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Law of the Sea

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On 16 February 1979 Ambassador at Large Elliot L. Richardson addressed the classes of the Naval War College. His address will be of interest and value to Review readers and the following is adapted from it.

LAW OF THE SEA

by

Elliot L. Richardson

This presentation is intended to discuss where the Law of the Sea Conference now stands. Because your bases of information are so varied, some basic background is in order. The United Nations Conference on the Law of the Sea that is now underway began in 1974. It is the third U.N. Conference on the Law of the Sea; the first in 1958 developed several conventions, one of the most important of which is the Convention on the Continental Shelf; the second one in 1960 attempted to deal with the high seas and territorial waters, and ended in failure when agreement on a 12-mile territorial sea failed by one vote. The present one began out of the realization that there needed to be comprehensive extension and revision of customary international law to accommodate a series of developments that had been emerging and gaining force over a decade or more.

There were in the first place a number of technological developments that had to be recognized; for one thing, the advancement of technology involved in drilling in deep water in the Continental Shelf. This presented a problem, partly because the Continental Shelf Convention of 1958 adopted an exploitability test to define the outer limits of national jurisdiction. A nation's jurisdiction over the shelf under that convention extends as far as technological capacity permits the exploitation of the resources of the shelf. And that, of course, has meant that the boundary has been extending progressively seaward as technological capacity has evolved. But in the meanwhile it also had become apparent that it was only a matter of time until the capacity would also exist to mine the resources of the deep seabed. These are, for the foreseeable future, resources of manganese nodules originally discovered by H.M.S. *Challenger* over 100 years ago. These black, potato-sized objects, found at depths of 14,000 feet to over 20,000 feet on the bottom of the ocean around most of the world, are valuable because they contain significant quantities of nickel, copper, cobalt, and manganese. Devices were under development that could pick nodules up from the sediment where they lay, pump them to the surface, and extract the minerals.

Because the question of management and control of these resources requires definition of the area in which such control would be exercised, it became necessary to define the boundary between national jurisdiction over

the shelf and international jurisdiction over the seabed. In the meanwhile there had been increasing pressure on the ocean environment with the threat that unless effective international cooperation could be achieved, the living resources of the ocean could be subject to irreparable damage.

Coastal states in various ways were beginning to feel pressure on the protein resources within their coastal waters, and there is no more dramatic example of this than the virtual destruction of some fishery stocks on Georges Bank off Cape Cod as the result of overfishing, largely by Soviet vessels. But other countries also felt that the need for some form of management and control over these fishery stocks required the extension of coastal states' jurisdiction. As much as 30 years ago a few countries in South America proclaimed coastal state jurisdiction through the extension of the territorial sea out to 200 miles. From the standpoint of freedom of navigation and overflight there was the risk that other countries would follow suit, thereby, if not denying, at least creating very serious complications for freedom of navigation and overflight within the 200-mile zone. There was agreement that control over the problems of pollution as well as fisheries required the updating of the ancient definition of the territorial sea by extending it from 3 miles to 12. A consequence of this, in turn, would be that some 115 straits around the world would be overlapped by territorial seas.

As is commonly known, the legal provisions governing navigation and overflight over a territorial sea are defined in terms of "innocent passage." Innocent passage means, in effect, that vessels transiting the territorial sea must do so expeditiously and without engaging in any such activity as military exercises or fishing. But innocent passage does not embrace the submerged passage of submarines nor does it include any right of overflight. The overlapping of straits, therefore, could result in the denial of any legal right for a submerged submarine to enter the Mediterranean through the Strait of Gibraltar or to travel submerged through any other major strait, like the Strait of Malacca or the Strait of Lombok. Some 30 percent of the ocean area could be denied freedom of navigation and overflight if jurisdiction over the 200-mile zone for the protection of fisheries and other resources also carried with it the legal consequence that such waters were regarded as territorial waters rather than waters subject to high-seas freedoms. This extension of coastal state jurisdiction also could present problems for the free conduct of marine scientific research, and that has in fact been one of the concerns of the Conference.

It was recognized that because of the problems that would inevitably arise in the application of broad new regimes, there needed to be established a system of binding dispute settlement. The text now before the Conference would, if adopted, be the first major treaty to incorporate a comprehensive system of such settlement.

We now have before us, following the Seventh Session of the Conference, which took place in two stages during 1978 (8 weeks in Geneva and 4 weeks in New York), a document known as the Informal Composite Negotiating Text (ICNT). It is called a *negotiating* text because it has never been formally negotiated. It is called a *composite* negotiating text because at the end of the Sixth Session, in 1977, the separate negotiating texts that had up to that point been developed by the committee chairmen were brought together in a single document. It is called *informal* because all of

the negotiations that have taken place up to now have sought consensus; there have been no formal proceedings of the Conference and no votes under the rule calling for affirmative action by a two-thirds majority vote. And it will only be when the Informal Composite Negotiating Text has gone through a new edition and has then been adopted as a draft treaty that we will for the first time begin to proceed formally.

It remains to be seen whether the Conference will ever achieve that stage. On the one side, the overwhelming majority of all issues has been resolved. Perhaps 90 percent of the some 400 articles and 200 pages of text are now the subject of broad consensus. Within that consensus are almost all of the provisions that vitally affect navigation and overflight. But before discussing those provisions, some of the unresolved issues should be mentioned.

Putting aside for the moment the problem of deep-seabed mining, four major issues have been the subject of negotiation in specially constituted negotiating groups since the spring of 1978. One group has been charged with the question of how to accommodate the interests of the landlocked and geographically disadvantaged states (LL/GDS) that have been excluded from participation in fisheries beyond 3 miles and inside 200 miles by the achievement of consensus on the establishment of 200-mile economic zones or fishery zones. The landlocked among the LL/GDS also have had concerns with transit over the territory of states lying between themselves and the sea. These questions have now come close to the point of as good an accommodation as it is reasonable to hope for between the competing interests of the LL/GDS on the one side and the coastal states on the other.

A second negotiating group has been concerned with problems of dispute settlement with respect to access to fisheries in the exclusive economic zone by third countries; issues, for example, with respect to the fairness and the substantiality of the basis upon which coastal states have determined what is the optimum sustainable yield of a particular fisheries stock. On that, in turn, depends the share of the fishery that the coastal state itself can exploit effectively and thus the surplus that is available for allocation among other countries.

A third negotiating group has been concerned with an issue I've touched on already—the definition of the outer limits of the Continental Shelf. Here we have three competing options: one, put forward mainly by the Arab countries, would limit coastal states' jurisdiction to the same boundary as the exclusive economic zone—that is, 200 miles. A second, proposed by the Soviet Union, would establish a fixed mileage limitation of 300 miles, or perhaps more, from the baseline near the shore, but in any case, some definite and relatively easy ascertainable limit. The third approach is one advocated by the broad-margin states, mainly Great Britain, Ireland, Norway, Canada, Australia, New Zealand, India, and Argentina—the so-called Irish formula. Under the Irish formula there would be applied a sediment test—that is, a measurement of the depth of the sediment overlying the rock stratum beneath. The Irish formula, believe it or not, provides that the limit of a coastal states' jurisdiction is the point at which the depth of the sediment is 1 percent of the distance from the foot of the continental slope! And on the determination of this point, of course, turns jurisdiction over many billions of dollars worth of hydrocarbons.

The fourth of these four nonseabed mining negotiating groups is concerned with dispute settlement with respect to the boundaries of the exclusive economic zone and the Continental Shelf between opposite and adjacent states. Here the main competing doctrines are those of equidistance and the recognition of so-called "equitable principles." For every country that benefits from the application of the principle of equidistance, there is an equal and opposite country that would benefit from equitable principles. For example, equidistance applied without qualification would give Canada quite a lot of Georges Bank, although Georges Bank lies east and somewhat south of Cape Cod. It came as a great surprise to the fishermen of New Bedford that grounds they have traditionally fished upon might turn out to belong in considerable part to Canada. So at least with respect to that dispute, the United States is an advocate of equitable principles.

There were, as of early 1978, two other major concerns not embraced within these four negotiating groups in which the United States has a particular interest: one is in protection against marine pollution, and we were able to gain some significant improvements in those provisions of the text in the two negotiating sessions in 1978 (with the help in part of the *Amoco Cadiz* disaster, which once again illustrates the proposition that it's an ill wind that doesn't blow some good). The other major outstanding concern for the United States not embraced in any present negotiating group, but falling within the jurisdiction of Committee Three of the Conference, is the text on marine scientific search. There we are trying to offset some of the negative effects of a text that establishes a consent regime for the conduct of scientific research within the 200-mile zone and the coastal state's jurisdiction over the Continental Shelf. We have, in the meanwhile, worked hard for some improvement of the language dealing with the protection of marine mammals.

Turning now to seabed mining, we have a host of difficult and unresolved issues. Whereas in the case of navigation, overflight, innocent passage, transit through straits, etc., the Conference has been dealing with the codification, evolution, and adaptation of customary international law, in the case of seabed mining we have been seeking to draft a constitution for a new kind of international organization. This organization would have responsibility for access to and management and control over the resources represented by the manganese nodules. This management and control would be exercised by an International Seabed Authority with two governing bodies: an Assembly in which all members would be represented on a one-nation, one-vote basis and a Council, a smaller body, in which there would be representation of such particularly concerned interests as the seabed miners, major consumers of the metals involved, and the land-based producers of those metals who are concerned by the potential damage to their economies resulting from competition by seabed mining.

We still face exceedingly difficult problems with respect to how these interests will be represented and how votes will be taken in the Council. There are problems with respect to the creation of an operating entity for the International Seabed Authority that will be called "The Enterprise." The Enterprise will in effect be an international corporation created to conduct seabed mining. There have been problems of how it would be financed and how it would acquire the necessary technology to engage in seabed mining. The

land-based producers have been able to persuade the Conference that they need the protection of a production ceiling on seabed mining, and that leads to a number of problems with respect to the availability of a sufficient number of contracts for seabed mining for member countries, and their state-sponsored entities, including private companies.

There are problems of how to fix the schedule of payments to be made by companies to the Authority in the form of initial fees, royalties, and profit-sharing. There are a great many other problems also raised by the necessity of creating a structure that can deal with all aspects of an entirely new, risky, and very expensive industry. It is estimated that a single seabed mining project will cost up to a billion dollars, including the costs of prospecting, exploration, and technological development as well as the construction of seabed-mining ships, transportation vessels, and shore-based processing facilities.

Here, more clearly than anywhere else in the Conference, we have a cleavage between north and south, developed and developing countries. The Group of 77, representing the developing countries, is seeking a maximum role for The Enterprise, and the industrial countries are insisting upon maximum opportunities for their companies to obtain contracts with the Authority and security of tenure under those contracts. The seabed-mining provisions of the treaty have tended to dominate public attention in the United States recently, although they are only a part of the whole, and this part needs to be looked at in the context of the other interests at stake.

Because many of you are concerned with freedom of navigation for commercial and naval vessels and with freedom for aircraft to fly over straits and economic zones, I'd like now to describe more fully where the Conference stands on these subjects. With minor qualifications, these aspects of the proposed comprehensive treaty have been brought to the point of substantial consensus. In the case, for example, of the territorial sea, it has been agreed that it will be extended to 12 miles and that the problem of overlapping straits will be dealt with through a new regime of transit passage. This regime, in effect, will preserve the principal legal aspects of the high-seas passage that exists where there remains a high-seas lane between the 3-mile territorial seas on each side of the straits.

In the summer of 1977 we had intense negotiations over the issues of freedom of navigation and overflight in the 200-mile economic zone, and we now have a text which makes clear that the freedoms of navigation and overflight that apply within the 200-mile economic zone are the same freedoms of navigation and overflight that apply to the high seas beyond the 200-mile economic zone.

One more new concept that emerged early in the Conference is that of "archipelagic waters." Its meaning is that countries comprising a group of islands, such as the Philippines or Indonesia, would be allowed, in effect, to declare that the waters embraced by these islands are the equivalent of territorial seas. This, of course, would raise the same problems of freedom of navigation and overflight that the extension of territorial waters over straits would raise. Here it has been agreed that lanes open to free navigation and overflight will be established and defined by courses and distances from point to point through the archipelagic waters, with a permitted deviation of a certain number of miles on each side of the axis thus established.

The interests of the coastal states in establishing and enforcing marine environmental-protection measures have been carefully balanced against maritime interests in preventing the harassment of navigation. It has also been agreed that the application of binding dispute-settlement procedures would be subject to a military exception.

In general, the world has a vital interest in establishing the rule of law in all these respects, and observance of the rule of law has no greater importance for any affected group than it does for those of us who are charged with responsibility for the preservation of navigational freedoms. When it comes to the question of where ships and airplanes can legally go, it is important to have clear rules and thus to be able to avoid the conflicts that could otherwise arise. The potential for conflict does more than poison good relations with the countries affected. It could also compel the allocation of resources to vindicate asserted rights in ways that would impair the availability of these resources for their primary purposes.

Besides that, I think we see today that the community of nations has reached a point at which the sense of independence and autonomy felt by many countries, perhaps all countries, is such that simply to be big and strong does not confer the power to act in disregard of the interests of smaller states. We no longer live in a world in which gunboat diplomacy is tolerated, and the establishment of a clear and accepted regime of the ocean that includes adequate recognition of maritime interests can help us to escape the necessity of choosing between accepting the undesirable restriction of navigational freedoms or asserting them only at the cost of the destruction of good relations and the charge of behaving like a bully.

It is, I think, impossible now to be confident that the Conference will succeed in resolving the remaining issues before it. I hope it can. Like most participants, I believe that the success of the Conference would make a major contribution to the rule of law. We also believe that this, perhaps the most ambitious negotiating effort ever undertaken by the world community, would, if successful, enormously strengthen confidence that complex problems cutting across national lines are capable of negotiated solutions. Conversely, the failure of the Conference would be a serious setback to this hope.

After a 3-week intersessional meeting early this year, negotiations resumed on 19 March. Many countries are increasingly feeling the strain of allocating top-level people to the Conference. The prospect that the United States and a few other countries may go forward with unilateral seabed mining legislation has also contributed to a sense of urgency toward bringing the work of the Conference to the earliest possible close. And though the intersessional meeting scored no dramatic gains, it was successful, nevertheless, in the somewhat ironic sense that it sharpened the remaining divergencies in a way that exposed the underlying economic realities with a minimum of ideological and political rhetoric. We have, in a sense, positioned ourselves for a major effort to see whether we can close the remaining gaps. I hope we can, and yet I cannot confidently predict it. For my own part, I find the effort exceedingly difficult, demanding, complex, and often frustrating, but I can assure you that it is never boring.

Because the answers to questions following Ambassador Richardson's presentation cover points not raised in the address, they are included here.

Do you have any plans to go ahead with a treaty, to get it signed and to get agreement on 90 percent of the issues, even if you can't achieve consensus for such things as seabed mining and a few other points?

From the standpoint of the United States and other major maritime countries, it would be of great benefit to be able to consolidate in a treaty the matters that I have already identified as subject to broad agreement. But the problem is that from the outset it was conceived that this Conference would seek to negotiate a package deal in which maritime interests were balanced against resource interests. Insofar as the developing countries, represented in the Group of 77, considered navigational interests as mainly of concern to the developed maritime and naval powers, they have continued to insist that their compensation for these concessions would have to take the form of agreement on a seabed-mining regime in which all countries would be represented and in which all countries would share. As a practical matter, it is virtually impossible to visualize any document coming into force that deals with the navigational issues without also comprehending the resolution of these resource-related problems. So, while it's conceivable that if the Conference failed, there might be an interval in which the world community paused and regrouped and then tried again on a basis drawing on pieces of the present effort, it's certainly not possible that we can simply lop off seabed mining, for example, and then get enough ratifications to bring a treaty into force dealing with the remaining issues.

What is the U.S. position on deep-sea mining?

The U.S. position on deep-sea mining is that our companies must have assured opportunity to engage in seabed mining under reasonable terms and conditions, including security of tenure under their contracts with the International Seabed Authority, and a fair chance to recover their investment and achieve a fair return. The access that we will have, of course, is dependent upon negotiating a regime that is capable of attracting the necessary investment. Nobody is now prepared to put any money into seabed mining except four multinational consortia and one French group—the four are multinational consortia headed by the U.S. Steel Company, Kennecott, Lockheed, and the International Nickel Company of Canada. Each of these consortia includes components belonging to other industrial countries—Japan, Great Britain, Germany, the Netherlands, and Belgium, in varying combinations. The heart of the problem is designing a regime that will justify risking up to a billion dollars in a single seabed-mining project. Our constant effort is to convince the developing countries that it is in their interest, as well, to agree on a seabed-mining regime that can attract investment. I don't know how I have failed thus far even to mention "the common heritage of mankind." This phrase goes back to a speech in 1967 by Arvid Pardo, then the Permanent Representative of Malta to the United Nations, which led to the adoption in 1970 of a U.N. Resolution containing a declaration of principles designed to govern seabed mining, including the declaration that the resources of the deep seabed constitute the common heritage of mankind. Our message is essentially that the common heritage of mankind will remain indefinitely without use to humanity in the vast depths and enormous pressure and cold of the ocean floor unless the seabed-mining regime that

emerges from this Conference is capable of giving reasonable confidence to investors. Our task in Geneva will be to get agreement on the basis of the understanding that that confidence is a precondition for breathing life into the concept of the common heritage.

Do you feel that if we moved ahead to exploit unilaterally the seabed resources under the guarantee of the U.S. Government that that would perhaps spur an agreement among the Group of 77 for a more universal enterprise for the exploitation of those resources?

It is hard to tell what effect the final passage of seabed-mining legislation by the United States would have on the Conference. There are those who warn that it would have a highly destructive effect and trigger the assertion of unilateral national claims to the seabed itself. On the other hand, the U.S. legislation now pending, which almost passed the Congress in 1978 only to be hung up at the last moment in the Senate, is designed to be consistent with the general approach of the ICNT and provides for the setting aside of payments by the mining companies recognizing the legitimacy of the claims of other countries to share in the proceeds. The legislation would be superseded by a treaty, and because seabed mining cannot now get underway on a commercial scale before 1985 at the earliest, that would allow a treaty to be negotiated well before that date. So far as the effect on the negotiations is concerned, I think that the awareness that seabed mining must be regarded as inevitable (if not under a universal convention, at least under reciprocal national legislation) has served to make the participants in the Conference aware that time is not necessarily on their side. And I think this has contributed to the sense of urgency that now exists.

Enforcement of these laws seems to be a major problem. To what extent does the role of national navies enter in your discussion as far as enforcing certain laws that you are proposing?

I think the role of navies needs to be looked at primarily in terms of the exercise of nationally claimed rights, including rights that the countries to which those navies belong believe to rest upon a solid foundation of international law. In the absence of a treaty (and even under the treaty) it is also important to deliver clear and unmistakable protests against national claims inconsistent with international law, whether that law belongs to the body of customary international law or has been made part of a universal convention. Such protests must be backed up by the consistent exercise of the internationally recognized right, and in a situation in which the exercise of a right is subject to challenge, there would need to be the readiness to go forward nevertheless. This would necessitate appropriate preparation to meet the possibility of any such challenges. Beyond that, of course, there is the potential for bringing to bear various forms of international proceedings including, even in the absence of the treaty, an international court of justice or arbitration. Under the treaty there would be a whole array of legal means to vindicate these rights. I think, therefore, that if firmness, intelligence, and consistency is applied to the assertion of rights that do rest upon a broad basis of international law, it follows that there should be minimal occasion to have to resort to any form of police action in their enforcement.