

A Funny Thing Happened to the Common Heritage on the Way to the Sea

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I wish the title of this article didn't have such funny implications. It's really very sad. We went to the mountain top in 1970. In December of that year with no dissenting votes, the United Nations General Assembly declared that the resources of the sea bed beyond national jurisdiction are the common heritage of mankind.¹ What a bonanza! We dreamed of pooling these resources for the service of mankind, and they include an estimated 2.25 trillion barrels of oil² (possibly amounting to half of the total world reserves³) and

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1. "The sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction (hereinafter referred to as the area), as well as the resources of the area, are the common heritage of mankind." Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction, G.A. Res. 2749, 25 U.N. GAOR, Supp. 28, at 24, U.N. Doc. A/8097 (1970).

2. A U.N. report estimates that the ultimate potentially recoverable petroleum (including oil and equivalent of gas) is 2,272 billion barrels. Report of the Secretary-General of the United Nations on Economic Significance, in Terms of Sea-Bed Mineral Resources, of the Various Limits

enough nodules containing manganese, cobalt, copper and nickel to supply the world for thousands of years.⁴

In 1970, after several years of preliminary backing and filling, the United Nations decided to call a world conference, generally known as the Law of the Sea Conference, for the purpose of implementing this dream.⁵ Almost 150 nations met in Caracas, Venezuela, from June 20, to August 29, 1974. The results were amazing.

With a choice of placing the resources described above in a common pot for the benefit of all mankind but primarily for the benefit of the developing countries, or alternatively, each country appropriating for itself as much as possible, one would expect the developing countries to opt for the common pot. Unfortunately, the opposite has turned out to be true. The developing countries have joined a stampede to divide the best part of the ocean treasure *colonial style*. Under the plan which the have-nots are wholeheartedly endorsing, each coastal State would have exclusive economic jurisdiction over the exploitation of the resources on the seabed for a distance of 200 miles from shore.⁶ This means that roughly ninety percent of the oil lying in the seabed would fall under national, as distinguished from international, jurisdiction and control.⁷ It is all sadly reminiscent of the way Africa was divided

Proposed for National Jurisdiction, U.N. Doc. A/AC.138/87, at 14 (1973) [hereinafter cited as Report of the Secretary-General].

3. "In 1972 world oil production passed 50 million barrels a day or 18.25(10⁹) barrels a year. About 3.3 billion barrels, that is 18 per cent, of the 1972 oil production came from off-shore deposits." *Id.* at 9. The report states further that "[a]lthough the ratio of world off-shore to on-shore *proved* reserves is nearly one to five, the *unproved* potential off-shore and on-shore resources are more nearly equal." *Id.* at — (emphasis added).

4. "Even if only about 1% of the nodules in the Pacific Ocean prove economic to mine, the reserves of many metals in the nodules will still be measured in terms of thousands of years at the present rates of free world consumption." J. MERO, *THE MINERAL RESOURCES OF THE SEA* 234 (Elsevier 1964). The nodules are believed to be forming at a rate exceeding the rate at which the metals they contain are being consumed by man. *Mineral Resources of the Sea*, U.N. Doc. ST/ECA/125, at 14 (1970).

5. G.A. Res. 2750, 25 U.N. GAOR, Supp. 28, at 26, U.N. Doc. A/8097 (1970).

6. Actually they are going even further than this. In a speech which lasted an hour and a half Ambassador Galindo Pohl, the representative of El Salvador, investigated the theoretical aspects of such jurisdiction and concluded that it was a part of the "sovereignty" of the coastal State, *limited* to a certain extent by the duty to permit freedom of navigation, overflight, laying of cables, etc. (basically the high seas freedoms), but not an enumerated set of rights *delegated* to the coastal State by the world community. The opposite is the clear implication of his statement: the reservoir of sovereignty over this area lies with the coastal State, with specific limits thereon only for the benefit of the world community. We shall see that many African States followed the same theoretical path.

7. "All of the proved reserves to date fall within the 200-mile limit. . . .

up among the European powers at the Berlin Conference of 1885.⁸

Not satisfied with that, some countries are saying that the remaining ten percent should also be gobbled up by the coastal States, contending that coastal State jurisdiction to exclusively exploit the mineral resources should go to the very edge of the continental margin, *i.e.*, to the point where the margin reaches the deep seabed, in those regions where the edge of the margin is more than 200 miles from shore.⁹ Thus, the last ten percent of all presently known seabed areas where oil can be found will be divided among the coastal States. Leaders of this drive to Pied Piper the under-privileged countries down to the sea are a group of Latin American states and the members of the Organization of African Unity. It is one of the greatest give-aways in history.

The United States, for example, which has openly and repeatedly declared itself willing to share the revenues from the mineral resources in the 200-mile economic zone,¹⁰ has already taken billions

Total resources are estimated to be approximately 1,988 billion barrels or 87 per cent of the estimated total resources of hydrocarbons of the sea-bed." Report of the Secretary-General, *supra* note 2, at 37. The picture is even gloomier because a large number of countries are opting for exclusive jurisdiction beyond the 200-mile mark to the *edge of the continental margin* if in a particular case the edge of the margin is more than 200 miles from shore.

8. Ritchie-Calder, *Caracas—"Smash-and-Grab,"* 7 THE CENTER MAGAZINE, November/December, 1974, at 35.

9. "Many Latin American delegations, joined by India, Norway, and Australia, among others, proposed a two-hundred-mile-zone, plus an extension of jurisdiction over the seabed beyond that—to include the outer margin of the continental shelf, down to the abyssal plain." Borgese, *The Law of the Sea*, 7 THE CENTER MAGAZINE, November/December, 1974, at 29 [hereinafter cited as Borgese].

10. It is my delegation's view, that as part of a satisfactory and widely acceptable treaty, an equitable and perhaps the most practical accommodation in this area may well be to provide for coastal states' exclusive rights in the continental margin but also to provide for international payments from mineral resources at a modest and uniform rate in the area beyond 12 miles or the 200-meter isobath, whichever is further seaward. These payments would be used primarily for developing countries, including developing landlocked and other geographically disadvantaged states.

Statement by John R. Stevenson, Special Representative of the President and U.S. Representative to the Conference at Caracas, July 11, 1974, in U.S. DEP'T OF STATE, PUB. NO. 8794, LAW OF THE SEA: THIRD UNITED NATIONS CONFERENCE 12 (1974). [Hereinafter LAW OF THE SEA].

The coastal state would have a duty to respect the integrity of the foreign investment on the shelf and to make payments from mineral resource exploitation for international community purposes,

of dollars in royalties and bonuses from drilling on its continental shelf at a depth of only a few hundred feet and with the greatest portion of its shelf still to be exploited.¹¹ If the exclusive economic zone were limited to 40 miles from shore, approximately 60% of the world's proved offshore oil resources would fall into the *international pot*.¹²

I can attribute the stupid position adopted by so many of the developing countries only to: (a) the developing countries' distrust of anything proposed by an imperial power (it is important to note that neither Russia, nor the Peoples Republic of China has declared itself in favor of sharing of revenues in the exclusive economic zone); (b) a conflict of interest among the developing states that hasn't come out into the open. This position results in developing States that have shelves with great potential leading other developing and geographically underprivileged countries by the nose in the name of "unity."

It may be possible to overcome distrust of imperial power proposals by a simple appeal to reason. However, where unity is embodied in a politically adopted declaration, appeals to reason may not be so easy. Such a political declaration was adopted by the Organization of African Unity at Addis Ababa on July 2, 1973. It reads in part as follows:

6. That the African States recognize the right of each coastal State to establish an exclusive economic zone beyond their [*sic*] territorial seas whose limits shall not exceed 200 nautical miles, measured from the baseline establishing their territorial seas;

7. That in such zones the coastal States shall exercise permanent *sovereignty* over all the *living* and *mineral* resources and shall manage the Zone without undue interference with the other

particularly for the economic benefit of developing countries. *Id.* at 40.

See also statement by President Richard Nixon of May 23, 1970, proposing that all nations adopt 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 (218.8 yards) and urging that such resources be regarded as the common heritage of mankind. Mr. Nixon stated that the treaty would provide an international regime for the exploration of sea-bed resources, as per the limit noted above. The regime would provide for the collection of substantial mineral royalties to be used for international community purposes, particularly, economic assistance to developing countries. *N.Y. Times*, May 24, 1970, § 1, at 28, col. 3-4.

11. "Most offshore wells are in water depths less than 70 [meters], but recent trends are carrying exploration into deeper water, and successful oil wells have been drilled in water more than 400 [meters] deep." H. BERRYHILL, JR., *THE WORLDWIDE SEARCH FOR PETROLEUM OFFSHORE—A STATUS REPORT FOR THE QUARTER CENTURY 1947-72*, at 3 (U.S. Geological Survey Circular No. 694, 1974) [hereinafter cited as *Geological Survey Circular No. 694*].

12. Report of the Secretary-General, *supra* note 2, at 33.

legitimate uses of the sea: namely, freedom of navigation, overflight and laying of cables and pipelines;

8. That the African countries consider that scientific research and the control of marine pollution in the Economic Zone shall be subject to the jurisdiction of the coastal States;

9. That the African countries recognize, in order that the resources of the region may benefit all peoples therein, that the landlocked and other disadvantaged countries are entitled to share in the exploitation of *living* resources of neighbouring economic zones on equal basis as nationals of coastal States on bases [*sic*] of African solidarity and under such regional or bilateral agreements as may be worked out;

10. That nothing in the propositions set herein should be construed as recognizing rights of territories under colonial, foreign or racist domination to the foregoing. . . .¹³

A similar declaration was made in 1970 by several Latin American countries but not with unanimity of opinion; several countries having reservations about the validity of the claims made.¹⁴

When I was at Caracas I spoke to one of the prominent leaders espousing the cause of the developing countries and questioned him about the results that would be obtained for the underprivileged countries if the Organization of African Unity (OAU) resolution were carried to its logical conclusion, since it would mean that a great many underprivileged countries would have 200 miles of nothing and by the same token would lose the opportunity to participate in the vast treasure of oil resources described above. His only answer was that he felt bound by the OAU resolution and could do nothing about it, adding sadly, "We need people like you who have the interest of mankind as a whole to raise their voices down here." This was a small consolation to me, for I was about to fly back to New York.

Is it true that the developing countries have a unified interest in addressing themselves to the common heritage problems, or is there a real diversity of interest in this group? Do geographically disadvantaged and land-locked countries have interests that are inconsistent with developing countries that are not so disadvantaged

13. U.N. Doc. A/AC.138/89, at 5-6 (1973) (emphasis added). Note the emphasis on sovereignty and the willingness to share only living resources.

14. At the meeting in Lima, Peru, in August, 1970, 14 Latin American and Caribbean countries declared that all nations have a right to claim as much of the sea and seabed near their coasts as they deem necessary to protect their offshore wealth, present and potential. *Six countries did not agree.* N.Y. Times, Aug. 16, 1970, § 1, at 21, col. 1.

or land-locked? Is it possible that greed plays a part in all this and that those who are leading the underprivileged nations down an empty path have selfish interests at heart?

To illustrate, one should note that there are 30 land-locked States, which of course have no offshore assets.¹⁵ In addition, there are 22 countries where offshore exploratory drilling, as of January 1, 1972, had failed to yield discoveries of petroleum, and five more where only noncommercial petroleum has been found.¹⁶ The countries which are either land-locked or where offshore petroleum shows no promise comprise the poorest areas of the world. These include every nation in the African starvation belt.¹⁷ A study by the United States Geological Survey would indicate, in addition, that possibly 14 of the 19 coastal States of South America have little or no potential for offshore petroleum finds.¹⁸ Where no oil is discovered on land the chances of discovery offshore are poor,¹⁹ and there are really very few areas in the world where massive oil resources exist.²⁰ On the other hand, there have been some off-

15. In Africa: Botswana; Burundi; Central African Republic; Chad; Gambia; Lesotho; Malawi; Mali; Niger; Swaziland; Upper Volta; Uganda; and Zambia. In Asia and the Middle East: Afghanistan; Bhutan; Jordan; Laos; Mongolia; and Nepal. In Europe: Austria; Czechoslovakia; Vatican City; Hungary; Liechtenstein; Luxembourg; San Marino; and Switzerland. In South America: Bolivia and Paraguay.

16. The countries, followed by the year of initial drilling, are as follows. In Africa: Republic of Congo (1966); Equatorial Guinea (1968); Liberia (1971); Mauritania (1969); Morocco (1969) show of oil; Portuguese Guinea (1968); Senegal (1966); Spanish Sahara (1966); Ethiopia (1965); Malagasy (1970); Mozambique (1969); Sudan (prior to 1964). In Asia and the East: Turkey (1970); Israel (1970); India (1971) show of oil and gas; Philippines (two wells, 1971); Thailand (one well, 1971); West Malaysia, including central part of China Sea (1970). In Central America and the Caribbean: Colombia (1971); Honduras (1971); Nicaragua (1966). In Europe: France (1972); Greece (1971) show of oil and gas; Malta (1971); Yugoslavia (1971) show of oil and gas. In South America: Guyana (1967) show of hydrocarbon; Surinam (1965). Geological Survey Circular 694, *supra* note 11, at 10.

17. "The main winners, after all, would be the United States, Canada, Australia, Brazil, and South Africa, who were already rich; while a large number of nations would be disadvantaged. Sixty-eight such nations were mentioned among the latter, of which fifty-four would be developing nations, including the poorest, which are landlocked." Borgese, *supra* note 9.

18. Geological Survey Circular 694, *supra* note 11, at 8. In Brazil, Argentina, Ecuador, and Peru finds have been made, but the fields are small. *See also id.* at 8 table 1. Venezuela, of course, has a giant oil field.

19. The countries without significant offshore discoveries to date share a common characteristic. With the exception of Columbia, none has had previous significant petroleum production on land and, without exception, there has been little or no production from their onshore coastal areas near the continental shelves. *Id.* at 10.

20. "[F]ive offshore areas overshadow all others in the amount of petroleum discovered: The Persian Gulf, Lake Maracaibo [Venezuela], the

shore discoveries in the following African countries:²¹ Angola-Cabina, Cameroon, Congo (Brazzaville), Dahomey, Egypt, Gabon, Ghana, Lybia, Nigeria, South Africa, Tunisia and Zaire.

Of course, other ways of being geographically disadvantaged exist. A nation's continental margin can be so small that no matter what they receive they are not going to find much there. For instance, 42 States would have margins with an area of less than 50,000 square miles even if they were consigned a 200-mile economic zone.²²

Obviously, if States have continental shelves where oil has been discovered and there is a possibility of significant income coming

northern Gulf of Mexico, the North Sea, and offshore southern California." *Id.* at 23.

21. *Id.* at 8 table 1.

22. GEOGRAPHICALLY DISADVANTAGED STATES

<u>NAME</u>	<u>COASTAL LENGTH (N.M.)</u>	<u>MARGIN AREA TO 200 N.M. (SQ. N.M.)</u>
<u>AFRICA</u>		
1. Algeria	596	40,000
2. Ethiopia	546	22,100
3. Gambia	38	5,700
4. Guinea	190	20,700
5. Ivory Coast	274	30,500
6. Kenya	247	34,400
7. Mauritania	360	45,000
8. Sierra Leone	219	45,400
9. Sudan	387	26,700
10. Togo	26	300
11. Tunisia	555	25,000
<u>ASIA/MIDDLE EAST</u>		
12. Bahrain	68	1,500
13. Bangladesh	310	22,400
14. Cyprus	290	29,000
15. Iraq	10	200
16. Israel	124	6,800
17. Khmer Republic	210	16,200
18. North Korea	578	37,800
19. Lebanon	105	6,600
20. Singapore	28	100
21. Yemen	244	9,900
22. North Viet-Nam	382	22,200
<u>EUROPE</u>		
23. Albania	155	3,600
24. Belgium	34	800
25. Bulgaria	134	9,600
26. Denmark	686	20,000
27. Finland	735	28,600

to them *directly*, they have a self-interest in establishing a 200-mile exclusive economic zone that is inconsistent and in conflict with the interest of geographically disadvantaged and land-locked countries. It seems to me that every statement made by these countries in the debates has to be considered in the light of such self-interest. I was astounded, for example, to hear Paul Engo, of Cameroon, state that from this point of view the 200-mile economic zone is a zone in which the coastal country had "sovereignty" and that while his country was willing to share *fishery* resources with some of the underprivileged and land-locked neighbors, sharing of mineral resources could not occur because they were located in the economic zone which is a natural extension of the *sovereignty* of the coastal State. Sovereignty, he said, does not permit sharing. My response to that is: "Why not?"

There is another underlying area of self-interest that we must look at with reference to the fisheries of many developing countries. I can well understand the prevalent desire to avoid giving up any part of these fisheries where they comprise a vital economic element. It's one thing to have something in your pocket and another thing to have a promise as to the future. Accordingly, countries such as Iceland and Peru are clinging to the 200-mile economic resource zone as a lifeline for their own self-preservation. My own feeling is that the fisheries question should be completely separated from the mineral resources question. I want to separate the ques-

NAME	COASTAL LENGTH (N.M.)	MARGIN AREA TO 200 N.M. (SQ. N.M.)
28. German Democratic Republic	191	2,800
29. Germany, Federal Republic	308	11,900
30. Malta	50	19,300
31. Netherlands	198	24,700
32. Poland	241	8,300
33. Romania	113	9,300
34. Sweden	1359	45,300
35. Yugoslavia	426	15,300
<u>SOUTH AMERICA</u>		
36. Guyana	232	38,000
37. Trinidad & Tobago	254	22,400
38. Uruguay	305	34,800
<u>NORTH AMERICA</u>		
39. Barbados	55	48,800
40. El Salvador	164	26,800
41. Guatemala	178	28,900
42. Haiti	584	46,800
43. Nicaragua	445	46,600

S. FREZON, SUMMARY OF 1972 OIL AND GAS STATISTICS FOR ON-SHORE AND OFF-SHORE AREAS OF 151 COUNTRIES 156 (U.S. Geological Survey Professional Paper No. 885, 1974).

tions so that the logic and the respective benefits do not get confused and so that people speaking in their own self-interest in one area do not damage the hopes of others in another area.

I must say that I am proud of my country for the stand that it has consistently taken in these debates. If we had wanted to be more demagogic we certainly could have established ourselves as the espousers of the Third World cause. Maybe that's what we should have done. Maybe our rhetoric was just too matter of fact. However, it was sufficient to draw a comment from the staid New York Times, which, in an editorial on July 21, 1974 stated:

The United States favors the sharing of revenues from development of sea bed minerals beyond the continental shelf but within the proposed economic zone. This appears to be a new version of the imaginative "trusteeship-zone" concept first proposed by President Nixon several years ago. It would assure the international community of at least some income from the exploitation of offshore oil, the most promising source of deep-sea wealth in the near future. The United States is also pressing for international sharing in the wealth that may soon be scooped from the deep seabed in the form of manganese nodules, rich in copper and nickel and cobalt.²³

Now, what about those manganese nodules? These lie mostly in the abyssal sea beyond the proposed 200-mile exclusive economic resources zone.²⁴ The nodules will comprise part of the common heritage and the consensus of those attending the Law of the Sea Conference in 1974 seems to favor the establishment of an international authority which will have the exclusive jurisdiction to exploit these particular resources. There may be disagreement as to the manner in which the resources should be exploited but there is little or no difference over whether or not these will fall within the jurisdiction of what is commonly referred to as the common heritage. This is of some solace to us who came out of the last session of the Conference licking our wounds. In the long run we may have won a tremendous victory resulting from the formation for the first time of a strong international organization with economic resources. The area involved is, after all, two-thirds of the entire seabed, the 200-mile economic zone eating up approximately 35% of such seabed. But the amount of income that will be derived from this particular area as a result of the exploitation of manga-

23. N.Y. Times, July 21, 1974, § 4, at 14, col. 1-2.

24. Report of the Secretary-General, *supra* note 2, at 18.

nese nodules is not expected to run very high.²⁵ In the next ten years if three commercially viable mines are established, revenues will probably not exceed ten to twenty million dollars. If this sum is divided among 77 nations, we are not going to be very helpful to them.²⁶ Nevertheless, a truncated common heritage, in some respects symbolic and in some respects realistic, still exists. Because thousands of years of supply of these metals are contained in this area, perhaps in the long run we will have established a great victory for mankind as a whole. Unfortunately, you and I will not be around to see it, but those who work for mankind in general do not expect to get their rewards on earth, only in heaven.

Is the fight to share the revenues in the 200-mile economic zone finished? Not by a long shot. I have a feeling that disadvantaged countries will ultimately wake up to the fact that they are being taken. I have a feeling that the United States will help them wake up. So I shall continue fighting as I have in the past and who knows, perhaps in the 1976 summary by the *San Diego Law Review* of what happened at the 1975 session of the Conference, I shall write an article entitled: *Common Heritage, Lost Paradise Regained*.

25. Landlocked and other geographically disadvantaged states should not expect that sharing in the benefits from deep seabed hard minerals alone could make a significant contribution to their economies.

Statement of Ambassador Stevenson, July 11, 1974, LAW OF THE SEA, *supra* note 10, at 12.

26. See, e.g., LaQue, *Prospects For and From Deep Ocean Mining*, 5 MARINE TECHNOLOGY SOC'Y. J. 13-14 (1971).