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# Issues Before the Third United Nations Conference on the Law of the Sea

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# ISSUES BEFORE THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA

*H. Gary Knight\**

In 1974 the international community of nations will convene in Caracas, Venezuela, to rewrite substantial portions of the international law of the sea. This article describes the events which led to this conference and identifies the major issues which will be dealt with there.

## I. BACKGROUND

### A. *History of the Law of Ocean Space*

The world ocean covers some seventy per cent of the surface of the Earth and, besides serving as a medium for the exchange of commodities, is the repository of substantial food and energy resources.<sup>1</sup> Initially, the ocean was used primarily for transportation of people and goods, and the exploitation of fishery resources situated relatively near to the major land masses. With the development of appropriate technologies, the range of uses of the ocean has now expanded to include the exploitation of non-living resources, the laying of submarine cables and pipelines, military use, the dumping of waste products from upland areas, recreation, and scientific research leading to the expansion of knowledge about the planet and the enhanced use of other resources.

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All of the comments made in this article are my own personal views and do not necessarily reflect the views of the United States Government. Further, nothing contained in this article was imparted to me exclusively in connection with my service on the Advisory Committee on the Law of the Sea, and all comments are based on publicly available information.

1. For a collection of articles concerning the physical properties of the ocean and its resources, see *THE OCEAN* (W.H. Freeman & Co. 1969).

It is not surprising to find that as both the diversity and intensity of these uses of ocean space increased during the Nineteenth and Twentieth centuries, many conflicts occurred between nations and between users of the marine environment. Most of these disputes were resolved on the basis of the doctrine of "freedom of the seas," the fundamental principle governing the use of ocean space which emerged during the Sixteenth, Seventeenth, and Eighteenth centuries from the competitive struggle among European nations for access to the lands and resources of the newly discovered continents of North and South America, Africa, and Asia.<sup>2</sup> This principle, articulated by the Dutch lawyer Hugo Grotius in 1509 and which posited that no nation could validly subject any part of the high seas to its sovereignty, was based on the dual premises that the resources of the seas were inexhaustible at the then current rate of demand and that it was not possible for nations or individuals to appropriate areas of the seas to their exclusive control.<sup>3</sup> Certainly with respect to transportation of goods by sea the principle of freedom of the seas was a desirable one which retains much merit even to the present time. However, with respect to the exploitation of the living and non-living resources of the sea, it soon became apparent that increased demand for resources would result in congestion of effort and depletion of physical and economic return unless some basis of regulatory jurisdiction were established.<sup>4</sup> Further, national economic and military security interests dictated that some area of the ocean immediately surrounding the land masses be placed under the absolute or near absolute jurisdiction of the coastal state. From the Seventeenth century to the present, these and other economic and security factors have resulted in the development of a number of concepts which modify the general rule of freedom of the seas. Security interests resulted in international acceptance of the concept of the territorial sea — a relatively narrow band of ocean adjacent to a nation's coast over which it has nearly absolute territorial jurisdiction.<sup>5</sup> Economic considerations prompted development of the concept of the continental shelf which allocates to the coastal state the exclusive right to exploit the oil, gas, and

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2. On the emergence of the doctrine, see T. FULTON, *THE SOVEREIGNTY OF THE SEA* (1911); P. POTTER, *THE FREEDOM OF THE SEA IN HISTORY, LAW AND POLITICS*, chs. II-V (1924).

3. H. GROTIUS, *MARE LIBERUM* ch. V (R. Magoffin transl., 1916).

4. See Christy, *Marine Resources and the Freedom of the Seas*, 8 NAT. RES. J. 424 (1968).

5. On the origin of the concept of the territorial sea, see S. SWARZTRAUBER, *THE THREE-MILE LIMIT OF TERRITORIAL SEAS* (1972); Fenn, *Origins of the Theory of Territorial Waters*, 20 AM. J. INT'L L. 465 (1926).

other mineral resources located in the seabed and subsoil adjacent to its coast.<sup>6</sup> The same economic considerations permitted some limited extension of the reach of exclusive national jurisdiction with respect to the exploitation of living marine resources.<sup>7</sup>

From time to time other problems have resulted in the temporary creation of special zones of jurisdiction adjacent to coastal states. Examples include neutrality zones in time of war; military identification zones in time of peace; zones to facilitate the enforcement of customs, fiscal, health, and immigration laws; zones whose purpose is to protect the coastal and marine environment; and zones to protect against unwarranted intrusions into or effects upon the national economic or social fabric.<sup>8</sup>

Until the middle of the Twentieth century, the use of the sea was generally governed by customary international law principles with occasional multilateral treaties defining the special interest of affected states. It was not until 1958 that there was a successful and meaningful general codification of some principles of the law of the sea.

#### B. *The 1958 and 1960 United Nations Conferences on the Law of the Sea*

In 1958 the United Nations sponsored the First United Nations Conference on the Law of the Sea which produced four major international agreements concerning the use of ocean space.<sup>9</sup> The Convention on the High Seas<sup>10</sup> codified the concept of freedom of the seas but also introduced a reasonableness test as a means for resolving disputes where congestion or conflicts of interest occur. That Convention also contained detailed provisions concerning navigation of ships on the high seas and proscriptive and enforcement jurisdiction with

6. On the origin of the concept of the continental shelf, see Z. SLOUKA, *INTERNATIONAL CUSTOM AND THE CONTINENTAL SHELF* (1968); Cosford, *The Continental Shelf 1910-1945*, 4 *MCGILL L.J.* 245 (1958); Lauterpacht, *Sovereignty Over Submarine Areas*, 27 *BRIT. Y.B. INT'L L.* 376 (1950).

7. On the origin of the concept of exclusive fishery zones, see P. FENN, *THE ORIGIN OF THE RIGHT OF FISHERY IN TERRITORIAL WATERS* (1926); Teclaff, *Jurisdiction Over Offshore Fisheries—How Far Into the High Seas*, 35 *FORDHAM L. REV.* 409 (1967).

8. See generally, Dickinson, *Jurisdiction at the Maritime Frontier*, 40 *HARV. L. REV.* 1 (1926); Oda, *The Concept of the Contiguous Zone*, 11 *INT'L & COMP. L.Q.* 131 (1962).

9. See Dean, *The Geneva Conference on the Law of the Sea: What Was Accomplished*, 52 *AM. J. INT'L L.* 607 (1958); Jessup, *The United Nations Conference on the Law of the Sea*, 59 *COLUM. L. REV.* 234 (1959).

10. Convention on the High Seas (done April 29, 1959, 13 U.S.T. 2312 (1962), T.I.A.S. No. 5200, 450 U.N.T.S. 82, in force Sept. 30, 1962).

respect thereto. The Convention on the Territorial Sea and Contiguous Zone<sup>11</sup> failed to specify an agreed maximum breadth of the territorial sea but did establish rules concerning the location of the baseline from which offshore zones are measured as well as rules governing the right of innocent passage of vessels navigating in territorial waters. The Convention on the Continental Shelf<sup>12</sup> accorded exclusive rights to coastal states for the purpose of exploiting the natural resources of the seabed and subsoil adjacent to their coasts. Finally, the Convention on Fishing and the Conservation of the Living Resources of the High Seas<sup>13</sup> provided a mechanism for alleviating conflicts between the interests of coastal states in the living resources off their coasts and the interests of distant water fishing states in exploiting those same stocks of resources.

The unresolved questions of the breadth of the territorial sea and the precise nature of the rights of coastal states with respect to living resources off their coasts were again dealt with in 1960 during the Second United Nations Conference on the Law of the Sea.<sup>14</sup> However, no agreements emanated from that meeting, with the final compromise on a six mile territorial sea, an additional six mile exclusive fishing zone, and a system for phasing out distant water fishing in the extended fishing zone falling one vote short of the required two-thirds majority.

Because of the failure of the First and Second Conferences to produce solutions to the critical questions of the breadth of the territorial sea and the nature of fishing rights in coastal areas, and because of the advance of technology in other areas of ocean space use, problems and conflicts concerning the exploitation of ocean resources and the use of ocean space continued during the 1960's in increasing frequency.

### C. *Problems with the Existing Law of the Sea*

By way of illustrating the need for further consideration of the

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11. Convention on the Territorial Sea and the Contiguous Zone (*done* April 29, 1958, 15 U.S.T. 1606 (1964), T.I.A.S. No. 5639, 516 U.N.T.S. 205, in force Sept. 10, 1964).

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

13. Convention on Fishing and Conservation of the Living Resources of the High Seas (*done* April 29, 1958, 17 U.S.T. 138 (1966), T.I.A.S. No. 5969, 559 U.N.T.S. 285, in force March 20, 1966).

14. See Bowett, *The Second United Nations Conference on the Law of the Sea*, 9 INT'L & COMP. L. Q. 415 (1960); Dean, *The Second Geneva Conference on the Law of the Sea: The Fight for Freedom of the Seas*, 54 AM. J. INT'L L. 751 (1960).

law of the sea, a few selected examples of serious problems concerning the use of ocean space will be briefly identified here.

First, with the development of sophisticated technology for the exploitation of petroleum and natural gas resources from the continental shelf, a question arose concerning the seaward extent of coastal state jurisdiction over such resources. The Convention on the Continental Shelf was subject to varying interpretations on the question,<sup>15</sup> and concern developed whether coastal state jurisdiction could extend to mid-ocean or whether at some point the international community at large, operating through an international agency, should possess rights to extract non-living resources from the seabed and the subsoil.

Second, stocks of certain species of fish were being seriously depleted as a result of intensified catch efforts coupled with the "open access" character of the high seas. Further, some coastal state fishery enterprises such as those of the United States were faced with increasingly difficult competitive efforts from well financed and technologically superior distant water fishing states such as the Soviet Union, Norway, and the United Kingdom. The combination of stock depletion, potential economic deprivation, and other factors resulted in a number of conflicts involving fishing vessels, some of which escalated to violence.<sup>16</sup>

Third, the economic feasibility of mining metal bearing nodules from the seabed necessitated the development of some legal regime to govern their exploitation where the continental shelf jurisdiction of the coastal state terminated (an issue partially related to the question of the seaward extent of the continental shelf). Some felt that these mineral resources should be exploited for the benefit of all mankind, while many coastal states wished to protect whatever economic interests they might have in such resources near their coasts.<sup>17</sup>

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15. The Convention on the Continental Shelf, article 1, provides that the term "continental shelf" refers to: "[T]he seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas." (Emphasis added.) On the question of the seaward extent of the legal continental shelf, see Brown, *The Outer Limit of the Continental Shelf*, 13 *JURID. REV. (N.S.)* 111 (1968).

16. See, e.g., T. Wolff, *Peruvian-United States Relations over Maritime Fishing* (Occasional Paper No. 4, Law of the Sea Institute, March 1970); Azzam, *Dispute Between France and Brazil over Lobster Fishing in the Atlantic*, 13 *INT'L & COMP. L. Q.* 1453 (1964); Bilder, *The Anglo-Icelandic Fisheries Dispute*, 1973 *WISC. L. REV.* 37 (1973).

17. See, e.g., Bowett, *Deep Sea-Bed Resources: A Major Challenge*, 31 *CAMBRIDGE L. J.* 50 (1972); Laylin, *Past, Present and Future Development of the Customary International Law of the Sea and the Deep Seabed*, 5 *THE INT'L LAWYER* 442 (1971).

Fourth, the international legal concept of innocent passage, by which both merchant and military vessels navigate in the territorial waters of states other than the flag which they fly, began to present some difficult problems of application. Some states wished to more comprehensively regulate the passage of foreign vessels for purposes of environmental protection and national security, while the major maritime powers generally opposed the imposition of any additional burdens on navigation.<sup>18</sup>

#### D. *The Maltese Initiative—1967*

The initiative toward reconsidering the law of the sea was taken by the permanent mission of Malta to the United Nations when it introduced to the United Nations General Assembly agenda in 1967 the question of the regime to govern exploitation of the non-living resources of the seabed and subsoil beneath the high seas beyond the limits of national jurisdiction.<sup>19</sup> In response to debate on that agenda item the General Assembly adopted Resolution 2340 (XXII) which created the Ad Hoc Seabed Committee.<sup>20</sup> In these deliberations—which by and large caught the major maritime powers by surprise—it became very clear that the majority of the nations of the world wished to expand the agenda to include all uses of ocean space and that they would be unsatisfied to limit it strictly to the so-called “seabed question” which was concerned with the regime to govern nonliving resource extraction on the deep ocean floor. At this point, then, the deliberations gradually began to blend into negotiations which would ultimately lead to a new law of the sea conference.

## II. PROCEDURAL DEVELOPMENTS, 1967-1973

### A. *The Seabed Committee*

In December, 1968, the General Assembly, acting on the recommendation of the Ad Hoc Seabed Committee, adopted Resolution

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18. See Knight, *The 1971 United States Proposals on the Breadth of the Territorial Sea and Passage Through International Straits*, 51 ORE. L. REV. 759 (1972); Comment, 3 CALIF. WEST. INT'L L. J. 375 (1973).

19. U.N. Doc. A/6695, reprinted in H.R. REP. No. 999, 90th Cong., 1st Sess. 7R (1967). See also the statement of Ambassador Pardo before the First Committee, United Nations General Assembly, on November 1, 1967, elaborating on his concepts [U.N. Doc. A/C.1/PV.1515 and A/C.1/PV.1516, also reprinted in *Interim Report on the United Nations and the Issue of Deep Ocean Resources*, at 267].

20. G.A. Res. 2340 (XXII) (1967); 7 INT'L LEGAL MATERIALS 174 (1968). See Goldberg, *U.N. Establishes Ad Hoc Committee to Study Use of Ocean Floor*, 58 DEP'T STATE BULL. 125 (1968).

2467 (XXIII) (1968) which created the permanent United Nations Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction ("Seabed Committee" hereinafter).<sup>21</sup> During 1969 and 1970 the Seabed Committee met semi-annually to deliberate the issue. Three important resolutions were adopted by the General Assembly as a result of these meetings. In December, 1969, the "moratorium" resolution was passed. It declared that, pending the establishment of an international seabed regime:

(a) States and persons, physical or juridical, are bound to refrain from all activities of exploitation of the resources of the area of the sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction;

(b) No claim to any part of that area or its resources shall be recognized.<sup>22</sup>

This resolution was opposed by all but two technologically developed nations, but clearly expressed the intent of the majority that seabed resources were to be subject to international, not national, regulation.

In December 1970, the General Assembly adopted Resolution 2750-C (XXV) (1970) — the "principles" resolution — which represented a consensus of opinion on the basic features of a seabed regime. The first four operative paragraphs provide that:

1. The sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction (hereinafter referred to as the area), as well as the resources of the area, are the common heritage of mankind.

2. The areas shall not be subject to appropriation by any means by States or persons, natural or juridical, and no State shall claim or exercise sovereignty or sovereign rights over any part thereof.

3. No State or person, natural or juridical, shall claim, exercise or acquire rights with respect to the area or its resources incompatible with the international regime to be established and the principles of this Declaration.

4. All activities regarding the exploration and exploitation

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21. G.A. Res. 2467 (XXIII) (1968); 8 INT'L LEGAL MATERIALS 201 (1969). The Seabed Committee consisted originally of 42 nations, but membership was expanded to 86 in December, 1970 [G.A. Res. 2750-C (XXV) (1970), operative para. 5] and to 91 (including the People's Republic of China) in 1971 [G.A. Res. 2881 (XXVI) (1971), operative para. 3].

22. G. A. Res. 2574-D (XXIV) (1969), 9 INT'L LEGAL MATERIALS 422 (1970).



of the resources of the area and other related activities shall be governed by the international regime to be established.<sup>23</sup>

The adoption of the "principles" resolution represented a giant step forward in the negotiations since the Seabed Committee could now, at least in theory, turn to the more specific task of hammering out hard texts of agreements concerning the seabed question. In recognition of this plateau of achievement, Resolution 2750-C (XXV) (1970) — the "conference" resolution — was also adopted. This resolution called for the convocation in 1973 of the Third United Nations Conference on the Law of the Sea ("Third Conference" hereinafter) and constituted the Seabed Committee as a preparatory group with instructions to develop draft treaty articles on the seabed issue as well as a comprehensive list of subjects and issues related to the law of the sea to be dealt with by the Third Conference.<sup>24</sup> During 1971 and 1972 the Seabed Committee continued to meet in preparatory sessions. Following each year's meetings, appropriate resolutions were adopted by the General Assembly instructing the Secretariat to provide certain types of information or special studies for the use of the Seabed Committee.<sup>25</sup>

### *B. The Third Conference*

At its 1972 meeting, the General Assembly, acting on the authority of Resolution 2750-C, requested the Seabed Committee to hold two further preparatory sessions in 1973, the year originally scheduled for the initiation of the substantive law of the sea conference.<sup>26</sup> Resolution 3029-A also requested the Secretary General to convene the first session of the Third Conference for a period of two weeks in November-December, 1973, "for the purpose of dealing with organizational matters," and called for a second session of the conference "for the purpose of dealing with substantive work" to be convened at Santiago, Chile, for a period of eight weeks in April-May, 1974. The resolution expressed the expectation that the Third Conference would be concluded during 1974 or at a subsequent session or sessions no

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23. G. A. Res. 2749 (XXV) (1970), 10 INT'L LEGAL MATERIALS 220 (1971), adopted by 108 votes to none with 14 abstentions. In spite of the overwhelming support for Resolution 2749 in the voting, its value as evidence of customary international law is greatly reduced by the compromise nature of most of its operative provisions.

24. G. A. Res. 2750-C (XXV) (1970), 10 INT'L LEGAL MATERIALS 226 (1971).

25. See, e.g., G. A. Res. 3029-B and 3029-C (XXVII) (1972) which requested comparative studies of the extent and economic significance for the international area and for riparian states of various proposals for limits of national jurisdiction over seabed resources.

26. G. A. Res. 3029-A (XXVII) (1972), 12 INT'L LEGAL MATERIALS 223, 224 (1973).

later than 1975, and observed that the government of Austria had offered Vienna as a site for 1975 should that additional time be required.

The procedural meeting was held in New York from December 3 to December 14, 1973. As a result of the *coup d'etat* in Chile, the site for the substantive meeting was changed to Caracas, Venezuela, and the dates of June 20-August 29, 1974, subsequently established for the meeting.<sup>27</sup>

### C. *The Agenda*

As noted above, the issue resulting in creation of the Seabed Committee was the regime to govern the extraction of non-living resources of the seabed beyond the limits of national jurisdiction. However, it became obvious from an early date that many states wished to open other areas of the law of the sea for negotiation and for inclusion in the Third Conference agenda. Although there was some substantial difference of opinion concerning the appropriate scope of the agenda, the "conference" resolution of December 17, 1970, included a specification that the Third Conference deal with, in addition to the seabed question:

[A] broad range of related issues including those concerning the regimes of the high seas, the continental shelf, the territorial sea (including the question of its breadth and the question of international straits) and contiguous zone, fishing and conservation of the living resources of the high seas (including the question of the preferential rights of coastal states), the preservation of the marine environment (including, *inter alia*, the prevention of pollution) and scientific research.<sup>28</sup>

At its July-August, 1972, meeting the Seabed Committee reached agreement on a full agenda. A copy of that agenda is appended to this article as annex A.

### D. *The Players*

The 91 members of the Seabed Committee as well as the full complement of nations which will assemble during the Third Conference reflect a diversity of economic, technological, military, social, and other aspects of national life. A number of these distinctions

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27. G. A. Res. 3067 (XXVIII) (1973).

28. G. A. Res. 2750-C, note 24 *supra*.

between groups of nations have profound consequences for national positions on law of the sea and the effort with which those positions are presented.

Among the more important classifications of nations in this regard are:

(1) Technologically developed nations and developing nations, especially with regard to ability to exploit and use ocean resources.

(2) Military powers and non-military powers.

(3) Maritime powers and non-maritime powers.

(4) Coastal states and land-locked states (one can also include "shelf-locked" states, *i.e.*, states with continental shelves which must be shared with adjacent neighbors).

(5) States with long coastlines and states with minimum sea contact.

(6) States with resource rich continental shelves and those with resource poor offshore areas.

(7) Archipelago states and normal coastal states.

(8) States situated astride straits used for international navigation and states possessing a substantial merchant marine or which are heavily dependent on ocean borne commerce.

(9) States with strong coastal fishing industries and states with strong distant water fishing capabilities.

This list is incomplete, but should give some idea of the multitude of interests involved in the negotiations.<sup>29</sup> As if this were not enough complexity, however, many states have further diversity of interests within their own national policy making structures. For example, in the United States, there are quite different perspectives concerning oceans policy held by the Department of Defense, the petroleum industry, the fishing industry, hard mineral mining industries, scientific research institutions, and those concerned with protection of the marine environment. Even within a single national industry such as fisheries there are often different viewpoints on law of the sea matters — such being the case among the tuna, shrimp, salmon, and coastal fishing industries in the United States.

### III. SUBSTANTIVE ISSUES BEFORE THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA

As noted above, the agenda for the Third Conference is extremely broad, covering virtually every use and resource of the ocean.

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29. For further discussion of the various groupings of nations and their interests in and impacts on the negotiations, see Alexander, *Indices of National Interest in the Oceans*, 1 OCEAN DEV. & INT'L L.J. 21 (1973).

There are, however, five basic issues of overriding importance which will be considered and I have thus limited this article to the identification and discussion of these critical subject matter areas.

In an article of the broad scope yet restricted length such as this one, it is not possible to set forth with comprehensiveness all of the positions taken by each country or even each group of countries with respect to each of the issues considered. Because many of the splits of opinion tend to form along a north-south line—*i. e.*, between industrially developed countries and the developing nations — I have chosen in many instances to utilize the proposal set forth by the United States as being fairly representative of the developed nations' position and have then selected only one from among many proposals set forth by developing nations to indicate the general trend of contrary thinking.

Finally, in considering the various issues, positions, and possible outcomes, the reader should bear in mind the tension between the concept of freedom of the high seas in its absolute form and the concept of property rights and regulatory authority in the oceans. Events of the past fifty to one hundred years indicate a clear trend in most instances away from the former and toward the latter. Of critical importance, however, is the nature of the property right, jurisdictional base, regulatory authority, or other grant of power with respect to the various uses of ocean space. As will be noted subsequently, the form of the regulatory power can often have as much significance as the substantive rules imposed pursuant thereto.

#### A. *Non-Living Resources*

The seabed question, and thus the current law of the sea negotiations leading to the Third Conference, had its genesis in a consideration of the regime to govern the extraction of non-living resources beyond the limits of national jurisdiction. There are two fundamental issues to be resolved with respect to such non-living resources: (1) the seaward extent of national jurisdiction, and (2) the regime to govern the exploration for and exploitation of non-living resources both within and beyond national jurisdiction.

##### 1. *Within National Jurisdiction*

###### a. *Limits*

Of obvious importance is the determination of the boundary between national jurisdiction and an international seabed area, for this will effect an allocation of wealth between the coastal states and

the international community as a whole. As noted above,<sup>30</sup> the present law concerning the seaward extent of national jurisdiction over non-living resources contained in the Convention on the Continental Shelf is open ended, thus inviting either unilateral state action or international agreement in order to develop a generally acceptable resolution of the problem of indefiniteness. Much debate has taken place concerning the proper interpretation of the so-called "exploitability" clause of Article 1 of the Convention, and it is far from clear precisely what seaward limits were contemplated by the term "adjacent."<sup>31</sup>

Early in the negotiations, many less developed countries, stimulated by predictions of vast riches to be secured from exploitation of seabed resources, expressed favor with very narrow national limits thus placing significant economic resources within international jurisdiction. The rationale of this approach was that such resources (and the revenues derived therefrom) would be the common heritage of mankind and could thus be applied to the special needs of developing countries or otherwise equitably distributed.<sup>32</sup> As the negotiations progressed, however, it became clear that the earlier predictions of vast wealth waiting for the taking from the seabed were overstated or based on incomplete data. In fact, the only resources of value in the non-living category currently being exploited in any significant economic amount from the ocean are petroleum and natural gas, and these exploitation activities are still being carried on in relatively shallow waters, in all cases less than 200 meters.

Two basic approaches emerged as viable alternatives to the politically unacceptable concept of narrow limits of national jurisdiction. The first of these — the intermediate zone concept — was put forward by the United States in its draft seabed treaty submitted to the Seabed Committee in 1970.<sup>33</sup> The United States envisioned a three tier jurisdictional approach in which national jurisdiction over non-living resources would be exclusive from the coastline to the 200 meter isobath; from the 200 meter isobath to the edge of the continen-

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30. See note 15 *supra*.

31. See, e.g., Goldie, *The Exploitability Test — Interpretation of Potentialities*, 8 NATURAL RES. J. 434 (1968); Goldie, *A Lexicographical Controversy — the Word "Adjacent" in Article 1 of the Continental Shelf Convention*, 66 AM. J. INT'L L. 829 (1972).

32. For a statistical survey of various boundary options and their effects on resource allocation, see Hodgson and McIntyre, *National Seabed Boundary Options*, mimeographed, 1972 (Dep't of State).

33. Draft United Nations Convention on the International Seabed Area, U.N. Doc. A/AC.138/25 (1970), 9 INT'L LEGAL MATERIALS 1046 (1970).

tal margin there would be a "trusteeship area" which would be international in juridical character but the resources of which would be exploited subject to the administration of the coastal state; and beyond the limit of the continental margin there would exist a purely international area to be administered by a new international agency. Although there was limited support for this concept, the United States continued to maintain it as an official position until late 1972.

The other alternative, which began to emerge in 1971 and 1972, is that of the economic resource zone. Under this proposal national jurisdiction over both living and non-living resources would extend to significant distances from the coast — 200 miles being a popular suggestion — and a purely international area would exist beyond the limit of national jurisdiction. This proposal was considered quite appealing by many less developed countries who now perceived that their short term economic interest might be best served by ensuring continued jurisdiction over the presently exploitable petroleum and natural gas resources of the continental shelf rather than taking a chance on sharing future revenues to be generated from the exploitation of resources located beneath deeper waters. The texts illustrating areas of agreement and disagreement concerning the seabed question prepared for the Third Conference by Sub-Committee I of the Seabed Committee<sup>34</sup> provide some indications of the nature of the limits likely to be agreed upon. The alternatives presented are: (1) the outer limit of the continental shelf or 100 nautical miles, whichever is farther seaward; (2) a fixed but unspecified mileage from the coastline; (3) the outer lower edge of the continental margin or 200 nautical miles, whichever is farther seaward.<sup>35</sup>

The question of limits is also affected by existing international law concerning the seaward extent of national resource jurisdiction in the ocean. The Convention on the Continental Shelf specifies that the exclusive resource jurisdiction of the coastal state extends to the 200 meter isobath or, beyond that limit, "to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas."<sup>36</sup> It has thus been generally agreed that coastal states presently have a vested right to at least the 200 meter isobath. Subject to more debate among both politicians and scholars, however, is the question of the nature of coastal state rights between the 200 meter isobath and the edge of the continental margin.

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34. Report of Sub-Committee I, Annex III: Texts Illustrating Areas of Agreement and Disagreement on Items 1 and 2 of the Sub-Committee's Programme of Work, U.N. Doc. A/AC. 138/94/Add.1 (1973).

35. *Id.* at 2-3.

36. Convention on the Continental Shelf art. 1, note 12 *supra*.

One school of thought holds that since this area is subject to coastal state jurisdiction conditioned only on compliance with the "admits of the exploitation" test of the Convention on the Continental Shelf, the resources of the area are in fact presently vested in the coastal state. Proponents of this theory argue, then, that no nation should give up to an international organization or agency rights to which it presently has access.<sup>37</sup> The contrary view is that the rights beyond the 200 meter isobath vest only upon *actual occurrence* of the condition precedent, namely the exploitation of the natural resources of the area, and that since there has been no such exploitation these rights are inchoate at best.<sup>38</sup>

Thus some states supporting the economic resource zone concept argue that to the extent that the continental margin extends beyond 200 miles they have a vested interest in this area and it must be included in any economic resource zone agreed upon at the Third Conference. At the present time, it seems extremely likely that some form of the economic resource zone concept will be adopted and that the seaward limit of national jurisdiction will be fixed — in maximum — at a 200 mile or edge of the continental margin figure.

*b. Regime*

Incorporated within the economic resource zone concept is the notion that the coastal state would have exclusive authority to establish whatever rules and regulations concerning disposition of resources under its jurisdiction which it chose. The existing law of the continental shelf accords the coastal state exclusive sovereign rights to explore for and exploit the non-living resources (and sedentary species of living resources) of the seabed and subsoil in the area subject to national jurisdiction.<sup>39</sup> The economic resource zone concept would thus work no significant change in this legal structure.

The major issue concerns the extent to which international standards or other external regulations or authorities will be made applicable to this essentially national zone of resource jurisdiction. The United States has, for example, made very firm its position that it can only accept broad national resource jurisdiction if there are inter-

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37. See, e.g., Ely, *Deep Sea Minerals and American National Interests*, THE LAW OF THE SEA: INTERNATIONAL RULES AND ORGANIZATION FOR THE SEA 423 (L. Alexander ed. 1969); and NATIONAL PETROLEUM COUNCIL, PETROLEUM RESOURCES UNDER THE OCEAN FLOOR (1969).

38. See, e.g., Knight, *Dissenting Statement to the Report of the Marine Resources Committee of the Section of Natural Resources Law of the American Bar Association on the Proposed Seabeds Treaty*, 5 NAT. RES. LAWYER 154 (1972).

39. Convention on the Continental Shelf art. 2, note 12 *supra*.

national standards imposed on the area in five respects, *viz.*: prevention of unreasonable interference with other uses of the ocean as the result of the exercise of resource jurisdiction by the coastal state (directed principally at navigational rights); protection of the ocean from pollution; protection of the integrity of investment; sharing of revenues derived from seabed exploitation for international community purposes; and a system of peaceful and compulsory settlement of disputes.<sup>40</sup>

This approach is generally supported by the major maritime powers who feel that the resource jurisdiction to be accorded to coastal states under a resource zone concept might extend to unreasonable interferences with both military and commercial navigation. This issue will be discussed in further detail in the section of the article concerning territorial sea breadth and navigation, as well as the section dealing with pollution, and will therefore not be pursued further here. Suffice it to note that there is a conflict of position between the major maritime powers and the less developed coastal states over the precise nature of the jurisdiction to be accorded to the coastal state and the international standards, if any, to be made applicable to the area under national jurisdiction.

## 2. *Beyond National Jurisdiction*

There are two basic issues involved in the negotiations concerning the non-living resources of the seabed and subsoil located beyond ultimately agreed bounds of national jurisdiction. The first relates to the composition of the international organization which will have administrative responsibility with respect to the conservation and development of the resources, and the second concerns the substantive rules which will be applicable to marine mining activities.

Two preliminary comments are in order at this point. First, the only resources to which the regime and the authority would appear to be applicable in the short to intermediate term are manganese nodules. Several different industrial enterprises have indicated that they are prepared at the present time to begin prospecting activities as a prelude to commercial exploitation of the metals contained in manganese nodules and are thus actively pressing for the adoption of regimes in the immediate future to govern the extraction of such

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40. See Statement of John R. Stevenson before the Seabed Committee, August 10, 1972, U.N. Doc. A/AC.138/SR.77-89 at 63 (1972). See also *United States of America: Draft Articles for a Chapter on the Rights and Duties of States in the Coastal Seabed Economic Area*, U.N. Doc. A/AC.138/SC.II/L.35 (1973).



resources, whether at the national or the international level.<sup>41</sup> In the longer term, however, fossil fuel deposits may well be exploited from beyond the continental shelves as evidenced by a recent study conducted by the Woods Hole Oceanographic Institution.<sup>42</sup>

Second, there is a substantial scholarly debate concerning whether the non-living resources of the seabed beyond limits of national jurisdiction are *res nullius* — *i.e.*, the property of no one, title vesting in him who first reduces the resources to his possession — or whether such resources are the “common heritage of mankind” and, if so, what the juridical content of that phrase is. It seems fairly clear that prior to adoption of General Assembly Resolution 2749<sup>43</sup> such resources would have been regarded as *res nullius* in the same manner as fish swimming in the high seas. Resolution 2749, however, indicates a contrary expectation on the part of the vast majority of the international community. Unfortunately, the classification of these resources as the “common heritage of mankind” does little to clarify the legal status of the manganese nodules and other seabed resources, for there are as many interpretations of the phrase as there are interpreters.<sup>44</sup> The direction of the future is obviously toward some form of international control which will fit the “common heritage” concept. Before the establishment of the new regime, however, the legal debate is not likely to be settled.

#### a. Machinery

The basic issue is the internal structure of the new international agency to be charged with the responsibility for allocating exploitation rights and regulating exploitation activities with respect to non-living resources of the seabed beyond the limits of national jurisdiction. The negotiations to date have progressed on the basis that the organization will be similar to already existing specialized agencies of the United Nations, at least to the extent that they possess two separate organs with administrative responsibilities — an

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41. See, e.g., testimony of John E. Flipse, President, Deepsea Ventures, Inc. in *Hearings on Deep Seabed Hard Mineral Resources (H.R. 13076) before the Subcommittee on Oceanography of the House Committee on Merchant Marine and Fisheries*, 92d Cong., 2d Sess., ser. 32, 9, 13 (1972).

42. Report No. 3196 of Woods Hole Oceanographic Institution; see also OCEAN SCIENCE NEWS, Oct. 26, 1973, at 3.

43. Note 23 *supra*.

44. See, e.g., Anand, *Equitable Use and Sharing of the Common Heritage of Mankind*, THE LAW OF THE SEA: NEEDS AND INTERESTS OF DEVELOPING COUNTRIES 70 (L. Alexander ed. 1973); Gorove, *The Concept of “Common Heritage of Mankind”: A Political, Moral, or Legal Innovation?*, 9 SAN DIEGO L. REV. 390 (1972).

assembly and a council. Assemblies are generally one nation-one vote policy making organs, while councils are generally more restricted in membership and are charged with operational functions. A substantial conflict of views exists with respect to the powers and functions to be accorded to these respective organs.

The less developed countries favor a strong policy making and operations role for an assembly in which all nations would have equal participation. This view appears to be motivated as much by preoccupation with political participation in the agency as with the economic efficiency of operations. The technologically more developed nations tend to favor placing policy making powers almost exclusively in a council which would be so structured as to ensure balanced participation between the developed and developing countries, while excluding no group from participation thereon. The United States proposal, for example, envisions a twenty-four member council divided into two sections, the first consisting of the six most industrialized nations based on gross national product figures and the second consisting of 18 developing countries including representatives of landlocked states and other geographically disadvantaged states. In order to take affirmative action, this council would not only have to act by a majority of its entire membership but also by a majority of each of the two subdivisions.<sup>45</sup> Many variations on this theme have been proposed during the negotiations,<sup>46</sup> but the basic dispute is not so much as to which council structure or regime will be adopted as to whether this will be the approach taken at all.

Although the composition issue is of vital importance to the future operation of the international seabed organization, the rules under which the resources will be allocated are of equal significance.

#### *b. Regime*

Assuming some acceptable compromise can be reached concerning the nature of the international authority to govern exploitation of non-living resources beyond the limits of national jurisdiction, it will be necessary to develop some approach to the promulgation of rules and regulations concerning activities to be conducted in the area. There are two basic approaches which might be taken — the “constitutive” and the “substantive.” The constitutive approach

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45. *Draft United Nations Convention on the International Seabed Area*, U.N. Doc. A/AC. 138/25, arts. 36, 38, Appendix E.

46. For an analysis of various proposals for the governing body of an international seabed authority, see Sohn, *The Council of an International Sea-Bed Authority*, 9 *SAN DIEGO L. REV.* 404 (1972).

would be to establish procedures for rule making and then leave the promulgation of the actual rules and regulations themselves up to the international authority consistent with the established procedure. The substantive approach would be to attempt to develop in the Third Conference all of the rules and regulations to be applicable to deep seabed marine mining activities and include these in the treaty or append them thereto as annexes. The constitutive approach has the merit of flexibility and adaptability while the substantive approach could result in ill-conceived rules and regulations and a later inability to modify those rules and regulations in response, to new technological or other developments. Nonetheless, it is not likely that the states involved would be willing to give up the rule making power exclusively to an international authority and accordingly some blend of the two approaches is most likely to emerge from the Third Conference.

There are three issues which seem to be of principal importance in the minds of the negotiators at the present time concerning the regime to govern deep seabed mining: (1) the method of allocation of rights; (2) operating rules and regulations; and (3) production controls.

As to the method of allocating rights, there is a marked divergence of attitude between the developed nations and the developing countries. The latter's viewpoint has been most forcefully expressed by Latin American nations who have proposed what has become known as the "enterprise" concept. This approach would establish the Enterprise as the operating arm of the authority exclusively empowered to undertake all technical, industrial, or commercial activities relating to the exploration of the seabed and the exploitation of its resources either through service contracts or joint ventures with companies or states.<sup>47</sup> The United States and other developed countries prefer a licensing system to the international agency monopoly approach suggested in the Latin American draft. Those nations supporting the licensing system take the position that the essential element of any resource management system consists in *guaranteed* access to ocean resources under *reasonable* conditions.<sup>48</sup> A middle course suggested by both Canada and Australia would include the enterprise concept but would also permit the international authority

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47. *Working Paper on the Regime for the Sea Bed and Ocean Floor and Its Subsoil Beyond the Limits of National Jurisdiction*, U.N. Doc. A/AC.138/49 ch. III, § 3 (1971); see also *Texts Illustrating Areas of Agreement and Disagreement* at 107, note 34 *supra*.

48. See Statement by Ambassador John R. Stevenson before the Subcommittee on Minerals, Materials, and Fuels, of the Senate Committee on Interior and Insular Affairs (93d Cong., 1st Sess., Sept. 19, 1973) at 10.

to issue licenses for exploitation directly to states or companies.

The United States has taken a strong position in opposition to the enterprise concept. In a statement made on August 10, 1972, the head of the U. S. delegation to the Seabed Committee stated:

[W]e believe it is important to dispel any possible misconceptions that my Government would agree to a monopoly by an international operating agency over deep seabed exploitation

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The second issue relates to the operating rules and regulations and here again the question concerns the nature of the origin of the rules and regulations. Developed nations generally prefer the use of specialized commissions or other technical bodies for the development and submission of rules and regulations, with final approval to be given by the policy making organ of the agency. The United States, for example, has recommended the creation of a Rules and Recommended Practices Commission which would propose rules and practices to the Council of the seabed agency for adoption.<sup>50</sup>

The third issue, that of production controls, appears to be of critical importance. Some developing countries are dependent to a great extent on one or two mineral exports for their economic livelihood. It was suggested at an early date that the mining of deep seabed minerals could result in increased supplies which would depress prices for these exports, thus injuring the economic base of these nations. At the request of the Seabed Committee<sup>51</sup> the United Nations Secretariat undertook a study of the issue which was published in 1971.<sup>52</sup> Although the potential economic impacts do not appear to be as widespread or severe as some had imagined, there is nonetheless evidence of possible adverse economic effects stemming from seabed mining. Thus it is not surprising to find that there have been several proposals put forth in the negotiations to grant the international seabed authority power to control or limit production of seabed minerals. These proposals range from those which would only accord

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49. Statement by John R. Stevenson before the Seabed Committee at 63, note 40 *supra*.

50. *Draft United Nations Convention on the International Sea Bed*, U.N. Doc. A/AC.138/25 arts. 67-68 (1970); see also *Texts Illustrating Areas of Agreement and Disagreement* at 128, note 34 *supra*.

51. G.A. Res. 2750-A (XXV) (1970), 10 INT'L LEGAL MATERIALS 224 (1971).

52. See *Possible Impact of Sea-Bed Mineral Production in the Area Beyond National Jurisdiction on World Markets, with Special Reference to the Problems of Developing Countries: A Preliminary Assessment*, U.N. Doc. A/AC.138/36 (1971); *Additional Notes on the Possible Economic Implications of Mineral Production from the International Sea-Bed Area*, U.N. Doc. A/AC. 138/73 (1972).

recommendatory power to the seabed agency, to those which would authorize reduction of production or the fixing of price levels. The United States and other developed nations have taken the position that the authority should not have any powers in the area of production controls.<sup>53</sup>

*c. Provisional Entry into Force*

One of the major concerns expressed by the United States deep sea mining industry has been that the delays occasioned by the law of the sea negotiations and the time necessary for subsequent ratification of any international agreement arrived at during the Caracas conference may result in the imposition of economic hardships and loss of competitive standing. Some companies have indicated that they are ready at the present time to begin prospecting operations but are reluctant to commit the requisite capital until they know the parameters of the seabed regime under which they will be operating.<sup>54</sup> As a result, the United States proposed during the March, 1973, meeting of the Seabed Committee that a study be made by the United Nations Secretariat concerning the possibility of provisional entry into force of the draft articles on the seabed regime following the adoption and authentication of the text at the Caracas meeting.<sup>55</sup> The study by the Secretariat indicated a number of precedents for such provisional entry,<sup>56</sup> and it therefore seems likely not only that this approach will be taken with respect to the seabed regime but also for other aspects of the law of the sea treaty thus making the new rules applicable from the conclusion of the 1974-75 Conference rather than waiting several years pending deposit of the requisite number of ratifications.<sup>57</sup>

*d. National Legislation to Authorize Seabed Mining Activities*

Mineral industry representatives in several countries have

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53. Statement by Ambassador John R. Stevenson before the Subcommittee on Minerals, Materials, and Fuels at 10, note 48 *supra*.

54. See statement of John E. Flipse at 13, note 41 *supra*.

55. The Seabed Committee recommended that such a study be made. See *Recommendation of Sub-Committee I Adopted at its 66th Meeting held on 27 March 1973*, U.N. Doc. A/AC.138/SC.I/L.20 (1973).

56. See *Examples of Precedents of Provisional Application, Pending their Entry into Force, of Multilateral Treaties, Especially Treaties which have Established International Organizations and/or Regimes*, U.N. Doc. A/AC.138/88 (1973).

57. The four 1958 law of the sea agreements, notes 10-13, *supra*, required passage of an average of six years each from adoption to entry into force.

indicated a desire to proceed on a *unilateral* basis with deep seabed mining activities. Bills were introduced in the Ninety-Second Congress<sup>58</sup> and reintroduced in the Ninety-Third Congress<sup>59</sup> which would, through reciprocal national legislation, create a system, administered by each participating nation only with respect to its own nationals, permitting exploration for and exploitation of seabed minerals. Although it is undeniable that the mere introduction of such bills and the strong support therefor evidenced by the domestic mining industry<sup>60</sup> gave impetus to more progressive action in developing an international seabed regime in the Seabed Committee, their passage could easily prejudice current negotiations by encouraging unilateral responses from developing coastal states with respect to near shore resources.<sup>61</sup> In testimony delivered on March 1, 1973, before the Subcommittee on Oceanography, House Merchant Marine and Fisheries Committee, the United States Government took a position in opposition to enactment of such bills until such time as either (1) it becomes clear that unsatisfactory progress is being made toward adoption of an international seabed regime in the current negotiations, or (2) the Third Conference has concluded without taking appropriate action on the subject.<sup>62</sup>

Many developing countries have been disturbed by the initia-

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58. S. 2801, 92d Cong., 1st Sess. (1972); H.R. 13904, 92d Cong., 2d Sess. (1972). See *Hearings on Deep Seabed Hard Mineral Resources (H.R. 13904) before the Subcommittee on Oceanography of the House Committee on Merchant Marine and Fisheries*, 92d Cong., 2d Sess., ser. 32 (1972); and *Hearings on S. 2801 before the Subcommittee on Minerals, Materials and Fuels of the Senate Committee on Interior and Insular Affairs*, 92d Cong., 2d Sess. (1972). No action was taken by either subcommittee on the bills during the ninety-second session of Congress.

59. S. 1134 and H.R. 9, 93d Cong., 1st Sess. (1973) are identical in language to their predecessors in the Ninety-Second Congress. See *Hearings on S. 1134 before the Subcommittee on Minerals, Materials and Fuels of the Senate Committee on Interior and Insular Affairs*, 93d Cong., 1st Sess. (1973).

60. For an exposition of the industry view, see Humphreys, *An International Regime for the Exploration for and Exploitation of the Resources of the Deep Seabed — The United States Hard Mineral Industry Position*, 5 NATURAL RES. LAWYER 731 (1972).

61. For divergent views of these seabed mining bills and their potential impact on the law of the sea negotiations, see Knight, *The Deep Seabed Hard Mineral Resources Act — A Negative View*, 10 SAN DIEGO L. REV. 446 (1973); Laylin, *The Law to Govern Deepsea Mining Until Superseded by International Agreement*, 10 SAN DIEGO L. REV. 433 (1973).

62. Statement of Charles N. Brower, Acting Legal Adviser, Department of State, and Acting Chairman, Inter-Agency Task Force on the Law of the Sea before the Subcommittee on Oceanography of the House Committee on Merchant Marine and Fisheries; Supplemental Statement of Leigh S. Ratiner, Director for Ocean Resources, Department of the Interior, 93d Cong., 1st Sess., March 1, 1973.

tives of the mining industries and the United States Congress in the proposed legislation, fearing that it might result in a monopoly by technologically developed nations on the benefits to be derived from the exploitation of seabed mineral resources. Obviously, whether unilateral exploitation is undertaken now or whether these companies work within the framework of an international regime later, the benefits will accrue to a greater or lesser degree to those companies and nations possessing the requisite technology. Nonetheless, the international approach can ensure some equitable sharing of royalties or other economic benefits among developing nations and can also ensure protection of other international community interests which might not be adequately secured through the unilateral approach. Given the United States Government's March 1, 1973, testimony however, it appears that the question is moot in this country at least through the conclusion of the Caracas segment of the Third Conference in August, 1974. The future of the United States legislation will ultimately depend upon the degree of progress made toward the development of a seabed regime at the Caracas meeting.

### B. *Living Resources*

Unlike the situation of the regime to govern exploitation of seabed minerals beyond national jurisdiction, the subject of high seas fisheries is not a *de novo* issue, but rather one in which there has been development of both industry practice and international law for hundreds of years. Although this state of affairs makes the issues more obvious and specific, it also results in an inertial force against radical departure from the existing regime.

The present state of high seas fisheries is characterized by steadily reduced stocks of fish and increased international conflicts stemming from problems of access to fishery resources. Both problems have their roots in the open access character of fisheries which itself stems from the classical concept of freedom of the high seas. Since no individual or nation has the right under the doctrine to appropriate areas of the high seas, there is no jurisdictional base from which management or other regulatory activities can take place.<sup>63</sup> The absence of regulation has resulted in overfishing, gear congestion, and biologic and economic waste. There have been several attempts in the past to ameliorate these problems. One approach has been for the nations involved in fishing a particular geographical area or particu-

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63. See F. CHRISTY AND A. SCOTT, *THE COMMON WEALTH IN OCEAN FISHERIES* chs. 2, 9 (1965); Christy, *Fishery Problems and the U.S. Draft Article*, in *PROCEEDINGS: FOURTH NATIONAL SEA GRANT CONFERENCE* 200 (Katzel, et. al., eds. 1972).

lar species or stock of fish to enter into bilateral or multilateral agreements concerning the conservation and allocation of the resources. These agreements have established fishery commissions of varying dimensions and with varying degrees of authority, but by and large the prevailing national (*vis-a-vis* international) interests coupled with a lack of effective enforcement mechanisms has resulted in these agreements being of limited utility in conserving fishery resources.<sup>64</sup>

A second approach has been for coastal states to extend their exclusive fisheries jurisdiction to substantial distances from the coast in order to provide a single repository of management authority.<sup>65</sup> It is generally conceded today that state practice in this regard has probably ripened into a rule of customary international law permitting extension of exclusive fisheries zones to a distance of twelve nautical miles from the coast. More troublesome have been the claims of 50, 100, and 200 miles breadth for such zones. These unilateral claims — *i.e.* those probably not sanctioned by present international law — have resulted in serious conflicts in many instances. Most notable of these conflicts have been those between Iceland and the United Kingdom concerning the former's extension of her fishery zones over a period of years since 1958,<sup>66</sup> and the dispute between the United States, on the one hand, and Chile, Ecuador, and Peru, on the other hand, concerning the latter's 200 mile claims in the South Pacific.<sup>67</sup>

In viewing the present fisheries problem, one must be aware of two sets of conditions. The first relates to the resources in question. Different species of fish have differing migratory characteristics which may in some cases dictate the need for different management regimes. The living resources of the sea fall into four basic categories according to their migratory habits — coastal, highly migratory, anadromous, and sedentary. Coastal species are those which migrate in the water off the coasts of one or more nations but which do not enter fresh or estuarine waters and which do not have worldwide or transo-

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64. See *Report on Regulatory Fishery Bodies*, F.A.O. Fisheries Circular No. 138 (1972), U.N. Doc. A/AC.138/64 (1972); CARROZ AND ROCHE, *The International Policing of High Seas Fisheries*, 6 CAN. Y.B. INT'L L. 61 (1968); Koers, *The Enforcement of International Fisheries Agreements*, 1 NETHERLANDS Y.B. INT'L L. 1 (1970).

65. See Comment, 44 WASH. L. REV. 307 (1968); Teclaff, *Jurisdiction Over Off-shore Fisheries—How Far Into the High Seas*, 35 FORDHAM L. REV. 409 (1967).

66. See Bilder, *The Anglo-Icelandic Fisheries Dispute*, 1973 WIS. L. REV. 37; Katz, *Issues Arising in the Icelandic Fisheries Case*, 22 INT'L & COMP. L.Q. 83 (1973).

67. See Lecuona, *The Ecuador Fisheries Dispute: A New Approach to an Old Problem*, 2 J. MARITIME L. & COMM. 91 (1970); Loring, *United States-Peruvian "Fisheries" Dispute*, 23 STAN. L. REV. 391 (1971); Smetherman and Smetherman, *The CEP Claims, U.S. Tuna Fishing and Inter-American Relations*, 14 ORBIS 951 (1970-71).



ceanic migratory characteristics. Highly migratory oceanic fishes are characterized by extremely broad distribution and large-scale, often transoceanic, migrations, the prime example being the tunas.<sup>68</sup> Anadromous species are those which require a fresh-water environment for their spawning, egg incubation, and, in most cases, the rearing of juveniles, and upon the marine environment for the majority of their growth and maturation. Among anadromous species are the Pacific and Atlantic salmons, trouts, shads, stripped bass, smelts, and sturgeons.<sup>69</sup> Sedentary species are those which at the harvestable stage either are immobile on or under the seabed or are unable to move except in constant physical contact with it.<sup>70</sup>

The second set of conditions concerns the diverse national interests in fishery activities. Some nations have highly developed fishery fleets and processing facilities, while others rank the fishing industry low on their scale of national priorities.<sup>71</sup> The degree of investment — whether utilizing private or public funds — naturally has an impact on the force with which positions on fishery problems are argued in the negotiations. Further, some nations concentrate their fishing effort off their own coasts, while others have constructed large flotillas which roam the world ocean in search of living resources.<sup>72</sup> This dichotomy, too, results in polarization of positions on fishery issues.

With these biologic and national interest factors in mind, it is appropriate to divide the proposals on fisheries made in the preparatory meetings for the Third Conference into three categories — the proposal for management on a “species” basis, the proposals of distant water fishing nations, and the proposals for broad coastal state jurisdiction.

The “species” approach is most forcefully articulated by the United States. In short, it seeks to apply management systems on a species-by-species basis, the systems being geared to the particular biologic characteristics of the species in question. The original United States fishery proposal, Article III of the draft treaty articles submitted to the Seabed Committee at its July-August, 1971 meeting,<sup>73</sup> had

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68. See *Special Considerations Regarding the Management of Anadromous Fisheries and Highly Migratory Oceanic Fishes: Working Paper Submitted by the United States of America*, U.N. Doc. A/AC.138/SC.II/L.20 at 5 (1973).

69. *Id.* at 2.

70. Convention on the Continental Shelf art. 2(4), note 12 *supra*.

71. See Johnson, *Trends in World and Domestic Fisheries*, 97 U.S. NAV. INST. PROC. 25 (June, 1971); C. NIGHTINGALE, *EXPLOITING THE OCEANS* (1968).

72. See Iguchi, *A View of a Distant-water Fishing State—Japan*, *THE LAW OF THE SEA: NEEDS AND INTERESTS OF DEVELOPING COUNTRIES* 143 (L. Alexander ed. 1973).

73. *Draft Articles on the Breadth of the Territorial Sea, Straits, and Fisheries Submitted by the United States*, U.N. Doc. A/AC.138/SC.II/L.4 (1971).

provided essentially for management on a stock rather than on a zonal basis. However, emphasis was placed in Article III on the use of regional and international organizations for the management of fisheries. In recognition of the trend toward a 200 mile economic resource zone, the United States has revised its fisheries position, submitting a working paper on the subject to the July-August, 1972, meeting of the Seabed Committee.<sup>74</sup> The basic elements of the United States position are as follows:

(a) Coastal states are to have regulatory (conservation) authority over and preferential catch rights to all coastal species off their coasts, to the limits of their migratory range. The same principle is applicable to anadromous species, with the preference going to the state in whose fresh waters they spawn.

(b) Coastal states are obligated to provide access for other states to any portion of such resources not fully utilized by the coastal state, with appropriate priorities to states which have traditionally fished the resource or states in the region, including landlocked states.

(c) Coastal and anadromous resources which are located in or migrate through waters adjacent to more than one coastal state are to be regulated by agreement among the affected states. The revised proposal contains sections on enforcement and dispute settlement to provide the framework for this cooperative process.

(d) Highly migratory oceanic resources are to be regulated by international fishery organizations.

The "species" approach has not received wide support to this point in the negotiations, in part due to the appealing simplicity of the economic resource zone concept.

Distant water fishing nations are generally opposed to the extension of broad exclusive fisheries zones or coastal state preferences, for their fleets range far and wide on the world ocean in search of concentrations of fish found principally in waters above the world's continental shelves and thus within the 200 mile limit often proposed for such zones. Both Japan and the Soviet Union, leading distant water fishing states, have submitted draft articles to the Seabed Committee on the subject of international fisheries management.

The Japanese articles provide preferential rights to *developing* coastal states to the extent of their catch capacity, and a preferential right for *developed* states to the extent necessary for the maintenance of its "locally conducted small-scale coastal fishery." Excluded from the preferential rights concept are anadromous species and highly

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74. *United States Revised Draft Fisheries Article*, U.N. Doc. A/AC.138/SC.II/L.19 (1973).

migratory species of fish which are to be regulated pursuant to international or regional arrangements. Dispute settlement provisions ensure that regulatory measures imposed by the coastal states take into consideration the interests of other states concerned, an obvious reference to distant water fleets. In the words of the proposal, Japan seeks

to ensure that a gradual accommodation of interests can be brought about in the expanding exploitation and use of fishery resources of the high seas, without causing any abrupt change in the present order in fishing which might result in disturbing the economic and social structure of States.<sup>75</sup>

The Soviet Union articles would permit a *developing* coastal state to reserve annually that part of the allowable catch of fish which could be taken by that state. The articles would also permit *any* coastal state to reserve annually that part of allowable catch of anadromous species spawned in its rivers which can be harvested by that state. Any uncaught stock, up to maximum sustainable yield, would then be open to distant water fishing fleets. Where no international agreements exist concerning regulatory measures for fisheries, the Soviet Union articles would permit coastal states to establish such regulatory measures "on the basis of scientific findings" and "in agreement with the states also engaged in fishing in the said areas." Finally, the articles contain a provision which takes into consideration the growth of the fishing capability of the developing coastal states with respect to increasing the allowable catch allocated to that coastal state.<sup>76</sup>

A number of proposals concerning broad coastal state jurisdiction over living marine resources have been introduced in the Seabed Committee.<sup>77</sup> The concept common to all of these proposals is that coastal states should have exclusive or preferential rights to all living and non-living resources in a maritime zone adjacent to their coasts extending no more than 200 nautical miles from the coastline. The bases for this concept are that the coastal state has a vital economic

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75. *Proposals for a Regime of Fisheries on the High Seas: Submitted by Japan*, U.N. Doc. A/AC.138/SC.II/L.12 at 1 (1972).

76. *The Union of Soviet Socialist Republics: Draft Article on Fishing*, U.N. Doc. A/AC.138/SC.II/L.6 (1972).

77. See, e.g., *Draft Articles for Inclusion in a Convention on the Law of the Sea: Working Paper Submitted by the Delegations of Ecuador, Panama and Peru*, U.N. Doc. A/AC.138/SC.II/L.27 (1973); *Working Paper on Sea Area Within the Limits of National Jurisdiction Submitted by the Chinese Delegation*, U.N. Doc. A/AC.138/SC.II/L.34 (1973); *Draft Articles on Fisheries by Canada, India, Kenya, and Sri Lanka*, U.N. Doc. A/AC.138/SC.II/L.38 (1973).

interest in the resources of its adjacent maritime areas, and that these resources constitute part of the patrimony or national wealth of the coastal state. This being the case, it follows that the coastal state should have the exclusive (or at least preferential) jurisdictional rights with respect to the exploitation of these resources.

In spite of the seemingly overwhelming support for the economic resource zone concept, there are a number of issues which remain for agreement. For example, how will highly migratory and anadromous species be treated within the zonal approach? It seems probable that coastal state competence with respect to fisheries would not include highly migratory species such as tuna and whales, but that those species would be subject to some form of international management. It also seems likely that if an economic resource zone concept were adopted, anadromous species would be included in the coastal state competence because of the special relationship between the fish stock and the coastal state.

On the issue of limits, the 200 mile maximum appears to be a very likely element of such a regime, but less certainty exists concerning the criteria which the coastal state will be authorized to use in delimiting its economic zone. So far the suggestions have been so general as to offer little guidance — economic, geological, biological, and similar factors are enunciated without elaboration. It seems extremely unlikely, however, that any coastal state would assert jurisdiction over less than the 200 miles permitted, and that the outcome will almost certainly be delimitation by the vast majority (if not all) of coastal states of economic zones to a distance of 200 miles from the coastline.

Another issue is whether coastal state rights with respect to fishery resources will be exclusive or simply preferential. If these rights are exclusive, then the coastal state would be under no obligation to afford other members of the international community access to the fish stocks in question. Thus the stocks could be underutilized or not exploited at all, in the discretion of the coastal state. Under a system of preferential rights, however, the coastal state would have what would amount to a right of first refusal with respect to the allowable catch from the stock. If it did not take up to the maximum sustainable yield, it would then be under an obligation to permit other members of the international community to have access on reasonable terms to the remaining stock. The conditions of entry might well involve license fees and would certainly involve compliance with regulations concerning the maximum sustainable yield, the use of certain types of gear, and the like.

This then is the framework in which the Third Conference will

operate on the fishery question. The most desirable object, of course, would be to design a regime which would most efficiently use the resources available, while avoiding sudden economic dislocation caused by jurisdictional arrangements differing from those now in force. In view of the varying biologic habits of fish, and the diverse national interests involved, it seems problematical that this goal will be achieved in its entirety.

### C. *Territorial Sea Breadth; Navigation*

The breadth of the territorial sea — that belt of ocean space over which the coastal state exercises near absolute sovereignty — has been a bone of contention throughout the development of the law of the sea. Closely related to the question of the breadth of the territorial sea has been the question of the nature of the rights of navigation in territorial waters by vessels flying the flag of a state other than that of the coastal nation. Problems concerning the right of transit through straits used for international navigation where the same constitute territorial waters have been particularly acute.

#### 1. *The Breadth of the Territorial Sea*

The breadth of the territorial sea has never been the subject of an international agreement. Indeed, most authorities are of the opinion that there has never been any customary international law rule concerning the maximum breadth of the territorial sea. For a period of time during the Eighteenth and early Nineteenth centuries all of the major maritime powers of the world claimed only three nautical miles as the breadth of the territorial sea. However, beginning in the Twentieth century, the claims became more diverse. Although in 1958 a majority of nations still claimed three miles as the proper breadth of the territorial sea, at the present time no single breadth can claim a majority of states as adherents.<sup>78</sup>

For reasons related primarily to fisheries rather than national security, there has been a trend toward a breadth of twelve miles for the territorial sea during the past ten to twenty years. At present 35 states claim three or four miles, 67 claim six to twelve miles, and 16

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78. On the territorial sea breadth issue in general, see S. SWARZTRAUBER, *THE THREE-MILE LIMIT OF TERRITORIAL SEAS* (1972); Heinzen, *Three Mile Limit: Preserving the Freedom of the Seas*, 11 *STAN. L. REV.* 597 (1959); Meade, *The Great Territorial Sea Squabble*, 95 *U. S. NAV. INST. PROC.*, 45 (April, 1969); McDougal and Burke, *The Community Interest in a Narrow Territorial Sea: Inclusive Versus Exclusive Competence Over the Oceans*, 45 *CORNELL L. Q.* 171 (1960).

claim in excess of twelve miles.<sup>79</sup>

It is not therefore surprising to find that agreement on a maximum twelve mile breadth for the territorial sea will probably be easy to secure at the Third Conference provided that the resource and other interests of coastal states can be accommodated in other areas. If broad coastal state jurisdiction over living and non-living resources can be secured through adoption of some such concept as the economic resource zone, then there is little reason to assert absolute sovereignty over a maritime belt greater than twelve miles. Indeed, it is probably logical to limit the territorial sea breadth to three miles or even two or one considering the relative uselessness of such narrow limits from the standpoint of national security. Nonetheless the concept of the twelve mile territorial sea seems firmly ingrained in the positions of the states negotiating in the current law of the sea deliberations and it is most likely to be the outcome of the Third Conference.<sup>80</sup>

## 2. *Navigation in Territorial Waters*

### a. *The Territorial Sea*

The traditional international law rule concerning navigation within the territorial sea of another state has been one of "innocent passage."<sup>81</sup> Innocent passage is defined as passage which is not prejudicial to the "peace, good order or security of the coastal State."<sup>82</sup> There is no international law definition of what is meant by the latter phrase nor has there been sufficient state practice to establish customary international law rules concerning it.<sup>83</sup> The test of innocence is thus subjective and is to be applied by the coastal state in its sole discretion. This subjectivity and national discretion have led some

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79. Data taken from U.S. DEP'T. OF STATE, NATIONAL CLAIMS TO MARITIME JURISDICTIONS (Int'l Boundary Study, Series A Limits in the Sea, No. 36, 1st rev., March 1, 1973).

80. On the United States position and some additional issues, see Knight, *The 1971 United States Proposals on the Breadth of the Territorial Sea and Passage Through International Straits*, 51 ORE. L. REV. 759, 763-769 (1972).

81. Convention on the Territorial Sea and the Contiguous Zone Arts. 14-23, note 11 *supra*.

82. *Id.*, art. 14(4).

83. The Corfu Channel Case, [1949] I.C.J. 4, did hold that: "[i]t is . . . generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is *innocent*. Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace." *Id.* at 28.

nations to criticize the concept and express the fear that coastal states might impose unreasonable burdens on international commerce by categorizing, for political, military, or economic reasons, certain types of passage as not innocent. However, where the passage is for the purpose of importing goods to or exporting goods from a coastal state, it seems unlikely that the coastal state would interfere with its own well being in terms of participation in international trade and commerce. Thus it is probable that "innocent passage" will remain the international law standard in territorial waters. A different set of problems arises where territorial waters encompass international straits which vessels seek to transit without involving themselves with the ports of the adjacent coastal states.

*b. Straits*

The straits issue has become one of the major focal points of the current international law of the sea deliberations. The United States first raised the issue in its proposal for a regime of passage which would approximate the right of freedom of navigation on the high seas provided that the transit of the territorial straits was solely for the purpose of getting from one side to the other.<sup>84</sup> A number of states vehemently opposed this proposal, most notably the archipelago states of Malaysia and Indonesia, and the nation which sits astride the straits of Gibraltar, Spain.<sup>85</sup> The contentions of these states were twofold, namely that the free transit regime would not provide the coastal state adequate assurances with respect to protection of its beaches from pollution, and that it would not provide the coastal state adequate protection from the possible adverse effects of military conflicts occurring between the superpowers during transit. The United States responded to these criticisms by proposing a system of absolute liability for pollution when transiting international straits,<sup>86</sup> but has continued to insist on an agreement according the rights of submerged passage and overflight, rights which do not now appertain in international law.<sup>87</sup>

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84. *Draft Articles on the Breadth of the Territorial Sea, Straits, and Fisheries Submitted by the United States of America*, U.N. Doc. A/AC.138/SC.II/L.4 art. II (1971).

85. For typical reactions, see the excerpts quoted in Knight, at 774-79, note 80 *supra*.

86. See statement of John R. Stevenson before Subcommittee II of the Seabed Committee, July 28, 1972, U.N. Doc. A/AC.138/SC.II/SR.37 at 2 (1972).

87. The Convention on the Territorial Sea and the Contiguous Zone provides in art. 14(6) that "[s]ubmarines are required to navigate on the surface and to show their flag" when exercising the right of innocent passage through territorial waters.

A group of developing nations submitted a counterproposal on straits passage during the March, 1973, meeting of the United Nations Seabed Committee.<sup>88</sup> That proposal, which would give great discretion and authority to coastal states with respect to vessels navigating near their shores, is entirely inconsistent with the approach taken by the major maritime powers and has thus polarized the forces on each side of the issue. To further exacerbate the problem, the United States has stated that the issue of straits is a non-negotiable one and that there cannot be a successful law of the sea conference without the accommodation of the interests set forth in the United States proposal.<sup>89</sup>

Thus the fate of the entire Third Conference may well hinge on the ability of states to negotiate an acceptable compromise from among the radically divergent approaches suggested so far on the issue of passage through international straits.

#### D. Pollution

Pollution of man's environment is an all-encompassing subject cutting across every facet of activity on the face of the Earth. Merely contemplating the world-wide adjustments necessary to maintain a reasonable quality of the Earth's environment is an awesome task. It is not surprising then to find that the Seabed Committee, in its preparatory work for the Third Conference, has sought to rigidly limit the scope of its work to keep it within the confines of the Third Conference agenda. It has been decided for example, that the subject of land-based pollution as well as a good deal of the international law concerning air and water pollution would not be considered by the Third Conference but that these items would be left to the work of the recently established United Nations Environmental Program.<sup>90</sup>

The Third Conference will, however, address itself to two basic sources of pollution of the oceans: (1) pollution produced in the process of exploiting the non-living resources of the seabed and subsoil;

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88. *Cyprus, Greece, Indonesia, Malaysia, Morocco, Philippines, Spain and Yemen: Draft Articles on Navigation Through the Territorial Sea Including Straits Used for International Navigation*, U.N. Doc. A/AC.138/SC.II/L.18 (1973).

89. Statement of John R. Stevenson before Subcommittee II of the Seabed Committee, August 3, 1971; summary in U.N. Doc. A/AC.138/SC.II/SR.4-23 at 47 (1971). The critical nature of the issue for the United States was reiterated during 1972 and 1973; see Statement of John R. Stevenson before the Seabed Committee, August 10, 1972, 67 DEP'T STATE BULL. 382-83 (1972); and statement of John R. Stevenson before Subcommittee II of the Seabed Committee, July 25, 1973, U.N. Doc. A/AC.138/SC.II/SR. 70 at 11 (1973).

90. See G. A. Res. 2997 (XXVII) (1972), 12 INT'L LEGAL MATERIALS 433 (1973).



and (2) pollution introduced to the marine environment from deliberate and accidental vessel discharges.

### 1. *Seabed Source Pollution*

Seabed source pollution — limited at this point in time to the exploration for and exploitation of petroleum, natural gas, and sulphur deposits — actually constitutes only two percent of all pollutants introduced in the ocean annually and only five percent of maritime sources, vessels accounting for the other 95 percent.<sup>91</sup> Nonetheless, seabed pollutants are usually introduced in near-shore, populated areas where the impact is much more direct and obvious than the greater amounts of pollution gradually accumulating in mid-oceanic areas. Thus, though the percentage is small, the impact is large and it is therefore not surprising to find that the vast majority of *developed* nations support strict safeguards to prevent pollution of the ocean and the adjacent beaches from fossil fuel exploitation activities. There are several proposals suggesting rules and regulations to govern exploitation beyond the limits of national jurisdiction which would impose reasonably strict pollution prevention requirements. Further, within the framework of the economic resource zone concept each coastal state would be given the right to adopt standards as strict as it wishes for the protection of its own coasts. A more difficult question arises concerning the establishment of minimum international standards for the protection of the marine environment which would be applicable equally to the seabed area within the economic resource zone and the area beyond.

The reason for the problem is that many *developing* countries are not as enthusiastic about the concept of pollution prevention as are developed countries. They correctly and astutely observe that most industrialized countries achieved their level of technological superiority at no small cost to their environments and only now, in their years of affluence, are in a position to afford consideration of such factors as environmental quality. The developing countries have yet to use (or abuse) their environment to produce the standard of living extant in western Europe, North America, Japan, and Australia. They therefore argue that the suggestions concerning restrictions of industrial development for purposes of protecting the marine environment are, whether willfully or unintentionally, directed at reducing the growth opportunities for developing countries. Such countries

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91. *Competence to Establish Standards for the Control of Vessel Source Pollution: Working Paper Presented by the United States of America*, U.N. Doc. A/AC.138/SC.III/L.36 at 2 (1973).

have intimated that they would accept such restrictions only if the developed nations were willing to subsidize the costs involved so that they (the developing nations) could proceed with industrial development apace.

## 2. *Vessel Sources Pollution*

The Inter-Governmental Maritime Consultative Organization ("IMCO") has been engaged in attempts to reduce or restrict the discharge of pollutants from vessels for many years. However, many developing nations have charged — and perhaps not incorrectly — that IMCO has by and large been the tool of the major maritime powers and its efforts at pollution prevention have been token at best. It was such a reaction to the unwillingness or inability of IMCO to move rapidly in the Arctic pollution situation that led Canada to take unilateral action by way of a 100 mile pollution prevention zone in which the construction and operation of ships is strictly regulated, ostensibly for the purpose of protecting the fragile Arctic environment.<sup>92</sup> Nonetheless, developments have proceeded at IMCO, most recently resulting in adoption of the text of the International Convention for the Prevention of Pollution from Ships, 1973.<sup>93</sup>

The Seabed Committee has also placed the question of vessel source pollution on its agenda and there have been a number of proposals in this area. As with other issues involved in the negotiations, the issue no longer appears to be whether to retain absolute freedom of the high seas as opposed to establishment of jurisdictional bases for management, but rather the nature of the jurisdictional base. Major maritime powers are generally opposed to zonal approaches to jurisdiction — whether in regard to fisheries jurisdiction, vessel pollution control, or regulation of scientific research — while most developing nations perceive that their national interests can best be protected through establishment of broad offshore zones of national jurisdiction. The situation is particularly acute with respect to the pollution issue, where the potential for imposition of excessive cost burdens on maritime transport is great if each coastal state should be free to establish its own pollution standards within a 200

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92. See Beesley, *Rights and Responsibilities of Arctic Coastal States: The Canadian View*, 3 J. MARITIME L. & COMM. 1 (1971); Bilder, *The Canadian Arctic Waters Pollution Prevention Act: New Stresses on the Law of the Sea*, 69 MICH. L. REV. 1 (1970).

93. International Convention for the Prevention of Pollution from Ships, 1973: Text of the Articles of the Convention as Adopted by the Conference, IMCO Doc. MP/CONF/WP. 35 (1973).

mile zone. This situation would not be unlike that which would exist if trucks traveling from Maine to California were required to have a different type of pollution control device operative in each state through which they passed — the costs of acquiring thirteen or fourteen different devices, plus the time expended in changing them at each state boundary, would greatly raise the cost to the consumer of the goods being transported.

The most comprehensive and sophisticated vessel pollution proposal is that of the United States. The United States proposal envisions a combination flag state-port state-coastal state regulatory system which, in the words of the United States representative to the Seabed Committee when the United States draft articles on pollution were tabled, provides that:

The flag State would continue to have enforcement responsibilities over its vessels, although such authority would not be exclusive, and would assume a specific obligation to enforce international standards in the case of vessels flying its flag, subject to the right of other States to have recourse to compulsory dispute settlement procedures to ensure that the obligation was fully discharged.

The port state would be able to enforce pollution control standards in the case of vessels using its ports, regardless of where violations took place.

The coastal state would have rights and remedies that would fully protect its environmental interests; provision was made for dealing with the four major marine pollution problems facing a coastal state: serious maritime casualties off its coasts, violations of international standards presenting imminent danger of major harmful consequences, persistent and unreasonable failure of a State to enforce the international standards with respect to vessels flying its flag, and general violations of the standards.<sup>94</sup>

The United States' fear — indeed that of most major maritime powers — is that extensive pollution zones might be abused to adversely affect maritime commerce. Of course, developing nations probably import proportionately more goods by ocean borne transport than do developed nations, yet the potential for disruption of maritime commerce as an outgrowth of a non-ocean related controversy remains. The United States, in August, 1973, delivered a statement to the Seabed Committee pointing out that the majority of coastal nations

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94. Statement of John Norton Moore before Subcommittee III of the Seabed Committee, July 18, 1973, U.N. Doc. A/AC.138/SC.III/SR. 41 at 4 (1973).

of the world are "zone locked," *i.e.*, vessels bound from their ports to areas beyond any 200 mile economic resource zone would of necessity pass through the economic resource zone (and, if the zonal approach were taken, the pollution control zone) of at least one other nation.<sup>95</sup> If pollution control zones were used to inhibit maritime transport, the effect would obviously be felt not only by the United States and other maritime powers, but by the majority of the world's coastal nations. Thus the form which pollution control agreements take concerning appropriate jurisdiction to promulgate and enforce rules may well be of greater importance than the substantive rules themselves.

#### *E. Scientific Research*

The issue of freedom of scientific research is one, like fisheries, which has been before the international community for some time. The Convention on the Continental Shelf adopted in 1958 contains a provision concerning scientific research involving research on the continental shelf. That provision states that:

The consent of the coastal state shall be obtained in respect of any research concerning the continental shelf and undertaken there. Nevertheless, the coastal state shall not normally withhold its consent if the request is submitted by a qualified institution with a view to purely scientific research into the physical or biological characteristics of the continental shelf, subject to the proviso that the coastal State shall have the right, if it so desires, to participate or to be represented in the research, and that in any event the results shall be published.<sup>96</sup>

Presumably, then, scientific research concerning the high seas beyond the limits of territorial waters is unrestricted as is research involving the seabed and subsoil beyond the limits of continental shelf jurisdiction. However, a number of states which have unilaterally adopted extensive fishery zones or territorial seas have also reserved the right to require compliance with national rules and regulations concerning the conduct of scientific research and, in some cases, have denied ocean scientists the right of access to extensive zones of ocean space.<sup>97</sup>

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95. Statement by John Norton Moore before the Seabed Committee, August 13, 1973, U.N. Doc. A/AC.138/SR.100 at 7 (1973).

96. Convention on the Continental Shelf art. 5(8), note 12 *supra*.

97. Background material on this issue can be found in the following articles: W. Burke, *Marine Science Research and International Law* (Occasional Paper No. 8, Law of the Sea Institute Sept., 1970); Clingan, *Scientific Inquiry in the Oceans: Legal*

Once again the problem turns on the differing perspectives of developed and developing nations. Developed nations with the potential to convert raw scientific data into economic benefit or military power tend to favor removal of all limitations on scientific research in the oceans, including those now present with respect to the continental shelf.<sup>98</sup> Developing nations perceive, rightly or wrongly, that completely unrestrained and unregulated scientific research only promises to widen the economic gap between developed and developing nations, principally because the latter do not possess the technical skills or industrial wherewithal to gain from such data even should it be provided to them by the developed nations' research institutes.

The United States proposal, typical of that of technologically advanced nations, would reverse the burden of proof from the regime of Article 5(8) of the Convention on the Continental Shelf by permitting research to proceed in economic resource zones after expiration of a notice period, provided that certain assurances are given and certain conditions concerning the conduct of the expedition observed. The only power of the coastal state (in addition, of course, to being able to compel adherence to the assurances and conditions) is to have representation in the research venture. Contrary to this approach is the very succinct and very nationalistic proposal of a group of developing nations which provides:

Whenever, according to this Convention, the consent of a coastal State is requested for undertaking marine scientific research in the areas under its sovereignty and national jurisdiction the *explicit consent* of that State shall be obtained before such activity is undertaken.<sup>99</sup>

Similarly, a proposal sponsored by five Latin American nations contains in its first operative paragraph the following provision:

The coastal State shall have the right to bring under regulation scientific research activities conducted in the zone subject to its

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*Regulation and Responsibility*, 6 LEX ET SCIENTIA 77 (1969); Knauss, *Development of the Freedom of Scientific Research Issue of the Third Law of the Sea Conference*, 1 OCEAN DEV. & INT'L L. J. 93 (1973).

98. See, e.g., Statement of John Albers before Subcommittee III of the Seabed Committee, March 22, 1973, U.N. Doc. A/AC.138/SC.III/SR. 33-39 at 2; and statement of Philip Handler before Subcommittee III of the Seabed Committee, March 29, 1973, U.N. Doc. A/AC.138/SC.III/SR. 33-39 at 50 (1973).

99. *Algiers, Brazil, China, Ethiopia, Egypt, Iran, Kenya, Pakistan, Peru, Philippines, Romania, Somalia, Trinidad and Tobago, Tunisia, Yugoslavia: Draft Article on Consent to Conduct Marine Scientific Research*, U.N. Doc. A/AC.138/SC.III/L.55 (1973). (Emphasis added.)

maritime sovereignty and jurisdiction.<sup>100</sup>

The outcome of the Third Conference will thus have an important impact on the conduct of oceanographic research, with the nature of the impact depending primarily on whether a restrictive or a liberal attitude is taken toward the conduct of such research within any economic resource zones legitimized by the Conference.

#### IV. CONCLUSION—A COMMENT ON PROCEDURE AND SOME LIKELY OUTCOMES

As this article was being prepared, the Third Conference opened with a procedural session in New York City. This session, extending from December 3 to December 14, 1973, concerned itself exclusively with the procedures to be utilized when the substantive conference opens in Caracas on June 20, 1974. Probably the single most important procedural item discussed was the matter of voting procedure for adoption of treaty articles.

In the past, it has been the general practice of such conventions to divide into committees and subcommittees to handle the separate items on the agenda with a majority of votes sufficing to adopt draft treaty articles at the subcommittee or committee level. In the plenary session, a two-thirds majority has been required to adopt draft treaty articles by the conference as a whole.<sup>101</sup> The law of the sea negotiations and Third Conference preparatory work have been marked from their inception by a divergence from the past practice of voting on each issue as it arose. Because all nations perceived the necessity for universal or near-universal acceptance of the treaty articles emanating from the Third Conference, a "consensus" system has been adopted for the deliberations of the Seabed Committee in its preparatory work. Actual votes have been few and have usually amounted to no more than a formal endorsement of what had been agreed to by consensus through informal negotiations. Votes on critical issues have been avoided almost entirely, and it is therefore not surprising to find strong support for continuation of this consensus approach at least until the final plenary vote at the Third Conference. The consensus system has a number of advantages. First, it keeps all the parties

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100. *Scientific Research within the Zone Subject to the Sovereignty and Jurisdiction of the Coastal State*, U.N. Doc. A/AC.138/SC.III/L.45 (1973).

101. The Vienna Convention of the Law of Treaties [U.N. Doc. A/CONF.39/27 (1969), 8 Int'l Legal Materials 679 (1969); not yet in force] provides in article 9(2) that: "The adoption of the text of a treaty at an international conference takes place by the vote of two-thirds of the States present and voting, unless by the same majority they shall decide to apply a different rule."

negotiating and does not isolate one nation or group of nations on any particular issue, thereby polarizing the parties. Second, it has the virtue of ensuring an agreement which will be acceptable to all and thereby achieving the universality or near universality required of a global law of the sea treaty.

These advantages, however, contain inherent weaknesses. First, consensus tends to produce a lowest common denominator end product, for by the process of consensus one ultimately arrives at something which is really fully acceptable to no one yet which does not impair the critical national interests of anyone. Such an agreement is apt to be the product of political bargaining rather than a response to technological, biological, and economic facts of life. Nonetheless, many feel it is better to have some agreement which is generally honored than to continue with the existing system. Precisely what procedure will be established cannot be known at this moment but will, of course, be decided before the Third Conference opens its first substantive session in Caracas.

Although the final outcome of the Third Conference will not be known until the summer, 1974, and perhaps not even until 1975, a general trend in favor of broad, exclusive national zones of jurisdiction in the sea is clearly discernable. If this is in fact the outcome, it will be a disappointment to the many persons who have labored over the past six years to establish a meaningful international regime for the use of ocean space. Yet if the new regime avoids the national conflict and resource waste characterizing the use of ocean space for the past three decades, it will permit a generation of stability in ocean affairs which could be the foundation on which a new international order would be constructed at the turn of the century.

## ANNEX A

UNITED NATIONS: SEABED COMMITTEE LIST OF SUBJECTS AND ISSUES  
TO BE DISCUSSED AT LAW OF THE SEA CONFERENCE

[August 16, 1972]

*List of Subjects and Issues Relating to  
The Law of the Sea*

1. International Regime for the Sea-Bed and the Ocean Floor Beyond National Jurisdiction
  - 1.1 Nature and Characteristics
  - 1.2 International Machinery: Structure, Functions, Powers
  - 1.3 Economic Implications
  - 1.4 Equitable Sharing of Benefits Bearing in Mind the Special Interests and Needs of the Developing Countries, Whether Coastal or Landlocked
  - 1.5 Definition and Limits of the Area
  - 1.6 Use Exclusively for Peaceful Purposes
2. Territorial Sea
  - 2.1 Nature and Characteristics, Including the Question of the Unity or Plurality of Regimes in the Territorial Sea
  - 2.2 Historic Waters
  - 2.3 Limits
    - 2.3.1 Question of the Delimitation of the Territorial Sea: Various Aspects Involved
    - 2.3.2 Breadth of the Territorial Sea, Global or Regional Criteria, Open Seas and Oceans, Semi-Enclosed Seas and Enclosed Seas
  - 2.4 Innocent Passage in the Territorial Sea
  - 2.5 Freedom of Navigation and Overflight Resulting from the Question of Plurality of Regimes in the Territorial Sea
3. Contiguous Zone
  - 3.1 Nature and Characteristics
  - 3.2 Limits
  - 3.3 Rights of Coastal States with Regard to National Security, Customs and Fiscal Control, Sanitation and Immigration Regulations
4. Straits Used for International Navigation
  - 4.1 Innocent Passage
  - 4.2 Other Related Matters Including the Question of the Right of Transit
5. Continental Shelf
  - 5.1 Nature and Scope of the Sovereign Rights of Coastal States Over the Continental Shelf. Duties of States
  - 5.2 Outer Limit of the Continental Shelf: Applicable Criteria
  - 5.3 Question of the Delimitation Between States: Various Aspects Involved
  - 5.4 Natural Resources of the Continental Shelf
  - 5.5 Regime for Waters Superjacent to the Continental Shelf
  - 5.6 Scientific Research
6. Exclusive Economic Zone Beyond the Territorial Sea
  - 6.1 Nature and Characteristics, Including Rights and Jurisdiction of Coastal



- States in Relation to Resources, Pollution Control and Scientific Research in the Zone. Duties of States
- 6.2 Resources of the Zone
  - 6.3 Freedom of Navigation and Overflight
  - 6.4 Regional Arrangements
  - 6.5 Limits: Applicable Criteria
  - 6.6 Fisheries
    - 6.6.1 Exclusive Fishery Zone
    - 6.6.2 Preferential Rights of Coastal States
    - 6.6.3 Management and Conservation
    - 6.6.4 Protection of Coastal States' Fisheries in Enclosed and Semi-Enclosed Seas
    - 6.6.5 Regime of Islands Under Foreign Domination and Control in Relation to Zones of Exclusive Fishing Jurisdiction
  - 6.7 Sea-Bed Within National Jurisdiction
    - 6.7.1 Nature and Characteristics
    - 6.7.2 Delineation Between Adjacent and Opposite States
    - 6.7.3 Sovereign Rights Over Natural Resources
    - 6.7.4 Limits: Applicable Criteria
  - 6.8 Prevention and Control of Pollution and Other Hazards to the Marine Environment
    - 6.8.1 Rights and Responsibilities of Coastal States
  - 6.9 Scientific Research
7. Coastal State Preferential Rights or Other Non-Exclusive Jurisdiction Over Resources Beyond the Territorial Sea
- 7.1 Nature, Scope and Characteristics
  - 7.2 Sea-Bed Resources
  - 7.3 Fisheries
  - 7.4 Prevention and Control of Pollution and Other Hazards to the Marine Environment
  - 7.5 International Co-Operation in the Study and Rational Exploitation of Marine Resources
  - 7.6 Settlement of Disputes
  - 7.7 Other Rights and Obligations
8. High Seas
- 8.1 Nature and Characteristics
  - 8.2 Rights and Duties of States
  - 8.3 Question of the Freedoms of the High Seas and Their Regulation
  - 8.4 Management and Conservation of Living Resources
  - 8.5 Slavery, Piracy, Drugs
  - 8.6 Hot Pursuit
9. Land-Locked Countries
- 9.1 General Principles of the Law of the Sea Concerning the Land-Locked Countries
  - 9.2 Rights and Interests of Land-Locked Countries
    - 9.2.1 Free Access to and from the Sea: Freedom of Transit, Means and Facilities for Transport and Communications
    - 9.2.2 Equality of Treatment in the Ports of Transit States
    - 9.2.3 Free Access to the International Sea-Bed Area Beyond National Jurisdiction

- 9.2.4 Participation in the International Regime, Including the Machinery and the Equitable Sharing in the Benefits of the Area
- 9.3 Particular Interests and Needs of Developing Land-Locked Countries in the International Regime
- 9.4 Rights and Interests of Land-Locked Countries in Regard to Living Resources of the Sea
- 10. Rights and Interests of Shelf-Locked States and States with Narrow Shelves or Short Coastlines
  - 10.1 International Regime
  - 10.2 Fisheries
  - 10.3 Special Interests and Needs of Developing Shelf-Locked States and States with Narrow Shelves or Short Coastlines
  - 10.4 Free Access to and from the High Seas
- 11. Rights and Interests of States with Broad Shelves
- 12. Preservation of the Marine Environment
  - 12.1 Sources of Pollution and Other Hazards and Measures to Combat Them
  - 12.2 Measures to Preserve the Ecological Balance of the Marine Environment
  - 12.3 Responsibility and Liability for Damage to the Marine Environment and to the Coastal State
  - 12.4 Rights and Duties of Coastal States
  - 12.5 International Co-Operation
- 13. Scientific Research
  - 13.1 Nature, Characteristics and Objectives of Scientific Research of the Oceans
  - 13.2 Access to Scientific Information
  - 13.3 International Co-Operation
- 14. Development of Transfer of Technology
  - 14.1 Development of Technological Capabilities of Developing Countries
    - 14.1.1 Sharing of Knowledge and Technology Between Developed and Developing Countries
    - 14.1.2 Training of Personnel from Developing Countries
    - 14.1.3 Transfer of Technology to Developing Countries
- 15. Regional Arrangements
- 16. Archipelagoes
- 17. Enclosed and Semi-Enclosed Seas
- 18. Artificial Islands and Installations
- 19. Regime of Islands:
  - (A) Islands Under Colonial Dependence or Foreign Domination or Control;
  - (B) Other Related Matters.
- 20. Responsibility and Liability for Damage Resulting from the Use of the Marine Environment
- 21. Settlement of Disputes
- 22. Peaceful Uses of the Ocean Space: Zones of Peace and Security
- 23. Archaeological and Historical Treasures on the Sea-Bed and Ocean Floor Beyond the Limits of National Jurisdiction

24. Transmission from the High Seas
25. Enhancing the Universal Participation of States in Multilateral Conventions Relating to the Law of the Sea