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Some Recent Developments concerning Fishing and the Conservation of the Living Resources of the High Seas

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SOME RECENT DEVELOPMENTS CONCERNING FISHING AND THE CONSERVATION OF THE LIVING RESOURCES OF THE HIGH SEAS

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There is apparently growing, widespread demand among nations to convene a new international conference on the law of the sea in order to review and perhaps amend many of the provisions of the four conventions adopted at the International Conference on the Law of the Sea held in Geneva in 1958 concerning the High Seas,[1] the Territorial Sea and the Contiguous Zone,[2] the Contenental Shelf[3] and Fishing and Conservation of the Living Resources of the High Seas.[4] For example, when considering the matter of a regime for the peaceful uses of the seafloor beyond the limits of national jurisdiction, the General Assembly, at its last session in January 1970, adopted a resolution going far beyond questions concerning the resources of the ocean floor, in which it:

> *Requests* the Secretary-General to ascertain the views of Member States on the desirability of convening at an early date a conference on the law of the sea to review the regimes of the high seas, the continental shelf, the territorial sea and 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.[5]

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1. Convention on the High Seas, April 29, 1958, *in force* Sept. 30, 1962, 13 U.S.T. 2312, T.I.A.S. No. 5200, 45 U.N.T.S. 82 [hereinafter cited as High Seas Convention].

2. Convention on the Territorial Sea and the Contiguous Zone, April 29, 1958, *in force* Sept. 10, 1964, 15 U.S.T. 1606, T.I.A.S. No. 5639, U.N.T.S. 205 [hereinafter cited as Territorial Sea Convention].

3. Convention on the Continental Shelf, April 29, 1958, *in force* June 10, 1964, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311 [hereinafter cited as Continental Shelf Convention].

4. Convention on Fishing and Conservation of the Living Resources of the High Seas, April 29, 1950, *in force* March 20, 1966, 17 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 285 [hereinafter cited as Fishing Convention].

5. U.N. Doc. A/RES/2574 (XXIV), 15 Jan. 1970.

This was passed as an amendment to a resolution originally introduced by Malta, calling for an international conference to deal only with problems concerning the limits of national jurisdiction over the seabed. Despite opposition by the United States, and a number of other nations, to a conference with such broad terms of reference the resolution was adopted by a large majority in the General Assembly, 65 to 12 with 30 abstentions.[6]

Although opposed to a conference of such broad compass, the United States would apparently welcome an international conference of more limited scope, especially to deal with important problems left unresolved by the Geneva Conferences in 1958 and 1960, as has been indicated by a recent speech of John R. Stevenson, Legal Advisor to the Department of State. Mr. Stevenson particularly referred to the need for some uniform agreement on the breadth of the territorial sea and of an exclusive fishing zone, noting, however, the effect of a broad territorial sea (12 miles) on freedom of navigation, especially in important international straits.[7] He also referred specifically to the problem of fishing on the high seas in areas contiguous to coastal States; he noted that this problem has become greatly exacerbated by the development of large and mobile high seas fleets that can move in on an area, seriously overfish the stocks, and move on, resulting in economic dislocations in a coastal State, or a region thereof, which is dependent on such fisheries for its livelihood.[8]

It is evident that the provisions of the Convention on Fishing and Conservation of the Living Resources of the High Seas, and the provisions concerning fishing in the other 1958 Conventions, do not provide a completely satisfactory basis for resolving some international fishery problems. This is shown not only by the demand for a new conference, but also from the recent practices of nations in dealing with fisheries claims and disputes, outside of, or beyond, the provisions of the 1958 Conventions.

I shall review the pertinent background to the 1958 conventions, as they concern fisheries, and review their provisions

6. 24th General Assembly, Verbatim Record of Dec. 15, 1969.

7. Stevenson, *International Law and the Oceans, Address Before the Philadelphia World Affairs Council and the Philadelphia Bar Association,* 18 February 1970, Dep't of State Press Release No. 49, 18 Feb. 1970, 3-4, LXII DEP'T STATE BULL. 339, 340-41 (1970) [hereinafter cited as Stevenson].

8. *Id.* at 4-5, LXII DEP'T STATE BULL. at 341.

in relation to recent activities of nations in international fishery affairs, with particular emphasis on practice and policy of the United States.

BACKGROUND TO THE 1958 CONVENTIONS

The International Law Commission,[9] commenting on its preparatory work culminating in the final draft articles of a Convention on the Law of the Sea, prepared at its Eighth Session in 1956, noted that, when it was first set up, it was thought that its work might have two different aspects: On the one hand the codification of international law, and on the other hand the progressive development of international law, that is, the preparation of draft conventions on subjects which have not yet been regulated by international law, or in regard to which the law has not yet been sufficiently developed in the practice of States. The Commission noted that, in preparing its rules on the law of the sea, it became convinced that, in this domain at any rate, the distinction between these two activities can hardly be maintained. Consequently, the Commission did not attempt to specify which of its draft articles fell into one or the other category. However, it seems quite evident that much of the Convention on Fishing and Conservation of the Living Resources of the High Seas, both as drafted by the Commission and as finally adopted by the 1958 Conference, falls into the category of progressive development. To quote Professor D.M. Johnson:

> The traditional doctrinal international law of the sea grew without any clear reference to the actual and potential functions that can be exercised in the sea, and it has provided little or no guide for the resolution of most contemporary fishery conflicts. The lack of coherent and authoritative decisions has left international tribunals without a clear sense of the underlying principles of fishery law.[10]

He further writes:

> International law, like domestic law, is built up partly by the adjudication of disputes between competing interests . . . . In international litigation there is an embarassingly thin stock of

9. Int'l L. Comm'n, Report, 11 U.N. GAOR, Supp. 9, U.N. Doc. A/3159 (1956) [hereinafter cited as ILC, 8th Session].

10. D. M. JOHNSON, THE INTERNATIONAL LAW OF FISHERIES 111 (1965) (footnotes omitted).

> principle available to the courts, in the absence of a universal code, but at the 1958 Conference on the Law of the Sea some success was achieved in supplying this deficiency through 'progressive development'.[11]

Although the Convention on Fishing and Conservation of the Living Resources of the High Seas was adopted by a two-thirds majority at the 1958 Conference, it has since been ratified by only 27 nations, and notably lacks ratification by important major fishing nations and maritime powers, some of the reasons for which I will discuss below. Consequently, the practical effectiveness of this Convention, although it has provided a workable definition of "conservation," and a codification of the rights and duties of States in relation thereto, on which nations generally rely in their negotiations over international fishery disputes, has been less than might have been hoped.

An important difficulty with the 1958 Conventions, with respect to international fisheries affairs, is that they do not deal fully with the four important policy problems concerning marine resources, that, following McDougal and Burke,[12] may be listed as follows:

(1) What, if any, limitations on the use of the resources are desirable?

(2) Who ought to be permitted access to these resources on the high seas?

(3) Who ought to be permitted to prescribe and apply policies regarding limitation on access, if such limitations are desirable?

(4) How should disputes regarding prescription and application be resolved?

With respect to the first problem, it was fairly easy to achieve agreement on the desirability of limitation of use, for purposes of conservation, of those living resources that are heavily exploited, conservation being defined as "the aggregate of the measures rendering possible the optimum sustainable yield from those

11. *Id.* at 113. *See also* E.N. Oribe in *The Geneva Convention—Ten Years Later*, PROC. THIRD ANN. CONF. LAW OF THE SEA INSTITUTE 64-66 (1969).

12. M. MCDOUGAL & W. BURKE, THE PUBLIC ORDER OF THE OCEANS 927 (1962) [hereinafter cited as MCDOUGAL & BURKE 1962].

resources so as to secure a maximum supply of food and other marine products."[13] Although some economists and politicans are not fully satisfied with this definition, believing that even further limitations on fishing are desirable to increase net economic yield or social welfare, it has been, and continues to be, a useful standard. Agreement as to the duties, and rights, of States in relation to the adoption of measures for purely conservation purposes also presented no great difficulty.

The third problem was also dealt with in detail in the Convention on Fishing and Conservation of the Living Resources of the High Seas. The special interests of the coastal State in the conservation of the living resources of the high seas adjacent to its territorial sea is recognized, as well as the rights and interests of distant-water fishing nations. This Convention sets forth the duties of States engaged in high seas fisheries to adopt, and cooperate with other States in adopting, necessary conservation measures, provides for participation of the coastal State in conservation management of the living resources of the high seas off its coast, whether or not its nationals are actually engaged in the fishery, and also provides that, in cases of necessity, under stipulated criteria, the coastal State may adopt unilateral conservation measures.

Respecting the fourth problem, this Convention provides a detailed procedure for the settlement of disputes concerning the necessity and validity of conservation measures (that should not discriminate in form or in fact among fishermen of different States on the high seas), through negotiations among the nations concerned, and, failing such negotiated solution, provides for compulsory, binding arbitration.

The important problem that the 1958 Conventions failed to deal with in a satisfactory manner is the second on the above list; that is, within the limitation of the maximum sustainable yield, who gets the fish? In the first place, of course, there was failure to agree on where the territorial sea, or an exclusive fishing zone, ends and the high seas begin. Beyond that, however, many nations appear to be dissatisfied with complete freedom of access to the living resources on the high seas by all nations on an equal footing, many believing that the coastal State should, in at least some circumstances, have a priority right to a share of the catch.

13. Fishing Convention, *supra* note 4, Art. 2.

The difficulty of allocation of priority of access is clearly expressed in the commentary of Iceland on the draft articles of the International Law Commission adopted at its Eighth Session, in which it is stated:

> At first there seemed to be a tendency within the Commission to ignore or at least to deal very unrealistically with the problem of jurisdiction over fisheries. The Commission in those earlier stages seemed to think that the problem of jurisdiction over fisheries could be solved by, on the one hand, the exclusive rights of the coastal State within its territorial sea and, on the other, the adoption of articles concerning conservation measures on the high seas which would be equally binding to all nations fishing in a given area. . . . Of course it is necessary and to everyone's benefit to insure the maximum yield of the fish stocks both within and outside the territorial sea. But what if the requirements of the coastal State and other States in the coastal area are not satisfied by the maximum yield?[14]

And, further,

> . . . a fundamental distinction must, as already stated, be made between two different things. On the one hand there is the problem of conservation of the fish stocks. From a scientific point of view there seems to be pretty common agreement as to what measures are required to insure the maximum sustainable yield. Theoretically, such measures could be taken either unilaterally or through international agreements with exactly the same effect. . . . The other problem to which I referred relates to the situation where, in spite of adequate measures to sustain the maximum sustainable yield, that maximum yield is not sufficient to satisfy the requirements of all those who are interested in fishing in a given coastal area. In that case . . . we maintain that the proper solution is not to take some arbitrary number of miles . . . and say that within that area the coastal State has priority but outside it the situation is the same for all. . . . The different coastal areas are so variable that it is neither reasonable nor realistic to put them all in the same straightjacket and our contention is . . . that each coastal State should itself determine its fishery limits on the basis of all relevant considerations. The standard objection against this

14. Conference on the Law of the Sea, 3 U.N. GAOR, U.N. Doc. A/Conf. 13/5, at 42, and Add. 1-4, at 87 (1958) [hereinafter cited as Conference Official Records].

> proposition is that such a formula would lend itself to abuse so that excessive demands would be made even in the absence of any real need. From that point of view it has been suggested that some arbitral body should be empowered to make the final decision.[15]

A major obstacle in dealing with this sort of problem at the 1958 Conference was the apparent impossibility of arriving at any generally acceptable set of criteria as to who should have what priorities respecting access to the resource when the total harvest thereof is limited. I doubt whether this difficulty has been much ameliorated since then.

In the period immediately following World War II, it became generally evident that the law of the sea was an important subject, ripe for codification and some progressive development. The rapid recovery and growth of the industrialized sea fisheries following the war, and the growing conflicts between distant water fishing nations and coastal States was an important stimulus. At its first session in 1949, the International Law Commission had commenced to study the question of the regime of the high seas and, at about this same time, various fisheries questions had become matters of considerable importance among several members of the United Nations, and were being vigorously debated in the General Assembly and Committees thereof. The International Law Commission continued its efforts, and, at its fifth session in 1953, produced drafts of suggested articles for an international convention covering the continental shelf, fisheries resources of the high seas and the contiguous zone.[16]

In this document, the Commission adopted three draft articles covering the basic aspects of the international regulation of fisheries.[17] The first of these articles deals with the problem of conservation, setting forth the right of a State to regulate and control fishing activities in areas of the high seas, where nationals of other States are not thus engaged, to protect the resources against waste or extermination; providing for such regulation by agreement where more than one State is concerned; and referring disputes thereover to an international authority. The second

15. *Id.* at 88-89.

16. Int'l L. Comm'n, Report, 8 U.N. GAOR Supp. 9 (Ch. III, at 12), U.N. Doc. A/2456 (1953).

17. *Id.* at 17.

article deals with the special rights of the coastal State, and provides that "[i]n any area situated within one hundred miles from the territorial sea, the coastal State or States are entitled to take part on an equal footing in any system of regulation, even though their nationals do not carry on fishing in the area."[18] The third article would establish an international authority, to be created within the framework of the United Nations, that would be able to prescribe regulations essential for protecting the fishing resources of any area of the high seas against waste or extermination, and providing that States would be bound by the findings of such an authority.

The Commission noted, however, that there was considerable opposition on the part of many nations to this third article, on the ground that there was no real need for the creation of an international authority, since fisheries could be regulated, as in the past, by means of agreements between States. The Commission went on to observe[19] that, while the articles adopted contain the general principles, only a detailed convention or conventions could translate them into a system of working rules, and that it is probable that that object may be achieved on a regional basis rather than by way of a general convention, noting that conventions concluded in the past for the protection of fisheries had been, as a rule, on a regional basis. Since this involved matters of a technical character, the Commission found it outside its competence, and suggested that the General Assembly should enter into consultation with the Food and Agriculture Organization (FAO) with a view to investigating the matter, and preparing drafts of a convention or conventions on the subject, in conformity with the general principles embodied in the draft articles.

In this report on its Fifth Session, the Commission also explained that, with respect to the continental shelf, it had referred to its "natural resources" rather than "mineral resources" in order to encompass as resources of the shelf the products of sedentary fisheries, in particular to the extent that they are natural resources permanently attached to the bed of the sea. It stated that "[i]t is clearly understood, however, that the rights in question do not cover so-called bottom-fish and other fish which, although

18. *Id.*
19. *Id.* at 18-19.

living in the sea, occasionally have their habitat at the bottom of the sea or are bred there."[20]

The same commentary is repeated in connection with the final draft articles prepared by the ILC at its Eighth Session.[21] The question of just which living resources pertain to the shelf and which to the superjacent high seas was, however, to become a matter of considerable contention at the 1958 Conference, and still remains a matter of considerable contention and conflict.

In accordance with the recommendation of the ILC, the General Assembly in 1954 requested the Secretary-General to convene an international technical conference at the headquarters of FAO to study the problem of international conservation of the living resources of the sea, and to make appropriate scientific and technical recommendations. Pursuant to this resolution,[22] an International Technical Conference on the Conservation of the Living Resources of the Sea was held in Rome from 18 April to 10 May, 1955, attended by representatives of 45 nations. Background papers had been previously prepared by invited experts and were circulated to participants.[23] After extensive discussions, the Conference arrived at a number of very important conclusions and recommendations, incorporated in its report.[24] Among these were an agreed definition of "conservation of the living resources of the high seas"; recognition of the special interests of the coastal State in maintaining the productivity of resources of the high seas near its coast; the need for specific types of scientific information required as a basis for any fishery conservation program; a review of the principles of successful international conservation organization; and considerations of the applicability of existing types of international conservation measures and procedures to other international fishery conservation problems. In connection with the last topic, the Conference concluded that:

> The present system of international fishery regulation (conservation measures) is generally based on the geographical

20. *Id.* at 14.

21. ILC, 8th Session *supra* note 9, at 42.

22. G.A. Res. 900, 9 U.N. GAOR Supp. 21, at 51, U.N. Doc. A/2890 (1954).

23. *Papers presented at the International Technical Conference on the Conservation of the Living Resources of the Sea,* 11 U.N. GAOR, U.N. Doc. A/Conf. 10/7 (1956).

24. *Report of the International Conference on the Conservation of the Living Resources of the Sea,* 10 U.N. GAOR, U.N. Doc. A/Conf. 10/6 (1955).

> and biological distribution of the marine populations with which individual agreements are concerned. From the scientific and technical point of view this seems, in general, to be the best way to handle these problems. This sytem is based upon conventions signed by the nations concerned.[25]

The report of the Conference advocated a number of guiding principles in the formulation of such regional conventions, and pointed out that the conventions, and the regulatory measures taken thereunder, should be adopted by agreement among all interested nations (including the coastal States). It further noted the possibility of disagreements, both as to the need for conservation measures and the nature of such measures, and possible refusal on the part of other States to observe such measures. It was suggested that a solution to such problems might be found through agreement among States to refer disputes to qualified expert arbitrators. The Conference also recognized the serious problem that is created when intensive exploitation of offshore waters adjoining heavily fished inshore waters considerably affects the abundance of fish in the latter, and there has not yet been established a conservation system involving all of the concerned States. The responsibility and authority of the coastal State under these circumstances, pending negotiation of suitable arrangements, was extensively debated but no agreement was reached.

In the light of the report of this Rome Conference, the International Law Commission at its Eighth Session rather thoroughly revised its draft articles concerning the conservation of the living resources of the high seas.[26] These draft articles incorporated the definition of conservation recommended by the Rome Conference, set forth the rights and duties of users of the living resources of the high seas respecting the conservation management thereof, and set forth the special interests of the coastal State in the conservation of the living resources in the high seas adjacent to its territorial sea, and its right to participate in any system of research and regulation in such an area. The coastal State would also be given authority to adopt unilateral measures of conservation, failing a negotiated agreement with other States, when there is an urgent need for measures of conservation, the

25. *Id.* at 9.

26. ILC, 8th Session, *supra* note 9, at 32-38.

proposed measures are based on appropriate scientific findings, and do not discriminate against foreign fishermen. Additional articles provide for settlement of disputes by agreement among the States concerned but, failing that, provide for compulsory arbitration.

These draft articles were substantially adopted, in the Convention on Fishing and Conservation of the Living Resources of the High Seas at Geneva in 1958, with some improvements in drafting and added precise time periods for various actions in connection with the arbitration provisions, after extensive debate both in the Third Committee and in the Plenary Meetings. The interest of the coastal State was further strengthened by additional paragraphs concerning the priority of its fishing regulations.[27]

This Convention obviously went far beyond the previous customary law in giving to coastal States large powers of regulation of fisheries in the high seas off their coasts for conservation purposes. It was recognized that such powers could easily be abused[28] and that, in consequence, the noncoastal State must have a guarantee of some suitable means of settling disputes equitably. Thus, the compulsory arbitration provisions of the Convention became an essential component of a "package deal," failing which the Convention could not have been adopted.[29] However, the Soviet Union, and other members of the Soviet bloc, were adamantly opposed to compulsory arbitration, and strongly opposed it both in the Third Committee[30] and in the Plenary Meetings.[31] But these aspects of the Convention were so mutually necessary that they could not even be voted on separately. Consequently, despite opposition of the Soviet bloc, all of the proposed fisheries articles, with one exception, were voted on, and adopted, *en bloc*.[32] Before voting on the articles

27. Fishing Convention, *supra* note 4, Art. 6.

28. Conference Official Records, *supra* note 14, at 88-89.

29. See commentary by McDOUGAL & BURKE 1962, *supra* note 12, at 996.

30. U.N. Conference on the Law of the Sea, 13 U.N. GAOR, U.N. Doc. A/Conf. 13/41 (1958) at 75, 77.

31. U.N. Conference on the Law of the Sea, 13 U.N. GAOR, U.N. Doc. A/Conf. 13/38 (1958) at 43, 44.

32. *Id.* at 43-47. The single exception was a proposed article that would give preferential fishing rights to the coastal State, when it is necessary to limit the catch and the people of the coastal State are overwhelmingly dependent on the coastal fisheries for their livelihood or economic development. This proposal, voted on separately, was defeated.

themselves, there was considered the matter of whether nations in signing the Convention might be allowed reservations to any of the provisions; Germany had proposed that no reservations be allowed to the fishery articles.[33] This proposal failed to muster a two-thirds majority. The articles as a whole were then adopted by a vote of 44 to 16 with 8 abstentions. However, at a later Plenary Session, dealing with reservation clauses in all of the Conventions, it was decided, by a majority of 49 to 13 with 10 abstentions, that no reservations would be allowed to those articles that became Articles 6, 7, 9, 10, 11, and 12 of this Convention, dealing with the special interest of the coastal State and with the procedure for settlement of disputes, including compulsory arbitrartion.[34]

It is easy to see why this Convention has received so few ratifications by important fishing nations, having been ratified through October 1968 by only the following nations with substantial sea fisheries: Australia, Mexico, Portugal, South Africa, United Kingdom and United States.[35] Some nations, such as the USSR, are opposed to compulsory settlement of disputes. Others are opposed to the encouragement of exclusive and preferential rights of coastal States. This Convention remains, therefore, largely a statement of principles, rather than an active mechanism for achieving conservation of fishery resources.

The ILC had taken note of proposals for claims to exclusive fishing rights on the basis of special economic circumstances, where a nation is primarily dependent on the coastal fisheries for its livelihood, and also had taken note of the "principle of abstention" as perhaps reflecting problems that deserve recognition in international law, but had declined to deal with them because of their technical character.[36] There was no agreement on these matters at the 1958 Conference, despite extensive debate.

While there was considerable sympathy for according some priority to coastal States, such as Iceland, which were really overwhelmingly dependent upon the fishery resources of their adjacent seas, it proved impossible to arrive at any adequate

33. *Id.* at 46.

34. *Id.* at 58.

35. Informal tabulation by U.S. State Department, Office of Special Assistant to the Secretary for Fisheries & Wildlife, 8 Oct. 1968.

36. ILC, 8th Sess, *supra* note 9, at 38.

formulation to distinguish between such a claimant and other claimants who would extend the principle to individual communities within the coastal State, and to lesser developed countries, to improve their economies through exclusive or preferential access to the living resources off their shores.[37] In consequence, the Conference contented itself with a Resolution recommending:

> That where, for the purpose of conservation, it becomes necessary to limit the total catch of the stock or stocks of fish in an area of the high seas adjacent to the territorial sea of a coastal State, any other states fishing in that area should collaborate with the coastal State to secure just treatment of such situation, by establishing agreed measures which shall recognize any preferential requirements of the coastal State resulting from its dependence on the fishery concerned while having regard to the interests of the other States.[38]

Under the "abstention principle," where a stock of fish is being fully utilized, is under adequate scientific investigation, and is under reasonable regulation and control to maintain the maximum sustainable yield, other nations than those already fishing the stock will abstain from fishing it. This principle had been applied to salmon, and a few purely marine species, under the North Pacific Convention[39] among the United States, Canada and Japan, in which the Japanese agreed to abstain from fishing such stocks in the Northeast Pacific. The United States and Canada at the 1958 Conference proposed, and vigorously argued in favor of, including this abstention principle[40] in the Convention on Fishing and Conservation of the Living Resources of the High Seas. It was not, however adopted, and, when introduced in the form of a resolution, was rejected by the Plenary Meeting.[41]

As we have already noted, the extent of the territorial sea and

37. W.M. Chapman, PROC. THIRD ANN. CONF. LAW OF THE SEA INSTITUTE, 35, 50-52 (1969), has briefly summarized the activities at the 1958 Conference concerning this matter [hereinafter cited as Chapman 1969].

38. 13 U.N. GAOR, U.N. Doc. A/Conf.13/L.56 (1958), VI. Special Situations Relating to Coastal Fisheries.

39. International Convention for the High Seas Fisheries of the North Pacific Ocean, May 9, 1952, *in force* June 12, 1953, 4 U.S.T. 380, T.I.A.S. No. 2786, 205 U.N.T.S. 65.

40. U.N. Conference on the Law of the Sea, 13 U.N. GAOR, U.N. Doc. A/Conf. 13/41 (1958) at 9, 22, 102-04, 109-10, 121-22, 155.

41. U.N. Conference on the Law of the Sea, 13 U.N. GAOR, U.N. Doc. A/Conf. 13/38 (1958) at 47, 109. *See also* Chapman 1969, *supra* note 37, at 52.

exclusive fishing zone remains one of the important unresolved sources of conflict. The ILC, in the drafts prepared at its Eighth Session, recognized a zone of the high seas, not extending beyond twelve miles from the baseline from which is measured the breadth of the territorial sea, contiguous to its territorial sea, in which the coastal State may exercise control concerning customs, fiscal or sanitary regulations. In its commentary[42] it stated explicitly that it was not willing to recognize any exclusive right of the coastal State to engage in fishing in the contiguous zone, because it considered that there was no prospect of an agreement to extend the exclusive fishing rights of the coastal State beyond the territorial sea. Nor was the majority of the Commission willing to accept a claim of the right of the coastal State to take whatever measures it considered necessary for the conservation of the living resources.

The breadth of the territorial sea in relation to the breadth of a possible contiguous fishing zone, both to encompass no more than twelve miles from the baseline from which the territorial sea is measured, was widely debated under various formulations at the 1958 Conference, but no agreement was reached. Subsequently, at a Conference called especially for the purpose in 1960, these matters were again examined in great detail, but, again, no agreement could be reached, although there very nearly succeeded a proposal, advanced by Canada and the United States, for a six mile territorial sea plus a contiguous fishing zone extending to a maximum of six more miles, but permitting nations with historic fishing rights in the outer six miles the opportunity to continue to fish there for ten years. This proposal was adopted in Committee by a vote of 43 to 33 with 12 abstentions. It received additional support when amended by a proposal from Argentina to give the coastal State, in the high seas adjacent to its exclusive fishing zone, a preferential right of fishing, especially if its economic development or the feeding of its population depended on that activity. This amended proposal failed of adoption by a single vote.[43]

42. ILC, 8th Session, *supra* note 9, at 40.

43. The various proposals at the 1960 Conference, and their treatment, are succinctly discussed by MCDOUGAL & BURKE 1962, *supra* note 12, at 541-47.

RECENT PRACTICE AND POLICY OF NATIONS AND CURRENT TRENDS

It was intended that the Conventions on the Law of the Sea, adopted at Geneva in 1958, should provide, so far as possible, a comprehensive code for the conduct of the international affairs of nations in the marine realm. With respect to fisheries, the provisions of the several Conventions, particularly the Convention on Fishing and the Conservation of the Living Resources of the High Seas, attempt to set forth fundamental principles concerning the rights and duties of nations on the high seas, to describe and delimit the exclusive jurisdiction of the coastal State, and its special interest in the conservation of living resources off its shores, to put forth rules and guidelines for unilateral action and international cooperation to conserve the living resources, and to provide a basis for settlement of disputes. As we have seen, this objective was not fully achieved. Many nations regard the provisions of the Conventions related to fisheries as unsatisfactory in one way or another.

In this section I will examine the major provisions of the 1958 Conventions with respect to fisheries, and the recent practices and apparent policy of nations, especially the United States, in relation thereto. From this, we may identify the nature and direction of current trends, and achieve a better appreciation of likely developments, especially should a new law of the sea conference be convened in the near future.

Freedom of fishing on the high seas

Among the freedoms of the high seas, expressly enumerated in Article 2 of the Convention on the High Seas, is freedom of fishing. These freedoms are to be exercised by all States with reasonable regard to the interests of other States in their exercise of freedoms of the high seas. The right of fishing is further amplified in Article 1 of the Convention on Fishing and Conservation of the Living Resources of the High Seas, wherein it is stipulated that "all States have the right for their nationals to engage in fishing on the high seas, subject (a) to their treaty obligations, (b) to the interests and rights of coastal States as provided for in this Convention, and (c) to the provisions contained in the following Articles concerning conservation of the living resources of the high seas."

The right of free access of all States to the fisheries of the high seas is apparently upheld by a large majority of nations, but the high seas, for fisheries purposes, at least, are tending to shrink. There are strong pressures for extension of the territorial sea and/or an exclusive fishing zone, and for extensions of the special rights of coastal States even beyond such zones. These tend to limit the region which can be regarded as high seas, where freedom of access to fisheries, on an equal footing, is open to all. Further, certain of the living resources that appertain to the seabed are under the exclusive jurisdiction of the coastal State, and in some locations the seabed under national jurisdiction extends far out under the overlying high seas. There is also a strong desire on the part of some nations to add to the resources of the seabed certain of the demersal species that are presently regarded as resources of the high seas.

There is also some support for entirely eliminating the present right of fishing on the high seas by the establishment of a regime for the living resources of the high seas to be managed by some international authority, that might have the right to determine who harvests the fish, to collect revenues from the high seas fisheries, and to arrange for their disbursement, or distribution, for the benefit of all nations, but especially the underdeveloped nations. This tendency is stimulated from two sources: First, the activities of certain authors and organizations devoted to the development of world government, who believe that the oceans are a good place to begin the establishment thereof and, second, an outgrowth of the current activities toward the establishment of an international regime for the peaceful uses of the seabed beyond the limits of national jurisdiction, currently being vigorously pursued in the United Nations.

With respect to the latter, it may be recalled that the General Assembly in December 1967 established an *Ad hoc* Committee for "[e]xamination of the question of the reservation exclusively for peaceful purposes of the sea-bed and ocean floor, and the subsoil thereof, underlying the high seas beyond the limits of present national jurisdiction, and the use of their resources in the interests of mankind."[44] The General Assembly transformed this *Ad hoc* Committee into a Standing Committee the following year.[45] This

44. G.A. Res. 2340, 22 U.N. GAOR Supp. 16, at 44, U.N. Doc. A/6716 (1967).
45. G.A. Res. 2467, 23 U.N. GAOR Supp. 18, at 15, U.N. Doc. A/7218 (1968).

Committee has been very active, and has issued several reports[46] dealing with the establishment of an outer boundary for national jurisdiction over the resources of the seabed, and the establishment of an international regime for the management of the exploration and exploitation of the deep seabed beyond. It is evident that the tendency in this Committee, and in the General Assembly as well, is toward the development of a regime for the peaceful uses of the deep seafloor involving a new international authority that would be responsible for the exploration and exploitation of its resources, would allocate these rights, would collect revenues therefrom, and would somehow distribute the proceeds to the community of nations. The Seabeds Committee has confined itself primarily to the resources of the seabed, and particularly the mineral resources, except as utilization thereof may interfere with other uses of the superjacent waters, or may pollute them. However, a few nations are beginning to advocate extension of such an international regime for the use of the ocean's resources to the living resources of the overlying high seas as well. For example, during the debates concerning the seabed matter in the General Assembly last autumn, the representative of Guatemala is reported to have said that the seabed and the superjacent waters are an independent whole and must be subject to one regime.[47] At the same meeting, the delegate of Ecuador, in agreeing that a legal regime must be established for the deep seafloor, also noted that the legal status of the seabed cannot be separated from that of the superjacent waters. Thus, apprehension that the jurisdiction of an international authority for the seabeds might "creep" up through the superjacent high seas, to include the living resources, may not be entirely without foundation.

The primary stimulus toward abandoning freedom of the seas with respect to fisheries in favor of an international authority,

46. See, for example, Report of the *ad hoc* Committee to Study the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction, 23 U.N. GAOR, U.N. Doc. A]7230 (1968); Committee on the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction, Report of the Legal Subcommittee, 24 U.N. GAOR, U.N. Doc. A/AC. 138/18 (28 August 1969), and Report of the Economic and Technical Subcommittee, 24 U.N. GAOR, U.N. Doc. A/AC, 138/17 (27 August 1969); and Committee on the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction, Economic and Technical Subcommittee, *Interim Report*, 25 U.N. GAOR, U.N. Doc. A/AC. 138/SC.2/L.6 (26 March 1970).

47. U.N.G.A. First Committee, 1676th Meeting, Press Release GA/PS/1548, (4 November 1969).

however, appears to be not from governments but from various influential individuals and private organizations devoted to promoting world government under the aegis of the United Nations. Clark Eichelberger, in a recent article advocating the administration of the bed of the sea by an authority of the United Nations, makes it quite clear that he and his colleagues believe this to be but a first step, and that an authority for the sea must concern itself with other matters, including the high seas fisheries.[48] The Commission to Study the Organization of Peace is even more explicit in a recent publication where it is stated:

> While this report is directed primarily to the sea-bed, the Commission is aware that an international regime for the sea must eventually encompass the world's fisheries and other marine resources, pollution control, weather control and other activities. It may be hoped that the establishment, step by step, of a rational regime for the development, administration and regulation of the resources of the sea will provide the nations with a new instrument of international cooperation on a universal scale much more effective than those developed in other fields.[49]

Some others involved in this effort are the World Peace Through Law Center,[50] and Mrs. E.M. Borgese of the Center for the Study of Democratic Institutions. Mrs. Borgese has reviewed the proposals of other organizations and individuals, and has prepared her own rather elaborate draft statute for the peaceful uses of the high seas and the seabeds beyond the limits of national jurisdiction, that would establish a complex international authority to regulate, supervise and control all activities on the high seas, and on or under the seabed, including, *inter alia*, the regulation of fisheries, fish-farming and aquaculture.[51]

Proposals for such an international authority are apparently quite attractive to individuals in small, newly emerging and underdeveloped countries, with little technical knowledge, because of their promise of great riches from the sea for the benefit of all

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48. Eichelberger, *The United Nations and the Bed of the Sea*, 6 SAN DIEGO L. REV. 339, 350 (1969).

49. THE UNITED NATIONS AND THE BED OF THE SEA, NINETEENTH REPORT OF THE COMMISSION TO STUDY THE ORGANIZATION OF PEACE, 1969, at 29.

50. *Treaty Governing the Exploration and Use of the Ocean Bed*, Pamphlet Series, No. 10, WORLD PEACE THROUGH LAW CENTER 1, 25 (1968).

51. E.M. Borgese, *The Ocean Regime*, CENTER FOR STUDY OF DEMOCRATIC INSTITUTIONS, Occ. Papers 1, 11, 29-31 (October 1968).

mankind. Not only are the potential benefits greatly exaggerated, but some experts, at least, believe that the establishment of an international authority to administer the resources of the seabed and the fisheries of the high seas would actually be very detrimental to the development of the underdeveloped countries.[52]

Exclusive jurisdiction of the coastal State

Exclusive jurisdiction of the coastal State over living resources of the adjacent ocean is dealt with, directly or indirectly, in several of the 1958 Conventions.

The sovereignty of a State over its territorial sea includes, of course, sovereignty over all aspects of the exploration, exploitation, and conservation of the living resources therein. Unfortunately, the Convention on the Territorial Sea and the Contiguous Zone remains silent on the breadth of the territorial sea. As we have seen, it was not possible at the Conferences of either 1958 or 1960 to arrive at an agreed breadth of the territorial sea, despite the fact that, as the ILC had pointed out, the right to fix the limit of the territorial sea at least at three miles was not disputed, and international law did not permit the limit to be extended beyond twelve miles.[53] The ILC had expressed the opinion that the question should be decided by the international conference.

Similarly, it proved impossible to establish a contiguous fishing zone extending to twelve miles from the baseline of the territorial sea, within which the coastal State might exercise jurisdiction over the living resources. Thus the 1958 Conventions remain silent on that matter also.

A major impediment to arriving at general agreement about the breadth of exclusive fisheries jurisdiction, either through sovereignty over the territorial sea or through jurisdiction over fisheries in an exclusive fishing zone, at both the 1958 and 1960 Conferences, was the fact that no combination could be developed that would generally satisfy both the military requirement for freedom of navigation, through the device of a narrow territorial sea, and the desire for a zone of at least twelve miles breadth for

52. See, for example, W.M. Chapman, *The Ocean Regime of the Real World,* PROC. FOURTH ANN. CONF. LAW OF THE SEA INSTITUTE 446, 454-55 (1910).

53. ILC, 8th Session, *supra* note 9, at 13.

fisheries jurisdiction by the coastal State. This conflict was perhaps as great within States as between States; for example, the conflict between coastal fisheries interests and defense interests was quite evident in the case of the United States.

The Convention on the Continental Shelf, through its definition of the natural resources of the shelf as including "sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil,"[54] also confers exclusive jurisdiction over that category of fishery resources to the coastal State out to the limit of its continental shelf.[55] Thus, the extent of the seabed within the limit of national jurisdiction is a matter of interest from the standpoint of fisheries, as is also the matter of any possible modification of the definition of just which of the living resources belong to the sedentary species.

The Convention on Fishing and Conservation of the Living Resources of the High Seas deal, by definition, with those resources beyond the exclusive jurisdiction of the coastal State. However, many species of marine organisms migrate freely between the area of exclusive jurisdiction of the coastal State (internal waters and the territorial sea) and the adjacent high seas, so that, for the conservation of these resources, there is required a degree of cooperation and coordination between the sovereign of the territorial sea and nations fishing in the adjacent high seas. This was specifically recognized in the 1958 Fishing Convention by the provision that, in such a situation, a State whose nationals are engaged in fishing in the high seas adjacent to the territorial sea of a coastal State shall not enforce conservation measures which are opposed to those that have been adopted by the coastal State, but may enter into negotiations with a view to prescribing by agreement necessary conservation measures.[56] A resolution of the 1958 Conference[57] also deals with this matter.

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54. Continental Shelf Convention, *supra* note 3, Art. 2, para. 4.

55. The "continental shelf" of the Continental Shelf Convention, Art. 1, refers to the limit of national jurisdiction, and is only remotely related to the geological concept. This is fully discussed by K. O. Emery, *An Oceanographer's View of the Law of the Sea*, ISTITUTO AFFARI INTERNAZIONALI, SYMPOSIUM ON THE INTERNATIONAL REGIME OF THE SEA-BED (1970), (*in press*.)

56. Fishing Convention, *supra* note 4, Art. 6, para. 4.

57. 13 U.N. GAOR, U.N. Doc. A/Conf.13/L.56 (1958), IV. Cooperation in Conservation Measures.

The manifest desire of a large number of nations to extend their right of exclusive access and control, respecting fisheries, to a band of adjacent sea at least twelve miles wide is demonstrated by the recent action of many nations in extending their claims for territorial seas or fishing limits. From a recent listing of claims, for breadth of the territorial sea and fishing jurisdiction, of members of the United Nations System,[58] it may be seen that only 32 nations still adhere to a three mile territorial sea, while 42 claim territorial seas of twelve miles breadth. A few claim intermediate distances, and extreme claims, beyond twelve miles, are limited to eight nations, six of them in Latin America. In addition, Brazil also declared a 200-mile territorial sea on 25 March 1970.[59] An even more striking feature of this listing of claims is that only 16 nations still limit their claims for fisheries jurisdiction to three miles, while 66 nations now claim twelve miles. Some dozen nations that claim relatively narrow territorial seas claim exclusive fishing zones, conservation zones, or other exclusive jurisdictions over fisheries to distances from 65 to 200 miles.

It seems clear that pressure for extended exclusive fisheries jurisdiction is much greater than ten years ago, relative to the counter-pressures of naval interests, and of interests in distant-water fisheries, to maintain narrow territorial seas and narrow fishery limits. This, of course, is a reason that United States, in 1966, joined those nations claiming a three mile territorial sea and an additional contiguous fishery zone of nine miles, asserting that this is now consistent with the practice of the great majority of nations. It also seems quite evident why the United States might be willing to go along with the establishment of a twelve-mile territorial sea, if freedom of navigation of its naval vessels in international straights were maintained.[60] Whether this will prove possible, or, indeed, whether it will prove possible to limit the breadth of exclusive fishing zones to only twelve miles, is doubtful. Although formal claims to broader fisheries jurisdiction are, so

58. *Breadth of Territorial Sea and Fishing Jurisdiction Claimed by Members of the United Nations System.* Communication from U.S. State Dep't Office of the Special Assistant to the Secretary for Fisheries & Wildlife, August 15, 1969. *See also, Limits and Status of the Territorial Sea, Exclusive Fishing Zones and the Continental Shelf.* FAO FISH. TECH. PAPER NO. 79 (1968).

59. Christian Science Monitor, April 9, 1970, at 4, col. 1.

60. Stevenson, *supra* note 7, at 4-5, LXII DEP'T STATE BULL. at 341.

far, few, the pressure for broader exclusive fisheries jurisdiction may very well continue to increase, so that a two-thirds majority of nations at a future conference in favor of fixing a definite twelve-mile fishery limit may become impossible.

It is noteworthy, in this connection, that United States fisheries interests are strongly divided. Fishermen in the Pacific Northwest and Alaska, and along our Northeast and Central Atlantic Coasts, off whose shores large, efficient, foreign, distant-water fishing fleets operate, favor a much broader zone of exclusive jurisdiction, while the distant-water tuna fishermen operating from California and Puerto Rico, for example, together with the distant-water shrimp fishermen of the Southeast Atlantic and Gulf Coats, are opposed.

The current position of the United States, according to a recent paper by D.L. McKernan, Special Assistant to the Secretary of State for Fisheries and Wildlife, and his colleague W. Van Campen,[61] is that attempts by coastal States to protect their fishery interests by unilateral action through extending their jurisdictional claims beyond twelve miles can hamper full utilization of fisheries resources, and may lead to retaliatory actions by distant-water fishing States, with harmful results. Recourse, therefore, should be had to existing international mechanisms for peaceful settlement of disputes, rather than to unilateral action. On the contrary, other nations, such for example as Chile, Ecuador and Peru, have proven quite adamant in their extended unilateral claims, and in refusal to resolve the problem either by negotiation or through other available international mechanisms, such as the International Court of Justice.[62]

The second type of exclusive jurisdiction of the coastal State over living resources is over the resources of the Continental Shelf. This is also fraught with potential problems, especially in any new international negotiations. It may be recalled that there was very

61. McKernan and Van Campen, An Approach to Solving International Fishery Disputes. Paper presented at Ann. Meeting Am. Fish. Soc., New Orleans, 11 Sept. 1969 (TRANS. AM. FISH. SOC., *in press*), 2, 23-27 [hereinafter cited as McKernan and Van Campen].

62. T. Wolf, *Peruvian—United States Relations Over Maritime Fishing: 1945-1969*, LAW OF THE SEA INST., OCC. PAPER NO. 4 at 13-20. *See also, Hearings on Foreign Seizures of U.S. Fishing Vessels Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 9th Cong., 1st Sess., Ser. 90-8, 13, 58-59 (1967).

extensive debate in the Fourth Committee at the 1958 Conference concerning just what living resources are resources of the seabed and subsoil, and what belong to the superjacent high seas.[63] Many delegations were in favor of restricting the definition to those organisms that are actually within, or physically attached to, the seabed or subsoil, or live immobile on it, at their harvestable stages. Others were strongly in favor of including demersal species, that can swim well above the seabed, but are associated with it at certain stages of their life histories, such as many so-called "bottom-fishes" and a variety of demersal crustacea, including shrimps, lobsters, and crabs. Indeed, the opinion was so nearly divided as to whether or not there should be included in the definition, as it now appears in the Convention on the Continental Shelf,[64] a terminal phrase reading "but crustacea and swimming species are not included," that a vote in the Committee to include that phrase failed by a tie, 27 for, 27 against and 13 abstentions.[65] With the recent large growth in tonnage and value of catch, and expansion to many new areas of the world ocean, of the fisheries for shrimps and lobsters, not to mention the increasing utilization of demersal fish on formerly little-exploited continental shelves, it would not be surprising if, at any new conference, the definition of the living resources pertaining to the seabed or subsoil were broadened to include such species. It is, therefore, of some importance for the United States carefully to consider whether this would be in its best interests. So far, the United States has claimed as creatures of the shelf only such mobile crustacea as king crabs, and tanner crabs that, while they walk about on the seabed, have not been demonstrated to be capable at their harvestable stages of swimming in the waters above it.

The question of the limit of national jurisdiction over the resources of the seabed is also pertinent. Under the Convention on the Continental Shelf, this extends to at least 200 meters and, in submarine areas "adjacent to the coast . . ., beyond that limit, to where the depth of the superjacent waters admits of the expoitation of the natural resources. . . ."[66] There is, however,

63. U.N. Conference on the Law of the Sea, 13 U.N. GAOR, U.N. Doc. A/Conf.13/42 (1958) at 27-29, 47-49, 61-62, 69.

64. Continental Shelf Convention, *supra* note 3, Art. 2, para. 4.

65. U.N. Conference on the Law of the Sea, 13 U.N. GAOR, U.N. Doc. A/Conf. 13-42 (1958) at 70.

66. Continental Shelf Convention, *supra* note 3, Art. 1.

considerable debate, both nationally and internationally, as to how much further offshore, or deeper, the present limit extends under this definition,[67] as well as where it ought to be established in any new negotiations.[68]

Certain organisms, such as king crabs and tanner crabs, presently coming under the definition of living resources of the shelf, live in commercial abundance considerably deeper than 200 meters. Some demersal crustacea and fishes extend in commercial abundance beyond 1,000 meters depth.[69] Thus, it seems impossible to deal with the matter of exclusive jurisdiction over the living resources of the continental shelf separately from the definition of where the national jurisdiction over the seabed ends, and also the nature of an international regime for the seabed beyond.

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67. Some authorities believe that the adjacency criterion extends the potential outer limit to encompass the entire continental margin, to at least the outer edge of the continental slope, in depths of some 2000 to 3000 meters; *see, e.g.*, NATIONAL PETROLEUM COUNCIL, PETROLEUM RESOURCES UNDER THE OCEAN FLOOR 9-10, 55-63 (1969); COMMITTEE ON DEEP SEA MINERAL RESOURCES, AMERICAN BRANCH, INTERNATIONAL LAW ASSOCIATION, INTERIM REPORT, July 19, 1968, at IX-XII; Jennings, *The Limits of Continental Shelf Jurisdiction: Some Possible Implications of the North Sea Case Judgment*, 18 INT. & COMP. LAW QUARTERLY 819 (1969). Others believe that national jurisdiction cannot be extended to such depths, including Goldie, *The Exploitability Test—Interpretation and Potentialities*, 8 NAUTRAL RESOURCES J. 434, 447-48, 452 (1968); L. Henken, INST. STUDY SCIENCE & HUMAN AFFAIRS, MONOGRAPH 1 (1968) at 24; Henken, *A Reply to Mr. Finlay*, 64 AM. JOUR. INT. LAW 42, 62-72 (1970); both of these authors assert that, in any event, the extent of national jurisdiction ought to be much more limited, and that the Continental Shelf Convention should be revised to make this explicit. S. Oda, *Proposals for Revising the Convention on the Continental Shelf*, 7 COLUM. J. TRANSNAT'L L. 1, 3-10, 30 (1968), on the contrary, believes that, by a literal interpretation of the Convention, the entire bed of the oceans is subject to national jurisdictions, and that it will require a revision of the Convention to make the limits more restrictive.

68. THE COMMISSION ON MARINE SCIENCE, ENGINEERING AND RESOURCES, OUR NATION AND THE SEA 143-56, advocates redefinition to limit each nation's jurisdiction to 200 meters depth, or 50 miles offshore, whichever encompasses the greater area, and recommends that there be negotiated a new regime for the deep sea floor beyond, including an intermediate zone out to 2,500 meters depth or 100 miles offshore, in which the coastal State would control access to the resources under terms established, in part, by an international authority. This international authority would also be responsible for the control of exploration and exploitation of the resources of the deep sea floor, beyond the intermediate zone. Similar proposals have been discussed in the Seabeds Committee of the General Assembly (see note 46 *supra*). The National Petroleum Council is strongly opposed to new arrangements that would further limit national jurisdiction over the resources of the continental margin, and to an international authority with such extensive powers as proposed by the Commission. NATIONAL PETROLEUM COUNCIL, PETROLEUM RESOURCES UNDER THE OCEAN FLOOR, 11, 13, 69-78 (1969).

69. Schaefer, *Living Resources of the Sea-bed*, ISTITUTO AFFARI INTERNAZIONALI, SYMPOSIUM ON THE INTERNATIONAL REGIME OF THE SEA-BED (1970) (*in press.*)

As of this writing, although the United States recognizes that there is a portion of the seabed beyond national jurisdiction, and is in favor of setting a precise boundary as soon as practicable, as well as establishing an equitable international regime for the deep seafloor,[70] it has not yet adopted any official position as to where the outer limit of national jurisdiction should be established. There is involved in arriving at such a position an extremely complex interaction of military interests, fisheries interests, petroleum interests, and interests concerned with other minerals of the seafloor.

It seems quite certain that at any new conference it will be impossible to avoid reconsideration of all the matters concerning the living resources in any way related to the seabottom adjacent to the continents.

So far as concerns species that move between waters clearly under national jurisdiction, such as the territorial sea or the contiguous exclusive fishing zone, and offshore waters of the high seas, the general practice of the United States has evidently been to arrive at suitable accommodations among the various users by negotiation, bringing to bear not only the conservation principles of the 1958 Convention, and regional conventions in the specific areas of concern, but also such economic and political considerations as may be pertinent. McKernan and Van Campen have explicitly stated that, in the case of conflict of economic interests where coastal fishermen and distant-water fishermen are utilizing the same resource, there exist mechanisms for resolving such conflicts by negotiation, with proper consideration for the interests of both parties.[71] However, it appears that not all nations are willing to rely on this sort of mechanism; some prefer to protect their interests by extension of their exclusive fisheries jurisdictions, or at least by demanding special rights in the high seas, often in very broad regions thereof, adjacent to their shores,

70. Stevenson, *supra* note 7, at 5-6, 7, LXII DEP'T STATE BULL. at 341-43. See also statement of Ambassador C. Phillips in the Seabeds Committee of the General Assembly on March 26, 1970, U.S. Mission to the United Nations Press Release USUN-43(70). However, on May 23, 1970, President Nixon released to the press a statement on U.S. ocean policy proposing that all nations adopt as soon as possible a treaty under which they would renounce all claims to the natural resources of the seabed beyond 200 meters depth, and proposing an international regime for the seabed beyond; he said that the U.S. will introduce specific proposals at the next meeting of the U.N. Seabed Committee.

71. McKernan and Van Campen, *supra* note 61, at 2, 11-16.

not only for conservation purposes but also to obtain a preferential share of the harvest.

Related to the foregoing is the "abstention principle," at least as it applies to salmon and North Pacific herring, both of which reproduce and are fished in waters under national jurisdiction but also migrate extensively to the high seas beyond, where they may be subject to commercial fishery. This principle, as we have noted, was rejected at the 1958 Conference, but it continues to be applied under the provisions of the North Pacific Convention among Japan, Canada, and the United States.[72] With respect to salmon, under a treaty between Japan and the USSR, concerning conservation of fisheries in the Northwest Pacific, decisions on allocations of catch of salmon between the two parties are arrived at by negotiation each year.[73] The abstention principle, as advocated by the United States and Canada at the 1958 Conference is, in general, applicable to purely marine species, so that this appears to be a type of exclusive access to high seas resources by those States already using them, where the full harvest is already being obtained, and the stocks are under scientific investigation and suitable conservation management.

Conservation of living resources of the high seas, and the special interests of the coastal State

The Convention on Fishing and Conservation of the Living Resources of the High Seas in Article 2 defines conservation in terms of maintaining the fish stocks so as to render possible the maximum sustainable yield. By Articles 3 and 4, it imposes on fishing nations the duty individually and collectively to adopt measures for conserving the living resources fished by their nationals. Articles 6 and 7 accord extensive special rights to coastal States. Under Article 6, the coastal State is entitled to take part on an equal footing in any system of research and regulation for purposes of conservation of the living resources of the high seas adjacent to its territorial sea, even though its nationals do not carry on fishing there. This article further accords priority to the conservation regulations established by the

72. International Convention for the High Seas Fisheries of the North Pacific Ocean, May 9, 1952, *in force* June 12, 1953, 4 U.S.T. 380, T.I.A.S. No. 2786, 205 U.N.T.S. 65.

73. McDOUGAL & BURKE 1962, *supra* note 12, at 955. See also *The Management of Fishery Resources*, F.A.O., Rome (1967) at 28.

coastal State, and requires other States to negotiate with it concerning measures for the conservation of the living resources of the high seas in that area. Article 7 goes even further, giving the coastal State the right, following failure of negotiation with other States, to impose unilateral measures of conservation in any area of the high seas adjacent to its territorial sea where there can be made a showing of urgency, an appropriate scientific basis, and nondiscrimination against foreign fishermen.

As we have already noted, these extensive rights of regulation of the fisheries on the high seas by the coastal State, flowing from its special interests in the conservation of the fishery resources off its shores, could easily be subject to abuse, giving rise to the necessity for adopting, in detail, a rapid and effective mechanism for adjudication of disputes. Consequently, Articles 9 through 12 of the Convention stipulate in detail a mechanism for settlement of disputes, in the first instance by negotiation, and, failing that, by compulsory arbitration. Dispute-settlement aspects of the Convention will be discussed below under the appropriate heading.

This Convention provides a quite adequate basis for conservation of the living resources of the high seas, through cooperation of the fishing nations and of the adjacent coastal States. As envisaged by the Rome Conference of 1955, several additional intergovernmental fisheries bodies have been established under multilateral conventions, and other agreements among interested States, since 1958, for the purpose of collecting the necessary scientific information, and providing means of cooperation in the conservation management of specific resources or all of the fisheries resources of a particular region.[74] The 1958 Convention certainly provides an adequate basis for the coastal State to exercise its special interests in the conservation of the living resources of the high seas off its shores.

Yet this Convention is widely regarded as being quite inadequate. The difficulty, as we have already observed, is that many nations, both coastal States and those with distant-water fisheries, are interested in a great deal more than conservation. They are at least equally interested in who gets the fish. Thus, there continues to be considerable pressure for allocation of

74. *The Management of Fisheries Resources*, F.A.O., Rome (1967), Annex Table 16, provides information on 21 intergovernmental fisheries bodies, of which 5 were established subsequent to 1958.

access, in those cases where the maximum sustainable yield has been attained, through fixed catch-quotas within that limit, among nations engaged in the fishery,[75] or by other means.

Preferential fishing rights of coastal States

The problem of equitably accommodating claims to preference in the harvesting of high-seas fishery resources, based on economic needs of coastal States, originally elucidated especially by Iceland,[76] remains unsolved. In connection with this topic the speech of John Stevenson contained the statement that:

> Many nations do not believe that mere conservation of . . . fisheries adequately protects their interests. . . . We believe . . . economic pressures have contributed significantly to the trend toward expanded unilateral jurisdictional claims and that many nations will insist that these problems be dealt with in conjunction with agreement on the breadth of the territorial sea.[77]

Certainly the United States is among the nations maintaining that the interests of coastal States in the resources of the high seas off their coasts extend beyond conservation to encompass also economic interests. This has been explicitly stated by McKernan and Van Campen,[78] who also apparently believe that this is a critical matter for underdeveloped nations, since they say: "Unless ways can be found to give the developing countries confidence on this point, we are likely to see a continuing erosion of the freedom to fish in many parts of the world."[79] At a recent panel discussion, Ambassador Anderson of Iceland indicated that the 1958 Conventions do not satisfy the special economic needs

75. THE COMMISSION ON MARINE SCIENCE, ENGINEERING AND RESOURCES, OUR NATION AND THE SEA 105-109 (1969) strongly advocates, for example, a system of national catch-quotas among all nations operating in the cod and haddock fisheries of the North Atlantic, and also commends to early consideration a system of national catch-quotas for the North Pacific Fisheries. It recognizes, however, the difficulties of accommodating the preferential rights of coastal States, in the general case. See also J. Crutchfield, *National Quotas for the North Atlantic Fisheries: An Exercise in Second Best*, PROC. THIRD ANN. CONF. LAW OF THE SEA INSTITUTE 263 (1969), and also McKernan and Van Campen, *supra* note 61, at 8.

76. Conference Official Records, *supra* note 14, at 87-89, and Chapman 1969, *supra* note 37, at 50-52.

77. Stevenson, *supra* note 7, at 4-5, LXII DEP'T STATE BULL. at 341.

78. McKernan and Van Campen, *supra* note 61, at 14, 16.

79. *Id.* at 14.

of his country.[80] Ambassador Oribe of Uruguay in the same discussions clearly indicated that the question of the special interests of the coastal States concerning fisheries were not solved from the viewpoint of the interests and aspirations of the Latin American countries. Indeed, Ambassador Oribe advocated, with respect to the resources of the sea, that we should abandon the universalistic approach in favor of a regional approach.[81]

Canada is another example of a nation insisting on extending the concept of the special interests of the coastal State in the living resources of the high seas, beyond conservation. In a recent speech, J. Davis, Minister of Fisheries and Forestry, pointed out that Canada has increased its exclusive fishery jurisdiction by adopting a twelve-mile fishing zone, and is committed to a policy of further enlarging this by measuring the zone from baselines drawn between headlands.[82] Baselines had already been established on the east coast of Newfoundland and Labrador, and the Minister announced the intention to take similar action in other coastal regions as soon as possible. He indicated, however, that this was still inadequate, and that there needs to be defined the extent of the interests of the coastal State in the fisheries even further off its coasts, "not only for purposes of conservation but for management as well," and went on to say that the coastal State ought to be assigned the major responsibility for the management of fisheries over its continental shelf.[83]

The question of preferential fishing rights of coastal States, not covered by the 1958 Convention, is likely to be of critical importance at any new conference. The preceding discussions indicate pressures for some recognition of preferential rights of coastal States, based on economic considerations, to the harvest of the living resources of the high seas adjacent to their territorial seas or contiguous fishing zones. It is not evident, however, what sort of provisions in a new convention on the law of the sea could achieve this result in a manner to command the assent of two-thirds of the nations present and voting.

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80. *The Geneva Convention: Ten Years Later*, PROC. THIRD ANN. CONF. LAW OF THE SEA INSTITUTE 72-78 (1969).

81. *Id.* at 70-71.

82. J. Davis, Address at the Boston Fish Expo, Oct. 16-19, 1968, manuscript distributed by Information Branch, Dep't of Fisheries (1968) at 2-3.

83. *Id.* at 4.

One way of obtaining preferential fishing rights over a greater breadth of the high seas off a nation's shores is extension of its claims to unilateral jurisdiction. This is undoubtedly a major motivation for extension of the territorial sea in some instances, and the establishment of exclusive fishing zones in others. Certainly this is the major factor in the 200-mile claims of a few nations. Similar results may be achieved by adopting methods of drawing baselines extending both the territorial sea and exclusive fishing zones further offshore than they would have gone otherwise, as was done, for example, by Iceland in 1950[84] and by Canada more recently.[85]

Another method, that seems to be preferred by the United States, for example, is to achieve recognition of certain preferential rights, based on economic considerations, by means of multilateral or bilateral negotiations with other countries engaged in the fishery on the high seas in the area of concern.

In order to establish a factual, scientific, biological basis for such negotiations, it is highly desirable to obtain the required data through the cooperative efforts of the various countries fishing in the area. This may be achieved, as in the case of the Northwest Atlantic, by means of an international commission representing all, or nearly all, countries fishing there.[86] Similarly, in the Northeast Pacific this role of fact finding is fulfilled primarily by the North Pacific Commission, among Canada, Japan and the United States, also relying on the findings of already-existing specialized commissions concerned with halibut,[87] and with the salmon of the Fraser River.[88]

However, bilateral cooperation in investigations, outside the framework of a formal convention, can also be effective. Whereas

84. B. McCHESNEY, INTERNATIONAL LAW SITUATION AND DOCUMENTS 1956, LI U.S. NAVAL WAR COLLEGE 466-67 (1957).

85. J. Davis, Address at the Boston Fish Expo, Oct. 16-19, 1968, manuscript distributed by Information Branch, Dep't of Fisheries (1968) at 2-3.

86. International Convention for the Northwest Atlantic Fisheries, 8 Feb. 1949, *in force* for United States July 3, 1950, 1 U.S.T. 477, T.I.A.S. No. 2089, 157 U.N.T.S. 157.

87. Convention for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea, March 2, 1953, 5 U.S.T. 5, T.I.A.S. No. 2900, 222 U.N.T.S. 77. (Replaces the earlier Conventions of 1924 and 1937).

88. Convention for the Protection, Preservation, and Extension of the Sockeye Salmon Fishery of the Fraser River System, *in force* 28 July, 1937, 50 Stat. 1355, T.S. 918; and Protocol amending the Convention to include pink salmon, *in force* 3 July 1957, 8 U.S.T. 1057, T.I.A.S. No. 3867, 290 U.N.T.S. 103.

in the Northwest Atlantic close cooperation between the U.S. and U.S.S.R. in scientific investigations of the fisheries resources is carried out through mechanisms related to the Northwest Atlantic Fisheries Commission, in the Northeast Pacific, where the U.S.S.R. is not a party to the North Pacific Convention, such research has been effectively arranged on a less formal, bilateral basis, involving the scientists and research vessels of the fisheries agencies of the two countries.[89]

On the basis of scientific findings concerning the biological aspects of the resources of concern, the nations may then enter into pragmatic practical negotiations taking into account all pertinent economic aspects, and various political factors as well. This sort of negotiated practical solution has been of value in resolution of problems of the United States in both the North Pacific and North Atlantic Oceans.

In the case of the Pacific, the United States has maintained preferential fishing rights, through the abstention principle, to salmon and some other species, by means of the North Pacific Convention. It is noteworthy that, although Japan has at various times objected to this Convention, on the basis that it was negotiated at a period, immediately after the War, when she was at a disadvantage in such negotiations, she has continued to adhere to the Convention despite the opportunity to withdraw from and thus terminate it, since 1963.[90] Under executive agreements between the United States and Japan,[91] Japan has agreed to refrain from fishing with certain types of gear in specified areas of the high seas near the United States during specified seasons, and, at the same time, has received permission of the United States to use specified areas of its exclusive fishing zone for certain fishery-connected loading and unloading operations of its vessels. A similar executive agreement is also

89. A formal basis for this cooperative fisheries research, that is carried out not only on the high seas, but in the contiguous fishing zone of the U.S. as well, is a series of Executive Agreements, the most recent being Northeastern Part of the Pacific Ocean off the United States Coast, Agreement with the U.S.S.R., *amending and extending the Agreement of February 13, 1967, as amended and extended*, Jan. 31, 1969, 20 U.S.T. 340, T.I.A.S. No. 6636.

90. Art. II, para. 2, provides that the treaty will continue in force for ten years, after which it will be terminated as to all contracting parties one year after notice of withdrawl of a contracting party.

91. Certain Fisheries Off the United States Coast, Salmon Fisheries, Agreements with Japan, December 23, 1968, 19 U.S.T. 7632, T.I.A.S. No. 6600.

effective between the U.S. and U.S.S.R.[92] in the North Pacific; vessels of the Soviet Union are permitted to carry out certain fishing and loading operations in specified areas of the United States' contiguous fishing zone, and agree to refrain from, or restrict, fishing operations using specified types of gear in given areas of the high seas.

On the Atlantic, an executive agreement has been negotiated between the United States and the U.S.S.R.[93] under which the nations agree to cooperative scientific research and exchanges of scientific and statistical data, and agree to fishing regulations in specified areas of the high seas, during specified seasons, that result in preferential fishing rights of U.S. fishermen to particular species; fishing vessels of the U.S.S.R. are accorded the right to fish in specified areas and seasons in the United States' contiguous fishing zone, and to carry out loading and unloading operations in specified waters of that zone and of the territorial sea. A similar agreement has quite recently been negotiated between the United States and Poland.[94]

McKernan has pointed out that such executive agreements have been quite successful in solving the limited set of problems with which they deal, in four ways: (1) Resolution of differences in jurisdictions; (2) Arrangements for joint research and conservation programs; (3) Limiting foreign fishing, to some degree, in waters off our coasts; (4) Reduction of conflicts between different types of fishing gear.[95]

He notes, however, that these executive agreements suffer from being limited in time and subject matter, and in being not necessarily reflective of broad public opinion. He regards the bilateral and multilateral conventions as superior, but he observes that they also have limitations in the world ahead, because, when a large number of nations begin fishing the resources rather than just two, three or four, the situation becomes complicated simply because of the number of people and nations involved, and the

92. See note 89 *supra.*

93. Agreement with the U.S.S.R. on Certain Fishery Problems on the High Seas in the Western Areas of the Middle Atlantic Ocean, December 13, 1968, 19 U.S.T. 7661, T.I.A.S. No. 6603.

94. Fisheries in the Western Region of the Middle Atlantic Ocean, Agreement with Poland, June 12, 1969, 20 U.S.T. 884, T.I.A.S. No. 6704.

95. D. McKernan, *International Fisheries Arrangements Beyond the Twelve Mile Limit,* PROC. THIRD ANN. CONF. LAW OF THE SEA INSTITUTE 255, 256 (1969).

differences in the way they deal with administrative problems.[96] He has, therefore, advocated a future regime involving an international treaty, or other arrangement, that gives preference to coastal States over resources off their coasts, although, at the same time, providing for the existing interests and investments of distant-water fishing States and for limited entry of newcomers.[97]

McKernan and Van Campen have also observed that it would be best if such problems could be solved by reference to a set of universally accepted principles and rules governing the relation of nations and their common use of ocean resources, but that this degree of unanimity among nations has not yet been achieved. Meanwhile, they note, it is possible for the nations to work out by negotiation practical solutions that protect the interests and legal positions of all parties.[98]

Unfortunately, solution of problems arising from claims of coastal States to preferential fishing rights on the adjacent high seas can only be solved by negotiation and cooperation if the parties concerned are willing to negotiate and cooperate. In the event that this condition is not met, the procedure becomes ineffective, and the problem is solvable only by the use of force, military or economic. An outstanding case of such an impasse is the problem concerning fishing on the high seas involving the United States on the one side and Chile, Peru, and Ecuador on the other.[99] The three Latin American nations have for many years asserted the right to regulate the fisheries off their shores to a distance of 200 miles, including the levying of expensive license fees on foreign fishing vessels, which claim has been strongly opposed by the United States whose flag vessels operate extensively in this region in the tuna fisheries. Despite the threat of economic sanctions, and the suspension by the United States of certain types of military assistance to Peru, it has not yet proven possible to resolve this problem by negotiation, as we have already discussed. Special negotiations were recently undertaken with Peru in the hope of resolving the problem by means of some sort of bilateral agreement, perhaps similar to the executive agreements in the North Atlantic and North Pacific already

96. *Id.* at 257.
97. *Id.* at 259-60.
98. McKernan and Van Campen, *supra* note 61, at 27.
99. See note 62 *supra.*

referred to, but have been unsuccessful. The most recent conference among the four governments was held in August 1969 at Buenos Aires. None of the parties were willing to alter their positions. Indeed, the delegate from Peru indicated that the three Latin American nations were cohesive in their firm decision "to maintain inalterable, without even a debate, the juridical positions of the parties."[100] The only result was an agreement to meet again, during the same year, at Bueno Aires;[101] to date, the meeting has not been resumed.

Another example of possible failure of negotiations is the current threat of entry by Korea into the salmon fisheries of the Northeast Pacific. It is reported that Korean fishermen, without the consent of their government, actually engaged in these fisheries in 1969, and that there are plans for extensive operations during the summer of 1970.[102] This has caused a strong reaction on the part of the members of the North Pacific Convention,[103] since it could cause severe disruption to the somewhat delicate arrangements for preferential rights in the salmon fishery in the entire North Pacific.

In view of the evident demand for recognition of some sort of preferential rights of fishing of coastal States in the adjacent high seas, it would obviously be highly desirable at any new conference to establish some international rules and guidelines for determining such preferences. McDougal and Burke chide the 1958 Conference, and the International Law Commission before it, in not attempting this ambitious task.[104] However, as we have already discussed, there appears to be no adequate basis for

100. Conference Among Chile, Ecuador, Peru and the United States on Fisheries, Second Plenary Meeting, CONPES/DOC. 24 (1969) at 5.

101. Joint Declaration at the End of the First Period of Sessions, CONPES/DOC. 22 (1969).

102. National Fisherman, November 1969, at 2-A, Col. 4; January 1970, at 2-A, Col. 5; February 1970, at 15-A, Col. 1.

103. National Canners Association, Fishery Information Bulletin, November 14, 1969, reported that the North Pacific Commission at the final Plenary Session of its Sixteenth Annual Meeting on November 7, 1969

> took note with grave apprehension of reports that the Republic of Korea, which is not a member of the Commission, engaged in fisheries of salmon in the eastern Bering Sea during 1969 and agreed to request that the member Governments—Canada, Japan and the United States—take appropriate measures to deter any such operations in the Convention area which will impair the achievement of the conservation objectives of the Convention.

104. MCDOUGAL & BURKE 1962, *supra* note 12, at 1006.

distinguishing cases of real economic necessity from claims of economic necessity that may have little merit. It is not evident that the obstacles to resolving this problem that existed in Geneva in 1958 have been in any way diminished and, indeed, with the creation of a great many more coastal States, all of whom in one way or another are likely to regard themselves as being in a "special situation," the problem is likely to be even more difficult the next time around.

Settlement of disputes

Some effective and efficient means of settlement of disputes is obviously an essential element in any international legal regime for the utilization and conservation of the living resources of the high seas. Where, as in the case of the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas, there are granted new rights and privileges, and imposed new duties, where these did not before exist, it is particularly necessary to have agreed-upon, effective means for settlement of disputes.

It is, of course, preferable to handle disputes through negotiation, voluntary arbitration, or submission to a competent court, such as the International Court of Justice. However, when these means fail it is necessary to have some effective compulsory means of settlement. It was for this reason, as we have seen, there were adopted Articles 9 through 12 of the Convention on Fishing and Conservation of the Living Resources of the High Seas, as an essential component of the international law setting forth new rights and duties of nations, and particularly coastal States, with respect of the living resources of the high seas.

Just how well this system of compulsory arbitration would work we do not know, because it has not been tried. As we have seen, a good many nations have not acceeded to this Convention because they object to compulsory arbitration, and, in the case of the few fisheries disputes among those nations adhering to the Convention, this machinery has not been called into action.

At any new conference on the law of the sea, there will certainly arise the question of additional preferential fishing rights of coastal States. Provisions of an agreement on that subject could lead to even more conflicts than are likely to arise under the provisions of the 1958 Convention respecting conservation of

the living resources of the high seas. The matter of adjudication of disputes is, therefore, certain to become of even greater importance than it was in 1958.

There are three possible results of a reconsideration of means for settlement of disputes concerning conservation and utilization of the living resources of the high seas. First, there might be adopted some compulsory arbitration procedure similar to that set forth in the existing Convention. Second, there might be a reversion to the original proposal of the International Law Commission to establish an international authority, within the framework of the United Nations, competent to prescribe regulations of fisheries binding upon all States-parties to a new convention.[105] There seems to be a considerable tendency toward accepting such a solution for the resources of the deep seabed beyond national jurisdiction, and it is possible that, with the greatly changed composition of the United Nations, such a solution for the high seas fisheries would receive wider support than it did in 1958. The third alternative, that in my view is the most likely, is that no agreement can be reached on any mechanism for compulsory settlement of disputes. If compulsory arbitration were acceptable, I believe that a great many more nations would adhere to the existing Convention and employ its provisions. Likewise, there is little evidence that any large number of fishing nations (nearly all coastal States are to some extent fishing nations) are enthusiastic about a supra-national authority.

Conclusions and Outlook

The foregoing review indicates that at any new conference on the law of the sea there will certainly be subjected to reexamination a good many of the provisions related to fisheries already adopted in the 1958 Conventions, including, at least, the following: the outer limit of national jurisdiction over the resources of the seabed (continental shelf); definition of the living resources appertaining to the continental shelf; the definition of "conservation;" the nature of the special rights of the coastal State in conservation of living resources in the contiguous high seas; the rights and duties of distant-water fishing nations; and means of settlement of disputes over conservation matters and over rights of fishing.

105. Int'l L. Comm'n, Report, 8 U.N. GAOR Supp. 9, at 17, U.N. Doc. A/2456 (1953).

It thus seems highly unlikely that at the proposed new conference it will be possible, as suggested by Mr. Stevenson, to avoid "[r]eopening the questions settled by the 1958 conventions [which] would cause needless confusion and delay."[106] While one can appreciate his desire, in the interest of rapid progress, to confine the issues to only a few of the important questions that remained unsettled at the 1958 and 1960 Conferences, such hope seems doomed to disappointment.

The outlook, therefore, especially in view of the fact that the General Assembly has the bit in its teeth, is for the convening, within the next few years, of a new conference on the law of the sea that will, so far as living resources are concerned, reconsider everything adopted at the 1958 Conference, as well as the unresolved issues discussed above, and perhaps additional issues which have not yet occurred to us.

106. Stevenson, *supra* note 7, at 6, LXII DEP'T STATE BULL. at 342.