CONFERENCE OF SOVIET AND AMERICAN JURISTS ON THE LAW OF THE SEA AND THE PROTECTION OF THE MARINE ENVIRONMENT*

INTRODUCTION

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The essays in this collection are the product of the second phase of an exchange of visits between Soviet and American international lawyers, conducted under the auspices of the American Society of International Law and the Carnegie Endowment for International Peace on the one hand, and the Institute of State and Law of the Academy of Sciences of the U.S.S.R. on the other. The first phase of this exchange was a conference of American and Soviet legal practitioners which took place in New York from January 7th to 11th, 1974, and dealt with the legal aspects of trade between the Soviet Union and the United States.

In response to an invitation from the Institute of State and Law, a delegation of ten persons representing the Carnegie Endowment for International Peace and the American Society of International

*For their extraordinary assistance in the publication of these papers, the editors would like to acknowledge and express their appreciation to Professor H. Gary Knight, Louisiana State University; Mr. Charles W. Maynes, Carnegie Endowment for International Peace; Mr. Robert E. Stein, International Institute for Environment and Development; Mr. Gerald K. Fisher and Mrs. Eva A. Sheldon, American Society of International Law. The papers here are substantially the same as presented at the Moscow Conference. The paper presented by Mr. B.M. Klimenko at the Conference is not included, however.

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Law visited Moscow during the period of June 15th to 26th, 1975, and exchanged views with Soviet scholars on the law of the sea, with special emphasis on the protection of the marine environment. Although both the American and Soviet delegations included several persons who had participated in the sessions of the Third Law of the Sea Conference, the discussions held in Moscow were of an academic character and were entirely unofficial.

In arranging these meetings with their Soviet colleagues, the Carnegie Endowment for International Peace and the American Society of International Law had in mind first, the desirability of an exchange of views in order to identify the points where United States and Soviet interests and views converged and where they diverged; second, the provision of a nonofficial and academic occasion for a wider and freer exchange of views than is possible in official meetings; and third, an opportunity to lay a foundation for a long-term continuing exchange of views on a variety of scholarly subjects.

The papers in this collection reflect the format of the meetings. An American and a Soviet paper were prepared for each item on the agenda, and it is these papers that appear in this collection. These studies provided the starting point for the open and wide-ranging discussions which took place between the members of the two delegations.

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FREEDOM OF SCIENTIFIC RESEARCH IN THE WORLD OCEAN

A.F. Vysotsky*

I. INTRODUCTION

Recent activities aimed at progressive development and codification of law of the sea principles and rules have brought about quite a number of problems new to the science of international law. Legal regulation of marine scientific research ranks with the more important of them.

Freedom of scientific investigation is a key question here. No other issue has been given as much consideration by international legal writing and by reports of international law experts and oceanographers dealing with the subject.

It is but natural that the Soviet Union and the United States should be particularly interested in the issue since: (1) these two countries carry out the most extensive and systematic research into the marine environment; and (2) they bear the bulk of difficulties entailed by their participation in oceanic research projects on an unprecedented scale and of vital importance for all of humanity.

Soviet scholars are well acquainted with articles and scientific reports by M.B. Shaefer, W.L. Sullivan, W.T. Burke, R. Revell, C.A. Auerbach, J.A. Knauss, P. Handler, W.S. Wooster, J.A. Teger Kildow, M.D. Bradley, M. Redfield, and others dealing with questions of freedom of scientific research. We hope that our American colleagues have had an opportunity to become acquainted with the articles and papers by our scientists.

As a legal issue, the freedom of scientific research is a versatile problem which comprises many subproblems. Thus, defining the contents of this principle, as well as determining the scope of ensuing rights and duties of states engaged in scientific research into the marine environment, is of great interest. The juridical notion of the term "scientific research" has not yet been agreed upon; the classification of investigations of various kinds, and the criteria of their differentiation from similar uses of the sea have not been developed either.

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The editors wish to express their appreciation to Helen S. Hundley for her assistance in the preparation of this paper.
However, due to various reasons, doubt recently has been cast upon the expediency of the further existence of freedom of marine research per se.

The question which has caused discussion and which has challenged international lawyers is whether the legal regime of peaceful scientific research should be preserved and whether the World Ocean should be left open for free conduct of all kinds of investigations and scientific experiments by all states on the basis of their common and equal right to use the high seas, or whether the existing regime should be dismissed and replaced by control over these uses by coastal states and by an international body in all parts of the maritime expanses.

II. THE SOVIET LEGAL POSITION ON FREEDOM OF SCIENTIFIC RESEARCH ON THE HIGH SEAS

It is the general belief of Soviet international lawyers, oceanographers, economists, and other experts that freedom of the high seas undoubtedly should be preserved and confirmed. The Soviet doctrine proceeds from the premise that freedom of scientific research on the high seas is a generally recognized rule (principle) of the law of the sea. Any denial of its existence as part of the law of the sea de lege lata is juridically groundless. Let us present the arguments to the contrary.

It is argued that freedom of the high seas does not cover and has never covered scientific research. Some views have been expressed at Subcommittee III of the U.N. Preparatory Committee for the Law of the Sea Conference to the effect that freedom of scientific research cannot be interpreted as one of the freedoms of the high seas; neither can it be considered as "a generally recognized principle of international law, nor as a generally recognized principle of the freedoms of the high seas, completely recognized by the international law."


The right of states to conduct free scientific investigations in and on the ocean is rejected, in particular on the strength of the fact that the 1958 Convention on the High Seas\(^1\) makes no direct mention of freedom of scientific research as one of the "freedoms."\(^2\)


This argument proceeds from an erroneous treatment of the freedom of the high seas as constituting a certain fossilized set of its uses, a set of specific "freedoms," each of which is viewed as being lawful only in the case of a direct mention in a universal treaty or convention.

However, the longstanding practice of using maritime spaces testifies to the fact that freedom of the high seas, since its establishment as a principle of international law, always has been understood as the right of states to be involved in any kind of marine activity, provided that: (1) the activity in question is not prohibited by special agreements between states; (2) the activity in question is not limited by restrictions which ensue from other states' possessing the same rights; and (3) the activity in question is not restricted by generally recognized principles of international law.

If a particular use of the sea is not prohibited, does not interfere with the rights of other users, and is carried out in compliance with generally recognized international law principles, its lawfulness follows from the principle of freedom of the high seas. Any other interpretation of this principle would stop the development of any new peaceful uses of the high seas which are not specifically referred to in existing international agreements.

The references to article 2 of the Convention on the High Seas as proof of the nonexistence of the freedom of scientific research are groundless not only in principle, but also in substance. The article under consideration reads:

[Freedom of the high seas] comprises, inter alia, both for coastal and non-coastal states:

1. Freedom of navigation;
2. Freedom of fishing;
3. Freedom to lay submarine cables and pipelines;
4. Freedom to fly over the high seas.

These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.4

It is true that one cannot find any direct reference to freedom of scientific research in this article. But as can be easily seen from the travaux préparatoires of the 1958 Geneva Conference on the Law of the Sea, the drafting participants deliberately turned down the very

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1 [Ed. Note] Note 1 supra.
2 [Ed. Note] Id. art. 2.
idea of listing all possible "freedoms," rather, the drafters agreed to enumerate "some of the main freedoms" only.\textsuperscript{5}

The exemplary and unrestrictive nature of the list of freedoms of the high seas is clear from the very text of article 2 of the High Seas Convention.

First, the list is preceded by the notation that freedom of the high seas includes the four mentioned "freedoms" only \textit{inter alia};\textsuperscript{1} in other words, these are mentioned in particular. Second, the text of the article directly mentions other freedoms ("[t]hese freedoms and others")\textsuperscript{7} of the high seas as existing in addition to those freedoms enumerated. Furthermore, it is of no small importance that freedom of scientific research was implied when mentioning these "other freedoms." In its commentary to article 2 the International Law Commission pointed out: "The list of freedoms of the high seas contained in this article is not restrictive. The Commission has merely specified four of the main freedoms, but it is aware that there are other freedoms, such as freedom to undertake scientific research on the high seas . . . ."\textsuperscript{8}

The study of materials pertaining to this matter shows that it was not uncertainty with regard to the existence of the principle of the freedom of scientific research that prevented the treaty article from making a specific mention of this freedom in the list of most important uses of the seas; but it was the attempts of certain Western powers to prevent the contents of this freedom in order to justify their unlawful nuclear tests on the high seas.

B. \textit{Applicable International Customs as Foundations for the Freedom of Scientific Research}

Another point of interest is that the convention clauses under consideration did not set up a new principle of international law, but only confirmed juridically an existing customary rule. Scientific research in the high seas has long been conducted without any restrictions, provided, naturally, that the rules and principles regulating relations between states and the use of the sea space be observed. This procedure of carrying out marine scientific expeditions

\textsuperscript{4} [Ed. Note] High Seas Convention, supra note 1, art. 2.
\textsuperscript{7} [Ed. Note] Id.
has long been recognized by states and has not been questioned until recently.

1. The "Safe Conduct" of Scientific Expeditions

Moreover, well-known is the practice of the past, when ships engaged in marine scientific research enjoyed a kind of legal protection in the form of the so-called "safe conduct". The La Pérouse expedition undertaken in 1785 for the purpose of making discoveries had such a safe conduct. Before that, Louis-Antoine de Bougainville, another French navigator, went on his round-the-world voyage from 1766 to 1769 on the "La Boudeuse," with a similar safe conduct from the British. The well-known English seafarer Captain Cook went on his last voyage in 1776 at the height of the American War of Independence against the English, a war in which the French also were involved. Even though the French were aiding the Americans, the French Minister of the Navy instructed all French ships to regard Cook and his vessels as neutral.

Late in the 19th century Charles de Boeck of France and Carlos Calvo of Argentina wrote that they were not aware of a single instance where a belligerent state would refuse to follow the rule which exempts from capture a warship or a nonmilitary vessel fitted for purposes of exploration or discoveries, or where such a state would refuse it safe conduct.

In the early 19th century a number of expeditions were undertaken to make a general geographic description of oceans and seas, and an oceanographic expedition of the corvette "Challenger" (1872-1876) was followed by other expeditions with the special aim of investigating the physical, chemical, and other properties of the marine environment, the sea flora and fauna, and the structure and composition of the seabed.

Oceanographic expeditions and round-the-world voyages for scientific purposes increased in number and became more and more regular, among them the voyage of the Russian corvette "Vityaz" (1886-1889), the United States expedition on the "Albatross" (1888-1905), the Belgian expedition on the "Belgique" (1901-1903), the British voyage on the "Discovery" (1901-1904), and others.

2. Protection for Scientific Vessels During Naval Warfare

The lawfulness of all these activities was taken for granted. There was no need for their legal protection since no one either interfered with them or encroached upon them. A real threat to the normal conduct of marine scientific investigations could arise, however, in
the event of naval hostilities. And states, taking into consideration
the importance of these activities for all nations, came to an agree-
ment on some special rules for their protection during naval war.

The Hague Conventions of 1907 on the laws and customs of naval
war\(^9\) prohibited the capture of enemy vessels involved in peaceful
scientific research on the high seas. They also established a favoura-
ble order for ships of scientific expeditions entering ports of neutral
states and staying there.\(^10\) Thus scientific expeditions received spe-
cial legal protection, even under circumstances in which the appli-
cation of the principle of freedom of the high seas was restricted.

3. **Long-term International Research Programmes**

The scale of scientific research in the World Ocean is increasing
in our age, particularly in the last quarter century. Hundreds of
special ships furnished with modern equipment are involved in sci-
entific research. Long-term research programmes, some of which are
of a global nature, are being worked out. Many of these programmes
are coordinated on an international level and are carried out by joint
efforts of scientists from many countries. The most significant of
them are the Second International Polar Year (1932-1933), the In-
ternational Geophysical Year (1957-1958) and its continuation—the
International Geophysical Cooperation Year (1959), and the recent
Long-Term and Expanded Programme of Oceanic Exploration and
Research, of which the International Decade of Oceanic Exploration
is an important element.

All these intensive and multifold activities are carried out by the
states and their citizens on the solid legal foundation of the principle
of freedom of peaceful scientific research in the sea. Not a single
state has ever questioned the rightfulness of these uses of the high
seas. An international practice which has been followed for a long
time is convincing proof of a general recognition by states of the
principle of freedom of scientific research on the high seas.

1907, 36 Stat. 2332 (1910), T.S. No. 541 (effective for United States Jan. 26, 1910); Convention
Concerning Bombardment by Naval Forces in Time of War, Oct. 18, 1907, 36 Stat. 2351
(1910), T.S. No. 542 (effective for United States Jan. 26, 1910); Convention for Adaptation
to Maritime Warfare of the Principles of the Geneva Convention of July 6, 1906, Oct. 18, 1907,
36 Stat. 2371 (1910), T.S. No. 543 (effective for United States Jan. 26, 1910); Convention on
Certain Restrictions on the Right of Capture in Naval War, Oct. 18, 1907, 36 Stat. 2396 (1910),
T.S. No. 544 (effective for United States Jan. 26, 1910); Convention on the Rights and Duties
of Neutral Powers in Naval War, Oct. 18, 1907, 36 Stat. 2415 (1910), T.S. No. 545 (effective
for United States Feb. 1, 1910) [hereinafter cited as Neutral Powers Naval Convention].

\(^10\) [Ed. Note] Neutral Powers Naval Convention, supra note 9, art. 14, para. 2.
III. SOVIET-AMERICAN INTERPRETATIONS OF THE FREEDOM OF SCIENTIFIC RESEARCH

The existence of freedom of scientific research as a principle of international law and its paramount importance for effective implementation of marine scientific research is recognized both by Soviet and American authors. Nevertheless, the differences in their understanding and interpretation of freedom of scientific research as a legal principle should not be overlooked.

A. The Differences Between the Soviet and American Views

The Soviet lawyers take as their premise that the principle of freedom of scientific research, viewed as one of the elements of the generally recognized freedom of the high seas, can be in effect within the maritime space limits defined by international law as constituting "the high seas," and within these limits only. The high seas, according to the 1958 convention, include "all parts of the sea that are not included in the territorial sea or in the internal waters of a State." Some of our American colleagues suggest too broad an interpretation of this principle. They try to use it as a legal basis for relieving coastal states of control over scientific research conducted within their territorial waters as claimed in accordance with existing rules of international law.

In July 1971 at the Malta Pacem in Maribus Conference on the most efficient ways of exploration and exploitation of the World Ocean, American participants suggested that any "open research," i.e., research which is in the interests of all mankind and which is carried out with the intention that its results be published openly, could be conducted in the territorial waters of a coastal state without its consent. Similar recommendations previously were made by the Commission on Marine Science, Engineering and Resources established by the United States Congress in 1966. The Commission

\[^{11}\text{A. Kolodkin, Mirovoy okean 215-16 (1973) [hereinafter cited as Kolodkin]; Sovremennoe mezhdunarodnoe morskoe pravo 138 (M. Lazaryof ed. 1974); A. Vysotsky, Pravovye problemy svobody nauchnykh issledovanii v mirovom okeane (1974); Zhudro, Nekotorye voprosy mezhdunarodnopravovogo rezhima otkrytogo morya in Ocherki mezhdunarodnogo morskogo prava 154 (V. Koretsky & G. Tunkin eds. 1962).}

\[^{12}\text{[Ed. Note] High Seas Convention, supra note 1, art. 1.}

\[^{13}\text{W. Burke, Towards a Better Use of the Ocean 121 (1969) [hereinafter cited as Burke]; M. McDougal & W. Burke, The Public Order of the Oceans 792 (1962); Henkin, Changing Law for the Changing Seas, in Uses of the Sea 69, 70-71 (E. Gullion ed. 1968).}

\[^{14}\text{[Ed. Note] See generally Pacem in Maribus (E. Borgese ed. 1972).}

\[^{15}\text{[Ed. Note] 33 U.S.C. § 1104 (1970); see Commission on Marine Science, Engineering
undertook an intensive investigation of a broad array of marine problems, including the legal ones. In its report to the President the Commission recommended in particular that the principle of maximum freedom for scientific inquiry be effectuated and that the United States take the initiative in proposing a new convention on scientific research, embodying, *inter alia*, provisions providing for the possible conduct of scientific research in the territorial waters and on the Continental Shelf of a coastal nation without its prior consent.\(^\text{16}\)

The legal order in force is proclaimed to be "out of date." It allegedly does not meet the needs of science and technological progress and must be "modernized." The report states: "To observe, describe, and understand the physical, geological, chemical, and biological phenomena of the marine environment, the marine scientist must conduct investigations on a global basis. But the existing international legal framework does not facilitate these investigations."\(^\text{17}\)

Similar views were expressed in W.L. Sullivan's paper which was delivered at the Fourth Annual Conference of the Law of the Sea Institute in the United States,\(^\text{18}\) in the speech of P. Handler, the president of the National Academy of Sciences, delivered in March 1973 to Subcommittee III of the U.N. Committee on the Preparation of the Conference on the Law of the Sea,\(^\text{19}\) and by others.\(^\text{20}\)

Some American scientists even call for complete revision of "ancient" doctrines of international law pertaining to coastal power in order to adjust them to current needs.

However, one cannot agree with the assumption that the existing legal regime governing scientific research in coastal waters hampers the continuing advance of world oceanography. No one doubts the necessity for freedom of action for scientists in carrying out scientific inquiry. But the exploration of the World Ocean cannot be

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\(^{15}\) *OUR NATION AND THE SEA*, supra note 15, at 202-03.

\(^{16}\) Id. at 201.


\(^{20}\) BURKE, *supra* note 13, at 115-16.
undertaken without due regard for existing political boundaries and for the different legal status of its parts. These boundaries and differences have taken shape and have become firmly established due to certain historical and socioeconomic conditions of state development, and presently they are confirmed by generally recognized rules of international law. The problem of freedom of scientific research can be solved only within this framework and on the basis of these rules and not by rejecting them.

Any kind of legal regulation of state activity in the World Ocean, including scientific research, should proceed necessarily from two equally valid legal principles underlying the contemporary regime of maritime space: (1) the principle of the freedom of the high seas and (2) the principle of state sovereignty in coastal waters. Neglecting either of these principles would run contrary to existing international law, contrary to the interests of coastal states and contrary to the international community as a whole.

It also should be pointed out that the expanded interpretation of freedom of marine scientific research and the introduction of such recently coined notions as "the principle of maximum freedom" and "the utmost freedom of scientific research," which are understood as covering the waters of a coastal state, compromise the very principle of freedom of scientific research and make the whole problem much more complicated to settle. The differences in interpretation of the contents of the freedom of scientific research do not prevent Soviet and American experts from being equally concerned about the future of that freedom. It would not be an exaggeration to state that never before in the history of exploration and research into the World Ocean has the threat to regular marine scientific expeditions been so real as it seems to be now.

B. The Importance of Freedom of Scientific Investigation

Some say that the principle of the freedom of scientific research is out of date and cannot help to settle problems challenging humanity in our day. These assumptions seem to be groundless for several reasons.

To begin with, it should be borne in mind that the concept of freedom of scientific research on the high seas was formed in the course of a long historical process, and consequently, the concept was strengthened itself as a result of the objective necessity for states to use maritime space freely in order to conduct scientific research and experiments.

Many of the greatest discoveries, which enriched humanity with
new knowledge about our planet and let mankind realize the great role of the World Ocean in its life, would not have been possible without such freedom. It is the long time practice of free marine scientific inquiry that has permitted the buildup of a solid scientific foundation, an important springboard for a peaceful offensive on the ocean.

The existence of such an objective necessity, i.e., a necessity which is caused by specific material conditions of international life, hardly can be denied seriously in our day. Neither can the present need for freedom of oceanic research be denied. Such a need has not passed; on the contrary, it has grown as never before.21

In the years to come the World Ocean undoubtedly will become one of the most important, and in many instances, the main source of meeting the peoples' demands for food and energy. Many states, and above all, the developing ones which are striving to strengthen their national economies and increase their standards of living, set their hopes to a great extent on marine resources.

It is quite obvious that the problems arising here, among them such urgent ones as the practical utilization of the World Ocean's expanses through exploitation of its biological and mineral resources, pollution control and the preservation of ecological balance, long-term weather forecasting, and many others, cannot be solved effectively without carrying out a vast complex of fundamental scientific research and experiments aimed at the exploration of the most significant phenomena and processes of the World Ocean. These investigations include (1) the development of the theory of physical, chemical, biological, and geological processes, (2) comprehensive studies of the hydrometeorological regime, hydrobiology, and hydrology of the oceans and seas, and (3) geological and geophysical studies of the Earth's crust and the upper mantle under the oceans and seas.

The need for broader knowledge of the sea is stressed in many resolutions of the U.N. General Assembly. The General Assembly has approved a resolution introducing the above mentioned Long-Term and Expanded Programme of Oceanic Exploration and Research, which is a reflection of such a need. The purpose of the

Programme is "to increase knowledge of the ocean, its contents and the contents of its subsoil, and its interfaces with the land, the atmosphere and the ocean floor and to improve understanding of processes operating in or affecting the marine environment, with the goal of enhanced utilization of the ocean and its resources for the benefit of mankind."22

The increasing practice is joint scientific expeditions with participation by several countries is another proof of the recognition of the great importance of marine scientific investigations. There arose a need for an international body to coordinate all these activities. To this end the Intergovernmental Oceanographic Commission (IOC) under the United Nations Educational, Scientific, and Cultural Organization (UNESCO) was established in 1960. Since the time of the establishment of this organization, the number of its member states has doubled. At present roughly half of the planet's countries participate in IOC activities. This is convincing evidence both of the importance of marine science and of the necessity for cooperation.

The main factors which demand the further development and the strengthening of freedom of scientific research include: (1) the unprecedented, increased role of scientific expeditions and experiments in the ocean; (2) the growth of marine expeditions in number; (3) the broadening of the World Ocean investigation programmes; (4) the engineering complications involved in such investigation; and last but not least, (5) the very methodological foundation of modern marine investigation projects, a foundation which is based upon the conception of the unity of the World Ocean and the interconnection of all its processes.

The principle of freedom of scientific investigations meets both the interests of world science and the particular needs of different countries, including those of the developing states. Freedom of research is a matter of primary necessity for the present national and international projects of scientific investigation, as it is the only possible approach guaranteeing unimpeded and unhindered conduct of peaceful scientific research and experiments of various types in the World Ocean. At the same time, such freedom does not infringe upon the rights of coastal states in their territorial seas and on their Continental Shelves. Such freedom provides flexibility in

choosing place and time for observations and experiments or in making alterations and changes in research schedules, which is indispensable for marine scientists.

IV. ALTERNATIVES TO THE FREEDOM OF SCIENTIFIC RESEARCH

It is interesting to note, however, that some individuals who actively support further development and broadening of oceanic research programmes oppose freedom of inquiry, thus neglecting the direct connection between the effectiveness of such programmes and the legal order of their undertaking. They make suggestions and submit projects aimed at the limitation or elimination of freedom of investigation in the World Ocean. These alternatives to free conduct of marine research can only seriously harm the interests of ocean science and, in the final analysis, the interests of all humanity.

A. The Proposed Exclusive Right of a Coastal State to Control Scientific Research Within its “Economic Zone”

To be sure of this point, one has only to become acquainted with the propositions of certain states at the Third U.N. Conference on the Law of the sea. These propositions suggest that coastal states be provided with an exclusive right to undertake marine scientific research or to establish complete control over any kind of research carried out within the 200-mile coastal belt (“economic zone”).

The introduction of such a regime would result in exempting vast marine expanses, constituting about 40 percent of the World Ocean surface, from free utilization by states for the purposes of peaceful scientific investigation and the establishment of a restrictive legal order.

Supporters of such an order declare that it is not aimed at interference with scientific research, but is aimed exclusively at the protection of economic and other interests of coastal states in their economic zones. However, the imposing of control by a coastal state over any kind of scientific research conducted by other states in its economic zone, in the final analysis, would lead to vast areas of the high seas being practically closed for scientists.

Initially, the undertaking of scientific research would be seriously


hindered by the very necessity to apply to a coastal state for permission to conduct such research. The suggested procedure for getting the consent of a coastal state is so complicated and involves so many formalities that the implementation of the research programme planned to be carried out in this particular area may finally prove to be either very difficult or altogether inexpedient.

For instance, one of the draft proposals suggests a list of terms containing over 10 items which must be satisfactorily complied with before permission to conduct a research expedition would be granted. Under such a draft proposal any state planning a research expedition would be expected: (1) to disclose the nature and the objective of the undertaking and (2) to give full information regarding the sponsoring institution, the scientific staff, the vessels, equipment, Ocean Data Acquisition Systems (ODAS), and remote sensing devices operating in the atmosphere or beyond. It should also provide the coastal state with the opportunity to participate in all stages of the research project, including the stages of working out the project and processing the collected data. Moreover, it should undertake that results of scientific research shall not be published without "the explicit consent" of the coastal state.\[Ed. Note\]\[21\]

As is well-known, planning, preparation, and organization of contemporary marine research expeditions is an extraordinarily complicated process which is both time and labour consuming. Technologically developed countries take one to three years to cope with the tasks involved in preparing for such an expedition. It is self-evident that the requisite data can be submitted to the coastal state at the final stage of preparation only when all plans are adopted and schedules are worked out. It would take probably not less than a year to get through all the permission formalities. But by that time the planned expedition may well have lost its scientific value.

It is known as well that even after a scientific project has been approved, in the course of carrying out investigations in the field, the necessity may arise for changing either the routes of the expeditions or their operative schedules, or both. Such changes are quite normal, are determined by a number of objective factors, and above all, are determined by the very nature of oceanic investigations, that is, the complexity and shifting character of the subject of study—the World Ocean. If bound by the data reported to the coastal state, scientists would be deprived of any maneuverability, which is indispensable for them. The situation will be even more

\[21\] [Ed. Note] Iraq: Draft Articles, supra note 23, item 2(b), para. 2.
aggravated if the route of the expedition crosses the economic zones of two or more states.

In our analysis of the possible consequences of the introduction of coastal state control we have proceeded, so far, from the assumption that, provided all the terms were observed, the coastal state would finally grant its consent to the undertaking of research in its economic zone. But the main point is that there is no guarantee of getting such consent even if all the formalities are observed. Thus, in fact, the imposing of coastal state control would leave the fate of numerous oceanic research projects to the discretion of coastal states.

As mentioned above, oceanologically the World Ocean is a single, integral entity. All of its processes are mutually linked and are mutually conditioned. Current long-term programmes of investigation into the ocean and its parts are based upon this conception of its integrity. In many cases such programmes include the systematic and sometimes simultaneous conduct of scientific experiments in many different regions of the sea including those regions which are supposed to obtain the status of economic zones. So in case of the refusal of a coastal state to grant permission to undertake peaceful scientific experiments in areas of the high seas adjoining its territorial waters, the unified system of investigations would lose some important links which would affect negatively the efforts of many states in studying the marine environment.

Analyses and evaluations of 53 projects of the Long-Term and Expanded Programme of Oceanic Exploration and Research were made by an American scientific research institute to define the dependency of these projects upon oceanographic investigations in coastal waters. (The latter were not precisely defined, but were considered to include the geographical Continental Shelf and its overlying waters or the region of coastal sea belt extending to at least several tens of nautical miles offshore.) The study ascertained that three-fourths of these projects were dependent to a considerable extent upon coastal access, and many of them could not be undertaken without such access.26

We are being assured that a coastal state, being aware of the importance of fundamental oceanic investigation for its own interests and for those of other states, would not hinder the undertaking of such investigations. But the present practice of conducting marine scientific research in coastal regions under the jurisdiction of a

26 Oceanic Research, supra note 21, at 29-39.
coastal state gives evidence to the contrary. In many instances coastal states have refused to grant permission to undertake scientific investigations and experiments in their territorial waters and on their Continental Shelves. In spite of the provision of the 1958 Geneva Convention on the Continental Shelf,\textsuperscript{27} which states that a coastal state shall not normally withhold its consent to purely scientific research into the physical or biological characteristics of the Continental Shelf,\textsuperscript{28} the number of refusals is considerable.

It is hardly reasonable to make the success of peaceful research of vital importance for all nations dependent upon an individual state’s good will, which might prove to be extremely unreliable. Projects of that kind should repose not upon the unsteady basis of coastal state discretion and good will, which in many cases is affected by considerations which are very remote from the needs of fundamental science, but should repose upon the stable international legal principle of freedom of scientific research on the high seas. This principle has long been recognized in international law and is reaffirmed daily by extensive international experience.

The application of this principle in the economic zone would lead neither to damaging the rights of coastal states, nor to encroachment upon their specific interests in these areas of the sea. As is apparent from the draft proposals on the subject submitted by some states, these rights and interests could well be guaranteed by appropriate international agreement.

B. The Proposed "Internationalization" of Oceanic Activities on the High Seas

A grave threat to free conduct of scientific research and, in the final analysis, to the whole future of oceanic science, is harbourd in concepts of the so-called internationalization of oceanic activities, suggested to a considerable extent by American scientists and politicians.\textsuperscript{29} As it has been pointed out in Soviet scientific writings, these concepts seem to be untimely and unacceptable in principle.\textsuperscript{30} The analysis of some proposals based upon these concepts and sub-


\textsuperscript{28} [Ed. Note] Id. art. 5, para. 8.


\textsuperscript{30} G. Kalinkin & N. Ostrovsky, \textit{Morskoe dno; komu ono prinadlezhit?} 87-89 (1970); Kolodkin, \textit{supra} note 11, at 218.
mitted to the Third United Nations Conference on the Law of the
Sea permits one now to come to a conclusion about their practical
uselessness as well.

One of the draft projects on scientific research submitted by a
group of developing countries suggests endowing an international
body, which is supposed to be set up to govern the exploitation of
the seabed mineral resources, with the exclusive right to undertake
any kind of scientific investigation in this area. "Marine scientific
research in this international area," the project says, "shall be con-
ducted directly by the International Authority and, if appropriate,
by persons, juridical or physical, through service contracts of asso-
ciations or through any other such means as the International Au-
thority may determine, which shall ensure its direct and effective
control at all times over such research." 21

Thus, states are deprived of their rights to the free conduct of
scientific research in the part of the high seas beyond economic
zones ("international area"); the International Authority alone
would enjoy this right. The International Authority, according to
this proposal, would carry out all scientific research directly or by
hiring physical or juridical persons. In other words, substantial
restriction of the sovereign rights of states is suggested by passing
their vital prerogatives to a certain supranational authority—
"internationalization" of their oceanic activities.

As a basis for the idea of internationalization, references are
sometimes made to the "specific" nature of contemporary marine
activities. True, the very character of contemporary marine activi-
ties may bring to life international organizations capable of coordi-
nating and combining the efforts of all countries in this field. But
the states, the members of these organizations, have never relin-
quished their sovereign rights, which includes the right to free use
of the sea. None of these organizations has ever substituted, or is
entitled to substitute, itself for a sovereign state or to place itself
above it.

The existence at present of over 150 sovereign states, which are
divided into two diametrically opposed social systems, each of
which with different political and economic foundations, principally
different aims of foreign and domestic policies, and principally dif-
ferent systems and organizations of production, makes it possible to
combine the efforts of states in exploration and exploitation of the
World Ocean only on the grounds of respect for their sovereign rights

21 [Ed. Note] Iraq: Draft Articles, supra note 23, item 2(a), para. 2.
and of consideration for their mutual interests.

The proposals to place oceanic research under the authority of an international body ignore these premises and the established experience of states. It has been long recognized that the high seas are not only open for free use by all nations, but also that the use itself is carried out on the basis of full equality of states: "The high seas being open to all nations, no state may validly purport to subject any part of them to its sovereignty." \(^{32}\)

Thus, the principle of the freedom of the high seas, including the freedom of scientific research, stands to the effect that neither a single state nor a group of states united within an international organization may enjoy a preferential or exclusive right to undertake scientific research on the high seas. Neither can they prohibit any other state from carrying out such research. They are not and never have been entitled to impose their rules on the scientific vessels of other states which are engaged in peaceful research on the high seas.

The establishment of an international body's exclusive right to undertake scientific investigations on the high seas or to provide it with the power to control the activities of coastal states would mean (1) the elimination of freedom of scientific research, (2) the restriction of the sovereign rights of states on the high seas, and (3) the passing of these rights to this body. Therefore it would run contrary to the U.N. Charter as well as to other fundamental sources of international law.

Such is the legal side of the problem. However, the above considered suggestions are utterly out of touch with reality from the practical point of view as well.

Supposing an international authority were set up, the first question to be answered would be the question of working out the "strategy" of scientific research, namely, determining the main fields of investigations and their priorities. Who in that authority would give an evaluation of the planned expeditions and what criteria would be used for the purpose of such evaluation? How numerous would the administrative and scientific staff of the organization have to be in order to cope with its tasks? Even these few questions show the doubtfulness and frailty of the structure suggested.

Further development of marine science demands intensive large scale and global investigations and experiments in the World Ocean. Contemporary oceanic research is a complex of interrelated

\(^{32}\) [Ed. Note] High Seas Convention, supra note 1, art. 2.
scientific undertakings which involve a great number of scientific research ships, aircraft, satellities, and oceanic data acquisition systems. It is hardly probable in the present situation that sovereign states would agree to place their scientific fleets and other equipment under the full control of an international body.

Marine scientific expeditions are at present very expensive. According to rough estimates, the yearly expenses of 10 to 15 countries for oceanic research comes to some US$2 billion. There are some 250 large scientific research ships in the world, and operational expenses to maintain them alone constitute several million dollars annually. It is hard to believe that the projected profits of an international body resulting from exploitation of seabed resources would be sufficient to cover these expenses.

Moreover, as it is known, scientific expeditions in the sea are but one element, though an indispensable one, of fundamental World Ocean investigations. The study of the sea is being carried out in numerous research centres of many countries far from the sea expanses. Marine expeditions are inconceivable if they are out of touch with the vast theoretical and practical work of these institutions and computing centers and with the activities of many concerned enterprises.

Generally speaking, contemporary investigations into the World Ocean, as well as with the exploration of outer space, are a purposeful use of the scientific and economic potential of a country in this particular field. It is highly improbable that sovereign states would place this potential at the disposal of an international body.

V. Conclusion

The harmful consequences for the further progress of marine science through imposing restrictions on scientific research within the 200-mile economic zone were analyzed above. These consequences evidently would be aggravated if similar restrictions were introduced in vast expanses of the ocean beyond national jurisdiction.

As for granting an international authority the exclusive right to engage in scientific research, it would virtually result in stopping projects of investigation which are going on now on an unprecedented scale.

All this would cause an irretrievable damage to further development of marine research. It would delay the full scale utilization of the resources of the World Ocean for many years and would make impossible the solutions of the problems of marine environmental protection and the preservation of ecological balance as a whole.
Only freedom of scientific research on the high seas accords with the level and scope of modern research in the World Ocean, the exploration and exploitation of which is one of the cardinal directions of present scientific and technological progress. The principle of freedom of scientific research provides a solid guarantee for carrying out unhindered the coordinated activities of oceanic research, envisaged by the agreement between the governments of the Soviet Union and the United States on cooperation in scientific research of the World Ocean.33

The scientists of our countries decided to combine their efforts for comprehensive exploration of the World Ocean for peaceful purposes and for the benefit of all mankind. They can and should combine their efforts to elaborate a scientific foundation for the most reasonable legal order for such investigations.

THE INTERNATIONAL LAW OF SCIENTIFIC RESEARCH IN THE OCEANS

Richard R. Baxter*

I. INTRODUCTION

Freedom of scientific research in the oceans has come to be a shared concern of the Soviet Union and the United States. We are both major maritime powers. We have the two largest navies in the world. We both have large merchant marines—but not the largest ones in the world, for the Soviet Union ranks sixth and the United States eighth in terms of tonnage, the figures in the latter instance being somewhat distorted by the exclusion of United States owned merchant ships which are registered under flags of convenience, such as those of Liberia and Panama. Both of our countries have major scientific interests and capabilities in the oceans. We have observed with great interest the major commitment to scientific research in the oceans that the Soviet Union began to make in the 1950’s,¹ a program which, so far as the available figures indicate, surpasses that of the United States.

Scientific research in the sea serves both national and international interests. Research in fisheries can, for example, improve the catch of a national fishing fleet. But more fundamental research into the geology of the oceans or into climate, as affecting and affected by the oceans, can contribute to the welfare and perhaps even to the survival of mankind as a whole. In the United States it has become platitudinous to speak of the oceans as our last great reserve or as our last frontier, but these expressions do remind us of how much we have yet to learn about the oceans. Enhanced knowledge will enable us not only to preserve or utilize the oceans, but also to widen our knowledge of the world in which we live. That knowledge may in time permit us to protect ourselves against some of the worst disasters that can be contemplated—starvation and the exhaustion of resources, earthquakes, and changes of climate that might bring a new ice age. Scientific research which may enable us to deal with

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¹ CONGRESSIONAL RESEARCH SERVICE, SENATE COMM. ON COMMERCE & NATIONAL OCEAN POLICY STUDY, 94TH CONG., 1ST SESS., SOVIET OCEAN ACTIVITIES: A PRELIMINARY SURVEY 39-53 (Comm. Print 1975).
these problems will benefit all nations and must be of concern to all nations.

Déttente has reduced the sources of friction between our two countries on questions of scientific research, and we are now entering a new era of collaboration in ocean research. We have had our difficulties in the past, as we must be frank to acknowledge. The Soviet Union thought it improper that two United States Coast Guard icebreakers, engaged in oceanographic research, should pass through the Vilkitsky Straits, which the Soviet Union considers to be within Soviet territorial waters. Our two countries have exchanged protests about the conduct of seismological field tests in the North Pacific. And American oceanographers have expressed concern that in the late 1960's and early 1970's the Soviet Union was not prepared to allow research by American scientists on the Continental Shelf of the Soviet Union.

In this happier era, we find not only that Soviet-American scientific collaboration is feasible, but also that there are close resemblances between the negotiating positions of our two countries on questions of scientific research in the United Nations Conference on the Law of the Sea. We both generally find ourselves in support of freedom of scientific research in the oceans, although there are differences in the precise positions of the United States and the Soviet Union which should not be underestimated. It is greatly hoped that we shall be able to maintain our cooperation not only in scientific research but also in the drawing up of new treaty law with respect to scientific research.

II. THE EXISTING LEGAL REGIME

It is of some importance to consider the existing legal regime of scientific research in the seas, for if the United Nations Conference on the Law of the Sea is not successful in drawing up new treaties, then scientific research, like other aspects of the utilization of the sea, will be governed by the existing Geneva Law of the Sea.

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Conventions of 1958 and by customary international law. What is the present position under the Conventions of 1958?

There is no question that insofar as internal waters are concerned, no scientific research may be conducted by a foreign state without the permission of the coastal state. The same is true of scientific research in the territorial sea, both under customary international law and the Convention on the Territorial Sea and the Contiguous Zone. Foreign vessels enjoy only a right of innocent passage through the territorial sea, and scientific research is not a form of innocent passage as defined in article 14 of the Territorial Sea Convention. Any research in the territorial sea can therefore be conducted only with the permission of the coastal state. It is well understood, of course, that with the drawing of straight baselines, the claims made by states to broader territorial seas, and the claims that have been asserted by archipelago states to the waters of such archipelagoes, the area of internal waters and of territorial seas has been much increased on a global basis.

Many states have established exclusive fisheries zones—a form of contiguous zone not referred to in the Convention on the Territorial Sea and the Contiguous Zone—outside their territorial seas. The United States position has been that research with respect to fisheries in such areas can be undertaken only with the consent of the coastal state. Research unconnected with fisheries conducted in the water column beyond the territorial sea is considered not to require permission.

It is only in the Geneva Convention on the Continental Shelf that any express reference is made to scientific research in the Conventions of 1958. Article 5, paragraph 8 of the Convention provides:

The consent of the coastal State shall be obtained in respect of any research concerning the continental shelf and undertaken there. Nevertheless the coastal State shall not normally withhold

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its consent if the request is submitted by a qualified institution with a view to purely scientific research into the physical or biological characteristics of the continental shelf, subject to the proviso that the coastal State shall have the right, if it so desires, to participate or to be represented in the research, and that in any event the results shall be published.\textsuperscript{8}

Overshadowing this provision is the uncertainty about the breadth of the Continental Shelf under article 1 of the Convention. But the imprecision of the right to conduct scientific research in the shelf does not end there. There may well be dispute about what constitutes "purely scientific research." There have been disagreements concerning whether naval or Coast Guard oceanographic vessels belong to a "qualified institution."\textsuperscript{9} Article 5, paragraph 8 provides for what is basically a "consent regime," but subject to a qualification which is incapable of ready application under any procedure for third party dispute settlement. While the right of the coastal state to participate in the research and the requirement of publication are intended to make possible the verification of the purely scientific character of the research and to provide a \textit{quid pro quo} for the coastal state,\textsuperscript{10} the benefits of the two requirements may be speculative. The coastal state may lack qualified personnel to participate in the research, and a duty to publish what may be unpublishable for scientific reasons or what the coastal state may not want to have published\textsuperscript{11} may in itself be detrimental to the interests of the coastal state, the state conducting the research, and the international scientific community.

Scientists have complained that the consent regime leads to costly delays in the scheduling and conduct of scientific research.\textsuperscript{12} They also fear that permission for research may be withheld through ignorance or through a desire to maintain secrecy. The ambiguity of many of the terms employed in article 5, paragraph 8 of the Continental Shelf Convention can provide plausible bases for denial of the right to conduct research.

Article 5 is not one of the articles of the Continental Shelf Convention which is declaratory of customary international law.\textsuperscript{13} It is

\textsuperscript{8} Continental Shelf Convention, \textit{supra} note 6.

\textsuperscript{9} Kildow, \textit{supra} note 5, at 14.

\textsuperscript{10} Continental Shelf Convention, \textit{supra} note 6, art. 5, para. 8.

\textsuperscript{11} Research in the Black Sea was not allowed in 1969 because of concern about the "availability of data to other countries." Kildow, \textit{supra} note 5, at 15.


\textsuperscript{13} North Sea Continental Shelf Cases, [1969] I.C.J. 3, 39.
not easy to say what the state of the law is with respect to those states, which constitute a majority of the international community, that are not parties to the Convention. Coastal states not parties to the Convention may very well lay down the same requirement as in the Convention in order to protect their coastal interests. And if the statement of article 2, paragraph 1, that "[t]he coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources" fairly reflects the state of customary international law, then research with respect to natural resources may be an interference with the "sovereign rights" of the coastal state. Such research would be subject to the permission of the coastal state. In this respect, article 21 of part III, Marine Scientific Research, of the Informal Single Negotiating Text, presented by the chairman of the Third Committee at the conclusion of the Geneva session of the Law of the Sea Conference, may be, in so far as it applies to the Continental Shelf, no more than declaratory of customary international law. The article calls for the consent of the coastal state with respect to "[a]ny research project related to the living and non-living resources of the economic zone and the continental shelf . . . ." However, as observed subsequently in this paper, the standard may require further elaboration.

In the high seas, including the high seas over the Continental Shelf, there is presently no restraint placed upon scientific research in the water column or, beyond the limits of the Continental Shelf, in the seabed or subsoil. The right to conduct scientific research is not specifically adverted to in the Geneva Convention on the High Seas of 1958, but the list of freedoms comprehended within the freedom of the seas in article 2 is not exhaustive.

III. THE LAW OF THE SEA CONFERENCE

Two polar extremes may be discerned in the attitudes toward scientific research shown at the United Nations Conference on the Law of the Sea. With regard to the Continental Shelf, the economic zone, and the seabed and subsoil, one point of view is that research should be subject to a consent regime, whether the area concerned is under the jurisdiction of the coastal state or the international authority. At the other extreme, there would be freedom of scientific
research in these three areas, subject to compliance with a number of conditions such as notification and the sharing of research results. It is common ground that the consent of the coastal state will be required for research in internal waters and in the territorial sea.

The developing countries of the Group of 77 generally favor a consent regime in the economic zone, although the landlocked and geographically disadvantaged states among them adopt a more liberal view toward scientific research. The developing coastal countries generally share the view that coastal states should exercise a wide measure of control over an economic zone of 200 miles and, to the extent that the Continental Shelf allocated to coastal states extends beyond that zone, over that area as well. Control is power, which has both political and economic value. Beyond this, developing countries fear that scientific research will be used as a cover for exploration and prospecting for the resources of the seabed and water column or for military purposes.

The conditions that would be imposed under the position taken by the Group of 77, when consent is given, are so onerous as to discourage any scientific research at all. There would have to be active participation and representation by the coastal state. Assistance, as requested by the coastal state, would have to be furnished in the assessment of the data generated. Publication of the results of research could not be accomplished without the consent of the coastal state.

The negotiating position of the United States has exactly the opposite approach. There would be freedom of scientific research in the economic zone, subject to the requirements of (1) advance notification; (2) certification that the research would be "purely scientific" and conducted by a "qualified institution"; (3) opportunity for the coastal state to participate or be represented; (4) sharing of data and samples with the coastal state; (5) publication of the results of the research; (6) assistance to the coastal state in assessing the data; and (7) compliance with international environmental standards. A possible intermediate position that was put forward at the end of the Caracas session of the Law of the Sea

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19 Id. item 2(b), para. 1.
21 Id.
Conference was built about the formula of article 5, paragraph 8 of the Continental Shelf Convention of 1958. Consent would be required, but would not be normally withheld if certain information were provided to the coastal state and if there were an undertaking to provide for participation by and sharing of information with the coastal state. It was suggested at that time that a formula like that of the United States might define "marine scientific research" in such a way as to exclude "industrial exploration and other activities aimed directly at the exploitation of marine resources," or that a regime of freedom of research in the economic zone might be defined to exclude "research concerned with the exploration or exploitation of the living and non-living resources" of the zone, which would be subject to a consent regime.

The Informal Single Negotiating Text plots a middle course with respect to the economic zone. A research project of "a fundamental nature" would not be subject to coastal state consent; but a "research project related to the living and non-living resources of the economic zone and the continental shelf" would require the explicit consent of the coastal state. It is understood that this formula owes much to a proposal made by Bulgaria and eight other states (including the U.S.S.R.) which makes this same distinction. The landlocked and geographically disadvantaged states look to a similar formula, according freedom to "marine scientific research" to the exclusion of "industrial exploration and other activities aimed directly at the exploitation of marine resources."

The middle positions reflect a grouping towards a distinction between research which is related to exploration and exploitation of natural resources and that which is not. A variety of terminology has been employed to express this distinction, and it may be useful to
record some of these forms of words here. These include "purely scientific research"; "designed to increase man's knowledge and conducted for peaceful purposes"; "of a fundamental nature"; as contrasted with "industrial exploration and other activities aimed directly at the exploitation of marine resources"; "related to the exploration and exploitation of the living and non-living resources of the economic zone"; and "[directly] related to the living and nonliving resources of the economic zone."

It should be possible to produce a text which would be acceptable to both the U.S.S.R. and the United States and which also would elicit substantial support from other countries on the basis of the distinction implicit in the above terminology. If freedom of scientific research is to be favored in the 36 percent of the oceans which would be comprehended within economic zones, it might be well to take freedom of scientific research as a starting point, and then to exclude from permissible scientific research exploration directed to the exploitation of the natural resources of the economic zone or Continental Shelf or research which may be expected to cause material harm to these resources. The Single Negotiating Text certainly incorporates a good basis for an acceptable formula.31

In further stages of the work of the Law of the Sea Conference, it is important that the text on scientific research in the economic zone be formulated in the Third Committee. The chairman of the Second Committee submitted a text which provided for a consent regime in this area,32 without the more detailed elaboration to be found in the articles submitted by the chairman of the Third Committee.33 But even within the Third Committee text, there is inconsistent terminology that must be harmonized.

The United States has shown no sympathy for the idea that in the area of the seabed and subsoil that would be subject to the jurisdiction of the international authority or some like entity, scientific research, like other activities, should be under the control of the authority. The developing countries have put forward the view that scientific research activities in the international area should be conducted directly by the international authority or by individuals34 under the direct and effective control of the authority. An ominous note is struck by the provision of the Informal Single Negotiating

32 Id. pt. II, art. 49.
34 Iraq; Draft Articles, supra note 18, item 2(a), para. 2.
Text put forward by the First Committee that dissemination of the results of research is to be made “through the Authority,”\textsuperscript{35} which would seem to give a controlling role to that entity in determining what information should be made available to the scientific community.

This restrictive view of the freedom to conduct scientific research in the oceans is not shared by landlocked states, whether developing or developed. It is not the view of the United States or of most of the other developed countries of the West, nor is it the view, there is reason to suppose, of the Soviet Union or the socialist states of Eastern Europe. Again, freedom of scientific research should be the dominant theme. The Informal Single Negotiating Text produced in the Third Committee recognizes that all states have a right to conduct scientific research in the international seabed area, subject to notification to an “International Sea-bed Authority,”\textsuperscript{36} and that there is an unfettered right to conduct such research in the high seas beyond the limits of the economic zone.\textsuperscript{37} The only limits that one might envisage as being placed on research would be directed to the exploration or exploitation of the natural resources which would be placed under the supervision of the international authority. The criteria that may be developed for the economic zone and for the Continental Shelf may be useful here as well, but only with respect to the natural resources of the bed of the sea.

There seems to be general agreement that no scientific research may be undertaken in the territorial sea of a state without that state’s permission. The United States ventures the hope that “coastal states . . . shall cooperate in facilitating the conduct of scientific research in their territorial sea, . . .”\textsuperscript{38} but it is clear that permission must be obtained from the coastal states.

It is to be hoped that in subsequent sessions of the Law of the Sea Conference recognition will be given to the priority that should be enjoyed by the Third Committee in drawing up texts on scientific research. Simultaneous and differing approaches in the First, Second, and Third Committees can only lead to confusion. Moreover, the real expertise and the more reasonable approach to these problems seem to lie in the Third Committee, the chairman of which has produced a text that can serve as the basis for ultimate agreement.

\textsuperscript{35} Negotiating Text, supra note 15, pt. I, art. 10.
\textsuperscript{36} Id. pt. III, Marine Scientific Research, art. 25, para. 2.
\textsuperscript{37} Id. pt. III, Marine Scientific Research, art. 26.
\textsuperscript{38} United States: Draft Articles, supra note 20, art. 6.
It is essential, however, that the terms in that text be sharpened and that internally consistent terminology be employed.

If the permissible scope of scientific research is agreed upon, it appears that questions of responsibility and liability and of development and transfer of technology will fall into place rather readily. In all probability only technical refinements are called for in the Informal Single Negotiating Text of the Third Committee.

If there is to be any form of "consent regime," it would be important that the conditions to be satisfied be kept as simple as possible and the maximum flexibility be assured. Onerous requirements, long delays in processing of applications, and inflexibility on the part of the coastal state or the international authority can be effective restraints on freedom of scientific research and can be extremely costly to the states or institutions conducting the research.

IV. SETTLEMENT OF DISPUTES

As has been observed, the two main lines in the Law of the Sea Conference are the recognition of freedom to conduct certain forms of research and a requirement that permission be obtained from a state or an international authority in order to carry on that form of activity. Disputes may well arise with respect to the permissibility or impermissibility of a particular research project under a regime of qualified freedom. Even if consent must be obtained in order to perform research, there might well be differences with respect to whether research falls within the terms of the permission granted or whether obligations imposed on the researcher have been satisfied. Questions of responsibility for harm done under either contingency may also be envisaged.

Both the dispute settlement procedure "of a general nature" and that based on a "functional" approach, as presented by the co-chairmen of the informal working group on the settlement of disputes, happily contemplate compulsory third party settlement of disputes arising with respect to scientific research. It is understood that the first is favored by the United States and the second by the Soviet Union. It is not clear whether the special functional procedure for the settlement of disputes about scientific research would be of a binding character. The settlement under the "general" approach, would be binding, of course. Another respect in which the two formulations differ is that under the "general" approach, indi-
viduals under some circumstances would have access to a "Law of the Sea Tribunal" in order to seek redress for the detention of a vessel, or perhaps under other circumstances as well. This latter provision would be of particular importance to the United States, because oceanographic research is often carried on by private institutions.

V. THE LAW OF SCIENTIFIC RESEARCH IN THE ABSENCE OF NEW LAW OF THE SEA CONVENTIONS

The prospect must be faced that there may be: (1) no conventions on the law of the sea; (2) conventions applicable only to certain areas and uses of the oceans; or (3) conventions to which the great majority of states will not become parties. Thus the existing Geneva Conventions of 1958 or customary international law may continue to be applicable to all or part of the states comprising the international community. Of course, the problems that have arisen under the existing law will continue and will in all probability be exacerbated. Who is to know whether research in a part of the continental margin is research in the Continental Shelf of the coastal state, subject to a consent regime, or whether it is research in the seabed and subsoil, which is not now regulated by treaty? If the coastal state and the state carrying on research are not mutually bound by the Convention on the Territorial Sea and the Contiguous Zone of 1958, their relationships will be governed by customary international law. There is a degree of uncertainty about the exact state of customary international law with respect even to research on what is mutually understood to be the Continental Shelf.

In the absence of any treaty, it would appear to be to the mutual advantage of the Soviet Union and the United States to claim an unfettered right to conduct scientific research in the water column and the seabed and subsoil of the high seas.

Even if there are no new treaties, most coastal states will lay claim to a 200-mile economic zone of one sort or another. Furthermore, existing rights in the Continental Shelf will be retained. It seems probable that coastal states claiming economic zones will impose a "consent regime," at least with respect to research which is oriented toward exploration and exploitation in the water column (i.e., regarding fisheries) and in the seabed and subsoil (i.e., regard-
ing oil and hard minerals). Beyond that, it would be in the mutual interest of the two countries to resist further inroads into freedom of research. Disputes will probably arise because suspicious coastal states will claim that the research is directed to prospecting or exploration for natural resources. There will be no dispute settlement procedure for dealing with such differences. Attempts by coastal states to deal with legitimate scientific research through the use of force will have to be resisted by diplomatic and, if necessary, stronger means. If there is normally to be cooperation, exchange of data, and transfer of technology between the coastal state and the state conducting the research, the suspension of such exchanges may be employed as a sanction.

Although the United States has asserted that it will be prepared to move to recognition of a 12-mile territorial sea only if that limit is widely accepted by treaty, the United States will probably be faced with almost universal acceptance of that limit and will be forced to yield, even if there is no treaty. The customary international law will remain; the state or institution desiring to carry on research will be able to do so only if the coastal state consents.

There will be every reason to promote regional cooperation in scientific research through multilateral arrangements and to conclude bilateral agreements regulating the circumstances under which research can be conducted.

On balance, states with a strong interest in scientific research in the oceans may have more to lose through new treaty regulation of scientific research than they have to gain. Everything depends on how the new conventions finally look.

Scientific research is one of those areas in which it is possible that customary international law will develop through the interaction of states so that at some future time the law may be codified by treaty. It would be highly desirable if coastal states could be persuaded to accept approval and certification of research by an international body such as the International Oceanographic Commission, as an alternative to a cumbersome consent procedure. A bilateral licensing procedure could thereby be replaced by a multilateral one.

VI. SPECIAL ARRANGEMENTS CONNECTED WITH DEFENSE

It is well known that one of the strongest guarantees against the use of nuclear weapons is provided by the invulnerability of the sea-based nuclear deterrent in the form of the missile-carrying submarines of the Soviet Union and the United States. A dramatic improvement in the capabilities for antisubmarine warfare of either
power would have a profoundly destabilizing effect. It has been suggested that one way to preserve the invulnerability of the sea-based deterrent would be to create sanctuaries in which one state's missile-carrying submarines might conceal themselves and in which detection and tracking by the other state would be prohibited. The establishment of any such zones in the oceans might call for a suspension of scientific research in those areas, on the ground that such research might be used as a cover for the detection and tracking of submarines. Thus the prospect may be faced that the day might come when it would be necessary for both powers to adopt a rule of mutual self-denial with respect to scientific research in certain areas of the oceans. This contingency is remote at the moment and the subject a complex one. No more can be done here than to call attention to it.

15 See Garwin, The Interaction of Anti-Submarine Warfare with the Submarine-Based Deterrent, in The Future of the Sea-Based Deterrent 87, 116-17 (W. Cahn, B. Feld, & K. Tsipis eds. 1973); Baxter, Legal Aspects of Arms Control Measures Concerning the Missile Carrying Submarine and Anti-Submarine Warfare, in id. at 209, 220-24.
RESPONSIBILITY AND LIABILITY FOR HARM TO THE MARINE ENVIRONMENT

Robert E. Stein*

I. INTRODUCTION

It is the purpose of this paper to review some of the ways the international community has decided to assign and apportion responsibility for harm to the marine environment, as well as liability for that harm for which a particular group is considered responsible. This review leads to the conclusion that the increased uses of the oceans for a variety of activities thus far have outstripped the capacity of the international community to deal with them. For this reason, new ways of looking at responsibility and liability are needed—and a healthy mixture of global, regional, and domestic regulation is proposed.

II. NATURE OF HARM

A range of activities, undertaken because of their real and potential benefit, goes on in the marine environment. Vessels transport, discharge wastes, and occasionally have accidents; rigs produce, and may leak; fish are caught, and may be depleted. On land the range of activities considered necessary for modern industrial society also has its by-products, many of which find their way into the marine environment, from dumping, direct discharge, or precipitation from the atmosphere. With these diverse sources, it is not surprising that there has been considerable difficulty both in assessing the damage and identifying the sources of pollution. A recent report by the United States National Academy of Science states:

In practice, however, most estimates are based on inadequate knowledge of emissions and environmental distribution and are incorporated into the estimate at a very early stage. The first crude estimate then suggests new measurements to make, and these usually lead to modifications of the estimate. Prediction and verification are achievable goals, although no estimates have yet been subjected to rigorous evaluation.¹

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It will not be the purpose of this paper to quantify the magnitude of harm to the marine environment. Nor can we simply paraphrase a United States Supreme Court Justice's definition of obscenity, by saying "I may not be able to define it, but I know it when I see it." Suffice it to say that these are gross examples of pollution which have captured the attention of the mass media and which have led to attempts at international regulation. There are also many insidious emissions into the marine environment which accumulate, leaving a victim or victims who do not know who caused the harm or how they can be compensated for the damage.

III. RESPONSIBILITY

In considering questions of responsibility for harm to the marine environment, there are, of course, a number of analogies which can be considered. Foremost among them is the discussion and Declaration on the Human Environment (Stockholm Declaration) agreed to at the 1972 United Nations Conference on the Environment in Stockholm and subsequently endorsed by the United Nations General Assembly. In the following discussion the Stockholm Declaration first will be considered for its relevance to the marine environment. Responsibility will be considered in two forms: (1) responsibility for ensuring that activities which are about to take place, or which are in the planning process, do not cause harm to the marine environment; and (2) responsibility after the fact.

A. Anticipatory Responsibility

Principle 21 of the Stockholm Declaration states: "States have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or areas beyond the limits of national jurisdiction." At the Stockholm Conference, a number of states indicated that this principle reflected existing international law. One of the difficulties with the Stockholm Declaration was, however, that it did not define its terms. What is meant by "damage to the environment of other States"? How far do states have to go to "ensure" that damage does not occur? What are the situations to which the provision applies or does not apply? Even if the principle is based on a generally...
accepted rule of international law that states shall not engage in activities which cause harm to others, there still is a need for further definition. The Stockholm Declaration does refer to the marine environment specifically. Principle 7 states: "States shall take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health, to harm living resources and marine life, to damage amenities, or to interfere with other legitimate uses of the sea."

The Stockholm Conference also agreed to an Action Plan which endorsed a number of principles "as guiding concepts" for the Caracas session of the Third United Nations Conference on the Law of the Sea in 1973. Those principles begin with the statement that "[e]very State has a duty to protect and preserve the marine environment and, in particular, to prevent pollution that may affect areas where an internationally shared resource is located." The principles continue with the statement that "[s]tates should assume joint responsibility for the preservation of the marine environment beyond the limits of national jurisdiction" and that "[i]n addition to its responsibility for environmental protection within the limits of its territorial sea, a coastal State also has responsibility to protect adjacent areas of the environment from damage that may result from activities within its territory." To what extent do these principles as stated in the documents prepared for, during, and following the United Nations Conference on the Human Environment apply to the marine environment? Throughout the law of the sea discussion there was acceptance of the general obligation to preserve and protect the marine environment. Accordingly, a number of states have submitted proposals to the Law of the Sea Conference which set forth the specific responsibility of states and other entities. For example, the 1973 draft articles presented by the United States state: "A State has the responsibility to take appro-

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5 The general rule of sic utere has been referred to by the International Court of Justice in the Corfu Channel Case, [1949] I.C.J. 4, 22 and by the International Commission for the Pyrenees in the Lake Lanoux Arbitration, 24 I.L.R. 101, 123 (1957).


1 Id. para. 197, subpara. 1.

2 Id. subpara. 5.

3 Id. subpara. 17.


appropriate measures to ensure, in accordance with international law, that activities under its jurisdiction or control do not cause damage to the environment of other States or to the marine environment beyond the limits of national jurisdiction." Similarly, the draft articles submitted by Kenya state: "States shall be responsible for damage caused by their activities, those of their nationals, physical or juridical, and others under their control or registration to any part of the marine environment."

These articles do provide a general basis for activities in the marine environment. It is important to note that activities of the state itself, as well as those of entities acting under its jurisdiction or control, are covered, thus eliminating the question of attribution. The United States draft articles are clearly anticipatory in nature, while those of Kenya are less clear. The first fertile result of these submissions appears in the Informal Single Negotiating Text which was issued following the Geneva session of the Conference, which ended on May 10, 1975. At the request of the President of the Conference, the three committee chairmen presented single texts. Part III of the text, presented by the chairman of the Third Committee, deals with marine pollution. Article 41, which deals with the subject of responsibility, states:

1. States have the responsibility to ensure that activities under their jurisdiction or control do not cause damage to areas under the jurisdiction of other States or to the marine environment of other States and shall, in accordance with the principles of international law be liable to other States for such damage.

2. States have the responsibility to ensure that activities under their jurisdiction or control do not cause damage to the marine environment beyond areas where States exercise sovereign rights in accordance with this Convention.

This language is clearly anticipatory in nature as well. Most considerations of the Stockholm Declaration have concluded that the

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17 Id. art. XXII.
20 Id., pt. III, Protection and Preservation of the Marine Environment, art. 41. As will often be emphasized before the next session of the Conference (scheduled for New York in March 1976), the Single Negotiating Text does not represent a compromise, but will "only provide a basis for negotiation." Moreover it does not prejudice other proposals already made or the right of any delegation to make new proposals. See id. pt. III, Protection and Preservation of the Marine Environment.
best way to minimize environmental harm is to avoid it, and that the responsibility to ensure that harm is not created certainly involves the responsibility to plan to avoid the harm itself.¹⁸

There are a number of activities that states might take to implement these principles. The first to consider is some form of environmental assessment. In a number of legal systems, legislation has been passed to provide for a planning mechanism which is designed to take environmental factors into account and to make sure they are adequately considered before an activity that might have some harm to the environment takes place.

In the United States the National Environmental Policy Act of 1969¹⁷ (NEPA), signed by the President in 1970, is designed to accomplish that purpose by a number of means including the issuance of "environmental impact statements."¹⁸ In the context of the followup to the Stockholm Conference, the General Assembly considered the obligation to consult with other states in advance of undertaking an activity. Because of the specific objection of Brazil, in part resulting from Brazil's ongoing discussions with Argentina over the planning for dams on the River Parana, the General Assembly resolution was somewhat muted.¹⁹ Nevertheless, consideration has been given to a variety of aspects dealing with treatment in advance of responsibility. Within the United States, for example, NEPA statements have been prepared for projects affecting areas outside the United States. Moreover, other interested governments have been asked to participate in the NEPA process.²⁰

A number of states have raised this question in the context of the Law of the Sea Conference, and the United States introduced a proposed article dealing with environmental assessment. The article applies to activities under the jurisdiction or control of a state "which may reasonably be expected to create a risk of significant pollution of the marine environment."²¹ Under these circumstances assessments would be prepared and provided to international organizations, which would then provide them to other states. There would also be an obligation to consult with states and international

²¹ CRP/MP/7/Add.2, March 24, 1975 (informal document of the Third Committee).
organizations in order to minimize adverse environmental consequences and to provide assistance, especially to developing countries, concerning the preparation of environmental assessments. Despite a number of objections to this proposal, on April 15, 1975, the chairman of Committee III tabled a text on the subject of environmental assessment.\(^2\) Paragraph 1 of article 15 of the Protection of the Marine Environment portion of part III of the *Single Negotiating Text*\(^3\) is identical to paragraph 1 of the environment assessment article prepared by the chairman, but for some inexplicable reason leaves out the second paragraph of the chairman's text which contains a statement that "States shall, on request, provide appropriate assistance in particular to developing countries concerning the preparation of such environmental assessments."\(^4\)

Despite the disclaimer language in the introductory note\(^5\) to the *Single Negotiating Text*, article 15 is obviously a compromise. It does not contain a requirement that adequate information be provided to other states, but merely calls for "reports" of the results of the assessments which shall be communicated to the interested states. Unless they contain sufficient information for the interested states to make a judgment, these reports merely would be warning to states in advance of an activity which indeed may cause harm to the marine environment. Moreover, there is no indication at all of the opportunity for the interested states to consult with the states about to carry out an activity in order to raise questions about the possible effects of the activity. At a minimum, it would seem that there should be notification to interested parties that an activity is about to be undertaken. This might well be followed by information exchange and consultation. This is especially true if the Conference succeeds in placing wider bands of the ocean under virtual domestic jurisdiction. With increased activity in these areas the potential for environmental harm, which will spill over, increases, and there is a need to assure that the interests of adjacent states are protected. The information provided should be complete enough to permit the state reviewing the information to make a judgment whether further consultation with the acting state is desired. It is submitted that the international community should seriously consider, on a regional or

\(^2\) CRP/MP/18, April 15, 1975 (informal document of the Third Committee) [hereinafter cited as CRP/MP/18].

\(^3\) *Negotiating Text*, supra note 14, pt. III, Protection and Preservation of the Marine Environment, art. 15.

\(^4\) CRP/MP/18, supra note 22.

\(^5\) *Negotiating Text*, supra note 14, pt. III, note by the President.
global basis, ways to provide for effective means of notification, information exchange, and consultation, in order to carry out fully a state's responsibility to avoid harm to the marine environment.

B. Responsibility for Harm which Has Already Occurred

The aforementioned discussion deals with responsibility for action that has not yet taken place. It is somewhat speculative because of the lack of attention to the issue. More attention has been paid to responsibility for damage that has already occurred. As noted above, the Kenyan proposal heads in this direction. Additionally, the general obligation to protect the marine environment as set forth, for example, in article 2 of the Protection and Preservation of the Marine Environment portion of part III of the Single Negotiating Text confirms this responsibility.

Paragraph 1 and 2 of article 41 of the Protection and Preservation of the Marine Environment portion of the Single Negotiating Text, already discussed, are equally specific on this point. Moreover, it is clear from article 41 that it makes no difference whether the harm to the marine environment takes place in areas under the jurisdiction of a state (i.e., the territorial sea or a special economic zone) or in those areas of the high seas which are not subject to national jurisdiction.

There is a precedent for this argument in the International Law Association's Helsinki Rules. Article X of the Rules makes it clear that the responsibility of the states applies equally to water pollution originating (1) within the territorial state or (2) outside the territorial state if it is caused by the state's conduct. Comment (d) of article X makes it clear that the article:

engages the responsibility of a State to take action with respect to all pollution causing substantial injury in the territory of a co-basin State regardless of whether the pollution results from public activity of the State itself, within or outside its territory, or from conduct of private parties within its territory.

The section of the Single Negotiating Text dealing with scientific research is also explicit on this point and extends as well to international organizations.

A brief review of some of the conventions considering responsibility is in order, since clearly, even if they are accepted, the provisions

of the Law of the Sea Convention accept the possibility of specific obligations assumed by states in more specific agreements. The Baltic Convention unfortunately does not even go that far (although it has the possibility of going further) since its discussion of responsibility for damage is an umbrella stating that "[t]he Contracting Parties undertake, as soon as possible, jointly to develop and accept rules concerning responsibility for damage resulting from acts or omissions in contravention of the present Convention, including inter alia, limits of responsibility, criteria and procedures for the determination of liability and available remedies." It is not known whether the parties to the Baltic Convention have further advanced the consideration of this subject.

The 1972 Ocean Dumping Convention also postpones the determination, stating:

In accordance with the principles of international law regarding State responsibility for damage to the environment of other States or to any other area of the environment, caused by dumping of wastes and other matter of all kinds, the Contracting Parties undertake to develop procedures for the assessment of liability and the settlement of disputes regarding dumping.

There are a number of aspects of responsibility, therefore, which seem clear from the jurisprudence today. These existing conclusions can be stated as the following:

a. A state is responsible for actions that it carries out, or that are carried out under its jurisdiction or control, which cause harm to the marine environment.

b. The responsibility of the state includes the harm caused in areas subject to the control of another state, or in areas under "international jurisdiction."

c. Although there is a general principle of responsibility, the degree to which it must be carried out and the circumstances under which it is brought into play are not as clear as they might be. For these reasons specific conventions have dealt with this subject and

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29 Id., pt. III, Protection and Preservation of the Marine Environment, art. 45.
31 Id. art. 17.
33 Id. art. X.
even in such conventions, the results are not explicit. The general rule in the absence of these conventions is even less clear.

d. The Single Negotiating Text of the Law of the Sea Conference does deal with the question of responsibility but needs implementation in a number of specific circumstances. Moreover, as pointed out in the paper by Richard Frank, questions of enforcement are not carefully drawn in the text and are in need of further clarification.

e. One way of minimizing harm is to provide for an effective system of reporting after an accident. This factor is recognized in the 1973 IMCO Convention on Pollution from Ships and the Single Negotiating Text. Neither document, however, contains a penalty for failure to report, something which is found in domestic legislation.

IV. LIABILITY

It remains to be considered how the international community has attempted to implement responsibility by providing a mechanism or sets of mechanisms for liability, both in terms of types and amounts.

If we return to the Stockholm Conference on the Human Environment, the discussion of liability is even less satisfactory than that of responsibility. Principle 22 of the Stockholm Declaration states: "States shall co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by the activities within the jurisdiction or control of such States to areas beyond their jurisdiction." This principle, like the general principles which apply to liability for damage to the marine environment, leaves open the questions of the amount of pollution necessary to make a state liable and the type or types of liability which would apply. Since the principle says "develop further," it can be interpreted as admitting some bases for liability, but what they are remains uncertain. Indeed, it is possible that given the magnitude of a potential disaster from, for example, a supertanker carrying oil or liquified natural gas, this form of liability could prove inadequate. As will be dis-

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31 See page 73 infra.
33 NEGOTIATING TEXT, supra note 14, pt. III, Protection and Preservation of the Marine Environment, art. 7.
34 Note 3 supra.
cussed below, perhaps alternative methods to liability itself might be considered. What do the various conventions say? The bulk of the conventions, typified by the 1972 Ocean Dumping Convention, postpone the issue. Article 17 of the Baltic Convention includes "the determination of liability and available remedies" in the areas of subjects to be developed by the parties.

At the law of the sea discussions a number of states drafted liability provisions for submission to the Conference. The United States draft reiterates the Stockholm Principles by stating: "States shall undertake, as soon as possible, jointly to develop international law regarding liability and compensation for pollution damage including, inter alia, procedures and criteria for the determination of liability, the limit of liability and available defenses." The draft of the Soviet Union states: "Each State shall be held liable for pollution causing damage to the marine environment whenever such pollution results from activities carried out by official organs of that State or by its physical and juridical persons." Other states have submitted articles as well. The Single Negotiating Text seems to retreat from the proposals put forward by the United States and the Soviet Union, as well as by some of the others, by again going back to the Stockholm type of formulation in stating: "When necessary, States shall co-operate in the development of international law relating to the protection and preservation of the marine environment in establishing inter alia criteria and procedures for the determination of liability, the assessment of damage, the payment of compensation and the settlement of related disputes."

The section of the Single Negotiating Text dealing with liability for scientific research does go into more detail. It contains a mix of "liability in conformity with international law" and provision for liability for damage within areas under national jurisdiction in accordance with the laws of the coastal state, "taking into account the relevant principles of international law."

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38 Note 32 supra.
39 Note 30 supra.
40 United States: Draft Articles, supra note 11, art. XXII, para. 2.
43 NEGOTIATING TEXT, supra note 14, pt. III, Protection and Preservation of the Marine Environment, art. 41, para. 3.
44 Id. pt. III, Marine Scientific Research, arts. 34-36.
With this background it seems clear that even if the New York session of the Law of the Sea Conference were to work out an agreement, there would be a great deal of discretion left to states as to the kinds of liability that will apply to activities which have caused damage to the marine environment. Indeed, there is a hint in a footnote to the United States draft articles which states that “[t]he Committee may wish to consider whether or to what extent the law of the sea negotiations provide the appropriate forum to address the details of this issue.” For this reason, the next section of this paper will consider in turn (1) the types of situations to which liability might apply; (2) the type of liability which might apply; (3) the actors who conceivably are involved and who might be held responsible or assessed with liability; and (4) possible alternatives to liability which might be considered.

The types of activities to which liability might apply are basically those set forth in the second paragraph of the paper. Of the various types of situations noted, the one which is already most subject to agreement is pollution from vessels. Yet, there are gaps in the existing fabric since many of the conventions dealing with vessel source pollution are not yet in force, and those that are in force depend upon flag states for enforcement, which is likely to be an ineffective means.

The largest source of pollution entering the marine environment is that from land-based sources. A source which is diffuse and hard to quantify, it is unlikely that more than lip service will be paid to solution of land-based marine pollution by the international community as a whole. Indeed, the thrust of most of the consideration given to the subject, both by the Single Negotiating Text, the

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45 United States: Draft Articles, supra note 11, art. XXII, para. 2n.

46 For a more thorough discussion of the problem of pollution from vessels see the paper by Richard Frank, page 73 infra. See generally R. HALLMAN, TOWARDS AN ENVIRONMENTALLY SOUND LAW OF THE SEA (1974); Sandbrook & Yurchyshyn, Marine Pollution from Vessels, in CRITICAL ENVIRONMENTAL ISSUES ON THE LAW OF THE SEA 19 (R. Stein ed. 1975).


48 NEGOTIATING TEXT, supra note 14, pt. III, Protection and Preservation of the Marine Environment, art. 16.
Baltic Convention, and the Paris Convention on Land-Based Sources is to refer to the need for domestic legislation.

A discussion of the forms of liability which might apply usually contains two parts: (1) whether the liability should be strict, or absolute, or whether it should rely on some measure of fault; and (2) whether the liability should be limited in terms of the amount that a claimant can recover for injury from a particular incident. With respect to the first part it is difficult to generalize, since the particular kinds of activities may deserve differing treatment. One of the objects of establishing a kind of liability should be to provide a sufficient deterrent to prevent harm from occurring. For this reason, a number of suggestions have been made to apply strict liability or absolute liability. Another difficulty arises when the source of the environmental harm is not known, as several or a large number of factors may be responsible for the pollutant. In this case, as will be discussed below, liability, whether strict or absolute, is hard to implement. The second aspect of this problem is also difficult to solve. The 1969 Civil Liability Convention contained a rather low limit, largely felt to be inadequate, if a supertanker were to run aground or split up. For this reason a supplementary convention was opened for signature in 1971 to establish an international fund for compensation for oil pollution damage. But, even this fund has a limit of US$30 million, with the possibility of doubling that to US$60 million. Given the range of activities which are now engaged in, is this amount sufficient? The fund covers pollution from oil, but what of the other hazardous cargoes which are carried in increasing quantities? There are many long-lived toxic substances which are shipped around the world in containers or on vessels which are not especially suited for their transport. And even if they are, a supertanker full of liquified natural gas can cause considerable damage which is far in excess of a limit such as US$60 million per incident.

Without having answered the previous question, the next aspects of liability are the actor or actors who are involved and who might

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*Note 30 supra.


*Note 47 supra.

*1971 International Fund Convention, supra note 47.

*In an incident in 1944 in Cleveland, Ohio, a ruptured liquified natural gas storage tank was ignited, pouring burning gas into sewers, where it vaporized and exploded. Flames reached one half mile into the air; over 100 people were killed, 300 were injured, and a large amount of property was damaged. See A. REITZE, ENVIRONMENTAL PLANNING: LAW OF LAND & RESOURCES ch. 19, at 100 (1974).
be held responsible. The various passages from conventions and from the *Single Negotiating Text* noted above indicate that actors, corporations, and juridical persons are to be considered responsible for their activities. The Trinidad and Tobago rules\(^4\) indicate that an off-shore operator should be primarily responsible for seabed activities, and the vessel for pollution from that source. A difficulty with this approach is that if these entities are primarily responsible to the exclusion of the state of nationality, then it becomes difficult to obtain adequate satisfaction of a single vessel corporation or a single platform operation corporation is established. As the international community develops ways of piercing through such a corporate veil, it should be recalled that in the case of the *Torrey Canyon*, which triggered international concern for oil pollution, considerable difficulty was encountered because the *Torrey Canyon* was the only asset of the corporation, at least on the primary level. Only by finding a “sister ship” in another port which belonged to the parent corporation was some sort of satisfaction obtained. For this reason it is clear that a state which permits an activity to go forward must itself be held liable for the results of that activity. The portion of the *Single Negotiating Text* dealing with scientific research\(^5\) is the only place wherein the possible responsibility and liability of international organizations is mentioned. However, it would be useful to consider a situation where an activity is licensed by an international seabed authority which had conducted some form of environmental assessment, and where this activity, as a result of a miscalculation by the international organization, causes environmental harm. Should the international organization be immune from liability or should it, as a juridical person, be sued? What if an international organization provides funding for a particular activity and the state involved relies upon the assessment by the international organization of the viability of the project? If this results in some form of environmental harm to the marine environment, should the international organization be considered responsible? These are questions which the Law of the Sea Conference will obviously be unable to answer, yet which should remain in the minds of those with a continuing interest in the preservation of the marine environment and an evolving law of the sea.

The final alternatives to be considered are ways to provide compensation to victims of marine pollution other than by the assess-

\(^4\) Trinidad and Tobago: Draft Articles, *supra* note 42.

ment of liability. There may be a number of circumstances in which an alternative to assessment of liability is important. One circumstance, which has been mentioned above, occurs when there are a number of sources of pollution, and the single actor responsible cannot be found. A second occurs when an activity is considered worthwhile, yet charged with risk, and a means such as insurance is sought to avoid a strict liability situation. If the objective of the system is to make whole the victim of pollution then the international community has a good deal of work to do to consider alternatives to the liability system. It should be noted that while the 1971 International Fund Convention 56 was not in force, the major oil pollution carriers, seeking to establish some limit to their own liability, set up a voluntary agreement concerning liability for oil pollution 57 (TOVALOP). This agreement includes a maximum of US$10 million for cleanup expenses undertaken by the ship owners. It does not pay damage claims, but is restricted to governmental cleanup expenses. 58 With the increased uses of the deep seabed for both oil drilling and the possible taking of manganese nodules, consideration should be given to the possible establishment of a fund governing these activities. Drilling for oil most likely will be conducted within the economic zone of a particular state, but the effects may go well beyond that. It is difficult at this time to assess completely what the effects will be, from an environmental point of view, of mining manganese on the deep seabed. In this context one must consider the shore-based effects as well as the effects on the deep ocean floor and the effects in the water column above it. However, the funds themselves may prove inadequate and the question of liability must revert to the question of advanced planning and assessment of a particular kind of activity before it is undertaken. At the same time, the international community will have to move faster than it has moved if it is to establish acceptable and effective international standards to govern carriage and exploitation. As will be discussed in the next section, this must be done both on a regional and domestic level, in addition to the broader international considerations.

V. THE ROLE OF REGIONAL AND DOMESTIC REGULATION

Given the inability, to date, of regulation on a global front to

56 Note 47 supra.
58 Id. at 500. TOVALOP is supplemented by CRISTAL (Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution) which will provide payments to individuals on a basis similar to that of the 1971 International Fund Convention, supra note 47.
Achieve effective control of pollution of the marine environment, a combination of the "umbrella" of the general international community must be coupled with effective management on a regional and domestic level. Recognizing this, there have been a small number of agreements in the past few years which have dealt with problems on a regional level which thus far have not been treated effectively on a global level. These are the agreements of the northeast Atlantic states on ocean dumping and land-based pollution and that of the Baltic states on pollution of that area generally. Additionally, the recent meeting held by the United Nations Environment Programme (UNEP) on pollution of the Mediterranean Sea gives hope that the countries directly interested in that region will recognize their primary responsibility to conclude a system to reduce the pollution of that body of water.

But even these agreements do not carry effective regulatory weight, but, in and of themselves, may be considered "mini umbrellas." This puts the task of regulating where it most often should be, namely, within the domestic legal and political processes of states. That does not mean that states should not act in concert or otherwise be subject to international standards, but there is a recognition that the most effective place for enforcement of environmental regulations is on the national level. In the United States, for example, marine pollution has been considered as part of the control of water pollution, and the 1972 Federal Water Pollution Control Act Amendments included questions of discharges and pollutants into navigable waters which include the territorial sea and contiguous zones. A National Pollution Discharge Elimination System created under that legislation will be administered by the Environmen-

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61 Land-Based Source Convention, supra note 50.
62 Baltic Convention, supra note 30.
The Environmental Protection Agency has issued regulations for discharges under that system. Additionally, prior to the conclusion of the 1972 Ocean Dumping Convention, Congress passed the Marine Protection, Research, and Sanctuaries Act of 1972 which requires permits for transporting and dumping waste in ocean waters. In order to conform certain minor jurisdictional questions to the 1972 Ocean Dumping Convention, the Marine Protection, Research, and Sanctuaries Act was amended in 1974 to incorporate those provisions of the Convention. Included in this federal legislation are the costs for federal clean-up of oil pollution spills. But is this sufficient?

In a suit brought in the United States District Court for the Middle District of Florida, a group of shipping owners challenged a Florida statute which was designed to complement the federal legislation by assessing strict liability for clean-up costs to the State of Florida itself, as well as providing compensation to persons in the State of Florida who might be injured because of oil pollution spills. The State of Florida with its long Atlantic and Gulf shorelines is favored both by shipping and tanker traffic, as well as by tourists and retired persons, who provide a large portion of Florida's income. In a decision in 1973, the Supreme Court of the United States held that the State of Florida could adopt such legislation which was not "preempted" by the federal government since indeed the Florida legislation was to be complementary and was not designed to supplant the standards set forth in the federal legislation. The importance of this case is that in a federal system such as the United States (which may well be mirrored in federal states in other parts of the world) the national level is not the smallest level of regulation, but, indeed, constituent entities within a particular country may have their own requirements designed to protect themselves from the dangers of pollution.

The action of the State of Florida is not unlike that of certain states which have urged international fora such as the Law of the Sea Conference to recognize the right of a coastal state to protect...
its own borders with standards which supplement or complement those established by the international community.

A recent report of the Congressional Research Service of the United States Library of Congress describes a number of actions taken domestically by the Soviet Union to protect its coastal areas and to improve the marine environment. It would be of interest to learn whether there are situations involving the constituent entities of the Soviet Union similar to the one which was raised by the *Askew* decision in the United States.

VI. Conclusion

The conclusion to a discussion of this subject necessarily must be incomplete. Although a patchwork quilt of arrangements has been developed, questions of liability and responsibility are often left to "further discussions." The Law of the Sea Conference, even if it reaches agreement after the March 1976 session, will refer the subject on to later consideration as well. But despite this, there are certain statements which can be made. States are responsible for the harm which they, or those which act under them, permit to occur to the marine environment. Whether that responsibility will ever be translated into compensation for the victims of harm is a more difficult question. However, the international community must develop appropriate rules and guidelines for implementation at more effective levels—such as those involving only those states with a direct interest in the problem. This approach of a global catalyst which urges on regional management with domestic enforcement is the most hopeful and perhaps the soundest approach for the foreseeable future. The approach must be considered in terms of what Wolfgang Friedmann called the "International Law of Cooperation," moving on all levels—universal, regional, bilateral, and unilateral to avoid further damage to the marine environment while attempting to enhance its present quality through other positive channels.

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74 A Congressional Research Service, Soviet Ocean Activities: A Preliminary Survey (1975). The study was prepared for the use of the Senate Committee on Commerce (94th Congress) and for the National Ocean Policy Study.

75 See *Who Protects the Oceans* (J. Hargrove ed. 1975) (pocketpart) (chart).

LIABILITY FOR MARINE ENVIRONMENT POLLUTION DAMAGE IN CONTEMPORARY INTERNATIONAL SEA LAW

A. L. Makovsky*

I. INTRODUCTION

The problem of compensation for damage caused by marine pollution arose in international sea law at the close of the 1960's. Until now the rules providing such compensation were contained in the national laws of individual states. In most cases these were general rules on civil liability for causing damage. Special rules of international law relating to damage caused by pollution of the sea due to shipping which were created at the end of the 1960's and at the beginning of the 1970's, and which still have not come into force, have greatly influenced the development of related national legislation in some countries.

Concurrent with the preparation and acceptance of certain international agreements directly governing or providing for subsequent regulation of the liability for marine environment pollution damage from different sources (such as ships, land-based sources, etc.) has been a process of discussing and working out the basic principles of such liability. This work is carried out now within the framework of the Third United Nations Conference on the Law of the Sea, and its results may essentially influence the further development of international and national laws in the field of liability for marine environment pollution damage.

II. MARINE ENVIRONMENT POLLUTION CONVENTIONS

A. International Convention on Civil Liability for Oil Pollution Damage

Civil liability for damage caused by oil pollution from ships is regulated in the most detailed manner in international law. The International Convention on Civil Liability for Oil Pollution Damage provides for liability "for any pollution damage caused by oil which has escaped or been discharged from [a] ship" which was

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2 Id. art. III, para. 1.
"caused on the territory including the territorial sea of a Contracting State . . . ." The liability for damage compensation is placed upon the "owner of a ship." The Convention practically excludes the possibility of making the state directly responsible for such liability. The Convention does not apply "to warships or other ships owned or operated by a State and used, for the time being, only on Government non-commercial service." As to the damage caused by state commercial ships, the Convention permits the subjection of each state to suit for such damage, but this provision is evidently of no great importance since, in all cases, when a ship owned by a state is operated by an independent state company, the company for the purposes of the Convention shall mean "the owner of a ship."

The Convention envisages liability as considerably strict on its grounds and high in its amount. The lack of fault in pollution does not exonerate the shipowner from his liability; he may be exonerated from liability only in the cases exactly stated in the Convention, which are limited to acts of war, natural phenomena of an exceptional character and intentional acts of third parties. The limit of liability for each ship is the product of 2000 "francs of Poincaré" (about US$160) times the registered tonnage of the ship. However, it is stipulated that a second "ceiling" of liability, which is of importance for ships with greater registered tonnage (supertankers), amounts to 210 million "francs of Poincaré" (about US$17 million). In the interest of victims, the Convention prescribes maintenance of compulsory insurance or other financial security by shipowners for their possible liability in the sums indicated above. The state of the ship's registry must attest to the existence of such insurance by special certificate. The state shall not permit a ship under its flag to trade, unless the ship has obtained the certificate. The state also shall not permit any ship carrying more than 2000

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5 Id. art. II (emphasis added).
6 Id. art. III, para. 1.
7 Id. art. XI, para. 1.
8 Id. para. 2.
9 Id. art. I, para. 3.
10 [Ed. Note] Id. art. III, para. 2.
12 [Ed. Note] Id.
13 [Ed. Note] Id. art. VII, para. 1. This requirement applies only to ships carrying more than 2,000 tons of oil. Id.
14 Id. para. 2.
15 Id. para. 10.
tons of oil, irrespective of the ship’s flag, to enter or leave its ports without the certificate.\textsuperscript{14}

B. \textit{International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage}

To provide even greater compensation for oil pollution damage, the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage\textsuperscript{15} was prepared and adopted by an Intergovernmental Maritime Consultative Organization (IMCO) conference. The main provisions of this complicated Convention, from a juridical point of view, concerning the compensation of damage are as follows:

1. a “Fund” is established through the contributions of receivers of crude oil and fuel oil carried by sea-firms, companies, organizations, etc.;\textsuperscript{16}

2. the Fund will compensate for oil pollution damage mainly in cases where the amount of damage exceeds the limits of shipowner liability,\textsuperscript{17} as provided in the 1969 Convention,\textsuperscript{18} and also, in some cases, where the shipowner under the 1969 Convention is exonerated in general from liability (e.g., when the tanker incident occurred from a natural phenomenon of an exceptional character);

3. the aggregate amount of sums paid in the case of an incident to the victims of oil pollution damage by the shipowner and the Fund shall not exceed 450 million “francs of Poincaré” (US$36 million).\textsuperscript{19}

These Conventions apply only to oil pollution damage compensation (the 1969 Convention applies also to whale oil). It is possible, however, to suppose with sufficient confidence that in the near future the 1969 Convention will be extended to cover pollution damage from agents other than oil. This issue is included in the work programme of IMCO, and its discussion in the Legal Committee of IMCO proved that such a proposal meets with great support.

C. \textit{Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters}

Liability for pollution damage caused by the discharge of differ-
ent wastes into the sea for the purpose of their dumping is not established today in international law. The Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter\textsuperscript{26} signed on December 29, 1972, in London, stipulates only that parties are to elaborate “procedures for the assessment of liability”\textsuperscript{21} in accordance with “the principles of international law regarding State responsibility for damage to the environment of other States or to any other area of the environment, caused by dumping of wastes and other matter . . . .”\textsuperscript{22} The uncertainty of this wording gives an opportunity to work out the “procedures for the assessment of liability” in different directions. Obviously depending upon the decisions of the United Nations Conference on the Law of the Sea, the cited text may be filled with different contents, since one of the objects of the Conference is the revision and determination of the indicated “principles of international law.”

Mention may be made of two factors that will affect the contents of future rules on liability, predetermined to a certain extent by article X of the Convention. First, the Convention stipulates a number of cases where the discharge of wastes (irrespective of the person responsible) is permissible;\textsuperscript{23} i.e., the factors exonerating liability will be stipulated.\textsuperscript{24} Second, the Convention “shall not apply to those vessels and aircraft entitled to sovereign immunity under international law.”\textsuperscript{25}

D. Convention on the Protection of the Marine Environment of the Baltic Sea Area

With regard to liability for damage to the marine environment caused by pollution from land-based sources and exploration, exploitation and mining of the seabed, there are some regional international agreements which do not prescribe directly such liability, but do provide for subsequent elaboration and adoption of special provisions on such liability by the parties to the agreement. One example of this type of regional agreement is the Convention on the Protection of the Marine Environment of the Baltic Sea Area,\textsuperscript{26} signed by the Soviet Union, Denmark, Poland, the Federal Republic of Germany and Sweden. It is interesting that the “rules concerning

\textsuperscript{21} [Ed. Note] Id. art. X.
\textsuperscript{22} Id.
\textsuperscript{23} [Ed. Note] Id. art. IV, para. 1, subparas. b-c, annex II.
\textsuperscript{24} [Ed. Note] Id. annex III.
\textsuperscript{25} Id. art. VII, para. 4.
responsibility for damage resulting from acts or omissions in con-travention of the present Convention," which shall be elaborated and accepted by the parties, will contain, among other things, "lim-its of responsibility." 28

E. Convention on the Liability of Operators of Nuclear Ships

The provisions on the liability for nuclear damage have a particu-lar place in international law. The existing international agreements do not contain special rules on liability for pollution damage caused by radioactive substances, but some cases of such damage are covered by these agreements.

The Convention on the Liability of Operators of Nuclear Ships signed at Brussels provides for liability for "nuclear damage [which] means loss of life or personal injury and loss or damage to property which arises out of or results from the radioactive proper-ties or a combination of radioactive properties with toxic, explosive or other hazardous properties of nuclear fuel, radioactive products or waste . . . ." The Convention shall apply when a nuclear ship flying the flag of a contracting state is the source of an incident causing nuclear damage, and when the location of the damage is of no importance. 31

As in other nuclear conventions, the problem of determining the person liable for damage is worked out on the principles of so-called "channeled liability." In all cases the "operator" of a nuclear ship is liable. 29 If a state is the operator, liability for the damage will be placed on it. 30 It should be taken into consideration that the Convention applies to warships and "other State-owned or State-operated ships on non-commercial service." 31

The operator's liability is limited to the very high limit of 1,500 million "francs of Poincaré" (about US$120 million) for damage caused by a nuclear incident. 32 The operator shall insure this liability or maintain other financial security covering it. The amount, type and terms of the insurance or security are specified by the state giving the operator authorization (license) to operate the nuclear

27 Id. art. 17.
28 [Ed. Note] Id.
30 Id. art. I, para. 7.
31 Id. art. XIII.
32 Id. art. II, paras. 1-2.
33 Id. art. I, para. 4.
34 Id. art. X, para. 3.
35 Id. art. III, para. 1.
ship. If the insurance or the financial security prove to be inadequate to compensate the damage, the state shall "ensure the payment of . . . compensation . . . by providing the necessary funds . . . ."  

Although the Convention states that the operator "shall be absolutely liable for any nuclear damage," it nevertheless provides for circumstances exonerating the operator from liability ("act of war, hostilities, civil war or insurrection").

The parties to the Convention are Zaire, the Malagasy Republic, Portugal, the Netherlands and Syria. Before it may come into force, it is necessary that at least one state operating a nuclear ship or authorizing such operation under its flag participate. According to available information the Federal Republic of Germany intends to ratify the Convention.

F. The Solution in Contemporary International Law of the Marine Environment Pollution Problem

The international agreements mentioned above differ in their objects, contents, period of coming into force and circle of participants. Moreover, they are not exhaustive of the existing rules of international law concerning compensation for pollution damage. Nevertheless, based upon the information given, one can draw certain conclusions about the solution in contemporary international law of the problem of liability for damage caused by marine environment pollution.

First, the liability for pollution damage provided by existing international agreements is civil in nature for damage caused by non-contractual infringement (tort). Liability comes only in cases of specific property damage to certain persons who may be physical or legal persons or a state. Responsibility for damage to the marine environment as such (i.e., no damage to certain persons), or, in other words, liability for infringement of obligations to protect the marine environment which derive from relations between states is not envisaged by these agreements.

Second, the liability is placed either on the harm doer or person carrying out a certain kind of activity; e.g., the operator of a nuclear ship. Generally, a physical or legal person is the subject of such
liability. In some cases the state may be liable, not as the subject of international law, but only because it either caused damage or directly carried out the appropriate activity. Furthermore, there is a trend in international agreements to avoid application of general rules concerning liability for pollution damage to the state, particularly by accepting the immunity of warships and other state owned ships on noncommercial service.

Third, the place where the damage occurred is of no importance with regard to the harm doer's responsibility for compensating this damage. Under the Convention on the Liability of Operators of Nuclear Ships, the damage is subject to compensation whether it is caused in the territorial sea or on the high seas. The International Convention on Civil Liability for Oil Pollution Damage provides for compensation for damage caused only in the territory (including the territorial sea) of the contracting state. This limitation does not derive from the substance of liability prescribed by the Convention, but from reasons of appropriateness.

Fourth, the limits to liability for pollution damage stipulated by existing international agreements are high in comparison with other cases of civil liability known to international law.

Fifth, this liability is considerably more strict than common civil liability founded on fault, but, as a rule, it is not absolute.

III. THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA: MARINE ENVIRONMENT POLLUTION

While discussing the problems of marine environment pollution prevention in the course of preparation for the Third United Nations Conference on the Law of the Sea (in the Subcommittee on the Seabed) and at the Conference itself (at its second session in Caracas) comparatively little attention was given to liability for damage caused by such pollution. A number of states submitting their draft articles regarding the prevention of marine environment pollution did not include general provisions on such liability. Other states restricted themselves in their drafts to mentioning the necessity to work out these provisions. For the time being the Conference has not

" [Ed. Note] Note 29 supra.
" [Ed. Note] Note 1 supra.
" [Ed. Note] Id. art. II.
" The majority of participants in the Conference from which the Convention was adopted believed that it was inappropriate to extend the Convention to the high seas because (1) damage from pollution would not be as substantial as near the coast, and (2) such an extension of the scope of the Convention's application would impede solving a number of problems, including, first, the problem of jurisdiction of disputes.
yet begun to elaborate upon any agreed texts of articles concerning such liability.

In the course of the work of Subcommittee III on the Seabed and Committee III of the Conference, some states proposed a number of draft articles on the liability for damage caused by marine environment pollution. Analysis of these draft articles is of essential interest, since the principles of liability expressed in them differ considerably from those on which the existing international agreements in this field are based.

A. Draft Articles of the United States

The United States draft articles provide only for state responsibility to "undertake, as soon as possible, jointly to develop international law regarding liability and compensation for pollution damage including, inter alia, procedures and criteria for the determination of liability, the limits of liability and available defenses." Although this rule assumes various interpretations, the lack of mention of state liability and compensation for damage caused to the "marine environment" in general, and, at the same time, the direct indication of the necessity for determining "the limits" of liability, lead one to think that the draft is primarily concerned with the subsequent development of the civil liability of physical and legal persons for definite damage caused by pollution.

Furthermore, the United States draft articles envisage a duty of a state with jurisdiction or control of the activities which cause damage to the environment of other states "to provide recourse" for these states and their nationals "to a domestic forum empowered: (a) to require the abatement of continuing sources of pollution of the marine environment, and (b) to award compensation for damages."

Such a possibility of making a claim by a state, its organizations, or its nationals in the courts of another state exists also in the legislation of most countries. In this respect the United States draft does not propose anything new. At the same time this rule witnesses the definite aspiration for transferring the problem of liability for pollution damage to the plane of a general civil claim.

The draft articles on responsibility proposed by the United States

46 Id. art. XXII, para. 2 (emphasis added).
47 Id. para. 3 (emphasis added).
thus supposes less cardinal changes of the existing regime of liability for pollution damage when compared with other drafts.

B. Draft Articles of Australia and Norway

In the draft articles of Australia\(^4\) and Norway,\(^4\) as in a number of other states' draft articles,\(^5\) a distinction is made between liability for damage caused to areas under the jurisdiction of another state and liability for damage to the environment beyond the limits of national jurisdiction.

The draft articles of Australia envisage that "[i]f activities under the jurisdiction or control of one State cause damage to areas under the jurisdiction of another State . . . the first-mentioned State [is] internationally liable to the second State and shall pay compensation accordingly."\(^3\) This rule is reproduced verbatim in the draft articles of Norway with the difference being: "the first-mentioned State shall, in accordance with the principles of international law, be internationally liable . . . ."\(^2\) Both drafts, although they do not recognize it directly, give the opportunity of compensation for damage caused not only to particular persons, but also to the "marine environment" as such.\(^3\)

Another important feature of both drafts is that the state, under whose jurisdiction or control the activities which caused the damage were carried out, is considered liable. However, both drafts deal with "international responsibility of the State," and the draft of Norway also deals with responsibility "in accordance with the principles of international law." Apparently this must mean that the responsibility may be incurred only for activities carried out by the state itself, its bodies and officials. As regards the activities of so-called "private persons" (nationals and legal persons), the state shall be internationally liable for damage caused by such activities


\(^3\) Norwegian Working Paper, supra note 49, art. XX, para. 1 (emphasis added).

\(^3\) [Ed. Note] Id. para. 2; Australia: Working Paper, supra note 48, principle (e)(ii).
only when there was an omission of the corresponding state contradicting its responsibility to ensure the prevention of the marine environment pollution of another state.

As to the liability for damage caused to the environment in areas beyond the limits of national jurisdiction, both drafts provide only for a responsibility of states to "co-operate to develop effective procedures for making reparation or paying compensation in respect of damage."54

C. Draft Articles of the Federal Republic of Germany

The draft articles of the Federal Republic of Germany55 contain a specific rule concerning international state liability. The draft articles provide that if a ship which the flag state has certified as being in compliance with the requirements of the Convention (obviously meaning requirements relating to ship design, equipment, crew, etc.) does not comply with these requirements and pollutes the marine environment as a result, then the state issuing such certificate shall be internationally liable for the damage caused to other states and their nationals and must pay compensation accordingly.56

D. Draft Articles of Canada

The draft articles of Canada57 are identical to those of Australia58 and Norway59 with regard to liability for damage caused in areas beyond the limits of national jurisdiction,60 but the Canadian draft articles go further in deciding the question of liability for damage caused "in the areas or to the areas under jurisdiction of any State including the environment of that State."61 In principle, the other state is responsible only when such damage may be "attributed" directly to the state.62 In other cases, when nationals of the state caused the damage, the state is required to "provide recourse with a view to ensuring equitable compensation for the victims of marine pollution."63

54 Norwegian Working Paper, supra note 49, art. XX, para. 2; Australia: Working Paper, supra note 48, principle (e)(ii).
56 Id. art. 1, para. 3.
61 [Ed. Note] Id. para. 2 (emphasis added).
62 Id. para. 1.
63 Id. para. 2, subpara. a.
However, in the case when such local remedies are exhausted or are absent, the state of the victim may present a claim for indemnification to the state which has jurisdiction over the person or persons responsible for the damage. When agreement on the claim to be settled is unachievable, either state may submit the dispute to arbitration or to a court in accordance with the procedure fixed by themselves or a third party designated by them.44

Thus, this concept of the Canadian draft articles differs in principle from other draft articles in that general civil liability of “private persons” for pollution damage under certain conditions can “develop” into that of the state exercising jurisdiction over these persons, and civil law relations respecting such damage can be substituted for those of international law. Such substitution of one theory of liability for another is a dangerous (and lame) point of this concept. In substance, any rejection of damage compensation may be considered as the situation under which all remedies are exhausted.

E. Joint Draft Articles of Ecuador, El Salvador, Peru and Uruguay, and Draft Articles of Kenya

The most laconic and, at the same time, strict rule concerning liability for pollution damage is contained in the joint draft articles of Ecuador, El Salvador, Peru and Uruguay,45 in which it is said that “[s]tates shall be responsible for any damage caused to the marine environment of other States or to the international sea by discharges from their territory, waters subject to their sovereignty and jurisdiction and vessels flying their flag.”46 The draft articles generally exclude the liability of physical and legal persons for pollution damage, and transfer the problem of such damage compensation to the plane of state relations. Moreover, it involves a number of questions regarding compensation for damage caused to the “international sea”:

(1) How and by whom is the amount of this damage to be determined?
(2) Who has the right to claim the damages?
(3) To whom shall the appropriate funds be paid and for what are they intended?

The draft articles do not answer these questions. They also leave

44 Id. subpara. b.
46 Id. art. 7 (emphasis added).
unclear the priorities of claims of one state against another, who
shall settle controversies among them, and who shall determine the
required procedures.

An identical rule, on its merits, is proposed in the draft articles
of Kenya, in which it is said that "[s]tates shall be responsible
for damage caused by their activities, those of their nationals, physi-
cal or juridical, and others under their control or registration to any
part of the marine environment." 68

IV. CONCLUSION

From the above analysis it is clear that pollution damage reme-
dies in international (and national) law are achieved mainly by
means of the establishment, regulation and expansion of civil liabil-
ity of persons who directly cause the damage, namely, physical or
legal persons. In the course of preparation for the Third United
Nations Conference on the Law of the Sea and at the Conference
itself, a number of proposals were suggested regarding the defining
of rules on state liability for damage where the state exercises juris-
diction or causes the damage itself.

There is no opposition, in principle, to proposals which would
make the state responsible for the compensation of damage caused
by the state itself, its bodies, or its officials. But it is necessary to
consider that this may be realized by establishment of "the interna-
tional liability" of the state, by extension to the state of the same
rules of civil liability which apply to its nationals and legal persons
for the same damage, but with the retaining of the jurisdictional
immunity of the "state-respondent." The practical consequences in
both cases may be profoundly different. The first remedy appar-
ently is proposed in the draft articles of Norway and Australia.

The model of the second remedy may be the liability of the state
operator under the Convention on the Liability of Operators of Nu-
clear Ships.

Introduction of state liability for pollution damage caused by its
bodies and nationals does not seem well-founded. The system of
rules concerning civil liability of persons causing damage resulting
from pollution is only taking shape in the international law.

67 Kenya: Draft Articles for the Preservation and the Protection of the Marine Environment
68 Id. art. 29.
71 [Ed. Note] Note 29 supra.
agreements which have been approved already and which will soon come into force\textsuperscript{2} ensure the payment of compensation for damages covered by the agreements. Of course, it is necessary that the scope of these agreements be expanded and that identical agreements be concluded to compensate for marine pollution damage from other sources (\textit{i.e.}, from land based sources, from the exploitation of the seabed, etc.). Substitution of this liability for that of the state may result in the state's becoming a permanent defendant in many court and arbitration cases.

The practical consequences of the development, under certain conditions, of the concept of the liability of physical and legal persons into that of the state exercising its jurisdiction over them\textsuperscript{3} will depend on the content of these Conventions. It should be reasonable to place such liability on a state only as a sanction of international law if the state does not provide adequate remedial legal processes (\textit{i.e.}, publication of the necessary legislation, opportunity to bring claims in court, etc.) for the setting of certain minimum levels of liability of its nationals and governmental bodies for pollution damage.

There is a definite trend revealed in the draft articles submitted to the Third United Nations Conference on the Law of the Sea which seeks to introduce into international law the rule of "compensation of damage caused to the marine environment." It is necessary to note that there is a certain contradiction in this concept as stated. When such a measure of liability as "the compensation of damage" is used, the damage is compensated so as to rehabilitate the property status of the subject suffering this damage. With regard to the damage caused to the marine environment within the territorial sea, one may say the damage was suffered by the corresponding state; but regarding the damage caused to the marine environment on the high seas, it is impossible to find such a specific victim.

\textsuperscript{2} [Ed. Note] 1969 Oil Pollution Convention, \textit{supra} note 1; 1971 Oil Pollution Convention, \textit{supra} note 15.

\textsuperscript{3} Canadian Draft Articles, \textit{supra} note 50.
PROTECTION OF THE MARINE ENVIRONMENT FROM POLLUTION

Richard A. Frank*

I. INTRODUCTION

This paper discusses the following six issues relating to the protection of the marine environment from pollution in the context of the Third United Nations Conference on Law of the Sea: (1) vessel-source pollution; (2) environmental control of deep seabed mining; (3) land-based sources of pollution; (4) pollution from resource activities in the economic zone; (5) environmental monitoring and assessment; and (6) the double standard. The paper describes what happened with respect to these issues at the Spring 1975 Conference session at Geneva, and then identifies and discusses what problems relating to them will arise in a state of affairs existing after the conclusion of the Law of the Sea negotiations.

II. VESSEL-SOURCE POLLUTION

A. Issues at the Geneva Session

At the Law of the Sea Conference, the basic conflict concerning vessel-source pollution has been between those states desiring to protect maritime interests and those desiring to protect environmental interests. Three alternative schemes have been proposed and debated. The first scheme, favored by maritime countries, would continue to vest primary enforcement responsibility in the flag state and standard-setting responsibility in an international organization as well as the flag state. A second, proposed by coastal states with a primary interest in environmental protection, also entails standard-setting by an international organization, but would place primary standard-setting and enforcement responsibility in coastal states with respect to pollution occurring within a specified distance from the coastline. A third proposal is intended to be a middle ground. It would also depend upon standard-setting by international organizations but would give port states primary standard-setting responsibilities with respect to vessels using their

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ports, and enforcement powers for violations which may have occurred both inside and outside the port area and indeed anywhere.

Vessel-source pollution control has been the most controversial environmental issue discussed during the Law of the Sea Conference. Because Committee III, which handles environmental and scientific research matters, had been unable to resolve the problem, it was delegated at the Geneva session to the Evensen Group (a representative group of delegations under the direction of the head of the Norwegian delegation). The Evensen Group produced several revisions of draft articles dealing with the regulation of pollution from vessels, the most recent of which was a sixth revision dated April 16, 1975. The Evensen Group did not complete its negotiations, particularly with regard to enforcement issues, and will continue them in intersessional meetings.

The first issue discussed by the Evensen Group was whether flag states should be required to apply international measures to their vessels. Several countries (including Greece, Spain, and some developing countries) strongly opposed any such obligation. The United States, Canada, and other maritime powers supported a flag state obligation.

The next problem related to the nature and extent of the rights of coastal states to establish pollution control regulations for vessels in the territorial sea. Maritime states and military interests argued for strict limitations on such rights. They urged that coastal states should only be able to establish regulations relating to discharge of pollutants, with some adding that such regulations must not affect the construction, design, equipment, or manning requirements of vessels. The Soviet Union advocated this approach in draft articles which would permit coastal states to establish regulations, in addition to international regulations, on vessel-source pollution within the territorial sea, but with the proviso that such regulations would be "in conformity with international regulations and may not deal with the design, construction, equipment, operation, or manning of a foreign ship . . . ."

The prevailing view is probably the one which was vigorously advocated by many developing countries, Canada, and Australia, to the effect that coastal states should have standard-setting and regu-

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1 The Evensen Group's draft articles were informal documents of limited distribution which were not given official United Nations document numbers.


3 Id. art. 2, para. 1.
latory authority over vessels in the territorial sea. The approach reflected in the most recent Evenson text involves broad coastal state rights, with international straits excepted and the innocent passage doctrine maintained.

With regard to coastal state rights to establish pollution control standards and regulations for vessels in areas beyond the territorial sea within an economic resource zone, the latest Evensen draft contains three basic alternatives: (1) full standard-setting rights; (2) standard-setting rights restricted to discharge standards; and (3) standard-setting rights restricted to vulnerable and/or special areas. However, meaningful negotiations were not conducted on this matter.

While the Group of 77 has not yet been able to reach a formal position on this issue, some developing countries have indicated that they are less interested in securing a broad right to set standards for vessels in wide zones off their coasts than in securing broad rights in "special areas." One reason for the waning interest of some developing countries in coastal state standard-setting power appears to be the fear that developed countries would use such authority to impose economic burdens on the vessels of developing countries. Developing countries, especially those with aspirations for sizable merchant marines, believe that they most often will have "last year's models" which will not be equipped with the best pollution control equipment.

Many countries continue to oppose any blanket standard-setting authority for coastal states over areas outside the territorial seas, but some of these countries have not opposed special areas concepts which, for example, could provide Canada and the Soviet Union with authority to protect Arctic waters from vessel-source pollution. At Geneva the United States continued to advocate port state standard-setting rights with some but not substantial support.

In the enforcement area, maritime powers continued to insist upon perpetuating the flag state system, while offering as a "compromise" a regime under which port states would have enforcement authority over narrowly defined types of violations (e.g., those which may cause significant damage to the port state), unless the flag state preempts the port state by initiating prior enforcement proceedings. The Soviet Union draft articles provide for coastal state enforcement responsibility in the territorial sea, and enforcement authority beyond that to prevent, mitigate, or eliminate seri-
ous imminent pollution of the coastline or related interests if there is reasonable expectation of “major harmful consequences” from an “incident.”

As noted above, developing countries appear to have shifted their focus to securing broad enforcement rights. They strongly favor coastal state enforcement of violations of international standards within broad areas off their coasts. Insistence upon such rights in an economic resource zone is fully consistent, of course, with their conception of the zone, and if granted, would satisfy in large part their “sovereignty” claims for this area. Several countries have suggested that a new enforcement zone could be less extensive, including, for example, the territorial sea plus a relatively small “contiguous” zone beyond. India has proposed a 30-mile enforcement zone including a 12-mile territorial sea and an 18-mile contiguous zone.

Some maritime powers have indicated interest in a coastal state enforcement regime provided that there are either very limited or no standard-setting rights for coastal states beyond the territorial sea. They have argued that coastal state enforcement should be limited to international discharge standards. Obviously the willingness of maritime powers to accept full enforcement rights will increase if the enforcement zone is relatively small.

The United States continued to advocate port state enforcement without flag state preemption, including enforcement by the port state of violations of international requirements wherever such violations occur. As yet, the United States has had little success in securing strong support for this position from maritime powers.

Regulation of vessel-source pollution in straits is being dealt with primarily in Committee II of the Conference. Major maritime and military powers continue to resist any attempts to secure coastal state standard-setting rights within straits, and remain cool to any coastal state enforcement rights. However, the maritime powers may be willing to accept a very narrow coastal state standard-setting right; i.e., designation of traffic lanes and limited coastal state enforcement rights (e.g., for violation of internationally established traffic separation schemes). A group of 14 states (chaired by Fiji), including the major straits states, privately surfaced a set of

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5 Id. art. 4.


proposed articles⁸ which provide for some control by straits states over vessels and which appear to have the support of the United Kingdom.⁹ These articles require vessels in transit to comply with international safety and pollution regulations. The straits state is allowed to prescribe both traffic separation rules, with the approval of the competent international organization, and rules “giving effect” to international pollution rules. Under such a proposal straits states would have no enforcement rights. The Informal Single Negotiating Text¹⁰ prepared by Committee II¹¹ followed this regime in articles 34-44.

Vessel-source pollution is covered in articles 20, 26-39, and 42 of the Committee III Single Negotiating Text.¹² With respect to standard-setting, (1) flag states must adopt “effective laws and regulations” which shall be “no less effective than generally accepted international rules and standards”;¹³ (2) coastal state authority in the territorial sea is unclear because coastal states may establish laws “more effective” than international measures, but these national laws must “conform” with the international measures¹⁴ (under the Committee II Single Negotiating Text, coastal states may establish environmental laws relating to the territorial sea,¹⁵ but not for design, construction, manning, or equipment of foreign ships, or other matters covered by international treaties unless the treaty specifically authorizes coastal state standards);¹⁶ and (3) coastal states may adopt measures for special circumstances if the appropriate international organization approves¹⁷ and may unilaterally adopt such measures “where particularly severe climactic conditions create obstructions or exceptional hazards to navigation, and where pollution of the marine environment, according to accepted scientific criteria, could cause major harm to or irreversible

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¹ These also were informal documents of limited distribution which were not given official United Nations document numbers.
⁴ Id. pt. II.
⁵ Id. pt. III, Protection and Preservation of the Marine Environment.
⁶ Id. pt. III, Protection and Preservation of the Marine Environment, art. 20, para. 2.
⁷ Id. pt. III, Protection and Preservation of the Marine Environment, art. 20, para. 3.
⁸ Id. pt. II, art. 18, para. 1.
⁹ Id. pt. II, art. 18, para. 2.
¹⁰ Id. pt. III, Protection and Preservation of the Marine Environment, art. 20, para. 4.
disturbance of the ecological balance." Port state standard-setting authority is not mentioned.

The Committee III *Single Negotiating Text* provided for enforcement as follows: (1) flag states must enforce international standards wherever violations occur; (2) port states may enforce violations of international discharge standards occurring within a distance from the coast (such distance to be decided later), except that the flag state may preempt this right; (3) coastal states may enforce international discharge and construction standards for vessels passing through their territorial sea, subject also to flag state preemption (this right appears to be inconsistent with or to be limited by the Committee II *Single Negotiating Text* which provides that passage through the territorial sea is innocent unless, with respect to the environment, there is an "act of wilful pollution, contrary to the provisions of the present Convention"); and (4) coastal states may enforce an illegal discharge off another state's coast at the request of that state, subject to the same preemption. The only penalties that can be imposed by coastal states are monetary.

### B. Issues for the Future

Under the new treaty, coastal states will be empowered to exercise standard-setting and enforcement powers in the territorial sea and probably in the economic zone. Coastal states may have been entitled to exercise some of this authority in the past, but they have not been inclined to do so. The very fact that a new international convention on the law of the sea reiterates a right and extends it further seaward is likely to mean that many coastal states now will choose to exercise these standard-setting and enforcement rights. This exercise should be both effective and reasonable. There is in reality no standard-setting norm in the convention. The norm that should be applied is that of the best available pollution prevention technology. By the same token, efforts should be made to assure that standards are set and enforced in a nondiscriminatory fashion; that

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18 *Id.* pt. III, Protection and Preservation of the Marine Environment, art. 20, para. 5.
19 *Id.* pt. III, Protection and Preservation of the Marine Environment, art. 25, para. (b).
20 *Id.* pt. III, Protection and Preservation of the Marine Environment, art. 27, para. 3.
21 *Id.* pt. III, Protection and Preservation of the Marine Environment, art. 28, para. 5.
22 *Id.* pt. III, Protection and Preservation of the Marine Environment, art. 28, para. 1.
23 *Id.* pt. III, Protection and Preservation of the Marine Environment, art. 28, para. 5.
24 *Id.* pt. II, art. 16, para. 1.
25 *Id.* pt. II, art. 16, para. 2, subpara. (h).
26 *Id.* pt. III, Protection and Preservation of the Marine Environment, art. 28, para. 2.
27 *Id.* pt. III, Protection and Preservation of the Marine Environment, art. 28, para. 5.
28 *Id.* pt. III, Protection and Preservation of the Marine Environment, art. 28, para. 9.
standards achieve an environmental purpose and are not merely subterfuge for other objectives; and that states do not set higher standards for foreign vessels than for domestic vessels or, without good reason, for vessels passing the coast as opposed to vessels entering the port.

Flag states have been notorious in the past for their failure to establish adequate vessel pollution control standards and to enforce those standards. To a great extent, the responsibility for the prevention of vessel-source pollution, especially in international areas, will be placed on flag states. Measures such as publicizing noncompliance will need to be taken within those jurisdictions and by other governments or nationals of other governments to assure that the flag states will comply with the environmental requirements in the convention.

The convention may not clarify whether a passage which threatens pollution of the territorial sea is innocent. Domestic regulations on this subject are likely to be promulgated, and the issue at some point may be the subject of dispute settlement.

Although it would not be in the environmental interest to include a provision in the convention permitting a flag state to preempt coastal state enforcement, such a provision in some form may remain. This could result in a new wave of scrutiny by one state of the administrative or judicial processes of another state, since preempted coastal states will want to assure that violators doing damage to their zones or coastal areas are prosecuted.

III. ENVIRONMENTAL CONTROL OF DEEP-SEABED MINING

A. Issues at the Geneva Session

During the deep seabed negotiations thus far, the central environmental issues have involved the nature and extent of the pollution control powers of the seabed authority and the nature and composition of the environmental regulatory body within the seabed authority.

The Single Negotiating Text for Committee I contains provisions relating to the marine environment which probably accurately reflect to a substantial extent a general consensus of the delegations. Article 12, entitled Protection of the Marine Environment, directs a seabed authority, with respect to activities in the international area, to take appropriate measures for the adoption and implementation of international rules 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, particular attention being paid to the need for protection from the consequences of such activities as drilling, dredging, excavation, disposal of waste, construction and operation or maintenance of installations, pipelines and other devices related to such activities;

(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.29

One of the commissions within the seabed authority is the "Technical Commission" established in article 31. The Technical Commission must include individuals with qualifications, inter alia, with respect to "ocean and environmental sciences and maritime safety . . . ."30 The Technical Commission is required to formulate and submit environmental rules and regulations31 to a "Council"32 and to "[p]repare assessments of the environmental implications of activities in the area and consider and evaluate these implications before recommending the rules, regulations and procedures"33 under which deep seabed mining will be conducted. While article 31 requires environmental assessments which must be considered before the recommendation of rules, regulations and procedures, there is no express requirement for the preparation of environmental assessments prior to the granting of licenses or prior to opening particular areas to exploitation.

Finally, Committee I's Single Negotiating Text includes annex I, entitled Basic Conditions of General Survey Exploration and Exploitation. Article 12, paragraph 17, of the annex, with respect to the rules, regulations, and procedures, states:

The Authority shall take into account in adopting rules and regulations for the protection of the marine environment the extent to which activities in the Area such as drilling, dredging, coring and excavation, as well as disposal, dumping and discharge in the Area of sediment or wastes and other matters will have a harmful effect on the marine environment.34

The annex provides further, with regard to unique areas of environmental importance, that "the Authority may refuse to open any

29 Id. pt. I, art. 12.
30 Id. pt. I, art. 31, para. 1.
31 Id. pt. I, art. 31, para. 2, subpara. (i).
32 Id. pt. I, art. 31, para. 2, subpara. (v).
33 Id. annex I, art. 12, para. 17.
part or parts of the Area . . . when the available data indicates the risk of irreparable harm to a unique environment or unjustifiable interference with other uses of the Area."

B. Issues for the Future

Assuming that an environmental regime approximating the above is in fact adopted in the convention, the following problems will arise with respect to the environment and deep seabed mining after the conclusion of the convention.

Deep sea mining may commence and may be authorized during provisional application of the convention (that is, after the convention is concluded and signed, but before it receives adequate ratifications to come into force) and after it enters into force, but before the authority is established and before it prepares environmental regulations. Some of that unregulated deep sea mining could well create adverse environmental effects. Furthermore, techniques and equipment will be developed without benefit of international environmental criteria, and the subsequent imposition of environmental requirements that would inhibit the use of those techniques or equipment will be extremely difficult. Assuming environmental regulations are not included in the convention pending the adoption of environmental regulations by the authority, the only effective environmental controls will be exercised by individual governments over their nationals or vessels. In order to assure that at least that degree of environmental control takes place, efforts on a national level should be undertaken to see that sound national environmental regulations are adopted before a state's vessels or nationals engage in deep sea mining.

One fundamental deficiency with the Single Negotiating Text is that the seabed authority does not have an internal organ whose primary function is environmental protection. The Technical Commission, for example, will have both developmental and conservation and assessment responsibilities, thereby creating a conflict of interest. This conflict will operate less to the detriment of the environment if members of the Technical Commission have a strong environmental interest. The Technical Commission must include individuals who have backgrounds in "ocean and environmental sciences," and efforts should be made, following the conclusion of the convention, to see that the Technical Commission does contain a significant number of persons with an environmental perspective.

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35 Id. annex I, art. 3, para. (b).
36 Id. pt. I, art. 31, para. 1.
The Technical Commission will propose rules and regulations for the protection of the marine environment and, before doing so, will prepare assessments of the environmental implications of deep seabed activities. Every effort should be made to see: (a) that the Technical Commission undertakes its environmental assessment task immediately after it is established; (b) that the environmental rules and regulations are adequately broad in scope (e.g., some delegations have attempted to exclude processing at sea from the regulatory scope of the seabed authority) and effective; and (c) that the Technical Commission continues to engage in environmental assessments as necessary, whether or not such assessments are related to the promulgation of rules and regulations (i.e., that the Technical Commission prepare such assessments for new licensing or the opening of new areas for development etc.).

The Technical Commission, unlike most multilateral entities, will supervise activities in the area and thus will enforce environmental regulations. Efforts should be undertaken to assure that the Technical Commission actively pursues that function. If it does so successfully, the concept of environmental enforcement by international bodies should be considered in other contexts, e.g., vessel-source pollution.

The seabed authority undoubtedly will establish some formula for relationships among nongovernmental organizations, like organizations interested in and with expertise in environmental protection. Such organizations may have, for example, a form of consultative or observer status similar to that utilized by specialized agencies. The type of association ultimately formulated should provide for an effective working relationship which permits such organizations to contribute to the standard-setting and enforcement responsibilities of the seabed authority.

IV. LAND-BASED POLLUTION

A. Issues at the Geneva Session

It has been generally assumed that the law of the sea convention would treat the land-based pollution problem in vague terms, and that assumption has turned out to be true. The informal working group of Committee III has agreed on a text regarding obligations of states to adopt measures for land-based sources of marine pollu-
tion, and this draft text has been adopted as article 16 of the Committee III *Single Negotiating Text*. It merely requires states to "establish national laws and regulations to prevent, reduce and control" such pollution.\(^{40}\) No norm is suggested. The provision does not provide that such national rules conform to internationally established rules and regulations; rather, states are obligated only to take any internationally agreed measures "into account" in establishing national plans.\(^{41}\)

Regarding establishment of international measures, states are requested in vague language to "endeavour" to establish global and regional rules and standards;\(^{42}\) *i.e.*, there is no firm obligation to do so within a specific period of time, and the draft text leaves open the question whether, if international measures are adopted, they will be based on an economic double standard. With respect to the double standard, article 16 states that international measures must take into account "the economic capacity of developing countries and their need for economic development."\(^{43}\)

B. *Issues for the Future*

Since the law of the sea convention apparently will not assign to a specific international organization the responsibility for establishing international standards for land-based sources of pollution and since it does not establish a date by which a conference should be convened to adopt such rules, it is quite possible that no organization will take an initiative and that an international conference on this subject may not be called in the near future. Efforts should be undertaken to assure that some international agency, perhaps the United Nations Environment Program, does assume that responsibility, or at least that a state or group of states convenes an international meeting to establish international land-based pollution standards and to establish some sort of ongoing international infrastructure in this area.

The text of the convention will be particularly vague about the obligation of states to take actions to prevent, reduce, and control land-based sources of pollution. Furthermore, there will be no requirement that states should inform any international organization or other states about their implementation of this obligation. Efforts should be undertaken to assure that each country does in fact com-

\(^{40}\) *Id.* pt. III, Protection and Preservation of the Marine Environment, art. 16, para. 1.

\(^{41}\) *Id.*

\(^{42}\) *Id.* pt. III, Protection and Preservation of the Marine Environment, art. 16, para. 3.

\(^{43}\) *Id.*
ply with this albeit vague obligation in a good faith manner. Some international organization should ultimately assume some responsibility for playing a coordinating and information-disseminating role concerning the environmental standards to be set and enforcement measures to be taken.

V. POLLUTION FROM RESOURCE ACTIVITY IN THE ECONOMIC ZONE

A. Issues at the Geneva Session

Just as with land-based sources of pollution, it has been assumed that the convention would obligate states to establish laws and regulations to prevent, reduce, and control pollution of the marine environment arising from activities concerning exploration and exploitation of the seabed in the economic zone. Such a provision has been negotiated in the working group of Committee III, and the provision is included in article 17 of Committee III's Single Negotiating Text.

The key debate has revolved around the question of whether states should be required to adhere to international measures with respect to these activities. At the Geneva session a negotiating group was established by the chairman of the working group of Committee III to deal with this issue. Its efforts resulted in a proposed article incorporating a binding international-measures concept. It provides that coastal state laws, regulations, and measures designed to prevent and control pollution from zonal activities "shall be no less effective than generally accepted international rules, standards and recommended practices and procedures." Significantly, members of the maritime powers, known as the Group of 17 (including the United Kingdom, which previously had opposed this approach) indicated that this text was acceptable. Their agreement was largely based upon the incorporation of the phrase "generally accepted" to modify "international rules, standards and recommended practices and procedures." These adjectives arguably give considerable discretion to states in determining which international measures they must accept.

When the draft text was presented to the informal working group, however, it was strenuously opposed by developing countries, led by Brazil and India. All of the familiar arguments were made against binding measures, including contentions that such an obligation infringes on coastal state sovereignty over resources in the economic zone.

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resource zone. Brazil and India added a double standard argument, noting that the proposal did not provide for differing obligations based on stages of economic development and that binding international measures could impose unfair economic burdens on developing countries.

Speaking in defense of the draft text, the Chairman of the informal working group stated that he had been informed by experts that expenses for adequate pollution control equipment for offshore oil and gas development would be relatively low, would be borne by financially secure corporate bodies and, therefore, that the economic impact of such a requirement should not be a major concern. The United States was the only delegation which made a strong statement in favor of the binding international-standard concept, emphasizing the following points: (1) knowledge concerning pollution control mechanisms for Outer Continental Shelf development is advanced and widespread, and relatively little time or effort would be needed to develop a set of minimum international measures; (2) the economic costs of providing adequate protection, particularly from Outer Continental Shelf oil and gas development, are not expected to be large; and (3) the concept of "generally accepted" international measures provides considerable flexibility for states, is consistent with a scenario which would involve a subsequent conference to develop international measures, and implies that widespread acceptance of measures is a precondition to an obligation to conform to them.

Negotiations were also impeded by another major controversy sparked by the draft text. This involved the nature of activities and installations in an economic resource zone over which coastal states will have pollution control jurisdiction. The developing countries, led by Brazil, argued for language which in effect would give coastal states authority over any activity or installation in areas under national jurisdiction. This, of course, is supportive of their general approach that the economic resource zone is essentially an area of sovereign rights. However, this jurisdictional issue is a basic issue before Committee II (the draft text under discussion in effect deferred this issue to Committee II) and many countries viewed Brazil's obstinacy on this issue in Committee III as simply a means for delaying any progress until this jurisdictional issue was resolved in favor of the developing countries in Committee II. The major military powers wanted to avoid anything in any part of a treaty implying that coastal states can take action with respect to any military installations and were particularly sensitive to claims to
control environmental harm caused by cables, pipelines, or activities in the water column. On the other hand, from an environmental point of view, it may well be important to ensure that coastal states have pollution control jurisdiction over any activities or installations likely to result in harm to the marine environment and that any international regulations which are applicable relate to all such activities and installations.

One compromise, suggested by Colombia, would require that national measures to control pollution from zonal activities be "no less effective" than generally accepted international measures. Article 17 of the negotiating text adopts the Colombian proposal and provides that national measures shall be "no less effective than generally accepted international rules . . . ." The article defers to the ultimate Committee II text the types of activities over which coastal states will have pollution control jurisdiction in the zone.

B. Issues for the Future

The law of the sea convention will leave three residual issues relating to control of pollution arising from activities concerning exploration and exploitation in the economic zone. First, states will be obligated to establish international laws and regulations to prevent, reduce, and control such pollution. The international community will need to monitor these state laws to see that they are put into effect, that they are adequate, and that they are implemented. Secondly, states, acting through the appropriate international organization or by diplomatic conference, are to establish global and regional rules, standards, and recommended practices and procedures. However, the convention will not establish a time frame for doing this, nor will it vest responsibility in any particular intergovernmental organization or in any state to convene a diplomatic conference. Efforts should be undertaken promptly to see that some international organization assumes jurisdiction over this issue and to see that the international rules and standards are developed in a timely fashion. Third, the standard describing the relationship between the national and international standards is ambiguous; the national standards are to be "no less effective than generally accepted international rules . . . ." Some procedure will need to be developed to scrutinize national standards to see that, if they are

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47 Id.
48 Id. pt. III, Protection and Preservation of the Marine Environment, art. 17, para. 3.
49 Id. pt. III, Protection and Preservation of the Marine Environment, art. 17, para. 1.
not consistent with international standards, they are "no less effective." A burden should be placed on the coastal state to demonstrate that its standards, if different from the international standards, are in fact "no less effective."

VI. MONITORING AND ENVIRONMENTAL ASSESSMENTS

A. Issues at the Geneva Session

Both the monitoring of pollution and the preparation of environmental assessments regarding pollution have been discussed at the Law of the Sea Conference, and texts on these subjects have been negotiated in the working group of Committee III. The working group texts are incorporated into the Committee III Single Negotiating Text as articles 13 and 14 in the case of monitoring, and as article 15 in the case of environmental assessments.

The text on monitoring is rather weak, providing in pertinent part that "[s]tates shall, consistent with the rights of other States endeavour, as much as is practicable... to observe, measure, evaluate and analyze... risks or effects of pollution of the marine environment." Moreover, states are only obliged to make available "reports of the results" of monitoring, not the actual data uncovered, to the "United Nations Environment Programme or any other competent international or regional organizations..." Unfortunately, states could not see fit to accept an unqualified obligation to undertake and disclose monitoring activities.

Shortly after the Geneva session commenced, the United States introduced a quite comprehensive and strong environmental assessment article. It provided that states would be required, with respect to activities under their jurisdiction or control "which may reasonably be expected to create a risk of significant pollution of the marine environment": (1) to "endeavor" to prepare assessments of potential environmental implications of such activities; (2) to provide such environmental assessments to competent international organizations, which in turn would be required to provide them to other states; (3) to consult with other states and competent international organizations with a view toward minimizing and preventing adverse environmental consequences; and (4) to provide assistance in particular to developing countries preparation of assessments.

The article proved quite controversial, with many countries

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49 Id. pt. III, Protection and Preservation of the Marine Environment, art. 13, para. 1.
50 Id. pt. III, Protection and Preservation of the Marine Environment, art. 14.
51 This was an informal document of limited distribution which was not given an official United Nations document number.
sharply attacking it. The major objections centered on two facets of the proposal: (1) the requirement to consult with other states regarding proposed projects which might be environmentally harmful; and (2) the requirement to provide detailed environmental assessments of projects to other states. India and the Soviet Union objected to a consultation obligation. As regards communication of environmental assessments, many countries objected for commercial and political reasons to a requirement to provide detailed information concerning major projects within their jurisdiction or control to other countries. Several argued that the kind of detail required in impact statements done in the United States under its National Environmental Policy Act\textsuperscript{52} was entirely inappropriate in the international area.

Article 15 of the Single Negotiating Text accommodates these strongly held concerns. Essentially, it provides that states "shall, as far as practicable, assess the potential effects of . . . [potentially harmful] activities on the marine environment and shall communicate reports of the results of such assessments"\textsuperscript{53} to competent international organizations, which in turn shall provide them to individual states. The text contains no obligation of consultation with regard to potentially harmful activities, nor does it even mention the desirability of consultation. States are only obliged to make available reports of assessments (which very likely will consist of watered down, generalized summaries), rather than the environmental assessments themselves.

B. Issues for the Future

Subsequent to the adoption of a convention with monitoring and environmental assessment articles, the national focus should be toward assuring that these articles are implemented so as to give the greatest degree of analysis and disclosure. First, in many cases, states will need to adopt national laws requiring monitoring and preparation of environmental assessments and establishing the institutional framework within which these will be achieved. Second, channels will have to be established so that monitoring reports and environmental assessment reports will be made available on a regular basis to the relevant international organizations and thereafter to concerned states. Third, these provisions of the convention should be interpreted in the future in the broadest possible manner.

\textsuperscript{53} NEGOTIATING TEXT, supra note 10, pt. III, Protection and Preservation of the Marine Environment, art. 15.
States not desiring to prepare environmental assessments could understate potential effects of potentially harmful activities and claim they are not obligated to prepare assessments with respect to these activities. The threshold or trigger point requiring an environmental assessment should not be an unduly high one—any potentially harmful activity should result in an assessment. Furthermore, even though states are only obligated to provide reports and not assessments, a trend could be developed under which some states provide the full assessment in the hope that others will follow suit; doing so will help assure that states are in fact complying with their obligation to undertake adequate assessments and will also aid recipient states in evaluating what actions should be taken.

VII. THE DOUBLE STANDARD

A. Issues at the Geneva Session

At the Geneva session developing countries insisted upon a double standard which would subject them to less stringent requirements than those required of the developed countries with respect to virtually every environmental protection obligation. Nothing but restatements of hard positions occurred with respect to this question during meetings of Committee III or of its informal working group. As in the past, this problem was largely avoided in private negotiations, primarily because it appears to be a major bargaining tool for both sides and may not be finally resolved until other fundamental questions (e.g., the nature of the economic resource zone, or rights in straits) are resolved.

Some attempt was made to have the double standard dealt with by the Evensen Group. That Group (during an intersessional meeting prior to Geneva) received a suggestion to handle the double standard question by imposing a general “due diligence” obligation on states regarding their environmental protection duties. “Due diligence” would not be expressly defined, except to provide that in determining whether states were acting consistent with that standard, account would have to be taken of “differing capabilities.” This approach is questionable from an environmental point of view, since, in effect, it amounts to a vague, open-ended invitation to coastal states to define for themselves the nature and extent of efforts they must make regarding pollution control.

A more acceptable approach involves placing clear, objective limitations on any double standard. Various limitations which could be set on the double standard include: (1) limiting a double standard to land-based activities; (2) providing for objective criteria to be
satisfied prior to invoking the double standard (e.g., by requiring a case by case showing that substantial economic injury will result if pollution controls of a certain kind are adopted, providing that the double standard exception can only be employed when adverse economic effects will result, and/or providing that developing countries would have a longer time than others to meet certain pollution control obligations); and (3) excluding toxic and hazardous substances. None of these proposals as yet have been reduced to draft proposals or discussed in a meaningful or detailed manner with developing countries.

The double standard issue is raised generally in articles 3 and 4 of the *Single Negotiating Text of Committee III* which provide that states, in satisfying their environmental duties, shall “take into account their economic needs and their programmes for economic development” and act “in accordance with their capabilities.”

**B. Issues for the Future**

Some type of double standard will inevitably appear in the law of the sea convention. That standard may be limited to only certain types of pollution, e.g., land-based sources, or it may apply across the board to all types of pollution. While it may be tied to a norm and may have procedural conditions attached to its application, it will most likely be simply a vague statement indicating that developing countries may be exempted from environmental standards. If this is in fact the case, the real negotiation over double standards will occur during subsequent conferences when specific standards are articulated. Developing countries no doubt again will attempt to insert a double standard provision in those subsequent conventions, and at that time there will be a greater need to have a normative standard so that those negotiating will know when and under what conditions developing countries need not apply a specific standard.

The existence of the double standard could create significant problems for the development of international environmental law. Developed countries may be unprepared to promote or accept high international standards if they know that a high standard will automatically result in an exemption for developing countries. The pressure will thus be toward international standards with which “last year’s equipment” can comply, rather than standards which would

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54 *Id.* pt. III, Protection and Preservation of the Marine Environment, art. 3.
55 *Id.* pt. III, Protection and Preservation of the Marine Environment, art. 4.
force the usage of the best available technology. In order to avoid these potential consequences, efforts should be undertaken to assure that every application of a double standard in a subsequent convention or by a developing country is questioned; only in those cases where a double standard is in fact legitimate should it be allowed to be put into effect, and it should remain in effect only for the period of time it can be justified.
THE FREEDOM OF NAVIGATION AND THE PROBLEM OF POLLUTION OF THE MARINE ENVIRONMENT

V. A. Kiselev*

I. INTRODUCTION

The international division of labour is one of the most important factors for the development of the modern world. The requirements for international trade result in intensive upgrowth of merchant fleets, since the development of foreign trade is impossible without maritime transport. For free realization of commerce, navigators must come near the coasts, sail in the coastal waters and call at the harbours and ports of the states with which they intend to trade.

From the legal point of view, the areas of the World Ocean are divided into three principal categories: the internal waters, the territorial seas and the high seas. Internal waters and the territorial seas are parts of the territories and are under the sovereignty of the appropriate coastal states. The distinction between these areas consists of the fact that the internal waters are subject to the sovereignty of coastal states without any general exceptions, whereas in the territorial sea, the coastal states may enjoy their sovereign rights taking into account the universally recognized principles of international law pertaining to innocent passage of foreign merchant ships. As to the high seas, ships of all nations may enjoy freedom of navigation and, as a general rule, are under exclusive authority of the flag state.

The achievements of the scientific and technical revolution permitted mankind to begin a more intensive use of the World Ocean. Traditional activities on the seas, namely, navigation and fishing, are developing rapidly. New forms of human activity appear, particularly the exploration and exploitation of natural resources of the seabed and its subsoil. New problems have arisen side by side with these achievements. One of these is the problem of pollution of the World Ocean.

It is well known that land-based sources of pollution are responsible for the largest quantities of pollutants released into the marine environment. In our opinion, this fact should always be borne in

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mind when considering the problem of marine pollution from ships, because even if this source of pollution were to be fully eradicated, the problem of the preservation of the marine environment would be neither fully nor even substantially settled.

But from the legal point of view, in the light of work of the Third United Nations Conference on the Law of the Sea, the most complicated problem at present is the prevention of marine pollution from ships. This complication is the result of the fact that navigation is a type of international activity: ships flying the flag of one state navigate the high seas and find themselves in areas which are subject to the limited (territorial waters) or unlimited (internal waters) sovereignty of other states.

It is the international nature of navigation that necessitates finding ways for the delimitation and combination of measures which would be used for prevention of pollution of the marine environment from ships on the international level, on the national level by flag states and on the national level by coastal states.

Pollutants enter the marine environment from ships in three principal ways: (1) spillages during loading, unloading and bunkering operations; (2) spillages due to maritime casualties and other incidents; and (3) spillages due to intentional operational discharges. Dumping into the seas of industrial and other wastes is a special case. Dumping of such wastes should be considered as a specific type of pollution from land-based sources. Really, in this case, ships are merely the means of transportation for such wastes and do not present danger by themselves.

The problem of preventing pollution of the marine environment is by nature a technical one and, in principle, owing to the progress of science, it may be solved properly. But some important aspects of the problem have a clearly legal nature.

From a number of legal issues which relate to the problem of pollution of the marine environment from ships, two of the most important might be indicated: (1) the issue concerning the nature of norms and standards aimed at the prevention of pollution and (2) the issue of the effective fulfillment of such norms and standards.

II. INTERNATIONAL NORMS AND STANDARDS CONCERNING POLLUTION OF THE MARINE ENVIRONMENT

In international law there is a principle according to which a state may neither use its territory nor permit its territory to be used in such a manner that causes substantial damage, including damage
which results from pollution, in the territory of another state. From this principle obviously follows the prohibition against using areas which are out of the state's territory, in this case, the high seas, when it results in substantial damage in a foreign territory.

A. Pollution of the High Seas

1. The Applicable International Conventional Law

One may suppose that the pollution of the high seas is equally prohibited under modern international law. This prohibition follows from the principle of freedom of the high seas according to which every state shall take into account "the interests of other States in their exercise of the freedom of the high seas." Pollution of the seas by oil and radioactive wastes is directly forbidden under the provisions of that Convention.

In principle, no state pretends to a "freedom of pollution." A handsome majority of authorities in the field of international law stick to a view that all states are obliged to take measures for prevention of pollution of the seas under existing principles of international law. As early as 1937, the Institute of International Law expressed the view that "a State would be failing of its international obligations if it neglected to take all proper measures to prevent practices which . . . are manifestly contrary to the exploitation and rational protection of the wealth of the sea." Under such practices the Institute meant in particular "uncontrolled emission of oil, sewer water and other injurious substances." The Institute reaffirmed this standpoint in 1969: "[s]tates are obliged to take all necessary measures to prevent pollution of the high sea in result of any activity connected with their personal or territorial competence." In general terms this duty was formulated in the Stockholm Declaration on the Human Environment.

It should be noted, however, that the waters of the World Ocean are capable of assimilating, without detriment, a great number of harmful substances, and it is quite obvious that this capability may be used in the future. An absolute prohibition of the introduction into the seas of all harmful substances is not realistic, since every

2 [Ed. Note] Id. art. 24.
3 [Ed. Note] Id. art. 25.
kind of activity in the sea is connected with the introduction into
the marine environment of some quantities of alien substances.

Naturally, for solution of the problem of pollution of the marine
environment as a whole, there is a requirement for the establish-
ment of norms and standards determining the maximum quantities
of pollutants which might be discharged from every concrete source,
taking into account all of the sources of pollution, both marine and
land-based. Proceeding from the global nature of the problem and
the complexity of its technical solution, the requirements of such
norms and standards should be established on the international
level, with the exception that a state may impose higher or addi-
tional norms and standards for any source of pollution which is
under its jurisdiction or control, for example, control over land-
based sources, control over exploitation and exploration of the conti-
nental shelf and control over ships flying its flag. But until recently
all efforts taken on the international level were directed in fact
towards the prevention of marine pollution from ships in connection
with which there are already established some proper norms and
standards.

Thus, the 1954 International Convention for the Prevention of
Pollution of the Sea by Oil5 (as amended in 19626), the parties to
which at present are 50 States, including all the principal maritime
powers, prohibits intentional discharge from ships of oil and oily
mixtures of a certain concentration, namely, more than one part of
oil per 10,000 of the mixture,7 within the so-called "prohibited
zones,"8 which extend from 509 to 15010 miles from the coasts, and
anywhere at sea from ships with a gross weight of more than 20,000
tons.11

The efficiency of the 1954 Convention shall be considerably in-
creased due to the 1969 amendments12 which are expected to be in

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(effective for United States Dec. 8, 1961).
(effective for United States May 18, 1967) [hereinafter cited as Amended 1954 Oil Pollution
Convention].
7 [Ed. Note] Id. art. I, para. (1).
8 [Ed. Note] Id. annex A.
9 [Ed. Note] Id. annex A, para. (1).
10 [Ed. Note] Id. annex A, para. (2).
11 [Ed. Note] Id. art. III, para. (c).
Legal Mat'ls 1 (1970). These amendments were adopted by the assembly of the Inter-
Governmental Maritime Consultative Organization and will come into force 12 months after
force in the very near future. In particular, these amendments will limit to a considerable extent the allowed contents of oil which may be discharged from a ship during a voyage.\textsuperscript{13}

The 1973 International Convention for the Prevention of Pollution from Ships\textsuperscript{14} is to some degree a code of juridical and technical rules which, being widely adopted, shall, as it is referred to in the preamble, result in "the complete elimination of intentional pollution of the marine environment by oil and other harmful substances and the minimization of accidental discharge of such substances."\textsuperscript{15} The Convention contains the universal norms and standards aimed at limiting the operational discharge of wastes from ships, e.g., oils, noxious substances, sewage and garbage,\textsuperscript{16} and those discharges having to do with construction and equipment.\textsuperscript{17} This Convention is expected to enter into force in 1976 or 1977.

The 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter\textsuperscript{18} (which is not yet in force) provides for practically an absolute prohibition of dumping of highly toxic substances at sea,\textsuperscript{19} and establishes a system for controlling the dumping of all other wastes.\textsuperscript{20}

The 1969 International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties,\textsuperscript{21} which apparently has already entered into force this year, authorizes coastal states to take measures on the high seas in respect to foreign ships to prevent oil pollution of the coasts and coastal waters,\textsuperscript{22} with the proviso that any measures taken be in proportion to the actual or threatened danger of oil pollution to the coasts and to the coastal

ratification by two-thirds of the Governments which are parties to the original 1954 Convention. Amended 1954 Oil Pollution Convention, \textit{supra} note 7, art. 16, para. 4.


\textsuperscript{15} [Ed. Note] \textit{Id.} preamble.

\textsuperscript{16} [Ed. Note] \textit{See, e.g., id.} annex I, ch. II, regs. 9, 17.

\textsuperscript{17} [Ed. Note] \textit{See, e.g., id.} annex I, ch. II, reg. 21.


\textsuperscript{19} [Ed. Note] \textit{See, e.g., id.} art. IV, para. 1, in conjunction with annexes I, II.

\textsuperscript{20} [Ed. Note] \textit{See, e.g., id.} annex III.


\textsuperscript{22} [Ed. Note] \textit{Id.} art. I.
waters. The 1973 Protocol Relating to Intervention on the High Seas in Cases of Marine Pollution by Substances Other Than Oil extends the 1969 Intervention Convention to all other pollutants.

Thus, there are already a number of international agreements (many of which are not yet in force) stipulating, in our opinion, a sufficient protection of the marine environment from pollution from ships. Norms and standards contained in these agreements apply, in fact, to all possible cases of pollution from ships: (1) to the intentional operational discharges (the 1954 Convention, as amended, and the 1973 Convention) and (2) to pollution of the seas due to casualties (the 1973 Convention, the 1969 Intervention Convention, as well as the 1973 Intervention Protocol).

As it appears, therefore, the main problem is that of getting these conventions into effect as soon as possible and of controlling their proper implementation.

2. Supplemental Regional Agreements

The system of universal international conventions is supplemented by a number of regional agreements aimed either toward an earlier implementation of the provisions of such conventions (which are not yet in force) for some regions, or towards the establishment of some additional instruments for the prevention of marine pollution. Among such agreements in particular are the following: the 1969 Agreement for Cooperation in Dealing with Pollution of the North Sea by Oil; the 1972 Oslo Convention on the Control of Marine Pollution by Dumping from Ships and Aircraft; the 1974 Convention on the Protection of the Marine Environment of the Baltic Sea Area; and the 1974 Paris Convention for the Prevention of Marine Pollution from Land-Based Sources.
B. Pollution of the Territorial Waters of Coastal States

Whereas the question concerning the nature of the norms and standards for prevention of pollution from ships applicable to the high seas seems to be clear to a certain extent, it is not so clear in connection with those applicable to the sea waters that are a part of a state’s territory.

1. The Territorial Sea and Innocent Passage

As is generally known pursuant to the 1958 Convention on the Territorial Sea and the Contiguous Zone,35 “[t]he sovereignty of a State extends, beyond its land territory . . . , to a belt of sea adjacent to its coast, described as the territorial sea.”36 But the sovereignty of a state in the territorial sea is limited by universally recognized norms of international law which are based on the principle of freedom of navigation concerning innocent passage of foreign ships.37

In accordance with the provisions of the 1958 Convention, a coastal state shall not lay obstacles to innocent passage through its territorial waters,38 but at the same time it may establish the rules of such a passage.39 While exercising the right of innocent passage, foreign ships are obliged to comply with the corresponding laws and regulations of the coastal state.40 As was noted by the International Law Commission of the United Nations in its comments to the draft of that article,41 such laws and regulations may be, for example, laws and regulations dealing with protection of the coastal state’s waters from any pollution from ships.42

2. Innocent Passage in Relation to Pollution of Coastal Waters

In this connection a question arises whether a coastal state has a right to impose within its territorial sea such norms and standards with which the failure to comply would result in a foreign ship’s losing the opportunity to exercise a passage?

36 [Ed. Note] Id. art. 1, para. 1.
37 [Ed. Note] Id. art. 14, paras. 1, 4.
38 [Ed. Note] Id. art. 15, para. 1.
39 [Ed. Note] See, e.g., id. art. 16, paras. 1, 2, 3, art. 17.
40 [Ed. Note] Id. art. 19.
42 [Ed. Note] Id. at 39, 40.
a. National Legislation on Discharges in Territorial Waters. Many years ago some states prescribed certain restrictions related to disposal of wastes from ships into coastal waters. Thus, according to the provisions of the regulations for skippers and others coming on merchant ships into Russian ports of 1723, the discharge from ships of ballast and garbage into the Russian coastal waters was forbidden by the threat of a fine, and, in the event of recidivism, by confiscation of the ship.

By the 1920's a number of countries, including Great Britain, 13 the United States, 14 and some others, had adopted special legislation prohibiting intentional discharge of oil from ships within the limits of the territorial waters.

The 1954 Oil Pollution Convention, prescribing the quantities of oil allowed to be discharged within the prohibited zones (less than one part per 10,000 of the mixture), 15 does not limit the right of a coastal state to take stricter measures for prevention of pollution within the limits of the territorial sea. 16

b. More Extensive National Regulation. At present the legislation of a number of countries not only prescribes stricter provisions concerning the discharge of oil than those under the 1954 Convention, but also prohibits the discharge of other harmful substances, and contains certain provisions regulating the behaviour of the ships while in those waters. For example, under the laws of some countries, the transfer of oil at night to or from a ship is allowed only with permission of port authorities; 17 and the ship's masters are obliged to report to the coastal authorities any spillage of oil and other pollutants, etc. 18 Obviously, performance of such requirements cannot present any serious obstacle for navigation. Thus, the practice of coastal states imposing appropriate norms and standards with respect to a ship's behaviour within the limits of the territorial seas may be considered as approved and universally recognized.

c. The Right of a Coastal State to Regulate a Ship's Construction

16 [Ed. Note] Id. art. VI, paras. (1), (2).
and Equipment. More complicated is the question of the right of a coastal state to impose norms and standards relating to a ship’s construction and equipment for ships operating within its territorial waters, as well as norms and standards in respect to other factors which could not be changed from case to case. Until recently this question had not arisen at all since the coastal states had not promulgated any requirements in this respect. But now the solution of this question has become of great importance.

Proceeding from the provisions of the 1958 Convention on the Territorial Sea and the Contiguous Zone which prescribes to foreign ships, while exercising the right of innocent passage through territorial waters, a duty to observe the laws and regulations of the coastal state in regard to transportation and navigation, one may come to the conclusion that a coastal state has some rights in this respect, since such norms and standards are aimed towards the prevention of pollution due to casualties and other maritime incidents. Nevertheless, a conclusion that a coastal state has a right *de lege lata* to impose arbitrarily any norms and standards in respect of a ship’s construction and equipment seems to be arguable. It is impossible to keep from noting that there is some conflict between such a right of a coastal state and the right of ships to innocent passage.

If every coastal state were to have the right to impose national standards regarding a ship’s construction and equipment in the rather narrow 12-mile belt of its coastal waters, serious obstacles to international navigation might be created. It is of course unrealistic to assume that every coastal state, which number more than 100, would exercise this right without delay and would impose its absolutely particular norms and standards within the limits of the territorial waters. Rather, another development would be possible—namely, the recognition of such a right would create an objective possibility for substantial differences among such norms and standards which could make their fulfillment practically impossible. Also it should be noted that, as was confirmed by the Inter-Governmental Maritime Consultative Organization’s (IMCO’s) experience, elaboration of scientifically well-grounded and technically correct norms and standards is a highly complex problem, the solution of which may be rather difficult for any individual country.

Within the framework of IMCO, there were attempts made to formulate clearly prescriptions relative to the nature of norms and
standards while working out the 1973 Convention. In one article of a draft of this Convention, it was provided that a state should not impose stricter requirements regarding a ship's construction, equipment, and manning (excluding, of course, ships flying under the state's own flag) within its own jurisdiction than those provided for by the Convention. However, this provision was not included in the Convention. Nevertheless, the absence of any clear prohibition in this respect in the 1973 Convention cannot be a cogent argument that the coastal states should dispose of such a right.

In our opinion, the right of a coastal state to impose national norms and standards regarding a ship's construction, etc. within the limits of its territorial waters—even when there are as of yet no international ones—should be secondary to their duty to take measures for the elaboration of such norms and standards on the international level, e.g., through IMCO.

d. The Coastal State Receives Other Protection. It should be noted also that, as a rule, the available international agreements take into account the special interests of coastal states in preventing the pollution of their coasts and coastal waters.

Thus, for the protection of the coasts and coastal waters, the 1954 Convention established a system of prohibited zones which extended to a distance of 50 to 150 miles. In accordance with the 1973 Convention, the discharge of practically all pollutants, with the exception of disinfected sewage and comminuted garbage, at the distance of 12 miles from the coasts is completely prohibited. Furthermore, the discharge of certain sorts of garbage is prohibited at the distance of 25 miles and the discharge of oil from tankers is prohibited at the distance of 50 miles from the coasts.

The special interests of the coastal states in compensation of damages caused by oil pollution are taken into account by the 1969 International Convention on Civil Liability for Oil Pollution Damage and the 1971 International Convention on the Establishment of an International Fund for Compensation of Oil Pollution Damage.

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51 [Ed. Note] Amended 1954 Oil Pollution Convention, supra note 7, annex A.
III. Enforcement of the International Norms and Standards

A. Flag State Responsibility for Implementation

The 1954 Convention makes flag states responsible for implementation of its provisions.\(^\text{55}\) A coastal state may apply its legislation regarding foreign ships only when an infringement is committed within its territorial waters.\(^\text{56}\) But when infringement is committed on the high seas, even in immediate proximity to the territorial waters of a coastal state, this state may only inform the flag state about the infringement.\(^\text{57}\) Practically the only form of control regarding a foreign ship under the 1954 Convention is an inspection of oil record books while the ship concerned is within a port of a coastal state.\(^\text{58}\)

Practice in the application of the 1954 Convention shows that the sole control by the flag state of implementation of the international norms and standards is insufficient. It does not matter that a flag state may have no interest in a strict implementation of the Convention by the ships flying its flag. The matter is rather that, between a ship and a state whose flag the ship is flying, there is not often a required tie. It happens that ships, especially in relation to ships flying under "flags of convenience," do not enter for years the ports of the state whose flag they are flying. Therefore, a flag state, even when it desires to investigate and to punish a case of pollution, has no opportunity to do it.

B. Coastal State Responsibility for Implementation

The rights of coastal states regarding the control of the implementation of the international norms and standards by foreign ships are extended to some extent by the 1973 Convention.\(^\text{59}\) This is expressed, in particular, in the following instances. First, in addition to the right of a coastal state under the 1954 Convention to inspect oil record books, the 1973 Convention provides for a right to inspect oil record books and cargo record books at port or offshore terminal, as well as a right to inspect proper international certificates\(^\text{60}\) such as the oil pollution prevention certificate,\(^\text{61}\) the pollution prevention

\(^{55}\) [Ed. Note] See, e.g., Amended 1954 Oil Pollution Convention, \textit{supra} note 7, art. VI, para. (1).

\(^{56}\) [Ed. Note] See, e.g., \textit{id.} art. VI, para. (2).


\(^{60}\) [Ed. Note] \textit{Id.} art. 5, para. (2).

\(^{61}\) [Ed. Note] \textit{Id.} annex I, ch. I, regs. 5-8, appendix II.
certificate for the carriage of noxious liquid substances in bulk, and the sewage pollution certificate. If the ship does not have such certificates, or if there are clear grounds for believing that the condition of the ship or its equipment does not correspond substantially with the particulars of the certificates, the coastal state authorities may inspect the ship, and shall deny its proceeding to sea, if it turns out that the ship may present a threat of harm to the marine environment.

Second, a coastal state has a right, on its own initiative or upon a request of another state which is a party to the Convention, to inspect the foreign ship at its ports or offshore terminals for the purpose of verifying whether the ship has discharged any harmful substances beyond the limits of the coastal state's jurisdiction which are in violation of the Convention. If such an inspection indicates a violation of the Convention, the coastal state shall supply the flag state with the appropriate materials for investigation and punishment. In the light of the discussion of the matter at the Third United Nations Conference on the Law of the Sea, it seems quite probable that the coastal states will be provided with some additional rights to control navigation for the prevention of marine pollution. The matter concerns the rights of coastal states at the zone of the high sea which borders on the territorial waters, which probably may extend to 200 miles from the land. In this case, the limits of such a zone might coincide with limits of an economic zone. But, in our opinion, it would be more correct to treat a pollution control zone as an independent category which is not connected with an economic zone.

By what rights might coastal states be entitled, within such zones, to exercise pollution prevention control over ships? It seems quite probable that there would be recognition of the rights of coastal states to investigate infringements of international norms and standards relative to the discharge of pollutants within such a zone. But it is hardly worthwhile to allow the authorities of the coastal state to stop foreign ships within the zone. Proceeding from the interests of navigation, a coastal state should be entitled to exercise a right to investigate such infringements only in cases where ships alleged to have discharged prohibited pollutants enter ports or offshore terminals of the coastal state. Within the limits of

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62 [Ed. Note] Id. annex II, regs. 11, 12, appendix V.
63 [Ed. Note] Id. annex IV, regs. 4-7, appendix.
64 [Ed. Note] Id. art. V, para. (2).
65 [Ed. Note] Id. art. VI, para. (2).
66 [Ed. Note] Id.
the zone itself, the coastal state's authorities might require foreign ships alleged to have committed such infringements to supply them with necessary information.

C. The Right of Coastal States to Bring Legal Proceedings and Impose Penalties

Recognition of the right of a coastal state to bring proceedings in respect to foreign ships discharging pollutants within the zone is a logical consequence of the right to investigate the violations. But, in our opinion, the flag state shall have preference in instituting such proceedings. The coastal state may exercise such a right only in the case where a flag state has not instituted proceedings within some fixed period.

In connection with the possible recognition of the right of a coastal state to institute proceedings in respect to prohibited discharges of pollutants in sizable areas of the World Ocean, the question concerning the kind of penalty which may be imposed regarding such infringements acquires special significance. It should be noted that there is a trend in the legislation of some countries toward more severe sanctions against discharges of pollutants. Thus, in accordance with the British Oil Pollution Prevention Act of 1971, the shipowner or shipmaster may be punished on summary conviction by a fine up to £50,000; the amendments of 1972 to the Australian Oil Pollution Prevention Act of 1960/65 increase the fine to up to A$50,000; the 1973 amendments to the French Oil Pollution Prevention Act of 1964 increase the fine to up to Fr100,000, and, in the case of recidivism, up to Fr200,000; the Prevention and Combating of Pollution of the Sea by Oil Act, adopted in the Republic of South Africa in 1971, provides for a fine of up to R$100,000; and under the Canadian legislation (Arctic Waters Pollution Prevention Act of 1971 and under the 1971 amendments to the Canadian Shipping Act) discharge of pollutants may be fined up to Can$100,000. Furthermore, the laws of many countries provide for imprisonment apart from a fine as a type of penalty. Thus, the laws of Japan

68 [Ed. Note] Id. § 14(4).
provide for imprisonment up to 6 months; Sweden\textsuperscript{73} and the United States\textsuperscript{74} up to 1 year; France, the Federal Republic of Germany, and the Republic of South Africa,\textsuperscript{75} up to 2 years; and the Soviet Union, up to 2 years (and, in case of substantial damage, up to 5 years).

In our opinion, a fine should be the only penalty which might be imposed on foreign seamen in connection with the prohibited discharge of pollutants within the zone. Furthermore, this principle ought to be approved also in respect to infringements committed by foreign ships in the internal and territorial seas of a coastal state as well.

The laws and regulations on the prevention of marine pollution from ships adopted by various coastal states are very different and this situation creates some difficulties for navigation. Obviously, it would be useful to attempt the unification of such laws and regulations within the framework of some international forum, for example, IMCO.

IV. CONCLUSIONS

1. Among the numerous sources of pollution of the marine environment, ships are far from being a principal source. Norms and standards for prevention of pollution from ships have already been developed on the international level.

2. Norms and standards for prevention of pollution of the marine environment concerning a ship's construction and equipment must be adopted, as a general rule, on the international level. At the same time, the coastal states may impose within the limits of territorial waters national requirements relative to the behaviour of the ships in addition to the international ones.

3. For the purpose of more effective implementation of international norms and standards, coastal states might be provided with some rights for combatting pollution within a zone of the high sea bordering on the territorial waters.

4. Since the laws and regulations of coastal states regarding the prevention of marine pollution from ships are very different, it seems to be useful to unify such laws and regulations.


\textsuperscript{75} [Ed. Note] See reference cited note 71 supra.
THE FREEDOM OF NAVIGATION UNDER INTERNATIONAL LAW

William E. Butler*

I. INTRODUCTION

The Geneva session of the Third United Nations Conference on the Law of the Sea has adjourned, having produced an informal negotiating text which is to be considered at a further session in the spring of 1976. The frustration which has arisen from the inability of the Conference to achieve tangible agreements more expeditiously is natural. Such frustration is to be expected since it is the largest conference of its kind which has been held within the United Nations framework, and it is perhaps the first which has touched upon such vital and immediate interests of the states concerned, all within an intensely political framework. A total revision of the entire body of the law of the sea is in prospect should the Conference succeed—and perhaps if it does not. Even if a treaty draft is agreed upon as early as mid-1976, it is possible that some years will pass before a substantial number of states ratify the convention(s). It is also conceivable that a draft text would not attract the number of ratifications which would be sufficient to make a significant impact upon the law of the sea, insofar as it would not be declaratory thereof. It is equally conceivable that such a text would soon be superseded by the pace of events in marine developments, a phenomenon which is not unknown with regard to the existing law of the sea conventions. This is not to sound a pessimistic note about the Conference, of which a nonparticipant can know little in any event, but rather to suggest that a perspective detached from specific Conference deliberations still has a useful place with regard to the matters under consideration, including the freedom of navigation.

Navigation on the high seas in recent centuries has been linked inextricably with two principles. The first is that vessels of all

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1 The first session of the Conference was held in Caracas, Venezuela, in the summer of 1974. The Geneva session was held in the spring of 1975.

states, whether coastal or not, enjoy the right to navigate on the high seas; the second, the principle of flag state jurisdiction, places responsibility on each state for fixing the conditions under which a ship may acquire its nationality and fly its flag. In its classic conception, then, the high seas are open to all for navigation, and each state is to exercise effective jurisdiction and control over vessels flying its flag.

Under the 1958 Geneva Convention on the High Seas, the provisions of which are "generally declaratory of established principles of international law," no state may validly purport to subject any portion of the high seas to its sovereignty. The freedom of the high seas must be exercised with reasonable regard to the interests of other states and under the conditions laid down by the Convention and by other rules of international law.

The freedom of navigation is only one component of the freedom of the seas, albeit to the layman or mariner, perhaps the most basic. Nevertheless, although the Convention on the High Seas lists the freedom of navigation first (in article 2), it establishes no hierarchy among the four listed constituent elements of the freedom of the seas, nor does it subordinate in any way other elements which may be deemed part of the freedom of the seas. From a historical perspective, it may be the case that the freedom of navigation should possess precedence by virtue of its antiquity; high seas fishing is probably a later phenomenon. In recent times, the "pressures" from a variety of sources upon the freedom of navigation and upon the concomitant principle of flag state jurisdiction have mounted to such an extent that one must ask again which functions the freedom is intended to serve, and how it can best do so.

Broadly speaking, one may say that the freedom of navigation is to serve maritime traffic in its widest sense, including the disposition of naval forces. Despite the rapid development of air transport and pipelines, the greatest percentage of tonnage moves by sea, and larger powers rely to a substantial degree upon naval forces to protect their coasts and to pursue their national interests. The pressures on the traditional notions of freedom of navigation and flag state jurisdiction are manifested in such diverse ways as the follow-

\[\text{2 Id. preamble.}\n
\[\text{3 The four elements include: (1) freedom of navigation; (2) freedom of fishing; (3) freedom to lay submarine cables and pipelines; and (4) freedom to fly over the high seas. Id. art. 2.}\]
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(1) increasing coastal state claims to jurisdiction over sea expanses previously acknowledged as high seas; (2) newly emerging components of the freedom of the seas which should be exercised equally with other components; (3) national restrictions on the kinds of vessels which may sail in particular places or at particular times; and (4) assertions of international community interests in the manners in which some flag states administer their vessels.

II. WHERE VESSELS MAY EXERCISE THE FREEDOM OF NAVIGATION

The Convention on the High Seas provides simply that "high seas" embrace "all parts of the sea that are not included in the territorial sea or in the internal waters of a State." There are a number of ambiguities and lacunae that article 1 glosses over, which one hopes will be clarified and filled by a new convention: to wit, (1) greater specificity on base lines; (2) definitions of historic and archipelagic waters, including, perhaps, an exhaustive enumeration thereof; and (3) an agreement on a breadth for the territorial sea. It would appear at this point that the 12-mile territorial sea enjoys the greatest support, although, if desired, states presumably could preserve a lesser limit and retain contiguous zones. An agreement on this basis would reflect prevailing state practice without materially reducing the expanse of high seas, whereas a failure to achieve consensus on this point in all probability would lead states to claim territorial seas of up to 200 miles, materially reducing the area within which the freedom of navigation could be exercised.

Nonetheless, there are certain traditional concepts of jurisdiction which would appear to be the subject of considerable alteration if a number of proposals presented at the Law of the Sea Conference should be accepted, and it is far from clear whether careful delineations are being drawn with regard to the kinds of zonal jurisdiction under contemplation. Should a 12-mile territorial sea, an additional contiguous zone of up to 12 miles, and an economic zone of 200 miles be accepted, then the question would arise as to what freedom of navigation can possibly mean within such zones (for it is evidently contemplated that the freedom of navigation should be safeguarded within these expanses).

Under the Convention's definition of high seas, the waters of a contiguous zone are deemed part of the high seas; such expanses are merely subject to particular jurisdictional rights of coastal states. It

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* Id. art. 1.

† See id. and accompanying text.
is not at all evident why serious consideration should be given to a
new contiguous zone extending 12 to 24 miles from the coast, unless
it is felt that the speed of vessels somehow requires a broader jurisdic-
tional zone. One should suppose that the principle of hot pursuit
would be ample protection for the coastal state in this regard. The
economic or resource zone has for some time been distinguished
from the contiguous zone in doctrinal writings, especially with re-
gard to fishing. Inasmuch as property rights in a particular resource
or resources are asserted therein, the navigation or activities of cer-
tain classes of vessels are necessarily restricted or precluded. It is
to be hoped that the Law of the Sea Conference can successfully
separate resource jurisdiction from both navigational freedoms and
contiguous zone jurisdiction, while safeguarding navigational uses.
But the premise from which the Conference proceeds will have im-
portant consequences for the freedom of navigation in general: Is
primacy of the right to living and nonliving resources in an economic
zone to coexist with the freedom of navigation on the high seas in
the jurisdictional sense of a contiguous zone or would the inclusion
of a freedom of navigation clause in a future convention (as regards
an economic zone) in actuality signify a subordination of the free-
dom of the seas to a superior coastal state claim? Are navigational
rights in an economic zone to become more analogous to a freedom
of transit or innocent passage than to a freedom of navigation?

Even the acceptance of a 12-mile territorial sea would have a
substantial impact upon the freedom of navigation through interna-
tional straits. Over 100 straits which now include strips of high seas
would be overlapped by a territorial sea under a universal 12-mile
rule, and still others potentially would be affected if a 12-mile limit
were linked to a broader economic or other type of resource (non-
contiguous) zone. The doctrine of innocent passage would not seem
to be particularly advantageous under these circumstances (given
its still ambiguous and subjective nature) to either coastal states or
traversing powers; nor is the freedom of navigation fully responsive
to the interests of straits powers. A right of unimpeded transit
through international straits—on condition that the environmental,
navigational, and security interests of the coastal power were
guaranteed and respected—would be an appropriate balancing of
interests. This would be even more so if there were an agreed defin-
tion or list of international straits. Acceptance of such a “transit”
principle would represent a departure from the principle of freedom
of navigation; that is, it would represent an exception or modifica-
tion predicated upon the special functional purpose which these straits have for international navigation. Failure of the Law of the Sea Conference to reach agreement on the matter of a broader territorial sea linked with a right of transit through straits would mean retention of the status quo, and coastal state attempts to restrict freedom of navigation through straits without doubt would give rise to serious international complications, if based on a territorial sea or zonal claim not generally recognized in international law.

III. Regulation of How Vessels Navigate

With rather few exceptions and pursuant to the principle of flag state jurisdiction laid down in the Convention on the High Seas, each individual state has responsibility for determining the conditions under which a ship may acquire its nationality and fly its flag. In addition, each state must exercise effective jurisdiction and control in administrative, technical, and social matters over its flag vessels in order to provide evidence of a genuine link between state and ship.

Vessels on the high seas are essentially regulated in three ways. The first and chief means is through national legislation, following the flag state principle. In recent years, however, there has been increasing dissatisfaction with the extent of reliance upon flag state jurisdiction. National legislation is far from uniform in maritime matters, and although the international system tolerates an extraordinary diversity of municipal legal rules governing behavior at sea, there are instances in which the divergences of national standards are both socially and morally unacceptable. There are also instances in which they have caused harm to third states. Proposals to meet these shortcomings approach the matter in two different ways. While some urge that the principle of flag state jurisdiction be strengthened, others urge that the principle be attenuated. Adherents of the former approach argue that the international community accepts too weak a "link" between state and vessel and allows shipowners from one country to register vessels in other states where safety standards may be lower or poorly enforced, or where wage rates and labor conditions may be substandard. Without doubt, the provision of the Convention on the High Seas stipulating the existence of a genuine link between the flag state and its vessels could be augmented usefully in a new convention which would elab-

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8 Id. art. 5, para. 1.
9 Id.
orate further the international standard of genuine link.

The second means, also an extension of the flag state principle, is the conclusion of multilateral or bilateral treaties and agreements between states obliging the parties to take certain measures regarding their own flag vessels; e.g., technical specifications, navigational standards, labor conditions, and rescue operations. Some of these are expressly mentioned in the Convention on the High Seas. The principal difficulty at the moment, particularly with regard to environmental standards for navigation, is securing a sufficient number of ratifications for conventions which genuinely require a high standard of performance from states-parties. Agreements concluded in the past decade within the framework of the Intergovernmental Maritime Consultative Organization have repeatedly encountered this difficulty.

It is not easy to evaluate the contribution of bilateral treaties to the development of freedom of navigation. The patterns of state practice reflected in national legislation seem to have attracted a higher degree of attention and generalization than has the immense network of bilateral arrangements concluded by states. A comparative inquiry into the consistency and depth of bilateral regulation of navigation would be a useful and perhaps surprising undertaking.

The third method of regulating the freedom of navigation on the high seas, and one favored by those skeptical of a purely flag state approach, is through nonflag state jurisdiction. Certain exceptions to flag state jurisdiction are a part of customary international law, while others have been established by bilateral and multilateral conventions. Particularly in recent years, states have been amenable to allowing officials of vessels of other contracting powers to board their ships in order to check compliance with fishing regulations; some urge that compliance with environmental standards be similarly enforced.

The classic exception to flag state jurisdiction is piracy, which has long been an offense against the law of nations and a crime in many countries. Articles 15 and 16 of the Convention on the High Seas are an attempt to encourage uniformity and consistency in defining piracy. Many are concerned, however, that the definition of piracy under international law does not also embrace acts of “state piracy” committed by government vessels in violation of international law.

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10 Id.

Acts of submarine warfare during the First World War and the late 1930's are especially recalled in this connection.

The principal question must be whether the concept of state piracy would add anything to existing international legal concepts of aggression, armed attack, and prohibition against the use of force. All of these acts, when committed intentionally, are invariably done for political purposes, which are said to be the principal constituent element of state piracy. Nor, if confronted again with a situation similar to that which existed in the Mediterranean during the 1930's, would recourse to a Nyon-type arrangement\(^\text{12}\) appear to be precluded by international law. It is noteworthy, however, that high American officials were quoted in the foreign press as describing the recent seizure of an American merchant ship by Cambodian naval vessels as state piracy. If the notion of state piracy is to be pursued in the law of the sea negotiations or elsewhere, proper consideration must be given to admissible sanctions, collective or individual, bearing in mind that warships would come within this concept.

The Definition of Aggression,\(^\text{13}\) adopted without vote on December 14, 1974, by the United Nations General Assembly, makes no mention of state piracy. Article 4 of the Definition requires that a determination be made by the Security Council as to whether a particular act would fall within the concept of aggression.

The right of hot pursuit seems to be satisfactorily treated in the Convention on the High Seas.\(^\text{14}\) However, clarification in a new convention as to whether the vessel commencing pursuit must complete the exercise or may be replaced in the chase by other vessels would be useful.

Other exceptions to flag state jurisdiction originate in multilateral conventions, including among others: the nearly dormant 1882 Convention for Regulating the Police of the North Sea Fisheries;\(^\text{15}\) the 1884 Convention on the Protection of Submarine Cables;\(^\text{16}\) the 1887 Convention on the Prohibition of Trade in Spirits in the North Sea;\(^\text{17}\) the 1959 Convention on the North-East Atlantic Fisheries;\(^\text{18}\)

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\(^{12}\) The Nyon Arrangement was an agreement between nine major European nations to take collective forceful actions against “piratical acts by submarines” in the course of the Spanish Civil War. Nyon Arrangement, done Sept. 14, 1937, 181 L.N.T.S. 135.


\(^{14}\) High Seas Convention, supra note 3, art. 23.

\(^{15}\) Convention internationale pour régler la police de la pêche dans la mer du Nord en dehors des eaux territoriales, done May 6, 1882, 9 Martens Nouveau Recueil 556 (ser. 2).

\(^{16}\) March 14, 1884, 24 Stat. 989 (1885), T.S. No. 380 (effective for United States May 1, 1888).

\(^{17}\) 79 Great Britain Foreign Office, British and Foreign State Papers 894 (1887).

the 1969 Convention Relating to Intervention on the High Seas in Case of Oil Pollution Casualties, and the 1973 International Convention on the Prevention of Pollution from Ships. The latter two conventions have yet to secure extensive acceptance on the part of states.

Some of the conventional exceptions to flag state jurisdiction have emerged because other freedoms of the sea required protection; e.g., fisheries and protection of submarine cables. Other exceptions emanate from the need of coastal states to ensure compliance with navigational and sanitary standards; e.g., prevention of oil pollution. In the near future competing uses of what is now the high seas may become so intense that the principle of flag state jurisdiction must give way to a new order of high seas regulation, perhaps by international institutions, and the extent of immunity for state vessels must be reconsidered.

The traditional conflict over immunities for state vessels performing acts of a "commercial" nature, as opposed to functions of a "public" nature, has centered around the unfairness (as viewed by most western powers) inherent in a state owned vessel being able to resist arrest or detention pursuant to civil law remedies, vis-à-vis the unfairness (as viewed by the socialist countries) in distinguishing between the functional uses of state ownership. In fact, the socialist countries have worked out bilateral arrangements with several western powers granting reciprocal immunities against civil arrest of vessels in their respective territories. The functional immunity theory laid down in article 9 of the Convention on the High Seas seems in practice to have imposed little burden on those states owning commercial vessels. Has the time come to reconsider the immunities which vessels performing public functions enjoy? Is there any reason, for example, why the international community should exempt warships, in peacetime, from the enforcement of environmental standards imposed upon other classes of vessels? If there is a special case to be made for warships, is the same case as persuasive when applied to other classes of public vessels? In the instance of naval vessels, should the particular functions of the vessels (e.g., research) have a bearing on the extent of immunities to be granted?

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IV. MILITARY NAVIGATION

In the modern era the law of nations must be, insofar as is humanly possible, a law of peace. Nonetheless, military armaments are very much a part of our lives and the object of regulation by international law, including on the high seas. The highest category of state vessel is generally considered to be the warship, defined in the Convention on the High Seas as a “ship belonging to the naval forces of a State and bearing the external marks distinguishing warships of its nationality, under the command of an officer duly commissioned by the government and whose name appears in the Navy List, and manned by a crew who are under regular naval discipline.” Warships possess complete immunity on the high seas from the jurisdiction of any state other than the flag state.

Warships enjoy the special prerogative under international law of being empowered to stop and board foreign merchant ships in the following situations: (1) when there are reasonable grounds for suspicion that the latter ships are engaged in piracy or the slave trade; (2) when there are reasonable grounds for suspicion that the ships are of the same nationality as the warship, although flying a foreign flag or refusing to show their flags; or (3) in other instances where such powers are conferred by treaty. Warships may also engage in the hot pursuit of foreign ships when such action is justified.

International law imposes special duties and limitations upon the operations of warships on the high seas as well. In addition to the normal legal constraints on the use of force, the international community has accepted widely the following obligations which, although admittedly wider in scope and effect, have an import upon the operation of warships: (1) to refrain from involvement in nuclear testing (except for peaceful purposes) on the high seas; (2) to avoid any military operations, maneuvers, or weapons testing in the zone governed by the treaty on the Antarctica; (3) to refrain from emplacing nuclear weapons or other weapons of mass destruction on the deep seabed or subsoil thereof; and (4) to observe the provisions of the Treaty on the Non-Proliferation of Nuclear Weapons.

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21 High Seas Convention, supra note 3, art. 8, para. 2.
In the case of the world's two largest naval powers, these multilateral obligations are augmented by recent bilateral agreements to prevent incidents at sea,\textsuperscript{26} to limit strategic armaments,\textsuperscript{27} and to reduce the danger of a nuclear war.\textsuperscript{28}

The law governing military navigation is far from perfected. The definition of warship quoted above\textsuperscript{29} has many variants in municipal legislation, and these variants are complicated by the constantly expanding number of vessel types which are joining modern naval fleets. The extent to which warships will enjoy a genuine right of transit through international straits, if at all, may come to depend on consensus as to whether transit is a modification of the freedom of navigation or a privilege granted by coastal states. Definition of a warship also can affect the immunities accorded to it. Should military icebreakers or intelligence-gathering vessels, for example, be accorded full immunity if they are not easily identifiable as such? Also, there is neither an adequate delineation of the right to conduct military operations and maneuvers on the high seas, nor an adequate delineation of the rights of other vessels to exercise their freedom of navigation. Advances in modern weapons technology ought to raise serious questions among legal advisers as to their legal implications for concepts of self-defense and armed attack. In fact, these matters receive very little attention in doctrinal writings, which base their treatment either on the experience of the last lamented war or on a meaningless level of abstraction divorced from


\textsuperscript{29} See note 21 supra and accompanying text.
the needs of those who require guidance in their disposition. Perhaps the state of international relations has advanced to a sufficient level of civility and concern over the failure of international law to address these matters more directly that the expertise of those immediately concerned can be discussed and explored in appropriate conferences or forums. If the great powers can discuss intimate details of strategic arms limitation, it should be possible to find a way of bringing reality to the doctrinal development of these matters in international law. On the western side, a personage such as the Stockton Professor of International Law at the United States Naval War College, or similar worthies in other countries, might assume the responsibility of organizing discussion on an international plane; a society of international law might also assume that responsibility. The aim ought to be to discuss these aspects of navigation initially rather than to produce agreed upon texts.

V. Conclusion

It would be as speculative to forecast the fate of freedom of navigation, should the law of the sea negotiations fail, as it would be to predict the ultimate content of a draft treaty produced by the Conference, notwithstanding the achievement of a negotiating text. Under one extreme scenario, the collapse of negotiations would be attended by a deluge of coastal state claims, ultimately leading to a division of the oceans and an end to freedom of navigation. Although most maritime powers are restraining internal pressures for unilateral action pending the Conference deliberations, that scenario seems unlikely. So too does the likelihood that the present regime for navigation on the high seas can survive a failure to reach an agreement. There will be extensive coastal claims by some states. The inability to rationalize the resource zone concept will give rise to jurisdictional conflicts of some magnitude.

In any event, as the types of ocean use expand, it will become essential to be explicit about the relationships of respective uses, with some loss of flexibility, and perhaps to be more precise about prohibited uses. All components of the freedom of the sea cannot enjoy a coequal relationship indefinitely; some hierarchy may have to be developed. If environmental protection is to become an interest at sea in itself, it seems farfetched to link oil pollution with violations of the freedom of navigation. Adequate technical measures to ensure that vessels do not breach environmental standards, although a condition precedent for exercising the freedom of naviga-
tion, ought to be defensible in their own right, rather than as a weak adjunct to that freedom.

The rapidity of technological advance in vessel design and construction and the enormous increases in marine traffic will require a continuing review of international standards for navigational safety. There seems to be an increasing disposition to seek international solutions for these matters, and due account of recent developments should be taken in formulating or reformulating article 10 of the Convention on the High Seas.
INTERNATIONAL FISHERIES MANAGEMENT WITHOUT GLOBAL AGREEMENT: UNITED STATES POLICIES AND THEIR IMPACT ON THE SOVIET UNION

H. Gary Knight*

I. INTRODUCTION

A strong case can be made concerning the international legal right of a coastal state to exercise exclusive jurisdiction over fishing to a distance of at least 12 nautical miles from its coast.1 Within that area the coastal state is possessed of absolute jurisdiction concerning if, by whom, when, where, and how fishing activities may be undertaken. Existing international law also recognizes the exclusive jurisdiction of the coastal state over sedentary species of living resources within the legally defined Continental Shelf.2 However, substantial stocks of living marine resources remain beyond the reach of these two concepts of exclusive coastal state jurisdiction. As a result, a conflict has developed concerning the precise relationship between coastal states' interests in fish stocks off their coasts, on the one hand, and distant water fishing nations' assertions of the right of the high seas freedom of fishing, on the other.3 If the doctrine of

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As of February 1, 1974, only 18 nations claimed fishing jurisdiction zones of less than 12 miles, while 67 claimed 12 miles and an additional 34 claimed in excess of 12 miles. U.S. DEP'T OF STATE, LIMITS IN THE SEAS, No. 36, NATIONAL CLAIMS TO MARITIME JURISDICTIONS (rev. ed. 1974).


3 Two of the major conflicts have been the "tuna war" between the United States and certain Latin American nations (see, e.g., Loring, *The United States-Peruvian "Fisheries" Dispute, 23 STAN. L. REV. 391 (1971)) and the "cod war" between Iceland and nations fishing off its coast (see, e.g., Bilder, *The Anglo-Icelandic Fisheries Dispute*, 1973 *Wis. L. Rev.* 37 [hereinafter cited as Bilder]).
freedom of the high seas were to prevail in absolute form beyond the 12-mile limit, then coastal states would have no special rights vis-à-vis distant water nations, and the open access principle of "first come, first served" would be applicable. If coastal states are possessed of some special rights with respect to fish in adjacent waters, then this right constitutes a derogation from the norm of freedom of the high seas which must receive international community sanction either through the customary law development process or by international agreement.

The purpose of this paper is not to discuss the international legal validity of unilaterally established 200-mile exclusive fishing zones. Although the existing law of the sea provides for reasonable exercise of the freedom of fishing beyond a relatively narrow band of territorial waters, the international community is engaged in a process of changing that legal regime. In that context it is the purpose of this paper to suggest that the attempt to reach a new international agreement concerning fisheries management on a global basis will not succeed in a timely fashion, that the current development of customary international law on the subject is so vague and ill-defined as to be of little assistance in determining national policies, and that the process of claim-response (centering about unilateral claims to exclusive or preferential fishing zones to substantial distances from the coast) will be determinative, over the next decade or two, of new emerging norms concerning fishery rights in coastal waters. The paper further examines likely United States legislation with respect to fisheries off its coasts with emphasis on the effect of such legislation on fishing activities of the Soviet Union.

II. THE FAILURE OF THE LAW OF THE SEA CONFERENCE AND THE INTERNATIONAL COURT OF JUSTICE TO RESOLVE THE FISHERIES PROBLEM

A. The Third United Nations Conference on the Law of the Sea

The issue of fisheries management is one of the most complex on the agenda of the Third United Nations Conference on the Law of the Sea.

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4 This doctrine posits that no nation may validly purport to subject any part of the high seas to its sovereignty, but that the freedoms of the high seas (including the freedom of fishing) are to be exercised by all states with reasonable regard to the interests of other states in their exercise of freedoms of the high seas. Convention on the High Seas, April 29, 1958, art. 2, [1962] 2 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82 (effective for United States Sept. 30, 1962) [hereinafter cited as High Seas Convention].

5 Excellent arguments have been advanced that this "open access" character of the high seas may not only result in overfishing and stock depletion, but also will almost inevitably lead to overcapitalization, gear congestion, and other forms of inefficiency. See, e.g., T. Christy, Jr. & E. Scott, The Common Wealth in Ocean Fisheries passim (1965).
the Sea (hereinafter referred to as the Third Conference). Some nations have supported in that forum a global agreement for the management of marine fisheries based on a rational biological basis rather than on politically motivated assertions of national sovereignty over large ocean areas. The Caracas and Geneva sessions of the Third Conference gave little assurance, however, that a timely, comprehensive, and widely accepted law of the sea treaty can be adopted. The agenda is too large, the participating nations too numerous, and the Conference orientation much too political to produce soon the desired agreement on scores of technical law of the sea issues. In reporting to Congress on the Geneva session, a United States representative noted that "[i]t is now clear that the negotiations cannot be completed before mid-1976 at the earliest, and at this time it is not clear whether or not a treaty can be completed during 1976." A target date to conclude a treaty was not agreed to by the Conference. Further, it will be extremely difficult following the Geneva session to stem the tide of unilateral action in the ocean—many developed and developing nations alike are now strongly inclined to protect their perceived ocean interests without further delay. In my opinion, even the production of the Informal Single Negotiating Text (hereinafter referred to as Single Negotiating Text) at the Geneva session does not represent such a watershed development as to have a marked influence on this trend toward unilateral action, and such acts could conceivably rob the Third

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Conference of its authoritative posture with respect to law of the sea issues.

Even if an agreement were reached, the trends in the negotiations make it clear that, at least with respect to fisheries, such an agreement would constitute little more than a validation of unilateral claims to broad fishing zones which might be expected in the wake of a Third Conference failure. Although the Single Negotiating Text is not an end product of the Third Conference, its economic zone provisions concerning fisheries constitute, in the words of a United States law of the sea negotiator reporting to Congress after the Geneva session, “an indication of an overall package necessary for a satisfactory treaty,” and reflect “areas of broad support negotiated within informal working groups.”

In short, the fishery articles in the Single Negotiating Text represent a relatively high level of negotiation and compromise, such that final treaty articles might differ little from the present text. On the fishery articles, United States negotiators noted further that the text “strongly confirms coastal State conservation and management jurisdiction over coastal species of fish out to 200 miles,” and has “a strong tilt in the direction of advancing the interests of coastal states.”

Thus, whether the Third Conference fails entirely, or whether it reaches agreement on fisheries issues by validating extensive coastal state control, it appears that the future of international fisheries management will almost assuredly develop in detail through the customary international law process, with interactions among affected states determining the ultimate outcome of that process.

B. The Fisheries Jurisdiction Cases

On July 25, 1974, the International Court of Justice delivered its opinion on the merits in the Fisheries Jurisdiction Cases. The factual background of fishing practices off the coast of Iceland and the long-standing dispute between Iceland and various distant water fishing nations are well known. The specific ruling of the Court was that Iceland's 50-mile exclusive fishery zone was not opposable to

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10 Statement of John Norton Moore, supra note 8, at 135.
11 Id. at 136.
12 Statement of Thomas A. Clingan, Jr., May 19, 1975, see reference cited supra note 8, at 138.
13 (United Kingdom v. Iceland), [1974] I.C.J. 3; Fisheries Jurisdiction Cases (Federal Republic of Germany v. Iceland) [1974] I.C.J. 175. Subsequent citations are to the United Kingdom case only; in most cases identical or quite similar language can be found in the Federal Republic of Germany v. Iceland opinion.
14 The best and most thorough background article on the subject is Bilder, supra note 3.
the United Kingdom and the Federal Republic of Germany. The Court went beyond this technical holding, however, to assert the existence of a new rule of customary international law concerning preferential rights of coastal states in fisheries off their coasts. According to the opinion, such rights do not exist *ab initio*, as in the case of Continental Shelf resource rights, but rather must be proven according to several criteria set forth in the opinion. First, there must be a special dependence of the coastal state on the fishery resources. Second, there must exist a scientifically demonstrated need to limit the catch in a given fishery to a level below that taken by all states fishing in the area. Third, the Court stated that such preferential rights should not be implemented unilaterally but must be developed through agreement between the states concerned and, in case of disagreement, through the means for the peaceful settlement of disputes provided for in article 33 of the Charter of the United Nations. Fourth, the Court noted that the concept of preferential rights was not static and that since such rights are a function of dependence they may vary as the extent of the dependence changes.

The Court went on to recognize the rights of states other than the coastal state by observing:

A coastal State entitled to preferential rights is not free, unilaterally and according to its own uncontrolled discretion, to determine the extent of those rights. . . . The coastal State has to take into account and pay regard to the position of such other States, particularly when they have established an economic dependence on the same fishing grounds.

Considerations similar to those which have prompted recognition of the preferential rights of the coastal State in a special situation apply when coastal populations in other fishing States are also dependent on certain fishing grounds.

If what the court says is a new rule of customary international law is *in fact* a rule of customary international law, then this framework must be the basis governing relations between coastal and distant water fishing nations in the future. Even if the rule is as the Court

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16 Id. at 24.
17 Id.
18 Id. at 26.
19 Id. at 30.
20 Id. at 27-28, 29.
says it is, however, the vagueness of the criteria for establishing the various elements leading to preferential and established rights leave so many questions unanswered that it is difficult to derive much real guidance from the opinion. The words of an earlier arbitration opinion dealing with the Continental Shelf during the formative stages of that legal doctrine are most appropriate here:

I am of [the] opinion that there are in this field so many ragged ends and unfilled blanks, so much that is merely tentative and exploratory, that in no form can a doctrine claim as yet to have assumed hitherto the hard lineaments or the definitive status of an established rule of international law.

Probably the better interpretation of the cases is that the concept described by the Court is, in fact, not a rule of customary international law at all. This view is presented most forcefully by Robin R. Churchill in a recent issue of the International and Comparative Law Quarterly. Churchill argues persuasively that there is no analytic evidence in the opinion to support the Court's conclusion that a new rule of customary international law has arisen along the lines it suggests—there is a lack of opinio juris, and the Court clearly has ventured into the field of lex ferenda rather than rendering an opinion lex lata. Although evidence shows some practice in the direction of preferential rights, there does not as yet exist any evidence that nations being granted preferential rights off their coasts in bilateral or multilateral arrangements are being accorded those favors as a matter of right; rather the favors are merely a matter of expediency or comity. If this analysis is correct, or even if the Court's holding is considered valid but ineffective because of its "ragged ends and unfilled blanks," the actual legal status of marine fisheries beyond the 12-mile limit is yet to be finally determined.

III. SOME LIKELY FUTURE FISHERIES PRACTICES

If in fact both the Third Conference and the I.C.J. have failed so far to give concrete guidance concerning the international legal status of high seas fisheries, then it is up to nations, through their actions and reactions, to develop a new normative structure. The remainder of this paper is directed to some general and specific thoughts along these lines.
A. Range of Expected Unilateral Fishery Actions

It is not particularly difficult to predict the types of unilateral, bilateral, and multilateral actions which are likely to be taken with respect to the management of marine fisheries. This is so because the voluminous record of proposals and statements made in the United Nations Seabed Committee from 1968 through 1973, coupled with the proposals and statements made during the Third Conference sessions in Caracas and Geneva, indicate clearly the probable course of events. What can be expected then is a combination of the following types of activities.

1. Broad Exclusive Fishing Zone Claims

Many nations, principally developing coastal states but also including some developed nations, will unilaterally assert jurisdiction over 200-mile (or, perhaps, broader) exclusive fishing zones. The juridical nature of such zones, as asserted by these states, will be such as to preclude any distant water fishing effort as a matter of right. No fishing in such zones may be undertaken without the express consent of the coastal state, and then only pursuant to its regulations and licensing arrangements. Responses to this type of claim will probably fall into one of the following four classes: (1) abandonment of any attempts to fish in such zones by the distant water state with attendant economic dislocation; (2) refusal to accept the legal validity of such zones by the distant water state and ensuing conflict (either physical or juridical) as a result of continued fishing activity; (3) negotiation of a bilateral treaty governing access by the distant water state upon specified conditions; or (4) development of business arrangements between the fishing enterprise and the coastal state.

2. Broad Preferential Fishing Zone Claims

Coastal states may establish 200-mile (or, perhaps, broader) preferential fishing zones. In such zones the rights of distant water states having access to the zone would be set forth in the unilateral proclamation and might contain preferences based on historic fishing rights, geographical proximity, dependence, and so forth. In any case, however, these recognized distant water fishing rights could be exercised only (1) if the coastal state did not exploit all of the allowable catch of a stock, (2) pursuant to the regulations imposed on the zone by the coastal state, and (3) upon compliance with licensing arrangements. The anticipated responses to such preferential zone
claims include the range of options mentioned above for exclusive zones, although the potential for conflict is much less since the legal right of the distant water state, albeit less than a right of high seas freedom of fishing, would be recognized in this type of claim.

3. Anadromous Species Claims

Unilateral assertions by “host” states can be expected for anadromous species. The claim will be for management control throughout the migratory cycle of the species. Such a claim would conflict with high seas freedom of fishing even beyond broad exclusive fishery zones. Responses to such claims would likely include the following: (1) acquiescence in the claim by nations fishing anadromous species on the high seas, with attendant economic dislocation; (2) refusal to recognize the validity of such host state claims and ensuing conflict should the host state seek to enforce its claims beyond any economic resource or fishery zone; or (3) negotiation of a bilateral or multilateral treaty among the affected states providing for rational (biologically oriented) management of anadromous species and an appropriate allocation of the benefits of the exploitation thereof.

4. Adverse Effects on Existing Multilateral and Bilateral Arrangements

Existing fishery commissions may be adversely affected where their jurisdictional reaches (whether area or stock oriented) overlap with unilaterally claimed exclusive or preferential fishing zones or in situations where states withdraw their support from such institutions because of conflict between distant water and coastal state fishing rights. Such conventions and commissions may have to be restructured to take into consideration the new geographical reach of exclusive and preferential fishing zones.

Likewise, bilateral arrangements may be vitiated when an exclusive fishing zone claim encompasses the area subject to the earlier bilateral treaty. Three basic options are available in this situation: (1) the unilateral claim might supersede the earlier arrangement, terminating it short of its full term, possibly with resulting conflict; (2) the unilateral claim could permit the continuation of existing bilateral arrangements, but terminate them at their conclusion; or (3) the unilateral claim could provide for continuation of bilateral or multilateral arrangements within some framework set out in the coastal state’s law or proclamation.

Though not exhaustive, the above enumeration gives some idea
of the range of unilateral, bilateral, and multilateral activities with respect to marine fisheries which may be expected in the relatively near future. It is from such actions and reactions that the new international law of high seas fishery management will likely evolve.

B. United States Fisheries Policy—Executive and Legislative

In order to provide a background to the likely congressional initiatives with respect to a broad exclusive United States fishery zone, the major facets of United States fishery policy to date will be briefly reviewed.

1. The "Second" Truman Proclamation

Modern United States high seas fishery policy began with the "second" Truman Proclamation of 1954. That document provided that the United States Government regarded as proper the establishment of "explicitly bounded" conservation zones in high seas areas, but that where fishing activities involved nationals of other countries such zones were to be established only pursuant to agreements between the United States and the other affected states. Similar rights were recognized for other nations, provided the interests of United States fishermen operating off their coasts were similarly recognized. This policy was entirely consistent with the obligations later assumed by the United States when it became a party to the Convention on Fishing and Conservation of the Living Resources of the High Seas. Although the United States has put forward more sophisticated proposals in the current law of the sea negotiations, the Truman Proclamation remains the cornerstone of United States fishery policy, viz., that areas more than 12 miles from the coast are high seas and therefore subject to freedom of fishing as one of the recognized freedoms of the high seas; that management and conservation systems on the high seas are proper only if they are the product of agreement among all affected nations; and that no nation has the right to unilaterally exclude other nations from fishing beyond the 12-mile limit.

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2. The 12-Mile Exclusive Fishing Zone

In 1966 the United States adopted a 12-mile exclusive fishing zone. As noted above, it seems fairly clear today that zones of that limit are recognized as valid in international law. Considering the trend of the law of the sea negotiations toward ever broader fishery zones, it is not likely that any future domestic or international developments will affect the 12-mile zone. The importance of the 1966 legislation for future fisheries policy is that the United States did not automatically terminate all foreign fishing in the zone when it was promulgated.

The first section of the act provides that the claimed exclusive fishing rights are "subject to the continuation of traditional fishing by foreign states within this zone as may be recognized by the United States." The United States subsequently recognized traditional fishing rights in agreements with Canada and Mexico. Other agreements, providing access to the zone but without recognizing traditional rights per se, were negotiated with Japan, Poland, Romania, South Korea, and the Soviet Union. Since, as will be noted in more detail shortly, the notion of historic fishing rights is embodied in both executive and legislative branch fishery

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28 Exclusive Fisheries Zone Act, 16 U.S.C. §§ 1091-1094 (1970). The act establishes a fisheries zone contiguous to the territorial sea of the United States in which that nation exercises "the same exclusive rights in respect to fisheries . . . as it has in its territorial sea . . . ." Id. § 1091.


policies, it may be expected—based on the 12-mile zone experience—that no total economic dislocation would occur in the event the United States adopts a 200-mile exclusive fishing zone.

3. Sedentary Species Protection Regulations of December, 1974

Effective December 5, 1974, the United States Government adopted a new policy with respect to Continental Shelf fishery resources, providing for the arrest and seizure of vessels taking such resources (except as provided in bilateral agreements) in cases where either fishing on the high seas involved gear designed specifically to catch Continental Shelf fishery resources, or high seas fishing could be expected to result in the catch of Continental Shelf fishery resources. The provision for exceptions in cases of bilateral agreements would appear to permit some flexibility in the implementation of the policy in situations where agreements with a distant water state permit the catch of sedentary species or specifically permit the use of gear which might otherwise be suspect.


a. United States Position. The most current proposal of the United States Government with respect to high seas fisheries (having abandoned the "species approach" for coastal fisheries which it introduced earlier in the negotiations) is predicated on coastal state exercise of exclusive regulatory rights within an established economic zone, subject to the requirement that the coastal state ensure the "full utilization" of renewable resources within such zone. The United States proposal provides that:

[T]he coastal State shall permit nationals of other States to fish for that portion of the allowable catch of the renewable resources not fully utilized by its nationals, subject to the conservation measures adopted pursuant to article 12, and on the basis of the following priorities:

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28 See United States: Draft Articles, supra note 6. See also Senate Foreign Relations Committee Hearings, supra note 36, at 34-35, 39-40 (Statement of Ambassador John R. Stevenson).
(a) States that have normally fished for a resource, subject to
the conditions of paragraph 3 [of article 13];
(b) States in the region, particularly land-locked States and
States with limited access to living resources off their coast; and
(c) all other States.
The coastal State may establish reasonable regulations and re-
quire the payment of reasonable fees for this purpose.39

The historic fishing rights mentioned in subparagraph (a) of article
13, paragraph 2, "reasonably related to the extent of fishing by such
State." Article 13, paragraph 3 provides further that:

Whenever necessary to reduce such fishing in order to accommo-
date an increase in the harvesting capacity of a coastal State, such
reduction shall be without discrimination, and the coastal State
shall enter into consultations for this purpose at the request of the
State or States concerned with a view to minimizing adverse eco-
nomic consequences of such reduction.40

With respect to anadromous species, the United States proposal
provides that only the host state shall have a right of fishing for
anadromous species beyond the limit of the territorial sea or eco-
nomic zone unless it authorizes exploitation by other states.41 With
respect to highly migratory species, regulation by the coastal state
within the economic zone and by the flag state beyond would be
conducted in accordance with regulations established by appropi-
ate international or regional fishing organizations.42

This policy position clearly evidences the willingness of the execu-
tive branch to accept foreign fishing within an extended fishery
zone, with limitations, though this position is largely predicated
upon the distant water fishing interests of the United States.

b. Fishery Provisions of the Single Negotiating Text. The gen-
eral rights of coastal states in an economic resource zone with re-
spect to fishery resources are set out in article 45 of the Single
Negotiating Text as follows:

1. In an area beyond and adjacent to its territorial sea, de-
scribed as the exclusive economic zone, the coastal State has:

   (a) sovereign rights for the purpose of exploring and exploit-
ing, conserving and managing the natural resources, whether re-
newable or non-renewable, of the bed and subsoil and the superja-
cent waters . . . .43
Articles 50 to 60 set forth details of the fisheries regime which may be summarized as follows:

(1) Allowable catch within the economic zone is to be determined by the coastal state, which has a duty to manage properly fishery stocks so as to avoid over exploitation.44

(2) A coastal state must promote “optimum utilization” of fishery resources in the zone; to this end, it determines its own harvest capacity and is obligated to give other states access to any surplus through appropriate agreements and arrangements.45

(3) Criteria to be considered in allocating surplus stocks to distant water fishing nations include “the significance of the renewable resources of the area to the economy of the coastal State concerned and its other national interests,”46 the interests of land-locked states,47 geographical disadvantage coupled with dependence on fishing in economic zones of neighboring states in a region or subregion,48 and “the need to minimize economic dislocation in States whose nationals have habitually fished in the zone or which have made substantial efforts in research and identification of stocks.”49

(4) Distant water states exercising a right of access must comply with the management regime established by the coastal state, including licensing and enforcement procedures.50

(5) Stocks migrating off the coasts of two or more states are to be managed through systems agreed upon by the affected states.51

(6) Highly migratory species are to be managed on a cooperative basis by the coastal state and states whose nationals fish such species, either directly or through international organizations.52

(7) Host state management rights and catch preferences for anadromous species are established, except where a high seas ban would “result in economic dislocation for a State other than the State of origin . . . .” in which case the state of origin is required to “co-operate in minimizing economic dislocation in such other States fishing these stocks . . . .”53

(8) Enforcement jurisdiction is accorded to the coastal state

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44 Id. pt. II, art. 50, para. 1, 2.
45 Id. pt. II, art. 51, para. 1, 2.
46 Id. pt. II, art. 51, para. 3.
47 Id. pt. II, art. 57.
48 Id. pt. II, art. 58.
49 Id. pt. II, art. 51, para. 3.
50 Id. pt. II, art. 51, para. 4.
51 Id. pt. II, art. 52.
52 Id. pt. II, art. 53.
53 Id. pt. II, art. 54.
within the economic zone, including the rights of boarding, inspection, arrest, and judicial proceedings necessary to ensure compliance with its laws and regulations.\textsuperscript{54}

The Single Negotiating Text, then, provides in essence for a system of coastal state preferential rights, with recognition of traditional fishing effort.

Although, as noted previously, it does not seem likely that the Third Conference will produce a timely and widely accepted international agreement along these lines, the provisions are nonetheless quite important because the law of the sea negotiators for the United States Government, in their desire to see the Single Negotiating Text system universally applied, are likely to press for adoption of that system in any unilateral action taken by the United States Congress during 1975. The impact of this position will be discussed in the next section concerning the relationships between the executive and legislative branches of government and the likely timing and substance of United States unilateral action on fisheries.

5. The Executive-Legislative Dichotomy; The Future of Cooperation

Until quite recently the executive and legislative branches of the United States Government had substantially different views on coastal fisheries management action, although the Caracas proposal of the executive branch brought the positions relatively close together as far as substance is concerned.\textsuperscript{55} This variance stemmed in part from the different governmental functions carried out by the two branches. The executive branch is concerned with the conduct of foreign relations, and must therefore take into consideration all law of the sea (and other international relations) interests in determining its fisheries position, and is strongly affected by other domestic policies (the "species approach," for example, was largely dictated by the perceived needs of the Department of Defense and its concern with "creeping jurisdiction"). Congress, on the other hand, is more subject to constituent pressures,\textsuperscript{56} more apt to respond

\textsuperscript{54} Id. pt. II, art. 60, para. 1.

\textsuperscript{55} See, e.g., the comparison between the United States Caracas Proposal and Senate Bill 1988 in Hearing on S. 1988 Before the Senate Armed Services Committee, 93d Cong., 2d Sess., at 180 (1974) [hereinafter cited as Senate Armed Services Committee Hearings].

in a manner which prefers some aspects of the fishing industry over others (a dominance of coastal fishing representation over distant water representation, for example), and is less subject to the perceived needs of federal agencies.

The principal difference in approach between the two branches of government has been with respect to timing. As noted above, the United States finally came to support the economic resource zone concept in Caracas—albeit with conditions, particularly the "full utilization" or preferential rights concept for coastal fisheries—and the Congress has long evidenced support for an extended fishing zone off the United States coast. Because of the ongoing law of the sea negotiations and the Third Conference, however, the executive had opposed any unilateral congressional action on the subject on the theory that enactment of such a law would adversely affect United States interests in the negotiations. It now appears that even this disagreement about timing will no longer stand between the two branches of government in their mutual desire for protection and proper management of United States coastal fisheries. Two factors have contributed to the very recent revision of executive branch policy on fisheries legislation.

First, Senate Bill 1988, which would have established a 200-mile fishing zone, passed the United States Senate in December 1974 by a 68-27 vote.\(^5\) This occurred in spite of a vigorous campaign on the part of the executive branch to defeat the bill, including letters or testimony in opposition from the President,\(^5\) the Secretary of State,\(^9\) the Chairman of the Joint Chiefs of Staff,\(^6\) the Deputy Secretary of Defense,\(^6\) the Deputy Secretary of State,\(^2\) and the Acting Secretary of State.\(^3\) The bill failed to pass in the House of Representatives only because of tactical—not substantive—oppo-

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\(^5\) The vote was nonpartisan, Democrats voting 42-12 in favor, Republicans voting 25-15 in favor, and one Independent also voting in favor.

\(^6\) Senate Armed Services Committee Hearings, supra note 55, at 258.

\(^7\) Senate Foreign Relations Committee Hearings, supra note 36, at 79.

\(^8\) Senate Armed Services Committee Hearings, supra note 55, at 35.

\(^9\) Senate Foreign Relations Committee Hearings, supra note 36, at 77.


\(^11\) Id. at 2.
sition. Although S. 1988 died with the closing of the 93d Congress, new fishery management bills have been introduced in the 94th Congress, including one identical to S. 1988. The obvious point is that the executive branch can no longer be confident of staving off congressional action.

Second, the Geneva session of the Third Conference did not produce sufficient progress to enable the executive branch to make a strong case for holding off on unilateral action on the basis that a treaty would be negotiated early in 1976. As noted above, United States negotiators at Geneva reported to Congress that the negotiations could not be completed before mid-1976 at the earliest and that it was unclear whether a treaty could be completed during 1976 at all. With little prospect of timely agreement, then, the executive branch has poor credibility with a "wait on the Third Conference outcome" approach to interim legislation.

Accordingly, in testimony before a subcommittee of the House Merchant Marine and Fisheries Committee on May 19, 1975, the executive branch announced a new approach to unilateral fisheries action:

[W]e are now conducting a thorough reevaluation of our interim policy [which had been to oppose unilateral fisheries zone extension legislation] to ensure the necessary balance is found between our broad interest in a multilateral resolution of oceans' problems and our more immediate needs, particularly the protection of coastal fisheries stocks. . . . This reevaluation will take into account the strong preference of many members of Congress for an extension of coastal fisheries jurisdiction to 200 miles. . . .

It should be noted that the reevaluation is not one of fundamental law of the sea or fisheries policy, but rather of the executive branch's prior opposition to domestic legislation before completion of a law of the sea treaty. Thus one should not expect much, if any, substantive alteration in United States fisheries policy, but there well may be a change in the method by which that policy is effectuated.

This reevaluation will be undertaken in close cooperation with members of Congress and their committee staffs, and the testi-

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44 See note 8 supra and accompanying text.
45 Statement of John Norton Moore, supra note 8.
46 Representative McCloskey of California made a strong appeal during the May 19, 1975, hearing that staff members from the House Merchant Marine and Fisheries Committee be included in the internal deliberations of the executive branch on the revision of its interim fisheries policy. See reference cited supra note 8, at 148. Discussions with various congressional staff members lead me to the conclusion that Congress will insist on such a "joint"
mony promised completion of the study and consultation “by, or soon after, the August congressional recess” at which time recommendations concerning interim legislation would be submitted as well as an evaluation of the factors considered in reaching the new position.† It is not likely, however, that Congress will wait until September to proceed further on fisheries zone legislation. The more likely scenario is that the Senate Commerce Committee, following its June 5, 1975, hearing will proceed to revise the draft legislation and have a bill acceptable to the full Senate ready by the end of July or, at the latest, early September (Congress recesses during August). The House will probably move even more expeditiously, possibly having a marked up bill in hand by the end of June. Assuming that any conflicts between the executive and legislative branches can be worked out, the bill will very likely be passed by both houses and signed by the President in September or October 1975.® If in fact the bill reflects executive-legislative compromises, then a presidential veto is unlikely since the executive position would presumably be reflected in the law. However, it is conceivable that Congress would not accept the executive position and enact a bill which might force a veto. Whether such a veto could be overridden is problematical, though recent indications are that Congress as presently constituted does not have sufficient legislative votes to override important legislative vetoes.

Senate Bill 961® obviously reflects the consensus of the Senate on what the bill ought to look like (though the management provisions are likely to be somewhat revised). The executive, as noted above, would like for the ultimate law to conform as nearly as possible to the Single Negotiating Text provisions on fisheries in order that the United States action (1) be consistent with negotiated articles and (2) not require any substantial alteration of domestic law when such a treaty is ultimately adopted. Because S. 961 does, by and large, reflect the United States position taken in the Third Conference and the fishery provisions of the Single Negotiating Text, it will be analyzed in the next section as a likely example of what United States fishery zone legislation will look like when it becomes law in the fall of 1975.

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† [Ed. Note] In fact, when the executive branch finally testified, it did not, as promised, change its position, but remained adamantly opposed to enactment of the 200-mile fishery zone bill.

® [Ed. Note] In fact, the bill was passed by the Congress in January of 1976.

6. **Analysis of Proposed United States Fishery Zone Legislation**  
   
a. **Description.** Although a plethora of bills on fishery management and fishery zones have been introduced in the 94th Congress, only two will be described here since they represent two main trends of thinking on the issue. The first is S. 961, authored by Senator Magnuson and commonly known as the "Magnuson Bill," and the other is H.R. 1070, authored by Representative Sullivan and commonly known as the "Sullivan Bill."\(^6\)

The Magnuson bill has as its purpose the protection and conservation of "threatened stocks of fish," and asserts "fishery management responsibility and authority over fish" to a distance of 200 miles from the coast and beyond with respect to anadromous species.\(^7\) The bill provides that it is not to contravene any treaty or international agreement "other than that necessary to further the purposes of the act."\(^8\) Highly migratory species are not included within the management responsibility unless they are not otherwise managed.\(^9\) The bill carries forward the concept of preferential rights for the coastal state, subject to recognized traditional fishing rights. Traditional foreign fishing is defined as

longstanding, active, and continuous fishing for a particular stock of fish by citizens of a particular foreign nation in compliance with any applicable international fishery agreements and with the laws of such foreign nation.\(^10\)

Pursuant to the bill, distant water fishing would be allowed in the zone only for nations having traditionally engaged in such fishing prior to the date of enactment of the new law and only as approved by a combined recommendation of the Secretaries of State, Commerce, and Treasury.\(^11\) Further, the grant of access for foreign fishing is conditioned upon reciprocity with respect to United States fishing in the waters of that nation, and subject to fees to defer administrative and management expenses.\(^12\)

The Secretary of State is authorized to negotiate with distant water states to effectuate the management objectives of the act with respect to the conservation of coastal, anadromous, and highly mi-

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\(^7\) S. 961, 94th Cong., 2d Sess. § 2(b) (1975).

\(^8\) Id. § 2(c)(2).

\(^9\) Id. § 4(a)(3).

\(^10\) Id. § 3(16).

\(^11\) Id. § 5(a).

\(^12\) Id. §§ 5(c), (d)(2).
gratory species.\textsuperscript{76} Included in this authority is the power to review existing conventions or fishery agreements to determine whether they are consistent with the act, and to renegotiate them should they be inconsistent with it.\textsuperscript{77} Finally, United States recognition of other exclusive fishery zones extending beyond 12 miles is based upon the recognition of the traditional fishing rights of United States citizens in such zones.\textsuperscript{78} This last provision permits the United States to continue to declare as violative of international law the exclusive fishery zones of west coast Latin American nations (and others) which deny any right of access to United States citizens, thus permitting continued application of the Fishermen's Protective Act\textsuperscript{79} pursuant to which fines and other charges levied against United States fishing vessels seized on the high seas are reimbursed to the fisherman by the United States Government. Such an approach thus permits the United States to manage and conserve fishery resources off its own coast without having to depart from its support of tuna fishermen operating in the South Pacific.

The Sullivan bill would, in effect, implement the provisions of the Convention on Fishing and Conservation of the Living Resources of the High Seas.\textsuperscript{80} The Secretary of Commerce would be authorized to promulgate regulations affecting fishing activities in high seas areas beyond the presently claimed 12-mile exclusive fishery zone with respect either to United States citizens or to foreign vessels of a state party to an international agreement with the United States for the purposes of fishery management.\textsuperscript{81} No specific seaward limit is specified for this authority, just as in the case of the "second" Truman Proclamation.

It is the judgment of most observers that the Sullivan bill has little chance of passage and that the Magnuson bill approach is most likely to be reflected in the ultimately enacted law.

b. \textit{The Bargaining Position Factor}. This and the subsequent section assumes—with some justification in my opinion—(1) that the Magnuson bill, or legislation similar thereto, will be enacted sometime in 1975, (2) that no international fisheries agreement will have been reached by that time, and (3) that the Soviet Union will desire to maintain its current level of fishing activity off the Atlantic Coast.

\textsuperscript{76} Id. \S\ 7(a).
\textsuperscript{77} Id. \S\ 7(b).
\textsuperscript{78} Id. \S\ 7(d).
\textsuperscript{80} Supra note 25.
\textsuperscript{81} H.R. 1070, 94th Cong., 1st Sess. \S\ 3 (1975).
of the United States.\textsuperscript{82}

The respective bargaining positions of the United States and the Soviet Union concerning fishery resources within 200 miles of the United States coast differ according to varying legal arrangements.

Under the concept of absolute freedom of the high seas, the Soviet Union has a clear bargaining edge because of (1) the open access character of high seas fisheries, and (2) its superior technology for harvesting such resources.\textsuperscript{83} Under this legal concept the Soviet Union may fish in waters beyond 12 miles from the coast without submitting to any regulation or restriction except that which it voluntarily chooses to accept.\textsuperscript{84} In such a situation the United States is at a considerable disadvantage unless it can find tradeoffs in which the Soviet Union is sufficiently interested to accept some limitations on its fishing effort. This has, of course, occurred in the several bilateral fishing agreements between the two nations and a multilateral agreement to which both were parties.\textsuperscript{85}

Under the concept of preferential rights as enunciated by the International Court of Justice,\textsuperscript{86} there is little doubt that Soviet fishing activities would meet the test of "established rights" under the criteria set forth in the \textit{Fisheries Jurisdiction Cases}. It seems less

\textsuperscript{82} For an analysis of the level of Soviet foreign fishing, and an argument against any future limitation of its expansion, see \textit{Senate Comm. on Commerce, 94th Cong., 2d Sess., Soviet Ocean Activities: A Preliminary Survey} 12 (Comm. Print 1975).

\textsuperscript{83} Id. at 9-16.

\textsuperscript{84} High Seas Convention, \textit{supra} note 4, art. 2.


\textsuperscript{86} See notes 13-23 \textit{supra} and accompanying text.
sure, but still likely, that the United States could meet the test of "preferential rights" under criteria also laid down in that opinion. This being the case, the Court's decision implies that the two nations would be under a duty to negotiate an acceptable allocation of fishery resources off the Atlantic Coast of the United States. In effect, this would put the two nations in a position of equal bargaining strength from the standpoint of legal rights, since neither preferential nor established rights seems, in the Court's view, to have precedence over the other.

Finally, under a 200-mile United States exclusive fishing zone, assuming either its acceptance by the Soviet Union or its international legal validity, the bargaining power would shift strongly to the United States, since it would then possess the right to exclude all foreign fishing efforts if it so chose. Although total exclusion is not likely, it is the legal position from which future negotiations could begin. How "historic" or "traditional" fishing effort is treated in such negotiations raises a distinct issue.

c. Implementation of Historic Rights (Including the Status of Existing Treaties). To analyze the Magnuson bill, the first inquiry must be whether Soviet fishing activities would meet the definition of "traditional foreign fishing" set forth in section 3(16) of the proposed legislation (see text accompanying note 72, supra) because section 5(a) provides that foreign fishing may only be authorized "if such nation has traditionally engaged in such fishing prior to the date of enactment of this Act."

That the Soviet Union's fishing efforts off the United States coast meet the requirements of "long-standing, active, and continuous fishing" is beyond doubt. It should be noted, however, that the general level of effort would not result in general historic rights, but rather that the test is "stock specific"—that is, the rights appertaining to a determination of "traditional foreign fishing" relate only to the "particular stock of fish" upon which the historic effort has been expended. Anticipating such a limitation, it is conceivable that the Soviet Union might immediately begin fishing efforts with respect to heretofore unfished stocks in order to establish historic rights under the bill. Such an approach would be invalid, however, not only because it would violate the spirit of the proposed legislation with respect to foreign fishing (which is to avoid abrupt economic dislocation), but also because it would be impossible in the short time remaining before the bill becomes law (probably less than six months) to meet the

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8. Id. § 3(16). See also note 62 supra and accompanying text.
requirements of “longstanding, active, and continuous fishing.”

It should be further noted that the definition is qualified by requiring that such effort (1) be “in compliance with any applicable international fishery agreements,” and (2) in compliance “with the laws of such foreign nation.” Thus, any breach of multilateral or bilateral agreements to which the Soviet Union is a party relating to fisheries off the United States coast would presumably be grounds for denying the privileges attached to establishment of traditional fishing effort.

Even should the Soviet Union meet the definitional test of “traditional foreign fishing,” the bill further provides that such rights shall not be recognized “unless any foreign nation claiming such rights demonstrates that it grants similar traditional fishing rights to citizens of the United States within the contiguous fishery zone of such nation, if any exist, or with respect to anadromous species which spawn in the fresh or estuarine waters of such nations.” It is unclear whether reference to the “contiguous fishery zone of such nation” refers only to one of equal proportions with that claimed by the United States under the bill, or would include present 12-mile zones. “Contiguous fishery zone” is defined in the bill as “a zone contiguous to the territorial sea of the United States within which the United States exercises exclusive fishery management and conservation authority,” so it would appear not to be limited to broad zones. Thus, the Soviet Union would be required to demonstrate that it granted traditional fishing rights to United States citizens in its claimed fishing zone. However, the qualification in the definition of “contiguous fishery zone” that the area be outside the territorial sea would at present make this a nonburden, since the Soviet Union also claims a 12-mile territorial sea. It is therefore my view that reciprocity would only have to be granted to fishery zones claimed by the Soviet Union beyond twelve miles, though the United States Government might take a different view based on its adherence to a 3-mile maximum breadth for the territorial sea.

Assuming that the tests so far discussed are met, there still remains the requirement of section 5(d)(2) that nations exercising foreign fishing rights must pay reasonable fees established by the Secretary of Commerce. Such fees, according to the bill, are to be set in an amount “sufficient to reimburse the United States for

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* S. 961, 94th Cong., 2d Sess. § 5(a) (1975).
* Id. § 5(c).
* Id. § 3(4).
administrative expenses incurred pursuant to this section and for an equitable share of the management and conservation expenses incurred by the United States in accordance with this Act, including the cost of regulation and enforcement.”

As for existing United States-Soviet Union fishery treaties concerning United States coastal stocks, the bill provides that the Secretary of State in cooperation with the Secretary of Commerce shall review such agreements to “determine whether the provisions of such agreements are consistent with the purposes, policy, and provisions of this Act.” If a finding of inconsistency is made, the Secretary of State is directed to “initiate negotiations to amend such agreement.” However, the section contains a proviso, as follows:

[N]othing in this Act shall be construed to abrogate any duty or responsibility of the United States under any lawful treaty, convention, or other international agreement which is in effect on the date of enactment of this Act.

That would seem clear enough on its face—current agreements between the United States and the Soviet Union would be honored until their expiration—except for the policy declaration in section 2(c)(2) of the bill which provides that:

It is further declared to [be] the policy of the Congress in this Act—

(2) to authorize no action, activity, or assertion of jurisdiction in contravention of any existing treaty or other international agreement to which the United States is party other than that necessary to further the purposes of this Act...

Since the principal purpose of the bill is “to take emergency action to protect and conserve threatened stocks of fish by asserting fishery management responsibility and authority over fish in an extended contiguous fishery zone,” it is arguable that, section 7(b) notwithstanding, the protection of threatened stocks of fish may require abrogation or modification of existing international agreements, including bilateral treaties between the United States and the Soviet Union. The purpose of the “other than necessary” provision, however, relates primarily to the enforcement sections of the Act.

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77 Id. § 5(d)(2).
78 Id. § 7(b).
79 Id.
80 Id.
81 Id.
82 Id. § 2(c)(2) (emphasis added).
83 Id. §2(b)(1).
Section 10 provides for enforcement by the Coast Guard within the 200-mile area, including the rights to board and inspect vessels, to arrest persons if reasonable cause exists to believe that such persons have committed acts prohibited by law, and to seize fish and gear found on vessels engaged in acts violative of the law. Enforcement thus shifts from flag state (applicable under a high seas regime) to coastal state because of the provision of section 9(a)(2) which makes any violation of existing fishery agreements a violation of the new law (provided they are reviewed as required by section 7(b)). The provision modifying the nonabrogation language, then, reflects a de facto change in those treaties utilizing flag state enforcement to reflect the new regime of coastal state enforcement. Though such a step does not affect the substance of existing fishery arrangements, the change in enforcement procedures might result in a charge of treaty violation by distant water fishing nations. However, such a step does not seem likely in view of the bargaining position factor discussed above—since any distant water fishing nation must essentially come with "hat in hand" to negotiate for future access rights, it is not likely to unduly ruffle the sensibilities of the coastal state off whose coast it must seek those rights.

IV. CONCLUSIONS

a. The Third United Nations Conference on the Law of the Sea is not likely to produce a timely, comprehensive, and widely accepted agreement on the law of the sea. Accordingly, no global fishery management treaty can be expected in the near future.

b. The opinion of the International Court of Justice in the Fisheries Jurisdiction Cases is probably not an accurate reflection of the customary international law rules applicable to high seas fisheries and, in any event, is so lacking in detail and specificity as to be relatively useless as a general guide to fisheries management conflicts.

c. The United States is almost certain to adopt, by congressional act, a 200-mile exclusive fishing zone in 1976. The most likely form of that law is the current version of the "Magnuson Bill."

d. The "Magnuson Bill" approach will place the United States in a superior bargaining position vis-à-vis the Soviet Union insofar as coastal fisheries exploitation is concerned. It is unlikely to result in exclusion of all foreign fishing effort, but rather to admit limited amounts of distant water fishing subject to regulations and the payment of reasonable license fees. Current bilateral arrangements will almost certainly be honored until their conclusion, save for the imposition of coastal state enforcement of such treaty provisions.
Problems pertinent to the utilization of living resources of the World Ocean have drawn world public attention. Peculiarly, the World Ocean is indeed a granary for mankind. Notably rich crops are harvested every year from its blue fields, reaching in recent years 70 million tons of fish, invertebrates and algae, which provide a supply of about 20 percent of the animal protein in the food ration of the world's population.

The rapid growth of population, as well as the aspirations of many states, primarily developing countries, toward considerable improvement of the living conditions of their peoples, naturally leads to an increasing demand for a greater volume and quality of food products, including fish. This demand becomes ever more urgent, regretfully, because of the gradual deterioration of the food supply for the population of the world.

It is this circumstance that has been particularly essential in the scope of problems discussed at many international conferences bearing on the utilization of the living resources of the ocean. It has been the leading factor in a number of practical decisions adopted by many countries aimed, in fact, at dividing the World Ocean and its biological resources into areas of interest. As is known, these trends, and the legal acts that followed, maintain that many coastal states find it necessary to establish wide 200 mile economic zones off their coasts so that the local biological resources could be exploited within these limits solely by the fishermen of these countries.

This position is being adhered to by the overwhelming majority of developing nations. Consideration of these positions has been the major factor which is to turn the scale when decisions are made at the Third U.N. Law of the Sea Conference, the successive phases of which were in Geneva (1973), Caracas (1974) and Geneva (1975).

In analysing this point of view it appears to me that it has been

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mostly political and economic factors that have been pressing in this whole discussion, and have given birth to this position, without due regard to the specific features of living resources. At the same time it is clear enough that any recommendations and decisions made at international conferences of this sort should be primarily aimed at reasonable as well as effective utilization of the World Ocean’s biological resources by mankind. It is therefore natural that such decisions should first of all be based on substantial scientific data on the biology, distribution, behaviour and abundance of the inhabitants of the ocean.

I would dare say that the contemporary scientific knowledge of oceanic biological resources and their peculiarities was not duly taken into account at the international conferences which have taken place. If the decision to establish the economic zones as mentioned above is adopted, humanity will have an instrument in its hands which will weaken and, in the future, probably destroy the living resources of the World Ocean, instead of protecting them.

As we know, many countries have estimated possible results of the universal validation of such economic zones. Their finding is that 38 percent of the entire water area of the World Ocean would be closed to foreign fisheries. They assume that there will remain about 60 million tons, or 70 to 80 percent of the world’s potential catch of fish and large invertebrates, within the limits of these zones. Moreover, the fact that at present about 90 percent of the total world catch is taken mostly from the coastal regions of the World Ocean, i.e., roughly from within 20 percent of its water area, undoubtedly enhanced the enticing side of these estimations for future legal decisions. In other words, it appears to many that the adoption of the decision to establish a 200 mile economic zone would endow these areas of the World Ocean with special rights, thereby not only facilitating the development of fisheries in the coastal states, but also raising the world’s fishing potential through a more effective regulation of fisheries by each of these countries.

Conversely, such a decision could cause a grave imbalance of the oceanic ecological system, followed by a sharp decline in the biological productivity of the World Ocean, which I shall try to prove later.

It should be taken into account that the numerous ecological systems of quite a variety of species which determine the biological productivity of the World Ocean, as well as those oceanological processes which also have a noticeable impact on this productivity, are greatly interconnected, mutually very much dependent, and,
taken as a whole, can be regarded as a uniform biological system of the World Ocean.

Since the waters of the World Ocean are very mobile, especially its surface layers of up to 500 to 1000 meters where the processes of biological production are most extensive, pelagic food organisms drift long distances; fish and other animals migrate for food and spawning; eggs, larvae, young food and fishing objects are sometimes carried away for many hundreds and thousands of miles. The populations of many commercial and food animals are closely interconnected, primarily by similar food resources, areas of reproduction, etc. At present we are not aware of any population of significant size in the World Ocean which is absolutely local and independent of the variations in the abundance of other populations of sea inhabitants.

Some data have been accumulated during recent years, and more are being obtained now, which corroborates relationships of this kind, the exclusively great interdependence of separate ecological systems of the World Ocean, and their great vulnerability when one element only is utilized commercially.

Let us consider some examples of this kind. The extremely long distances of migrations of such anadromous and catadromous fish as the Atlantic and Pacific salmon and eel are known well enough. Salmon migrate from the open areas of the northern Atlantic and Pacific Oceans where they feed to the rivers in the north of Europe, the northeast extremity of Asia, and the northwestern coast of America. Eel migrate from European rivers to the Sargasso Sea, located in the equatorial part of the Atlantic Ocean. These obvious and well analysed migrations, running for many thousand kilometers and crossing every zone existing or capable of being established by man, constitute special characteristics of these fish. As we know, there was a special discussion of a legal character at the above mentioned conference concerning these fish. These migrations are a classic example of the fact that animals do not know country boundaries. This must be taken into account in determining the legal background connected with the utilization of biological resources inhabiting the World Ocean.

Other examples of a similar nature can be given which, in many cases, have to do with populations of commercial species of greater abundance.

The Pacific sardine (*Ubacu-Ivasi*) which spawns off southern Japan is well known. During the peak period of its abundance, the species penetrated far north, reaching the shores of Korea, Primorie,
Hokkaido, Sakhalin and even Kamchatka. One may recall that during the years of high abundance of its stocks, the total catch of this small fish by Korean, Soviet and Japanese fishermen reached three million tons, and that the period of depression is again being followed by abundant growth. Undoubtedly in the coming years this fish will be taken in the spacious areas of the northwestern Pacific Ocean by fishermen of at least four countries.

As many specialists know, several species of saury have a vast distribution area. Those species spawning in the northwestern Pacific Ocean are utilized commercially more extensively. It turned out that a great number of larvae and the young of this fish are carried by the flow of Pacific currents to the northern and northeastern parts of the ocean to be recruited into the populations off Canada and the United States.

Hence, saury stocks are very widely scattered throughout the northern Pacific Ocean from a few centers of reproduction, located, as a rule, in the relative vicinity of the shores of some countries (Japan, the Soviet Union, and the United States). The rational exploitation of this quite abundant species, whose biomass is estimated to be many millions of tons, should naturally be carried out with due regard to this peculiarity of its distribution.

When speaking of the northern Pacific Ocean, the Pacific halibut also deserves mention. It migrates from the eastern coast of Kamchatka, across the Bering Sea and the Gulf of Alaska, to California, i.e., within the coastal waters of the Soviet Union, the United States and Canada. The migrations of black cod have quite a similar pattern.

The northern Atlantic Ocean is another area inhabited by many important commercial species with extensive migrations, emphasizing their ignorance of the possible limits of 200 mile economic zones. An example can be made of the Arctic-Norwegian cod spawning close to the Lofoten Islands, leaving then for the Barents Sea, coming close to Spitsbergen, and thus occupying a tremendous area within the northeastern Atlantic Ocean.

Up to three million tons of cod of this population are, in fact, taken by fishermen of all countries in some years, thus making this species a most important object of sea fisheries.

The population of Scandinavian herring can be given similar characteristics. This species also spawns in the vicinity of the Norwegian coast, but leaves for feeding mainly in the Norwegian Sea, and also in the Barents Sea, thus going far beyond the limits of the probable economic zones of some countries.
It should be remembered that the volume of catch of this herring in some years reached three million tons, and it once was the most important species in the total world yield of herring.

Another species which can be mentioned here is the redfish, whose adults and larvae make extensive migrations through the northern Atlantic Ocean latitudes between the waters adjacent to the American and European continents.

Poutassu provides a potential yield on the order of two million tons. It inhabits the open areas of the northeastern Atlantic Ocean almost entirely away from coastal waters, which is another proof of its offshore distribution. A similar pattern of distribution is typical of saury in the northwestern Atlantic Ocean, whose abundance in that area is sufficiently great and whose area of distribution is extremely vast.

The wide oceanic distribution of such a commercial species as grenadier, which is found in relatively deep areas, is even more manifest. The chief spawning area of this species is the middle of the mid-Atlantic underwater ridge. Larvae and young fish are spread from this area of reproduction to Labrador, Greenland, Iceland, Spitsbergen and northern Norway. Hence, the abundance of this species and the consequent efficiency of its fishery in the coastal zones of the northern Atlantic Ocean fully depend upon the status of the main reproductive part of this population found in the area of the underwater ridge, many hundreds and even thousands of miles from the present areas of fishery.

A somewhat different example can be given of the Patagonian hake, dwelling near the Atlantic coast of South America. During some periods of the year it leaves the coast for much deeper areas to spawn and is found beyond the economic zones. The so-called Falkland round herring and, especially, Patagonian poutassu are even more pronounced oceanic inhabitants which leave the Patagonian shelf during the warm period of the year in search of areas rich in food, penetrate far into the Antarctic waters, and feed there extensively.

In addition, if one recalls the typical inhabitants of the epipelagic layer of the World Ocean, primarily large and small tuna (with a potential catch on the order of three to five million tons), marlins, swordfish, sailfish, sharks and many species of squid and other representatives of this most spacious central region (with an area of over 100 million square kilometers), and takes into account that the catch of these species can be on the order of 10 million tons, one will understand that the fishing fauna of the World Ocean cannot be
considered tied up merely to its coastal areas, but that this fauna is distributed very widely throughout vast oceanic areas.

In discussing the problem of rational utilization of the living resources of the World Ocean, and the methods of its legal limitations, one ought to place a particular emphasis on the close interconnection between many links of ecological systems, including the connection between the abundance values of many commercial species constituting these systems.

It is a well known fact that as a result of a sharp decline in the abundance of Californian sardine, the size of anchovy population in this area has increased. A similar process was observed off the coasts of South Africa. Intensive fishing together with unfavourable natural factors in recent years has led to a decline in the abundance of herring, rockfish and some other species in the North Pacific, which has given rise to a sharp growth of pollock stocks and considerable expansion of its area. Pollock now is found in large quantities off British Columbia and more southerly where it did not occur earlier. On the other hand, the abundant young pollock is preyed upon by juvenile herring intensively, which is a considerable obstacle to the process of restoration of the stocks of this valuable species now in depression.

No doubt there exists a dependence between the drop in the abundance of large cod in the northern Atlantic Ocean and the significant increase and changes in distribution of capelin and Polar cod in these areas. Such changes have brought about a manifold increase in catches of these fish, which in recent years reached several million tons.

A hypothesis suggests itself that the decline in the stocks of sperm whales capable of transoceanic migrations can be accompanied (and, in fact, is accompanied) by an increase in the abundance of squid in many areas of the World Ocean, and by a decline in such commercial pelagic fish as saury, sardine, anchovy, etc. This means that the intensity of Antarctic whaling can affect the efficiency of fisheries in many countries located many thousand miles away from this area.

One can find many more similar examples of how greatly the living resources of the World Ocean are interdependent, but what has already been said indicates that it is impossible to regulate sea fisheries more or less objectively on the basis of isolated efforts by separate countries, which have "in their possession" small areas of the World Ocean adjacent to their shores.

One should not forget that according to present estimates, the
potential yield of fish and large invertebrates in the World Ocean can be on the order of 90 to 100 million tons, while the volume of possible catch of the above mentioned species only reaches 40 to 50 million tons; *i.e.*, these inhabitants of the ocean determine the effectiveness of the utilization of biological resources of the World Ocean. As we have tried to show, their exploitation cannot be performed by any separate country without due coordination of efforts with other fishing countries. It appears therefore that any decision pertinent to international jurisdiction and aimed at rational utilization of the living resources of the World Ocean must be accepted solely with due regard to the biological peculiarities of the ocean.

Only the coordinated decision of all interested countries, which are responsible both for the fate of living resources and for their rational and effective utilization, will produce the soundest international legal acts.
AN INTERNATIONAL REGIME FOR THE SEABED BEYOND NATIONAL JURISDICTION*

Thomas M. Franck**

I. INTRODUCTION

It was concern over the disposition and husbanding of the as yet only faintly apprehended resources of the seabed beyond national jurisdiction that impelled Ambassador Pardo of Malta to direct the attention of the United Nations toward the concept of a "common heritage of mankind." This resulted in the declaration1 passed by the United Nations General Assembly on December 17, 1970, which sought to establish the principle that the seabed and its resources beyond national jurisdiction were not subject to unilateral appropriation by any state or persons. Rather, the U.N. declared that this area would be developed in accordance with a new international regime to be created by negotiation.2

The General Assembly thereupon moved to enlarge both the composition and mandate of its ad hoc Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction3 and to charge it with responsibility for convening a global "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 resources of the sea-bed and ocean floor. . . ."4

This preparatory committee began having meetings in Geneva in March and July through August of 1971, and in New York in October of 1971. During the inceptive year it elected the Sri Lanka Ambassador, Mr. H.S. Amerasinghe, as Chairman and divided its mission among three subcommittees. Subcommittee I was charged with the task of preparing

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* Mr. Franck's article also appears in 13 OSGOODE HALL L.J. (1975). The Editors of the Georgia Journal of International & Comparative Law wish to thank the Osgoode Hall Law Journal for granting permission to publish this piece concurrently.


2 Id.
draft treaty articles embodying the international regime—including an international machinery—for the area and resources of the sea-bed and the ocean floor, and the sub-soil 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 . . . economic implications resulting from the exploitation of the resources of the area . . . as well as the particular needs and problems of land-locked countries . . .

Already during this session, the subcommittee had before it the thoroughly formulated but radically divergent views of various states and groups of states: (1) a draft convention prepared by the United States;6 (2) a working paper by the United Kingdom;7 (3) proposals by France;8 (4) a Tanzanian draft statute for a seabed authority;9 (5) Soviet draft articles for a treaty;10 (6) a Polish working paper;11 (7) a Maltese draft ocean space treaty;12 (8) a working paper submitted jointly by 13 Latin American States;13 (9) a preliminary working paper introduced by seven land-locked, shelf-locked and zone-locked (“geographically disadvantaged”) states;14 and (10) a Canadian working paper.15 As the rapporteur observed with considerable understatement, “[i]t was generally accepted that the establishment of an international sea-bed regime should be based on the Declaration contained in resolution 2749 (XXV). But the

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various draft proposals and opinions expressed reflected different interpretations as to the nature of this relationship. . . .”

During the period from 1971 to 1973, the First Committee of the conference, primarily under the chairmanship of Paul B. Enyo of the Cameroon, and with a working group headed by C. W. Pinto of Sri Lanka, succeeded in preparing an extensive set of alternative texts for 52 articles of a draft convention on the law of the sea. These again reflected sharply divergent views, but at least presented them in an organized fashion suitable for serious negotiations. Thus, by the time the first working session of the Third United Nations Conference on the Law of the Sea was convened in Caracas between June 20 and August 29, 1974, the First Committee, in the view of one United States representative, “was far ahead of the other Committees of the Conference.”

By the time the next meeting of the Conference had concluded in Geneva on May 9, 1975, another United States representative, Ambassador John N. Moore, expressed exactly the opposite conclusion. In his opinion the First Committee was now far behind the other two (territorial sea and economic zone; preservation of the marine environment) in progressing toward an acceptable universal convention on the law of the sea. The object of this paper, therefore, is to examine the causes of this loss of momentum and to examine the prospect of avoiding a situation in which an otherwise agreed upon universal convention—which now appears within reach—with its substantial benefits for all mankind, is allowed to founder on the issue of an international regime.

At the outset, it is important to note that the First Committee’s loss of momentum toward an agreeable text is not due to indolence. At its plenary meeting on April 18, 1975, the Geneva Conference requested the chairman of each of the three main committees “to

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18 The basic structure of the Committee was carried over into the Conference. Ambassador Amerasinghe, Chairman Enyo, and Mr. Pinto simply assumed at the Conference positions analogous to those held during the sessions of the Committee; the First Sub-Committee essentially became the First Committee of the Conference, albeit with the enlarged membership of all participating states.
20 Interview with Ambassador John N. Moore, in Washington, D.C., May 19, 1975 [hereinafter cited as Moore Interview].
prepare a single negotiating text covering the subjects entrusted to his committee." Chairman Paul Engo, in a minor miracle of drafting zeal, produced a complete text of 75 articles and one annex—a remarkable feat considering the variety and disparity of views within his committee. However, the difficulty with this draft is that to a greater extent than those prepared by the chairmen of the other two committees, it represents one tendency—namely, the tendency of the "Group of 77" [hereinafter sometimes referred to as the 77] or the developing countries (which now actually number more than 100)—and fails to achieve a workable reconciliation with the strongly held views of the United States, the Soviet Union, Canada, Europe, Australia, and New Zealand. These differences extend over almost but not quite all of the issues within the jurisdiction of the First Committee.

II. THE AREA SUBJECT TO AN INTERNATIONAL REGIME

Fundamental to an agreed convention establishing a seabed regime is a consensus on the area to be included. Such a consensus does not yet exist. A study made in 1972 by the United States Geographer analyzes the areas that would be allocated to each state if outer limits of national jurisdiction were set, respectively, at 40 miles from shore, at 200 miles, at a depth of 200 meters and at the edge of the continental margin. Notably, the study showed that the United States, the Soviet Union, Canada, Australia and Indonesia stood to be five of the six top gainers among all of the states under any of these four options. The growing awareness of the fact that they could not lose made both superpowers—originally reluctant to accede to the demand of the Group of 77 for a 200 mile economic zone under national jurisdiction—much less opposed to schemes for reducing the area of seabed under international jurisdiction.

Six different offshore limits of the economic zone have been discussed by the Committee and Conference at various times: (1) 40 miles; (2) 200 meter isobath; (3) 500 meter isobath with a 100 mile minimum; (4) 3,000 meter isobath; (5) 200 miles; and (6) the edge

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21 Third United Nations Conference on the Law of the Sea, Informal Single Negotiating Text, pt. I, at 1, U.N. Doc. A/CONF.62/ WP.8 (1975) [hereinafter cited as Negotiating Text]. The President of the Conference has stated that the Negotiating Text "should take account of all the formal and informal discussions held so far, would be informal in character and would not prejudice the position of any delegation nor would it represent any negotiated text or accepted compromise." Id.

22 Bureau of Intelligence and Research, Dep't of State, Limits in the Sea (Int'l] Boundary Study Ser. A, No. 46, 1972).

23 Id. at 5-34.
of the continental margin. The economic implications of several of these alternatives have been explored in some detail. The limit which is adopted obviously affects the extent of resources available to an international regime.

Under the 40-mile limit, 90 percent of the world’s proven offshore hydrocarbon resources and 59 percent of ultimate as yet unproven potential hydrocarbon reserves are believed to be within the economic zones. No known mine-grade manganese nodules would be within the national areas, and it is expected that rich mineral deposits (e.g., gold, platinum, zircon, and sulphur) will be exploited beyond the 40 mile limit in the future. In the case of the 200 meter isobath limit, almost all of the proven reserves and 68 percent of total potential seabed petroleum resources would be within the economic zone. While no manganese nodules are located landward of the 200 meter isobath line, some of the minerals noted above will probably be found. If a 3,000 meter isobath limit is used to define the economic zone, all known reserves and 93 percent of potential hydrocarbon resources will come under exclusive national control. Moreover, some quantities of manganese nodules (albeit less abundant than at lower depths) and many of the minerals listed above would also be within the national economic zones. The 200 mile limit would embrace all known petroleum reserves and approximately 87 percent of estimated total seabed hydrocarbon resources, as well as about 10 percent of possible mine-grade manganese nodules, all of the presently exploitable mineral resources, and most of those having potential economic value in the next few decades. The edge of the continental margin limit would include all potential hydrocarbon resources.

The first deduction to be drawn from this evidence is that under any conceivable new global convention, the principal benefits will accrue to already affluent states, including the United States, the Soviet Union, Canada and Australia. Among the less developed, Indonesia, Argentina, Mexico, and Brazil (the wealthier of the poor) stand to gain substantially, while China, Japan, Vietnam, the Philippines and India have high hopes of finding large petroleum deposits in the sizable areas between their coasts and the edge of

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2' Id. at 34-35.
3' Id. at 36.
4' Id. at 37-38.
the continental margin. Most other states probably stand to gain little.28 Landward of the 200 meter isobath line there may be as many as 1,544 billion barrels of oil. At a price of US$5.50 per barrel, the aggregate value of these reserves is US$8,492 billion.29 However, 13 nations with gross national products greater than US$1,000 per capita have approximately 66.2 percent of this oil.30 In effect, no conceivable economic zone agreement, despite its being the brain-child of the less developed countries (prodded by the Latin Americans), is likely to have anything but a reinforcing effect on the present overall global disparity between the rich states and the poor, although it might incidentally make a few of the poor less so. To a large extent this outcome is the fault of the poor nations themselves. Instead of pressing for some system of general revenue sharing in the huge windfall area that will constitute the economic zone, they have instead focused their attention on establishing a regime favorable to their interests in the area beyond national jurisdiction even as the size and economic importance of that area has continued to shrink with the full consent of the Group of 77. This mismanagement of the less developed countries’ strategy is primarily attributable to the genius of a relatively small number of broad-shelf and rich coastal fisheries states in their ranks who were able to persuade the rest that their interest also lay in the direction of very broad economic zones established solely for the benefit of the coastal state.

This need not have been a foregone conclusion. In 1970 the United States supported the notion of a worldwide renunciation of any sovereignty claims to the seabed beyond a depth of 200 meters.31 Its draft treaty of August 3, 1970, envisioned the creation of “Coastal State Trusteeship Areas” in the area beyond the 200 meter depth, embracing the continental margins,32 in which revenue derived from seabed exploitation would be equitably shared and in which an international authority would share rulemaking jurisdiction with the coastal state. At that time, Canada, as another major broad-shelf beneficiary, took an equally generous position, actually pro-

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30 Id. at 2.


32 Id. at 212.
posing in 1969 to share revenues from the entire area between the 12 mile territorial sea and the continental margin.\textsuperscript{33} When these proposals elicited no visible response from the Afro-Asian States that would have stood to gain the most, the position was quietly downgraded by the United States, and abandoned outright by Canada.\textsuperscript{34} At Caracas, the United States indicated its willingness to go along with the Group of 77 to accept a 12 mile territorial sea and a 200 mile economic zone, so long as these changes in the status quo were part of a comprehensive package including freedom of navigation and overflight.\textsuperscript{35} The United States, like Canada, also indicated that where the continental margin extended more than 200 miles from shore, the economic zone should embrace the additional area.\textsuperscript{36}

The Soviet position also evolved toward broader national areas of jurisdiction and commensurately smaller international areas of jurisdiction. At Geneva in 1973, the Soviets had supported a 12 mile territorial sea\textsuperscript{37} and a limit for the economic zone at the 500 meter isobath (with a minimum of 100 miles from the baselines from which the territorial sea is measured).\textsuperscript{38} At Caracas, the Soviets, like the United States, embraced an economic zone of 200 miles, contingent upon reaching agreement on straits transit and overflight as well as upon an agreed 12 mile limit for the territorial sea.\textsuperscript{39} France, too, at Caracas, agreed that "[f]or reasons of simplicity and of fairness to the countries lacking a continental shelf, a distance criterion should be used" and "favored a limit of 200 nautical miles from the baselines."\textsuperscript{40}

\textsuperscript{33} Martin, Canada Won't Share, is Rebuffed, The Globe and Mail (Toronto), April 19, 1975, at 7, col. 4.
\textsuperscript{35} Statement of Mr. Stevenson (United States) before the 38th Meeting of the Plenary Session of the Third U.N. Conference on the Law of the Sea, July 11, 1974, in 1 CARACAS, supra note 34, at 160.
\textsuperscript{38} Id. at 29.
\textsuperscript{40} Statement of Mr. Jeannel (France) before the 37th Meeting of the Plenary Session of the
At their spring 1974 meeting in Nairobi prior to the Caracas session, the Group of 77 still found themselves basically grouped around the 200 mile economic zone concept, but with some favoring an option by the coastal state to extend its economic jurisdiction to the edge of the continental margin where that was more than 200 miles from shore, while still others, including some of the land-locked states, called for a less than 200 mile economic zone or preferred it to be a regional, rather than a national zone. At Caracas, an irresistible momentum emerged around the limit of 200 miles or more, and when the issue was again taken up in Geneva in 1975, the overwhelming majority of nations had formally lined up behind an economic zone of at least 200 miles, leaving open the question of any further extension to the edge of the continental margin.

One ray of hope did emerge for salvaging something for the cause of an equitable international system out of all this national aggrandizement. The unofficial working group of approximately 35 states convened by the Norwegian Minister Jens Evensen early recognized during meetings in New York in mid-February 1975, that the idea of revenue sharing could be revived in a limited way so as to gain general acceptance among all states for the claims of broad-shelf nations to an economic zone incorporating the area between 200 miles and the edge of the margin: a distance which, in Canada’s case, could be as much as 600 miles off the Newfoundland coast.

The United States continues to support some form of sharing in this area, proposing that it begin in the sixth year of production at one percent of “wellhead market value,” rising to five percent after ten years. Canada, at the end of the 1975 conference, has again accepted some form of revenue sharing in this area. Great Britain has indicated a willingness to “look seriously” at sharing but Australia, another broad-shelf state with a margin of up to 600 miles, has so far refused to go along.

In any event, the international area has now been firmly forced back to the seabed beyond the continental margins. While the draft text prepared by the chairman of the Second Committee at the end

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41 Working Group Appointed to Prepare for the Nairobi Meeting of the Group of 77 on the Law of the Sea, Report, Spring 1974, (mimeographed) [hereinafter cited as Nairobi Report]. This is an informal paper of limited distribution which has not been assigned an official U.N. document number.

42 LOGAN, supra note 34, at 24.

43 Martin, Canada Won’t Share, is Rebuffed, The Globe and Mail (Toronto), April 19, 1975, at 7, col. 4.
of the 1975 Geneva Conference distinguishes between the regime of the economic zone and the Continental Shelf. This appears to be largely a distinction without a difference as far as the regime of the shelf is concerned. The result would grant to coastal states exclusive "sovereign rights for the purpose of exploring [the Continental Shelf] and exploiting its natural resources," to the outer edge of the continental margin.

In sum it appears that the international regime will be confined to an area seaward of the 200 mile limit or to an area seaward of the edge of the margin, whichever is the farthest from the coastline, and that accordingly, its jurisdictional importance, range of activities, and revenues will be far less than had originally been proposed by the initial United States draft treaty. On the other hand, it again appears possible that there will be revenue sharing in the area between 200 miles and the continental margin, and, in the estimate of United States authorities, even though only a few states would be required to make contributions under such a project, "the amount accruing from this source to the international authority would, for the foreseeable future, substantially exceed revenues derivable from the seabed beyond national jurisdiction." For this reason a few delegations, the French in particular—even though their coastal configuration does not place them in the position of having to share with the international authority any part of their coastal production—are opposed to the proposal because they fear that it would unduly strengthen the authority and make it too independent: a sort of world government of the seas. To France, a continental margin revenue sharing scheme would be acceptable only (1) if it bypassed the international authority and (2) if revenues derived from production were distributed directly by contributors to recipients in accordance with an agreed formula laid down in the treaty. The outcome of this unresolved issue will affect considerably the viability and future development of an international authority.

III. THE POWERS AND FUNCTIONS OF AN INTERNATIONAL AUTHORITY

The degree to which nations are willing to entrust independent supervisory powers to an international authority is inversely propor-

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44 Negotiating Text, supra note 21, pt. II, arts. 45, 62.
45 Id. pt. II, art. 62.
46 Id. pt. II, art. 63.
47 Moore Interview, supra note 20.
tional to individual national mining capabilities. Thus, the "capable" nations favor—at the most—some form of licensing or contractor system, while the developing counties support a stronger authority in which they can exercise a large degree of control.49

The United States, Canada, the European Countries and Japan have consistently pressed for freedom of exploitation under minimum conditions of international standards and regulations while the developing countries have wanted an international authority, which they designate "the enterprise," to have maximum powers. The United States favors a seabed mining system in which access will be permitted under conditions favoring investment,50 but has asserted that an international authority must have basic rights: (1) to protect the environment; (2) to accumulate data on matters relevant to its function; (3) to prevent unauthorized exploitation; (4) to require that mining be carried out safely; (5) to provide for overseas training and technology transfer programs set up to benefit the developing countries; (6) to insure against monopolies by a few developed states; and (7) to participate itself in the benefits of resource development.51 Similarly, an international authority should assume certain duties: e.g., (1) to assure free, equal and nondiscriminatory access for all states to deep sea resources and (2) to provide stable investment conditions. Further, (3) it should avoid needless regulation and protect proprietary data,52 and (4) its control should be limited to matters directly related to the exploration and exploitation of seabed resources.53 Initially, the United States, Japan, and Western Europe wanted an international authority to be limited to granting exclusive mining licenses to natural and juridical persons,54 but the United States has since begun to broaden its approach to include other, presumably more complex "legal arrangements"55 which perhaps would include some forms of joint venture.56 The United States prefers an international authority not to operate as a mineral exploiter itself, but prefers such an authority

49 For a comparative analysis of national positions see First Committee Working Group, Proposals Regarding Conditions of Exploration and Exploitation, March 18, 1975 [hereinafter cited as CP/Working Paper No. 2]. This is an informal paper of limited distribution which has not been assigned an official U.N. document number.
51 71 STATE, supra note 36, at 403.
52 Id. at 404.
53 Id. at 405.
55 Sohn, supra note 19, at 3.
56 Moore Interview, supra note 20.
to grant areas to state and private enterprises which, in the case of "hard minerals," would not exceed 30,000 square kilometers—areas half the size proposed by Western Europe.\textsuperscript{57} Lastly, the United States has favored a treaty which would set out the basic conditions of exploitation quite specifically in an appendix.\textsuperscript{58}

The Soviet position is only to a limited extent different from that of the United States. They have supported a licensing system like the one proposed by Washington, but would make lots for exploitation available only to nations, and not available to private enterprises.\textsuperscript{59} The Soviet Union has also pioneered the idea of reserving lots for later exploitation by developing nations, a proposal which has had a sympathetic hearing in the United States delegation and which is also supported by France\textsuperscript{60} and some other Western States. The French have also pressed for very specific regulation in the treaty itself of the terms of licensing and exploitation. For example, the French have pressed for specific regulation of the term of years, and the size and condition of leases, thereby leaving less discretionary or rulemaking power in the organs of an international authority.\textsuperscript{62}

At Caracas, the 77 submitted their proposal to the First Committee. It states:

All activities of exploration of the Area and of the exploitation of its resources and all other related activities including those of scientific research shall be conducted directly by the Authority. The Authority may, if it considers it appropriate, and within the limits it may determine, confer certain tasks to juridical or natural persons, through service contracts, or association or through any other such means it may determine which ensure its direct and effective control at all times over such activities.\textsuperscript{63}


\textsuperscript{58} United States: Draft Appendix, supra note 57, passim.


\textsuperscript{60} Id.

\textsuperscript{61} Statement of Mr. Jeannel (France) before the 37th Meeting of the Plenary Session of the Third U.N. Conference on the Law of the Sea, July 11, 1974, in 1 CARACAS, supra note 34, at 155; statement of Mr. Jeannel (France) before the 6th Meeting of the First Committee of the Third U.N. Conference on the Law of the Sea, July 16, 1974, in 2 CARACAS, supra note 39, at 25.


\textsuperscript{63} Draft Articles considered by the Committee at its Informal Meetings (articles 1-21), Aug. 5, 1974, art. 9-B, U.N. Doc. A/CONF.62/C.1/L.3 [hereinafter cited as Draft Articles].
The Group of 77 thus strongly aligned itself with an international authority having wide powers to regulate all activities in the international area which would conduct exclusive mining activities itself through service contracts with appropriate parties.44 The service contract approach was intended by the 77 as a concession to the developed countries,45 but they were careful to provide that "direct and effective control" over all operations will remain with the international authority at all times.46 At Caracas, the 77 did offer to include certain provisions in the regime which were intended to placate the technologically advanced states: (1) contracts would be awarded on a competitive basis; (2) a contractor who fulfills the requirements of one stage would get priority in later stages; and (3) the international authority would have the duty to ensure security of tenure to a contractor, within the terms of the agreement.47 But there is much in the 77 proposals that is left to the discretion of the authority. Namely, the sizes of the areas to be subjected to service agreements are not specified, nor are the time spans of the individual agreements.48

Most private entrepreneurs would almost certainly be unwilling to operate with so little protection. In particular it is quite clear that the 77 see their approach as wholly unlike any form of licensing—which is an unacceptable concept to the third world.49

The 77 further proposed at Caracas that any proceeds collected by a nation through taxing an exploiting enterprise which is its national, must be paid to the international authority. If the state itself is the party to the service contract, an equivalent amount will be paid.50 The central role envisioned by the 77 for an international authority is underscored by several elements added to their position at Caracas: (1) title to the international area, as well as to the resources in it, should be inalienable and reside in the international authority;51 (2) there must be no assignment of contractual rights

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45 Sohn, supra note 19, at 4.
46 Stevenson & Oxman, supra note 64, at 9.
47 Sohn, supra note 19, at 4.
49 Statement of Mr. Truque (Colombia), speaking as Chairman of the Group of 77, before the 11th Meeting of the First Committee of the Third U.N. Conference on the Law of the Sea, Aug. 6, 1974, in 2 Caracas, supra note 39, at 55, 56.
50 Draft Articles, supra note 63, art. 10-B.
51 Group of 77 Text, supra note 68, para. 1.
without consent of the international authority;\(^\text{12}\) (3) the international authority shall constantly be informed of all relevant data uncovered by the contractor;\(^\text{13}\) (4) the international authority can take steps to ensure the efficient and timely performance of service contractors;\(^\text{14}\) (5) a broad right of inspection is vested in the international authority.\(^\text{15}\)

The Canadians, some Europeans, and the Australians, seeking to reconcile the approach of the 77 with that of other states, have suggested a parallel licensing/direct exploitation system.\(^\text{6}\) Thus, Australia has stated that an international authority "should not merely be a regulatory or licensing authority, but should be empowered to enter into other contractual arrangements with States and also to undertake exploration and exploitation on its own behalf when it had accumulated the necessary resources and experience."\(^\text{17}\)

Essentially the developing countries fear that the United States and Soviet approaches would lead to full-scale exploitation of mankind's last frontier by a few technologically advanced nations to the exclusion of the vast majority. The developed states, on the other hand, are concerned that the 77 would set up an international authority controlled by the least advanced states with unlimited authority to curtail production, control marketing, and discriminate in their own favor in allocating mining rights and setting prices.

The *Single Negotiating Text* drafted by the Chairman of the First Committee at the end of the 1975 Geneva Conference sides decisively with the 77's views, despite some efforts at compromise. It establishes an operating enterprise which, "subject to the general policy direction and supervision of the Council" shall "undertake the preparation and execution of activities of the Authority in the Area. . . ."\(^\text{18}\) The governing board of the enterprise is to be heavily controlled by the 77 with the seats being allotted half to Africa, Latin America and Asia, one third to Eastern European and other Socialist states, and one sixth to Western Europe, the United

\(^{12}\) Statement of Mr. Truque (Colombia) before the 14th Meeting of the First Committee of the Third U.N. Conference on the Law of the Sea, Aug. 19, 1974, in 2 CARACAS, *supra* note 39, at 72, 73.


\(^{14}\) Id. § 24.

\(^{15}\) Id. § 30.

\(^{16}\) Stevenson & Oxman, *supra* note 64, at 7.


\(^{18}\) NEGOTIATING TEXT, *supra* note 21, pt. I, art. 35.
States, Canada, Australia, New Zealand and others. It provides for a Hydra-headed bureaucratic system for administering the deep seabed including not only the enterprise and its governing board, but also an assembly, council, economic planning commission, technical commission, tribunal and secretariat. These are discussed below. Within the area beyond national jurisdiction "all rights in the resources are vested in the Authority" including all "title to the minerals or processed substances derived from the area" except as provided by the convention, the rules of the international authority and the terms of contracts made by the international authority. Exploration and exploitation "shall be conducted directly by the Authority" or by states or by entities or persons sponsored by states to the extent the international authority, in its unfettered discretion, decides to share its monopoly. The international authority may also construct processing facilities and engage in transportation or marketing. It may "to the extent that it does not currently possess the personnel, equipment and services for its operations" employ outsiders on service contract. Marketing of its products is to be carried out with a double standard: at not less than international market prices except that lower prices may be charged developing countries. The international authority may enter into joint ventures but these must "ensure direct and effective fiscal and administrative control by the Authority at all stages of operations. . . ." There is no provision for state or private exploitation of the ocean floor except through a joint venture contract with the international authority. But these joint ventures do not approximate the concept as understood in the capitalist states. The international authority is left essentially unfettered discretion in awarding joint venture contracts and setting their terms, except that "selection from among the applicants shall be made on a competitive basis" taking the convention as a whole into account and preference shall be given to an applicant who, pursuant to an earlier contract, is the discoverer. The maximum number of contracts any

79 See id. pt. I, art. 27, para. 1, subpara. c.
80 Id. pt. I, annex IA, art. 1.
81 Id. pt. I, annex IA, art. 2.
82 Id. pt. I, annex IA, art. 3, para. b.
83 Id. pt. I, annex IB, art. 4.
84 Id. pt. I, annex IB, art. 4, para. d.
85 Id. pt. I, annex IB, art. 4, para. e(ii).
86 Id. pt. I, annex IC, art. 6, para. b.
87 Id. pt. I, annex IC, art. 8, para. c.
88 Id. pt. I, annex IC, art. 8, para. e.
state may hold shall be the same for all nations, regardless of size or level of technological development.\(^9\)

There is nothing in the proposed rules to require the international authority to enter into contracts with any parties anywhere. Contractors are required, in accordance with their contract, to give the international authority access to all their secret data to the extent "relevant to the effective implementation of the powers and functions of the organs of the Authority. . . ."\(^9\) The international authority also would have an unlimited right to inspect all facilities of a contractor in the area.\(^9\) Industrial enterprises contemplating this requirement will scarcely be comforted by the ensuing proviso that the "Authority shall not disclose to third parties . . . such of the transferred data as is deemed to be proprietary by the Contractor"\(^9\) given the fact that the international authority, its enterprise and secretariat, will be heavily staffed by persons who, if U.N. experience is any guide, may be presumed to be reporting back to "third parties."

The discretion of the international authority to make rules and regulations is left extremely wide by the Single Negotiating Text's draft annex, particularly as to size of contractually-allotted areas of exploitation and length or renewability of tenure. This virtually unlimited discretion may work well enough if its effect is to cause the international authority and those with advanced technology to bargain in good faith. On the other hand, there is a justifiable suspicion that the developing countries would just as soon see seabed resources—which, despite evidence to the contrary,\(^9\) they continue to see as dangerous competitors to their own land-based resources—continue to go unexploited. If so, the unlimited discretion to set terms would facilitate the international authority in taking an uncompromising position vis-a-vis developers, which would be anything but serious arm's-length negotiations.

On a more constructive note, the Single Negotiating Text does provide that in the event of a dispute between the international authority and the contracting party arising out of interpretation of the convention, contract, or authority rules and regulations, either

\(^{9a}\) Id. pt. I, annex IC, art. 8, para. f.

\(^{9b}\) Id. pt. I, annex IC, art. 10, para. a.

\(^{9c}\) Id. pt. I, annex IC, art. 13.

\(^{9d}\) Id. pt. I, annex IC, art. 10, para. a.

\(^{9e}\) For a study of this question see U.N. SECRETARY GEN., ECONOMIC SIGNIFICANCE, IN TERMS OF SEA-BED MINERAL RESOURCES, OF THE VARIOUS LIMITS PROPOSED FOR NAT'L JURISDICTION, U.N. Doc. A/AC.138/87 (1973). A revised version of this report was prepared for the Secretary General prior to the 1975 Geneva Conference.
party may invoke the dispute settlement procedures established by the convention.\(^4\) This provides, successively, for (1) consultation, (2) negotiation, (3) conciliation or other procedures chosen by the parties and, (4) if these fail to resolve the dispute within one month of its commencement, "any party to a dispute may institute proceedings before the Tribunal, unless the parties agree to submit the dispute to arbitration. . . ."\(^5\) (5) The judgments of the tribunal shall be final and binding and enforceable in the territories of members as if awarded by the highest domestic court.\(^6\) But (6) if the judgment goes against the international authority, there is no "domestic jurisdiction" within which enforcement may be levied. It also should be noted that the Single Negotiating Text seems to contradict this wide grant of judicial review by suggesting elsewhere that the tribunal’s jurisdiction to enter into contractual disputes exists only where specifically provided by a contract.\(^7\) It also appears that the proposed procedures for compulsory judicial settlement of disputes\(^8\) may not yet have been accepted by the Soviet Union and several other states. It may be, however, that the western powers ought to be the ones to be reluctant. Given the proposal that the judges be elected by the assembly on the recommendation of the council—both to be controlled, if the Single Negotiating Text were adopted, by states not notoriously sympathetic to free enterprise—and that the terms of the judges be for only five years, it is more than a little likely that the tribunal will reflect the dominant sociopolitical and economic assumptions of the numerical majority in the other organs of the international authority.\(^9\)

IV. THE DECISION MAKING PROCESS AND THE STRUCTURE OF THE INTERNATIONAL AUTHORITY

Just as the dimensions of a satisfactory role for the international authority depend on the size of the area under its jurisdiction, so, too, designing appropriate powers and discretion for the international authority is closely related to the way power is balanced within and among its organs. The United States position is best

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\(^{10}\) Negotiating Text, supra note 21, pt. I, annex IC, art. 20.
\(^{11}\) Id. pt. I, art. 57.
\(^{12}\) Id. pt. I, art. 59, para. 1.
\(^{13}\) Id. pt. I, art. 32, para. 1(b).
\(^{15}\) Negotiating Text, supra note 21, pt. I, art. 32, paras. 5, 6.
summarized in the words of Ambassador John Stevenson and Bernard Oxman, another United States representative to the Law of the Sea Conference: "The best alternative is to agree on a Council that, in composition and voting structure, sufficiently balances the substantive interest involved to inspire confidence when coupled with precise and enforceable treaty limitations on the substantive scope of decisions."100

The United States in 1970 suggested an international authority consisting of an assembly, a council, an operational arm, and a dispute settlement body. The assembly would be responsible for broad policy guidance and would make decisions by a majority vote of those present and voting.101 The council would handle executive decision making with concentration on the system of exploration and exploitation.102 It would have 24 members, including the six most industrially advanced states, at least 12 developing states and at least two land-locked or geographically disadvantaged states. Decisions by the council would require triple majorities among all the members, the six industrially advanced states and the other 18 members.103 The dispute settlement body (or tribunal) would consist of five to nine judges elected by the council.104 Lastly, the United States has suggested a rulemaking procedure similar to that employed by the International Civil Aviation Organization (ICAO): rules would be drafted by a specialized subsidiary organ, and after council approval, forwarded to all states for review. If after a fixed period, less than one third of the members have objected, the proposed rules would become binding.105 As has been observed, these proposals are light years removed from those of the Group of 77 first circulated in a draft of January 1975 and February 1975.106 A similar proposal had also been put forward earlier by thirteen Latin American States.107 The Group of 77 proposed that the assembly be "the supreme policymaking organ" with power to lay down general

100 Stevenson & Oxman, supra note 64, at 11.
102 70 State, supra note 50, at 15.
103 63 State, supra note 31, at 209, 215.
104 Id.
105 70 State, supra note 50, at 17.
106 These memoranda were circulated privately and have no document number. The February draft is referred to as the "Supplemental Draft Articles of the Working Group of the Group of 77" and contains new drafts of articles 10, 22-24, 32-35 [hereinafter cited as Supplemental Articles].
guidelines. It would vote in substantive matters by a two-thirds majority.\textsuperscript{108} The council would be the executive organ of the authority\textsuperscript{109} and would also vote in substantive matters by a two-thirds majority.\textsuperscript{110} Its membership would be elected by the assembly. Up to one-third of the places would be reserved for states with "special interests"—half of these from among the developed and half from the developing nations. Among the former would be those with most advanced technology and sea investment, as well as the major importers of the land-based minerals which are also produced from the sea. Among the developing states, "special interests" would include the principal exporters of the land-based minerals also found on the seabed, as well as the states with large populations and land-locked and geographically disadvantaged states. The principle of geographical distribution would apply to election of both the special interest and the general members of the council.\textsuperscript{111} In addition there would be the enterprise to explore, exploit, and enter into joint ventures\textsuperscript{112} and a governing board of the enterprise elected by the assembly which would operate by majority vote.\textsuperscript{113}

The Soviet position, like that of the United States, differs markedly from that of the 77. In the Soviet version there would be a conference of all members and an executive board of 30 members, elected on a geographically allocated basis with five members for each of five regions\textsuperscript{114} and one land-locked member from each region.\textsuperscript{115} The conference would take substantive decisions by a two-thirds majority\textsuperscript{116} while the board, wielding most specific powers, would proceed by consensus in matters in substance.\textsuperscript{117}

There are numerous variations on these themes. The Canadian proposal, for example, calls for an assembly in which all members would be represented, which would be empowered to approve budgets, elect members of its executive body (council) and decide on matters referred to it by the council. Assembly decisions would be made by a two-thirds majority vote.\textsuperscript{118} The council would approve

\textsuperscript{108} Supplemental Articles, \textit{supra} note 106, art. 34.
\textsuperscript{109} \textit{Id.} art. 36.
\textsuperscript{110} \textit{Id.}
\textsuperscript{111} \textit{Id.} art. 35.
\textsuperscript{112} \textit{Id.} art. 38.
\textsuperscript{113} \textit{Id.}
\textsuperscript{114} The five regions are the socialist countries, Asia, Africa, Latin America, Western Europe and others.
\textsuperscript{115} Geneva I, \textit{supra} note 5, at 73.
\textsuperscript{116} \textit{Id.}
\textsuperscript{117} Sohn, \textit{supra} note 19, at 7.
\textsuperscript{118} Geneva I, \textit{supra} note 5, at 219.
mining and exploration regulations, manage marketing operations and oversee the distribution of benefits. In constituting the council the Canadian proposal utilizes classes of national interest: level of technology, length of coastline, land-locked status, level of economic development and, not unexpectedly, size of continental shelf. Total membership would not exceed 30, and decisions would be made by a two-thirds majority vote. Canada also proposed the creation of a secretariat which would report to the council and assembly on the authority's work and which would also collect and disseminate data, and a resource management commission with mixed operating and licensing functions combining some elements of the United States and the Group of 77's proposals. This commission notably would be made up of experts who, among other things, would issue licenses, supervise and inspect mining operations, enforce regulations, collect fees and royalties, and regulate volume and method of production. Canada also proposed establishment of a tribunal for dispute settlement which would be comprised of experts representing various legal systems and which would be elected by the council or assembly. Alternatively, disputes could be settled by the peaceful means set out in article 33 of the U.N. Charter. Appeals from tribunal decisions could go to the International Court of Justice.

As with the allocation of functional responsibility to the international authority as a whole, so in the instance of the authority's institutional structure, the Single Negotiating Text prepared by Chairman Paul Engo leans precipitously towards the preferences of the Group of 77. Between now and the New York Conference of 1976, much hard bargaining will be required to accomplish something approximating an agreed-upon text.

The Single Negotiating Text proposes establishment of an assembly, council, tribunal, enterprise and secretariat. The assembly, consisting of all members, is allocated powers exactly as set out in the January-February 1975 draft of the 77. It is specifically given control over revenues and budgets and is mandated to adopt the criteria, rules and regulations for "the equitable sharing of benefits derived from the Area and its resources. . . ." In this connection,
it should be noted that the Single Negotiating Text is quite unclear as to whether the expenses of the authority constitute a first charge on all income derived from licensing, joint ventures and other operations. The council is to be the "executive organ" as proposed in the 77 draft. It shall implement the "apportionment of benefits derived from activities in the Area" on the basis of the rules laid down by the assembly, and will have power to supervise the activities of the enterprise, and approve and supervise contracts.

It shall consist of 36 members, one third to represent "special interests" as set out in the proposal of the 77, and two thirds to be distributed, four each, among (1) Africa (2) Asia (3) Eastern Europe (4) Socialist States (5) Latin America, and (6) Western Europe and others.

This differs from the proposal of the 77 only in adding the category of "socialist" in addition to that of Eastern Europe—an addition quite unacceptable to the Western states, a substantial number of which, including the United States, Australia, and Canada, are left to scramble for places among the "others" subcategory of "Western European and others." As already noted, the same eccentric "geographic" allocation is also applied by the Single Negotiating Text to the important governing body of the enterprise.

The proposal of Chairman Engo's Single Negotiating Text regarding the enterprise and the draft concerning the tribunal have already been discussed above.

V. Modes of Reconciling Diverse Proposals on The International Regime

The disagreement over the scope and method of operations by the international authority could delay or even frustrate agreement regarding the convention as a whole. It is therefore essential for all sides to begin to negotiate this issue seriously and in a spirit of compromise—something which has not yet occurred in the First Committee.

Both the developed and the developing nations, as well as the Single Negotiating Text, have accepted the "joint venture" concept, and it is from this nominal agreement that a substantive consensus may yet be built. The concept of joint venture defined in the Single Negotiating Text does not, however, embody such a compromise and constitutes little more than subcontracting of functions essen-

126 Id. pt. I, arts. 42-45.

127 Id. pt. I, art. 28.

128 Id. pt. I, art. 27, para. 1(c).
tially reserved to the authority. A genuine compromise would re-
serve to the international authority or the enterprise overall control
within specified guidelines as to matters pertaining to the environ-
ment, safety, and the awarding of exclusive contracts. Beyond that,
joint venture contracts should contain certain standard provisions
permitting the state or private enterprise, as contractee, to operate
without administrative or other intervention by the international
authority except in instances where the contract is being vio-
lated—a matter to be determined by the tribunal. In other words,
the benefits derived from the joint venture would be divided be-
tween the parties in accordance with the terms of the contract, while
the administration of the venture, subject to applicable provisions
of the convention, would rest with the holder of the contract. The
convention would also have to provide with greater certainty than
at present that a party authorized to explore would have an option
to develop, and that a developer would have reasonable security of
tenure with an option to renew under conditions reasonably within
the original expectations of the parties. The proviso for unilateral
revision or termination of contract by the enterprise "in case of
radical change in circumstance" will have to be tightened up.

The joint venture concept does not exclude the possibility that a
contracting state or free enterprise may agree to pay the enterprise
its share of profits in a joint venture by providing other services to
the enterprise. Thus a typical joint venture exploitation agreement
could conceivably include a proviso by which the state or private
contracting party agreed to exploit two adjacent blocs of seabed, one
as leaseholding operator with sole operational responsibility and the
other as the enterprise's subcontractor operating under its direction.
In the first bloc, the participation of the enterprise would be limited
to profit sharing. In the latter, its participation would be tanta-
mount to operational control. The international authority's profits
from its share in the former—which presumably would be put in
production first—thus would be available to pay for the delivery of
subcontracted services in the development of the latter.

The prospects for achieving some such compromise between the
technologically underdeveloped majority and the only states capa-
able of exploiting the deep seabed within the foreseeable future, de-
deps upon achieving a further compromise on institutional ar-
rangements for governing the activities of the international author-

129 Supplemental Articles, supra note 106, art. 38, para. 3. The matter has been left for
further study by the NEGOTIATING TEXT, supra note 21, pt. I, annex I, art. 15.
ity in general and the enterprise in particular. Key to such a compromise is the principal organ of the proposed international authority, namely, its council. One proposal, made by Professor Louis Sohn, is as follows:

In view of the constant increase in the size of international councils, it is quite likely that a relatively large Seabed Council would be created. The figure of 48, proposed by Kenya, coincides with the number of members of the General Committee of the Law of the Sea Conference, which was finally agreed upon after a considerable discussion. If the distribution of seats in that Committee were followed, Africa would get 12 seats, Asia also 12, Latin America 9, Western Europe 9 and Eastern Europe 6.

Within these numbers a few permanent seats might be reserved for some countries. To avoid the stigma of inequality, equal number of such seats might be provided for the major developed countries and for the major developing countries. While the first ones might be chosen on the basis of gross national product, the second ones might be chosen on the basis of population, three from each developing region.

In any case, to protect the interests of all major groups, a high majority should be required, for instance five-sixths. In view of recent difficulties about some so-called "procedural" decisions, it might be desirable to apply this majority to all decisions, without any distinction between substantive and procedural decisions.¹

VI. LONG-RANGE PROBLEMS

It is already possible to foresee the kinds of problems which would become central concerns of the international authority once an international regime for the exploitation of the seabed has been established.

A. Sourcing and Redistributing Revenues

There is no single agreed-upon formula either for assessing the costs of the proposed international authority or for redistributing such profits as it may eventually derive. The matter of profit redistribution is likely to become important early rather than late if revenue sharing becomes applicable to the outer continental margin beyond 200 meters and if those shared revenues are made payable to the international authority. A simple formula would confine itself to two variables, namely, population and poverty:

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\frac{\text{Average per capital income of world}}{\text{Average per capital income of state}} \times \frac{\text{Population of state}}{\text{Population of world}} \times 100
\]

¹ Sohn, supra note 19, at 8.
There is much to be said for an agreed-upon allocation formula since an annual pie-splitting contest within the organs of the international authority could plunge that organization into bitter factionalism.

It should also be clarified that the general expenses of the organizations would constitute a first charge on the income of the enterprise and of the authority as a whole, if only to prevent the development of a sea-monster bureaucracy which would be financed by annual assessments.

B. The Rate of Exploitation

Even if the convention makes adequate provision for joint ventures under defined operating conditions, it will still, to some extent, be up to the international authority to control the rate at which areas of the seabed enter into production. It presumably will be the international authority which would create reserved areas specifically set aside for future production by the developing states. Moreover, the international authority will be in a position to decide when to let contracts for the exploration and exploitation of specified areas. While there will be some pressure on the international authority and the enterprise to authorize production—not only from the technologically advanced and industrial states, but also from populous and poor states that would stand to benefit from the redistribution of the income of the enterprise—it must also be expected that there will be countervailing pressures to delay exploitation indefinitely. The debate on this point to date is instructive in considering the long-term problems.

Two reports on this subject have been prepared by and for the Secretary General of the U.N. The major differences between the two studies may best be underscored by a brief listing of the central propositions of each:

The First Report states that: (1) Manganese nodules are the most likely deep-sea minerals to be exploited for the foreseeable future. (2) Enough is now known to permit commercial exploitation (in the Pacific and Indian Oceans—especially in the central Pacific region). (3) Significant technical problems are being encountered in dredging and pumping minerals to the surface. (4) A detailed comparative study of marine versus land-based mining is not yet practical, largely because of the lack of publicly available cost information, the immaturity of the marine mineral industry which results in higher costs, and questions concerning the future extent of regula-
tion. However, it is believed that mining is viable and can begin as soon as 1976. (5) The likelihood that marine mining will commence depends largely on whether firms feel they are technologically ready, whether they believe the legal setting is "safe," and whether they have adequate financing. (6) It is predicted that by 1985, six groups will be mining marine minerals, involving a total volume of about 15 million tons. (7) Nickel will be the "mainstay" of deep seabed mining, with copper, cobalt, and manganese obtained as by-products. (8) Nickel production should experience a minimum long-term growth rate of 6 percent per annum, and nodule production may account for 18 percent of total world demand by 1985. (9) Developing countries now account for 13 percent of world nickel production and are increasing rapidly as principal suppliers. This will have a substantial impact on the industry, "but it should not have a serious effect on land-based production as a whole." (10) The world market for copper is about 14 times that for nickel. Nodule production of copper is expected to have a small impact on the large, growing copper industry. (11) The market for manganese is small, and therefore nodule production will probably depress prices. This may hurt earnings of present producers. Many of these are developing countries, although only one such producer depends heavily on these revenues. (12) Cobalt is an expensive, lightly-used metal. By 1985, nodule production may account for half of world demand. Prices may decrease to approximately two-thirds of present levels. (13) By 1985, if maximum production is permitted, seabed mining might account for 66 percent of cobalt demand and 28.6 percent of world nickel demand. The impact of seabed development could be quite substantial in terms of the interests of developing nations.131

The Second Report while agreeing with the First Report's estimate of the effect on cobalt production holds that: (1) The probable impact on manganese prices is still uncertain since several potential miners are doubtful whether the recovery of this mineral will be economic. Nickel production from nodules will probably only help to counter the steady trend of price increases for this metal around the middle of the next decade. Copper prices are not expected to be much affected by nodule mining since supply from this source is likely to account for only 1.3 percent of world demand by 1985. (2) It is obvious from the interrelation of variables in the impact model

that decreases in metal prices would act as a brake to the further expansion of the nodule industry. (3) Developing countries, with only one exception, are not highly dependent on the exports of these minerals. By the end of the next decade, nodule mining might exert a downward pressure on nickel prices, affecting a few developing countries; the countries in question, however, are not highly dependent on nickel exports. (4) If the impact of nodule mining is expected to be rather moderate for both producers and consumers for the foreseeable future, who will benefit most from this new industry? The answer is obviously that the world community at large will benefit most and the advanced countries possessing nodule technology will benefit most in particular.\footnote{132}

The United States position essentially has been that it is in the interests of all consumers to encourage seabed mineral production. It is further claimed that appreciable decreases in existing producer income are unlikely.\footnote{133} The United States argues that increases in copper demand will greatly exceed the rate of development in seabed production. Nickel presents a similar picture, and manganese production from the seabed is presently unlikely. Thus, says the United States, it is only with respect to cobalt that a significant adverse impact upon developing nations could result from seabed mining operations. In this case, appropriate relief (e.g., through utilizing a compensation scheme) could be fashioned.\footnote{134}

It is the view of the United States that production restrictions, multilateral commodity agreements, and compensation plans will all force mineral prices up.\footnote{135} Since only a small number of developing countries are producers of nickel, copper, cobalt and manganese,\footnote{136} such price increases would primarily benefit the developed countries. Moreover, because seabed mining will account for only a small proportion of total world production of these minerals, its restriction would not effectively stabilize or increase the revenues of land-based producers.\footnote{137} In any event, the real losers in any attempt


\footnote{133} Stevenson & Oxman, supra note 64, at 10.

\footnote{134} 70 State. supra note 50, at 400.


\footnote{137} Id. at 10.
to restrict seabed mineral production would be the consumers, including the peoples of the developing countries who depend on capital goods made with these minerals. Lastly, the United States supports the notion of nondiscriminatory access to the seabed’s resources.

The 77, on the contrary, are most concerned that prices paid to land-based products be protected. Fluctuations must be minimized while resources are developed through a system of comprehensive control. Similarly, they argue that the benefits of seabed exploitation should be equitably distributed, with special concern for the developing countries. While the Group of 77 concedes that a majority of the developing countries would benefit from decreased prices that would likely result from increased resource supply, they are quick to question the accuracy of U.N. studies which minimize the negative impact of seabed mining. In these conflicting concepts, which are unlikely to be resolved in any but the most general way by the convention, lies another important source of future disagreement.

C. Creeping Jurisdiction

All institutions to some extent suffer or benefit from a tendency toward self-aggrandizement. There is no reason to expect an international authority for the high seas and seabed to behave differently. The Single Negotiating Text however, leaves ajar the door to virtually unlimited expansion. It visualizes power for the international authority not only to manage resources but also to control all activities in the area beyond national jurisdiction. Specific authority is given to control pollution, effect technology transfer to developing countries, control scientific research, and more generally, to regulate “activities in the area,” which is defined to include not only exploration and exploitation of resources, but also “other associated activities. . . .” On the other hand, the “area”

138 Id. at 6, 10.
140 Statement of Mr. Thomas (Trinidad & Tobago) before the 12th Meeting of the First Committee of the Third U.N. Conference on the Law of the Sea, Aug. 7, 1974, in 2 CARACAS, supra note 39, at 60, 61 [hereinafter cited as Statement of Mr. Thomas].
141 Draft Articles, supra note 63, art. 9-B.
142 Statement of Mr. Thomas, supra note 140, at 61.
143 NEGOTIATING TEXT, supra note 21, pt. I, art. 21.
144 Id. pt. I, art. 12.
145 Id. pt. I, art. 11.
146 Id. pt. I, arts. 1(ii), 10.
147 Id. pt. I, arts. 1(ii), 6.
is defined specifically to exclude the water column and the super-
adjacent air space. The prevention of pollution from seabed min-
ing, however, implies some responsibility for the ecosystem of the
sea column since this is where pollution damage is likely to occur.

There are, moreover, various national proposals for the creation of
international regulatory mechanisms to prevent sea pollution by
ships and to preserve living resources in the area beyond na-
tional jurisdiction. While it has not been proposed so far that the
international authority expand its regulatory functions to include
the regulation of such shipping and fishing activities in the sea
column above "its" seabed, it is not inconceivable that it might be
a more appropriate agency for these purposes than the Inter-
Governmental Maritime Consultative Organization (IMCO), the
Food and Agricultural Organization (FAO), or another ad hoc body.

D. Conflict with Coastal States

While there is as yet no indication that oil, gas, or other mobile
substances can be extracted from the deep seabed beyond national
jurisdiction, it is perfectly conceivable that problems of encroachment
on mutual fields might arise between the international author-
ity and the economic zones and Continental Shelves of coastal
states. Even more futuristically, a state might construct traps or
barriers along the edge of its shelf or zone to prevent the "flow" of
nodules or other surface mineral deposits to the deep seabed. Prob-
lems of this sort are touched upon, but scarcely resolved, by the
provision of the Single Negotiating Text that activities in the inter-
national area "with respect to resources in the Area which lie across
limits of national jurisdiction, shall be conducted with due regard
to the rights and legitimate interests of any coastal State across
whose jurisdiction such resources lie." This provision is much
weaker than others which were considered by the First Committee
at Geneva in 1975 which stated that resources of the international
area "which lie across limits of national jurisdiction shall not be
explored or exploited, except in agreement with the coastal State or

148 Id. pt. I, arts. 2(1), 15.
149 Eisma, Impact of Deep Sea Nodule Mining on the Ocean Life System, in OCEAN RE-
SOURCES AND THE OCEAN ENVIRONMENT (Sierra Club Int'l Series No. 3, 1974).
150 For the United States proposal which puts forward the possibility of utilizing IMCO see
70 STATE, supra note 50, at 398.
152 NEGOTIATING TEXT, supra note 21, pt. I, art. 14, para. 1.
States concerned,” and that where the resources of the international area are located near the boundary of national jurisdiction, exploration and exploitation shall be carried on “in consultation” and “where possible through such State or States.” Even more remote but still relevant are potential problems of faulting and subsidence which could occur on the Continental Shelf, or even more remotely, in the territory of a coastal state as a result of mining activities carried on in the international area. The Single Negotiating Text merely provides for liability on the part of states, corporations, or international organizations which “cause damage” by carrying on activities in the area not in conformity with the provisions of the proposed convention—a nonabsolute definition of liability insufficient to cover other forms of damage caused by activities carried on in conformity with the convention.

There are also likely to be legal problems pertaining to the recovery of historical treasures from the seabed. It has been pointed out, for example, that in 1959-61, the warship “Adolph” of King Gustav II was recovered after lying in repose for over 300 years on the seabed, and it now constitutes the “biggest tourist attraction of Stockholm.” The Single Negotiating Text would make the disposition of wrecks more than 50 years old subject to the regulation of the international authority, and it appears to give the international authority an option either to “preserve or [to] dispose” of such objects “for the benefit of the international community as a whole,” albeit giving “particular regard” to the “preferential rights” of the country of cultural or historical origin.

Finally of considerable practical importance among futuristic issues is the question of amending the convention after it comes into force. Under the draft prepared by Chairman Engo, amendment by the majority would be very easy, namely, by a vote of two-thirds of the assembly present and voting, and by ratification by two-thirds of the states which would be parties to the convention. Hence, the usefulness of preparing a written document with long-term guarantees would be put in doubt. The key to an agreeable amending

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154 Negotiating Text, supra note 21, pt. I, art. 17.
156 Id. at 141.
157 Negotiating Text, supra note 21, pt. I, art. 19.
158 Id. pt. I, arts. 64, 65.
process would probably have to be the participation of a council which would vote along the lines of a concurrent triple majority of all its members and of both representatives of technologically advanced and developing state members. A subsequent requirement for a four-fifths majority in the assembly and ratification by four-fifths of the parties to the convention would provide some guarantee against the rapid disintegration of the international regime once established.
SETTLEMENT OF DISPUTES UNDER THE LAW OF OCEAN USE, WITH PARTICULAR REFERENCE TO ENVIRONMENTAL PROTECTION

John Lawrence Hargrove*

I. INTRODUCTION

How will international disputes about ocean activities be settled after the conclusion of the Third Law of the Sea Conference? This paper will undertake to survey and assess the formal means likely to be available for the settlement of disputes arising under the law of ocean use when a new comprehensive law of the sea treaty comes into force. There is, of course, already a "law of ocean use" which will continue to exist even if the Third Law of the Sea Conference should fail to produce a generally accepted treaty. However, in that event, the content of that law will doubtlessly have been rendered somewhat murky by protracted negotiations and by accompanying governmental moves outside the negotiations in the form of claims and counterclaims. On the assumption that the Conference will produce a generally accepted and comprehensive treaty, there remains a somewhat less formidable uncertainty as to what that treaty will provide for the settlement of disputes. This paper will adopt that assumption, and will further assume that, in light of the events which occurred at the recently concluded Geneva session, one can predict a reasonably probable range of outcomes with regard to dispute settlement provisions in the treaty.

It is important to bear in mind what kind of body of law we are talking about when we speak of "the law of ocean use." There is no single or unified regime of such law, but only a collection of individual regimes springing from different sources in conventional and customary law. Even a new law of the sea treaty, as sweeping in scope as it may be with respect to the distribution of basic jurisdictional prerogatives in the ocean, will be only a part of this collection, albeit the most important single part. And it is possible that the law of the sea treaty itself, for many important purposes, may look very much like a collection of self-contained individual regimes governing particularly uses of the ocean or particular geographically de-

fined jurisdictions. Indeed, one of the important factors determining
the extent to which this will be true is the extent to which the treaty
will contain dispute settlement provisions applicable to questions
arising under any of its rules, thus tying its various parts together
in a procedural if not substantive way.

But regardless of the outcome of the Law of the Sea Conference,
and even if one limits the inquiry—as this paper does—to public
international law largely as embodied in multilateral treaties, a
prospective user of the world ocean who wishes to know what law
he must take into account will find himself dealing with a large and
widely disparate collection of sources of law. Most are in the form
of treaties which in fact are not universally applicable either geo-
graphically or in respect to their contracting parties. Some are elab-
orated with great detail and precision, and considerable technical-
ity, while others are in the form of some of the vaguest and most
general rules of customary international law. For example, the use
of the ocean as a medium of transportation has a body of rules which
is perhaps as precisely formulated as those governing any use of the
ocean. This is true both as to the distribution of basic rights of use
among the members of the global community, and as to the regula-
tion of the exercise of that right for various purposes such as the
protection of human life, property, or the marine environment. On
the other extreme, the right to use the ocean as a sink or as a
receptacle for wastes lurks unarticulated in the broadest principles
of national sovereignty and freedom of the seas. And such right is
regulated, if at all, only by similarly broad principles of interna-
tional responsibility—as aside from a few recent treaties which deal
with only a small portion of the total use of the ocean for this
purpose.

It is not surprising, therefore, that a prospective user of the ocean,
wishing to know not only what the substantive rules are, but also
what devices are available to settle differences concerning the
meaning of the rules, will find himself confronting an equally motley
array of widely differing mechanisms, most of which are of a highly
specialized application, defined by the treaty regime of which they
are a part.

II. DISPUTE SETTLEMENT UNDER THE NEW LAW OF THE SEA TREATY

The prospective law of the sea treaty nevertheless remains an
appropriate point at which to begin a survey of dispute settlement
with respect to the uses of the ocean. For there is a reasonable
prospect that the treaty itself will contain a unified set of procedures
set out in a special chapter on dispute settlement, which parties are obliged to apply to disputes arising under a number of its basic rules. And there is the even greater likelihood that the treaty will embody some dispute settlement procedure, applicable under specified conditions to virtually all of its rules, and thus covering collectively a very significant portion of the regime of law with which we are concerned.

At the Geneva session an informal "working group" of some 60 countries produced a text of 17 articles. The first four of these articles were transmitted to the Conference President "for the consideration of the Conference," while the remaining 13 were described as an "Annex," reportedly to distinguish them as having a lesser status of acceptance among the members of the working group. (The Soviet delegation, for example, reportedly did not wish to send all 17 articles forward on the same basis.) The working group's document included, additionally, annexes on (1) conciliation; (2) arbitration; (3) a law of the sea tribunal (in the form of a statute for that tribunal); (4) special dispute settlement procedures for fisheries, pollution, and scientific research; and (5) information and consultation "regarding the adoption or application of measures (including legislation regulations, administrative notices and boundary determination) falling within the scope of this Convention." The major features of the scheme introduced by the working group document follows.

A. Special Procedures Applicable in Designated Classes of Cases

Special classes of cases initially must be referred to special procedures where the relevant chapter of the law of the sea treaty so provides, and each such chapter may also provide that these procedures may be the only ones available in such cases. The working group document contains annexes setting out special procedures for disputes arising under the chapters on fisheries, pollution, and sci-

2 Since the writing of the present paper, the working group text discussed in the following pages has been superseded by a new text on dispute settlement, issued by the President of the Conference as a "single negotiating text" for consideration at the next session of the Conference. Third United Nations Conference on the Law of the Sea, Text on Settlement of Disputes, U.N. Doc. A/CONF.62/WP.9 (1975). While much remains the same in the two texts, the later document does contain changes representing important policy choices. However, the following analysis of the earlier document remains, on the whole, relevant for purposes of understanding and assessing the later text.
3 Working Group Dispute Settlement Text, supra note 1, annex III, art. 1, para. 1.
Scientific research, which have to be referred initially to specially constituted expert committees.\textsuperscript{4} Such reference would be compulsory in that it would be done on the request of any of the parties. The special committees would be required to render a decision within a certain period unless the parties come to an agreement in the meantime, but on its face, the text of each annex leaves unresolved the question whether the decision would be binding on the parties. It also leaves unresolved the question whether these would be the only procedures available in the classes of cases for which they are designated.

B. Conciliation

In cases where no special procedures are applicable, a conciliation procedure is available upon the agreement of all parties. The specially constituted conciliation commission must report within 12 months, and its report is not binding upon the parties.\textsuperscript{5}

C. Reference to One of Three Tribunals

Disputes which are subjected to the foregoing techniques and which are not settled (note that this implies that decisions under special procedures might not be binding in some cases), or other disputes which relate to the interpretation or application of the convention, are required to be settled by submission to one of three tribunals, upon the application of any party to the dispute.\textsuperscript{6} The identity of the tribunal is determined on the basis of the contracting party against whom the complaint is being made, since each party is required, upon becoming bound by the convention, to make a declaration of acceptance of the jurisdiction either of an arbitral tribunal, the Law of the Sea Tribunal, the International Court of Justice, or any combination among the three.\textsuperscript{7} Decisions both of the arbitral tribunal and the Law of the Sea Tribunal would be final and legally binding.\textsuperscript{8}

D. Settlement by Means Other Than Those Provided for by the Convention

Parties would remain free to agree to settle disputes which are subject to the dispute settlement provisions of the convention by

\textsuperscript{4} Id. annex II.
\textsuperscript{5} Id. annex IA, para. 7.
\textsuperscript{6} Id. annex I, art. 8, para. 1.
\textsuperscript{7} Id. annex I, art. 9, para. 2, subpara. (a).
\textsuperscript{8} See id. annex IB, para. 10; annex IC, art. 31, art. 33, para. 2, art. 34.
some other means, or in accordance with the provisions of a prior agreement.

E. Special Provisions

1. Provisional Measures

The tribunal would have the power to apply binding provisional measures in order to preserve the rights of the parties and minimize damage.

2. Exhaustion of Remedies Required in Special Cases

Exhaustion of local remedies would be required in a dispute relating to "the exercise by a coastal state of its enforcement jurisdiction" or "its exercise of jurisdiction over resources in the economic zone." The requirement apparently would not apply to any other case.

F. Possible Restrictions on the Applicability of the Procedures

The working group document envisages three kinds of limitation which may be placed on the scope of application of the general dispute settlement procedures. Each one of these is potentially of great importance.

1. Express Exclusions of Entire Portions of the Treaty

There appears, for example, to be general agreement that disputes arising under the chapter dealing with seabed mining in the international area would be subject to special procedures only, probably of a compulsory and binding character. (As already indicated, the articles envisage that special procedures provided for in some chapters might be of a preliminary character, leading to a later application of the general procedures provided in the convention; or they might expressly exclude the application of any other procedures, as appears to be the intention with respect to seabed mining.)

2. An Optional Declaration Limiting the Applicability of Dispute Settlement Procedures

An optional declaration by a contracting party limiting the ap-

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* Id. art. 2.
" Id. art. 3.
" Id. annex I, art. 12, para. 1.
" Id. annex I, art. 14, para. 1.
" See id. annex I, art. 6, art. 10, para. 2, subpara. (a).
" Id. annex I, art. 6.
Applicability of at least some of the treaty’s dispute settlement procedures to claims that a coastal state has violated its treaty obligations in the exercise of its exclusive jurisdiction, by one of the following four kinds of misdeeds, has also been envisaged:

(a) interfering with the freedoms of navigation or overflight or of the laying of submarine cables or pipelines, or related rights and duties of other states;
(b) failing to have due regard to other rights and duties of other States under this Convention;
(c) not applying international standards or criteria established by this Convention or in accordance therewith; or
(d) abusing or misusing the rights conferred upon it by this Convention (abus ou détournement de pouvoir) to the disadvantage of another Contracting Party.\(^\text{15}\)


An optional declaration by a contracting party excluding at least some of the general dispute settlement provisions from application to one or more of a specified list of categories of disputes is the third limitation which has been suggested; among such specified categories are:

(a) Disputes arising out of the exercise of discretionary rights by a coastal State pursuant to its regulatory and enforcement jurisdiction under this Convention, except in cases involving an abuse of power.
(b) Disputes concerning sea boundary delimitations between adjacent States, or those involving historic bays or titles, provided that the State making such a declaration shall indicate therein a regional or other third-party procedure, [whether or not] entailing a binding decision, which it accepts for the settlement of these disputes.
(c) Disputes concerning military activities, including those by government vessels and aircraft engaged in non-commercial service, but law enforcement activities pursuant to this Convention shall not be considered military activities.
(d) Disputes or situations in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations, unless the Security Council has determined that specified proceedings under this Convention would not interfere with the exercise of such functions in a particular case.\(^\text{16}\)

\(^{15}\) Id. annex I, art. 17, para. 1.
\(^{16}\) Id. annex I, art. 17, para. 3.
G. The Political Context

As an annex to the Informal Single Negotiating Text, produced at the Geneva session, and also by virtue of the description of the dispute settlement articles provided by the three co-chairmen of the working group, the working group's articles are hedged about with various caveats which indicate that they carry no commitments of support from delegations. Moreover, the text of the 17 articles and the appended annexes do not yet form a completely coherent whole, as the foregoing analysis indicates. It may be fair to say, however, that these articles and annexes suggest a fair approximation of at least one set of dispute settlement arrangements which might be expected to command general acceptance in the event a comprehensive treaty is concluded. If this is so, it is because they represent approximately the politically "right" mix of strengths and weaknesses. The essence of the procedures they set forth appears to be a compulsory and binding dispute settlement procedure available to ensure that coastal states do not, in their newly and vastly extended exclusive jurisdiction, violate reserved ocean freedoms in their own exclusive zones. (For most other purposes, compulsory and binding procedures would be available only at the option, exercised at the outset, of the state against whom they might later be invoked.) The articles thus would provide a means of policing the basic bargain the treaty will strike: namely, the grant of a geographically broad coastal state jurisdiction for economic purposes in return for iron-clad protection of the traditional freedom of navigation, albeit a freedom which may be dressed in new language. They thus would serve a purpose which, if quite minimal, is nevertheless essential to the concluding of a comprehensive treaty.

It is conceivable, of course, that many states, faced at the outset with such a set of articles and the choices they would present, might opt in favor of acceptance of a broad application of compulsory and binding settlement procedures beyond that core of disputes as to which the articles leave no option. Each state would recognize the risk to its own interests that would be entailed by leaving other states free to invoke its own exceptions against it on the basis of reciprocity. However, this is a highly uncertain speculation at present.

What is much less uncertain is that a new law of the sea treaty
embodying these provisions could well turn out to be one under which all but the most politically fundamental provisions would be left without the protection of reliable means of dispute settlement. Just what does this mean? The working group’s draft articles, despite their tentative and incomplete status, provide the basis for somewhat greater precision in our speculations as to what classes of disputes might and might not be covered by compulsory and binding procedures.

H. Nonexcludable Disputes

It has already been indicated that rights of free navigation—to which the major maritime powers have attached primary importance throughout the negotiations—appear to be clearly covered. This is the effect of annex I, article 17, paragraph 1, subparagraph (a), which speaks explicitly of “interfering with the freedoms of navigation or overflight or of the laying of submarine cables or pipelines.” Presumably the same is true of the language of subparagraphs (b) and (c), which speak of “failing to have due regard to other rights and duties of other States under this Convention” and “not applying international standards or criteria established by this Convention or in accordance therewith.” The latter language would seem to embrace both a failure of the coastal state accurately to apply international standards respecting the regulation of pollution from vessels—a major source of worry on the part of states primarily concerned with maintaining the freedom of navigation—but also a coastal state’s failure to apply internationally developed criteria respecting the utilization of coastal fisheries stocks or the conduct of scientific research. The precise value of both of these provisions to maritime powers and distant water fishing states is dependent on the content of other portions of the treaty. It is clear, for example, that if provisions relating to the economic zone do not recognize rights to participate in the utilization of the stock on the part of distant water states, the importance of this provision in a dispute settlement chapter to those states will be drastically diminished.

It is worth noting that the language of the four subparagraphs of article 17, paragraph 1, is broad enough that, should they be carried forward into a treaty and thereafter interpreted with a certain imagination and progressiveness, they might arguably be used to help in

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19 Id. annex I, art. 17, para. 1, subpara. (b).
20 Id. annex I, art. 17, para. 1, subpara (c).
putting teeth into any general exhortations in the chapter on envi-
ronmental protection designed to place the coastal state under in-
ternational obligations to protect the coastal ocean. It is not clear
whether provisions of this kind—for example, a general obligation
to protect the marine environment—will be included in the treaty.
But it is safe to say that, unless they are linked to some procedural
device by which they can be made effective on the initiative of
individual states or of international organizations, they may well be
of little more than cosmetic significance in the treaty as a whole.

I. Excludable Disputes

As to excludable classes of disputes, we should note in the first
place that the strong thrust in the dispute settlement discussions
toward eliminating or restricting the compulsory applicability of
any international dispute settlement procedures within the coastal
state’s economic zone is reflected in article 17 in two ways: (1) in
the provisions for optional declaration by parties totally excluding
some important classes of disputes such as boundary delimitations
between adjacent states or rights of historic bays; 21 (2) in the provi-
sion for optional declarations apparently excluding all disputes aris-
ing out of the exercise of coastal state jurisdictions, except “in cases
involving an abuse of power.” 22 The latter provision, reportedly in-
cluded at the insistence of the Canadian Delegation, would have the
effect of further narrowing even the nonexcludable core of disputes
provided for in article 17, paragraph 1. The concept of “abuse of
power” is by no means precise, but the least that can be said is that
it would limit the availability of reliable dispute settlement provi-
sions to a smaller class of disputes, in which the charges of a more
severe encroachment on reserved freedoms by the coastal state
could be persuasively argued.

As to the specific exclusions mentioned in article 17, paragraph
3, one may understand the reasons why the military establishment
of the United States or some other power may wish to provide for
the broad exclusion of all disputes “concerning military activities,”
but the soundness of those reasons is hardly self-evident. The same
may be said for the effort in article 17, paragraph 3, subparagraph
(d), to safeguard the exercise of the prerogatives of the United Na-
tions Security Council. It is true, for example, that parties to the
dispute over the status of the Strait of Tiran and the Gulf of Aqaba

21 Id. annex I, art. 17, para. 3, subpara. (b).
22 Id. annex I, art. 17, para. 1, subpara. (d).
might not be inclined to submit that dispute to procedures estab-
lished by the law of the sea treaty, particularly in view of the in-
tensely political character of the dispute and the fact that it is a part
of a larger and highly intractable dispute of long standing. At the
same time one could hardly expect the dispute settlement proce-
dures of the law of the sea treaty to be less successful in coping with
the dispute than the Security Council has been thus far.

Finally, one may wonder whether it is mere oversight that the
optional provision for exclusion of disputes concerning "sea bound-
ary limitations between adjacent states, or those involving historic
bays or titles"\(^2\) does not also extend to similar disputes between
opposite states, or to disputes involving the outer limits of national
jurisdictions over the territorial sea, the economic zone, or continen-
tal shelf. In any event, the inclusion in the draft of article 17 of
additional possible exclusionary provisions in blank has an ominous
ring.

III. SOME IMPLICATIONS FOR THE REMAINING NEGOTIATIONS AND THE
PERIOD THEREAFTER

To recapitulate, we may conclude that, if there is to be a compre-
hensive and generally accepted treaty at all, it will probably have
to provide compulsory and binding settlement procedures for dis-
putes concerning at least a small core of fundamental questions,
including the question of preserving rights of navigation. But at the
same time, as the process of ratification of the new law of the sea
treaty proceeds, a state of affairs may emerge in which large areas
of even that portion of ocean law which the treaty explicitly estab-
lishes would not be covered by reliable dispute settlement proce-
dures, and often would be covered by none at all.

What conclusions are to be drawn from this projection? The ab-
sence of dispute settlement procedures to which the parties are
bound to resort, and which entail a binding decision once resorted
to, is hardly strange in international affairs. It is, indeed, the rule
rather than the exception in international life. Nevertheless, a num-
ber of states, and notably the United States, have long argued in
the law of the sea negotiations that a new law of the sea treaty would
present an exceptional situation, in which compulsory and binding
dispute settlement procedures would be an essential ingredient of a
workable legal regime.

There is a good deal of merit in this position. First, the treaty
\(^2\) Id. annex I, art. 17, para. 3, subpara. (b).
negotiations are in large measure an effort to accommodate, through the orderly processes of law, a conflict which has been emerging since the end of the Second World War and which continues to grow in intensity among the various claims and interests of states with respect to the ocean. This is the conflict between the growing territorial or quasi-territorial pretensions of coastal states, and the historic interests of the maritime states in using the ocean as a medium of communication. Secondly, the perceived interests of states in the ocean have greatly increased in importance in the last quarter century. While the right of navigation has long been regarded by many states as vital to economic survival or military security, or both, and while fishing has been of similar importance to some states, these interests are now rivaled or surpassed in many cases by an interest in petroleum or other mineral exploitation. Finally, the number of states asserting such interests has greatly increased.

The sum effect of these factors will be a gradual proliferation of human activities in the ocean, and a steady growth of the importance attached to them. The very nature of these activities is such that rights with respect to them must be distributed in geographically overlapping ways: there is, for example, no way to delimit an effective right of navigation which does not overlap the right of economic exploitation in the coastal zone.

In such a situation it is reasonable to expect that any workable regime will require not only substantive rules of great precision, defining the various prerogatives of states in respect of these geographically overlapping activities, but also more reliable techniques of resolving good faith differences as to what rules mean or eliminating outright recalcitrance against the rules.

It may be that the present working group document, if further work on it proceeds in full appreciation of the importance of effective dispute settlement procedures on at least certain fundamental provisions, will emerge as meeting the minimum requirements discussed earlier in this paper. But what of the large areas of ocean law and activity, both within the scope of the new treaty and outside of it, as to which no such procedures would be available? We may divide the answer of this question into three parts: first, other portions of the law of the sea treaty containing detailed regulations of some area of ocean activity; second, activities regulated by existing multilateral treaty regimes, of a global or regional character; and, finally, one major interest in the ocean, namely the environmental interest, which is likely to be taken into account by the law of the sea treaty only peripherally at best.
A. Strengthening Dispute Settlement in the Emerging Treaty

As to the first, it is submitted that if the international community is capable of bringing itself to accept reliable settlement procedures for disputes arising from conflicts between navigational and coastal state economic interests, then there is little reason not to make similarly strong procedures available in the case of other classes of disputes arising under the treaty. The reason for failure to do so cannot be that states expect these other disputes to be more intense and intractable; indeed the contrary is more likely to be the case overall.

Nor, at the other extreme, can it reasonably be expected that there will not be significant disputes in these other areas and thus no need for effective procedures. The law of the sea treaty will be a substantially more complex effort at regulation of ocean conduct than ever before, undertaken at a time when ocean activities themselves can be expected to proliferate. The reasons are likely to stem from other sources: a general suspicion of compulsory and binding settlement procedures in international affairs as unduly infringing sovereignty; or a belief that, because they are so suspect by many states, they will not work; a general desire on the part of many coastal states to assimilate the economic zone as closely as possible to national territory; or special concerns of an individual state respecting a situation in which it is uniquely involved, such as a special geographic dispute, a special strategic concern, or the like. I suggest that in the remaining negotiations of the Law of the Sea Conference, each of these sources of resistance to broadly applicable and effective dispute settlement procedures should be subjected to the most careful and skeptical scrutiny. A treaty which applies compulsory and binding procedures only to a narrow class of disputes about what are now regarded as fundamental issues may be adequate to command adoption by the conference and ultimately to enter into force. However, it is not clear whether such a treaty would stand the test of time as a viable, working regime for the oceans.

B. Dispute Settlement Under Existing Ocean Treaties

As to other areas of ocean activity subject to detailed regulation in existing multilateral treaties, two things may be said. First, the great majority of these treaties contain provisions for the settlement of disputes arising under their provisions, and it may be possible to detect a trend with some recent treaties toward forms of arbitration
or adjudication.  

Secondly, it would appear that this large collection of dispute settlement provisions in individual treaties would remain legally unaffected by the coming into force of the law of the sea treaty with its own dispute settlement provisions except possibly in the case of prior law of the sea conventions which might be expressly superseded by the new treaty. This would probably be the case even in the absence of provisions in the new treaty such as those contained in working group articles 2 and 3, preserving the right of parties to agree to settle a dispute by means other than those provided in the law of the sea treaty, or to resort to a prior agreement.

C. Approaches to the Settlement of Environmental Disputes: Regional Treaties, a Global Treaty, a Code of Conduct

Finally, let us look briefly at the problem of disputes respecting the marine environment after the conclusion of a new treaty. Substantively, the treaty's efforts to assure protection of the marine environment are likely to be clearly subordinate to its other objectives and, in general, inadequate in themselves to meet this need as presently understood. As to ocean activities, the treaty will deal with pollution from vessels not by establishing standards to govern the conduct of vessel operators, but by allocating the right to establish such standards. It will allocate this right to coastal states and to an international organ or organs, with the division of their prerogatives carefully tailored to dampen fears that coastal states might

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24 Of some 32 multilateral agreements respecting maritime transport, fisheries, environmental protection, oceanography, law of the sea, conservation of wildlife, and other areas, to which the United States is a party, one-half contain some dispute settlement procedures. The four 1958 Geneva Law of the Sea Conventions are provided with one optional protocol for compulsory dispute settlement which is applicable to all. Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes, April 30, 1958, 2 U.N. T.S. 138, T.I.A.S. No. 5969, 59 U.N.T.S. 285 (effective for United States March 20, 1966) contains its own dispute settlement procedure.

Of the agreements with dispute settlement provisions, 14 are compulsory in character (eight of which are in force for the United States), and ten of these provide for a compulsory procedure which entails a binding decision (five of which are in force for the United States).

Of 21 multilateral agreements dealing with marine environmental protection (including nine from the group of agreements just mentioned) which were analyzed in a recent publication of the American Society of International Law, 14 contain some dispute settlement procedures. Of these agreements with dispute settlement provisions (six of which are in force), all 14 are compulsory in character, and 12 of these compulsory dispute settlement provisions entail a binding decision (five of which are in force). See the supplemental Table of International Legal Responses to Activities Threatening the Marine Environment, in WHO PROTECTS THE OCEAN? (J. Hargrove ed. 1975) (pocket part).
unduly impede navigation in their coastal zones through the exercise of their power to promulgate or enforce environmental regulations. As to extractive activities, the treaty will likely bestow on the coastal state the right to regulate these activities for environmental purposes within its economic zone, and as already indicated, establish an international mechanism for regulation of mining activities in the area beyond national jurisdiction. It is unlikely that the convention will provide an effective means by which either an individual state or the international community at large will be able to hold a coastal state to minimum standards of diligence in the protection of the environment of its coastal area from pollution through ocean-based activities.

Most importantly, however, the treaty will make little or no pretense of providing an effective check on the diligence with which a coastal state discharges its environmental responsibilities with respect of activities taking place on land but affecting the ocean. Consequently, environmental regulation of activities in the whole area in which human activity has its greatest impact on the ocean—namely the land mass and the coastal ocean to a distance of at least 200 miles—will be left largely to the sole discretion of the coastal state. It is true that the treaty may contain general exhortations with respect to protection of the marine environment, as indicated earlier, although even these may be weakened by exceptions which are thought to be in the interest of developing countries. But of themselves they are unlikely to have the precision or clarity necessary to have any significant practical impact. As already suggested, an effort to give them effect through the treaty's general dispute settlement procedures, so as to enforce minimum standards of environmental protection on the coastal state in its own jurisdiction, is hardly a promising enterprise. Therefore, in general it may be said that the protection of the marine environment from the bulk of human activities likely to create marine environmental threats in the future will have to be done, if at all, by means which are outside the law of the sea treaty—even if it is done on the basis of the jurisdictions established by that treaty.

The same may be said for international procedures designed to forestall or to settle disputes involving specifically environmental interests. It may be a source of some encouragement that promising, although on the whole fairly modest, starts have been made in this direction in recent years in the form of the two recent conventions on dumping and, more recently, the several European subregional
conventions. Of the latter, perhaps the most comprehensive is the Convention for the Protection of the Marine Environment of the Baltic Sea, of which the Soviet Union is a signatory. Neither the Oslo nor London Ocean Dumping Conventions concluded in 1972, contain explicit dispute settlement procedures. The Nordic Convention contains provisions for suit in foreign courts, even by individual aggrieved persons, as well as for consultation between governments assisted by an advisory commission. The Baltic Convention contains comprehensive dispute settlement procedures providing for negotiation, conciliation and eventually arbitration or adjudication, but resort to these procedures is not compulsory. It may be expected that the Mediterranean States which recently met in Barcelona to begin the drafting of instruments designed for the protection of the environment of that great enclosed sea, will be able to profit by the experience of the negotiators of the Baltic Treaty. Article 18 of the current Draft Convention for the Protection of the Marine Environment Against Pollution in the Mediterranean provides for compulsory submission to adjudication by the International Court of Justice or to arbitration.

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30 Id. art. 3.

31 Id. arts. 11, 12.

32 Baltic Convention, supra note 26, art. 18.


34 Id.
Regional treaties among states sharing an ocean area or a drainage basin are in any event one promising approach to the large task of environmental protection which the law of the sea treaty will probably leave essentially untouched. Two other possible complementary approaches deserve mention. One is the negotiation of a general treaty on protection of the marine environment which would contain at least general substantive principles applicable to all sources of environmental threat to the ocean, and which would contain general procedures of dispute settlement or avoidance. Another is the proposal which was recently considered and adopted by the Governing Council of the United Nations Environment Programme (UNEP) to elaborate a code of conduct with respect to what are called "shared natural resources." As envisaged by the report of the Executive Director of UNEP, such a code, which would not necessarily be of binding legal status, would elaborate principles applicable between two or more states with respect to the management of a natural resource shared by them. A shared drainage basin, or a shared coastal ocean or enclosed or inland sea, would be prime examples of such a shared resource. The code, according to the Executive Director's proposal, in substantial measure would be of a purely procedural character, dealing with such matters as the obligation of advance notification or consultation, exchange of information, and resort to peaceful methods for the resolution of disputes once they have arisen. It might also deal with substantive principles having to do with responsibility for environmental injury.

35 See the proposal contained in A. Chayes & R. Stein, The Avoidance and Adjustment of Environmental Disputes (Special publication of the American Society of International Law to be published in 1976).