JURISDICTION BEYOND 200 MILES: A PERSISTENT PROBLEM

For the past six years[1] the Third United Nations Law of the Sea Conference (UNCLOS III) has attempted to resolve the issue of how far coastal state jurisdiction should extend over the continental shelf.[2] Ranging in width from two to more than 600 miles,[3] the continental shelf contains nearly one-third of the world's petroleum resources.[4] In size, it is equivalent to eighteen percent of the earth's land surfaces,[5] and estimates indicate that it contains 2,500 billion barrels of oil.[6] Considering the shelf's enormous potential wealth, it is not surprising that its control is an issue of great controversy and concern to many nations.

While no definitive means of determining the outer boundary of the shelf has yet emerged from the Conference, there appears to be widespread acceptance of a 200-mile jurisdictional zone known as the exclusive economic zone (EEZ).[7] Endorsed by nearly seventy-three percent of the conferees at the 1974 meetings,[8] the 200-mile EEZ places the resources of 35.4% of the world's ocean (and ocean floor) under national control.[9] What the conferees have been unable to agree upon is the status of the continental shelf beyond the 200-mile limit.

For the most part, those coastal nations with wide continental shelves have adhered to their belief that jurisdiction extends be-

1. The Third United Nations Law of the Sea Conference held its first substantive meetings in 1974.

2. The term continental shelf has many legal and geological definitions. Two such definitions are:

> A generally shallow, flat submerged portion of a continent, extending to a point of steep descent to the ocean floor. AMERICAN HERITAGE DICTIONARY 288 (1973).
> A zone adjacent to a continent or around an island, and extending from the low water line to a depth at which there is usually a marked increase of slope to a greater depth. Oxman, *The Preparation of Article 1 of the Convention on the Continental Shelf*, 3 J. MARITIME L. 252 (1972) [hereinafter cited as Oxman].

3. Swing, *Who Will Own The Oceans*, 54 FOR. AFF. 529 (1976).

4. Howe, *Petroleum Operations in the Sea — 1980 and Beyond* (1968), *reprinted in* G.A. DOVMANI, OCEAN WEALTH, POLICY AND POTENTIAL, at 26 (1973).

5. Emery, *The Continental Shelves*, SCI. AM., Sept. 1969, at 108.

6. Swing, *supra* note 3, at 535.

7. Alexander & Hodgson, *The Impact of the 200-Mile Economic Zone on the Law of the Sea*, 12 SAN DIEGO L. REV. 569, 570 (1975).

8. *Id.*

9. *Id.* at 573.

yond the EEZ to the outer limit of the continental margin.[10] They claim that existing international law supports this position,[11] and have indicated an unwillingness to accept any treaty that diminishes their present rights.[12] Not surprisingly, this interpretation of existing international law is rejected by the majority of states with narrow shelves. These nations seek to limit jurisdictional control to 200 miles,[13] leaving resources from the area beyond 200 miles for the "common heritage of mankind."[14]

This Comment reviews the development of the continental shelf and exclusive economic zone doctrines. It then examines the provisions of the UNCLOS III Draft Treaty which relate to the seaward extension of the continental shelf and discusses the relationship between the continental shelf and the EEZ. Finally, this Comment examines and analyzes some possible compromise solutions concerning the status of the continental shelf beyond 200 miles, and attempts to determine what laws may govern international practice should UNCLOS III fail to produce an acceptable treaty.

I. DEVELOPMENT OF CONTINENTAL SHELF LAW

A. Early History

The origin of continental shelf law is commonly attributed to the Truman Proclamation.[15] Issued in 1945, the Truman Proclamation represents the first nationalistic assertion of a jurisdictional claim over the resources "of the subsoil and seabed of the continental shelf."[16] Prior to the Proclamation, jurisdictional claims beyond

10. The continental margin is the zone separating the emergent continents from the deep sea bottoms; it generally consists of the continental shelf, slope and rise. Oxman, *supra* note 2.

11. Convention on the Continental Shelf, Apr. 28, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311, North Sea Continental Shelf Cases, I.C.J. REP. 3 (1969), *reprinted in* 8 INT'L LEGAL MATS. 340 (1969).

12. *See* text accompanying notes 118-121 *infra.*

13. *See* text accompanying note 78 *infra.*

14. The Common Heritage of Mankind provides that the resources of the ocean floor beyond national jurisdiction are to be used for the betterment of mankind as a whole. Declaration of Principles Governing the Sea-Bed and Ocean Floor and the Subsoil Thereof, Beyond the Limits of National Jurisdiction, G.A. Res. 2749, 25 U.N. GAOR, Supp. (No. 28) 24, U.N. Doc. A/8097 (1970) [hereinafter cited as Declaration on Sea-Bed and Ocean Floor].

15. Policy of the United States with Respect to the National Resources of the Subsoil and Sea Bed of the Continental Shelf, Presidential Proclamation No. 2667, *reprinted in* 59 Stat. 884 (1945), and 13 DEP'T STATE BULL. 485 (1945) [hereinafter cited as Truman Proclamation].

16. *Id.*

the narrow limits of the three mile territorial sea were quite rare.[17] By declaring that it had exclusive rights to the resources of the continental shelf seaward to the point where the water exceeded 200 meters in depth,[18] the United States initiated what became, in effect, an oceanic "land grab" and a new area in the law of the sea.[19] This new area — continental shelf law — developed quickly. Unilateral declarations by other nations laying claims to the continental shelf off their coasts quickly followed. Mexico,[20] Panama,[21] Argentina,[22] and Peru[23] issued such declarations, and Costa Rica incorporated a claim into their constitution.[24] During the 1950's additional nations made continental shelf claims, but unfortunately, these declarations were often ambiguous and did not contain any uniform language. Some claims extended over the continental shelf to a depth of 200 meters,[25] some made no depth reference at all,[26] others claimed the continental or insular shelves,[27] and still others claimed the epicontinental[28] sea as well as the continental shelf.[29] The result of these varying and undefined claims was confusion. It became increasingly difficult to declare with certainty just how much of the earth's continental shelf was controlled by which nation. In light of the vast hydrocarbon resources that were contained within the shelf and the pressures for their development, a clear definition and delineation became imperative.

One of the early attempts at creating a uniform definition of the continental shelf occurred in 1956 at the Inter-American Spe-

17. Norway and Sweden have maintained a four-mile limit for many years. Russia has maintained a 12-mile limit since 1912. S. SWARTRAUBER, THE THREE MILE LIMIT OF TERRITORIAL SEAS (1972); Gutteridge, *Beyond The Three Mile Limit: Recent Developments Affecting the Law of the Sea*, 14 VA. J. INT'L L. 195, 198 (1974); Kent, *Historical Origins of the Three Mile Limit*, 48 AM. J. INT'L L. 537 (1954).

18. Truman Proclamation, supra note 15.

19. Martens, *Evolution of Coastal State Jurisdiction: A Conflict Between Developed and Developing Nations*, 5 ECOLOGY L.Q. 533 (1973).

20. U.N. DOC. ST/LEG/SER. B/1 at 13-14 (1951).

21. *Id.* at 15-16.

22. *Id.* at 4-5.

23. *Id.* at 16-17.

24. Costa Rica Decree L. 116, July 27, 1948. EL SALVADOR CONST. of 1950 art. 7 [hereinafter cited as Costa Rica Decree].

25. Truman Proclamation, *supra* note 15.

26. Mexico, *supra* note 20 and accompanying text.

27. Costa Rica Decree, *supra* note 24.

28. Argentina, *supra* note 22 and accompanying text. Argentina never provided a definition of the term epicontinental sea.

29. *Id.*

cialized Conference on Conservation of Natural Resources at Ciudad Trujillo.[30] There, the twenty attending nations created a definition which introduced an additional new term — the continental and insular terrace.[31] Although this term was dropped from later definitions, the Conference's definition remains noteworthy for its introduction of yet another measuring device — exploitability.[32] In their final resolution the conferees unanimously adopted the following:

> The sea-bed and subsoil of the continental shelf, continental and insular terrace, or other submarine areas, adjacent to the coastal state, outside the area of the territorial sea, and to a depth of 200 metres *or, beyond that limit, to where the depth of the superadjacent waters admits to the exploitation* of the natural resources of the sea-bed and subsoil, appertain exclusively to that state and are subject to its jurisdiction and control.[33]

In preparation for the First United Nations Law of the Sea Conference (UNCLOS I) the International Law Commission (ILC) included in its draft articles the exploitability criterion advanced at Ciudad Trujillo.[34] In justifying its inclusion, the ILC stated that the exploitability provision was necessary since "technical developments in the near future might make it possible to exploit the resources of the seabed at a depth of over 200 meters."[35] In order to avoid "the disadvantage of instability which 200 meters might create," the ILC decided not to specify a depth limit.[36]

In 1958, representatives of eighty-six nations met at Geneva for UNCLOS I. Before the Conference ended they had agreed upon a definition of the continental shelf:

> For the purposes of these articles, the term 'continental shelf' is used as referring (a) to the 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 superadjacent waters admits of the exploitation of

30. Inter-American Specialized Conference on "Conservation of Natural Resources: The Continental Shelf and Marine Waters," Ciudad Trujillo (now Santo Domingo) Dominican Republic, March 15-28, 1956, Final Act, Diario at 32-35 (Pan American Union 1956) [hereinafter cited as Ciudad Trujillo Conf.].

31. *See* text accompanying note 33 *infra*.

32. *Id.*

33. Ciudad Trujillo Conf., Final Act, *supra* note 30, at 13. Oxman, *supra* note 2 at 450-51 (emphasis added).

34. I.L.C. Report 8th Sess., [1956] at 41-42, Article 67. Oxman, *supra* note 2, at 468.

35. *Id.* at 40, *See* commentary accompanying text of Article 67 in Oxman, *supra* note 2, at 469.

36. *Id.*

the natural resources of the said areas: (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.[37]

By adopting the exploitability provision developed at the Ciudad Trujillo Conference, the Geneva conferees incorporated several different measuring devices into the Convention. Instead of the much needed definitive limit, the Conference had chosen a definition based upon three criteria: exploitability, adjacency, and water depth,[38] none of which were subject to precise delimitation. By failing to provide a single definitive test by which to determine the extent of coastal state jurisdiction, the Convention left the individual nations free to pursue self-serving unilateral action.

First Ghana[39] claimed a 100-mile fishery conservation zone, then Guinea[40] claimed a 130-mile territorial sea. Argentina[41] and Nicaragua[42] followed with 200-mile claims, while Pakistan[43] and Cameroon[44] also extended their jurisdiction. By 1967, sixteen nations had jurisdictional claims in excess of twelve miles.[45]

B. The North Sea Continental Shelf Cases

As additional nations joined in the grab for oceanic territory, a dispute developed in the North Sea over control of the continental shelf. In the 1969 *North Sea Continental Shelf Cases*,[46] (*North Sea Cases*) the International Court of Justice (ICJ) was asked to establish criteria for the delimitation of continental shelf boundaries between adjoining states. By declaring that states have an "inherent right"[47] to that area of the "continental shelf that constitutes a natural prolongation of its land territory,"[48] the Court created yet another method for measuring seaward jurisdictional limits. By

37. Convention on the Continental Shelf, *supra* note 11, art. 1.
38. *Id.*
39. U.N. Doc. ST/LEG/SER. B/18, at 23 (1976).
40. *Id.* at 24.
41. U.N. Doc. ST/LEG/SER. B/15, at 45 (1970).
42. Delimiting the National Fishing Zone to 200 Nautical Miles, Decree No. II of April 5, 1965, arts. 1-2, *reprinted in* U.N. Doc. ST/LEG/SER. B/15, at 656 (1970).
43. President's Proclamation of Feb. 19, 1966, *reprinted in* U.N. Doc. ST/LEG/SER. B/18, at 344 (1976). Pakistan claimed a 100-mile fishery zone.
44. Ordinance GPJFT/25, Nov. 13, 1967, *reprinted in* U.N. Doc. ST/LEG/SER. B/15, at 51 (1970).
45. Lynch, *The Nepal Proposal for a Common Heritage Fund: Panacea or Pipedream?*, 10 CALIF. W. INT'L L.J. 25, 30 (1980).
46. North Sea Continental Shelf Cases, *supra* note 11.
47. *Id.* at 22.
48. *Id.*

introducing the term "natural prolongation," the Court seemed to be saying that the coastal state maintained jurisdiction over that area of seabed between the shoreline and the abyssal ocean floor — an area encompassing not only the continental shelf, but the continental slope and rise as well.[49] When the Court's natural prolongation concept is coupled with the existing definitions from the 1958 Convention, it becomes abundantly clear that the Court's decision represents a step backward. Instead of clarifying the definitional dispute, the Court further complicated the matter by introducing another measurement criterion. As one author stated, "The North Sea Case illustrates . . . the urgent necessity of: (a) a definite vertical or horizontal limitation of the continental shelf, instead of the open-ended 'grab' situation permitted by Article 1 of the Convention."[50]

Thus, by 1970, several conflicting criteria existed for determining the seaward extent of the continental shelf. There was the 200-meter provision,[51] the adjacency test,[52] the exploitability test,[53] and the concept of natural prolongation.[54] The lack of clarity provided by these terms was further compounded by the fact that numerous conflicting legal and geological definitions existed for the continental shelf.[55]

II. Development of the Exclusive Economic Zone

A. Early History of 200-Mile Claims

Shortly after the issuance of the Truman Proclamation the first 200-mile jurisdictional claims emerged. Initially asserted by Chile[56] in 1947, the 200-mile zone did not receive the same immediate widespread acceptance that the continental shelf had enjoyed.

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49. There is not uniform acceptance of this explanation of the term natural prolongation. *See* Finlay, *The Outer Limits of the Continental Shelf*, 64 AM. J. INT'L L. 42, 52-57 (1970); Henkin, *International Law and "the Interests": The Law of the Seabed*, 63 AM. J. INT'L L. 504 (1969); Henkin, *A Reply to Mr. Finlay*, 64 AM. J. INT'L L. 62 (1970).

50. Friedmann, *The North Sea Continental Shelf Cases — A Critique*, 64 AM. J. INT'L L. 229, 240 (1970).

51. Convention of the Continental Shelf, *supra* note 11, art. 1.

52. *Id.*; *see also* North Sea Continental Shelf Cases, *supra* note 11, para. 41.

53. Convention on the Continental Shelf, *supra* note 11, art. 1.

54. North Sea Continental Shelf Cases, *supra* note 11, para. 19.

55. Hedberg, *Relation of Political Boundaries on the Ocean Floor to the Continental Margin*, 17 VA. J. INT'L L. 57, 74-75 app. (1976).

56. *Supra* note 20, at 16-17 (1951).

Although Chile was soon joined by Ecuador[57] and Peru,[58] the 200-mile zone remained somewhat of an oddity. Viewed by some as either extravagant or unlawful, these claims met with strong protests.[59]

Despite opposition, the three nations jointly issued the Declaration of Santiago[60] in 1952, proclaiming that each country possessed "sovereignty and jurisdiction over the area of the sea adjacent to the coast of its own country and extending not less than 200 nautical miles."[61] By the 1958 Geneva Conference, only four countries — Costa Rica,[62] Honduras,[63] Panama,[64] and El Salvador[65] — had joined the 200-mile group. Maintaining that "there [was] no juridicial or logical basis for a 12-mile limit,"[66] these countries took advantage of the failure of UNCLOS I and II to reach an agreement concerning the width of the territorial sea. This failure to define the limits of the territorial sea left these and other nations, at least in their judgment, free to define their own jurisdictional limits. As a result, by 1970 many other nations had extended their boundaries.[67]

Although not all of these extensions were for 200 miles,[68] there was a general realization that some sort of international agreement was necessary before any jurisdictional conflicts developed. It was

57. Decree No. 003, Feb. 22, 1951, U.N. Doc. ST/LEG/SER. B/1/Add 1 (1952); 4 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW, at 799-800 (1965).

58. Presidential Decree No. 781 of Aug. 1, 1947, U.N. Doc ST/LEG/SER. B/1, at 16 (1951); 4 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW, at 797-98 (1965).

59. Kunz, *Continental Shelf and International Law: Confusion and Abuse*, 50 AM. J. INT'L L. 828, 835-36 (1956). As one author commented: "The overwhelming majority of states are opposed to a 200-mile limit."

60. U.N. Doc. ST/LEG/SER. B/6, at 723 (1957).

61. *Id.* at 723-24.

62. U.S. DEP'T OF STATE, PUB. NO. 36 NATIONAL CLAIMS TO MARITIME JURISDICTION, at 21 (2nd rev. ed. 1974).

63. *Id.* at 47.

64. *Supra* note 20, at 15-16 (1951).

65. *Supra* note 62, at 30.

66. U.N. Doc. A/AC. 138/SR. 80, at 3 (1972).

67. Ten nations made 200-mile claims by 1970. Argentina, Brazil, Chile, Costa Rica, Ecuador, El Salvador, Nicaragua, Panama, Peru, and Uruguay. Honduras withdrew its claim during this time. For a complete list of jurisdictional claims, *see* U.N. Food and Agriculture Organization Fisheries, LIMITS AND STATUS OF THE TERRITORIAL SEA, EXCLUSIVE FISHING ZONES, FISHERY CONSERVATION ZONES AND THE CONTINENTAL SHELF, Circular No. 127 (Rome, Aug. 1971), *reprinted in* 10 INT'L LEGAL MATS. 1255 (1971) [hereinafter cited as FAO Study].

68. For example, Ghana claimed a 100-mile fishery zone. Guinea claimed a 130-mile territorial sea and the Maldives claimed an area of up to 55 miles. For a complete list of claims, *see* FAO Study, *supra* note 67.

against this background that the United Nations voted to convene UNCLOS III.[69]

B. UNCLOS III Preparation

Passed in 1970, the resolution convening UNCLOS III called for three years of preparatory work to be done by the United Nations Seabeds Committee, with the actual conference beginning in 1973. During the preparatory stages of UNCLOS III a number of regional declarations on the 200-mile zone were issued.[70] Incorporating the term "exclusive economic zone," these declarations gave the coastal state control of all resources to a distance of 200 miles, regardless of the breadth of their continental shelf. The first of these regional declarations was the Declaration of Montevideo.[71] Issued by nine Latin American states in 1970, the Declaration endorsed the 200-mile zone concept. This Declaration was followed by the Declaration of Santo Domingo,[72] where nine additional states, none of which had 200-mile zones, supported the idea. Similar declarations were issued at Yaounde[73] and Addis Abbaba,[74] where the forty-one members of the Organization of African States endorsed the idea. It was therefore not surprising that the 200-mile EEZ was incorporated in the preparatory documents of UNCLOS III.[75]

III. UNCLOS III

The first substantive meeting of UNCLOS III commenced in Caracas, in 1974, with more than 140 nations represented.[76] The

69. G.A. RES. 2750, U.N. DOC. A/8097 (1970), *reprinted in* 10 INT'L LEGAL MATS. 224 (1971).

70. *Infra* notes 71-74.

71. Montevideo Declaration on Law of the Sea, May 8, 1970, U.N. DOC. A/AC. 138/34 (1970), *reprinted in* 9 INT'L LEGAL MATS. 1081 (1970).

72. Declaration of Santo Domingo, June 7, 1972, 27 U.N. GAOR, Supp. (No. 21), 70 U.N. DOC. A/AC. 138/80 (1972), *reprinted in* 11 INT'L LEGAL MATS. 892 (1972).

73. Yaounde Conclusions of the Regional Seminar on the Law of the Sea, 27 U.N. GAOR, Supp. (No. 21), 74, June 20-30, 1972, U.N. DOC. A/AC. 138/79 (1972), *reprinted in* 12 INT'L LEGAL MATS. 210 (1973).

74. Organization of African Unity, Council of Ministers, Addis Abbaba Declaration of Issues of the Law of the Sea, May 24, 1973, U.N. DOC. A/AC. 138/89 (1973), *reprinted in* 12 INT'L LEGAL MATS. 1200 (1973).

75. Report of the Committee on the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction, 27 U.N. GAOR, Supp. (No. 21) A/8721 72, U.N. DOC. A/AC, 138/79 (1972); 28 U.N. GAOR, Supp. (No. 21) 30, U.N. DOC. 9021 (1973).

76. For a complete list of all attending nations, *see* [1974] U.N.Y.B., at 71-72.

Conference assigned the work relating to both the exclusive economic zone and the continental shelf to Committee Two.[77] At the initial Committee meetings on the EEZ the overwhelming majority of nations endorsed the principle of a 200-mile zone.[78] The following year, UNCLOS III produced a draft treaty, the Informal Single Negotiating Text (ISNT).[79] Although the treaty did not necessarily reflect the majority view on each issue, it provided the delegates a base from which to work.

Under the initial version of the ISNT, each coastal state was entitled to a 200-mile EEZ.[80] Within that zone the coastal state would exercise "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the seabed and subsoil."[81] In addition, those nations whose continental margins[82] extended beyond the 200-mile limit would be entitled to exercise jurisdiction throughout the natural prolongation of their land territory to the outer edge of the continental margin, subject only to limited international restraints.[83] However, the ISNT failed to provide a definition of the continental margin, thereby rendering precise delimitation impossible, since numerous definitions of the continental margin exist.

From the meetings there emerged two divergent schools of thought regarding the relationship between the continental shelf and the exclusive economic zone. One group of nations, mostly those with exceptionally wide continental margins,[84] voiced their objection to any attempt at limiting jurisdiction to 200 miles. They contended that under existing international law the entire continental margin was subject to their exclusive sovereign rights.[85] They

77. *Id.* at 74.

78. U.N. Doc. A/CONF. 62/C.2/SR 21-28 (1974).

79. Informal Single Negotiating Text (ISNT), U.N. Doc. A/CONF. 62/WP.1 (1975). Later versions of the text are titled INFORMAL COMPOSITE NEGOTIATING TEXT (ICNT).

80. *Id.* art. 46. This article was renumbered Article 57 in later draft treaties.

81. *Id.* art. 45. This article was renumbered Article 56 in later draft treaties.

82. *Id.* art. 62. The initial draft treaty did not provide any definition of the term continental margin. A definition was adopted in 1978. For definitions of the continental margin, *see* notes 10 *supra* and 126 *infra*. *See also supra* note 55.

83. *Id.* art. 69, Another portion of the ISNT provided for revenue sharing of an undetermined amount of those resources taken from the continental margin beyond the 200-mile limit.

84. Those nations with wide margins include Argentina, Australia, Brazil, Canada, India, Japan, Mexico, New Zealand, Norway, the United Kingdom, United States, Soviet Union. *See* appendix I for map.

85. *See* text accompanying notes 89-94 *infra*.

cited both the 1958 Convention and the *North Sea Cases* as support for their reasoning.

Many of the developing nations opposed this line of reasoning. They firmly believed that a flat 200-mile zone should be the definitive limit for all nations.[86] In viewing the EEZ as the answer to the continental shelf problem, they reasoned that the shelf would be subsumed within the EEZ, thereby eliminating any need to clearly define it.[87] As to portions of the continental margin situated beyond the 200-mile limit, they maintained that to allow its nationalistic control would seriously undermine the principle of the common heritage of mankind.[88]

A. Support for Jurisdiction Beyond 200 Miles

Predictably, many of the nations with the most to gain by an extension of jurisdiction beyond 200 miles found the ISNT provisions acceptable.

By providing for jurisdiction "throughout the natural prolongation . . . . to the outer edge of the continental margin," the draft treaty supported and sanctioned their jurisdictional claims beyond 200 miles. They regarded this provision as consistent with both the 1958 Convention of the Continental Shelf and the 1969 *North Sea Cases*. They reasoned that the exploitability provision of the 1958 Convention allowed jurisdiction throughout the entire shelf area, regardless of the distance from the coastline, and that the *North Sea Cases* sanctioned jurisdiction throughout the natural prolongation of the land territory.

Australia, whose continental margin extends beyond the 200-mile limit, maintained that the laws presently in force must not be adversely affected:

> The coastal state should exercise sovereign rights over the continental shelf up to the external limit of the continental margin . . . [A]ny diminution of the rights of the coastal state over the continental shelf would be inequitable . . . . [T]here was no reason . . . . why a coastal state should be deprived of an area over which it had *existing rights*.[89]

Another state whose continental shelf extends significantly beyond the 200-mile limit is Argentina. At the conference, Argentina

86. U.N. Doc. A/CONF. 62/C.2/SR. 22-27 (1974).
87. *Id.*
88. *See* text accompanying notes 111-121 *infra*.
89. U.N. Doc. A/CONF. 62/C. 2/SR. 17, at 146-47 (1974) (emphasis added).

indicated that a fixed distance (200-mile) criterion must not be the sole means of determining jurisdictional limits, since international law currently recognized that national sovereignty extended at least as far as the lower outer edge of the continental margin adjoining the abyssal plains.[90] The Argentinian representative stated, "[t]he territorial integrity of States, which was one of the basic principles of international law, could not be altered with impunity. Her delegation was not prepared to negotiate on its territorial integrity, and its continental shelf was part of its territory."[91]

Other States with wide shelves echoed this position, including the Union of Soviet Socialist Republics,[92] Norway,[93] Mexico,[94] the United Kingdom[95] and New Zealand.[96] The support was not limited to wide-shelf states, however. The representative of El Salvador, which has a narrow continental shelf, stated that: "there was no reason why that natural prolongation of its territory should end at any fixed distance, regardless of the nature of the seabed."[97] Burma's representative added "that the doctrine of the natural prolongation of the land territory into the sea had . . . attained the status of a basic principle of international maritime law."[98] Peru's representative commented that "no country had stronger claims than the coastal state over any part of its continental shelf, since the shelf constituted a natural and indivisible part of its national territory."[99]

B. The EEZ as a Jurisdictional Limitation

Those countries opposing the extension of jurisdiction over the continental shelf beyond the 200-mile EEZ based their objections on three separate grounds. One, the ICJ holding that the continental shelf was the natural prolongation of the nation's territory could not be relied upon since the ICJ had not been dealing with this issue of the outer limits of the continental shelf; two, the ICJ's interpretation of the word "adjacent" would preclude any seaward juris-

90. U.N. Doc. A/CONF. 62/C. 2/SR. 18, at 150 (1974).
91. *Id.*
92. U.N. Doc. A/Conf. 62/C. 2/SR. 20, at 160 (1974).
93. *Id.* at 164.
94. U.N. Doc. A/Conf. 62/C. 2/SR. 22, at 173 (1974).
95. U.N. Doc. A/Conf. 62/C. 2/SR. 25, at 200 (1974).
96. U.N. Doc. A/Conf. 62/C. 2/SR. 21, at 170 (1974).
97. *Id.* at 149.
98. *Id.* at 155.
99. U.N. Doc. A/CONF. 62/C. 2/SR. 16, at 145 (1974).

dictional extension of such magnitude; and three, extension beyond 200 miles would come largely at the expense of the common heritage fund.

1. *Questionable applicability of natural prolongation doctrine.* While some nations attacked the ISNT provision because it allowed coastal states to maintain jurisdiction beyond the 200-mile limit and detracted from the common heritage of mankind, others questioned whether nations really had a valid legal interest in that part of the margin.

The Jamaican delegate cautioned against interpreting the *North Sea Cases* as sanctioning coastal state jurisdiction throughout the natural prolongation of the continental shelf.[100] He pointed out that the ICJ had been addressing the issue of delimitation of the continental shelf between adjoining states, and not the seaward extent of its jurisdictional limits.[101] In closing, he warned that any sense of legitimacy for extended jurisdictional claims based on the Court's natural prolongation concept might be unsound.[102]

This restrictive interpretation of the Court's opinion is supported by a number of scholars, among them Professor Wolfgang Friedmann who wrote: "Nowhere does the Court's Judgment support indefinite prolongation of land territory into the sea."[103] Professor Louis Henkin echoed this interpretation by stating " 'natural prolongation' never gave any state proprietary rights."[104] Whether the concept of natural prolongation was meant solely as a method for delimitation or whether it may properly be applied to seaward jurisdictional limits is impossible to determine without further clarification by the Court.

2. *Limits to the adjacency concept.* Another part of the Court's opinion raises doubts as to whether the Court meant to sanction an interpretation which allows jurisdiction to extend as many as 200 or more miles. In the *North Sea Cases* the Court stated: "[I]t is evident that by no stretch of imagination can a point on the continental shelf situated say a hundred miles or even much less, from a given coast, be regarded as 'adjacent' to it, or to any

100. U.N. Doc. A/CONF. 62/C.2/SR. 20, at 167 (1974).
101. *Id.*
102. *Id.*
103. W.G. Friedmann, The Future of the Oceans 39-42 (1972).
104. Henkin, *A Reply to Mr. Finlay*, 64 Am. J. Int'l L. 62, 71 (1970).

coast at all, in the normal sense of adjacency."[105]

Although the term adjacency was applied to a set of circumstances unrelated to the outer limits of the shelf regions, it nonetheless raises some interesting questions. Professor Goldie suggests that the term adjacency is a multidimensional term, and that

> The distances which the Court mentioned might well be completely irrelevant in cases where the outer limits of the permissable shelf region are being delimited without the restraining presence of adjoining, let alone opposite states; . . . Adjacency in the North Sea context will tell us little that is directly relevant to the South East Pacific . . . Indeed, adjacency should not be invoked independently of its context.[106]

The Court recognized that adjacency has many possible meanings in stating that "terms such as 'near,' 'close to the shores,' 'off its coast,' 'opposite,' 'in front of the coast,' 'in the vicinity of,' 'neighboring the coast,' 'adjacent to,' 'contiguous,' etc . . . are capable of considerable fluidity of meaning."[107] Thus, any claim to extended rights based solely upon the adjacency criteria of Article 1 of the Continental Shelf Convention appears ripe for legal attack. Indeed, this very point was made by the delegate from Switzerland during the UNCLOS III meetings.[108]

3. *Extended jurisdiction at the expense of the common heritage fund.* Embodied in United Nations General Assembly Resolution 2749,[109] the notion behind the common heritage of mankind was that the resources of the ocean floor beyond national jurisdiction were to be used for the betterment of mankind.[110] The revenues collected from this area were to go toward aiding the underdeveloped nations of the world. Since the common heritage of mankind consisted only of those ocean resources beyond national jurisdiction, the viability of the concept depended upon where national jurisdictional limits were drawn.

Countries favoring the strict 200-mile limit argued that any jurisdictional expansion beyond the 200-mile limit would drastically reduce the anticipated revenues of the common heritage.[111] They

105. North Sea Continental Shelf Cases, *supra* note 11, para. 41.

106. Goldie, *A Lexicographical Controvery—The Word "Adjacent" in Article 1 of the Continental Shelf Convention*, 66 AM. J. INT'L L. 829, at 832-33 (1972).

107. North Sea Continental Shelf Cases, *supra* note 11, para. 41.

108. U.N. Doc. A/CONF. 62/C. 2/SR. 19, at 158 (1974).

109. Declaration on Sea Bed and Ocean Floor, *supra* note 14.

110. *Id.*

111. *See* text accompanying notes 113-116 *infra.*

claimed that by allowing states to maintain jurisdiction beyond the 200-mile limit, the common heritage fund would be rendered meaningless.[112] Speaking at Caracas, the delegate from Gambia stated that "if the concept of the continental shelf were to survive, it would be largely at the expense of the common heritage of mankind, and no one should then be surprised if the conference were to be dubbed a monumental hoax."[113] The delegate from Jamaica pointed out that if claims were allowed to the end of the continental margin only seven percent of the offshore resources would fall within the common heritage, raising serious doubts as to the economic viability of the fund.[114] The representative of Nepal, sponsor of the Nepal Proposal,[115] felt that creating a 200-mile EEZ itself dealt a death blow to the common heritage idea, since "the overwhelming proportion of ocean mineral wealth . . . is found within the EEZ."[116]

While the principle of the common heritage of mankind is given much lip service, few nations are willing to give up anything to support it. The attitude seems to be one of support in theory only. Some of the strongest proponents of the concept have themselves significantly undermined its potential funding base by endorsing preconference declarations which advocate a 200-mile EEZ.[117] Illustrative of this are many of the African nations who spoke strongly in favor of the 200-mile EEZ.[118] They concluded that limiting coastal state jurisdiction to 200 miles would preserve the common heritage fund.[119] However, the facts do not seem to support this rationale. Thirty-six percent of the world's ocean[120] and the overwhelming majority of its mineral wealth[121] fall within the EEZ.

It appears as if having decided upon that arbitrary mile limita-

112. *Id.*

113. U.N. Doc. A/CONF. 62/C. 2/SR. 20, at 160 (1974).

114. *Id.* at 167.

115. The Nepal Proposal would subject nations to a revenue-sharing formula on resources taken from within the EEZ which would provide the funding base for the Common Heritage Fund. *See* Memorandum by the Leader of the Delegation of Nepal relating to the Establishment of a Common Heritage Fund in the Interest of Mankind as a Whole but particularly in the Interest of the Developing Nations, U.N. Doc. A/CONF. 62/65 (1978).

116. *Id.* at 3.

117. *See* text accompanying notes 71-74 *supra.*

118. U.N. Doc. A/CONF. 62/C.2/SR., at 22-27 (1974).

119. *Id.*

120. Kronfol, *The Exclusive Economic Zone: A Critique of Contemporary Law of the Sea*, 9 J. MARITIME L. 461, 463 (1978).

121. Alexander & Hodgson, *supra* note 7, at 71.

tion, these nations have attempted to hold the line there. What they have failed to do is take a hard look at just what their earlier support for the 200-mile EEZ had done to that concept.

By endorsing the 200-mile zone, the developing nations supported an idea directly adverse to their interest in the common heritage fund. Any extension of national jurisdiction diminishes the common heritage fund, and it must necessarily be at the expense of the common heritage of mankind.

The attempt to halt seaward encroachment at 200 miles appears to be too little too late. During the Caracas debates few nations indicated a willingness to give up their resources for the common heritage of mankind. The time has come to reconsider the concept of the common heritage fund. If the idea is no longer viable, or if nations are unwilling to contribute to it from their resources, this should be admitted, and the concept should be abandoned. To verbally embrace the concept without providing any substantive support merely distorts the issues and debates before the conference.

IV. Possible Solutions and the Costs of Failure

A. The Irish Proposal

Between 1974 and 1978 few changes in the basic positions taken at Caracas occurred. Only minor modifications were made in the treaty provisions concerned with the continental shelf and the EEZ, and prospects for a consensus on this issue appeared to be fading.

Then, in 1978, the Irish delegation submitted what it hoped would be an acceptable compromise solution.[122] Accepted as part

122. Third United Nations Conference on the Law of the Sea. Reports of the Committees and Negotiating Groups on negotiations at the Seventh Session, May 19, 1978, NG. 6/1. Relevant portions of the Irish Proposal state:

> 1 The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.
>
> 2 The continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the seabed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor nor the subsoil thereof.
>
> 3 For the purpose of this Convention, the coastal State shall establish the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by either:
>
> (a) A line delineated in accordance with paragraph 4 by reference to the

of the draft treaty during the 1979 session,[123] and modified during the spring 1980 meeting,[124] the Irish proposal provided what many consider to be an acceptable compromise on the jurisdictional limitation issue.[125]

The new provisions provide a definition of the continental margin[126] and establish maximum limits for national jurisdiction.[127] In addition, they provide a method for delimiting the outer edge of the continental margin "by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least one per cent of the shortest distance from such point to the foot of the continental slope."[128] While the proposal does have its good points, it introduces too many measurement criteria and therefore should not be accepted without further revision and clarification.

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outermost fixed points at each of which the thickness of sedimentary rocks is at least 1% of the shortest distance from such point to the foot of the continental slope; or,

(b) A line delineated in accordance with paragraph 4 by reference to fixed points not more than 60 nautical miles from the foot of the continental slope. In the absence of evidence to the contrary, the foot of the continental slope shall be determined as the point of maximum change in the gradient at its base.

4 The coastal State shall delineate the seaward boundary of its Continental Shelf where that Shelf extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured by straight lines not exceeding 60 nautical miles in length, connecting fixed points, such points to be defined by coordinates of latitude and longitude.

123. Informal Composite Negotiating Text, (ICNT) Article 76, U.N. Doc. A/CONF. 62/WP. 10/Rev. 1 (1979), *reprinted in* 18 INT'L LEGAL MATS. 686, 723 (1979).

124. During the 1980 New York session, March 3 through April 4, the Irish Proposal was amended. Added to Article 76(3), the definition of the continental margin, were the words "It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof." U.N. DOC. A/CONF. 62/WP. 10/Rev. 2 (1980). *See* note 126 *infra*. Other changes were made, but they do not effect the provisions dealing with jurisdictional delimitation.

125. Oxman, *The Third United Nations Conference On the Law of the Sea: The Seventh Session (1978)*, 73 AM. J. INT'L L. 19, at 21-22 (1979).

126. *See* ICNT, *supra* notes 123-24, art. 76(3).

3 The continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the sea-bed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof.

127. *Id.* art. 76(5).

128. *Id.* art. 76(4)(a)(i) and (ii).

4 (a) For purposes of this Convention, the coastal State shall establish the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by either:

(i) A line delineated in accordance with paragraph 6 by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope; or,

(ii) A line delineated in accordance with paragraph 6 by reference to fixed points not more than 60 nautical miles from the foot of the continental slope.

The most notable accomplishment of the Irish Proposal is that it establishes a much needed definition of the legal character of the continental margin, a definition which had been notably absent in the earlier texts. Because Article 76(1) allows for coastal state jurisdiction "to the outer edge of the continental margin" such a definition was necessary to avoid possible confusion based upon differing definitions of the margin.

The major weakness of the proposal as adopted is that it fails to provide a precise method by which to delimit the boundary lines of the continental margin beyond the 200-mile limit.[129] Instead of clarifying the existing delimitation problems by providing a precise means for determining jurisdictional boundaries, the provision merely adds to the confusion. By tying boundary lines to the thickness of sedimentary rocks[130] the Conference has fallen prey to the same culprit that plagued the 1958 Convention — lack of certainty. From a practical perspective, Professor Hedberg points out that irregularities in sediment thickness[131] and meager sediment thickness data[132] combine to make implementation difficult and precise delimitation unlikely. He concludes that " . . . perhaps the greatest defect of the Irish . . . formula as regards practical applicability, is its compounding of two uncertainties in arriving at a boundary line: (i) the uncertainty of correct total sediment thickness determination and (ii) the uncertainty of precise location of the base of the slope."[133] In addition to tying boundary line to sediment thickness, the proposal also establishes a maximum limit for seaward jurisdiction of either 350 miles or 100 miles beyond the 2,500 meter isobath.[134]

Thus, under the Irish Proposal changes adopted by the Conference jurisdiction may extend to either 1) the 200-mile limit, or 2) beyond 200 miles to the outer edge of the continental margin, that location being determined by sediment thickness or 3) to a maximum distance of 350 miles or 4) 100 miles beyond the 2,500 meter isobath. By providing as many measurement criteria as it does, the ICNT fails to achieve certainty in jurisdictional delimitation. Commenting on the changes, Professor Hedberg wrote "the Law of the Sea Conference, in its efforts to satisfy everyone, is a compli-

129. *Id.*
130. *Id.*
131. Hedberg, *Ocean Floor Boundaries*, 204 Science No. 4389, at 138, April 13, 1979.
132. *Id.*
133. *Id.* at 139.
134. *Supra* note 127.

cated hodgepodge and travesty to which I believe the United States should never agree, because it is lacking in sound overall guiding principle, impracticable in application, and unfair to many nations, including the United States."[135]

While these provisions may satisfy those nations who want a fixed 200-mile limit by giving some valuable shelf area to the common heritage of mankind, and the wide margin nations, by allowing jurisdiction well beyond 200 miles, they do not resolve the basic delimitation problem. Therefore, despite the recent statements by the United States Delegation that "Committee II . . . virtually completed its work,"[136] much remains to be done. Unless a single, clear guideline for delimitation is inserted, it is only a matter of time before jurisdictional disputes develop.

B. The Cost of Failure

The question of what happens if the Conference either fails to produce a treaty, or if a treaty is produced but not ratified takes on increased signficance with each passing year. Commenting on the Conference's chances for success, United States Ambassador Elliot Richardson admitted: "[w]e have to recognize the possibility, indeed the probability, that we won't succeed."[137] If Ambassador Richardson's comments prove correct, what will be the legal status of the continental shelf, and what jurisdictional limits will prevail?

Without a treaty there will be five areas of international law to look to for guidance. They are:

1. The 1958 Convention on the Continental Shelf;
2. The *North Sea Continental Shelf Cases* Opinion;
3. The Informal Composite Negotiating Text (ICNT);
4. National Legislation and Practice;
5. Customary International Law;

As discussed above, both the 1958 Convention on the Continental Shelf and the *North Sea Cases* are inadequate as controlling law since they are subject to numerous conflicting interpretations.[138]

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135. Hedberg, *Evaluation of U.S. Mexico Draft Treaty on Boundaries in the Gulf of Mexico*, 14 MARINE TECH. SOC. J. 32 (1980).

136. United States Delegation Report, Ninth Session of the Third United Nation Conference on the Law of the Sea, February 27-April 4, 1980, New York, at 31.

137. *United States Ambassador Pessimistic About Agreement on Seas*, Washington Post, Apr. 14, 1978, p. 19 col. 1.

138. *See* text accompanying notes 89-113 *supra*.

As for the ICNT, obviously if it doesn't come into force it will have no binding effect on the practice of nations. There is little doubt that it will remain useful as a reference guide for drafting ocean legislation or bilateral treaties. However, its value in determining the legal status of the margin would be restricted to its persuasiveness as a document which once gave a sense of international opinion.

What is left then is state practice and customary international law. Customary international law develops through a variety of factors,[139] the most important of which has traditionally been the practice of nations.[140] In examining state practice over the past fifteen years a pattern of an increasing number of extended jurisdictional claims is discernible. Between 1967 and 1973, eighty-one nations made 230 such claims.[141] Furthermore, as of January 1, 1979, more than sixty nations asserted jurisdiction to 200 miles.[142] One of the gauges for measuring the development of customary international law is the response to such assertions.[143] Currently, there appears to be no significant opposition to jurisdictional increases up to 200 miles. When this lack of opposition is coupled with the number of states that have adopted such practices, it is clear that the 200-mile limit is *de facto* part of modern customary international law.[144] If this thesis is accepted, what will be the status of the margin beyond the 200-mile limit? It appears likely that those nations with wide continental margins will continue to assert jurisdictional rights beyond the 200-mile limit. Those nations claiming these rights will base their claims on both the 1958 Convention and the ICJ opinion in the *North Sea Cases*. While nations opposing this may well emit loud cries of protest, it is unlikely that they will yield any results. Unless some treaty is adopted, or the ICJ clarifies it's *North Sea Cases* opinion, such jurisdictional assertions are likely to become part of accepted international practice.

139. On the development of customary international law, *see* SØRENSEN, MANUAL OF PUBLIC INTERNATIONAL LAW 128-43 (1968).

140. Alexander, Cameron and Nixon, *The Costs of Failure at the Third Law of the Sea Conference*, 9 J. MARITIME L. 13, at 15 (1977).

141. Swing, *supra* note 3, at 531.

142. Lynch, *supra* note 45, at 34.

143. Laylin, *Emerging Customary Law of the Sea*, 10 INT'L LAW 67 (1976).

144. *Id.* at 672. It should be noted that not all of the 200 mile claims were for all rights to the living and nonliving resources of the seabed. Some of the claims were for fishery conservation zones or exclusive fishery zones, while others involved claims over the continental shelf. Therefore, it is not clear whether the customary 200-mile zone would include all the rights of the exclusive economic zone.

CONCLUSION

When UNCLOS III began meeting seven years ago one of the major problems facing the Conference was the establishment of limits to national jurisdiction over the continental margin. With nearly one third of the world's petroleum resources located beneath it,[145] control of the margin remains an important issue. Although it has been addressed by the Conference, to date this problem has not been adequately resolved.

After agreeing on a 200-mile EEZ during the first substantive meetings in 1974,[146] the Conferees have been unable to develop clear delimitation criteria for those areas of the margin which extend beyond 200 miles. Instead, they have adopted the provisions known as the Irish Proposal,[147] provisions which in the final analysis do little to clarify the issue. What the Irish Proposal does is establish three different limits to national jurisdiction. Aside from the 200-mile limit provided for in Article 57, the Irish Proposal limits jurisdiction to either 350 miles,[148] 100 miles beyond the 2,500 meter isobath,[149] or the "outer edge of the continental margin."[150] Thus, the Conferees at UNCLOS III have succeeded in replacing the nebulous delimitation criteria developed under both the 1958 Convention on the Continental Shelf and the 1969 *North Sea Cases* with a different set of vague and impractical criteria. While these provisions have provided some clarity, as with the definition of the continental margin,[151] they still fail to provide the needed certainty in delimitation. What was needed seven years ago and what is needed today is a single precise method of delimitation rooted in data subject to practical implementation.

With the lion's share of the valuable ocean floor already subject to national control, it is foolish to risk possible conflicts and confrontations when clarity could avoid them. With or without a treaty it appears as if a 200-mile EEZ will remain with us as part of customary international law. The only issue is how far beyond 200 miles national seabed jurisdiction will extend. If the Irish Proposal

145. *Supra* note 4.
146. *Supra* note 78.
147. *Supra* note 121.
148. *Supra* note 127.
149. *Id.*
150. *Supra* notes 121 & 128.
151. *Supra* note 126.

is accepted, the Conferees will have failed in adequately resolving this problem.

Michael D. Morin

APPENDIX I

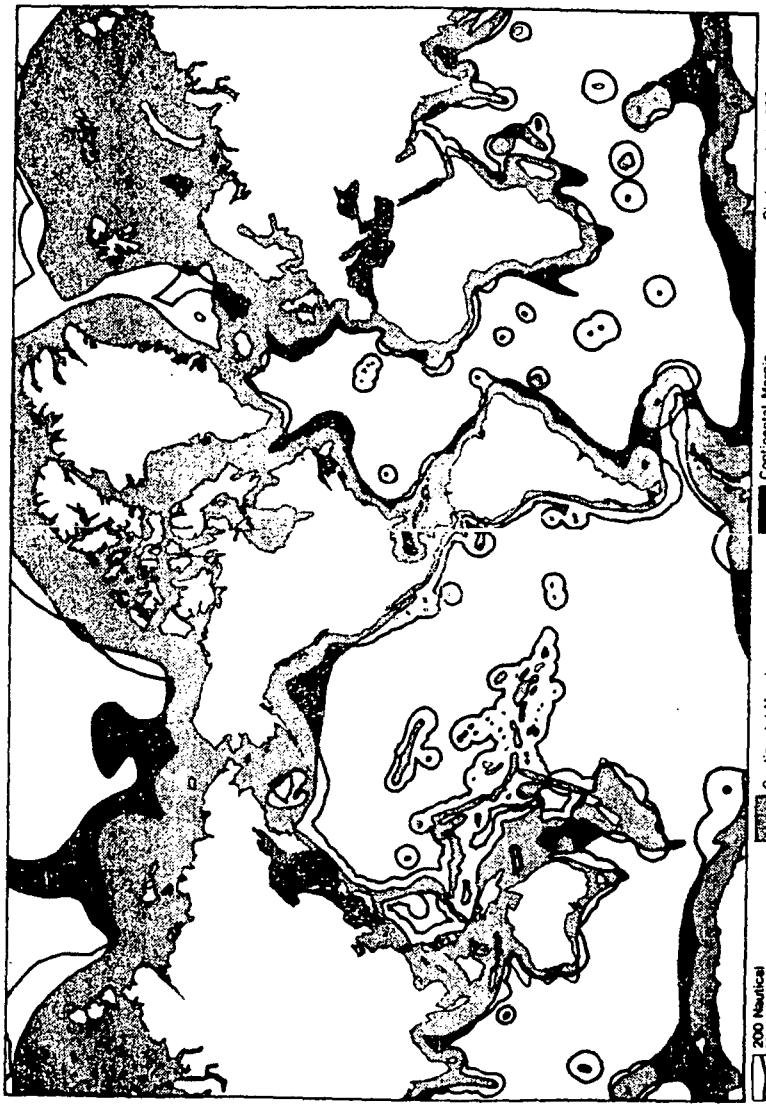

FIG. 6. Continental margins of the world in relation to the 200-nautical-mile exclusive economic zones.

SOURCE: *Office of the Geographer, U.S. Department of State*