm of the International Seabed Authority), and states and their respective private entities having equal access to the resources on the seabed.

The Group of 77, the vocal faction for the developing countries, proposed a system which would give broad discretionary power to the Authority in the field of negotiating exploitation contracts with states and private entities. The proposed system would thus empower the Authority to close off completely various areas of the ocean floor to resource exploitation. The developing countries fear that the parallel access system would lead to early depletion of the ocean's mineral resources and a rapid lowering of the world's commodity prices to the detriment of the mineral producers of the developing world.

The United States Secretary of State (Secretary), in an attempt to accommodate the objections to the parallel access system, proposed a package approach. The approach would include assured access in all its aspects to deep seabed mining sites by all nations and their citizens along with a financing arrangement to enable the Enterprise to begin immediate operation. As an integral part of that package, the Secretary proposed that a review of the system of seabed exploitation could be made in 25 years to determine if the treaty provisions were operating adequately. Following the Secretary's proposals, the negotiating atmosphere of Committee I changed; the member nations showed a new willingness to address the whole complex of issues involved in the system of exploitation.

The outlook for the negotiations is certainly unclear. While negative factors are indeed present, the Committee discussions showed a realization on the part of the members that in order to have a productive May session, they must be prepared to make hard political compromises. It is now apparent that many of the more extreme views have little chance for acceptance, and the more moderating influences must begin to emerge and take control.

*Committee II* — The negotiating at this session was conducted in open-ended groups established by the Chairman. The essential objective was to deal intensively with certain "priority issues." Initially, the groups were set up to deal with four basic questions: the legal status of the economic zone, rights of access of land-locked states to and from the sea and freedom of transit, payments and contributions in respect of the

exploitation of the continental shelf beyond 200 miles, and the definition of the outer edge of the continental margin. Subsequently, two additional groups were established to deal with straits and the delimitation of the territorial sea, the economic zone, and the continental shelf between opposite and adjacent states.

An important outstanding issue in Committee II is the juridical status of the economic zone. The position of many of the maritime powers is to retain the traditional high seas status of the zone, except for rights over resources and other limited rights assigned to coastal states. The present position of the RSNT, however, is that the economic zone is neither high seas nor territorial sea, but a zone *sui generis*. During two visits to the Conference, the Secretary stressed the importance of this issue and encouraged accommodation by member delegations.

Regarding the continental margin, two questions were of utmost concern: the definition of the continental margin where it extends beyond 200 miles and revenue sharing from mineral exploitation beyond 200 miles. The issue concerning the continental margin is of critical importance to those states having substantial continental margins as well as to those geographically disadvantaged states which wish to ensure that significant resources are kept for the common heritage of mankind. A compromise proposal, which gained support at the session, utilizes a fixed distance or fixed sediment rule to define the outer limit of the continental margin. The revenue sharing formula proposed by the United States called for sharing one percent of the value of production at the site in the sixth year of production, increasing in annual increments of one percent to a maximum of five percent in the tenth year and thereafter.

A significant number of land-locked and geographically disadvantaged states have pressed to have their interests accommodated. A successful conclusion to a treaty will have to account for access to the sea and transit rights, revenues from the continental margin beyond 200 miles, and access and preferential rights to living resources in the economic zones of neighboring states. Substantial progress has been made in the first two areas, while considerable controversy has been generated in the third. At issue are such problems as whether land-locked and geographically disadvantaged states should have preference over other neighboring states; whether that preference should exist only as to surplus; and whether a distinction should be made between developed and developing states.

Toward the end of the session, the question of straits was opened for discussion. The present text provides for free transit passage, an essential element in the adoption of the 12-mile territorial sea. Given the long history of prior cooperation on the straits question, further change is unlikely. A major outstanding question regarding delimitation between adjacent and opposite states is whether the method of delimitation should be according to equity or by application of the equidistance line. It is generally agreed, however, that the solution should be achieved by agreement between the parties.

*Committee III* — Most of the time spent in this committee was devoted to the problem of marine scientific research in the economic zone. The RSNT requires the consent of the coastal state for all scientific research in the zone, but provides that the coastal state may withhold its consent only for certain specified scientific research activities. Most members support the principle of coastal state consent. However, the majority view was that, while consent should generally be given, the researching state is not to act so as to interfere with economic activities within the zone. The RSNT provisions on marine pollution commanded general support from member states. However, particular attention was devoted to the provisions dealing with standards-setting in the territorial sea and the role to be given to the competent international organization.

*Dispute Settlement* — The plenary, in informal session, engaged in a detailed review of the articles on the settlement of disputes. A broad cross-section of the membership of the Conference participated actively in the discussions. Based on these discussions, the President of the Conference is expected to issue a revised RSNT on dispute settlement. The debate indicates that the major questions revolve around the choice of procedures for dispute settlement and the extent of dispute settlement in the economic zone.

## FISHERIES

### *Chile*

Chile announced a National Policy for the Fishery Sector which is expected to establish national long-term goals in fishery activities. The main objectives include increased exploitation of the available resources and control over fisheries to insure an uninterrupted source of food reserves for the country, increased per capita consumption of fish products

as a partial solution to the nutritional problems of the population, the creation of a foreign market for Chilean fisheries products, increased employment through the encouragement of fisheries related industry, and a continuation of the government's role in supervising the rational use of fishery resources. In order to achieve these goals, Chile has created a supervisory council empowered to apply the National Fishery Policy to all fisheries organizations. Chile plans to promote research to evaluate marine resources and determine the best methods and means of production and conservation. The government also plans to encourage the creation of cooperatives or other types of fishing trade associations through technical and financial assistance and the promotion of industrial development through investment incentives.

#### *Cuba*

Cuba's fishing industry could be severely damaged by the implementation of the 200-mile fisheries zone by the United States. Cuba's catch of silver hake off the coasts of the United States and Canada totalled 22,000 tons last year. Cuba has requested permission from the United States and Canada to catch 10,000 tons of silver hake in 1977 within their respective fisheries zones. The request was made by the Cuban delegation to the International Commission for the Northwest Atlantic Fisheries (ICNAF). The United States, however, does not have diplomatic relations with Cuba and is also requesting withdrawal from ICNAF. The United States withdrawal from regional fisheries organizations is mandated by the Fisheries Conservation and Management Act of 1976.

#### *United States*

The United States and the Soviet Union signed a bilateral Governing International Fisheries Agreement (GIFA) on November 26, 1976. The agreement provides for recognition by the Soviet Union of the 200-mile U.S. fisheries conservation zone and establishes the framework under which Soviet vessels will fish in the zone during the next five years. The U.S.S.R., on record as opposed to the U.S. zone when negotiations began, is the first major power to recognize the zone and complete an agreement with the United States. At the same time, the United States signed an agreement with Mexico allowing limited access by American fishermen and vessels within Mexico's 200-mile patrimonial sea.

The Coast Guard's proposed plan for enforcement of the new 200-mile fisheries zone suffered a temporary set-back. The Office of Management

and Budget (OMB) deferred the spending of the \$20 million requested for Coast Guard surveillance of the zone. The OMB increased the routine patrols of known active fishing areas in the zone (approximately 500,000 square miles), while sharply cutting back random patrols of the rest of the zone (1.7 million square miles). The OMB justified the cut by saying that the United States can ignore almost three-quarters of the zone for the present time until the Coast Guard acquires some actual experience with foreign response to the extended zone.

### MARINE MAMMALS

The United States National Marine Fisheries Service (NMFS) recently issued proposed regulations setting the porpoise mortality rate for 1977. The regulations completely prohibit the taking by the U.S. purse-seining fleet of certain specified stocks of marine mammals. NMFS established the 1977 porpoise mortality rate at 29,920, the optimum sustainable the 1977 porpoise mortality rate at 29,920, the optimum permit applicants to demonstrate that any proposed taking is consistent with the purposes of the marine mammals law. The regulations also require permit applicants to demonstrate that any proposed taking is consistent with the purposes of the marine mammals law. NMFS would also require the installation of a modified porpoise safety panel of 1¼ inch mesh and has suggested technical amendments to gear requirements in the current regulations. NMFS would also like to place an observer aboard each United States purse-seiner of 400 tons or more for at least one trip during 1977, contingent, of course, on the availability of manpower and funds.

In *Committee for Humane Legislation v. Richardson*, 540 F.2d 1141 (D.C. Cir. 1976), the Court of Appeals for the District of Columbia affirmed a lower court decision that the National Marine Fisheries Service's commercial tuna fishing regulations which permitted purse-seine fishing "on porpoise" violated the Marine Mammals Protection Act of 1972 (Act). The lower court's order halting tuna operations was stayed until the first of the year; however, in order to avoid adverse impact on the fishing industry and to allow time for NMFS to comply with the Act's requirements, NMFS had granted permits to the American Tuna Boat Association for the purpose of purse-seine fishing for yellow fin tuna "on porpoise." Fishing "on porpoise" means using the presence of porpoise as an indicator for tuna. Tuna follow below porpoises, which are then

encircled in a cup-like net, the open bottom of which is then drawn closed like a drawstring purse, trapping both porpoise and tuna. This practice results in substantial incidental deaths of porpoise. The Act was addressed in part to the growing problem of porpoise deaths incidental to commercial fishing.

The lower court declared the permit void and ordered that no further permits be issued until NMFS complied with the Act. NMFS ordered a ban on further purse-seine fishing "on porpoise" by tuna fleets for the rest of 1976 when it became apparent that the U.S. tuna fleet was rapidly approaching the maximum limit on the number of porpoise deaths allowed during the year. The court refused to award the \$300 million damages requested by the American Tuna Boat Association and also denied a 30-day extension sought by the Tuna Research Foundation.

Allocation of the 1976/1977 whaling quotas has been concluded by the International Whaling Commission (IWC). In announcing its decision not to protest the IWC quotas, the Japanese Whaling Association said that some of the quotas were set without regard to true scientific evidence and certain quotas for sperm whales were too low. However, the Japanese hoped that compliance with the quota would be understood by the world's peoples and particularly by those of the United States. The Soviet Union announced that it would continue to conduct its whaling within the context of the IWC and would base its whaling operations upon relevant scientific data.

The October 1976 meeting of the Inter-American Tropical Tuna Commission resulted in an encouraging sense of agreement, according to its members, on the international nature of the tuna-porpoise problem and support for the Commission's involvement in efforts to find solutions for this problem. The Commission's policy is to maintain tuna production at near current levels while maintaining porpoise stocks at or above current levels to insure their survival. The Commission feels that it is impossible to completely eliminate incidental porpoise deaths in purse-seining operations and warned that any attempt to phase out purse-seining at the present time would be unacceptable.

The Brazilian Congress is currently considering a bill to ban whaling in Brazilian coastal waters. The measure has been approved by the Justice Committee of the Chamber of Deputies and is now being reviewed by the Agriculture Committee. Observers feel that this action indicates that there are opposing points of view on whaling within the Brazilian govern-



ment. Brazil was recently allotted a quota of 1,000 minke whales to be taken from its coastal waters under the 1976 IWC agreement.

## POLLUTION

The United States House of Representatives subcommittee on the Merchant Marine and Fisheries announced that the proposed revisions to the Environmental Protection Agency's (EPA) ocean dumping regulations fell far short of the rigor and precision needed to accomplish the aims of the Marine Protection, Resources and Sanctuaries Act. The subcommittee specifically cited the lax enforcement and administration of the regulations, vague definitions of permissible and non-permissible ocean dumping concentrations, and a lack of specifications as to which dredged materials are considered environmentally unacceptable. The subcommittee also objected to the designation of dredge spoil sites by the Corps of Engineers and felt that the designation was properly the responsibility of the EPA. Of paramount concern to the committee was the need to establish uniform regulation of the dumping of both dredged and non-dredged materials and the enforcement of such regulations.

The National Oceanic and Atmospheric Administration (NOAA) is currently developing alternatives to ocean dumping. According to its annual report to Congress on ocean based dumping, the amount of contaminated dredged materials dumped into the ocean has been substantially reduced while the amount of sewage sludge entering the Atlantic Ocean has increased slightly. NOAA found a significant reduction in the amount of industrial waste dumped into the ocean due to the use of newly developed disposal methods. These alternatives include incineration, pyrolysis, land disposal, waste recycling and industrial process changes.

## OFFSHORE OIL

### *Canada*

Officials of Petro Canada confirm that an agreement has been reached on an \$80 million oil and gas exploration project to take place in the Arctic Islands by a consortium of seven oil companies. The project was spurred on by the discovery of an estimated 15 trillion cubic feet of natural gas and a possible commercial oil field.

*United States*

The United States Department of the Interior held the first sale of oil and gas leases in the Atlantic Ocean in August. More than 60 oil companies bid in excess of \$3.5 billion for 101 tracts of potential oil and gas fields 80 to 90 miles off the coasts of New Jersey and Delaware. The government raised approximately \$1.14 billion, twice as much as had been expected. The sale was delayed, however, by several legal challenges made by the state of New York, Nassau and Suffolk counties, and the Natural Resources Defense Council. A federal district court had earlier imposed a preliminary injunction just five days before the sale was scheduled to take place. The lower court held that the environmental impact statement (EIS) prepared by the Department of the Interior was deficient in that the Department had erroneously assumed that the oil and natural gas derived from the offshore fields would be transported by pipelines to the coast. The EIS failed to consider that states may prohibit the construction and use of offshore pipelines and shoreside facilities, which would result in the use of bulk carriers to transport the fuel, a method which would greatly increase the danger of environmentally hazardous oil spills. The lack of any meaningful discussion of this potential problem in the EIS violated the National Environmental Policy Act.

The United States appealed this decision, charging that serious economic injury and grave danger to the public interest would occur if the lease sales were delayed, and claimed that the plaintiffs had failed to show that irreparable harm would follow if the preliminary injunction were not granted. The Court of Appeals for the Second Circuit lifted the injunction, holding that there was not a sufficient showing of irreparable damage before the full appeal on the merits of the environmental issues could be held. The court stressed, however, that the sales could be rescinded later, if necessary, after arguments on the merits of the environmental complaints were held.

The leasing has enormous potential for the coastal cities of the eastern seaboard. Proponents believe that the Atlantic shelf is one of the nation's greatest hopes for increasing its domestic energy resources by the anticipated production of 4 million to 1.4 billion barrels of recoverable oil and 2.6 to 9.4 trillion cubic feet of natural gas. If exploitation of the Baltimore ocean canyon is determined to be environmentally sound, the first wells could be drilled within three to six months. The leasing program is also a certain means of meeting resource needs and helping to balance the federal budget. Revenue from both the leases and the rents

and royalties from the lease sites go directly to the federal government. The sale is also one way to aid the economically depressed communities on the eastern seaboard by partially relieving the high unemployment and reducing energy costs. Those opposing the sale, however, cite the danger to the environment from potential oil spills, which would pollute beaches and destroy fishery resources.

The amount of proven reserves on the shelf is as yet undetermined. The high bids offered during the sale point out the great expectations of the oil companies. Exxon was the most active company, bidding on 69 fields and having the highest bids on 34 of them. There has been wide speculation on the type of information that Exxon has on the sites because it favored the more distant, deep water portion of the fields, and did the most comprehensive geological studies of the area. If the Court of Appeals allows the lease sales to go through, production from the sites is expected within three years. The next sale of offshore oil and gas leases will involve the Georges Bank region of the North Atlantic, off the Massachusetts coast, and is not expected to take place before March.

Congress recently authorized \$1.2 billion of federal aid to coastal states over the next decade to help them deal with the costs of energy development. The legislation, called the Coastal Zone Management Act Amendments, expands the existing program that offers federal aid to states to draw up land use plans for their shorelines. While coastal states would not receive direct revenues from the offshore oil and gas leasing, they would receive aid in the form of loans and bond guarantees to help finance new public services associated with energy development.

## RESEARCH AND DEVELOPMENT

A National Science Foundation research project has recommended an area of the Caribbean Sea as an excellent site for an electric-generating ocean thermal energy conversion power plant. The gentle seas, the thermal gradient and the deep water near shore required for this type of power plant are all available at a location 1.5 miles off Point Tuna, near the town of Yabucoa, Puerto Rico. The availability of deep water makes the area suitable for a prototype floating plant that would be tied into the Puerto Rican power system. The project report noted that access to the plant would be excellent except during hurricanes, which they estimated would hit the site about 13 times in 100 years, not enough to prohibit construction of the facility.

Industry and government are now working together to determine what economic benefits can be derived from data supplied by the world's first oceanographic satellite, SEASAT-A. The satellite is designed to provide data on wind field, wave height, ice location classification and movement, hurricane prediction and currents. Suggested uses include the administration of the new 200-mile fisheries zone, the taking over of the work of the International Ice Patrol, and a study of fish production in coastal waters. The National Oceanic and Atmospheric Administration also hopes that SEASAT-A can provide a practical means of predicting changes in sea level that might be caused by melting or accreting ice sheets in Greenland and Antarctica.

The deepest hole ever drilled in the ocean — 10,000 feet down — will be attempted in a new voyage of the Deep Sea Drilling Project. The *Glomar Challenger* will drill at three sites in the Atlantic Ocean off the coast of North Africa. The purpose of the project is to examine ocean sediment in an effort to determine when, and if, the American and African continents were connected. To make the penetration, engineers will use a re-entry drilling technique in which the entire drill string is removed from the drilling hole in order to replace the bit, which is then returned into the same hole with sonar instruments.

### SEABED MINING

The United States Geodetic Service chartered the *Glomar Conception* for a project to appraise offshore resources and environmental conditions. The *Conception* spent sixty days during the summer coring the coast from Georgia to New England looking for traces of precious metals and evaluating the composition of the sea floor. The Department of the Interior has the authority to grant mineral leases but has yet to exercise that authority off the East Coast. Mining off the coast would be very different from oil wells because the operations would take place much closer to shore, as little as 12 miles in some cases, and would result in permanent damage to the seabed. There are no standards at the present time for seabed mining, although such standards would be desperately needed to prevent any damage to the ocean and the shoreline.

The United States Congress is presently preparing a bill on seabed mining which is planned to codify the 1958 Convention on the High Seas as it relates to deep sea mining, with the inclusion of an investment guarantee. It is believed that Congress will demand a bill that would

involve the licensing and regulation of United States companies and would require for that licensing the use of American ships and U.S. based processors. Such a bill would probably be in conflict with the provision of the United Nations Conference on the Law of the Sea. A comprehensive review of the issues involved in deep seabed mining is focusing on the policy implications of such mining with respect to both domestic resource interests and the national interest in achieving an international legal order for the oceans.

The House Merchant Marine and Fisheries subcommittee held hearings this fall to help promote the development of an overall oceans policy. The Secretary of Commerce, while testifying before the subcommittee, said that the government needed an integrated and comprehensive approach in deciding policies which affect the control and use of ocean resources. The Secretary noted that such decision making is presently split among several agencies. According to the Secretary, any change in the present oceans policy must be consistent with the policies of fisheries management and outer continental shelf oil and gas reserves, and in turn must be consistent with national security and international economic and political interests.

## SHIPPING

Chile has rejected a Peruvian proposal which would give land-locked Bolivia an outlet to the Pacific through the city of Arica. The proposed outlet would be part of the territory that the three countries have fought for in the last century. Bolivia would have been given access to the ocean through a strip of Chilean coastal land that would be placed under the equal administration of the three governments. Last year, Chile offered Bolivia a land corridor to the sea in exchange for some Bolivian land, but a 1929 treaty between Chile and Peru prohibits Chile from ceding any land to another country if the land in question previously belonged to Peru. Bolivia, which lost its Pacific coast to Chile in the war, has been demanding a sea outlet ever since. Peru announced after Chile's refusal that it would continue to seek a solution to the problem.

The United States Maritime Transportation Board has prepared a report on Human Error in Merchant Marine Safety. The report outlines fifteen categories of human error including lack of vigilance, ill understood pilot-master relationships, boredom, calculated risks, alcohol abuse and inadequate aids to navigation. These errors are responsible for approximately 85% of marine casualties. The board noted that one major ship is lost

every day, on the average, and the situation is not improving. The United States Coast Guard, for example, has reported a 31% increase in the number of vessels involved in merchant marine casualties. The U.S. ocean-going fleet suffers losses of more than \$300 million a year. The report suggests that, initially, the Coast Guard should require anti-collision devices on sea-going merchant ships to prevent accidents resulting from lack of vigilance. Further suggestions on improving the situation include clarifying the pilot-master relationship through changes in the law or regulations and improving the design of bridges on vessels to resemble airport control towers in order to provide greater visibility. The report also suggested the use of Vessel Traffic Service systems which are now operating in San Francisco Bay and which will be installed soon in the harbors of New York City, Houston-Galveston, Valdez AK, and Vancouver, British Columbia.

The Caribbean Multinational Shipping Line (NAMUCAR) reported a balance of \$30,000 for the first four months of operation. This is in contrast to predictions of a \$1 million deficit for the first year of operation. Trinidad & Tobago has been admitted as a new partner, joining Costa Rica, Cuba, Jamaica, Mexico, Nicaragua and Venezuela. El Salvador, Honduras, Panama, and the Dominican Republic are expected to become members soon.