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An Evaluation of United States Oceans Policy *

Robert B. Krueger **

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** A. B. Univ. Kansas, 1949; J. D. Univ. Michigan, 1952, Member of the Bar of the State of California; Chairman, California Advisory Commission on Marine and Coastal Resources; Member, U.S. Advisory Committee on the Law of the Sea.

I. Introduction

In historical perspective the United States clearly appears as a leader, albeit a somiethat inconsistent one, of recent world oceans policy. The 1945 Truman Proclamation on the Continental Shelf[1] was a landmark proclamation in asserting and establishing a right of appropriation to seabed resources beyond a nation's territorial

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[1] The Proclamation expressed the view that "the exercise of jurisdiction over the natural resources of the subsoil and sea bed of the continental shelf by the contiguous nation is reasonable and just" and proclaimed

> "...the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States [and] subject to its jurisdiction and control." Proclamation No. 2667, 3 C.F.R. 67, at p. 68 (1943-1948 Comp.).

At the same time President Truman issued the Continental Shelf Proclamation he also issued the proclamation entitled Policy of the United States with Respect to Coastal Fisheries and Certain Areas of the High Seas of which the principal premises were:

> "Fishery resources have a special importance to coastal communities as a source of livelihood and to the nation as a food and industrial resource;
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> "The progressive development of new methods and techniques contributes to intensified fishing over wide sea areas and in certain cases seriously threatens fisheries with depletion; [and]
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> "There is an urgent need to protect coastal fishery resources from destructive exploitation, having due regard to conditions peculiar to each region and situation and to the special rights and equities of the coastal State and of any other State which may have established a legitimate interest therein"

Proclamation No. 2668, 10 Fed. Reg. 12,304, 3 C.F.R., 1943-1948 Comp., pp. 67, 68 (1945)

The Proclamation then asserted that:

> "[T]he United States regards it as proper to establish conservation zones in those areas of the high seas contiguous to the coasts of the United States wherein fishing activities have been or in the future may be developed and maintained on a substantial scale.
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> "The right of any State to establish conservation zones off its shores in accordance with the above principles is conceded, provided that corresponding recognition is given to any fishing interests of nationals of the United States which may exist in such areas. The character as high seas of the areas in which such conservation zones are established and the right to their free and unimpeded navigation are in no way thus affected."

Ibid. See contemporaneous Executive Order providing for the Establishment

sea [2] and served as the precedent for the many subsequent national assertions of jurisdiction, as well as the concept of the 1958 Geneva Convention on the Continental Shelf.[3] The lasting impact of this imaginative, and then unilateral, national act was reflected in the 1969 decision in the *North Sea Continental Shelf* case [4] before the International Court of Justice in which it was noted that the Proclamation served as "the starting point of the positive law on the subject." [5] So, too, the United States by its enactment of the 1953 *Outer Continental Shelf Lands Act* [6] authorizing the development in minerals underlying "all submerged lands ... of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control" [7] and its willingness to apply the *Act* to remote sections of the continental shelf, even slope, provided an example of exploitive quest that was followed with alacrity elsewhere.[8] It then appears that its own introspection of the conse-

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of Fishery Conservation Zones No. 9634, Sept. 28, 1945, 10 Fed. Reg. 12,305; 3 C.F.R., 1943-1948 Comp., p. 437.

While the proposed conservation zones have never been created, the proclamation nonetheless stands as clear evidence of a strong history of U.S. interest in the protection of domestic coastal fisheries from foreign fleets. For a current and excellent examination of the development of U.S. policy in this area see Allen, *Law, Fish and Policy,* (1971), 5 Int'l Lawyer, at p. 621, 630. See also J. Bingham, *Report on the International Law of the Pacific Coastal Fisheries,* p. 5 (1938); Loring, *infra,* n. 91, at pp. 397 *et seq.* The Truman Fisheries Proclamation provided clear precedent for the concept of the succeeding claims of Latin American nations. *Id.,* at p. 399. See Lecture by Ambassador Alfonso Arias-Schreiber of Peru to National Defense College of Canada on "Foundations of the Marine Sovereignty of Peru," pp. 4 *et seq.* (Lima, April 9, 1970); *supra,* n. 91.

[2] See Krueger, *The Background of the Doctrine of the Continental Shelf and the Outer Continental Shelf Lands Act,* (1970), 10 Nat. Res. J. 442, at p. 464.

[3] *Id.,* at p. 471.

[4] [1969] I.C.J. 3.

[5] [1969] I.C.J. 3, at p. 33. See Krueger, *supra,* n. 2, at pp. 481, *et seq.*

[6] 43 U.S.C. §§ 1331-43 (1964).

[7] 43 U.S.C. § 1332(a) (1964). See Krueger, *supra,* note 2, at pp. 466, *et seq.*

[8] Commencing in 1961 the Department of the Interior has issued leases under the *Outer Continental Shelf Lands Act* covering areas 40 miles offshore and in waters as deep as 4,000 feet and 26 miles offshore and in waters from 1,200 to 1,800 feet in depth. In addition the Secretaries of the Interior and the Army asserted jurisdiction under the Act over an area approximately 120 miles off Southern California which is separated from the coastline by waters as deep as 6,000 feet. Lastly, the Secretary of the Interior has issued exploratory permits under the Act to conduct core drilling in the Gulf of Mexico in waters as deep as 3,500 feet and on the Atlantic seaboard for waters as deep as 5,000 feet and lying as far as 250-300 miles from the coast. Krueger, *supra,* n. 2, at pp. 478-479.

quences of this type of global activity led to a reconsideration of its own and world oceans policy.

President Johnson in 1966 made his much quoted statement that:

> under no circumstances must we ever allow the prospects of rich harvest and mineral wealth to create a new form of colonial competition among the maritime nations. We must be careful to avoid a race to grab and to hold the lands under the high seas. We must ensure that the deep seas and the ocean bottoms are, and remain, the legacy of all human beings.[9]

The same year the *Marine Resources and Engineering Development Act* was adopted which required the President with the advice and assistance of the newly created Council on Marine Resources and Engineering Development to undertake a broad scale review of the marine science activities of the United States, including the duty to:

> undertake a comprehensive study... of the legal problems arising out of the management, use, development, recovery, and control of the resources of the marine environment...[10]

The *Act* also created a Commission on Marine Science, Engineering and Resources ("Marine Sciences Commission") which was required to:

> make a comprehensive investigation and study of all aspects of marine science in order to recommend an overall plan for an adequate national oceanographic program that will meet the present and future national needs.[11]

It was not, however, the United States but the smaller and developing nations led by Malta that provided the impetus for the current reexamination of global policy regarding the oceans, indeed the entire marine environment. In 1967 the Mission of Malta to the United Nations proposed a resolution which would call for a conference for the drafting of a treaty which would reserve the seabed and ocean floor "beyond limits of present national jurisdiction" as a "common heritage of mankind" and provide for their "economic exploitation... with the aim of safeguarding the interests of mankind [and using] the net financial benefits derived [therefrom] to promote the development of poor countries".[12] This highly controversial proposal found strong support from a number of the smaller and lesser developed countries in the United

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[9] Comments made by the President at the commissioning of the new research ship, The Oceanographer, on July 13, 1966.

[10] 33 U.S.C. § 1103 (1966).

[11] 33 U.S.C. § 1104(b) (1966).

[12] U.N. Doc. A/6695, dated August 18, 1967.

Nations[13] and led to a resolution of the 1967 United Nations General Assembly creating an *Ad Hoc* Committee to Study Peaceful Uses of the Sea-Bed and Ocean Floor Beyond Limits of National Jurisdiction.[14] This Committee, on which both the Soviet Union and the United States were represented, was given a broad mandate to study the entire international organization with respect to the seas.[15] During the course of its work in 1968, the United States expressed the view that there should be "an internationally agreed precise boundary for the deep ocean floor" and that no nation should "claim or exercise sovereignty" over it.[16]

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[13] It also found a substantial amount of support in the United States, notable in resolution proposed by Senator Pell that included its basic principles. S. Res. 172, 186, 90th Cong. 1st Sess. (1967). *See* Senate Comm. on For. Rel. Report on Governing the Use of Ocean Space, 90th Cong., 1st Sess. (1967) pp. 1-7.

[14] 22 U.N. GAOR at U.N. Doc. A/2340 (1967).

[15] The *Ad Hoc* Committee was requested to cooperate with the Secretary-General in the preparation of a study with the twenty-third (1968) session of the U.N. General Assembly which would include:

"(1) a survey of the past and present activities of the United Nations, the specialized agencies, the IAEA [International Atomic Energy Agency] and other intergovernmental bodies with regard to the sea-bed and the ocean floor, and of existing international agreements concerning these areas;

(2) an account of the scientific, technical, economic, legal and other aspects of this item;

(3) an indication regarding practical means to promote international co-operation in the exploration, conservation and use of the sea-bed and the ocean floor, and the subsoil thereof, as contemplated in the title of the item, and of their resources, having regard to the views expressed and the suggestions put forward by Member States...." *Id.*

[16] U.N. Doc. A/AC.135/25 (June 28, 1968); U.N. Doc. A/AC.135/L.1, Annex III, at p. 4 (July 16, 1968). The proposal also stated that there should be established "as soon as practicable, internationally agreed arrangements governing the exploitation of resources of the deep ocean floor" which shall included provision for:

(a) the orderly development of resources of the deep ocean floor in a manner reflecting the interest of the international community in the development of these resources;

(b) conditions conducive to the making of investments necessary for the exploration and exploitation of resources of the deep ocean floor;

(c) dedication as feasible and practicable of a portion of the value of the resources recovered from the deep ocean floor to international community purposes; and

(d) accommodation among the commercial and other uses of the deep ocean floor and marine environment."

Id., at para. 2.

In December of 1968 the United Nations General Assembly created a permanent 42 member Committee with essentially the same framework of responsibility.[17] During 1969 the Committee considered a number of broad economic, technical and legal issues regarding the exploration, exploitation and use of the seabeds, including the type of administrative machinery that should be established for the development of natural resources in areas beyond limits of national jurisdiction and the extent of those limits.[18] The United States indicated that it was in favor of an international régime providing for the administered development of deep ocean resources and international emphasis on a number of goals directed toward greater and more beneficial uses of the marine environment.[19]

In 1969 the Marine Sciences Commission reported to the President and Congress in a report entitled *Our Nation and the Sea*[20]

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[17] The Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction was instructed:

"(a) To study the elaboration of the legal principles and norms which would promote international co-operation in the exploration and use of the sea-bed and the ocean floor and the subsoil thereof beyond the limits of national jurisdiction and to ensure the exploitation of their resources for the benefit of mankind, and the economic and other requirements which such a regime should satisfy in order to meet the interests of humanity as a whole;

(b) To study the ways and means of promoting the exploitation and use of the resources of this area, and of international co-operation to that end, taking into account the foreseeable development of technology and the economic implications of such exploitation and bearing in mind the fact that such exploitation should benefit mankind as a whole;

(c) To review the studies carried out in the field of exploration and research in this area and aimed at intensifying international co-operation and stimulating the exchange and the widest possible dissemination of scientific knowledge on the subject; [and]

(d) To examine proposed measures of co-operation to be adopted by the international community in order to prevent the marine pollution which may result from the exploration and exploitation of the resources of this area." 23 U.N. GAOR at U.N. Doc. A/2467 (1968).

[18] See U.N. Doc. A/AC.138/1 (Feb. 5, 1969), through U.N. Doc. A/AC.138/20 (Oct. 23, 1969), *passim.*

[19] Ambassador Phillips, U.S. Ambassador to the United Nations, stated on October 31, 1969, that "[b]ecause mere registry of claim would probably ouly contribute to a confused race, it is our view that an international regime should include an international registry of claims governed by appropriate procedures." See Press Release USUN-141(69).

[20] Commission on Marine Science, Engineering and Resources, *Our Nation and The Sea: A Plan for National Action* (1969) (hereinafter cited as "Our Nation and The Sea").

in which it was recommended that the United States "take the initiative to secure international agreement on a redefinition of the 'continental shelf' for purposes of the Convention on the Continental Shelf" and that the redefined continental shelf be fixed at a depth of 200 meters or 50 miles from the coastline, whichever is further.[21] Beyond that distance the Commission recommended an "intermediate zone" extending from the redefined continental shelf to the 2500 meter isobath or 100 miles from the coastline, whichever is further. In this zone the coastal states would administer the resources, but proceeds from it would be paid to the "International Fund" to be used for the benefit of the poor and developing nations of the world. The governing board of the International Fund would be determined by the U.N. General Assembly. To administer areas beyond this buffer zone there would be the "International Registry Authority", similar to the World Bank in organization, which would register the claims of various nations for mineral resources and pay the proceeds to the International Fund.[22]

This proposal did not meet with immediate acceptance domestically,[23] however, and the United States' position in international discussions continued to be quite conservative, as was that of the Soviet Union. As a result neither was able to effectively guide deliberations in the United Nations on this and related subjects. In December of 1969, following extensive and heated debates in the Sea-Bed Committee and the U.N. First Committee, the United Nations General Assembly adopted a very important resolution over the active opposition of the United States and the Soviet Union and their usual supporting blocs. By a 65-12 vote with 30 abstentions the General Assembly passed a resolution requesting the Secretary General to determine "the desirability of convening at an early date a conference on the law of the sea to review the regimes of the high seas, the continental shelf, the territorial sea and contiguous zone, fishing and conservation of the living resources of the high seas, particularly in order to arrive at a clear, precise and internationally accepted definition of the sea-bed and ocean floor which lies beyond national jurisdiction, in the light of the international regime to be

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[21] Our Nation and The Sea, at p. 145.

[22] *Id.*, at p. 147.

[23] *See* Report of National Petroleum Council, Petroleum Resources under the Ocean Floor 72 (1969); Joint Report of Sects. of Nat. Res. Law, Int'l and Comp. Law and Standing Comm. on Peace and Law Through U.N., app. ABA at p. 4 (Aug. 7, 1968).

established for that area".[24] This resolution is quite significant in that there had been a considerable effort by the United States and others of the developed powers to avoid a broad scale conference of this type and to endeavor to reach international consensus by uniform unilateral declarations of policy.[25] By a vote of 62-28 with 28 abstentions the General Assembly also passed a resolution providing that nations "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".[25a] This resolution, which was of little legal effect,[26] nevertheless was quite revealing of the political antipathy of the developing nations toward the great powers on the subject of marine resources. This was also vividly illustrated by the passage of a further resolution adopted by acclamation in the General Assembly referring a "Draft Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and the Sub-soil Thereof",[27] which had been prepared and supported by the Soviet Union and the United States, back to the Geneva Conference of the Committee on Disarmament because of objections voiced by a number of the smaller nations during debate.[28] The General Assembly also passed without objection by the United States or the Soviet Union resolutions requesting the Sea-Bed Committee to expedite its work and prepare a draft resolution stating the principles which it believes should govern the peaceful uses of the seabed[29] and a resolution requesting the Secretary General to prepare a study on various types of interna-

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[24] U.N. GAOR at U.N. Doc. A/2574A (1969). The original version of the resolution was introduced by Malta and called for the Secretary-General to determine the views of member states on the desirability of a conference "for the purpose of arriving at a clear, precise and internationally acceptable definition" of the area beyond limits of national jurisdiction (the "continental shelf") and the "prospective establishment of an equitable international regime" for such area. U.N. Doc. A/C, L 473 (Oct. 31, 1969), Rev. 2 (Dec. 2, 1969). See Krueger *supra*, n. 2 at p. 446.

[25] *See* Sea-Bed Committee Press Release USUN-36(69) (March 28, 1969) to USUN-183(69) (Dec. 2, 1969).

[25a] 24 U.N. GAOR at U.N. Doc. A2574D (1969).

[26] Resolutions of the U.N. General Assembly do not have a formal binding effect upon member states. Articles 10 through 17 of the United Nations' Charter which sets forth powers of the General Assembly provides merely that that body may "discuss", "consider" and "recommend".

[27] Press Release USUN-142(69) (Nov. 3, 1969).

[28] 24 U.N. GAOR at U.N. Doc. A/7902 (1969) adopted by acclamation.

[29] 24 U.N. GAOR at U.N. Doc. A/2574B (1969).

tional machinery for the exploration and exploitation of sea-bed resources.[30]

In 1970 there were a number of significant developments in this area, most of which reflected a recognition by the developed countries that future international deliberations on basic oceans issues were unavoidable and even desirable. Many, too, evidenced the desire of the United States to assume leadership and establish the initiative in future discussions.

The U.N. Seabeds Committee met in New York in March where the United States proposed a relatively comprehensive set of principles [31] and indicated a willingness to attend a future law of the sea conference or conferences if the issues were "treated in manage-

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[30] 24 U.N. GAOR at U.N. Doc. A/2574C (1969).

[31] Press Release USUN-27(70) (Rev. 1). The objectives stated were as follows:

"1. To encourage exploration and exploitation of seabed resources.

2. To assure that all interested States will have access, without discrimination, to the seabed for the purpose of exploring and exploiting mineral resources.

3. To encourage scientific research and the dissemination of scientific and technologic information related to seabed resources.

4. To encourage the development of services, such as aids to navigation, maps and charts, weather information, and rescue capability.

5. To provide procedures for the assignment of rights to minerals or groups of minerals in specific areas under terms that protect the integrity of investments in seabed resource development, that encourage economic efficiency in the exploration and exploitation of seabed resources, that prevent a race for claims, and that discourage operators from seeking to hold large areas for purely speculative purposes.

6. To provide for a reasonable return on risk investment.

7. To provide revenue to benefit international community purposes, taking special account of the needs of the developing countries, and to meet the operating expenses of the international body established to administer its provisions.

8. To assure that exploration and exploitation of seabed mineral resources will be carried out in a manner that will protect human life, prevent conflicts between users of the seabed, safeguard other uses of the ocean environment against undue interference, avoid irreparable damage to the environment and its resources, and promote the use of sound conservation practices.

9. To provide terms and procedures governing liability for damage resulting from exploration and exploitation of seabed minerals so that damage will be adequately repaired or compensated.

10. To provide for the stability of rules, and yet for the flexibility to

able packages".[32] The following month Canada introduced in its House of Commons the *Arctic Waters Pollution Prevention Act* (creating a Pollution Control Zone extending 100 nautical miles from the coastline and to all adjacent waters located above its continental shelf)[33] and a companion bill extending Canada's territorial sea to 12 miles.[34] Within such a zone, Canada asserted the right to regulate this discharge of substances and to control shipping.[35]

The Canadian proposal was immediately challenged by the U.S. Department of State as constituting "unilateral extensions of jurisdictions on the high seas [which] the United States can [not] accept".[36] Notwithstanding, the Canadian Parliament promptly en-

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introduce modifications over time responsive to new knowledge and new developments.

11. To provide effective procedures for the settlement of disputes.
12. In the overall, to establish an international regime so plainly viable that States will in fact ratify the treaties establishing it." *Id.*, at pp. 3-5.

[32] U.S. Dept. of State Press Release No. 49 (Feb. 18, 1970); U.S. Dept. of State Press Release USUN-81(70) (June 12, 1970) ("procedures for the resolution of these issues should be structured so as to insure that each issue receives appropriate attention").

[33] *Arctic Waters Pollution Prevention Act* Bill C-202 Sect. 3, (1) and (2). It was passed by the House of Commons on April 22, 1970. House Commons Debates, Apr. 22, 1970, 6170-6172. *Id.*, at Sect. 4. The *Act* has been printed in (1970), 9 Int'l L. Materials 543.

[34] Bill C-203, an *Act to Amend the Territorial Sea and Fishing Zones Act*, *ibid.*, at p. 553 (1970).

[35] *Arctic Waters Pollution Prevention Act*, n. 33 *supra*, at Sect. 4.

[36] U.S. Dept. State Release No. 121 (Apr. 15, 1970), which gave as a reason for the objection the following:

> "We are concerned that this action by Canada, if not opposed by us, would be taken as precedent in other parts of the world for other unilateral infringements of the freedom of the seas. If Canada had the right to claim and exercise exclusive pollution and resources jurisdiction on the high seas, other countries could assert the right to exercise jurisdiction for other purposes, some reasonable and some not, but all equally invalid according to international law. Merchant shipping would be severely restricted, and naval mobility would be seriously jeopardized.
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> The potential for serious international dispute and conflict is obvious."

Actually, as was pointed out in the Canadian reply to the U.S. Government, its position is not inconsistent with the development of international solutions in this area:

> "It is well known that Canada takes second place to no nation in pressing for multilateral solutions to problems of international law, and

acted these measures into law. The very imaginative Canadian action proved to have a large impact on subsequent international deliberations by focusing attention on, first, the critical interest of the coastal state in controlling offshore pollution, second, the continuing utility of the specialized contiguous zone as a means of

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that Canada has repeatedly and consistently shown its good faith by its continuous efforts to produce agreed rules of law. The Canadian Government is, however, determined to fulfil its fundamental responsibilities to the Canadian people and to the international community for the protection of Canada's offshore marine environment and its living resources, and the proposed legislation is directed to these ends.

The Canadian Government has long been concerned about the inadequacies of international law in failing to give the necessary protection to the marine environment and to ensure the conservation of fisheries resources. The proposed anti-pollution legislation is based on the overriding right of self-defence of coastal states to protect themselves against grave threats to their environment. Traditional principles of international law concerning pollution of the sea are based in the main on ensuring freedom of navigation to shipping states, which are now engaged in the large scale carriage of oil and other potential pollutants. Such traditional concepts are of little or no relevance anywhere in the world if they can be cited as precluding action by a coastal state to protect this environment. Such concepts are particularly irrelevant, however, to an area having the unique characteristics of the Arctic, where there is an intimate relationship between the sea, the ice and the land, and where the permanent defilement of the environment could occur and result in the destruction of whole species. It is idle, more-ower, to talk of freedom of the high seas with respect to an area, large parts of which are covered with ice throughout the year, other parts of which are covered with ice most of each year, and where the local inhabitants use the frozen sea as an extension of the land to travel over it by dogsled and snowmobile far more than they can use it as water. While the Canadian Government is determined to open up the Northwest Passage to safe navigation, it cannot accept the suggestion that the Northwest Passage constitutes high seas.

In these circumstances the Canadian Government is not prepared to await the gradual development of international law, either by other states through their practice nor through the possible development of rules of law through multilateral treaties. The Canadian Government has repeatedly made clear that it is fully prepared to participate actively in multilateral action aimed at producing agreed safety and anti-pollution standards and protection of the living resources of the sea but is not prepared to abdicate in the meantime its own primary responsibilities concerning these questions."

Summary of Canadian note of April 16, tabled by the Secretary of State for External Affairs in the House, April 17, (1970), 9 Int'l L. Materials 607, at pp. 610-611; see also Prime Minister Trudeau's remarks following the introduction of the legislation on April 8, 1970, *id.*, at pp. 610-613.

fulfilling and serving both national and international purposes, third, the potential inhibition that expanded territorial seas and contiguous zones could create on free transit through areas now regarded as high seas or international straits and, fourth, the importance of nationalism as a determinant of international policy.[37]

The reason for the very strong reaction on the part of the United States to the Canadian offshore proposals became clear when, on May 23, 1970, President Nixon announced a new United States oceans policy, in which he proposed a treaty to limit existing rights of coastal states in their continental shelves to areas lying under depths of 200 meters and establish international régimes for the areas beyond. The Nixon proposal stated in part:

> The issue arises now — and with urgency — because nations have grown increasingly conscious of the wealth to be exploited from the seabeds and throughout the waters above, and because they are also becoming apprehensive about the ecological hazards of unregulated use of the oceans and seabeds. The stark fact is that the law of the sea is inadequate to meet the needs of modern technology and the concerns of the international community. If it is not modernised multilaterally, unilateral action and international conflict are inevitable.
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> This is the time, then, for all nations to set about resolving the basic issue of the future regime for the oceans — and to resolve it in a way that redounds to the general benefit in the era of intensive exploitation that lies ahead. The United States as a major maritime power and a leader in ocean technology has a special responsibility to move this effort forward.
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> Therefore, I am today proposing that all nations adopt as soon as possible a treaty under which they would renounce all national claims over the natural resources of the seabed beyond the point where the high seas reach a depth of 200 meters (218.8 yards), and would agree to regard these resources as the common heritage of mankind.
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> The treaty should establish an international regime for the exploitation of seabed resources beyond this limit. The regime should provide for

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[37] See *infra*, at n. 105 *et seq.* Some have not viewed the Canadian position in as favorable a light. In Ratiner, *United States Oceans Policy: An Analysis*, (1971), 2 Jour. of Maritime Law and Commerce 225, at p. 234 the Canadian action was characterized as the "staking out [of] bargaining positions." In Bilder, *The Canadian Arctic Waters Pollution Prevention Act: New Stresses on the Law of the Sea*, (1970), 69 Mich. L. Rev. 1, at p. 30, Canada's justification of its action under principles of "self defense" was characterized as "particularly troublesome and capable of introducing new uncertainties into this already muddy area of international law." This is another way of saying, "better an uncertain and unworkable rule of international law than a workable national solution." The merit of the Canadian position has been increasingly evidenced by the type of criticism that it has drawn. See J. Beesley, *Rights and Responsibilities of Arctic Coastal States: The Canadian View*, (1971) 3 Journ. Maritime Law and Commerce 1.

the collection of substantial mineral royalties to be used for international community purposes, particularly economic assistance to developing countries. It should also establish general rules to prevent unreasonable interference with other uses of the ocean, to protect the ocean from pollution, to assure the integrity of the investment necessary for such exploitation and to provide for peaceful and compulsory settlement of disputes.

I propose two types of machinery for authorizing exploitation of seabed resources beyond a depth of 200 meters.

First, I propose that coastal nations act as trustees for the international community in an international trusteeship zone consisting of the continental margins beyond a depth of 200 meters off their coasts. In return, each coastal state would receive a share of the international revenues from the zone in which it acts as trustee and shall impose additional taxes if these were deemed desirable.

As a second step, agreed international machinery would authorize and regulate exploration and use of seabed resources beyond the continental margins.

The United States will introduce specific proposals at the next meeting of the United Nations Seabeds Committee to carry out these objectives.

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It is equally important to assure unfettered and harmonious use of the oceans as an avenue of commerce and transportation, and as a source of food. For this reason the United States is currently engaged with other states in an effort to obtain a new treaty for these purposes. This treaty would establish a 12-mile limit for territorial seas and provide for free transit through international straits. It would also accommodate the problems of developing countries and other nations regarding the conservation and use of the living resources of the high seas.[38]

The means selected by the U.S. Department of State to "introduce specific proposals", as announced, were to prepare and present to the U.N. Seabeds Committee a Draft United Nations Convention on the International Seabed Area, dated August 3, 1970.[38a] The Draft Convention is an imaginative, comprehensive and detailed document with many novel features. It would reserve to the coastal state its existing rights only to the 200 meter isobath and would give it only such rights in the adjacent area beyond, desiguated the "International Seabed Area", as were expressly authorized.[39]

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[38] Wkly. Comp. Presidential Docs., May 25; 1970, at pp. 677-678.

[38a] U.S. Dept. of State Press Release, No. 229, Aug. 3, 1970; (1970), 9 Int'l L. Materials 1046; U.N. Doc. A/AC. 138/25, Aug. 3, 1970 (hereinafter referred to as "Draft Convention").

[39] Draft Convention, arts. 2, 27(1). These provisions would effect an enormous renunciation of rights which a coastal state could presently claim under the *Convention on the Continental Shelf* and under the doctrine of the continental

It calls for the creation of an International Seabed Resource Authority with seabed resource jurisdiction over the entirety of the International Seabed Area [40] and with the authority to use revenues therefrom "for the benefit of all mankind, particularly to promote the economic advancement of developing States, Parties to this Convention, irrespective of their geographic location".[41]

Administratively, the Authority would have an International Seabed Boundary Review Commission to review and approve boundaries proposed by each coastal state,[42] an Operations Commission to issue licenses for seabed mineral exploration and

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shelf. See Krueger, *supra*, n. 2 at pp. 452, 478 and 481 *et seq.*; Supplemental Report National Petroleum Council, *Petroleum Resources Under the Ocean Floor*, p. 15 *et seq.*, March, 1971. It appears to have been for this reason that the drafters of the Draft Convention added the following *caveat* to Article 2:

> (NOTE: The preceding Article is not intended to imply that States do not currently have rights under, or consistent with, the 1958 Geneva *Convention on the Continental Shelf.*)

[40] Draft Convention, 19(2) and 23, arts. 13(1). The Draft Convention authorizes the Authority to license only "mineral deposits" for "exploration and exploitation" (Art. 13[1]). The fact that it has this power and general regulatory power for the protection of the marine environment (Art. 23), however, would clearly seem to give it preemptive authority over the entirety of the international seabed area and, to a substantial extent, the waters and resources above. While this element does not appear to have been stressed by U.S. Department of State representatives in domestic discussions, U.S. Ambassador Christopher H. Phillips in speaking to the U.N. Seabeds Committee stated as follows:

> "A fourth point raised by some other delegations is, why is the machinery called "International Seabed Resources Authority" rather than "International Seabed Authority". It is true that the Authority's function is broader than resources management but since its functions are *primarily* concerned with resources this name seemed more appropriate to us." (Emphasis added).

United States Mission Press Release, Geneva, August 28, 1970. See also Statement by John R. Stevenson to the U.N. Seabeds Committee, United States Mission Press Release, Geneva, August 20, 1970. Cf. Auburn, *infra*, n. 246 at p. 179; Jennings, *infra*, n. 246 at p. 448.

[41] Draft Convention, art. 5(1). The Draft Convention also requires that a portion of the revenues be used

> "...to promote efficient, safe and economic exploitation of mineral resources of the seabed; to promote research on means to protect the marine environment; to advance other international efforts designed to promote safe and efficient use of the marine environment; and to provide technical assistance to Contracting Parties or their nationals" (Art. 5(2)).

[42] *Id.*, arts. 1(4), 45.

exploitation [43] and supervise operations, a Rules and Recommended Practices Commission [44] to propose annexes to the Convention and a Secretariat comprised of a Secretary-General and staff.[45] Politically, the Authority would be directed by an Assembly consisting of all contracting parties and a Council consisting of "the six most industrially advanced Contracting Parties" and 18 others elected by the Assembly, of which at least 12 would be required to represent developing countries.[46] Except for its elective powers and its authority to suggest and recommend, the Assembly would have no real responsibilities and the Council itself would not be empowered to act without a majority of both the industrially advanced parties and the 18 others.[47] The structure proposed in the Draft Convention also included a Tribunal to determine disputes and advise on legal matters.[48]

The Draft Convention would give to the coastal state administrative control over the issuance of licenses and operations in the "continental margins" which were indicated as extending probably to the foot of continental rise and thus encompassing all lands over which a coastal state could assert jurisdiction and control under the doctrine of the continental shelf or the *Convention on the Continental Shelf*.[49] Within this "International Trusteeship Area", the coastal state would be authorized to issue "mineral exploration and exploitation licenses" (and keep 33½% to 50% of revenues received therefrom), determine "the allowable catch of the living resources of the seabed", and prescribe operating and conservation measures with respect thereto so long as the same would be "higher than or in addition to those required under this Convention".[50]

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[43] *Id.*, art. 44.

[44] *Id.*, art. 43.

[45] *Id.*, arts. 62-64.

[46] *Id.*, arts. 35, 36.

[47] *Id.*, art. 38. This provision drew fire from a number of the developing countries and was the subject of a great deal of defensive explanation at Geneva in August of 1970. See Ambassador Phillips, *supra*, n. 40.

[48] *Id.*, arts. 46-60.

[49] *Id.*, art. 26(1). The seaward boundary is stated as extending "beyond the base of the continental slope" down to a fixed but yet unspecified gradient. See Krueger, *supra*, n. 2 at pp. 471, 478.

[50] *Id.*, art. 27. The ambiguous character of the "trusteeship" zone concept led to criticism within the U.N. Seabeds Committee, largely by representatives of developing countries, and to some rather protracted explanations of its reason for being (Statement by John R. Stevenson, United States Mission Press Release, Geneva, August 27, 1950). See *infra*, n. 55.

The Convention specifically noted that:

> The United States has simultaneously proposed an international Convention which would, *inter alia*, fix the boundary between the territorial sea and the high seas at a maximum distance of 12 nautical miles from the coast.[51]

There was a great deal of domestic controversy regarding the Draft Convention both before and after its presentation to the U.N. Seabeds Committee.[52] It appears for this reason to have been ex-

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[51] Footnote, art. 1, para. 2.

[52] In a letter from the chairman and ranking minority member of the U.S. Senate Committee on Interior and Insular Affairs to Secretary of State, William P. Rogers, dated July 21, 1970, doubt was expressed that Congress would ever agree to the financial arrangements contemplated for the coastal state in the international trusteeship area and concern was expressed over the "elaborate labyrinth of legal rules and procedures" and "an international organization potentially so vast as to make the size of the United Nations pale by comparison." The Senators concluded that it was "highly unlikely that other coastal states would be willing to agree to the terms of such a treaty" and stated their opinion that

> "to table such a complicated and unwieldy document... at Geneva would seem certain to invite bitter criticism of and embarrassment to the United States Government."

After extensive hearings the Special Subcommittee on Outer Continental Shelf of the U.S. Senate Committee on Interior and Insular Affairs reported on December 21, 1970, that it generally supported the Nixon proposal and then stated:

> "Our only areas of initial difference with the President are his suggestions that the United States should renounce its sovereign rights to its continental margin in return for similar, but limited rights in an area designated as a trusteeship zone, and his suggestion that leases applying to areas of the Continental Shelf beyond the 200-meter isobath be issued subject to an international regime to be agreed upon.
>
> Regarding the proposal suggesting renunciation of the heart of our sovereign rights, we have three objections:
>
> (1) The offer to renounce our sovereign rights beyond the 200-meter isobath could cast a cloud on our present title to the resources of our continental margin;
>
> (2) The renunciation of our sovereign rights to the resources of our continental margin beyond the 200-meter isobath in no way guarantees the willingness of the international community to re-delegate functionally to us the same rights we would renounce, and
>
> (3) Our sovereign rights to explore and exploit our continental margin, although reaffirmed by the 1958 Geneva Shelf Convention, are nevertheless inherent rights which have vested by virtue of the natural extension beneath the sea of our sovereign land territory. Our sovereign rights to the resources of this area are not dependent upon the acquiescence and approval of the international community. To renounce these inherent

pressly designated as "a working paper for discussion purposes [which does] not necessarily represent the definitive views of the United States Government".[53] While the United States received some encouragement for its voluminous product,[54] most of the expressed reaction ranged from the mistrust of some of the developing countries[55] to the somewhat studied indifference of the developed

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rights and to ask that they be returned in part to us merely requests the international community to give us that which, *ipso facto* and *ab initio*, is rightfully ours to begin with."

Report on Outer Continental Shelf, at pp. 29-30.

Regarding the Draft Convention it stated:

"The President did not provide any detailed suggestions as to the type of machinery which could best facilitate such a result. The draft working paper, on the other hand, proposed the creation of an immense international agency and very complicated rules related to deep seabed resource exploration and exploitation. Such an arrangement would seem to encourage such bureaucratic and pseudo-legalistic obstructions that rational and equitable use of the wealth of the deep ocean floor would be deterred rather than encouraged. None of the six alternative proposals printed as appendices to this report contain such elaborate proposals.

We do not suggest, however, that the U.S. draft working paper is without merit. It contains some articles worthy of serious consideration. It also contains unacceptable provisions. It is a document which will require further study by the Committee on Interior and Insular Affairs, by the executive departments, and by the concerned public. The Committee on Interior and Insular Affairs shall resume study of the draft working paper during the next session of Congress." *Id.*, at pp. 32-33. See also Hearings of such Special Subcommittee on Outer Continental Shelf dated December, 1966, January 22, 1970 and March 4, 1970, regarding "Issues Related to the Establishment of Seaward Boundary of the United States Outer Continental Shelf."

[53] The caveat was on the face of the Draft Convention; it also stated that the Draft Convention and its appendices "raise a number of questions with respect to which further detailed study is clearly necessary."

[54] India "agreed with many of the basic principles contained in the draft Convention," but objected to the concept of a "trusteeship" area. Prov. Sum. Rec. 34 mtg. A/AC.138/SR.34, at p. 14, (Aug. 13, 1970).

[55] E.g.: Malaysia: "The United States draft convention, for all its nine chapters, 78 articles and 5 appendices, in the final analysis was over-elaborate and misconceived; one could not see the wood for the trees." Prov. Sum. Rec. 33 mtg. A/AC.138/SR.33, at pp. 2-3 (Aug. 11, 1970). Cameroon: "[T]he International Seabed Resource Authority proposed by the United States delegation would only be acceptable if it formed an integral part of the organization and, as such, was responsible for the supervision, regulation, co-ordination and control of all exploration and exploitation activities... The United States' proposals concentrated too much on materialistic aspects and too little on the ocean floor's potentiality for peace." *Id.*, at p. 8.

Kenya: "[T]he 200 metres limit suggested by the United States would

countries.[56] The Draft Convention and the issues which it raised were discussed at length by the Seabeds Committee, but it adjourned in late August of 1970 without reaching agreement even on the principles which should obtain with respect to ocean areas beyond limits of national jurisdiction.

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discriminate against countries, such as Kenya, which had a narrow continental shelf. The United States proposal to set up a trusteeship area beyond the 200 metres limit, to include the continental slope, was also unacceptable to his delegation, as that, rather than the deep sea-bed, was precisely the area rich in petroleum, natural gas, manganese nodules, and so on." Prov. Sum. Rec. 35 mtg. A/AC138/SR.35 at p. 3. (Aug. 13, 1970).

Liberia: "...had doubts about the depth of 200 metres proposed for the limit of sea-bed area under the international regime. His Government might have objections to make on the granting of trusteeship of coastal States over any area of the sea-bed or ocean floor beyond the limits of national jurisriction, whatever limits might eventually be set to that jurisdiction." *Id.*, at p. 10.

Chile: "The draft, however, did not fit in with the concept of the common heritage of mankind as defined by the developing countries... Furthermore, in its provisions on limits, the draft discriminated against those countries which did not have a geographical or physical continental shelf, thereby departing from the criteria laid down by international law during the past twenty years." Prov. Sum. Rec. 30 mtg. A/AC.138/SR. 30 at p. 2 (Aug. 5, 1970).

[56] E.g.: United Kingdom: "While it was not at present prepared to suggest any precise formula or figure, his Government had been inclined to favour a simpler division of the sea-bed between national areas and areas subject to the international regime, and a reasonably deep limit to national jurisdiction or a combination of depth and width, to give a broad deep limit. It would also be prepared, however, to consider the United States proposal for a shallow limit to national jurisdiction and a trusteeship zone beyond that limit, if that idea appealed generally to members of the Committee." Prov. Sum. Rec. 30 mtg. A/AC.138/SR.30 at pp. 8-9 (Aug. 5, 1970).

U.S.S.R.: "Another important question was that of defining the limits of national jurisdiction of coastal states. Some delegations had stated that the problem could only be solved by revising existing regimes applying to the open sea, territorial waters, the continental shelf and so forth. However, the proposal that the 1958 Geneva Conventions should be revised had been opposed by a number of delegations, including the Soviet delegation, which believed that the foundations on which international co-operation in the matter now rested should be strengthened rather than undermined... The establishment of international machinery, which required very careful study, must be related to the conclusion of an international agreement on a regime for the exploitation of marine resources. It would be a serious mistake if such machinery were to be set up in the interests of an international capitalist consortium rather than of all States." *Id.*, at pp. 4-5.

Australia: "A novel feature of the United States paper was the concept of an intermediate trusteeship zone together with renunciation of national

Predictably, when the Secretary-General in 1970 polled the U.N. Member states to determine their views as to the desirability of convening at an early date a conference regarding the law of the sea in accordance with the December, 1969 General Assembly resolution on the subject,[57] the clear majority or the replies appeared to be in the affirmative, although many, including the United States, used cautionary language regarding the scope of a future conference or conferences and the preparatory work appropriate therefor.[58] The Soviet Union, in particular, took a cautious stand stating that the answer as to whether a conference is desirable " . . . depends first and foremost on the aims and tasks which would

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claims beyond the 200-metre isobath, which seemed to offer to the developing countries the prospect of an early and substantial share of the proceeds of any mineral exploitation of the outer areas of the continental shelf. The proposal might perhaps be even more appealing if the suggested depth limit of 200 metres were to be combined in some way with a distance limit . . . For the present, the Australian Government continued to favour a simple division of the sea-bed, with the area of national jurisdiction extending rather further than the 200-metre bathymetric contour, and areas beyond being directly subject to an international regime; it would, however, take note of the extent to which other ideas such as the proposed trusteeship zone gained support." Prov. Sum. Rec. 34 mtg. A/AC.138/SR.34, at p. 17 (Aug. 13, 1970).

[57] See *supra*, n. 24.

[58] The United States response stated in part:

"The United States Government believes that the outstanding issues regarding the law of the sea could appropriately be addressed and resolved at a future Law of the Sea conference or conferences. In this connexion, it should be noted that the considerations and questions bearing upon the breadth of the territorial sea are in many respects different from those bearing upon a sea-bed regime and boundary. All the outstanding issues are important and require appropriate concentration of effort and attention. The United States Government believes that the procedures for the resolution of these issues should be structured so as to assure that each issue receives appropriate attention in a manner which will facilitate its examination and enhance the opportunity for agreement." U.N. Doc. A/7925, July 17, 1970, at pp. 40, 41.

The Canadian response stated in pertinent part:

"The 1958 Geneva Conference on the Law of the Sea resulted in a wide measure of agreement on many important questions, and the four conventions adopted at that Conference represent, in the view of the Canadian Government, a very substantial achievement. The Canadian Government believes that it would be inadvisable to prejudice this achievement by reopening all the rules of law embodied in those conventions. Rather, the Canadian Government considers that it would be preferable to attempt to resolve such questions as were not settled

be given to such a conference and also on the extent of its preparedness for the successful disposal of the items on its agenda".[59] It then stated that "[t]he Geneva Conventions on the law of the sea have stood the test of time and shown themselves to offer a sound basis for the development of international cooperation [and] the Soviet Union feels that it would not be desirable to convene a conference to review the regimes established in the... Conventions".[60]

When the United Nations General Assembly convened for its 25th session late in 1970 there were a number of important developments regarding oceans policy. With the strong endorsement of the U.N. First (Political) Committee[61] the General Assembly

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by the conventions or which have emerged since 1958. These include, in particular, the need to develop agreed rules of law on:

(a) the breadth of the territorial sea;

(b) the nature and extent of jurisdiction of the coastal State over coastal fisheries;

(c) the rights and duties of States with regard to the conservation and management of the living resources of the sea;

(d) the rights and duties of States with regard to the preservation of the marine environment and the prevention of its pollution and degradation;

(e) the demarcation of the outer limit of the continental shelf; and

(f) the exploration and exploitation of the natural resources of the sea-bed beyond the limits of national jurisdiction.

In view of the Canadian Government, particular urgency attaches to resolving those questions relating to the breadth of the territorial sea, jurisdiction over coastal fisheries, the conservation and management of the living resources of the sea, and the preservation of the marine environment. The Canadian Government would favour the convening of an international conference on these matters as soon as practicable. The Canadian Government would not object to having such a conference address itself as well to the question of the delimitation of the outer limit of the continental shelf if other members of the United Nations considered this desirable." U.N. Doc. A/7925/Add.2, at pp. 2-3 (Sept. 10, 1970).

[59] U.N. Doc. A/7925, *supra*, n. 58, at pp. 36, 37.

[60] *Id.*, at pp. 36, 38. Similar statements were made by others of the Soviet Bloc. For further responses, see U.N. Doc. A/7925/Add. 1 (Aug. 27, 1970); U.N. Doc. A/7925/Add. 2 (Sept. 10, 1970); U.N. Doc. A/7925/Add. 3 (Oct. 1, 1970).

[61] The items allocated to the First Committee were: the Report of the U.N. Seabeds Committee, a report of the Secretary-General on marine pollution (U.N. Doc. A/7924, June 11, 1970), the report of the Secretary-General on the desirability of convening a Law of the Sea Conference and the question of the breadth of the territorial sea (U.N. Doc. A/C.1/998, Sept. 18, 1970).

adopted a resolution commending the Treaty on the Prohibition of the Emplacement of Nuclear and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof as drafted and reported by the Conference of the Committee on Disarmament dated September 11, 1970, and requested that it be opened for signature and ratification at the earliest possible date.[62] The proposed treaty would ban the implanting or emplacement on or in the ocean floor (beyond a 12-mile coastal belt) of "any nuclear weapons or any other types of weapons of mass destruction as well as structures, launching installations or any other facilities specifically designed for storing, testing or using such weapons".[63] It would also require parties to "continue negotiations in good faith concerning further measures in the field of disarmament for the prevention of an arms race on the sea-bed, the ocean floor, and, the subsoil thereof".[64]

In accordance with the resolution the Treaty was opened for ratification "at the earliest possible date"[65] and the same has been ratified by Japan and nineteen other nations; it will enter into force when ratified by twenty-two governments.[66]

A second very significant development was that Chairman H. S. Amerasinghe of the U.N. Seabeds Committe had been able to obtain committee consensus on a Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, and the same was unanimously approved by the General Assembly.[67] The approved principles are as follows:

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[62] U.N. Doc. A/RES/2660 (XXV) (Feb. 9, 1971).

[63] *Id.*, Annex para. 1, art. 1, art. 2. It is noteworthy that the proposed Treaty expressly disclaims any effect with respect to "rights or claims which such State Party may assert, or with respect to recognition or non-recognition of rights or claims asserted by any other State, related to waters off its coasts, including *inter alia,* territorial seas and contiguous zones, or to the sea-bed and the ocean floor, including continental shelves." *Id.*, Annex art. 4.

[64] *Id.*, Annex art. 5.

[65] *Id.*, para. 2.

[66] See LXV Dept. of State Bull. No. 1653 (March 1, 1971) — LXV Dept. of State Bull. No. 1700 (January 24, 1972), *passim.* The Treaty has also been signed by 76 countries including the United States and the Soviet Union. *Ibid.* The Treaty was approved unanimously in the United States Senate on February 15, 1972. Los Angeles Herald-Examiner, February 16, 1972.

[67] U.N. Doc. A/RES/2749 (XXV) (Jan. 28, 1971). See Provis. Verbat. Rec. 1933 mtg. (XXV Sess.) U.N. Doc. A/PV.1933, at p. 96 (Dec. 18, 1970); U.N. Doc. A/AC.1/L.542 (Nov. 25, 1970).

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 area 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 régime to be established and the principles of this Declaration;

4. All activities regarding the exploration and exploitation of the resources of the area and other related activities shall be governed by the international régime to be established;

5. The area shall be open to use exclusively for peaceful purposes by all States, whether coastal or land-locked, without discrimination, in accordance with the international régime to be established;

6. States shall act in the area in accordance with the applicable principles and rules of international law, including the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted by the General Assembly on 24 October 1970, in the interests of maintaining international peace and security and promoting international co-operation and mutual understanding;

7. The exploration of the area and the exploitation of its resources shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States, whether land-locked or coastal, and taking into particular consideration the interests and needs of the developing countries;

8. The area shall be reserved exclusively for peaceful purposes, without prejudice to any measures which have been or may be agreed upon in the context of international negotiations undertaken in the field of disarmament and which may be applicable to a broader area. One or more international agreements shall be concluded as soon as possible in order to implement effectively this principle and to constitute a step towards the exclusion of the sea-bed, the ocean floor and the subsoil thereof from the arms race;

9. On the basis of the principles of this Declaration, an international régime applying to the area and its resources and including appropriate international machinery to give effect to its provisions shall be established by an international treaty of a universal character, generally agreed upon. The régime shall, *inter alia,* provide for the orderly and safe development and rational management of the area and its resources and for expanding opportunities in the use thereof and ensure the equitable sharing by States in the benefits derived therefrom, taking into particular consideration the interests and needs of the developing countries, whether land-locked or coastal;

10. States shall promote international co-operation in scientific research exclusively for peaceful purposes:

(*a*) By participation in international programmes and by encouraging co-operation in scientific research by personnel of different countries;

(*b*) Through effective publication of research programmes and dissemination of the results of research through international channels;

(*c*) By co-operation in measures to strengthen research capabilities of developing countries, including the participation of their nationals in research programmes.

No such activity shall form the legal basis for any claims with respect to any part of the area or its resources:

11. With respect to activities in the area and acting in conformity with the international régime to be established, States shall take appropriate measures for and shall co-operate in the adoption and implementation of international rules, standards and procedures for, *inter alia*:

(*a*) The prevention of pollution and contamination, and other hazards to the marine environment, including the coastline, and of interference with the ecological balance of the marine environment;

(*b*) The protection and conservation of the natural resources of the area and the prevention of damage to the flora and fauna of the marine environment.

12. In their activities in the area, including those relating to its resources, States shall pay due regard to the rights and legitimate interests of coastal States in the region of such activities, as well as of all other States, which may be affected by such activities. Consultations shall be maintained with the coastal States concerned with respect to activities relating to the exploration of the area and the exploitation of its resources with a view to avoiding infringement of such rights and interests;

13. Nothing herein shall affect:

(*a*) The legal status of the waters superjacent to the area or that of the air space above those waters;

(*b*) The rights of coastal States with respect to measures to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution or threat thereof or from other hazardous occurrences resulting from or caused by any activities in the area, subject to the international régime to be established;

14. Every State shall have the responsibility to ensure that activities in the area, including those relating to its resources, whether undertaken by governmental agencies, or non-governmental entities or persons under its jurisdiction, or acting on its behalf, shall be carried out in conformity with the international régime to be established. The same responsibility applies to international organizations and their members for activities undertaken by such organizations or on their behalf. Damage caused by such activities shall entail liability;

15. The parties to any dispute relating to activities in the area and its resources shall resolve such dispute by the measures mentioned in

> Article 33 of the Charter of the United Nations and such procedures for settling disputes as may be agreed upon in the international régime to be established.[68]

The adoption of the principles proved to have a significant effect in putting aside in international discussions the nettlesome issue of what the controlling principles should be (particularly whether the ocean should be the "common heritage of mankind") [69] and raising the level of discussion in the U.N. Seabeds Committee to the substantive issues of the form and content of the institutions in which they are to be evidenced.[70]

Perhaps the most significant achievement of the twenty-fifth session of the U.N. General Assembly regarding the oceans was, however, the adoption of a resolution calling for a broad scale conference on the law of the sea. The United States proposed [71] and the U.N. First Committee strongly endorsed [72] a resolution im-

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[68] U.N. Doc. A/RES/2479, *supra*, n. 66.

[69] The Soviet Union particularly considered the "common heritage" concept to be unacceptable. See U.N. Seabeds Com. Rep. (XXIV Sess.) U.N. Doc. Supp. No. 22 (A/7622) (1969), at pp. 33-34.

[70] Following the adoption of the principles by the General Assembly Mr. Amerasinghe, Chairman of the U.N. Seabeds Committee, stated to the General Assembly

> "With the caution that is customarily reserved for official pronouncements by sovereign States on anything that rises above the level of the mundane, we may assign varying degrees of significance and validity to the Declaration, but we can all agree that its conspicuous merit is its daring originality and that its real virtue is its moral force.
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> * * *
>
> Special attention must be drawn to the concept of the common heritage of mankind which has, for the first time to my knowledge, been enunciated in an international document.
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> * * *
>
> The Declaration cannot claim the binding force of a treaty internationally negociated and accepted, but it is a definite step in that direction and, no less than the other two Declarations that have been adopted at this session, it has — if I may adapt the words of Walt Whitman — that fervent element of model authority that is more binding than treaties." Provis. Sum. 1933 mtg., *supra* n. 67 at pp. 99-100.

[71] U.N. Doc. A/CI/L. 536, Nov. 18, 1970. The version of the resolution finally adopted was that submitted by Canada and 24 others, including the United States. U.N. Doc. A/CI/L. 563 introduced Dec. 15, 1970. See statement by Senator Clairborne Pell, United States representative in Committee I (Press Release USUN-177(70), Nov. 26, 1970).

[72] The vote on the resolution was 100 to 8 with 6 abstentions. U.N. Doc. A/RES/8097 (XXV) (Dec. 16, 1970).

plementing the Secretary-General's poll regarding the conference, notwithstanding the active opposition of the Soviet Union and its bloc.[73] Subsequently the same was adopted by the U.N. General Assembly by vote of 109 to 7 with 6 abstentions.[74] In its final form the resolution noted "the political and economic realities, scientific development and rapid technological advances of the last decade have accentuated the need for early and progressive development of the law of the sea, in a framework of close international co-operation"[75] and "that a new conference on the law of the sea would have to be carefully prepared to ensure its success and that the preparatory work ought to start as soon as possible after the conclusion of the twenty-fifth session of the General Assembly, drawing on the experience already accumulated in the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction and using fully the opportunity provided by the United Nations Conference on the Human Environment, to be held in 1972, to further its work".[76] It then stated the decision of the General Assembly to convene in 1973 "a conference on the law of the sea which would deal with the establishment of an equitable international regime — including an international machinery — for the area and the resources of the sea-bed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction, a precise definition of the area, and 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".[77] It further stated its decision to review the reports of the U.N. Seabed Committee (which was designated the Preparatory Committee for the proposed con-

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[73] 1st Com. Provis. Verbat. Rec. 1800 mtg. (XXV Sess.) U.N. Doc. A/C.1/PV. 1800 (Dec. 16, 1971) at pp. 85-86.

[74] Those voting against the measure were Bulgaria, Byelorussian Soviet Socialist Republic, Czechoslovakia, Hungary, Poland, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics. Abstaining: Burma, Cuba, Mongolia, Romania, Saudi Arabia, Venezuela. Provis. Verbat. Rec., *supra* n. 67 at p. 98.

[75] U.N. Doc. A/RES/2750 (XXV) C. (Jan. 14, 1971) at p. 4.

[76] *Id.*, at p. 5.

[77] *Id.*, at pp. 5 and 6, para 2.

ference) "with a view to determining the precise agenda of the conference on the law of the sea, its definitive date, location and duration, and related arrangements".[78] The Seabeds Committee was enlarged by 44 members to be appointed by the Chairman of the First Committee "in consultation with regional groups and taking into account equitable geographical representation thereon",[79] making the Committee an 86 member group. It was instructed to prepare in 1971 "draft treaty articles embodying the international regime — including an international machinery — for the area

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[78] *Id.*, at p. 6, para. 3. Paragraph 3 also provides that if the General Assembly at its 1972 (XXVII) session "determines that the progress of the preparatory work of the Committee to be insufficient" it may decide to postpone the conference.

[79] *Id.*, at p. 6, para. 5. As of September 28, 1971 only 42 of the new seats had been filled. These were divided as follows:

Africa	13 members
Latin-America	9 members
Asia	11 members
Eastern Europe	3 members
Western European and Other States	6 members

Interview with U.N. Information Service representative Sept. 28, 1971.

In its twenty-sixth (1971) session the United Nations General Assembly noted "the encouraging progress of the preparatory work of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor... towards a comprehensive conference on the law of the sea, in conformity with its mandate contained in General Assembly resolution 2750 C (XXV)" and decided to add to the membership of the Committee "China and four other members to be appointed by the Chairman of the First Committee in consultation with regional groups with due regard to the interests of under-represented groups". U.N. Doc. A/RES/2881 (XXVI) (Jan. 13, 1972). The chairman of the First Committee subsequently announced the four additional appointments and the Committee is presently composed of the following 90 Member States:

Afghanistan, Algeria, Argentina, Australia, Austria, Belgium, Bolivia, Brazil, Bulgaria, Byelorussian Soviet Socialist Republic, Cameroon, Canada, Ceylon, Chile, China, Colombia, Congo, Cyprus, Czechoslovakia, Denmark, Ecuador, Egypt, El Salvador, Ethiopia, Fiji, Finland, France, Gabon, Ghana, Greece, Guatemala, Guinea, Guyana, Hungary, Iceland, India, Indonesia, Iran, Iraq, Italy, Ivory Coast, Jamaica, Japan, Kenya, Kuwait, Lebanon, Liberia, Libyan Arab Republic, Madagascar, Malaysia, Mali, Malta, Mauritania, Mauritius, Mexico, Morocco, Nepal, Netherlands, New Zealand, Nicaragua, Nigeria, Norway, Pakistan, Panama, Peru, Philippines, Poland, Romania, Senegal, Sierra Leone, Singapore, Somalia, Spain, Sudan, Sweden, Thailand, Trinidad and Tobago, Tunisia, Turkey, Ukrainian Soviet, Socialist Republic, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America, Uruguay, Venezuela, Yemen, Yugoslavia, Zaire and Zambia.

Ibid.

and the resources of the sea-bed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction, taking into account the equitable sharing by all States in the benefits to be derived therefrom, bearing in mind the special interests and needs of developing countries, whether coastal or land-locked, on the basis of the Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, and a comprehensive list of subjects and issues relating to the law of the sea referred to... above, which should be dealt with by the conference, and draft articles on such subjects and issues".[80] Two companion measures calling for reports by the U.N. Secretary-General on the economic effect of sea-bed development upon onshore resources and the special problems of land-locked countries passed unanimously.[81]

The concern of the developing countries over the economic impact of international development and action was also reflected in a resolution adopted by the General Assembly with respect to the proposed 1972 Conference on the Human Environment. The resolution reaffirmed that the Conference should take into account "the special needs of development in developing countries" and recommended the inclusion in the agenda "of one or more specific items relating to economic and social aspects in order to safeguard and promote the interest of developing countries with a view to reconciling the national environmental policies with their national development plans and priorities".[82] Despite the active objection

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[80] *Id.*, at p. 6, para. 6.

[81] Prov. Verbat. Rec. 1933 mtg., *supra* n. 67, at p. 96. A/RES/2750 (XXV) A (Jan. 14, 1970) noted that seabed resources should "be undertaken in such a manner as to foster the healthy development of the world economy and balanced growth of international trade, and to minimize any adverse economie effects caused by the fluctuation of prices of raw materials resulting from such activities", and requested a Secretary-General report to the U.N. Seabeds Committee for use in "making its recommendations as appropriate to foster the healthy development of the world economy and balanced growth of international trade, and to minimize any adverse economic effects caused by the fluctuation of prices of raw materials resulting from such activities". A/RES/2750 (XXV) B noted an earlier report of the United Nations Conference on Trade and Development dated Jan. 14, 1958 and instructed the Secretary-General to "supplement that document, in the light of the events which have occured in the meantime, with a report on the special problems of land-locked countries relating to the exploration and exploitation of the resources of the sea-bed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction".

[82] A/RES/2657 (XXV) (Dec. 14, 1970) p. 2, para. 2.

of the United States, Canada and a large number of the developed countries, the resolution also contains a provision requiring that preparatory work for the Conference consider "the financing of possible action in this field with a view to ensuring that additional resources are provided to developing countries in the context of the protection of the environment".[83] The resolution provides an

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[83] *Id.*, para 3. The vote in the General Assembly was 58 to 10 with 28 abstentions with respect to such paragraph. The amended resolution, however, was adopted unanimously. Provis. Verbat. Rec. 1918th mtg., Gen. Assembly (XXV) A/PV 1918, at p. 16.

This same trend was very much evident during the twenty-sixth (1971) session of the United Nations General Assembly at which it passed a resolution regarding development and environment upon recommendation of the Second Committee which recognizes that "aside from environmental disturbances provoked by human settlements and ecological problems related to nature itself, pollution of world-wide impact is being caused primarily by some highly developed countries, as a consequence of their own high level of improperly planned and inadequately co-ordinated industrial activities, and that, therefore, the main responsibility for the financing of corrective measures falls upon those countries" [; and] "that the quality of human life in the developing countries also depends, in large measure, on the solution of environmental problems which have their origin in nature and which are the product of under-development itself, within the general framework of development planning and the rational management of natural resources." U.N. Doc. A/RES/2849 (XXVI), at p. 2. The resolution then recommended that the action plan and action proposals submitted to the U.N. Conference on the Human Environment "must, *inter alia*:

> (a) Respect fully the exercise of permanent sovereignty over natural resources, as well as the right of each country to exploit its own resources in accordance with its own priorities and needs and in such a manner as to avoid producing harmful effects on other countries;
>
> (b) Recognize that no environmental policy should adversely affect the present or future development possibilities of the developing countries;
>
> (c) Recognize further that the burden of the environmental policies of the developed countries cannot be transferred, directly or indirectly, to the developing countries..." *Id.*, at p. 4.

It also contained other extensive provisions providing for the protection of and assistance to developing countries including a request that the Secretary-General submit a report "on a scheme of voluntary contributions which would provide additional financing by the developed countries to the developing countries for environmental purposes, beyond the resources already contemplated in the International Development Strategy." *Id.*, at p. 5. The resolution was adopted by the Second Committee by a vote of 62 to 4 (the 4 consisting of the United States and some of its usual voting associates) with 31 abstentions (the Soviet with its bloc and other developed countries). Rep. 2nd Com., U.N. Doc. A/8577 (Dec. 13, 1971), p. 12. Subsequently President Nixon proposed the creation of a Voluntary United Nations Fund for the

interesting example of the strength and independence of the developing countries in the United Nations which today cannot be blocked, but can be guided and shaped, as it was quite adeptly shown by the United States and Canada in the case of the law of the sea conference resolution.[84]

For the last few years it has been quite foreseeable that there would be an international conference or conferences on the entire spectrum of oceans issues of the type decided upon by the General Assembly and it has resulted in a spate of national claims for various forms of contiguous zones being quite obviously made with future negotiations in mind. Since 1968 the Convention on the Continental Shelf has been acceded to by ten nations, including Canada, China, Norway, Spain and Thailand, with a total of 49 nations now having agreed to be bound by it.[85] The clear intent of nations recently acceding appears to be to strengthen their case for a broad continental shelf of the type that can be claimed under this existing Convention.[86] Canada seems to have had a very similar attitude in promulgating fishery closing lines over areas traditionally regarded as high seas in the Gulf of St. Lawrence and the Bay of Fundy on the Atlantic Coast and Queen Charlotte Sound and Dixon Entrance-Hecate Straight on the Pacific[87] on the day following the adoption of the resolution calling for the 1973 Conference on the law of the sea. As with the *Arctic Waters Pollution Prevention Act*,[88] however, the purpose of the new closing lines

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Environment, with an initial funding goal of $100 million over the first five years, to provide funding for "environmental functions that are most likely to be centered in the international community following the U.N. Conference on the Human Environment (Stockholm) and the question of organizational and financial arrangements for the discharge of these functions." Press Release USUN-10(72) (Feb. 11, 1972).

[84] Compare the 1969 and 1970 General Assembly action *supra*, at nn. 24 *et seq.* and *supra*, at nn. 61 *et seq.*

[85] See U.N. Publication, *Multilateral Treaties in Respect of Which the Secretary-General Performs Depository Functions — List of Signatures, Ratifications, Accessions, etc. as of December 31, 1968*; U.N. Press Release L/T/756 dated Sept. 10, 1971.

[86] Ratiner, n. 37, *supra*. See also Krueger, n. 2, *supra*, at pp. 471, *et seq.*

[87] See News Release Department of Fisheries and Forestry of Canada, December 18, 1970.

[88] See Canadian Commons Debates, Dec. 18, 1970, p. 2189. At p. 2244 it is said in the statement of the Canadian Departments of Fisheries and Forestry and External Affairs as follows:

> "The possibility of covening such a conference has been under discussion in the current session of the United Nations General Assembly and the

appeared to be one of benign self-regulation pending the establishment of an international régime of fisheries conservation.[89]

Similarly in the summer of 1971 Iceland announced its intention to redefine its continental shelf claims so as to extend at least 50 miles from baselines and to establish exclusive fishery rights in superjacent waters on or before September 1, 1972.[90] So, too, have unilateral territorial sea claims grown. In 1970 Brazil claimed a territorial sea of 200 miles, thus establishing this régime for a majority of the Latin-American coastal states.[91] The concept of a

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Assembly has now resolved that a conference should be held in 1973. It is Canada's hope that there will emerge from that conference a rational system of fisheries conservation, management and exploitation in the common interest of all countries, including a clear recognition of the special rights and responsabilities of coastal states with respect to the living resources of the sea, and particularly the protection of the Atlantic and Pacific salmon stocks which are being maintained at considerable cost by the efforts of coastal states such as Canada and the USA."

[89] See *supra* nn. 36 *et seq.*

[90] Aug. 6 statement by Iceland to U.N. Seabeds Committee, Prov. Sum. Rec. A/AC.138/SC.II/SR.9 at 3, (Aug. 6, 1971); Report of Iceland to U.N. Seabeds Committee, *Fisheries Jurisdiction in Iceland,* 17 (July, 1971). A number of statements were made during debate in the U.N. Seabeds Committee urging that Iceland reconsider the decision to establish an exclusive fisheries zone, notably by the Soviet Union and the United Kingdom. See, *e.g.,* statement of United Kingdom to U.N. Seabeds Sub-Committee II, Aug. 6, 1971, Prov. Sum. Rec. A/AC.138/SC.II/SR.9 at p. 45, (Aug. 12, 1971); statement of U.S.S.R. to U.N. Seabeds Sub-Committee II, Aug. 13, 1971 Prov. Sum. Rec. A/AC.138/SR. 12 at pp. 9-10, (Aug. 17, 1971). The United Kingdom is a particularly large harvester of demersal species (Report of Iceland to U.N. Seabeds Committee, *Fisheries Jurisdiction in Iceland,* p. 19 [July, 1971] and the United Kingdom Ministry of Agricultural Fisheries and Foods indicated that it would create a considerable rise in the prices of cod and haddock. See London Times, Aug. 8, 1971 ("Fish prices threatened by Iceland").

[91] U.N. Food and Agricultural Organization Report, *Limits and Status of the Territorial Sea, Exclusive Fishing Zones, Fishing Conservation Zones and the Continental Shelf,* FAO Fisheries Circular No. 127 at p. 3 (1971); Los Angeles Times, Mar. 26, 1970. See Loring, *The United States—Peruvian "Fisheries" Dispute,* (1971), 23 Stanford L. Rev. 391, at p. 452. The nations with some type of 200 mile limit include Argentina (200 mile territorial sea declared in 1966), Brazil (200 mile territorial sea, 1970), Chile (200 mile exclusive zone for living and non-living resources, 1952), Costa Rica (200 mile fishery conservation zone, 1949), Ecuador (200 mile territorial sea, 1966), El Salvador (200 mile territorial sea, 1950), Nicaragua (200 mile exclusive fishery zone, 1965), Panama (200 mile territorial sea, 1967), Peru (200 mile exclusive zone for living and non-living resources, 1947) and Uruguay (200 mile territorial sea, 1969). *Limits and Status, supra* at pp. 3-15.

It is also noteworthy that a number of non-Latin-American countries claimed a contiguous zone for living resource purposes of broad dimensions, including

200 mile territorial sea or a contiguous zone of that breadth for the purpose of resource conservation and development also began to find strong support elsewhere. Spain, Yugoslavia and the Peoples' Republic of China formally stated their support for the 200 mile régime in joint statements made with Peru.[92] In the 1971 meetings of the U.N. Seabeds Committee a substantial number of coastal developing nations, including Algeria, Ceylon, Gabon, Ghana,

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Ceylon (fishery conservation zone of 100 miles from the territorial sea, 1957) Ghana (fishery conservation zone of 100 miles, 1963), India (fishery conservation zone 100 miles from the territorial sea, 1956), Korea (20—200 miles exclusive fishery zone, 1952-1954), Pakistan (100 miles from the territorial sea, 1956). *Id.* Further, at the June 15-19, 1971 meeting of the Organization of African Unity to the United Nations the Council of Ministers adopted a resolution stating in pertinent part as follows:

> "1. CONFIRMS the inalienable rights of the African countries over the fishery resources of the continental shelf surrounding Africa, in conformity with the spirit and principle of the Charter of the United Nations and the Charter of the Organization of African Unity;
>
> 2. URGES the governments of the African countries to take all necessary steps to proceed rapidly to extend their sovereignty over the resources of the high seas adjacent to their territorial water and up to the limits of their continental shelf;
>
> 3. CONFIRMS that the exploitation of fishery resources in the fishing areas thus defined for each country shall always be conducted in accordance with its national laws and regulations;
>
> 4. URGES the governments of the African countries to promote among themselves a policy of co-operation as regards the development of fisheries, in order to increase the participation of African States in the exploitation of maritime resources surrounding Africa."

Resolutions and Declarations of Seventeenth Ordinary Session of Council of Ministers, CM/Res. 250 (XVII).

A similar recommendation was made by the Sub-Committee on the Law of the Sea of the Asian-African Legal Consultative Committee meeting at its Twelfth Session, January 18-27, 1971. The report of the Sub-Committee there stated:

> "The majority of Delegations indicated that State had the right to claim certain exclusive rights to economic exploitation of the resources in the waters adjacent to the territorial sea in a zone the maximum breadth of which should be subject to negotiation. Most Delegations felt able to accept twelve miles as the breadth of the territorial sea, while supporting, in principle, the right of a coastal State to claim exclusive jurisdiction over an adjacent zone for economic purposes."

Doc. No. 2 (XXII) Prov. at p. 2; U.N. Doc. A/AC 138/34 (April 30, 1971), at p. 7; Accord: Latin-American meeting, *infra* n. 104.

[92] Statement of Peru to U.N. Seabeds Committee, Aug. 18, 1971, Prov. Sum. Rec. A/AC.138/SR.65 at p. 4 (Aug. 20, 1970).

Indonesia, Kenya, Mauritania, Nigeria and Yemen, supported the concept of a 200 mile contiguous zone for controlling resources of either or both the seabed and superjacent waters, the same being termed variously "intermediate zone", "patrimonial sea" and "economic zone".[93]

This contemporary history shows quite graphically and dramatically the sense of urgency that exists in the United States and the world community for the review and reappraisal of established rules of order for the oceans in the context of the needs and goals of today and the foreseeable future. The stage has thus been set and the mechanisms established for multilateral negotiations on all major oceans issues. An examination of factors influencing policy decisions in this area should, then, suggest some areas of predictable agreement and disagreement.

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[93] Algeria, Prov. Sum. Rec. A/AC.138/SR.65 at p. 11 (Aug. 18, 1971) (territorial sea); Ceylon, Prov. Sum. Rec. A/AC.138/SC.I/SR.11 at p. 25 (Aug. 4, 1971) (non-living resources); Gabon, Prov. Sum. Rec. A/AC.138/SC.I/SR.11 at p. 13, (Aug. 4, 1971) (continental shelf); Ghana, Prov. Sum. Rec. A/AC.138/SC.I/SR.22 at p. 3, (Aug. 18, 1971) (living and non-living resources); Indonesia, Prov. Sum. Rec. A/AC.138/SC.I/SR.16 at p. 4, (Aug. 9, 1971) (non-living resources); Kenya, Prov. Sum. Rec. A/AC.138/SC.II/SR.8 at p. 11 (Aug. 5, 1971) (living and non-living resources); Mauritania, Prov. Sum. Rec. A/AC.138/SC.II/SR.11 at p. 5 (Aug. 13, 1971) (non-living resources); Nigeria, Prov. Sum. Rec. A/AC.138/SC.II/SR.7 at p. 2, (Aug. 3, 1971) (non-living resources); Venezuela, Prov. Sum. Rec. A/AC.138/SR.64 at p. 3, (Aug. 13, 1971) (living and non-living resources); Yemen Arab Republic, Prov. Sum. Rec. A/AC.138/SR.65 at p. 14, (Aug. 20, 1971).

Other nations also supported the concept of some type of contiguous zone, although not necessarily of 200 miles: Australia, Prov. Sum. Rec. A/AC.138/SC.II/SR.6 (July 30, 1971) (fishing and pollution controls); Ivory Coast, Prov. Sum. Rec. A/AC.138/SC.II/SR.12 at p. 3 (Aug. 17, 1971) (conservation of biological resources); Tanzania, Prov. Sum. Rec. A/AC.138/SC.II/SR.13 at p. 10 (Aug. 17, 1971) (fishing controls).

Malta in a Draft Ocean Space Treaty submitted as a working paper at the U. N. Seabeds Committee recommended a contiguous zone for coastal state jurisdiction of 200 nautical miles, termed "national ocean space", in which the coastal state would have authority to manage all natural resources. See U.N. Doc A/AC.138/53, August 23, 1971, arts. 36, 57-61. The 200 mile figure appears to have been arrived at by a compromise based purely on considerations of national interest. In a March 23, 1971, statement to the U. N. Seabeds Committee Dr. Arvid Pardo of Malta noted that a total of 65 states could, if they desired, extend their jurisdiction to 150 miles from the coast, while a total of 38 states could extend their jurisdiction to 300 miles. He then concludes:

> "On the other hand we note that the majority of coastal States cannot extend their jurisdiction beyond 230 to 270 miles from the coast and that claims of coastal State jurisdiction much beyond 200 miles from the coast are rare and usually of an indirect nature. Thus the maximum limit of

II. An Evaluation of U.S. Oceans Policy

A. *Policy Considerations*

1. General

Man has long regarded the seas as he has the rest of the environment, a thing to dominate and subdue.[94] This drive or instinct has manifested itself variously, but consistently, on a national level in claims for closed seas, territorial seas and more recently in contiguous zones for specialized purposes, such as the development of natural resources in the continental shelf.[95] Traditionally these claims of national interest were made and challenged only by the few great powers of the world. With the massive growth of nationalism, the world's population, and ocean resource

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coastal State jurisdiction which need be suggested is somewhere between 200 and 270 miles from the coast. Taking into account the general interest of the international community to keep the widest possible area of ocean space open to the non-discriminatory access of all, and the fact that some coastal States have already proclaimed that their jurisdiction extends to 200 miles from their coasts, my delegation has come to the reluctant conclusion that, to avoid prolonged debate and haggling, it has become necessary to establish a distance of 200 miles from the nearest coast as the outer limit of coastal State jurisdiction in ocean space." Statement pp. 41-43.

A current head count for the U.S. Senate Committee on Interior and Insular Affairs indicates that twenty-nine countries have expressed support for a 200-mile national jurisdictional limit over either mineral resources, fishery resources or both and that an additional thirteen countries seem inclined toward a broad limit. See *The Law of the Sea Crisis*, A Staff Report on the United Nations Seabeds Committee, the Outer Continental Shelf and Marine Mineral Development, 92nd Cong., 1st Sess. (December 1971), at p. 5.

[94] It is said in Genesis 1:28:

"And God said unto them, Be fruitful, and multiply, and replenish the earth and subdue it; and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth."

George Washington noted in a 1783 letter to Chevalier de Castellux:

"I could not help taking a more extensive view of the vast inland navigation of these United States and could not but be struck by the immense extent and importance of it, and with the goodness of that Providence, which has dealt its favors to us with so profuse a hand. Would to God we had wisdom enough to improve them." Payne, *The Canal Builders*, (MacMillan: 1970), at p. 140.

President James K. Polk in 1847 advocated a waterway uniting the Pacific and the Atlantic with the comment: "Rend America asunder and unite the binding sea!" Payne, *The Canal Builders*, at p. 161.

technology with its concomitant exploitation of ocean resources and impingement upon the quality of the oceans, the oceans are at last brought into focus as a global interest of enormous and oxymoronic dimensions and challenges. The oceans are our cesspools, our larder, the reservoir of the earth's water, a nature preserve, our junkyard, the storage bin of minerals and chemicals, a future habitat, the creator and conditioner of atmosphere and environment, a source of air and water transportation, a place of recreation and environmental quality, and finally, an ambient, invaluable and unique common meeting ground for the nations of the world. Man will probably never have a last frontier as long as he permits himself to remain alive to seek another. In the sense of global life, however, the oceans are that.

If the world community acts intelligently and imaginatively regarding the oceans, this and future generations can use, enjoy and profit from their resources and qualities, perhaps even to an enhanced degree. If we do not act in this fashion, if we continue to regard the oceans and their resources as assets, as things, to be taken or exploited as we have in the past, the various nations can in their separate ways diminish, even cripple, the resource and environmental dynamics of the oceans and leave future generations not a cornucopia, but a wasted and polluted vessel. It would take

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[95] See Fulton, *The Sovereignty of the Sea*, (1911), pp. 5 *et seq.*, pp. 338 *et seq.*, and *passim*; Auguste, *Continental Shelf*, (1960), pp. 38 *et seq.*, Report Special Subcommittee on Outer Continental Shelf, *supra* n. 52; *Cf.* McDougal, *The Hydrogen Bomb Tests and the International Law of the Sea*, (1955), 49 A.J.I.L. 356; *Background Material on the Juridical Aspects of the Continental Shelf and Marine Waters*, Pan Am. Union Doc. 2, SG-2, March 3, 1956, at p. 8, and *passim*. See also, Ardrey, *The Territorial Imperative*, (Atheneum: 1968), in which it is said at pp. 334-335:

> "Identity, stimulation, security: if again you will think of them in terms of their opposites their images will be sharpened. Identity is the opposite of anonymity. Stimulation is the opposite of boredom. Security is the opposite of anxiety. We shun anonymity, dread boredom, seek to dispel anxiety. We grasp at identification, yearn for stimulation, conserve or gain security. (at pp. 336-337).
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> As we may understand the popularity of human war, we may understand the popularity of territory. There are few institutions, animal or human, that satisfy all three needs at once. Besides the security and the stimulation of border quarrels which it provides with equivalent largesse among species, it provides identity. 'This place is mine; I am of this place', says the albatross, the patas monkey, the green sunfish, the Spaniard, the great horned owl, the wolf, the Venetian, the prairie dog, the three-spined stickleback, the Scotsman, the skua, the man from La Crosse, Wisconsin, the Alsatian, the little-ringed plover, the Argentine, the lungfish, the lion, the Chinook salmon, the Parisian."

work, but as we have seen in the case of Lake Erie and the Blue Whale, it can be done.[96]

It is, therefore, entirely appropriate and necessary that the world community work toward establishing a management system for the oceans that will permit this and future generations to make a beneficial multiple use of them. It should be emphasized that it is essentially a resource management system for the oceans toward which the world community has been working, in a true sense groping. Any analysis of oceans policy, therefore, must be considered in this perspective and in view of the ultimate goal of effecting a system that will give appropriate recognition to national (and in U.S. federal context, state) and international interests in environmental quality generally and in particular, beneficial uses, amenities and resources of the oceans. The essentials are simple:

1. Existing resources, uses and amenities and the various elements impinging upon them should be identified and inventoried.

2. Criteria should be developed to evaluate and identify beneficial and detrimental aspects of resources, uses and amenities.

3. Decision-making machinery should be created to weigh and determine priorities among and conditions upon resources, uses and amenities on the basis of the established criteria. In this regard it should be emphasized that the "mix" of priorities will vary in the context of a particular area, a particular resource, use or amenity, the particular conditions and the particular time. An oil and gas lease that may be appropriate for offshore Tanzania or Louisiana might be inappropriate for the Riveria or the Santa Barbara Channel.

4. A plan should be prepared incorporating such criteria.

5. A system should be established which will effectively implement the plan.

While the essentials of an oceans management system are simple, however, the creation of one is an incredibly complex and difficult task. The major obstacle and a major determinent in deliberations on the subject is that of self-interest, in some respects unenlightened self-interest.

The United States, particularly those individuals within the Department of State that have been responsible for developing oceans policy, deserves a great deal of credit for initiating and pursuing international negotiations to explore the parameters of

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[96] See Marx, *The Frail Ocean*, (Coward-McCann: 1966), at pp. 8, 54, 64, 74. *et seq.*

agreement and disagreement of the various nations of the world, a necessary prelude to the formulation of new rules and régimes. Those who would seek to delay the commencement of international deliberation "until we know more about the oceans" ignore the course of human conduct regarding the environment.[97] Man has destroyed many things that he knew nothing or little about. Indeed, it has been his ignorance that has perhaps made his destruction so facile. We must protect the oceans while we learn about them.

Further, it is quite clear that the management system for the world's oceans must encompass all resource and user aspects of them and a reevaluation of all existing laws and conventions. Since this broad issue surfaced several years ago a number of rather disparate institutions, such as the American Bar Association and the Soviet Union, have gone on record as supporting the *status quo* established by the 1958 Geneva Conventions.[98] As attractive as the U.S.S.R. — A.B.A. backing may be, however, the Conventions and concepts of customary international law have shown that they are not capable of providing the requisite international management system for the oceans.[99]

It was, therefore, entirely appropriate that the United Nations General Assembly adopted its resolution calling for a 1973 conference on virtually every policy issue affecting the oceans,[100] their resources and their management.

It would at first blush appear to be desirable to separate the broad issues involved into "manageable packages" and deal with

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[97] This concept has at times received support from a number of sources. See, Report of the National Petroleum Council, *Petroleum Resources Under the Ocean Floor*, (1969) at p. 77. See also Joint Report of Sects. of Nat. Res. Law, Int'l and Comp. Law and Standing Comm. on Peace and Law Through U.N., A.B.A., (Aug. 7, 1968) *infra* n. 98.

[98] U.N. Doc. A/7925, *supra* n. 60. An A.B.A. Resolution adopted August 7, 1968 ((1969), 2 Nat. Res. Lawyer at pp. 96-97) urged that "the interests of the United States... be protected to the full extent permitted by the 1958 Convention Shelf". Recently, however, there has been a growing recognition that existing regimes do not comprise a practicable plan of management for the oceans. See *Report of the Deep-Sea Mining Committee of the International Law Association* (1970) at pp. 14-15.

[99] See statement by Senator Claiborne Pell in U.N. Committee I, Press Release USUN-177(70), Nov. 26, 1970, at pp. 4-5; Int'l Law Ass'n Report, *op. cit.*, n. 97.

[100] See *supra* n. 77.

them sequentially.[101] So many of the issues are interconnected, however, and in such varying and different degrees that it may prove quite difficult to remove the major ones from the critical mass of issues and trade-offs that provide the incentive for international agreement. It is difficult to divorce the issue of the limits of national jurisdiction from the issue of the régime beyond.[102] It is, similarly, difficult to consider the issue of the limits of national jurisdiction separate from the issue of the question of the breadth of the territorial sea and the use of international straits.[103] This is particularly true of the Latin American states, to whom the issues of the territorial sea, the continental shelf, and the contiguous zone for the conservation of living resources are interrelated in varying degrees.[104]

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[101] Statement of John Stevenson, The Legal Adviser to U.S. Dept. of State, Dept. of State Press Release No. 49, Feb. 18, 1970.

[102] Statement by W. D. Jamieson, U.K. Representative to the U.N. First Committee on Dec. 15, 1970, U.K. Mission to the U.N. Press Release No. 107, Dec. 15, 1970.

[103] *Ibid.*

[104] In the Latin-American meeting on "Aspects of the Law of the Sea" held in Lima, Peru on August 4-8, 1970, 20 Latin-American nations adopted the following declaration and resolutions, *inter alia:*

"Considering:

That there is a geographical, economic and social link between the sea, the land, and man who inhabits it, which confers on coastal populations a legitimate priority right to utilize the natural resources of their maritime environment;

That, in consequence of that priority relationship, the right has been recognized of coastal States to establish the extent of their maritime sovereignty or jurisdiction in accordance with reasonable criteria, having regard to their geographical, geological and biological situation and their socio-economic needs and responsibilities;

* * *

DECLARES as common principles of the law of the sea:

1. The inherent right of the coastal State to explore, conserve and exploit the natural resources of the sea adjacent to its coasts and the soil and subsoil thereof, as well as of the continental shelf and its subsoil, in order to promote the maximum development of its economy and raise the level of living of its people;

2. The right of the coastal State to establish the limits of its maritime sovereignty or jurisdiction in accordance with reasonable criteria, having regard to its geographical, geological and biological characteristics and the need to make rational use of its resources;

3. The right of the coastal State to adopt regulatory measures for the aforementioned purposes, applicable in the areas of its maritime sover-

2. Nationalism — A Major Determinant

One element in international deliberations must be emphasized: that of nationalism. Despite the logic of establishing global institutions to cope with global problems, it is a hard fact that they can be established only in the political context of nationalism which remains a strong and viable force among both developed and developing countries, many of the latter of which have only recently received their much coveted independence and "vote". To be feasible, therefore, any proposed global institution should be structured so as to give recognition to national interests and afford fair representation by all nations in the decision-making process. Such interests can be tempered to the extent necessary

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eignty or jurisdiction, without prejudice to freedom of navigation and flight in transit of ships and aircraft, irrespective of flag."

U.N. Doc. REDEMAR/35, Augnst 8, 1970; U.N. Press Release NV/198, October 20, 1970.

In December of 1970 Peru (Mr. Schreiber) stated to the U.N. First Committee:

"[T]here is a growing awareness of three very important conclusions.

First, that the concept of the territorial sea limited by the range of weapons (a fairly arbitrary concept based on force as a justification of the law) has been enriched by more reasonable criteria: that of the preservation of the marine environment and the utilization on a priority basis of its resources for the benefit and well-being of the coastal populations. In other words, instead of the requirements of military defence we have added the concepts of ecological and economic defence, in addition to considerations relating to the necessary customs, police, sanitary, fiscal, immigration control and so on.

Secondly, that the narrow limits of the territorial sea, set in the eighteenth century at the range of a cannon, fall short of meeting the responsibilities of the coastal States derived from the foregoing factors.

Thirdly, that these limits should be broadened, taking account of the geographical characteristics, the geological, ecological and other conditions and the social and economic needs and responsibilities of the respective coastal States.

Those who do not wish to accept these conclusions and cling to old rules — which were never universal — and who responded to the interests of their commercial enterprises in an area of colonial domination, act as if the realities of yesteryear were the same as those of today, and the changes that have occurred both in the political and economic fieds, as well as in the scientific and technological fields, do not matter to them a bit, and they pretend to ignore the fact that nations, which were formerly subjugated, have emerged to independent life and are determined to defend their rights because they know that otherwise they would not be able to ensure the well-being of their peoples." Provis. Verbat. Rec. 1738 mtg. U.N. First Com., U.N. Doc. A/C.1/PV. 1788 (Dec 8, 1970) at pp. 12-13.

to achieve a uniform international policy and the representation can be by classes or regions, but only to the extent that it is politically acceptable.[105]

Among the national interests that should (indeed must, if uniform solutions are to be provided) be given recognition are those of coastal nations in offshore resources and uses with respect to which they have a functional interrelationship, whether it be economic, geographic, geologic, biologic or ecologic.[106] Many of the Latin American states make a valid point in asserting rights to offshore resources beyond the accepted territorial sea and continental shelf.[107] One may question the dimension of their claims, the extent of the rights asserted and the propriety of the claims viewed in light of existing customary international law, but it is difficult to deny the nexus between many of these states and certain of the offshore resources involved, which gives rise to and evidences the intrinsic validity of the national interest shown by them.[108]

The geographical proximity of the Humboldt Current to Peru and the economic dependence which it has on its living resources is functionally little different than that of Norway to its fjords which was first nationally asserted, then judicially recognized, then incorporated into international convention.[109] Nor is Canada's geographic proximity to the Arctic and the ecological commonality which gave rise to its recent *Arctic Waters Pollution Prevention Act* greatly different from the geographic and resource considerations

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[105] See *infra* n. 241 *et seq.*

[106] See *supra*, nn. 91 and 104.

[107] Franklin, *The Law of the Sea: Some Recent Developments (With Particular Reference to the United Nations Conference in 1958)*, (1961), 53 Nav. War Coll. Bl. Bk. Ser. 16, at pp. 51 *et seq.*; Auguste, *op. cit.*, n. 95.

[108] *Ibid. Cf.* Kunz, *Continental Shelf and International Law: Confusion and Abuse*, (1956), 50 Amer. J. of Int'l L. 828, at p. 849.

[109] In *United Kingdom* v. *Norway*, [1951] I.C.J. 116, it was held that Norway could properly draw a straight baseline along its "skjaergaard", the islands, rocks and ramparts along the Norwegian coastline which extend as far as 45 miles apart. The Court commented that the solution was "dictated by geographic realities" and stated that

> "[t]he real question raised in the choice of base-lines is in effect whether certain sea areas lying within these lines are sufficiently closely linked to the land domain to be subject to the regime of internal waters" (At p. 133).

The Court emphasized the long and historical economic nexus between offshore fisheries and the Norwegian people and concluded that with due regard to the peculiar situation presented

> "...it may be that several lines can be envisaged. In such cases the coastal

State would seem to be in the best position to appraise the local conditions dictating the selection" (At p. 131).

Later the principles of the case were incorporated in Article 4 of the 1957 *Convention on the Territorial Sea and Contiguous Zone.*

Compare the physical and economic situation of Peru as described by its representative to the Sixth Committee of the United Nations General Assembly, Eleventh (1956) Session:

> "The sea off the coast of Peru has certain peculiar and unique characteristics which are determined by the Peruvian Humboldt current. This current flows along the coast of Peru, Chile and Ecuador; it is the largest cold-water current and as it wells up from the depths of the sea it brings with it the detritus carried down by the rivers.
>
> Owing to the occurrence of these circumstances, Peru depends for its food supply mainly on the sea, that is to say directly on *fish* and indirectly from *guano* which is essential to the farmers in the small coastal valleys. This is Peru's underlying motivation: the close relationship between man, the mainland and the sea in a particular country where the ecology is such that the biological balance must not be upset.... The protection and utilization of these resources, which are essential to the nation's livelihood, were the fundamental reasons for the action by Peru and for similar action by many other countries." U.N. Doc. A/Conf. 13/9 (1956).

The purpose of Peru in proclaiming a 200 mile maritime zone (see Auguste, *op. cit.,* n. 95, at p. 130) were stated as follows:

> "Had we merely proclaimed sovereignty over the submarine platform and, the epicontinental superjacent sea, we should have failed to protect our fisheries, which were at that time-in jeopardy. Nor would they have been adequately protected by the mere assertion of a right to establish at a later date conservation zones on the high seas later, as the United States proclamation did. Peru, perhaps more than the States who proceded it with their proclamations, had reasons for wishing to find a speedy and clear-cut solution for its problem without awaiting the slow and perhaps unobtainable consent of the international community, and a solution so expressed that it could take immediate action against the intrusion of the foreign fishing fleets which were threatening the *economic interests* of our country." E. Garcia Sayan, *Notes on the Maritime Sovereignty of Peru* (Geneva, 1958), at p. 3.

Compare the position of the Canadian Government, *supra,* nn.36-37. It is clear that at the time of the Peruvian declaration enormous fishery takings were occuring in the areas covered by the declaration which detrimentally affected some fish stocks. See Loring, *supra* n. 91, at pp. 414 *et seq.,* statement of W. M. Chapman, (Director of Research, American Tunaboat Association), Hrgs. before Comm. on Interior and Insular Affairs, U.S. Sen. 83rd Cong., 1st Sess. on S. 1901, Washington 1953, pp. 373-382; Auguste, *op. cit.,* n. 41, at pp. 264 *et seq.* See also McDougall & Burke, *The Public Order of The Oceans,* (1962), at pp. 305-419.

which gave rise to the 1945 Truman Proclamation and, again, the institutionalization of the national claim made therein.[110] The Canadian claim would appear to be an *a fortiori* situation for propriety with due regard to the fact that it is an interim measure to protect natural resources, rather than a claim to permit their exploitation, as was the Truman Proclamation.[111] Even within the context of our own country's federal-state relationship, examples exist. The natural nexus between California and offshore areas located between the mainland and the Channel Islands, such as the San Pedro and Santa Barbara Channels, is direct and observable, notwithstanding the fact that they are in international waters overlying lands under federal jurisdiction.[112]

The established régimes of the ocean, the territorial sea, the "freedom of the seas" to navigate, fish and fly and the more recent

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[110] The analogy to the 1945 Truman Proclamation has not been overlooked by Canada, see L. H. J. Legault (Legal Division, Canadian Department of External Affairs), *The Freedom of the Seas: A License to Pollute,* Int'l L. Ass'n. [Canada] Symposium, September 8-11, 1970 (inadequacy of existing laws discussed); 114 Canadian House of Commons Debates, April 16, 1970, No. 103, at pp. 5944, 5945; n. 1 *supra,* Canadian note of April 16, 1970, *op. cit.,* n. 36. *Cf.* Bilder, *supra,* n. 37 at p. 26.

[111] See Krueger, *supra,* n. 2 at pp. 464 *et seq.*; n. 36, *supra.*

[112] At its December 4-5, 1970 meeting, the California Advisory Commission on Marine and Coastal Resources referred to proposed federal coastal zone management legislation, and noted that:

> "the [California] *Marine Resources Conservation and Development Act* of 1967 requires that the Comprehensive Ocean Area Plan ("COAP") encompass areas between the Channel Islands and the mainland which have a functional interrelationship to them, such as the Santa Barbara Channel and San Pedro...."

The California Commission then recommended that:

> "federal coastal zone management legislation should authorise the inclusion in the defined coastal zone of any lands under federal jurisdiction and control where the administering federal agency determines them to have a functional interrelationship from an economic, social or geographic standpoint with lands within the territorial sea. Any such inclusion, however, should not convey, release or diminish any rights reserved or possessed by the Federal Government under the *Submerged Lands Act* or the *Outer Continental Shelf Lands Act* and should be subject to reasonable conditions imposed to protect the national interest in defense and national interest in defense and national security." Proceedings, Dec. 4-5, 1970 Mtg.

See House Committee on Merchant Marine and Fisheries, Subcom. on Oceanog., Hrgs., "Coastal Zone Management Conference", H.R. Rep. No. 91-14 (Oct. 28-29, 1969), at pp. 195 *et seq.*; Senate Committee on Commerce, Subcom. on Oceanog., Hrgs., "Federal Oceanic and Atmospheric Organization", 91st Cong. (Mar., Apr. and May, 1970), at pp. 1260 *et seq.*

doctrine of the continental shelf, will also have to be given recognition in any new proposed global institution. This need will exist not because of the frequently expressed fealty which the world community owes to many of these rules because of their long-standing and general observance.[113] They are rules and they can be changed — the evolution of international law is replete with examples of this mutability.[114] The need for recognition will rather arise from the political reality that there is wide-spread and strong national support for these régimes. In the case of the territorial sea, for example, there is, again, present the functional nexus between the coastal state and the offshore area for a variety of purposes.[115] The "freedom of the seas" evolved from the need of the powers of the world to freely travel the oceans, exploit their resources and contest one another there.[116] The great powers still want these rights and any workable global institution for the ocean must give recognition to them. Such recognition does not, however, mean that these rights and the basis therefor should not be critically examined in the context of the present-day needs and goals of the world community and appropriately tempered. It is a fact and one well known to the developing countries of the world that the "freedom of the seas" and at least initially, the doctrine of the continental shelf, were régimes created by the developed countries and principally used by them for their convenience and benefit.[117] The independent point of view of the developing countries has and should continue to serve a therapeutic purpose in achieving adjustments in established international régimes that serve to reduce the possibility of international conflicts.[118]

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[113] See *supra* n. 60. See generally L. Oppenheim, *International Law, A Treatise*, at pp. 24-27, 581-587, H. Lauterpacht ed. (8th ed., 1955).

[114] See Fulton, *op. cit.*, n. 95; Report Special Committee on Outer Continental Shelf, *supra* n. 52.

[115] See *United States* v. *California*, 332 U.S. 19 (1947), at p. 32; Fulton, *op. cit.*, n. 95, at pp. 576 *et seq*; McDougal and Burke, *op. cit.*, n. 110, at pp. 176-179; Judgment of *The Anglo-Norwegian Fisheries Case* [1951] I.C.J. Rep. 116.

[116] Report on Outer Continental Shelf, *op. cit.*, n. 52, at pp. 30-33; L. Oppenheim, *op. cit.*, n. 113, at pp. 593-594; see Opening Statement of Arthur Dean (U. S. Representative) at Geneva Law of the Sea Conference, Mar. 11, 1958: 38 Dept. of State Bull. 574, at pp. 576-579; see generally, R. Palmer, *A History of the Modern World* (2nd ed., 1962), at pp. 396, 512, 674-675. See also Franklin, *op. cit.*, n. 107, at pp. 115 *et seq.*; McDougall and Burke, *op. cit.*, n. 110, at p. 561.

[117] U.N. First Committee Prov. Summ. Rec., Nov. 6 - Dec. 16, 1970, *passim*; see also Legault, *op. cit.*, n. 110.

[118] See *supra* at n. 84.

It is quite apparent that national security requirements are important considerations for the great powers, particularly the United States and the Soviet Union. The ability to freely travel the world's oceans and its numerous straits by ship, submarine and air is of obvious importance to them.[119] In evaluating the priority that national security interests should receive in establishing a management system for the world's oceans, however, the long-range significance of confirming an absolute right of free transit should be weighed in terms of its necessity and worth and its cost as reflected by any concessions with respect to other relevant national interests that may be involved.

An expansion of the accepted limits of territorial sea to 12 miles as proposed by the United States [120] would close many important straits now regarded in part as high seas and the U.S. concern for the maintenance of free transit for military and non-military purposes through them is valid. A right of "innocent passage", as the same now exists with respect to the territorial sea, would not be

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[119] See Statement of Robert A. Frosch, Assistant Secretary of the Navy for Research and Development, Hrgs. Before Subcom. on Ocean Space of the Com. on For. Relations, U.S. Senate 91st Cong., 1st Sess., July 24, 25, 28 and 30, 1969, "Activities of Nations in Ocean Space", in which the following comment is made at pp. 30-31:

> "Beyond that, our greatest concern with regard to legal problems in the seas, and here it is not only a Navy concern but an Air Force concern and a DOD concern, has to do with the problem of the width of the territorial sea and the associated problems of passage and over-flight of international straits. This is an area in which there are some evidences of beginning encroachement by practice, and on area of considerable concern beeause such encroachment would change the entire pattern not only of overflights and passage for military vessels but the entire pattern of commercial use of the seas, and take it away from a pattern of free use, whether that use is established by clear international water definitions or by historical precedent that make certain straits international in a sense of passage.
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> From a defense point of view, we are interested in seeing the maximum of the seas in this respect both because we believe it is the best for U. S. national security interests in the broadest sense and because it is in keeping with a long tradition of freedom of the seas which, on the whole, has been generally consistent with peacekeeping efforts."

See also Rept. of Com. on Deep-Sea Mining of the Int'l L. Ass'n, (Australian Br., 1970), at pp. 19-20. *Cf.* Statement of Luke W. Finlay, representing the American Petroleum Institute in Hrgs. of Subcomm. on Minerals, Materials and Fuels of Sen. Comm. on Interior and Insular Affairs, Sept. 23, 1970; Statement Senator Lee-Metcalf, 117 Cong. Rec. S. 2814, S. 2818 (92nd Cong., 1st Sess., 1971).

[120] See *supra* n. 38.

sufficient.[121] It is highly questionable, however, whether this concern should be extended to internationalizing offshore coastal areas beyond the territorial sea that could logically be the subject of a national coastal contiguous zone for resource purposes, if a right of free transit through it is assured. This concept of internationalization, it seems clear, was the intent of the U.S. Draft Seabeds Convention in proposing the de-nationalization of large portions of the continental shelf and establishing the International Seabed Area, defined as "all areas of the seabed and subsoil of the high seas seaward of the 200 meter isobath adjacent to the coast of continents and islands".[122] The Draft Convention provides that the International Seabed Area "shall be open to use by all States, without discrimination, except as otherwise provided in this Convention" [123] and further provides that the "[e]xploration and exploitation of the natural resources of the International Seabed Area must not result in any unjustifiable interference with other activities in the marine environment".[124] Free transit through the entirety of the International Seabed Area, including the proposed International Trusteeship Area,[125] would thus be assured.

Further, it should be observed that military uses frequently do not follow defined orders. The *Convention on the Continental Shelf* does not presently authorize uses of the seabed for military purposes and a negative inference can be drawn in this regard.[126] Notwithstanding, however, it seems certain that the United States and many of the other developed powers use their continental shelves, indeed the continental shelves of each other, for various forms of military use. Whether this is a "right" or simply a matter of *realpolitik* is not of particular significance. When national security

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[121] Under the Convention on the Territorial Sea and the Contiguous Zone neither aircraft nor submerged submarines have a right of innocent passage and passage is deemed "innocent" only "so long as it is not prejudicial to the peace, good order or security of the coastal State". U.N. Doc. A/CONF. 13/L. 52, Art. 14, para. 4. There is, therefore, a subjective quality to the definition. See Statement by John R. Stevenson to Subcom. II of U.N. Seabeds Committee dated Aug. 3, 1971, *infra*, Part IV at p. 3.

[122] Art. 1, para. 2.

[123] Art. 3.

[124] Art. 8.

[125] Art. 26.

[126] A valid case can be made, however, that military installations are permitted use of the continental shelf by reason of the coastal state's inherent right of self-defense. See Franklin, *op. cit.*, n. 107, at pp. 65-67; McDougal and Burke, *op. cit.*, n. 110, at pp. 718-720. Cf. *The Law of the Sea Crisis, infra*, n. 272.

has required it there have been U-2 flights, submarines in all types of territorial waters and probably other unknown but equally exotic excursions by the military. By the same token it is questionable whether rights confirmed for "security" purposes will not be subject to unilateral withdrawal by the various states involved, if their own national interests indicate that it is desirable or expedient to do so at a future date. There is no reason that rights of this nature could not fall into question as quickly as did the provisions of the Geneva Conventions of 1958.

In evaluating national interests it should also be borne in mind that the developing countries (and certainly more than a few of the developed) of the world quite understandably are much more interested in achieving economic growth and, consequently, in the exploitation and development of resources, rather than in concerns of environmental quality and multiple use.[127] It is very clear from international discussions on the subject that the developing countries regard, and quite reasonably regard, the current concern over environmental quality as one that is relevant principally to affluent countries and peoples who can afford what is essentially a new luxury in an industrial society.[128] It would be interesting to see how many countries of the world, and even states of the United States, would accept Southern California's extensive offshore oil reserves with their inherent threat of pollution for the economic benefit that they would bring.[129] Lesser developed countries and peoples would like to first enjoy the benefits of industrialization and technology before they begin to control its deleterious aspects.

There has been a great deal of serious thought directed toward the issue of a régime for the oceans that would be workable — attractive to both developing and developed nations, to coastal as well as land and coast-locked.[130] There seems, however, to have been little done (or perhaps more accurately which could be done) to quantify the benefits which a given nation might receive under a particular form of international régime, such as that proposed

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[127] See *supra* nn. 91, 104.

[128] See U.N. Press Releases on Preparatory Conference on Human Environment, HE.1/Rev.1 (Mar. 6, 1970) to HE./16 (Mar. 20, 1970), *passim.*

[129] Pollution from offshore oil drilling appears in an overall environmental context to have a quite limited impact. See Krueger, *International and National Regulation of Pollution from Offshore Oil Production,* (1970), 7 San Diego L. Rev. 541, 558.

[130] See *supra* nn. 9 *et seq.*

by the United States, as against those which a nation might receive under the existing or another alternate régime. It is obvious from the unilateral claims made to date that coastal nations feel that their best national interests lie in a broad area of national jurisdiction.[131] It is equally apparent that the advantages which coastal and non-coastal nations would receive from an international régime of broad dimensions, such as that proposed by the United States, are nebulous and uncertain. The proposed International Seabed Resource Authority is required to use revenues from the exploration of the seabed "for the benefit of all mankind, particularly to promote the economic advancement of developing States Parties to this Convention, irrespective of their geographic location".[132] It is clear however, that this fund is to be composed of net revenue over and above administrative and operating costs of the Authority which could be very substantial[133] and further subject to the qualification that an indeterminate portion of the revenue is required to be used "to promote" resource exploitation, environmental research, the development of marine resource knowledge and technical assistance to contracting parties.[134] With due regard to this it is virtually impossible to assure any coastal nation that it will receive more under the proposed régime than it will from whatever zone of national jurisdiction it can legitimately claim. Further, it is only on principle that a land-locked nation can be assured that it will receive more from the international régime than it would otherwise.

The dynamics of the situation are becoming quite clear. If a developing coastal nation is asked to give up a potentially oil-laden continental shelf or a valuable coastal fishery for an unspecified share of an uncertain portion of undetermined revenue from (in large part) undiscovered resources, as it is essentially asked by the U.S. Draft Convention, predictably it will chose to claim and manage the resources involved, whether pursuant to an international régime providing for a broad contiguous zone or by unilateral declaration.[135] The fact that an international régime which would accommodate the interests of the coastal states might be defeated by land and shelf-locked states would be irrelevant. Such

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[131] See *supra* nn. 85-93.

[132] Art. 5, para. 1.

[133] App. D, paras. 1.1, 3.1.

[134] Art. 5, para. 2.

[135] See *supra* nn. 85-93, 104.

states may have a "blocking third",[136] but they do not constitute the majority which is necessary to establish a comprehensive régime for the oceans. If the international régime is not structured so as to accommodate the interests of the coastal states, they predictably will refuse to accept it and the land-locked states will lose the opportunity to establish rights of access to the oceans which they have long and ardently sought.[137]

In light of the very dominant pattern of national self-interest that has emerged among many of the coastal nations it is difficult in the extreme to perceive of consensus being established on an international régime that does not give valid recognition to it. It is further difficult in the extreme to perceive of a minimization of the confrontations, conflicts and environmental and resource mismanagement that has characterized international oceans policy in the past without such a consensus.

3. International Organization

The powers and composition of the international agency to be given responsibility to administer the oceans management plan should depend upon the extent of the lands, waters, and resources over which it will have jurisdiction and its duties with respect to them. If it were to be given management jurisdiction over all resources beyond a narrowly defined continental shelf, it would need broad powers and a comprehensive administrative framework.[138] If it were to be given management jurisdiction only over resources beyond a broadly defined continental shelf with limited regulation functions over activities in areas under national jurisdiction, it would seem that it could operate adequately with limited powers and a sparse administrative structure.[139]

With due regard to the strong national interest of many coastal states in the management of coastal and certain of the deep sea

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[136] See Ratiner, *United States Oceans Policy: An Analysis, op. cit.*, n. 37, at p. 240 (there are more than 40 such nations).

[137] See *supra* n. 81; Rep. Sec. Gen. on *Study of the Question of Free Access to the Sea of Land-locked Countries and of the Special Problems of Land-locked Countries Relating to the Exploration and Exploitation of the Resources of the Sea-Bed and the Ocean Floor Beyond Limits of National Jurisdiction*, A/AC.138/37, June 11, 1971.

[138] See Report of U.N. Secretary-General, *Study on International Machinery*, U.N. Doc. A/AC.138/23 (May 26, 1970) at pp. 28 *et seq.* ("International Machinery Having Comprehensive Powers").

[139] *Ibid.*, at p. 23 ("International Machinery For Registration and Licensing").

resources and the relative lack of incentive to abandon them in the proposals that have been offered to date, the latter situation seems more likely. Additionally, the caution with which new international structures are regarded makes it desirable that the one proposed for the oceans be sparsely structured, taking maximum advantage of existing institutions and agencies,[140] and reserve for future action issues not directly relevant to the plan of regulation.[141] The agency should be sufficiently complete to intelligently manage and allocate resources over which it has jurisdiction, supervise their development and multiple use, administer all other aspects of the plan of regulation[142] and be sufficiently flexible to permit restructuring if and as it is given further responsibilities — but not more. Certainly the oceans are "one world" in an environmental and resource sense, but politically we have not achieved this global unity. The proposed organization should reflect this reality.

4. International *v.* National Regulation

In evaluating any proposed global management plan for the oceans it does not serve any purpose to think in terms of "creeping jurisdiction" by either national or international agencies.[143] It has

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[140] See Reports of the National Petroleum Council (N.P.C.) and the American Bar Association (A.B.A.), *op. cit.*, n. 97.

[141] See Part II B 3, *infra*, n. 214.

[142] The desire to minimize the international controls involved in the new régimes have led some to recommend a registry which could receive and record claims, as opposed to a licensing authority which would allocate them. See A.B.A. and N.P.C. reports, *op. cit.*, n. 97. It is very apparent, however, that even those opposed in principle to a licensing authority want to achieve the ends which can be accomplished only by an agency with substantial decision-making powers. A consensus appears to have developed that at the very least a licensing authority of some type will be necessary. This is the clear import of the Nixon proposal and the U.S. Draft Resolution, and the suggestion of the recently approved U.N. Sea-Bed principles.

See also statement of Ambassador Phillips, U.S. Ambassador to the United Nations, made on October 31, 1969, that "[b]ecause mere registry of claims would probably only contribute to a confused race, it is our view that an international regime should include an international registry of claims governed by appropriate procedures". See Press Release USUN-141(69). As indicated in the Secretary-General's report, there is little reason to generically distinguish between a registry and a licensing authority: *op. cit.*, n. 138, at p. 24.

[143] Statement of John R. Stevenson, The Legal Adviser to the U.S. Dept. of States regarding the Draft Convention, Aug. 3, 1970, para. 1; Statement of Robert A. Frosch, *supra* n. 119; Statement John R. Stevenson to Subcon. II, U.N. Seabeds Com., Aug. 3, 1971, p. 5 ("historic tendencies to assert more and more types of control within fixed zones of special purpose jurisdiction").

become popular to use this term to describe the purported process by which a coastal state's jurisdiction for limited purposes (e.g., the development of the continental shelf for natural resources) will gradually and inexorably lead to regulations for all purposes (i.e., territorial sea). It follows from acceptance of this theorem that the "freedom of the seas" is threatened by the maintenance of a broad continental shelf and that the shelf consequently should be reduced or "internationalized".[144] This may or may not be a desirable result, but it should not flow from this line of reasoning.

The evolution of international law regarding the oceans has had a direct and it would seem necessary correlation with the development of technology and the need for exploitation.[145] Further, and more importantly, the growth in the world's population, particularly the portions directly affected by the oceans, the growth in the uses of the oceans and their resources and, finally, the conflicts between those uses and the environmental impingements resulting from them require regulation, and regulation in growing amounts, if chaos is to be avoided.[146] If ocean regulation is provided by a coastal nation regarding a use, interest or activity with which it has a functional nexus and which is not the subject of international agreement, it would seem an entirely appropriate act, even a commendable one where it has a beneficial effect from a resource or environmental standpoint. An example of this would be the Canadian *Arctic Waters Pollution Prevention*

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[144] The Marine Sciences Commission in its report, *Our Nation and The Sea,* accepted the validity of the theorem without qualification and came to a gross and tangled set of conclusions:

> "Such developments [Latin American 200 mile territorial sea claims] are obviously contrary to traditional U.S. Policy to limit national claims to the sea in the interest of the maximum freedom essential to the multiple uses, including military uses, which the United States makes of the oceans. *National security and world peace are best served by the narrowest possible definition of the continental shelf for purposes of mineral resources development.*" (Emphasis added). *Ibid.,* at p. 145.

Others beside the author have questioned the rationality of the statement and the thought processes through which it was reached. See Burke, *Law, Science, and the Ocean,* (1970), 3 Nat. Res. Lawyer 195, at p. 217.

[145] See *Resources of the Sea, Part One: Mineral Resources of the Sea Beyond the Continental Shelf,* Report of the United Nations' Secretary-General to the U.N. Economic and Social Council, U.N. Doc. E/4449/Add. 1, (Feb. 19, 1968), at pp. 14-17; Krueger, *op. cit.,* n. 2 at p. 452.

[146] A review of the various developments, interests and pressures renders this statement rather axiomatic. See Part II Al, *supra* n. 94; *Our Nation and The Sea, passim.*

Act.[147] If, on the other hand, the world community establishes regulations for uses, interests or activities which effectively and logically preempt regulation by the coastal states or are outside the accepted orbit of interest of the coastal states, this should be equally acceptable if, again, the regulations achieve a beneficial result. An example of this would be the regulation of areas beyond limits of national jurisdiction by an international agency, such as the proposed International Seabed Authority.[148] The point is, of course, that both national and international regulation of the world's oceans are proper depending upon the circumstances and that it serves little to speak in terms of "creeping jurisdiction". It is interesting to observe that it was likely, if not intended, that the International Seabed Authority proposed to be created by the August, 1970 United States Draft Convention would have or would come to have residual ("creeping"?) regulatory authority for all purposes over the continental margins, notwithstanding the coastal state being given limited "trusteeship" powers.[149]

Lastly, it should be noted that the theorem of "creeping jurisdiction", which was developed by the United States Department of Defense,[150] does not appear to be supported by historical fact. The historical fact is that successively greater national claims in offshore areas usually have not risen from internationally agreed régimes for national action, but in the absence of them. The case most frequently cited by the proponents of the theorem is that of Peru in which it successively established a 200 mile fishing conservation zone (1947), a 200 mile petroleum concession area (1952), a 200 mile area of exclusive sovereignty (1952), a 200 mile coastal air space zone (1965) and finally a 200 mile area of "Dominio" (1969).[151] This course of conduct, however, was not because of an internationally agreed régime permitting any of the national acts, but in the total absence of them. A more current example is the Canadian *Arctic Waters Pollution Prevention Act* in which an express premise for the national claim asserted was that there was no international agreed régime on the subject.[152] The

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147 See *supra*, nn. 35-37, 109-112.

148 See Part II B4, *infra* n. 231.

149 See *supra* n. 40.

150 See *supra* n. 119; Loring, *supra* n. 91, at pp. 428-431. See also Ratiner, *supra* n. 37, *passim*.

151 Loring, *supra* n. 91, at p. 430.

152 See *supra* n. 36. From time to time there seems to be recognition that the absence of a comprehensive regime is the cause for gradually expanding

relatively short history of the 1958 Geneva conventions further lends no factual support to the theorem. Conceptually unproven, probably invalid, and largely irrelevant, "creeping jurisdiction" has been a mischievous catch-phrase the case of which has detracted from rational discussions of the essential facts and issues involved.[153]

With the growth that we have seen in ocean uses and the increasing awareness of its importance on the environment we are coming to a period in which there should be comprehensive regulation of all uses affecting the oceans or their coasts. Whether it should be international, national or, within the U.S. federal-state context, at a state or local level depends upon the use or activity to be regulated and the fundamental appropriateness of the regulation.[154] It is a comprehensive oceans management plan toward which the international community is striving and this will not be practicable for the foreseeable future without such cooperative and "creeping" inter-relating jurisdiction.

5. National and International Objectives

The objectives which the United States has indicated should be served by the régime for the area beyond limits of national

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jurisdiction. In the Statement of Elliot L. Richardson, Under Secretary of State in Hearings on Issues Related to Establishment of Seaward Boundary of United States Outer Continental Shelf Before the Special Subcommittee on Outer Continental Shelf of the Senate Committee on Interior and Insular Affairs, 91st Cong., 2nd sess., Part 2, p. 427 (1970) it is said at p. 441:

> "If we have no treaty governing the right of exploration and exploitation of the continental margin, we can anticipate a situation in which coastal states progressively, over time, [claim] unilaterally wider and wider areas of exclusive control not suject to any international regulation or limitation." *Cf.* n. 143, *supra.*

[153] See also Loring, *supra* n. 91, at pp. 452-453.

[154] Recognition of the accuracy of this conclusion appears in the recommendation reached by the U.N. Food and Agriculture Organization's Marine Pollution Conference in December of 1970, in which it was stated that

> "...the increases in uncontrolled industrialization and in other waste-producing activities constitute, in the absence of new and increased remedial measures and preventive action, the major threat to the success of any measures for alleviating marine pollution and that this threat is aggravated by increasing world population." Press Release FAO/2210 (Dec. 17, 1970).

The resolution then recommended:

> "[*U*]*rgent action to prevent and combat pollution on individual, national, regional and international levels in order to minimize the effects on marine environment, its living resources and fishing.*" (Emphasis added).

jurisdiction,[155] the 1970 Declaration of Principles Governing the Sea-Bed and the Ocean Floor and the Subsoil Thereof beyond the Limits of National Jurisdiction, adopted with its approval by the U.N. General Assembly,[155a] the Nixon proposal of May, 1970 [156] and the U.S. Draft Convention [157] reflect in varying degrees the following broad policy objectives:

1. The internationalization of the world's oceans — the objective of minimizing national jurisdiction and control of the world's oceans and their resources and of maximizing international jurisdiction over them.[158]

2. The development of ocean resources — the objective of encouraging the exploration and exploitation of ocean resources,[159]

3. The encouragement of national participation in the development of ocean resources — the objective of permitting nations on a uniform basis to acquire exploration and exploitation permits.[160]

4. Assistance to developing countries — the objective of providing internationally earmarked assistance to developing countries.[161]

5. The preservation of free transit through the world's oceans and straits — the objective of limiting and avoiding national claims so as to afford convenience to military and commercial travel.[162]

6. The establishment of international consensus on ocean régimes — the objective of achieving uniformity in international law and eliminating future conflicts.[163]

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155 *Supra,* n. 31.

155a *Supra,* n. 68.

156 *Supra,* n. 38.

157 *Supra,* n. 38a.

158 The Nixon proposal and the Draft Convention, *supra,* nn. 68 and 38a; the 1970 Declaration of Principles, *supra,* n. 31. See *Our Nation and The Sea, supra,* n. 21.

159 This objective is present in all of the above-cited documents, *supra,* nn. 155-157.

160 U.S. objectives, *supra,* n. 31; Draft Convention, *supra,* n. 38a.

161 *Id., supra,* n. 159.

162 The Nixon proposal, *supra,* n. 156. The objective also appears to be evidenced by Article 3 of the Draft Convention, *supra,* n. 157, which provides:

> "The International Seabed Area shall be open to use by all States, without discrimination, except as otherwise provided in this Convention."

163 *Id., supra,* n. 159.

7. The encouragement of multiple use of resources — the objective of coordinating the management of the various ocean resources and uses to minimize conflicts.[164]

8. The advancement of knowledge and development of technology — the objective of learning more about the oceans and their resources and achieving the technological capability to safely permit scientific exploration and resource development.[165]

9. The protection of environmental quality — the management objective of preserving or restoring the natural condition of the environment.[166]

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[164] *Id., supra,* n. 159. This objective has been repeatedly acknowledged as necessary by many branches of the U.S. federal government. The Act for the classification of public lands which was passed contemporaneously with the law creating the Public Land Law Review Commission defined "multiple use" as follows:

> "[T]he management of the various surface and subsurface resources so that they are utilized in the combination that will best meet the present and future needs of the American people; the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; the use of some land for less than all of the resources; and harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land, with consideration being given to the relative values of the various resources and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output." 78 Stat. 987 §5, 43 U.S.C. §1415(b) (1964).

[165] *Id., supra,* n. 159. This policy is implicit in the Truman Proclamation and the administration of the *Outer Continental Shelf Lands Act.* It is made explicit by the *Marine Resources and Engineering Development Act* of 1966 and is also evidenced in the *Convention on the Continental Shelf.* The *Marine Resources and Engineering Development Act* provides:

> "(b) The Marine Science activities of the United States shall be conducted so as to contribute to the following objectives:
>
> (1) ...
>
> (2) The expansion of human knowledge of the marine environment.
>
> (3) The encouragement of private investment enterprise in exploration, technological development...."

80 Stat. 203 §2, 33 U.S.C. §1100 (1966).

[166] *Id., supra,* n. 159. This policy objective is also evidenced in a number of recent federal acts, particularly the recently enacted *National Environmental Policy Act* of 1969, which provides that "the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with" the *Act's* environmental protective policies, and that federal agencies shall use environmental design arts in their planning and by July 1, 1971, propose changes to their statutory authority and regulations to conform

The last three objectives are the same as certain of those identifiable as applicable to the U.S. outer continental shelf.[167] Note, however, that the following objectives which are also identifiable as being applicable to the U.S. outer continental shelf, and applicable in a beneficial sense, have not yet evolved as national or international policy objectives for the area beyond:

1. Efficient resource management — the objective of best effecting the prudent use of resources through their intelligent management.[168]

2. The encouragement of private participation — the objective of permitting qualified responsible representatives of the private sector to participate in the development of resources.[169]

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to the *Act's* purposes. Pub. L. 91-190 §§102-03, 83 Stat. 852 (1969). This policy is also evident in the Conventions on the Continental Shelf and High Seas. See Krueger, *op. cit.*, n. 129, at p. 571.

[167] See 1 Nossaman, Waters, Scott, Krueger & Riordan, *Study of the Outer Continental Shelf Lands of the United States* (Clearinghouse: Springfield, Va., 1968), §11.1 (hereinafter referred to as 1 Nossaman OCS Study); Krueger, *An Evaluation of the Provisions and Policies of the Outer Continental Shelf Lands Act*, (1970), 4 Nat. Res. J., pp. 763-764.

[168] The Truman Proclamation of 1945, the *Marine Resources and Engineering Development Act* and the legislative history of the *Outer Continental Shelf Lands Act* all evidence the objective of best effecting the prudent use of resources through their intelligent management by the federal government. Proclamation No. 2667, 3 C.F.R. (1943-1948 Comp.) 67; 80 Stat. 203, 33 U.S.C. §§ 1101-24 (1966). Also see, 1 Nossaman OCS Study, *op. cit.*, n. 167, §§1.5, 1.12. The Marine Sciences Commission in *Our Nation and The Sea* at p. 137 recommended, however, that the Secretary of the Interior be given and use the authority to issue offshore leases on the continental shelf for hard minerals on a non-competitive basis. The Commission also recommended that claims for mineral resources in areas beyond limits of national jurisdiction be registered with the proposed International Agency on a "first-come, first-registered" basis. *Id.*, at pp. 148, 150. It also recommended that the United States use the same policy in disposing of claims made by it with the proposed International Agency. *Id.*, at p. 155. From the standpoint of resource management these suggestions are quite illogical. See Brooks and Christy, *Memorandum on Suggested Operational Guidelines for an International Regulatory Authority for the Sea-Bed,* Twenty-First Report of Commission to Study the Organization of Peace (1970) at p. 29; Krueger, *op. cit.*, n. 167 at pp. 791-795.

[169] The *Outer Continental Shelf Lands Act* and the regulations promulgated pursuant thereto clearly contemplate that the development of minerals in the outer continental shelf be undertaken by qualified, responsible representatives of the private sector. 43 U.S.C. § 1337(a) (1964); 43 C.F.R. § 3380.1 (1964). The Marine Resources and Engineering Development Act also recognizes the desirability of "[t]he encouragement of private investment enterprise in exploration, technological development, marine commerce, and economic utilization of the

3. The maximization of revenue to the resource owner — the objective of effecting the greatest financial return for resource allocation and use.[170]

Some of the reasons for this are philosophical. The Soviet Bloc and many of the developing countries, for varying reasons, do not favor competitive means of resource allocation or private participation.[171] Further, many of the developing countries are more interested in maximizing their own participation in resource development and in the revenue therefrom than in maximizing return to an international agency, even one which will use revenues for assistance to them.[172] It is, moreover, far simpler and more ex-

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resources of the marine environment". 33 U.S.C. § 1101(b)(3) (1966); 1 Nossaman OCS Study, *op. cit.*, n. 167, § 11.1.

In Sprague and Julian, *An Analysis of the Impact of An All Competitive Leasing System on Onshore Oil and Gas Leasing Revenue,* (1970), 10 Natural Resources J. 514, at p. 531, it is concluded that an all competitive leasing system for federal onshore leases would have increased government bonus revenue from $10-million to $100-million in 1967 with a filing fee loss for non-competitive leases of only $2½-million. A competitive system of allocation appears as functionally valid for hard minerals as for oil and gas. See Brooks and Christy, *op. cit.*, n. 168, at p. 29; Thompson, *Canadian Trends in Mining and Petroleum Legislation: Some New Zealand Comparisons,* Australasian Mining Symposium 1, at p. 7 (1970); Krueger, *op cit.*, n. 167, at pp. 786 *et seq.*

[170] While there are indications in the legislative history of the *Outer Continental Shelf Lands Act* that the generation of revenue was a secondary consideration, its subsequent administration, particularly in recent years clearly indicates that a basic policy objective has been to maximize revenue to the federal government from the sale of mineral leases. This was particularly manifest in the 1968 Santa Barbara lease sale. See the *Nossaman Study, op. cit.*, n. 167, § 4.16.

[171] A draft resolution containing principles to govern the seabeds was presented to the U.N. Seabeds Committee by Brazil, Cameroon, Ceylon, Chile, India, Kenya, Kuwait, Libya, Madagascar, Sierra Leone, Sudan, Tanzania, Thailand, Trinidad and Tobago, and Yugoslavia which provided that the international machinery to be created should have

> "... responsibility for regulating, co-ordinating supervising and controlling exploitation, conservation, use and exploitation of that zone."

U.N. Doc. A/AC.138/SC.1/L.2 (March 23, 1970) at p. 3. The Soviet Union, however, believes that the responsibility for activities should be borne by the respective states, irrespective of how they choose to carry them out, and that the international machinery "should not itself carry out exploration and exploitation of sea-bed resources, since it might, in the final analysis, become a capitalist undertaking and a tool of monopolies". See U.S.S.R. representative statement to U.N. Seabeds Committee, 36th mtg., Aug. 14, 1970, Prov. Sum. Rec., U.S. Doc. A/AC.138/SR.36, at p. 12 (Aug. 14, 1970).

[172] *Supra,* nn. 82-83, 85-93, 104.

pedient to create a non-competitive administrative system of the type traditionally used and supported by the hard mining industry,[173] than to structure an economically efficient one employing competitive standards, particularly where the competing parties will be nations.[174] Again, the political reality of national interest would presently seem to have a strong influence. It is to be noted that the last of the principles supported by the United States in August of 1970 in the U.N. Seabeds Committe was that the international régime must be "so plainly viable that States will in fact ratify the

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[173] The U.S. hard mining industry has under the *Mining Law of 1872* non-competitive entry to federally-owned onshore lands. 17 Stats. 91 (1872). The *Outer Continental Shelf Lands Act* requires competitive bidding and the hard mining industry has used the fact that there are no outer continental shelf leases for minerals other than petroleum, sulphur and salt to support the contention that this form of allocation has discouraged the development of other minerals. *See* Walthier, Problems Relating to Mineral Exploration and Mining on the U.S. Continental Shelf, paper presented to the Public Land Law Review Commission (Jan. 11-13, 1968); U.S. Dept. Int., *A Report to the Public Land Law Review Commission* 90 (March 29, 1968). The argument is of questionable logic and utterly without factual support. See 1 Nossaman OCS Study, *op. cit.*, n. 167, §§ 11.10, 11.29 and 11.69; Krueger, *op. cit.*, n. 167, at pp. 778, 786 *et seq.* Notwithstanding, however, the concept of non-competitive allocation of hard mineral resources has been successfully advocated to both the Marine Sciences Commission and the Public Land Law Review Commission. *Ibid.*

[174] With respect to areas beyond limits of national jurisdiction consensus seems to have developed in support of an essentially non-competitive system of the type set forth in the Draft Convention where competitive bidding would be used only to determine allocation in the event of multiple filings. See Draft Convention, App. B. para 3.5. This has been in large part because of a feeling that a competitive system would give an unfair advantage to the developed countries. See Rpt. Deep-Sea Mining Comm. of Int'l L. Ass'n, *op. cit.*, n. 44, at pp. 14-26. The point has an emotional appeal, despite the fact that it is irrational from the standpoint of resource economics. Allocation of the resource has little to do with its exploitation. The developed powers of the word will have a great advantage in the exploitation of resources regardless of the original allocation which may in fact be made by a developing nation for them as a "flag of convenience". The choice of a non-competitive system of allocation for resources, for the area beyond limits of national jurisdiction must be made and rationalized on political grounds. In terms of resource management and economics, competitive allocation is clearly superior. In Brooks and Christy, *op. cit.*, n. 168, it is said:

> "Leases must be obtainable on the basis of some non-arbitrary allocation scheme. This is best achieved by some form of auction system.
>
> * * *
>
> The auction mechanism provides several advantages over a system that awards rights to the first claimant or over a system that awards rights

treaties establishing it" with the explanation that "[u]nless the regime we establish is acceptable to the vast majority of the nations who would participate in seabed resource development its chance of success is small".[175]

It will be helpful to examine the Nixon proposal and the U.S. Draft Convention in light of the foregoing policy objectives and their interrelationships.

B. *The Nixon Proposal — The U.S. Draft Convention*

1. Introduction

The Nixon proposal was essentially a liberalized version of that proposed by the Marine Sciences Commission in its 1969 report which would have confirmed unto coastal states exclusive jurisdiction to a depth of 200 meters or 50 miles from coastlines, whichever would be further, and established an "intermediate zone" beyond to the 2,500 meter isobath or 100 miles from coastlines, whichever would be further.[176] In the Nixon proposal the limit of national jurisdiction would end at 200 meters and the "intermediate zone" desigated a "trusteeship zone" would extend to the entirety of the "continental margin".[177] The international régime for the "trusteeship zone" and the area beyond were to provide for "the collection of substantial mineral royalties to be used for international community purposes, particularly economic assistance to developing countries".[178]

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on the basis of non-economic criteria. First, it helps to ensure that most efficient producers will get the exploitation rights.

* * *

Second, the auction mechanism provides the least arbitrary means for choosing among competing claimants.

* * *

Third, the auction mechanism approximates a fair value for the exploitation right much more effectively than any other system. The exploifer bids no more than he feels he can afford.

* * *

And finally, the auction mechanism will deter speculations from seeking to acquire exploitation rights. Other systems would have to depend entirely upon some kind of performance requirement to ensure that leases are used correctly."

[175] See U.S. Objectives, *supra*, n. 31, para. 12.

[176] *Our Nation and The Sea, op. cit.*, n. 20 at pp. 145-147.

[177] *Supra*, n. 38.

[178] *Ibid.*

Earlier proposals to internationalize the oceans and ocean resources had met with a great deal of opposition from extractive industries, particularly the petroleum industry,[170] and there was consequently reason to anticipate opposition to this proposal as well. In and of itself, it is questionable whether the Nixon proposal warranted the criticism of any of the extractive industries, if viewed objectively. The proposal, if adopted by the world community, would bring about a stabilization of titles in presently uncertain continental shelf and continental slope situations, establish a means for acquiring concessions in deep sea areas that are presently nonexistent and invest national concessions in areas beyond 200 meters with an international character which could materially assist the present expropriation problem. Moreover, there was no suggestion in the proposal that the proposed régimes would create any higher cost of doing business by way of royalties or rentals than are presently being paid and there was the indication that a coastal state would retain a number of independent rights with respect to properties in the "trusteeship zone." It was apparently for this reason that a "wait and see" attitude developed on the part of industry toward the proposal when it was first presented. As the implementing Draft Convention developed, however, it became very clear that the International Seabed Resources Authority would have extensive regulatory powers over the entirety of the international seabed area, including the International Trusteeship Area, and that the rights of the coastal states in the International Trusteeship Area were strictly limited. At this time, strong opposition to the Nixon proposal as so implemented developed within the petroleum industry and to a lesser extent within the hard mining industry, which undoubtedly felt more comfortable with the non-competitive licensing system proposed for the International Seabed Area.[180]

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[170] See N.P.C. and A.B.A. Reports, *op. cit.*, n. 97. See also Hearings on the Outer Continental Shelf before the Sen. Comm. on Interior and Insular Affairs, 91st Cong., 1st & 2nd Sess., at p. 10 (1970). *Cf.* Krueger, *The Convention on the Continental Shelf, the Need for Its Revision and Some Comments Regarding the Regime for the Lands Beyond,* (1968), 1 Nat. Resources Law. 1, at pp. 16-17.

[180] See statement of Northcutt Ely on behalf of the American Bar Association before the Subcomm. on Minerals, Materials and Fuels of the Comm. on Interior and Insular Affairs, U.S. Senate, dated Sept. 1970; statement of Luke W. Finlay on behalf of the American Petroleum Institute before said Subcommittee, dated Sept. 23, 1970. *Cf.* statement of John G. Laylin, mining lawyer to said Subcommittee dated Sept. 22, 1970. See also Report on Outer Continental Shelf, *supra,* n. 52 at pp. 5-28; Supplemental Report of N.P.C., *Petroleum Resources Under the Ocean Floor* (Mar. 1971), *passim.*

In many respects, the Nixon proposal was a quite clever one that gave the United States the initiative in the quite awkward negotiating situation that had developed as a result of the 1969 U.N. seabeds resolution.[181] Irrespective of this and its potential efficiency with respect to mineral development, however, it and the Draft Convention fail to suggest or provide a framework for a comprehensive management system for ocean resources and uses. It should be emphasized that what has been suggested is essentially another measure directed toward the exploitation of the natural resources of the seabeds of the type which has predominated the world's thinking regarding the oceans in the past. The Nixon proposal starts out well in referring to "the ecological hazards of unregulated use of the oceans and seabeds" and the need to establish "general rules to prevent unreasonable interference with other uses of the ocean [and] to protect the ocean from pollution".[182] The Draft Convention, however, is clearly geared toward mineral development with environmental considerations being weighed only insofar as they relate to such development. It is, in the final analysis, a quite benignly written international mining code. The Convention requires the International Seabed Resources Authority to issue very large blocs to nations on a non-competitive basis [183] and states that the categories of minerals and the areas to be covered by exploitation licenses "shall be those which will best promote simultaneous and efficient exploitation of different minerals".[184] There are restraints on the use of structures "for the exploration or exploitation of minerals deposits" so as to minimize interference with navigation similar to those contained within the *Convention on the Continental Shelf*.[185] The International Seabed Resources Authority is also required to prescribe Rules and Recommended Practices to protect "the marine environment against pollution arising from exploration and exploitation activities"[186] and to prevent "any unjustifiable interference with other activities in the

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[181] See *supra*, nn. 24-30.

[182] *Supra*, n. 38.

[183] App. A, para. 5.1; App. B, para. 3.4.

[184] Art. 15, para. 1.

[185] Art. 21. *Cf.* Convention on the Continental Shelf, U.N. Doc. A/CONF.13/L. 55, Art. 5, paras. 2, 3, 5 and 6.

[186] Art. 23, para. 1(a). The Council of the Authority is also authorized to "[i]ssue emergency orders, at the request of any Contracting Party, to prevent serious harm to the marine environment arising out of any exploration or exploitation activity and communicate them immediately to licensees", Art. 40, para. (j).

marine environment arising from the aforementioned activities".[187]

Except in the quite secondary sense in which the environment is considered by the foregoing provisions and the power of the International Seabed Resources Authority to establish international marine parks and preserves in areas that have "unusual educational, scientific or recreational value",[188] the Draft Convention literally ignores non-mineral and non-seabed uses, resources and values of the oceans. With due regard to the structure of the Draft Convention it could serve only to provide as a strong catalyst for early and relatively unconditioned exploration and exploitation of extractive resources of the seabed, particularly petroleum. The system provides for the development of mineral resources, the developing countries who will be a significant factor in the system's administration will receive direct economic development from the

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[187] Art. 23, para. 1(c).

The fact that the U.S. Draft Convention proposes both national and international policies and laws that profoundly affect oceans' environment raises strong question as to whether it did not fall within the purview of the National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852. In the event that it or a successor proposal does, an environmental impact statement to the National Council on Environmental Quality would be required. The *Act* requires that "all agencies of the Federal Government shall —

(A) Utilize a systematic, interdisciplanary approach which will insured the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment.

(B) identify and develop methods and procedures... which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on —

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented."

See *infra*, n. 244.

[188] Para. 25.

exploitation, and the developed countries and their nationals have the technology and interest in exploitation. There are no functional brakes provided in the system to effectively slow or prohibit development, even if necessary to protect environmental quality or other uses and resources of the ocean. This is true, although to a lesser extent, even as to the International Trusteeship Area in which the coastal state has the "exclusive right" to approve or disapprove application for licenses,[189] and may "impose higher operating, conservation, pollution, and safety standards than those established by the Authority, and may impose additional sanctions in case of violations of applicable standards".[190] Would the United States or any other developed power as trustee be able to withhold licensing operations in proven or highly potential offshore oil areas if requested to do so by the International Seabed Resources Authority?[191]

2. Trusteeship Zone Concept

The trusteeship concept of the Nixon proposal and the Draft Convention also raises problems. It is an apparent attempt to compromise the quite direct interest that a coastal state has in its continental margins that has been confirmed in varying degrees by the Truman Proclamation, the *Convention on the Continental Shelf* and customary international law[192] with the policy objective of achieving a greater internationalization of the world's oceans.[193] The coastal state would be given the right to administer seabed resources within the International Trusteeship Area which extends from 200 meters to probably the base of the continental slope[194] and in this area to determine the conditions under which mineral licenses would be issued[195] and living resources of the seabed would

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189 Art. 27, para. 2(a); Art. 28(b); App. C, para. 2.1.

190 Art. 27, para. 2(c); App. C, para. 10.1.

191 There would be many such areas if the proposed renunciation of title beyond a depth of 200 meters were to take place. See *supra,* n. 40; Krueger, *op. cit.,* n. 2, at p. 400; N.P.C. Supplemental Report, *op. cit.,* n. 180, at pp. 19 *et seq.*

192 See *supra,* nn. 1, 2 and 4.

193 See *supra,* n. 158.

194 Art. 26, para. 1. This could encompass lands as deep as 5000 meters (see National Petroleum Council Report, *Petroleum Resources Under the Ocean Floor,* (1969)) at pp. 23-25 but would probably average closer to 2500 meters (see Statement of W. T. Pecora, Director of U.S. Geological Survey, dated Feb. 1, 1968, para. 5).

195 Draft Convention, art. 28; *supra* nn. 189, 190.

be permitted to be exploited.[196] As an apparent recognition of the coastal state's continuing national interest in the area and in consideration for its continuing responsibilities, the Draft Convention would permit it to retain between 33⅓% and 50% of fees and payments received for the issuance or retention of a license or otherwise required by the Convention.[197] On the other hand, the Draft Convention would divest the coastal states utterly of any other rights in the International Trusteeship Area and give to the International Seabed Resources Authority, in effect, preemptive powers over the area, including the power to regulate and inspect all operations [198] and to issue emergency orders to prevent serious harm to the marine environment.[199]

The trusteeship concept immediately raised a number of objections. It was questioned whether a coastal state should have this high a degree of control over ocean resources if the same were in fact located beyond limits of national jurisdiction.[200] Some nations, largely developing, thought that the International Trusteeship Area should be administered purely by an international authority.[201] Others, such as Australia, expressed the point of view that the limits of national jurisdiction should be more liberally drawn and the trusteeship concept eliminated.[202] Additionally, the "trusteeship" appellation had an unsavory quality to a number of countries because of the history of the mandate system of the League of Nations and the succeeding U.N. trusteeship system.[203]

From the standpoint of resource management, there are distinct advantages in clearly defining and separating the responsibilities of the coastal states and of the proposed interuational agency. Potential conflicts are minimized and accountability is established. The history of the federal-state relationship in this country, which provides an interesting and useful analogy in analyzing most aspects of the proposed régime, bears this out.[204]

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196 *Id.*, para. f.

197 *Id.*, para. d and e.

198 Art. 2; art. 23. See n. 40.

199 Art. 40, para. (j). See statement by Ambassador Christopher H. Phillips, United States Mission Press Release, Geneva, Aug. 7, 1970, at p. 5.

200 See Liberia, *supra*, n. 55, at pp. 8-9.

201 Kenya, *supra*, n. 55, at pp. 2-3.

202 Australia, *supra*, n. 56., at pp. 16-17

203 Cameroon, *supra*, n. 55 at pp. 7-8. See *supra*, n. 50; Statement of Ambassador Christopher H. Phillips, United States Mission Press Release, Geneva, Aug. 28, 1970, at p. 2.

204 *E.g.*, see *Federal Water Pollution Control Act*, 33 U.S.C., §1151 *et seq.* (1970).

The Nixon proposal, itself, indicates that the international trusteeship zone would extend beyond all points at which the high seas reach a depth of 200 meters, which would establish an international character in lands lying between the mainland of a coastal state and its islands located more than 24 miles offshore (the sum of the two proposed 12-mile territorial seas combined) and separated by waters more than 200 meters deep. This situation would exist in the United States with respect to California, Alaska and other areas and in many other countries of the world. With due regard to the fact that the United States has abstained from claiming historic bays or drawing straight baselines, as it probably could in a number of these situations, there is a valid basis for concern that neither the United States nor the affected (U.S.) coastal states will have sufficient jurisdiction to permit effective coastal zone management.[205]

The Draft Convention ameliorates this problem by providing for a 60-mile closing rule and the drawing of straight base-lines in the demarcation of the 200 meter limit.[206] This would vastly extend the limits of national jurisdiction and the rules applicable to the continental shelf in many parts of the world where there are offshore reefs, banks and islands. In Southern California, for example, the rule would appear to encompass most of the continental borderland at least out to the Cortes Bank, 120 miles from the mainland and something less than 50 miles from San Clemente

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[205] The United States could quite properly draw a straight baseline connecting coastline fringes and offshore islands for purposes of measuring the territorial sea in the case of Alaska, Maine, Massachusetts and Louisiana, and to a somewhat lesser extent in the case of California. See *supra*, n. 109; *United States* v. *Louisiana*, 394 U.S. 11, at p. 72 (1969); Krueger, *op. cit.*, n. 167, at pp. 452 *et seq.* and 491. Canada has carefully and properly drawn straight baselines in similar situations both on its east and west coast. See maps of Can. Hydro. Serv., Marine Sciences Br., Dept. of Energy, Mines & Resources, Nos. 391, May 16, 1969 (Vancouver Island), 392, May 16, 1969 (Queen Charlotte Sonnd to Dixon Entrance), 401, May 16, 1969 (South and East Coasts of Nova Scotia), 402, October 27, 1967 (Newfoundland) and 402, October 27, 1967 (Labrador). The United States to the contrary in recently released maps (September, 1971) refuses to apply the straight baseline rule, notably in the case of Alaska. This approach results in large areas that would otherwise be inland waters or territorial sea nnder a straight baseline rule remaining as high seas and potentially International Seabed Area or International Trusteeship Area.

[206] Art. 1, para. 3. A similar rule is authorized for the delineation of the seaward boundary of the International Trusteeship Area. Art. 26, para. 1.

Island.[207] Pragmatically the provision would appear to be a desirable one, but it does raise the question as to why a closing rule of 60 miles was selected and whether the trusteeship zone concept should be retained in any case. If the nexus between the coastal state and the offshore within 60 miles of 200 meter points of closure is so great as to justify national jurisdiction why should it not extend to that distance based upon other and certainly not less logical considerations? Why should it not extend 100 miles or 200 miles or to the base of the continental slope?[208]

The existence of such a pervasive exception is an implicit and very strong recognition of the interest of the coastal state in a broad coastal zone. This fact points up the fundamental infirmity in the trusteeship concept proposed in the U.S. Draft Convention: it is impracticable to structure a régime for a contiguous zone for resources that does not give proper recognition to the many interests of the coastal state without setting definite, and in some areas narrow, limits to the jurisdiction of the proposed international seabeds agency.[209] This is not to suggest, however, that internationally approved national contiguous zones could not accomplish the goals of the international community. A régime could be created in which all of the broad policy objectives of the international community[210] were achieved in coastal areas by the coastal state acting as the agent of the international community in accordance with internationally approved standards. Such standards would logically consist of both those set forth in the organic treaty establishing the régime and those promulgated by the international oceans agency to be created, with such agency having

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[207] The Nixon proposal standing alone would result in large portions of lands lying between mainland California and certain of the Channel Islands which lie more than 24 miles offshore (the sum of the two proposed 12 mile territorial seas combined) and separated by waters more than 200 meters deep in being treated as international trust territory. The same situation would also exist in similar areas off Alaska. See Krueger, *op. cit.*, n. 167, at p. 490. There is a strong and presumptively legitimate interest on the part of California and many other coastal states (see *supra*, n. 112) in the proper management of offshore resources and it may have been out of deference to this quite basic political consideration that the 60 mile closing rule was developed. Aside from the fact that the rule "works" in the case of California, however, there is little in logic to recommend it. With due regard to the failure of the federal government to draw straight baselines the rule does not appear to "work" in some areas of Alaska, such as the Shelikof Straits.

[208] See *supra*, nn. 91-93, 104.

[209] *Cf.* Comm. on Deep-Sea Mining, Int'l L. Ass'n., *op. cit.*, n. 97, at pp. 12-13.

[210] See *supra*, nn. 158-166.

enforcement powers.[211] It would seem far more logical to have a broad resource contiguous zone of this type commencing at the edge of the territorial seas and reserving appropriate rights of free transit in the areas beyond,[212] than to attempt to develop a highly internationalized trusteeship zone of the type proposed in the U.S. Draft Convention which excludes large portions of the oceans and their resources in which the international community has broad and legitimate interests.[213]

This could be done as part of a "package" which included the earmarking of a portion of national revenues from the contiguous zone for international purposes. Such funds could be earmarked for the economic advancement of the developing state generally, as does the Draft Convention, but they might well be also appropriately earmarked for assistance to developing countries for the protection of their environment. It has been made very clear in the United Nations that the developing countries will need some form of direct subsidization in order to meet the environmental standards of developed countries.[214]

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[211] There are benefits that could accrue to both national and international interests from having some mixture of responsibility in offshore areas. For example, a national interest in environmental quality would be enhanced by an international system calculated to reduce environmental impingements by other nations. On the other hand, international interests could be served by having offshore resources managed by the coastal nation whose knowledge of them and their interaction with other resources and values is most complete. It is important, however, that the regulatory and enforcement powers of the international agency be limited to issues invested with an acknowledged international interest, such as environmental quality and the protection of living resources. An international agency having simply the power to require performance of the environmental and living resources convenants contained in the 1958 Geneva Conventions would go a long way toward establishing a workable order for the oceans. See *Convention on the Continental Shelf*, art. 5, paras. 1, 6, 7; *Convention on the High Seas*, art. 24; *Convention on Fishing and Conservation of the Living Resources on the High Seas*, art. 1, para. 2; Krueger, *op. cit.*, no. 129, at pp. 452-454.

The international interest in such a national contiguous zone could also be so developed as to minimize or eliminate the expropriation problem which is prevalent today in developing countries.

[212] See *supra*, 119 *et seq.*

[213] Under the draft convention, areas within its 60 mile-200 meter closing test would be excluded from any international regulation, except insofar as the same may be provided by the 1958 Geneva Conventions, customary international law or special convention. See *supra*, n. 207.

[214] See *supra*, nn. 82-83.

3. Non-Mineral Uses

The Nixon Proposal was directed to living as well as non-living resources. It stated that the proposed law of the sea treaty "would also accomodate the problems of developing countries and other nations regarding the conservation and use of the living resources of the high seas".[214a] Unfortunately, the U.S. Draft Convention virtually ignores this important element of oceans policy. In the proposed international trusteeship area, the coastal state has the power to "decide whether and by whom the living resources of the seabed shall be exploited".[215] In the International Seabed Area beyond the trusteeship zone, free access to all seabed living resources is guaranteed to each contracting nation, subject only to "such conservation measures as are necessary to protect the living resources of the International Seabed Area and to maximize their growth and utilization".[216] In neither area is there any régime established for non-seabed living resources, and neither the coastal state nor the proposed International Seabed Resource Authority have any meaningful management powers over such resources. Viewed in a political context, as it must be, the failure to deal with the fishery issue is one of the more obvious defects in the U.S. Draft Convention; to the coastal states with significant coastal fisheries this is a very important issue and one that cannot be given a secondary priority in international discussions regarding the oceans.[217]

The Nixon proposal and the Draft Convention do not give recognition to the need for the authorization and coordination of other uses in the proposed international area either by the proposed international agency or by the coastal state.[218] The use of the offshore for artificial islands for non-mineral purposes, such as airports and even living purposes,[219] appears to be both feasible

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[214a] See *supra*, n. 38.

[215] Art. 28(f).

[216] Art. 22.

[217] See *supra*, nn. 87-93, 104-109. Since the tabling of the Draft Articles on the Breadth of the Territorial Sea, Straits and Fisheries at Geneva in August of 1971 there is no longer a hiatus in U.S. policy on this point. See *infra*, nn. 283 *et seq.*

[218] See text *supra*, at nn. 181 *et seq.*

[219] Offshore islands and other man-made coastal installations are proving to be very much in demand, if not necessary, in urbanized coastal areas. There have been a vast variety of such structures and installations proposed for continental shelf areas, including airports, floating cities and hotels. See *Urban Expansion Takes to the Water*, Fortune Magazine 131 (Sept. 1969); I Nossaman OCS Study, *supra*, n. 167, § 11.61. The fact that the Convention on

and desirable. The authorization and regulation of the development of geothermal and fresh water resources, salvage and treasure recovery, aquaculture, and dredging and dumping, would also appear appropriate.[220]

Already there have been attempts to build islands on the Cortes Bank 120 miles off Southern California[221] and on the Triumph and Long Reefs located 4½ miles off southeastern Florida.[222] While both of these areas would fall within limits of national jurisdiction under the Draft Convention, they do point up the need for the consideration of non-mineral uses of the proposed International Seabed Area, including the International Trusteeship Area. The Draft Convention would effect a renunciation of the right of the coastal state to control such other uses, except to the extent that they might be construed as falling within the limited mineral and seabed resource delegation made to it and would invest the International Seabed Resources Authority with the power to prohibit them but not to authorize them.[223]

There have been indications that it was the intention of the drafters of the U.S. Draft Convention that the rights of the international community with respect to non-mineral uses be left as they are in whatever ambiguous state they may be. If one follows a flag nation analogy, can country A build and claim sovereignty over an offshore island located on the International Seabed Area adjacent to country B and 30 miles offshore?[224]

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the Continental Shelf does not expressly provide for such uses does not necessarily mean that a coastal state is without the power to make use of its continental shelf for such purposes, although a negative inference in this regard can be drawn from the language of the Convention. *Cf.* military use, *supra*, n. 126. See Krueger, *op. cit., supra*, n. 167 at 802; Auburn, *infra*, n. 246 at p. 181.

[220] *Id.*, at 803 *et seq.*; 1 Nossaman OCS Study, *op. cit.*, n. 167, §§ 11.62 - 11.63.

[221] 1 Nossaman OCS Study, *supra*, n. 167, at p. 20.

[222] Recently in *United States* v. *Ray*, 294 F. Supp. 532 (S.D. Fla. 1969) the construction of two islands nations on a reef approximately four and one-half miles offshore the southeast coast of Florida was held unlawful in the absence of federal permits under the provision of the *Outer Continental Shelf Lands Act* and a permanent injunction issued. On appeal the judgment was affirmed with the Fifth Circuit Court of Appeals noting "[n]either ownership nor possession by [the United States of the lands in question] is a prerequisite for the granting of injunctive relief". 432 F. 2d 16, 22 (1970).

[223] See Draft Convention, art. 2, *supra*, n. 38a.

[224] Under the U.N. Draft Convention, a good argument could be made that country A could undertake this act unless the International Seabed Resource Authority prohibits the same. Article 3 provides that

Could country B claim the same island, a territorial sea surrounding the same, and even a continental shelf adjacent thereto by constructing it and a causeway to it?[225] It should be quite clear that a coastal state which today has quite broad, although as yet inchoate, powers over its continental shelf for such purposes has a sufficiently direct nexus with them to be given jurisdiction and control over them.[226] Politically it would be difficult for most, if not all, of the countries of the world to accept the jurisdiction of an international agency over such other uses of their continental shelves and other immediately adjacent areas. In any case, however, these new uses of the oceans and their resources could be of great significance and a rule of law with respect to them should be created at a relatively early date both with respect to the International Seabed Area and for the continental shelf itself. It may be that the inclusion of certain of them in the agenda for the first law of the sea conference scheduled for 1973 would unnecessarily complicate it, but the point should be treated, even if only by way of reservation or exception.[227] Until an international régime for these uses has been established it would seem clear that any rights of the coastal state with respect to them should

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"The International Seabed Area shall be open to use by all States, without discrimination, except as otherwise provided in this Convention."

It seems quite clear, however, that International Seabed Resource Authority could and probably would prohibit such activity in light of its preemptive authority over the seabed and its regulatory powers for the purposes of living resource conservation and environmental protection. See Draft Convention, arts. 6-9, 22 and 23; *supra*, n. 38a. Under existing law country A could probably not build such an island in view of the fact that it would probably involve a proscribed use of country B's natural resources in which its rights are exclusive. See *Convention on the Continental Shelf, op. cit.*, n. 211, art. 2, para 2; The Geneva *Convention on the Continental Shelf*, (1959), 35 Brit. Y.B. Int'l L. The question is not free from doubt, however, in view of the fact that the island might constitute "territory" not theretofore claimed by country B. This was the 1969 Jessup International Moot Court Competition question.

[225] Country B would have a quite credible claim in such a case. The *Convention on the Territorial Sea and Contiguous Zone*, 2 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205, provides that the territorial sea is measured from the "low-water line long the coast" (Art. 3) and "the outermost permanent harbour works... shall be regarded as forming part of the coast" (Art. 8). Further, it is clear from the 1965 *U.S. v. California* (381 U.S. 139, 175 [1965]) decision that artificial filling creates a new coastline for this purpose. See Krueger, *op. cit.*, n. 2 at pp. 462-463. Again, However, the matter is not free from all doubt where a distance of the above magnitude is involved.

[226] *Id.*, *supra*, n. 217.

[227] See *supra*, n. 40; text, *supra*, nn. 223 *et seq.*

be preserved.[228] It seems certain, however, that the agenda for the conference cannot be limited to the seabed. It must include the issue of coastal fisheries and a national contiguous zone for their conservation and development if there is to be any reasonable expectation of establishing a consensus with the developing coastal states.[229] To these nations this issue cannot be severed from the mass of other relevant issues, such as the territorial sea, the breadth of the zone of national jurisdiction for the seabeds and the international régime for the seabeds.[230]

4. The International Seabed Resources Authority

The International Seabed Resources Authority proposed in the Draft Convention is a large and complicated agency, but one which could ultimately prove to be the type of organization that will be necessary in order to intelligently manage the world's oceans and their resources. The rationale presented by the United States for the structure was that it was easier to negotiate and administer a régime providing for extensive and complete machinery and simple rules than one calling for extensive rules and simple machinery.[231] The mixed reaction receive to date, however, would indicate that there is question as to whether this is the case.[232]

It does seem quite clear that the proposed Authority is more complex than it would be required to be in order to fulfill the functions that it will be assigned at least in the beginning years of its operations.[233] Part of the complexity would appear to be due to the responsibilities which it would be given regarding the International Trusteeship Area and political ramifications concerning it. The International Trusteeship Area can be expected to be the most attractive area during the begining years of the Authority, particularly for petroleum prospects, which undoubtedly

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[228] *Ibid.* See Krueger, *supra,* n. 2, at p. 493.

[229] See *supra,* nn. 87-93, 104-109. This is not to suggest, however, that an oceanic species, such as tuna, which are usually fished in a coastal or near coastal area, need be put in the same category as coastal fisheries, such as anchovy. See Loring, *op. cit.,* n. 91 at pp. 424, 434 *et. seq.*; statement of John R. Stephenson to subcommittee II of U.N. Seabeds Committee, Part V, *infra,* at p. 6.

[230] *Ibid.*

[231] Statement by Ambassador Christopher H. Phillips, United States Mission Press Release, Geneva, Aug. 7, 1970, at p. 7.

[232] See *supra,* nn. 55-56.

[233] See *supra,* n. 138.

was a factor in the formulation of the various commissions and the quite voluminous operating provisions.[234] The drafters were preparing the Authority to cope with all the problems of the Bureau of Land Management, the U.S. Geological Survey and the U.S. Army Corps of Engineers in the administration of the outer continental shelf.[235] The broad powers of the Authority with respect to the International Trusteeship Area also undoubtedly influenced the division of the proposed Council into "industrially advanced" and "developing" nations and the creation of their mutual veto powers.[236]

If the International Trusteehip Area were to be eliminated and a simplified régime developed, as suggested above,[237] there is, therefore, good reason to believe that the structure could be substantially simplified. If, for example, the coastal states were given jurisdiction over seabed resources and coastal fisheries to the base of the continental margins or a broader contiguous zone stated in terms of distance with appropriate covenants and conditions imposed in order to implement the identified policy objectives,[238] the Authority would need quite little by way of organizational structure or staff to administer resources in the area beyond and monitor or participate in the monitoring of the activities of the coastal states. In this regard the monitoring might also be carried out through the aegis of the U.N. Seabeds Committee or the Intergovernmental Oceanographic Commission of UNESCO in cooperation with other interested U.N. organizations.[239]

Moreover, enforcement of the covenants and conditions imposed upon the coastal states could be effected through the sanctions of withholding aid under the Draft Convention (and possibly through U.N. organizations generally) and a boycott on resources produced in violation of the conditions imposed. It would be possible also to provide for the suspension of rights in the high seas and the territorial seas of contracting nations.[240]

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[234] See *supra,* nn. 191, 194.

[235] See Krueger, *supra,* n. 167, at pp. 779 et seq.; 1 Nossaman OCS Study, Chapter 2 (Allocation of Federal Jurisdiction over Activities on or Affecting The Outer Continental Shelf).

[236] See *supra,* nn. 46-47.

[237] See *supra,* nn. 210-213.

[238] *Ibid.*

[239] See U.N. Law of the Sea Conference Resolution, *supra,* n. 71, para. 13.

[240] See L. Goodrich, E. Hambro, and A. Simons, *Charter of the United Nations* 311-14 (1969). There is here suggested nothing more than an application of the principle of reciprocity; the most prominent example of its use is the reciprocal tax or tariff treaty.

With a simplified system, completely international in focus, much less by way of a political structure would be necessary. There would seem to be less need to emphasize the division between the developing and developed countries. The concept of regional interest is an attractive one and perhaps the proposed Council could be composed of a designated number of representatives from identified regions represented among the contracting states with provision for election or rotation on a fixed basis.[241] With a structure of this type, there might not be a need for the proposed Assembly consisting of representatives of all contracting states.[242] Insofar as the allocation of revenues received from the International Seabed Resources Area or from a coastal state's offshore is concerned, the structure might provide for a committee of the Council to make such allocation and have on it developing and developed powers with mutual veto rights as proposed in the Draft Convention.[243]

The newly constituted Council could be given the authority to create commissions, committees, a tribunal and all of the other administrative machinery set forth in the Draft Convention without specifying their exact functions, dimensions and composition at this time. This would permit the organization to grow logically with its responsibilities. Again, the changing and expanding role of the federal government in the federal-state relationship in the United States offers an apt analogy.

It is noteworthy that any earmarking of funds for international purposes from lands claimed by the federal government and to establish restrictions or conditions on them in connection with an international régime will require federal legislation and probably an amendment to the *Outer Continental Shelf Lands Act*.[244]

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[241] This is somewhat the concept of the newly enlarged U.S. Seabeds Committee whose 44 new members are to be "appointed by the Chairman of the First Committee in consultation with regional groups and taking into account equitable geographical representation thereon in a framework of close international co-operation". See *supra*, n. 79.

[242] See *supra*, n. 47.

[243] See *supra*, n. 46.

[244] In the December 21, 1970, report of the Special Subcommittee on Outer Continental Shelf of the U.S. Senate Committee on Interior and Insular Affairs, *supra*, n. 52, it is stated at p. 29:

> "Article IV. Section 3, Clause 2 of the United States Constitution delegates to the Congress the power to dispose of all property of the United States. All rights specified in the 1953 Outer Continental Shelf Lands Act, and in the 1958 Geneva Convention on the Continental Shelf are the property

There have been strong indications within Congress that a simpler international régime and organization would be more acceptable.[245]

5. Reappraisal and Adjustment

The Nixon proposal was unquestionably a very generous and fair one. It showed to the world community the willingness of the United States to provide a format for the internationalization of the oceans, *if* other states would agree. The Draft Convention was an imaginative effort to provide compromises that would minimize national claims but still appeal to national interests. The U.S. Draft Convention, however, was an incomplete and somewhat awkward statement of the principles enunciated in the Nixon proposal. Few supporters of it can be found outside of the United States and there are strong opponents within this country.[246]

Notwithstanding, neither the Nixon proposal nor the U.S. Draft Convention, viewed even in a narrow sense has failed. The Nixon proposal remains a highly credited statement of foreign policy and the U.S. Draft Convention as a working paper has inspired a great deal of constructive thought in the United Nations and elsewhere that has contributed to the progress on international oceans policy. In a broader sense, moreover, the Nixon proposal may prove, may indeed already be, an outstanding success. It appears to have given the United States the initiative in a very difficult negotiating

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of the United States. The designation of those rights constituting the heart of our sovereign rights is in no way intended to be an exhausted description of all of the property rights possessed by the people of the United States in our continental margin. As we interpret Article IV, Section 3, Clause 2 of the United States Constitution, renunciation of any of the rights referred to in any of the aforementioned laws would require an Act of Congress."

In any case, it would be necessary that a new treaty on the subject be ratified by the United States Senate before the United States would be bound by it. In this regard, it is noteworthy that a credible, although highly legalistic, case can be made that Article 2.1 of the U.S. Draft Convention would violate Article 30 of the Vienna Convention on the Law of Treaties, 8 Int'l Leg. Materials, (1969), p. 674. Arguably, Article 2.1 would require a contracting party not to recognize rights confirmed by the 1958 Convention on the Continental Shelf as to non-contracting parties. See NPC Supplemental Report, *supra*, n. 39 at p. 17; *supra*, n. 187.

[245] See *supra*, n. 52.

[246] See *supra*, nn. 39, 52, 55-56. See also, Auburn, *The International Seabed Area*, (1971), 20 Int'l and Comp. L.Q., 173 at pp. 179 *et seq.*; Jennings, *The United States Draft Treaty on the International Seabed Area — Basic Principles*, (1971), 20 Int'l and Comp. L.Q. 443 at pp. 447 *et seq.*

situation. It, the U.S. Draft Convention and the other interim work of the Department of State, would appear to have had a significant role in creating the atmosphere which resulted in the very successful 1970 sessions of the U.N. First Committee and the General Assembly on the oceans resolutions.[247] It is very apparent from a review of developments in 1970 that the United States gradually assumed a role of leadership in seabeds matters and in this the Nixon proposal, as developed by the U.S. Draft Convention, played a major part.

It is clear that most of the principles of the Nixon proposal can be implemented by a treaty calling for a broad national resource contiguous zone of the type suggested above, the major exception being the proposed renunciation of national claims to seabed resources beyond an oceans depth of 200 meters.[248] The deletion of this element of the proposal should present no difficulty. The entire proposal was conditioned upon acceptance of the international community and this element has not been so accepted.[249]

Insofar as the Draft Convention is concerned, it was presented only as a working paper and appropriate adjustments in the format can properly evolve during the workings of the U.N. Seabeds Committee in its capacity as the Preparatory Committee for the proposed 1973 law of the sea conference.

C. *Future Developments*

1. Conference on the Law of the Sea

With the passage of the U.N. seabeds resolutions in late 1970,[250] it becomes very likely that there will be a United Nations conference or conferences on the law of the sea in 1973, as scheduled, or within a short period thereafter.[251] The conference is presently

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[247] See *supra,* nn. 61 *et seq.*

[248] See *supra,* nn. 38, 211-212.

[249] The Nixon proposal included:

"I believe that these proposals are essential to the interests of all nations, rich or poor, coastal and landlocked, regardless of their political systems. If they result in international agreements, we can save over two-thirds of the earth's surface from national conflict and rivalry, protect it from pollution, and put it to use for the benefit of all. This would be a fitting achievement for this 25th anniversary year of the United Nations." See *supra,* n. 38.

[250] See *supra,* nn. 61, *et seq.*

[251] See *supra,* n. 77.

scheduled to deal with the entire multitude of ocean and ocean resource questions, although the preparatory committee, the enlarged U.N. Seabeds Committee, seems to have been assigned a priority with the international issues framed by the Nixon proposal and the U.S. Draft Convention.[252]

It will be incumbent upon the preparatory committee to create a "manageable package" for the 1973 Conference which may very well involve limited treatment or reservation of some of these very complex issues.[253] The manner in which they are treated on the proposed agenda will be important to the success of the Conference.[254]

2. Convention Provisions

Obviously of prime interest is the fixing of limits of national jurisdiction for both seabed and oceans resources and the creation of a régime for the area beyond. At the time of the 1958 Geneva Conference on the Law of the Sea, there were 82 members in the United Nations of which 57 (out of 68 voting) voted in favor of the Convention. There are now 131 members in the United Nations [255] with most of the new members consisting of developing nations.[256] It is likely, therefore, that obtaining the requisite approval to a new treaty will be even more difficult than in 1958.[257] The coastal states which will have a substantial, even if not controlling,[258] majority at the conference have typically shown a strong interest in establishing a broad national contiguous zone for resource development and conservation purposes.[259] Furthermore, as we have seen, there are structural difficulties in attempting a "trusteeship" zone of the type proposed in the U.S. Draft Convention

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[252] See *supra,* n. 77.

[253] See *supra,* nn. 101, 229 *et seq.*

[254] See *supra,* nn. 57-60; U.S.S.R. Draft Treaty, *infra,* Part V, U.N. Doc. A/AC. 138/43, July 22, 1971.

[255] See Krueger, *The Convention on the Continental Shelf, The Need for Its Revision and Some Comments Regarding the Regime for the Lands Beyond,* (1968), 1 Nat. Res. Lawyer 1, at p. 13.

[256] Interview, October 11, 1971, United Nations Informations Service. The last three admittees were Bahrain, Qatar and Bhutan admitted on September 23, 1971. New York Times, Sept. 23, 1971. Bahrain and Qator are oil-rich Persian Gulf states.

[257] See Krueger, *supra,* n. 2 at p. 472.

[258] See *supra,* nn. 90-93, 104, 136.

[259] See *supra,* nn. 130 *et seq.*

in which the proposed international agency would in effect have preemptive powers.[260] Both factors weigh in favor of defining the contiguous zone broadly. The concept of establishing the zone in terms of designated water depth (2,500 meters?[261]) or distance from the coastline (200 miles?[262]), whichever is further, with portions of the revenue being earmarked international purposes, could prove to be politically attractive.[263] It is noteworthy that only 13 Latin American countries signed the Genevea Convention on the Continental Shelf and that only 8 have ratified or acceded to it.[264] When the first 200 mile claims were made they appeared unreasonable, if not shocking, in light of the then existing technology. This is not true today when present and probable technological capability is not limited to the near shore and continental shelf.[265]

The proposed international agency to administer resources in the area beyond could also be given specific monetary and regulatory functions in the contiguous zone to insure the effectuation of international policy objectives, principally those relating to environmental protection and resource conservation[266] The proposed convention could possibly be made more attractive to developing states by permitting them to retain all revenues from their area of national jurisdiction until they had reached a designated gross national product with progressive contributions being made thereafter until the state reached a "developed" level of GNP.[267]

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[260] See *supra*, n. 209 *et seq.*

[261] W. T. Pecora, Director of U.S. Geological Survey in 1968, commented that "the base of the continental slope... throughout much of the world is at or below the 2,500 meter isobath". He suggested that, therefore, "as an interim line of demarcation to delineate the continents from the oceans". February 1, 1968 statement. See Krueger, *supra*, n. 255 at p. 13; *supra*, n. 194.

[262] See *supra*, nn. 90-93.

[263] See Grunawalt, *The Acquisition of the Resources at the Bottom of the Sea — A New Frontier of International Law*, (1966), 34 Mil. L. Rev. 101, at p. 131; Krueger, *supra*, n. 255 at p. 14. Arvid Pardo has suggested a straight 200 mile limit for coastal state jurisdiction. See Malta *supra*, n. 93.

[264] Only Colombia, The Dominican Republic, Guatemala, Haiti, and Venezuela have ratified the Convention, although there has been an accession deposited by Jamaica, Mexico, and Trinidad-Tobago. U.N. Multilateral Treaties in Respect of Which the Secretary-General Performs Depositary Functions; List of Signatures, Accessions, and Ratifications. U.N. Publication, Dec. 31, 1970.

[265] See Krueger *supra*, n. 2 at pp. 451 *et seq.*

[266] See *supra*, nn. 211 *et seq.*

[267] The gross national product was the standard for differentiating between "developing" and "industrially advanced" parties under the Draft Convention. Art. 36, para 2; App. E, para. 1. See *supra*, n. 46.

The proposed national contiguous zone could initially be made applicable only to seabed resources and coastal fisheries,[268] but in the future hopefully the rights of the coastal state would also be extended to other uses, such as artificial islands.[269] The territorial sea could be established at 12 miles and rights of free transit guaranteed through designated international straits and national contiguous zones.[270] The right of free transit should, however, be subject to reasonable regulation by the coastal state for purposes of environmental and resource protection.[271] This might at times result in some impingement of military and national security values of developed nations.[272]

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[268] See *supra,* nn. 241a *et seq.*

[269] See *supra,* nn. 219-223.

[270] See *supra,* nn. 119 *et seq.*

[271] See *supra,* nn. 211 *et seq.*

[272] Malta has recommended a slightly modified right of innocent passage in "national ocean space". See Draft Ocean Space Treaty, *supra,* n. 93, art. 47; Pardo, *supra,* n. 93 at pp. 50 *et seq.*; *cf.* nn. 121 *et seq.* The Senatorial critics of the United States "free transit" proposal fear that it will in the short run require a trade-off of national interest in deep sea mining and in the long term be unobtainable. See *The Law of the Sea Crisis, supra,* n. 93.

At its twenty-sixth (1971) session the United Nations General Assembly adopted a resolution entitled "Declaration of the Indian Ocean as a zone of peace" in which it took note of "recent developments that portend the extension of the arms race into the Indian Ocean area, thereby posing a serious threat to the maintenance of such conditions in the area" and concluded that "the establishment of a zone of peace in an extensive geographical area in one region could have a beneficial influence on the establishment of permanent universal peace based on equal rights and justice for all, in accordance with the purposes and principles of the Charter of the United Nations". U.N. Doc. A/RES/2832 (XXVI) (Jan. 19, 1972). The resolution then declared the Indian Ocean to be a "zone of peace" and called "upon the littoral and hinterland States of the Indian Ocean, the permanent members of the Security Council and other major maritime users of the Indian Ocean... to enter into consultations with a view to the implementation of this Declaration and such action as may be necessary to ensure that: [*inter alia*]

> "(a) Warships and military aircraft *may not use the Indian Ocean for any threat or use of force against* the sovereignty, territorial integrity and independence of any *littoral or hinterland State* of the Indian Ocean in contravention of the purpose and principles of the Charter of the United Nations;
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> "(b) *Subject to the foregoing* and to the norms and principles of international law, *the right to free and unimpeded use of the zone by the vessels of all nations is unaffected." Ibid.* [Emphasis added.]

This resolution which was approved by the First Committee 50 to none with 49 abstentions, the abstentions consisting of the United States, the Soviet

The interest of coastal states in protecting offshore fish stocks in which they have a direct interest could also be recognized and further support created by provisions giving the coastal state preferential rights in them under terms which would encourage regional conservation measures. A Convention on Fishing and Conservation of the Living Resources of the High Seas similar to that adopted in Geneva in 1958, but "with teeth" should attract a great deal of support.[273] It would also be appropriate to give the proposed international agency powers to manage and protect fishery stocks in areas beyond limits of national jurisdiction.[274] Comprehensive national and international management powers could begin to establish a concept of rationality in the protection and allocation of living resources of the oceans.[275]

The régime for the international zone should incorporate the objectives set forth in the December, 1970 U.N. resolution and others identified above,[276] and could follow any one of a number of suggested organizational structures. A feasible course, and one which this writer favors, is the establishment of a relatively sparse

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Union and their normal voting associates, shows quite clearly the very cautious attitude which many of the developing countries have toward the military or "security" interests of the great powers. Rep. of U.N. 1st Com. U.N. Doc. A/8584 (Dec. 14, 1971), p. 3. See also Statement of People's Republic of China, New York Times, *infra*, n. 342. Cf. *infra*, nn. 285-286, 305, 313.

[273] *Convention on Fishing and Conservation of the Living Resources of the High Seas, supra*, n. 211, was also adopted at the 1958 U.N. Conference on the Law of the Sea and became effective in 1966 after being ratified by 25 nations. The Convention authorizes conservation measures by nations for "any stock of fish or other marine resources in any area of the high sea adjacent to its territorial sea". *Id.*, art. 7, para. 1. Few of the great fishing powers have ratified the Convention and it has distinctly failed to achieve its conservation purpose. See Crutchfield, *The Convention on Fishing and the Living Resources of the High Seas*, 1 Nat. Res. Lawyer (No. 2) 114, at pp. 119 *et seq.*; 1 Nossaman OCS Study § 1.4. Cf. *infra*, nn. 283 *et seq.*

[274] See *supra*, n. 214 *et seq.*

[275] There is no reason that fish stocks either in contiguous zones in which the coastal states have a preferred interest or in the area beyond cannot be allocated on a pre-determined basis, either competitively or non-competitively, so as to maintain their maximum sustainable yield. Crutchfield *supra*, n. 273 at p. 122 *et seq.* The Marine Sciences Commission made recommendations consistent with this concept. See *Our Nation and the Sea*, 92-93; Krueger *supra*, n. 167 at p. 803. It is noteworthy that the Draft Convention contains no provision for the allocation or conservation of living resources except with respect to those of the seabed. See arts. 22, 27, para. 2h; *supra*, nn. 214 *et seq.* Cf. *infra*, nn. 283 *et seq.*

[276] See *supra*, nn. 158 *et seq.*

organization with well-defined responsibilities which makes the maximum use of existing national and international agencies and institutions.[277] The financial assistance for the international agency "for international community purposes, particularly economic assistance to developing countries", identified in the Nixon proposal, could be supplied by earmarking in the Convention a portion of the revenue received by the coastal state from seaward portions of their areas of national jurisdiction. With a 2,500 meter/200 mile format, it would seem reasonable to require such payments as to all areas beyond 200 meters or 50 miles, whichever is further.[278] The international agency should be required in its operations to give full consideration to all uses, values and resources of the oceans in its policy determinations.[279]

Even in recent years, it has been unfashionable in some circles to speak of the need for the revision of the Geneva Conventions, much less the establishment of an international régime for the deeps.[280] In the past few years, however, we have moved toward a national and international understanding of the issues and problems involved which should lead us in the next five years to some rational and acceptable solutions to the major problems involved. If we do, it will provide sound evidence of the worth and viability of the United Nations. It is fitting that the first tangible steps toward this accomplishment occurred on its 25th anniversary.

III. Conclusion

Those in the U.S. Government who have supported the concept of free transit incorporated in the U.S. Draft Convention have been criticized, and largely unfairly criticized, as "nautical hawks".[281] The

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[277] See *supra*, nn. 138 *et seq.*, 231 *et seq.*

[278] *Cf.* the Marine Sciences Recommendation regarding its "intermediate zone", *Our Nation and The Sea*, pp. 145-151 (1969); the Nixon proposal, *supra*, n. 37.

[279] See *supra*, nn. 182, 214 *et seq.*; 1 Nossaman OCS Study §§12.1-12.2; Krueger *supra*, n. 167 at p. 808.

[280] See *supra*, n. 23.

[281] In 117 Cong. Rec. March 10, 1971, Senator Metcalf is quoted at p. S2815 as follows:

> "There are, however, some few militant factions in our Government which are hopeful that coastal nations will sacrifice their sovereign rights to the natural resources of their continental margins. These nautical hawks feel that their freedom to navigate may be hampered by the development of natural resources of the continental margins of the world."

See also statement of Senator Stevens, *id.* at p. S2818.

allegation does, however, raise an element of relevance. The term "hawk" immediately brings to mind Vietnam and the depersonalized and quite intellectualized policy commitments that were made by the United States. Vietnam, in the view of one expert observer, provides a classic example of "the non-material element of will, of purpose and patience... a rebuke of spirit to the logic of numbers",[282] a comment that perhaps is equally applicable to the position of the developing coastal nations of the world regarding their offshore resources. The United States has solid supporters within the world community for its approach in the development of international oceans policy, with Canada being one of the more innovative and treasured. It would be unfortunate in the extreme, however, if the United States and the other developed countries of the world were to give other than full recognition to the aspirations, policies and needs of the developing coastal states in creating necessary reconfignrations of oceans policy. These nations are not aberrant; they are not outlaw; they are not irrational. Their claims and interests must be accorded respect if consensus is to be established on the critical elements of oceans policy.

With due regard to the present and predicted need for resources, both living and non-living, it would seem clear that the world community and its various members should encourage the development of ocean resources, if development can be undertaken without a significant adverse impact on other equally important values peculiar to the area where the operation is to be conducted. The economic and revenue producing aspects of offshore development have been given great, at times overriding, consideration in the past and continue to be overemphasized by many. These considerations should not be ignored, but they should not be given greater weight than other beneficial policy objectives. Ocean resources should be managed for the maximum economic benefit, but only where this is compatible with other policy objectives. It may be that with the developing countries this concept is only feasible with outside assistance as appears to be the case with enviroumental protection programs generally. In this case the assistance should be provided.

In the conservation and development of ocean resources, the international community cannot afford to assume a neutral or passive role. It should provide the machinery to actively plan and manage resource development in such a manner as to best accomplish all identified policy objectives. The proposed new international

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[282] George W. Ball, former Undersecretary U.S. Department of State, in essay, "The Trap of Rationality", Newsweek Magazine, July 26, 1971, p. 64.

régime should provide the framework and the incentives for various states to meet this goal. In creating those incentives, great care must be taken to appropriately recognize resources, uses and values in which the various coastal states have a "real" interest. Traditional and vested rights in oceans should have a prominent place in considerations, but the issue is not what the rule of law is, but what the rule of law should fairly be.

Today the developments both here and in the United Nations give every promise of national and international rules that will move man toward the intelligent use and management of the oceans and cement further international bonds regarding this invaluable common heritage.

IV Epilogue

Except as expressly noted otherwise, the foregoing analysis has considered developments only through mid-1971. There were, however, a number of developments involved in the July-August 1971 meeting of the United Nations Seabed Committee that are worthy of note.

The announcement by the United States on August 3, 1971, of Draft Articles on the Breadth of the Territorial Sea, Straits and Fisheries [283] emphasized the priority given to free transit by the United States in unmistakable langnage:

> [T]here are uses of the oceans with respect to which we must all exercise the greatest care and circumspection. I am speaking of navigation and overflight. *The freedoms of navigation and overflight connect us as a single community;* they embody our rights and interests in communicating with each other.
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> In the imperfect world in which we live, many nations, including the United States, depend upon air and sea mobility in order to guarantee their ability to exercise the inherent right of individual and collective self-defense. *To contemplate changes in the law of the sea that might reduce that mobility is to contemplate changes affecting fundamental security interests not only of States compelled to maintain significant military preparedness, but also of States that rely on the stability created by a political and military balance to pursue other important national goals, and to avoid diverting too much of their attention and resources to matters of security.*

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[283] Statement by John R. Stevenson to Subcommittee II U.N. Seabeds Committee on "Submission of Draft Articles on the Breadth of the Territorial Sea, Straits and Fisheries", Release United States Mission, Geneva, August 3, 1971.

> We doubt whether any State would wish to subject its sea communications or defense preparedness to the consent or political goodwill of another State. Accordingly, *it should be apparent that new rules of international law that might have the effect of reducing mobility cannot be expected to enhance international stability.*[284]

The Draft Articles, supplementing the U.S. Draft Seabeds Convention, would establish the following:

1. A twelve mile territorial sea subject to a right of free transit in straits as "an inherent and inseparable adjunct of the freedoms of navigation and overflight on the high seas themselves".[285] The proposal, however, left (albeit somewhat ambiguously) the door open for pollution and environmental control by the coastal state:

> *Subject only to the right of free transit, territorial waters in international straits would retain their national character in each and every respect.* The new right of free transit would only apply in international straits, using the definition that was adopted at the 1958 Law of the Sea Conference; it would not apply to other territorial or internal waters. Moreover, the right is a narrow one — merely one of transiting the strait, not of conducting any other activities. Should a vessel conduct any other activities that are in violation of coastal State laws and regulations, it should be exceeding the scope of its right, and would be subject to appropriate enforcement action by the coastal State.
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> *When we refer to enforcement of coastal State laws and regulations, we intend to include reasonable traffic safety regulations both for vessels and aircraft.*[286]

2. An international or regional régime for the regulation of living resources of the high seas "designed to maintain the maximum sustainable yield or restore it as soon as practicable, taking into account relevant environmental and economic factors.[287] Allocation of the fishery would be without discrimination, except that "[t]he percentage of the allowable catch of a stock in any area of the high seas adjacent to a coastal State that can be harvested by that State shall be allocated annually to it".[288] There are two important exceptions to this rule, however:

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[284] *Id.*, at p. 2. Emphasis added.

[285] *Id.*, at p. 3.

[286] *Id.*, at p. 4. Emphasis added.

[287] Draft Articles on the Breadth of the Territorial Sea, Straits and Fisheries submitted by the United States, August 3, 1971, art. III, para. 2A, *supra*, n. 283, at pp. 6 *et seq.*

[288] Draft Articles, art. III, para 2C, *supra*, n. 287, at p. 4. This also applies to anadromous fish to the extent that they "can be harvested by the State in whose water it spawns". *Id.*, para. 2D. The form of fishery allocation and regulation proposed is quite clearly directed to species. See statement of Donald L. McKernan, *infra*, n. 295. The use of the concept of adjacency with

a) "The percentage of the allowable catch of a stock traditionally taken by the fishermen of other States shall not be allocated to the coastal State";[289] and

b) "[H]ighly migratory oceanic stock", *e.g.*, tuna, "shall be regulated pursuant to agreement or consultation among the States concerned with the conservation and harvesting of the stock".[290]

3. A conceivably regional, but predictably national, régime for coastal fisheries or those that spawn in the water of that nation. Except in the case of a "highly migratory oceanic stock", a coastal State would be empowered to implement all of the proposed conservation provisions, if it has submitted to "all affected States its proposal for the establishment... of an international or regional fisheries organization..."; "[n]egotiations with other States affected have failed to produce, within four month, agreement on measures to be taken either with respect to the establishment of an organization or with respect to the fisheries problems involved"; and "[t]he coastal State has submitted to all affected States the available data supporting its measures and the reasons for its actions".[291] It would appear predictable that "affected States" would be offered a proposal that would not inspire their acceptance.[292]

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respect to coastal fisheries, however, could lend itself to the same type of disagreement which has typified the construction of the continental shelf set forth in the 1958 Geneva Convention. U.N. Doc. A/CONF.13/L.55 (1958), art. 1. Compare Oxman, *The Preparation of Article 1 of the Convention of the Continental Shelf*, (1972), 3 Journ. Maritime Law and Commerce 245 and Stone, *Legal Aspects of Marine Oil and Gas Operations*, 15th Ann. Inst. on Mineral Law L.S.U. (1968), p. 31. See Krueger, *supra*, n. 2 at pp. 474-475.

[289] *Id.*, at art. III, para. 2C(1).

[290] If an international or regional organization established standards for the taking of "a highly migratory oceanic stock", it would be controlling. *Id.*, at art. III, para. 1, p. 3; III, para. 3A, p. 5. It is highly questionable, however, whether it will be practicable for such standards to be established in the near future. The international or regional organization must be one in which: "the coastal State and any other State whose nationals or vessels exploit or desire to exploit a regulated species have an equal right to participate without discrimination". *Id., at* art. III, para. 1, p. 3. *Cf. infra*, n. 292.

[291] Draft Articles, Art. III, paras. 3A and B(1) (2) and (3) *supra*, n. 287, at pp. 5-6. Art. III, para. 3 also provides:

> "The implementing regulations of the coastal State may apply in any area of the high seas adjacent to its coast or, with respect to an anadromous stock that spawns in its fresh waters, throughout its migratory range." *Id.*, at p. 6.

[292] The history of the relations between the various foreign fishing nations and the nations whose coastal fisheries they have exploited has typically not been a happy one. See Loring *supra*, n. 91, at pp. 424 *et seq.*; Auguste, *supra*,

The U.S. Draft Articles also provided for the compulsory settlement of disputes and a number of procedural matters such as the form of inspection and arrest functions.[293]

Politically, however, perhaps the most important aspect of the document from a political standpoint was the quite clear indication of relative rigidity with respect to the concept of free transit and the attitude of accommodation with respect to the fisheries issue. Compare the following statements:

> [T]he first two Articles we are presenting, we believe, would together provide the necessary accomodation of the international and maritime interests in navigation and overflight that I have outlined. They constitute basic elements of the Oceans Policy announced by our President last year. I trust that the considerations I have discussed explain why my Government would be unable to conceive of a successful Law of the Sea Conference that did not accommodate the objectives of these Articles.
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> It should be clear from my remarks concerning fisheries that our consultations have indicated a need for further accommodation of coastal States by distant water fishing States. We have submitted our own draft in order to encourage consideration of a practical solution of the problem that avoids juridical absolutes, and that takes into full account the modern trend toward international and regional cooperation. We look forward to the submission by other States of fishery proposals designed to achieve a broad accommodation of interests, and pledge our sympathetic consideration of any such proposal that is formulated in a way that precludes the potential for encroachment on freedom of navigation and overflight beyond....[294]

The U.S. delegation appeared to be technically the best equipped and prepared to advise the U.N. Seabeds Committee on the technical aspects of matters at issue.[295] While there were no members

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n. 95, at p. 264. The fact that the coastal State will be given regulatory power over coastal and anadromous fisheries, if an international or regional organization is not established, would in and of itself provide motivation to avoid agreement.

[293] Draft Articles, art. III, para. 4, *supra*, n. 287, at pp. 6-7; Stevenson statement, *supra*, n. 283, at p. 8.

[294] Stevenson statement, *supra*, n. 283, at pp. 5, 8. There would appear, therefore, to be some reason to believe that "a highly migratory oceanic stock", such as tuna, might well be also made the subject of coastal control if a critical tradeoff occurs. The majority of such stocks are caught within coastal areas and certainly the developing coastal States have the interest and are rapidly acquiring the technology to harvest them. See Loring, *supra*, n. 91, at p. 434 *et seq.* In the words of the Draft Articles, *supra*, art. III, paras. 2C, 3C, n. 288, they will shortly be in a position where such stocks "can be harvested" by them.

[295] See List of Delegations for U.N. Seabeds Committee, U.N. Doc. A/AC. 138/INF. 5 (July 23, 1971); *e.g.*, statements of Dr. Vincent E. McKelvey, Chief

of the private sector on the delegation,[296] certainly the views of various interested groups within the United States and Canada were fully and fairly represented. An example was the advice to the U.N. Seabeds Commitee that the cost of developing deep ocean resources would make it clearly inappropriate for the proposed international agency to have the power to develop resources directly, a position popular with both the U.S. petroleum and mining interests. A U.S. representative stated:

> But while the organization we propose would have strong supervisory and regulatory powers, and would be authorized to issue licenses to private organizations and to organizations created by States or groups of States, it would not in itself have the power to undertake seabed exploration and exploitation.
>
> We do not believe that an international organization with monopolistic powers, including the power to undertake for itself exploration and exploitation, would be an efficient means of developing these resources or of generating revenues from their production. Such an arrangement would not achieve our basic objective of developing the greatest benefit for mankind. Nor would it provide the incentives to operators and financial institutions to make the investments necessary to undertake ocean mining ventures.[297]

In most of the countries of the world, including the United States, the resource owner has the capability of developing the resource, if it wishes. The United States and its states have chosen to encourage private participation in resource development,[298] although governmental resource development has occurred in the United States.[299] In many other countries, however, the contracts negotiated with the resources developers are so detailed as to required development and other elements as to actually put the government "in the business".[299] Examples of this would be the North Sea development contracts issued for petroleum by the Governments of Norway

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Geologist, U.S. Geological Survey, to Subcommittee I, U. N. Seabeds Committee, dated August 4, 1971, and Donald L. McKernan, Alternate U.S. Representative, to Subcommittee II, dated August 17, 1971, United States Mission Geneva Releases regarding, respectively, seabeds resources and fisheries resources.

[296] See List *supra,* n. 295. A large number of U.S. nationals representing affected industry groups, particularly petroleum and fishery, were present and briefed by the U.S. Delegation.

[297] Statement by Bernard H. Oxman to Subcommittee I, U.N. Seabeds Committee, dated August 18, 1971, United States Mission Geneva Release, p. 3.

[298] See *supra,* n. 169.

[299] See Long Beach Net Profits Contract, 2 Nossaman OCS Study, App. 12, p. 12-A-16 *et seq.,* 12-A-156 *et seq.;* Krueger *supra,* n. 167 at pp. 789-790.

and the United Kingdom.[300] In the developed socialist countries, of course, it is customary for the sovereign to develop the resources.[301] Developing countries typically do not, regardless of their political philosophy, because of the costs of operation which indicates quite accurately that this is an economic issue.[302] As such, it should not be unacceptable to the United States, the U.S.S.R., or any developed power that the proposed international agency have the power of developing resources under its jurisdiction. With due regard to the economic realties involved, it will probably be many years before the proposed international agency has the financial ability to exercise this power, but conceptually it should have it.[303]

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[300] See 2 Nossaman OCS Study, App. C at pp. 12-C-59 (Norway), 12-C-75 (United Kingdom).

[301] An example is the Soviet Union which has a large and technologically advanced petroleum industry administered by the government. Note, however, that for grounds apparently arising out of Marxist theory, it would not wish to have self-directed development by the proposed international oceans agency and the potential competition which could occur from it. See *supra*, n. 171. *Cf.* Venezuela which since 1956 has had a governmental corporation, Corporacion Venezolana de Petroleo ("C.V.P.") with the power to develop petroleum either through a "mixed company" in which it and a private company are participants or at its option by itself. See 2 Nossaman OCS Study, App. C at p. 12-C-90 *et seq.*

[302] This is particularly true of offshore mineral development in which the "start-up" costs, particularly for petroleum, can be enormous. See Krueger, *supra*, n. 167 at pp. 777, 785 and 786 *et seq.*; 1 Nossaman OCS Study at p. 606.

[303] If a resource owner, such as the proposed international oceans agency, has discretion over work and development requirements, as it should have, a license for the exploitation of the resource can have a broad range of terms depending largely on the economic potential of the resource. The provisions of the U.S. draft convention, for example, are broad enough to accommodate virtually any form of lease, operating agreement, joint venture agreement or concession known to the U.S. petroleum and mining industries. See Draft Convention, art. 18, App. A, para. 7. See *supra*, nn. 299, 302. It is, therefore, of little consequence whether the agency is permitted to directly develop the resource itself and it would seem to serve little purpose to emphasize the economic incompetence of the developing countries or the proposed international agency to undertake this work. *Cf.* Oxman statement *supra*, n. 297 at p. 2.

It is noteworthy that the Working paper on the regime for the sea-bed and ocean floor and its sub-soil beyond the limits of national jurisdiction U.N. Doc. A/AC.138/49, introduced by Trinidad and Tobago on August 10, 1971, would effect in the words of the sponsors:

> "In keeping with the principle of the common heritage, the co-sponsors of the Working Paper contained in document A/AC.138/49 envisage the establishment of a system in which mankind, in the capacity of owner, would participate directly in the administration and management of the

The Soviet Union also tabled a draft seabeds treaty in the summer of 1971 with the U.N. Seabeds Committee.[304] The treaty, while largely structural in nature, stated the interest of the Soviet Union in preserving its position in the foreign fisheries and the free transit of the oceans:

> The use of the sea-bed and the subsoil thereof for the purpose of exploring and exploiting its resources shall not conflict with the principles of freedom of navigation, fishing, research and other activities on the high seas.[305]

The "Question of the limits of the sea-beds",[306] the "Question of licences for industrial exploration and exploitation of sea-bed resources",[307] and the "Question of the distribution of benefits"[308] were left as unsettled issues. The statements of the Soviet representatives to the U.N. Seabeds Committee, however, confirmed the the priority of the items on which a position had been taken in very direct terms:

> To recognize a state's rights over the biological resources of the high seas in that way amounted to making it responsible to the international community for a full and rational exploitation of the fish stocks and, moreover, to placing an obligation on it not to permit over-exploitation which might be detrimental to the replenishment of the stocks. It was very unlikely that the coastal state could fulfil such a task on its own without international co-operation and without the help of scientists and specialists from other countries concerned. *In those circumstances, the conferring of responsibility for such functions on the coastal state*

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area and the exploitation of its resources. Although in its initial stages it may not be possible under the system for mankind by itself to undertake activities in the area, it may nonethless enter into arrangements with third parties for the attainment of its objectives."

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"It would be therefore more in consonance with the principle of the common heritage for such a body in the early stages to enter into joint ventures, production-sharing and profit-sharing arrangements with other entities, public or private, national or international rather than to grant or issue licences to such entities. The concept of a licensing or concession system is in our view inconsistent with the principle of the common heritage."

Report of Subcommittee I, U.N. Seabeds Committee, U.N. Doc. A/AC.138/60, August 26, 1971, p. 6.

[304] U.S.S.R. Provisional Draft Articles of a Treaty on the Use of the Sea-Bed for Peaceful Purposes, U.N. Doc. A/AC.138/43 (July 22, 1971).

[305] *Id.*, art. 4.

[306] *Id.*, art. 3.

[307] *Id.*, art. 9.

[308] *Id.*, art. 14. Emphasis added.

might bring no advantages, but could be contrary to the interests of states, including the coastal state itself. No state could claim that it alone had the right and capacity to protect the resources of the zones adjacent to the high seas.[309]

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In stating its position, the Soviet delegation was not only anxious to protect the interests of the USSR, but it also has the sincere desire to find a flexible solution which would fully meet the interests of all. The articles of the treaty which the Committee was to draft must be universal in character and must be acceptable to all countries.[310]

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The realistic way to arrive at an equitable solution of the problem was to recognize the specific rights of the coastal state to exploit marine resources within the 12-mile territorial limit, taking into account, in an equitable manner, the interests of states engaged in deep-sea fishing. For its part, the Soviet Union was ready to make every effort to bring the work to a successful conclusion.[311]

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The debate had shown that opinions on the question of the territorial sea were divided. As ninety States had accepted a twelve-mile limit, it had been requested that that limit should be recognized and codified. The USSR shared that view. Other States, however, had requested that a distance of 200 miles should be adopted in order to protect the interests of coastal States. In his opinion, the distance of twelve miles ought to satisfy all States, and he hoped that the States which had asked for a greater distance would withdraw their claims, so as to avoid further difficulties and pave the way for a compromise solution.[312]

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[S]traits... should [be defined] more precisely. It had been pointed out that many straits would be affected if the breadth of the territorial sea was set at twelve miles. Ouly, the main straits, which played an important part in international navigation, should, however, be considered, and a list of such straits should be drawn up. The concerns and interests of the coastal States should obviously be taken into account in that connexion. What was wanted by countries like the USSR, which had requested freedom of transit in the territorial seas, was a reasonable, but not an absolute freedom of transit. He suggested that the Sub-Committee might include in its draft articles provisions covering the interests of coastal States in that respect.[313]

While the United States has relatively limited interest in foreign fisheries,[314] its position regarding other ocean issues appears en-

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[309] Prov. Sum. Rec. A/AC. 138/SC.II/SR.12 (August 17, 1971) at p. 10. Emphasis added.

[310] *Id.*, at p. 11.

[311] *Ibid.*

[312] Prov. Sum. Rec. A/AC. 138/SC.II/SR.13 (August 17, 1971) at p. 11

[313] *Id.*, at p. 12.

[314] The United States distant-water fisheries consist principally of tuna, fished off Peru and Ecuador, and shrimp, fished off Mexico. It is small

tirely consistent with those of the Soviet Union. It is interesting to note the sense of accommodation that both have in order to preserve a right of free transit through the world's oceans.[315]

A number of other draft conventions and working papers were submitted on the subject of the régime for the administration of the seabeds or oceans beyond limits of national jurisdiction during 1971, including those by the United Kingdom,[316] France,[317] Poland,[318] Tanzania,[319] Trinidad and Tobago et al.,[320] Afghanistan et al.,[321] Ca-

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in proportion to the coastal fishing industry operating off the United States. See Ratiner, *supra*, n. 37 at p. 235; Loring, *supra*, n. 91 at p. 424 *et seq.*

[315] Compare text at nn. 294 and 313, *supra.*

[316] The United Kingdom working paper submitted essentially proposed a mining code for seabed resources, U.N. Doc. A/AC.138/46 (July 30, 1971). See also Report of Subcommittee I *supra*, n. 303 at p. 3.

[317] The French working paper was also directed essentially to the exploitation of seabed resources. *Id.*, at p. 4.

[318] The Polish working paper submitted contained the following suggestion:

> "The organization to be established, and its nature and powers, should be adapted to growing needs. This means that, initially, before the exploitation of mineral resources of the international area is conducted on a large scale, the organs of the organization should not be over-developed, its secretariat should be small, and the competence of the organization should first and foremost be of a co-ordinating nature. This would be for the *transitional period.* The duration of this stage should depend on the progress of exploration and exploitation of the resources of the international area and, consequently, on the emergence and development of the need for institutionalized arrangements for international co-operation."

U.N. Doc. A/AC.138/44 (July 28, 1971), para. 10. *Cf.* Part II, A3 *supra*, at n. 138 *et seq.*

[319] The Draft Statute as submitted by Tanzania would authorize the proposed international agency to itself exploit the resources of the international area and emphasized that the agency should "pay particular attention to the desirability of minimizing fluctuations of prices of land minerals and raw materials that may arise from the exploitation of resources of the area". U.N. Doc. A/AC. 138/33 (March 24, 1971), arts. 16, 2(2). See Report of Subcommittee I *supra*, n. 303, at p. 5.

[320] *Id.*, at p. 5. See *supra*, n. 303.

[321] The preliminary working paper submitted by Afghanistan, Austria, Belgium, Hungary, Nepal, Netherlands and Singapore essentially represented the view of land-locked and shelf-locked states. It proposed that a coastal state have a "priority zone" extending 40 miles from the outer limit of a twelve-mile territorial sea of basically the same type proposed as a trusteeship zone in the U.S. Draft Convention. U.N. Doc. A/AC.138/55, August 19, 1971 ,art. IC. See Report of Subcommittee I *supra*, n. 303 at pp. 6-7.

nada [322] and Malta.[323] All of the proposals fall short of establishing a comprehensive resources management system for the oceans.[324] Probably the Malta Draft Ocean Space Treaty comes the closest in providing for the management of both living and non-living resources of the "national ocean space" extending 200 miles adjacent to a nation's coast [325] and in the "international ocean space" beyond.[326] Conceptually, however, it is defective in failing to provide means to enforce established international standards of environmental quality and resource protection in the national zone.[327] It, too, has its primary emphasis on the exploitation of natural resources.[328]

While a great deal of work remains to be done before conceptually sound draft articles are ready, nonetheless a great deal of progress has been made. Most of these proposals accepted the Assembly-Council-Secretariat concept of the U.S. Draft Convention [329]

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[322] The Canadian working paper on the seabed regime and machinery was essentially described by its drafters as proposing a resource management system:

> "The resource management system must be stable — the large amounts of investment capital needed will not be forthcoming without assurance of an impartial and objective regulatory and administrative climate within which to operate. The system must, however, have enough flexibility to take into account new scientific and technological advances and problems arising therefrom, such as marine pollution. The machinery must be effective, and thus have the necessary powers to deal with the States and other powerful entities engaged in exploitation. This entire field is one as yet only in its formative stages. It wonld therefore appear desirable to design machinery that would reflect these developments, with transitional skeletal machinery to begin with that could evolve along with the progress of development. These then are the concepts which underlie the philosophy of the Canadian working paper — development, equity, stability, flexibility, and effectiveness."

Id., at p. 7.

[323] Draft Ocean Space Treaty A/AC..138/53, Augnst 23, 1971.

[324] See *supra*, n. 96 *et seq.*

[325] Draft Ocean Space Treaty *supra*, n. 324, art. 36.

[326] *Ibid.*; *id.*, art. 66 *et seq.*

[327] In the national ocean space there is only a duty of consultation and cooperation with other states and the proposed international agency "before the coastal state may undertake or permit activities in national ocean space that miglit substantially reduce the living resources of ocean space outside its jurisdiction". *Id.*, art. 58, para. 1.

[328] See *supra*, n. 181 *et seq.*

[329] See *supra*, n. 45 *et seq.*

with the principal point of departure being whether the Council should be selected on a weighted basis, as favored by the developed nations,[330] or be simply elected by the Assembly without classification, as favored by the developing nations.[331] There also appeared to be consensus that the régime should be based upon the Declaration of Principles approved by the 1970 U.N. General Assembly and that the régime should be established by an international treaty of universal character.[332] The proposals submitted contained widely divergent concepts of contiguous zones for resource purposes, but there appeared to be a strong area of agreement as to the need for establishing a balance between the interests of the international

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330 See *supra*, n. 46. The Soviet proposal would provide for an executive board consisting of thirty States including five States from each of the following groups of countries:

"(a) the socialist countries,

(b) the countries of Asia,

(c) the countries of Africa,

(d) the countries of Latin America,

(e) the western European and other countries not coming within the categories specified in sub-paragraph (a) to (d) of this paragraph;

and (f) one land-locked country from each of the aforementioned groups of States."

See *supra*, n. 304, art. 21, para. 1.

The United Kingdom proposal stated:

"[J]ust as it would be appropriate to give developing States a special position on any institutions of the Authority which might be set up for the purpose of distributing sea bed benefits, so it would be necessary to make special provision on the Council for those States with an established sea bed technology, who have a special contribution to make in organising sea bed activity and without whose support no international regime in this field would be viable. This could be done by designating as members of the Council a limited number of industrialised countries which, either directly or through commercial enterprises based on their territory, have or develop a substantial sea bed technology. An important criterion in establishing a country's claim to be a designated member of the Council might be the extent to which it has an established tradition and expertise in the transfer of technological skills and abilities to developing countries."

Working Paper, *supra*, n. 316, para. 19.

331 The working paper introduced by Trinidad and Tobago provided for a Council of thirty-five members elected by the Assembly "from the lists prepared in accordance with Article... having due regard to the principle of equitable geographical representation". Trinidad and Tobago Working Paper *supra*, n. 303, art. 27. A similar provision was contained in the draft statute submitted by Tanzania. See *supra*, n. 319, art. 24.

332 Report of Subcommittee I *supra*, n. 303, at p. 9.

community and the coastal state and to provide means of communication between the proposed international agency and the coastal state.[333]

The Seabeds Committee also made substantial progress in preparing a list of subjects and issues relating to the law of the sea, as a prelude toward drafting treaty articles thereon.[334] It also had extensive discussions regarding the preservation of the marine environment,[335] although quite clearly the Committee was awaiting the outcome of the U.N. Conference on the Human Environment, scheduled for Stockholm in June, 1972, for guidelines as to its activities in this area.

In terms of specifics it is difficult to say that the U.N. Seabeds Committee has made the type of progress in its preparatory work that will be necessary in order to effect a comprehensive law of the sea conference in 1973, as tentatively scheduled. On the other hand the August, 1971 meeting of the Seabeds Committee clearly appears to have been the first in which it or any of its predecessor committees faced the realities of the situation and commented directly and at many times quite knowledgeably on them. Progress was accordingly made toward establishing a consensus on a number of the issues to be discussed at the proposed law of the sea conference. As indicated above, the developed nations have shown a willingness to compromise their interest in establishing or maintaining narrow zones of national jurisdiction in order to retain rights of free transit over the oceans and major straits that would be engulfed by the imminent twelve-mile territorial sea rule, and proposed extensive resource contiguous zones.[336] There have been indications that even this right of free transit may be modified to permit regulation by the coastal states or the proposed international agency at least for purposes of environmental protection.[337] The

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[333] *Id.*, at p. 10.

[334] See Report of Subcommittee II, U.N. Press Release, SB/60, August 27, 1971, Geneva, 10 Int'l L. Materials, pp. 973, 978-979 (1971). The United Nations General Assembly in its twenty-sixth (1971) session adopted a resolution upon recommendation of the U.N. First Committee generally commenting favorably upon the progress of the U.N. Seabeds Committee toward the proposed law of the sea conference. See U.N. Doc. A/RES/2881 (Jan. 26, 1972), *supra*, n. 79. Aside from adding the People's Republic of China and four other new members to the Committee its only significant action on the subject was to authorize two 1972 sessions in March-April and July-August. *Ibid.* See Rep. 1st Com., U.N. Doc. A/8623 (Dec. 17, 1971).

[335] Report of Subcommittee III, *Id.*, at pp. 980-981.

[336] See *supra*, nn. 294, 313.

[337] See *supra*, n. 286.

United States has shown itself amenable to regulation by the coastal state over an unspecified but potentially large portion of the high seas adjacent to it for purposes of the allocation and conservation of living resources.[338] The Soviet Union and other distant fishing nations have shown less accommodation on this point, but it is probable that agreement could be established on this point as well if consensus were reached on other major issues.[339]

For their own part, the developing coastal nations have given recognition that transportation in the oceans of the world is of universal benefit and should be maintained with, however, a desire for a broad zone of national jurisdiction for resource development and management.[340] Within this zone they appear largely to be willing to recognize a right of free transit with a substantially more stringent view of the rights of the coastal state to regulate the nature and circumstances of the transit.[341]

The case of the developing coastal states was given noteworthy impetus by the People Republic of China in its first address to the General Assembly after its recent admission. It was there stated:

> The Chinese Government and peoples resolutely support the struggles initiated by Latin American countries and people to defend their rights over 200-nautical-mile territorial seas and to protect the resources of their respective countries.[342]

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[338] See *supra,* nn. 287 *et seq.*

[339] See *supra,* nn. 309 *et seq.*; Summary Records Subcommittee II, U.N. Doc. A/AC.138/SC.II/SR.4, July 23, 1971 *et seq., passim.*

[340] See *supra,* nn. 91-93, 104.

[341] See *e.g.,* Draft Ocean Space Treaty *supra,* n. 323, art. 48; statement of the representative of Brazil, Prov. Sum. Rec., Subcommittee II, U.N. Doc. A/AC. 138/SC.II/SR.14 (August 18, 1971) p. 2; statement of the representative of Indonesia, Prov. Sum. Rec., Subcommittee II, U.N. Doc. A/AC.138/SC.II/SR. 12, (August 17, 1971) pp. 11-13; statement of the representative of Malaysia, Prov. Sum. Rec., Subcommittee II, U.N. Doc. A/AC.138/SC.II/SR.11 (August 13, 1971) pp. 2-3. *Cf.* statement of the representative of Italy, Prov. Sum. Rec., Subcommittee II, U.N. Doc. A/AC.138/SC.II/SR.15 (August 19, 1971) pp. 8-12.

[342] New York Times, November 16, 1971 ("Text of China's Policy Statement in the U.N."). The statement also contained the following comments:

> "China is still an economically backward country as well as a developing country. Like the overwhelming majority of the Asian, African et Latin-American countries, China belongs to the Third World."
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> * * *
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> "The Chinese Government and people resolutely support the struggles unfolded by the petroleum-exporting countries in Asia, Africa and Latin America as well as various regional and specialized organizations to protect their national rights and interests and oppose economic plunder." *Ibid.*

The shift in the balance of power which accompanied the entry of China into the U.N. and which was further emphasized by the U.S. — China discussions cannot but improve the political stature of the case of the developing coastal nations.[343]

There further seems to be consensus on the desirability of providing land-locked states with coastal access under terms that would make their entry to the exploitation of ocean resources competitive with those of coastal states, at least in the international area.[344] For their own part the land-locked and shelf-locked states appear to recognize that in order to establish such a régime it will be necessary that the coastal states be given quite broad contiguous zones for the purposes of resource conservation and development.[345]

Finally, it would be appropriate to offer some additional comments based upon personal observations of the U.N. Seabeds Committee at work in Geneva during August of 1971:

1. High seas fishery, including both coastal and migratory varieties, have been focused on as a part of the "common heritage of mankind". The desire of coastal states to control these living resources has become clearly evident in a number of suggestions by developing nations and some by developed for broad contiguous zones for resource management. The scientific and technical dis-

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This position is consistent with that previously taken by the People's Republic. See *supra*, n. 92.

Subsequently China in the U.N. Seabeds Committee, of which it was made a recent member (see *supra*, n. 79), attacked Japanese claims in the East China Sea with which the United States "collaborated" as "an attempt to further plunder China's coastal seabed resources". Los Angeles Times, March 3, 1972 ("Peking Sees U.S. — Japan Plot to Take Over Chinese Islands"). China further stated "it is within each country's sovereignty to decide the scope of its rights over territorial seas". *Ibid.*

[343] See *supra*, nn. 91-93, 104. See also New York Times, October 26, 1971 ("U.S. is Defeated in Key U.N. Vote on China, 59-54"); Time Magazine, November 8, 1971, p. 26 *et seq.* ("China: A Stinging Victory").

[344] Most of the lists of subjects and issues submitted to Subcommittee II in one form or another articulated an interest in establishing access. See Report of Subcommittee II *supra*, n. 334, p. 979. The working paper submitted by Norway on this subject, for example, contained in its list of issues the following:

"Land-locked States

— Right of access to the high seas

— Participation in the activities in the international sea-bed area."

U.N. Doc. A/AC.138/52 (August 13, 1971), para 8.

[345] See *supra*, n. 321.

tinctions between coastal and migratory species does not appear to have had any significant persuasion and it seems likely that the coastal states as a class will be interested in the taking and conservation of all living species within a broad coastal zone. The *quid pro quo* for this arrangement with respect to the distant-fishing nations may very well prove to be the protection of "traditional" takings, although even here it is likely that some concession will have to be made in light of the interest of the developing nations in developing capability in the taking of all fishery stocks in adjacent oceans areas.

2. The U.N. Seabeds Committee is not in reality a preparatory committee for the proposed law of the sea conference. With due regard to the scope of its work and the character of its operation its meetings are emerging quite clearly as the first part of the law of the sea conference. Because its operation and conclusions will be screened annually by the U.N. First Committee and General Assembly, the fate of the various issues to be decided may very well have been largely decided when the agenda is established for the conference.[346] After the issues have been framed, draft articles prepared and the same laboriously discussed in the fashion that they have during the past years, there is doubt as to whether any major reconfigurations of policy will be practicable at the conference itself.

This is not a regrettable outcome. If the in depth preparatory work now taking place in the U.N. Seabeds Committee had been undertaken before the 1958 Geneva Conference on the Law of the Sea and the abortive 1960 Geneva Conference, it is likely that some of the problems which have emerged from the 1958 Geneva Conventions could have been identified and appropriate modifications made. It seems certain, for example, that a definition of the breadth of the territorial sea would have been achievable, if this type of work had taken place in the earlier conference.[347]

The fact that the delegations to the U.N. Seabeds Committee are comprised both of experts and persons having political responsibility within their countries appears also to have had a beneficial effect. The issues involved are essentially political in nature and can best be cast into policy by this type of group rather than the

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[346] See *supra*, n. 78.

[347] The United States sponsored a proposal which would have provided for a territorial sea of six miles plus an exclusive fishery zone in an additional six miles which was defeated by a narrow margin. 3 Official Records law of the Sea Conference, U.N. Doc. A/Conf. 13/38, 39 (1958); 1 Nossaman OCS Study, pp. 3 *et seq.*

International Law Commission whose work was the primary source for the 1958 Geneva Conventions.[348]

3. The "common heritage of mankind" concept appears to be of secondary importance to the developing coastal states whose primary priority is essentially the acquisition of more territory and the control and management of resources in and above it in a broad contiguous zone of national jurisdiction. The *quid pro quo* for effecting this régime could well be the establishment of the jurisdiction of the international oceans agency to enforce international measures for environmental protection and the conservation of resources, internationally guaranteed rights of free transit and provision for adequate coastal success by land-locked nations. The overlap in governmental responsibility in the contiguous zone between the international agency and the coastal state could be very useful in the development of a comprehensive system of oceans management.

4. It has been repeatedly stated or implied by representatives of both developing countries and developed countries that only the latter have the financial capability to develop resources of their zones of national jurisdiction, whether for living or non-living resources. This concept is fallacious. If there is resource potential, it can be developed by an investor under license from the resource owner. If the resource potential is large, many investors will be interested and the terms can be very favorable to the resource owner, regardless of its own financial capability. In a broad sense the financial capability of a resource owner is irrelevant to the capability of its development.[349] The U.S. Draft Articles submitted in 1971 are consequently questionable in concept in allocating the take of a fish stock to be given to a coastal state on the basis of whether it "can be harvested by that state".[350]

5. There perhaps has been an overemphasis of the concept that developing nations are less interested in environmental protection and more interested in development than are other nations. It is becoming quite clear that a number of environmental concerns are not necessarily uneconomic either in the short or long run and social and cultural values are involved and esthetic characteristics are not in a broad sense simply a luxury for affluent nations. Where social and cultural values are involved and esthetic characteristics

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348 The Geneva Conventions grew out of draft articles prepared by the International Law Commission in large part during the period from 1950 to 1956. See Franklin *supra*, n. 107 at pp. 8 *et seq.*, 84 *et seq.*; Krueger *supra*, n. 2 at p. 473.

349 See *supra*, nn. 173, 301-303.

350 See *supra*, n. 288.

with a positive economic value are present (*e.g.*, tourism), development nations may be as concerned as developed countries.[351]

6. The internal criticism of the U.S. Draft Convention made in the United States both in the Congress and elsewhere was openly discussed in the U.N. Seabeds Committee.[352] It will be difficult in the extreme for the United States or any other nation to maintain leadership in the formulation of the complex series of oceans issues unless there is bipartisan support for its policies domestically. This appears to have been the case substantially to this point in time and it would be unfortunate if it were otherwise.

7. The Soviet Union and its bloc appear to be doing the developed nations a favor in taking as strong a position as they have on distant fishery operations and the breadth of limits of national jurisdiction. Certainly the developing coastal nations interested in or claiming a broad contiguous zone for resources purposes are fully aware that the Soviet Union and the land and shelf-locked nations could block the establishment of a régime that would give acceptability to their claims. There are less obvious factors that suggest that the Soviet Union is as prepared to come to agreement as the United States on fishery and all other issues, if an acceptable concept of free transit and compromises on other relevant issues are established. The Soviet Union appears to perceive the need for a comprehensive law of the sea conference as clearly as any other nation.

Developments during 1971 have continued to show the leadership of the United States in the development of oceans policy. They have also illuminated quite clearly and predictably the policies of the developing nations that are inconsistent with certain of the concepts of the 1970 U.S. Draft Convention and to a lesser extent the 1971 U.S. Draft Articles. The attitude of accommodation shown by the United States, the Soviet Union and other developed countries suggests that appropriate modifications of the type discussed above may be forthcoming at the appropriate time. If so, it seems likely that the international community will effect, whether in 1973 or in a succeeding year, the very necessary reconfigurations in oceans policy. In doing so it may provide a most useful precedent for other global interests that are equally a "common heritage of mankind" and improve the pattern of policy-making between the developed and developing nations of the world.

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[351] The New York Times, September 26, 1971, ("Pollution Grows in Pacific Isles — Conference Discusses Rise in Peril to Environment"), dateline New Caledonia. *Cf.* Los Angeles Times, November 18, 1971, ("Profit Seen in Pollution Fight").

[352] See statement of Peru *supra*, n. 92 at p. 5.