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NO RESOLUTION PRESENTED HEREIN REPRESENTS THE POLICY OF THE ASSOCIATION UNTIL IT SHALL HAVE BEEN APPROVED BY THE HOUSE OF DELEGATES. INFORMATIONAL REPORTS, COMMENTS AND SUPPORTING DATA ARE NOT APPROVED BY THE HOUSE IN ITS VOTING AND REPRESENT ONLY THE VIEWS OF THE SECTION OR COMMITTEE SUBMITTING THEM.

AMERICAN BAR ASSOCIATION

REPORT TO THE HOUSE OF DELEGATES

SECTION OF INTERNATIONAL LAW

RECOMMENDATIONS

The Section of International Law recommends adoption of the following:

BE IT RESOLVED, that the American Bar Association:

As to Seabed Resources of the Continental Shelf

(1) In reiterating its position on the exploration and exploitation of the continental shelf (a) expresses its firm conviction that within the submarine areas adjacent to the United States in which the United States is entitled to exercise sovereign rights for the purpose of exploring and exploiting their natural resources, the interests of the United States in these resources be protected

to the full extent permitted by the 1958 Convention on the Continental Shelf and (b) endorses the concept of an economic resources zone beyond the outer limits of the territorial sea, the precise breadth of which should be arrived at by international agreement which takes into account both the special interests of the coastal state and the interests of the international community. The proposal made by the President in 1970 that there be a sharing by the coastal state with the international community of financial benefits derived from exploitation of the seabed resources of such economic zone is also endorsed in principle.

As to Seabed Resources Seaward of the
Limits of National Jurisdiction

(2) Recommends that any international regime established with respect to the areas seaward of the limits of national jurisdiction incorporate the following principles: (a) that important decisions by the governing council be made by a system of voting that gives equitable consideration to all interests involved; (b) that the international authority created by the treaty have administrative and regulatory responsibilities, with power to license areas for exploitation by others, including States, governmental

organizations and private parties, but that it have no control over volume or rates of production, distribution or pricing of seabed resources; (c) that States and groups of States be eligible to operate as licensees and through joint ventures with licensees.

(3) Recommends that the United States, while not halting exploration and exploitation of seabeds beyond a depth of 200 meters during the negotiating of a Law of the Sea Treaty, should call on other nations to join the United States in an interim policy. The United States should suggest that all permits for exploration and exploitation of the seabed beyond 200 meters depth be subject to the international regime to be agreed upon, which regime should include due protection for integrity of investment in the interim period. The United States should also seek agreement that a portion of revenues derived by States during the interim period from exploitation beyond 200 meters be turned over to an appropriate international agency for the benefit of the international community.

As to Fishery Interests

(4) Urges that the United States seek in the law of the sea negotiations and in the Third United Nations Conference on the Law of the Sea an agreement which will

ensure an adequate jurisdictional base for management of the living resources of the high seas such that valid biologic and economic objectives of fisheries management can be secured.

(5) Urges that the United States Government not at this time take unilateral action to extend its exclusive fisheries zone beyond the present twelve mile limit.

As to Protection of the Environment

(6) Recommends that provision be made for establishment of internationally agreed standards for the prevention of marine pollution, to the ends (a) that the marine environment be adequately protected; (b) that, with respect to vessels engaged in international navigation, there be adequate enforcement of a single set of uniform standards, internationally determined; (c) that, with respect to exploration and exploitation activities on the seabed, the community interest in the oceans be recognized by acceptance and enforcement of international standards everywhere beyond the territorial sea, but with the possibility of supplemental, more exacting, coastal State standards within the coastal State economic resource zone;

(d) that methods for obtaining compensation for damage caused by violations of the internationally adopted rules described above be devised.

As to Unimpeded Navigation and Transportation

(7) Supports the principles that straits which have historically been open for international maritime traffic are international waters whose status should be protected against change as a result of any agreement on the breadth of the territorial sea, and that, as international waters, they should be subject to internationally agreed rules for the safety of navigation and prevention of pollution, with the proviso that any powers granted to coastal States in enforcement of international safety or anti-pollution regulations applicable to such waters be accompanied by adequate provisions for the prompt release under bond or other appropriate guarantee of any commercial vessel, of foreign registry detained under such regulations. Further supports the acquiescence by the United States in the recognition of a 12-mile territorial sea, subject to adequate safeguards against such actions impairing the world community's rights of unimpeded passage through and over straits

which have historically been open for international traffic.

(8) Recommends comparable provisions to preserve existing rights of unimpeded transit through archipelagic waters.

(9) Supports the view that coastal States have the right to establish deep water ports, power reactors, airports and other facilities of economic utility on the continental margins adjacent to their territorial seas and to operate them under their exclusive control, provided that they do so in such a manner as to avoid damage to the environment, unreasonable interference with international navigation or other high seas freedoms, and that any new international treaty dealing with the subject should so provide.

As to Integrity of Investments

(10) Urges that the integrity of investments in seabed resources be fully assured.

As to Scientific Research

(11) Supports the principle of non-interference on the part of the coastal State with scientific research

carried out with the intention of open publication, but recognizes the rights of the coastal State in the following respects: (a) Within territorial waters to exercise customary controls attaching to sovereignty; (b) within an economic resources zone to be determined, seaward of the territorial sea, to participate in the research, have full access to data and samples, and ensure compliance with reasonable restrictions, pursuant to international guidelines, pertaining to environmental hazards, marine pollution, safety of navigation and protection of resource exploitation facilities.

As to Settlement of Disputes

(12) Recommends that there be established a procedure for the compulsory settlement of disputes by ā permanent Law of the Sea Tribunal or a Tribunal selected on each occasion from pre-established panels⁷.*

(13) Recommends that in any dispute between the contracting parties, between any international organization and a contracting party, between any international

* The Ad Hoc Committee on the Law of the Sea and Related Matters has not reached a consensus as to the nature of the forum or procedure to be recommended. The accompanying report is qualified by this comment.

organization and the national of a contracting party, relating to the interpretation or the application of the treaty on the law of the sea, any party to the dispute may invite the other party or parties to the dispute to settle a dispute by direct negotiation, good offices, mediation, conciliation, or through special procedures provided for by an international or regional organization.

(14) Recommends that, when within 30 days no action has been taken by the invited party to resolve the difference by either non-compulsory or compulsory means, the other party to the dispute may refer the matter to the Law of the Sea Tribunal.

(15) Recommends that, when parties to a dispute have resorted to a non-compulsory dispute settlement procedure and have not been able to reconcile their differences within 180 days, then any party to the dispute may refer the matter to the Law of the Sea Tribunal.

BE IT FURTHER RESOLVED, that the President of the American Bar Association or his designee is authorized to present the substance of the foregoing resolution to appropriate committees of Congress.

REPORT OF AD HOC COMMITTEE ON THE LAW
OF THE SEA AND RELATED MATTERS APPOINTED BY
THE COUNCIL OF THE SECTION OF INTERNATIONAL
LAW IN AUGUST 1973

UNDERSTANDING THE DEBATE ON THE LAW OF OCEAN SPACE

INTRODUCTION

The debate which began in the United Nations in 1966 as a debate on "peaceful uses", i.e., exploitation of resources, of the seabed "beyond the limits of national jurisdiction" had become by 1970 a policy debate on the future legal regime of world ocean space. In the latter year the UN Seabed Committee officially became the preparatory body for the Third UN Law of the Sea Conference. The Conference began in November-December 1973 with an organizing session. The first substantive session is scheduled for April-May 1974.

The range of issues on the Conference agenda of 25 topics and more than 60 sub-topics is all inclusive. It includes breadth of the territorial sea, transit of straits, fisheries, seabed resources regime, coastal state preferential rights over resources beyond the territorial sea, pollution control, scientific research, land-locked states, states with wide continental shelves, shelf-locked states, states with narrow shelves, states with short coastlines, regional arrangements, high seas, archipelagos, enclosed and semi-enclosed seas, artificial islands and installations, development and transfer of technology, dispute settlement, zones of peace and security, archaeological and historical artifacts on the ocean floor, peaceful uses of ocean space.

The substance and the procedure of the "solution" of these law of the sea issues are the warp and woof of an exquisitely seamless web. They involve international political, economic, scientific and legal factors as well as national interests and priorities. Accordingly, in considering the ultimate Conference decision on any one issue one must bear in mind that each issue is but one of a number of critical ocean resource and use issues to be dealt with by the international community, the particular solution of which will not necessarily be based solely upon a consideration of factors unique to that issue. It will involve tradeoffs relating to other issues and probably even tradeoffs on matters external to the ocean environment.

Moreover, solutions of law of the sea issues are now viewed as being primarily the product of political negotiations. The UN is composed 2 to 1 of less developed countries who do not have the technology to exploit ocean space. To them freedom of the seas is meaningless at best and is an unequal freedom at worst. Their primary motivations are a greater participation in the usufruct of ocean space and the protection of their own resources.

Finally, there must be contemplated the possibility of failure to reach agreement on solution of critical issues. At the end of the second session of 1973 of the Conference Preparatory Committee on August 24 the chairman said in a closing statement that there was not enough agreement to justify a Committee recommendation to the General Assembly. It should be left to the Assembly, he said, to decide whether or not the third UN Conference on the Law of the Sea should adhere to the original schedule.

The most critical law of the sea issues are, or cluster around, the following topics and sub-topics of this report.

COASTAL STATE PREFERENTIAL RIGHTS IN OFFSHORE WATER AREAS

This report does not purport to be exhaustive of the history or entire range of issues involved in the matter of coastal state preferential rights in offshore water areas. Rather, it is focused on broad aspects of this topic which have a significant relation to the current debate leading to the Third United Nations Conference on the Law of the Sea.

THE TERRITORIAL SEA AND AN ECONOMIC RESOURCE ZONE

Traditionally, the territorial sea was a zone providing physical security for the coastal state. Later, it became a method for asserting exclusive jurisdiction with respect to living and non-living resources of the seas. Because of the emergence of the doctrine of the continental shelf, however, great expansions of territorial sea breadth became unnecessary with respect to non-living resources of the seabed and subsoil. Such was not the case with respect to living resources, however, and in several instances the breadth of the territorial sea was extended to 200 miles in order to ensure exclusive jurisdiction over fishery resources. Details of these events are discussed below. Suffice it to note that there is today a growing acceptance of some system of special rights for coastal states in adjacent waters for purposes of exploiting living and non-living resources, and, provided an acceptable formulas for expressing the precise nature of those rights can be found, it is not likely that the territorial sea concept will be utilized to gain that jurisdiction in the future.

Broad coastal state jurisdiction in international areas, such as a 200-nautical mile "Economic" zone beyond the territorial sea must be restrained by international protection of freedom of navigation. A study of the access of coastal states to international areas of the ocean, indicates that the establishment of such a zone would require some sixty-one coastal states to reach such international areas by passing through the economic area of one or more neighboring states. These sixty-one coastal states, comprising a majority of all such states, would be totally "zone-locked".

Additionally, five coastal states would be "partially zone-locked" in that they would be completely cut off from access to one of the oceans on which they face except by passing through the economic area of one or more neighboring states.

It appears that at least six completely land-locked states would, in addition to their present access problems, become partially zone-locked in that the state or states on which they are dependent for such maritime access would themselves be zone-locked.

The problem of the zone-locked state illustrates acutely the threat to the common interest--particularly to coastal states--if an expansion of economic jurisdiction were to be accompanied by an expansion of jurisdiction affecting navigation.

The concept of a "patrimonial sea" or an "economic resource zone" gathered increasing support in the law of the sea negotiations in the United Nations Seabed Committee. Such a regime would provide an exclusive or preferential right for the coastal state in the living and non-living resources out to a maximum distance of 200 miles from its coast. However, it has been made clear by proponents of such regimes that beyond a relatively short distance from the coast (probably 12 miles) traditional freedom of navigation would not be impaired. Thus, in view of the widespread acceptance of the doctrine of the continental shelf, and the likely agreement concerning special rights of coastal states in living resources off their coasts, it seems probable that fishery and non-living resource issues will cease to be important factors in considering the breadth of the territorial sea.

Thus, the issue will have come full circle with the primary interest of the coastal state reverting to questions of physical and military security.

The predominant interests to be accommodated by agreement on a reasonable maximum breadth of the territorial sea are, on the one hand, the security interest of the coastal state, and, on the other hand, the interest of the world community at large in the maximum use of the world's oceans and air space for purposes of commercial and military navigation.

With respect to commercial navigation, the maritime industry is interested in moving goods by sea in the shortest possible time, at the least cost and with the least restriction possible on operations. Thus, for them, it is important to maintain the largest possible ocean area as "high seas" wherein free navigation is recognized. Extension of territorial seas poses a threat in the form of potentially increased shipping distances, higher costs, and subjection of operations to a multiplicity of regulations and restrictions. Nonetheless, extension of the territorial sea breadth to twelve miles, provided agreement on resource issues can be achieved so as to forestall further expansion of territorial sea claims beyond twelve miles, would seem to be acceptable.

For essentially the same reasons the narrowest possible limit to the territorial sea is also desirable from a military standpoint. Retention of the largest possible area of the world's oceans as high seas would permit the utilization for military transportation of the shortest shipping distances and, hence, at minimum costs, and it would permit the maximum mobility, unfettered by the multiplicity of regulations and restrictions, of air and naval forces.

A significant factor in the maximum and most economical navigation of both commercial and military vessels and aircraft is the right to navigate with minimum interference through the narrows which connect one body of the high seas to another. Without such a right, essential trade and transit routes could be severed at the whim of a strategically located coastal state.

These factors have led maritime nations, including the United States, to propose, and actively advocate, international agreement on twelve miles as a maximum breadth of the territorial sea provided free passage through international straits which thereby become overlapped by territorial seas can be preserved (an issue discussed below), and provided some form of resource regimes which will accommodate the interest of the coastal states can be achieved.

TWELVE MILES AS THE BREADTH OF THE TERRITORIAL SEA

Based on a review of the statements made in the United Nations Seabed Committee and elsewhere over the past three years, it appears that if the offshore resource needs of coastal states can be accommodated through an economic resource zone or a similar concept, there will be widespread support for limiting the breadth of the territorial sea to twelve miles. Indeed, many delegates to the United Nations Seabed Committee have stated in just such terms their willingness to accept a 12-mile breadth for the territorial sea provided their resource needs in adjacent ocean areas are met.

In a recent Department of State tabulation, of 123 jurisdictions for which information was reported, 32% claimed 3 miles, 56% claimed 4-12 miles (42% claimed

exactly 12 miles) and 12% claimed in excess of 12 miles. This is indicative of a strong tendency over the past two or three decades away from a three-mile limit and toward the 12-mile limit. Thus it is conceivable that even in the absence of an international agreement on 12 miles for the maximum breadth of the territorial sea, a customary rule of international law might evolve within the next 10 to 15 years setting that distance as a maximum, provided that extensive claims for resource purposes were not couched in terms of territorial sea jurisdiction.

It appears that twelve miles would be an acceptable maximum limit to the great majority of states for the breadth of the territorial sea, provided that suitable resource regimes for coastal states can be developed, and provided that a suitable regime for transit of the world's narrows can be achieved.

The United States Proposal

In August 1971, the United States delegation to the United Nations Seabed Committee submitted a proposal that would establish the maximum breadth of the territorial sea at 12 miles. However, the United States' willingness to agree to the twelve-mile breadth is conditioned on further agreement with respect to free transit through international straits and preferential fishing rights for coastal states. Two observations about the United States proposal for a 12-mile breadth are in order:

- (1) The draft article would give the right to a coastal state to establish the breadth of its territorial sea at a maximum distance of 12 nautical miles from the baseline. Actual implementation and delimitation would have to be made by the coastal state. This leaves the way open for some states, which might prefer to do so, to maintain existing three, four, or six-mile breadths for their territorial sea and does not attempt to establish or delimit by international agreement the precise outer boundary of the territorial sea. In view of the great disparity in coastal configurations and national interests, this appears to be a desirable feature of the United States proposal.

(2) A twelve-mile territorial sea would of course render a nullity Article 24 of the Convention on the Territorial Sea and the Contiguous Zone which establishes a 12-mile maximum breadth for a special contiguous zone. However, Article 24 would remain relevant for states claiming less than a 12-mile territorial sea and should not therefore be ignored at any future law of the sea conference.

Passage Through International Straits

The present rules concerning passage through international straits which are overlapped by territorial seas are set forth in Article 14 et seq. of the Convention on the Territorial Sea and the Contiguous Zone and in the International Court of Justice decision in the Corfu Channel case.

In essence, the present regime provides that passage through territorial waters (whether coastal or through a strait) must be "innocent", i.e., not prejudicial to the peace, good order or security of the coastal state. Further, in straits used for international navigation, no suspension of the right of innocent passage is permitted. Although the right of innocent passage accrues to warships as well as merchant vessels, submarines must navigate on the surface and show their flag when transiting territorial waters. Finally, no right of overflight is included in the concept of "innocent passage". It should also be noted that some countries appended reservations to their ratification of the Territorial Sea Convention providing that their governments consider that a coastal state has the right to establish an authorization procedure for the passage of foreign warships through its territorial waters without distinction as to whether the territorial waters involved were in straits or merely along a coast.

In view of the trend noted above toward a 12-mile territorial sea, some concern has been expressed about a large number of straits (some figures are in excess of 100) which, though now containing corridors of high seas, would by virtue of extension of the territorial sea from 3 to 12 miles constitute territorial seas in their entirety. Principal concern has been, as would be expected, expressed by

major maritime powers, particularly by the United States and the Soviet Union with respect to naval operations, although it seems clear that similar concerns are present with states having commercial maritime interests.

It is clear that the present regime of innocent passage through territorial waters places several burdens on naval mobility, affecting operations by maritime powers: (1) passage is subject to the requirement of "innocence", a subjective test applied by the coastal states on an ad hoc basis without meaningful international standards or guidelines, (2) some states (including the Soviet Union) do not recognize a right of innocent passage by warships without prior authorization, (3) there exists no right of overflight, (4) submarines must navigate on the surface and show their flags, and (5) if the strait is not one "used for international navigation" there exists a right of temporary suspension of passage.

Also, it seems apparent that subjective coastal-state application of the presently vague innocent passage criteria could lead to major and costly restrictions on commercial navigation through narrow straits based on nature of the cargo carried (e.g., petroleum) or its destination.

At the July-August 1971 meeting of the United Nations Seabed Committee, the United States proposed a system of free transit through international straits. This proposal purports to change the existing regime of passage outlined above in several significant respects including: (1) a change from "innocent passage" to "free transit"; (2) inclusion of submerged passage within the concept of "free transit"; and (3) inclusion of overflight within the concept of "free transit". The importance which the United States places on this proposal in context of the current law of the sea negotiations was indicated by the speech introducing a draft article in which it was said that the United States Government "would be unable to conceive of a successful law of the sea conference that did not accommodate the objectives of" this proposal.

Strong opposition to the United States proposal was voiced by several states at the July-August 1971 meeting of the United Nations Seabed Committee. Although all states seemingly recognize the value of the maintenance of the free flow of international trade and commerce on

the oceans, including passage through straits, the interests of the technologically developed nations, particularly the two super-powers, can come into conflict with the interests of the developing countries. In brief, the problem can be stated as one of achieving a fair balance between, on the one hand, the need for unfettered movement of commerce and naval vessels on the high seas and through international straits and, on the other hand, the need for protection of the legitimate interests of coastal states (the latter most often being specified as avoiding pollution from massive oil carrying tankers, safety of navigation and avoiding military presence and confrontations by the super-powers near their coasts).

This problem can best be solved by adoption of a regime which permits the transit of both merchant vessels and warships through international straits but allows sufficient coastal state regulation of the act of transit reasonably to ensure protection of their shores from pollution and protection from military confrontations between other states. The validity of both sets of interests on this issue must be accommodated.

Any balancing of the interests of the entire community of nations against those of states located on the shores of straits used for international transit would seem clearly to call for internationally agreed, rather than unilaterally imposed, rules governing safety of navigation, provided only that such international rules are reasonably designed to protect the legitimate needs of the coastal states. Reasonable regulations concerning safety of navigation already exist in many of the world's important straits and it is likely that internationally agreed standards for safety of navigation (and pollution) modeled on them would be adequate to govern traffic through international straits as nearly as possible in the same way that it is now governed.

The United States has tentatively agreed to reasonable traffic safety regulations consistent with a basic transit right but has insisted that they should be established by international agreement, even though they would be enforced by the coastal state.

It would seem to be accepted that internationally agreed rules relating to safety of navigation in straits used for international transit must be enforced by coastal states with respect to straits lying within their territorial waters,

including the right to arrest a ship in serious cases related to enforcement of the rules or, in the case of warships, to require their departure. The very existence of a right to arrest necessitates adequate provision for the prompt release under bond of vessels so arrested. Otherwise, the very purpose of international standards could be vitiated by arbitrary detentions.

Passage Through Archipelago Waters

Certain archipelago states have asserted a right to encircle themselves with a pattern of straight baselines and to claim the waters within the baselines as "internal waters" of their national territory. The breadth of their territorial sea would then be measured seaward from those baselines. This proposal raises problems similar to those discussed above relating to straits. The immediate impact of these proposals would be to require the consent of the archipelago state for passage through its "internal waters". However, many sea routes through such "internal waters" are high seas under customary international law and so navigators have been free to use them in keeping with changing patterns of world trade. Archipelago states seeking thus to change present law may be obliged to consider conceding a non-discriminatory right of passage through designated corridors in order to make their specialized proposals more attractive to other states.

Whatever solution to this problem the United States agrees to as a user of ocean space it will, of course, have to yield to other users in relation to United States archipelago territory.

INTERNATIONAL FISHERIES MANAGEMENT

International fisheries management involves the conservation and allocation of the living resources of the marine environment other than sedentary species. In order to assess adequately the options now available for revision of the existing management system it is necessary to understand the historical context in which fishery management has developed,

to know the nature of past attempts at management and to be aware of the broad negotiating context of proposed arrangements.

Freedom of the High Seas and Fisheries Management

The fundamental effect of the principle of freedom of the high seas for fisheries management is that living resources situated in the high seas are subject to reduction to ownership by the one who first reduces the resources to his possession. Under such a regime the international law rule concerning the exploitation of fishery resources on the high seas became one of unregulated competition.

By the latter part of the Nineteenth Century, it became clear with respect to selected species that continued unregulated exploitation of fishery resources would lead to reduction of stocks to a point where their availability as food for man would cease.

One proposed solution to the problem of unrestricted access and undesirable competition in a fishery was for nations to assert exclusive competence in adjacent maritime areas with respect to the exploitation of living resources. Given exclusive jurisdiction, the coastal state could then exclude non-nationals from the fishery and would be possessed of the requisite jurisdictional authority to impose restrictions on its own nationals, or others if not excluded.

The other approach designed to alleviate problems of congestion and overfishing, as well as international conflict generated by fishing disputes, was for nations to enter into international agreements concerning fishing activities.

Management (or regulatory) fishery organizations, of which there are now more than twenty, possess a wide range of powers and functions. A few are species oriented (for example, with respect to tuna and whales) while most cover selected fishery resources within a designated area (some species-oriented bodies are also limited in geographical area).

All fishery regulatory organizations have as their base the gathering and analysis of scientific data on fishery stocks in order to promote more rational management. The regulatory powers of such entities vary greatly however. Most have only the authority to make recommendations to their member states concerning appropriate conservation action which may include the establishment of seasons, restrictions on the use of gear, and the like. A few have power to bind their member states directly.

By and large, the regulatory fishery commission concept-- though better than totally unrestrained competition among nations and fishermen--has provided a less than satisfactory solution to the conservation and allocation issues involved in high seas fishery management. The lack of binding authority, the predominance of the nation-state and its national interest, and the lack of effective enforcement mechanisms, all have contributed to this failure.

In September 1945, the President of the United States issued Presidential Proclamation 2668, which dealt with the problem of high seas fisheries management. That proclamation asserted that it was regarded as proper for the United States to "establish conservation zones in those areas of the high seas contiguous to the coasts of the United States wherein fishing activities have been or in the future may be developed and maintained on a substantial scale". If the activities involved only United States nationals, then unilateral regulations would be appropriate; however, if other nations were involved, the conservation regime was to be agreed upon. The proclamation also recognized the right of any other state to establish similar conservation zones, provided that it did so in accordance with the requirement of mutual agreement where the activity involved the nationals of more than one state. The United States has not expressly designated any conservation zones pursuant to Proclamation 2668.

A number of Latin American nations issued unilateral proclamations asserting exclusive fisheries jurisdiction to 200 miles from the coastline. These claims were first supported by a group of states on an international basis in the Declaration of Santiago in 1952. By that instrument, Chile, Ecuador and Perú each asserted "sole sovereignty and jurisdiction over the area of sea adjacent to the coast of its own country and extending not less than 200 nautical miles from the said coast". The basis for the claim was stated to be the duty of each state to "ensure the conservation

and protection of its natural resources", coupled with the fact that the present extent of the territorial sea and contiguous zone was insufficient to permit the conservation, development, and use of the living resources of the adjacent ocean waters.

Although the 200-mile exclusive fishing zone was not accepted outside Latin America until very recently, most coastal states did, during the 1950's and early 1960's extend their fishing limits to twelve miles. With the exception of Iceland and the United Kingdom, this process produced little serious conflict. Following this rising tide of extension of fisheries jurisdiction to twelve miles, the United States in 1966 adopted the Exclusive Fisheries Zone Act which established exclusive fishing rights in an additional nine-mile belt beyond the three mile territorial sea. Agreements were reached with nations which had traditionally fished in the three to twelve-mile zone concerning a phase-out of their activities.

In order to manage fisheries beyond the twelve mile zone which are not covered by international fishery conventions, many nations, particularly the United States, have utilized a system of bilateral treaties in which seasons, gear restrictions, and other regulatory processes are imposed on these high seas areas as between the parties to such agreements. Most such agreements are for limited terms, usually two years, and are renewed or modified as required upon expiration. These are at best stop-gap measures and, often involve bargaining elements external to the fishery.

Thus, the existing system of high seas fishery management can be characterized briefly as follows:

- (1) A legal regime of completely open access on the high seas;
- (2) A generally ineffective system of regional fishery agreements and commissions;
- (3) A conflict concerning the international legal validity of the unilateral extension of exclusive fishing zones beyond twelve miles; and
- (4) An ad hoc system of reacting to fishery management crises through short term bilateral agreements.

The Principal Issues in Inter-
national Fisheries Management

Basic to any system of fisheries management is a determination of the objectives of management. Traditionally, maximization of food production and conservation of fishery resources were viewed as essential if not exclusive valid objectives of fisheries management. This objective is usually phrased in terms of ensuring "maximum sustainable yield" from the fishery. Recently, however, the objective of maximizing net economic return from the fishery has found favor, principally among economists. This objective would result in transfer to other spheres of the extra, uneconomic effort expended in maximizing sustainable yield. Other proposed objectives of fisheries management include avoidance of international conflict, utilization of the fishery for employment purposes, equitable allocation of fishery resources, development of knowledge and technology, minimization of interference with other uses of ocean space, and political acceptability.

Regardless of the objectives selected for any given regime, an issue of considerable importance concerns the type of national, regional, or international organization or machinery to administer and enforce a regime. This raises such questions as the formula for governmental participation and the question of costs of maintaining such organizations.

In terms of allocation of resources, the most significant issues involve the interests of distant water fishing fleets versus the interests of coastal nations in the resources near their coasts; new entrants to a particular fishery; open access versus allocation of property rights; special treatment to be afforded anadromous, wide ranging, and sedentary species of living resources; and the role, if any, to be accorded landlocked states with respect to access to or sharing in the resources of the high seas.

The United States Fishery
Proposal: The "Species" Approach

The basic elements of the present United States posture with respect to fisheries are as follows:

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

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

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

(d) Highly migratory oceanic resources (tuna, whales, etc.) would be regulated by international fishery organizations.

(e) The conservation standard would be maximum sustainable yield, taking into account "relevant environmental and economic factors".

Representatives of the United States speaking in the Seabed Committee have made it clear that the United States is willing to accept a strong role for coastal states in the management of fisheries but that the United States prefers not to delimit zones of national jurisdiction for fisheries purposes. This reticence has its roots in non-fishery issues, particularly those related to naval mobility and the concept of "creeping jurisdiction".

It should be noted, however, that the United States has also indicated a willingness to accept broad coastal state jurisdiction over seabed resources provided that five enumerated international standards are made applicable to that area (the standards involve maintenance of multiple use of the area, protection of the marine environment from pollution, protection of investments, revenue sharing, and compulsory dispute settlement). It seems likely that if an agreement on these aspects of broad coastal state jurisdiction over seabed resources could be reached, the United

States would have little reluctance to accept a zonal rather than a species approach for the management of living resources.

Proposals of Distant Water Fishing Nations

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

The Japanese articles provide for preferential rights to developing coastal states to the extent of their catch capacity, and a preferential right for any developed state to the extent necessary for the maintenance of its "locally conducted small-scale coastal fishery". Excluded from the preferential rights concept are highly migratory species, including anadromous species, of fish which are to be regulated pursuant to international or regional arrangements. Dispute settlement provisions ensure that regulatory measures imposed by the coastal states take into consideration the interests of other states concerned, an obvious reference to distant water fleets. The stated objective of the Japanese articles is to achieve maximum sustainable yield of fishery resources.

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

provision which takes into consideration the growth of the fishing capability of the developing coastal states with respect to increasing the allowable catch allocated to that coastal state.

Current National Issues: The Affected
Fishery Industries and Their Interests

The fishing industry in the United States can be conveniently classified in four categories--tuna, coastal, salmon and other anadromous species, and shrimp.

The tuna industry relies on highly sophisticated gear which operates primarily off the western coasts of the continents of South America and Africa. Although tuna are a highly migratory species of fish, a substantial portion of the fishing activity of the United States distant water tuna fleet takes place within 200 miles off the coastline. The tuna industry has, therefore, borne the brunt of the conflict of view between the United States, on the one hand, and Chile, Ecuador and Perú ("CEP" countries), on the other hand, concerning the international legal validity of 200-mile territorial seas or exclusive fishing zones. Their vessels have been arrested, detained, fired upon, and generally harassed when attempting to operate within the 200-mile limit adjacent to the CEP countries which seek to impose a licensing requirement to validate the presence of vessels within such zones. Accordingly, the tuna industry would prefer, regardless of other arrangements emanating from the Third Conference, to maintain its right to follow the tuna wherever they may migrate without the imposition of additional economic burdens imposed by the existence of 200-mile economic resource zones or other jurisdictional arrangements.

The coastal fishing industry in the United States operates, by definition, primarily off our own coasts--New England, the middle and south Atlantic, the Gulf of Mexico, the Pacific, and the Pacific Northwest. The United States coastal fishing industry has not fared particularly well in the face of competition from the distant water fishing fleets of the Soviet Union, Japan, the United Kingdom, Germany, and other nations. The position of the industry is generally one of securing protectionist legislation or

international agreement which would give the United States the right to exclude distant water fleets from the United States coastal fishing areas (or to regulate them upon admission) in order to provide a better opportunity for the United States fleet to exploit these resources and to maintain the economic viability of the domestic fishing industry.

The anadromous fishing industry (principally salmon, but including other species as well) is not in a position to rely exclusively either on a zonal approach (such as desired by the general coastal fishery in the United States) or a completely open access regime (such as might be more satisfactory to the tuna industry). Although anadromous species spawn in the fresh and estuarine waters of the United States they range far and wide on the high seas and are thus subject to predation by distant water fishing fleets when outside national jurisdiction. Thus the anadromous fisheries industry would prefer a preference or exclusive right to the catch of anadromous species by the host state. Their position is thus akin to that of the coastal fisherman who desires exclusive access to the resource but differs in that even a 200-mile economic resource zone would be insufficient in itself to secure the requisite species protection.

Finally, the shrimp industry in the United States has interests similar to both the coastal industry and the tuna industry. A great deal of shrimp fishing is done off the coasts of the United States, principally in the Gulf of Mexico, but a significant portion is also conducted off the coasts of Mexico, Guyana, Brazil, and other foreign nations. Thus the shrimpers, although desiring the exclusive right to harvest shrimp resources off the coasts of the United States, do not wish at the same time to endanger their access to shrimp resources off the coasts of other states.

Coastal State Economic Zone

A large number of proposals concerning broad coastal state jurisdiction over living marine resources have been introduced in the Seabed Committee. All of the proposals share a common theme in asserting more or less extensive coastal state jurisdiction with respect to living marine resources.

One such proposal, by Kenya, would accord to coastal states the right to exercise jurisdiction over a zone not to exceed 200 nautical miles with respect to all living and non-living resources of the area. The criteria to be considered in determining the extent of such zones include geographical, geological, biological, ecological, economic, and national security factors. The jurisdiction to be exercised is exclusive with the coastal state, but it is to be without prejudice to the exercise of freedoms of navigation, overflight, and the laying of submarine cables and pipelines. The draft also requires the coastal state to permit exploitation of living resources to "neighboring developing landlocked and 'near landlocked' states as well as countries with a small /continental/ shelf", with the condition that the enterprises of such states be effectively controlled by their national capital and personnel. Finally, neighboring developing states are obliged to "mutually recognize their existing historic rights" and to "give reciprocal preferential treatment to one another" in the process of exploiting living resources of their respective economic zones.

The draft treaty articles submitted in 1973 by Colombia, Mexico and Venezuela follow closely the Declaration of Santo Domingo which represented the views of Caribbean countries on problems of the law of the sea. This proposal would establish a "patrimonial sea", giving to the coastal state "sovereign rights" over living marine resources and according to the coastal state the right to adopt necessary measures to ensure that sovereignty. The outer limit of the patrimonial sea would not exceed a distance of 200 nautical miles from the coastline and, beyond a twelve mile territorial sea, the freedoms of navigation, overflight, and cable laying would be unrestricted except as to factors "resulting from the exercise by the coastal state of its rights within the area". Significantly the draft articles conclude with a proviso that they are not to be interpreted "as preventing or restricting the right of any state to conclude regional or subregional agreements to regulate exploitation or distribution of the living resources of the sea".

Possible Outcomes of the Third Conference

There could be agreement on broad international standards to govern fishery exploitation, with details left to

agreement by the nations involved in a particular fishery, perhaps on regional geographic bases. There appears to be substantial sympathy among many members of the international community for special regimes for regional areas which would take into consideration the variety of economic, social, technological, and political situations existing in different parts of the world. Such a regime could, however, have an inhibiting effect on the mobility of distant water fishing fleets should the regional management base be used systematically to exclude vessels not of the region.

There could be international agreement on the validity of regionally determined fishing regimes without global standards which would afford almost total autonomy to regional organizations of coastal states.

Agreement could be reached on broad limits of national jurisdiction over all biologically productive areas of the sea, with requirements for interstate cooperation where necessary because of the migratory patterns of particular species.

There could be exclusive national jurisdiction over all biologically productive areas with cooperative agreements being purely voluntary acts on the parts of the states involved.

As noted above, there is a great deal of support among developing coastal states for a regime of broad coastal state jurisdiction over living and non-living resources of the marine environment. It appears at this time that the states supporting such a concept possess the requisite two-thirds majority to adopt treaty articles at the third conference. However, within the economic resource zone concept there are a number of issues whose resolution is still in doubt. For example, the seaward extent of such a zone is by no means certain. Some states argue for a 200-mile zone while others wish to preserve what they contend are "acquired rights" in continental shelf areas by providing an alternative boundary including the physical continental slope or rise where it extends beyond the 200-meter limit.

Further, there exists the issue of whether the rights in such a zone are to be exclusive or preferential. If exclusive, the coastal state would be under no obligation to permit access to their respective zones by distant water

fishing fleets even in situations where the coastal state did not achieve maximum utilization of the resource. If preferential, a system could be devised to impose an obligation on the coastal state to admit foreign fishing vessels in situations where it could not take the maximum sustainable yields of particular stocks. The access would presumably be pursuant to appropriate regulations and license fees if desired.

Still further, there is the issue of establishing international standards with respect to general conduct in economic resource zones. Such international standards--as advocated by the United States--might include items relating to the protection of the marine environment, maintenance of multiple use (particularly navigation), protection of integrity of investment, compulsory dispute settlement, and revenue sharing. Obviously, the adoption of a preferential right concept in opposition to an exclusive right concept, and the introduction of certain minimum international standards (albeit administered by the coastal state) would make the exclusive resource zone a much less nationalistic concept than the proposals of the more assertive Latin American states which actually approximate 200-mile territorial seas.

Another issue concerns the treatment to be afforded anadromous species and highly migratory species. The United States has advocated, for instance, that anadromous species be included within the preferential right of the coastal state regardless of the extent of their migration on the high seas. Other states, which have traditionally fished salmon and other anadromous species on the high seas oppose this approach. Additionally, there is some support for carving highly migratory species (tuna, whales, e.g.) from the jurisdiction of the coastal state.

THE SEABED BEYOND THE TERRITORIAL SEA

The seabed of the territorial sea partakes of the same national territorial character as the superjacent water. However, the seabed beyond the territorial sea is an international area the legal regime of which now differs in some respects from that of the superjacent high seas.

Coastal State Preferential Rights in
International Offshore Seabed Areas

Under the legal continental shelf doctrine coastal states now have an exclusive economic jurisdiction with respect to seabed resources beginning at the outer limit of the territorial sea. Its breadth is discussed below. The emerging consensus is that the legal continental shelf will be overlapped and superseded by a wider international seabed economic zone variously referred to as the Intermediate Area or Coastal Seabed Economic Area.

The recognition of broad coastal state management rights would be accompanied by provision for the equitable accommodation of other states' interests through measures, such as revenue sharing, which are consistent with coastal state resource management. It is the view of the United States government that "a new Law of the Sea Treaty would not be adequate if it gave to coastal States comprehensive seabed economic jurisdiction without providing for protection of the rights of other States in the seabed economic area of coastal States". These rights must not only be clearly provided for but a system should be established which would "assure that the coastal State does not go beyond its seabed economic rights or unjustifiably interfere with other activities conducted in the area or superjacent waters by other States". It is, therefore, in the interest of worldwide agreements on the rights of coastal states that there be correlative duties assumed by such states so as to assure a harmonious accommodation of interests.

Under the proposal the coastal state would "have exclusive rights over the natural resources of the coastal seabed and subsoil". The coastal state could "determine if exploration and exploitation will take place, who shall do it and on what terms and conditions".

The coastal state would also "have the exclusive right to authorize and regulate" in the Economic Zone and in the superjacent waters "the construction, operation and use of offshore installations affecting its economic interests" and "drilling for purposes other than exploration and exploitation of resources".

With respect to the foregoing, the coastal state may "apply standards for the protection of the marine environment

higher than those required by applicable international standards" (provided such standards are not discriminatory).

All states will continue to enjoy in the Economic Zone the freedoms of the seas not specifically limited in the proposed Convention including, of course, the right to navigate on and under the surface and to fly over it.

Compulsory dispute settlement procedures are proposed to assure that the special rights of the coastal state are respected and are exercised with due regard for the rights of non-coastal states and their nationals.

The position with respect to the above issues taken by the United States Delegation and by the draft treaty Articles submitted by it are based on the main points of the President's Ocean Policy Statement of May 23, 1970. These points were endorsed by a Resolution of the House of Representatives (H. Res. 330), March 28, 1973 and Senate Resolution No. 82 agreed to on July 9, 1973 and by a Resolution of the House of Delegates of the American Bar Association in August 1973.

This latter Resolution accepted the concept of an "economic resource zone", found the proposed width of 200 nautical miles to be "acceptable" and advocated "that the exclusive seabed jurisdiction of the United States should be protected to that distance or to the full width of the continental margin, whichever is greater".

The American Bar Association Resolution of August 1973 gave approval to four of the five conditions to United States agreement to a broad Economic Zone. The five, described in Senate Resolution No. 82 as "international community rights" are expressed therein as:

- "(a) protection from ocean pollution,
- (b) assurance of the integrity of investments,
- (c) substantial sharing of revenues derived from exploitation of the seabeds parti-

cularly for the benefit of developing countries,*

- (d) compulsory settlement of disputes, and
- (e) protection of other reasonable uses of the oceans,"

As to (c) the Resolution withheld support and recommended limitation.**

This Report does not take issue with the treatment in the Resolution of revenue sharing. Lessees and licensees in the economic zone and beyond will be taxed by their governments in accordance with national tax policy which might well include a tax basis no more severe than that imposed upon persons operating on land. Any treaty commitment regarding the amount contributed by way of revenue sharing

* There is an interesting difference between the statement of this principle in S. Res. 82 and in the President's May 23 announcement. The latter spoke of "collection of substantial mineral royalties to be used for international community purposes". It has been urged in a 1970 report of the Committee on Deep Sea Mineral Resources of the American Branch of the International Law Association that the contributions for distribution to developing countries should be paid by the sponsoring government from its general revenues. The amount of the contribution would not necessarily have any relationship to the amount collected in taxes and perhaps royalties from the licensee. The S. Res. is broad enough to permit this rather than the sharing of royalties which might bear no relationship to the success of the venture.

** "Any treaty commitment for contributing of governmental revenues from the American continental margin for international community purposes should be limited in amount, any larger contributions being preserved for appropriation by Congress in the light of the overall national interest from year to year."

would not necessarily be related to the taxes collected. It would be determined by considerations of fairness to the land/shelf locked states and be paid from the general funds of the states directly benefiting from the extraction of seabed resources.

Breadth of the Coastal Seabed Economic Area

The debate over what is now, and how much wider should become, the breadth of the coastal seabed economic zone is primarily a debate over who has what rights, and where, in relation to oil and gas. A 1969 report of the U.S. Geological Survey indicates that commercial seabed oil and gas deposits are generally limited to the continental margin and are about evenly divided between the area landward of the 200-meter isobath and the area seaward between the 200-2500 meter isobaths.

The breadth of the present exclusive sovereign rights of coastal states over seabed natural resources is defined in Article 1 of the 1958 Convention of the Continental Shelf as:

"... the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 meters or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas...." (Underlining added.)

In turn, Article 2 of the Convention confirms the exclusive sovereign rights of the coastal state over the continental shelf as thus defined for the purpose of exploring it and exploiting its natural resources and also confirms that:

"The rights of the coastal State over the continental shelf do not depend upon occupation, effective or notional, or on any express proclamation."

The International Court of Justice, in the North Sea Cases, which were concerned with the seabed boundary between adjacent coastal states, confirmed the foregoing coastal state seabed rights as customary international law in the Court's following language rejecting the argument that each coastal state should have a "just and equitable share" of

the continental shelf:

"19. ... the doctrine of the just and equitable share appears to be wholly at variance with what the Court entertains no doubt is the most fundamental of all the rules of law relating to the continental shelf, enshrined in Article 2 of the 1958 Geneva Convention, though quite independent of it,--namely that the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist ipso facto and ab initio, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short, there is here an inherent right. In order to exercise it, no special legal process has to be gone through, nor have any special legal acts to be performed. Its existence can be declared (and many States have done this) but does not need to be constituted. Furthermore, the right does not depend on its being exercised."

The Court reiterated the above role of the "natural prolongation" concept in its following language rejecting the argument that the equidistance line is a priori the seabed boundary between adjacent coastal states:

"39. The a priori argument starts from the position described in paragraph 19, according to which the right of the coastal State to its continental shelf areas is based on its sovereignty over the land domain, of which the shelf area is the natural prolongation into and under the sea. From this notion of appurtenance is derived the view which, as has already been indicated, the Court accepts, that the coastal State's rights exist ipso facto and ab initio without there being any question of having to make good a claim to the areas concerned, or of any apportionment of the continental shelf between different States."

There is no legally authoritative definition of "natural prolongation", "exploitability", "adjacency" or "appurtenance".

There is no relationship, according to the Court's dictum above, between natural prolongation and breadth of the legal continental shelf, i.e., of coastal state rights; natural

prolongation is simply the reason why, within the breadth of the legal continental shelf, international law attributes ipso jure title to the coastal state over natural resources without any special legal process or special legal acts, such as effective occupation, symbolic occupation or proclamation.

There are conflicting views among legal scholars on the breadth of coastal state's exclusive rights under the 1958 Convention on the Continental Shelf. Each of these conflicting views is held by some of the authors of this report.

One view, which is asserted by the American Bar Association Resolution of August 1973, is that the areas of exclusive coastal state sovereign rights over natural resources "encompass on with advancing technology will encompass the full extent of the continental margin".

The opposing view is that such area extends to the limit of exploitability existing at any given time, which limit does not now encompass the full extent of the continental margin and would encompass such full extent only if the continental margin were to be considered to its full extent as being "appurtenant" to the coastal land mass.

In the international debate to date there appears to be an emerging consensus on a coastal seabed economic zone of a wider breadth which will overlap and supersede the legal continental shelf but which would fall short of encompassing the entire continental margin everywhere, i.e., would leave part of the continental margin within the international deep seabed area discussed below. Every state would presumably make its decision on this point having in mind its overall national interest. In doing so states should not be hampered by the possibility of charges of "give away" or renunciation of "acquired rights".

The International Deep Seabed Area

The international deep seabed area, in the current debate, is the seabed area beyond the international coastal seabed economic area. Realistically the principal issue of this area is who, under what regime, is to exploit the copper, nickel, cobalt and manganese of the potato-shaped

accretions called manganese nodules found on the deep seabed. The nodules of primary commercial attraction are found in areas well beyond the limits of national jurisdiction no matter where the boundary of the coastal seabed economic zone is drawn. In the U.N. Seabed Committee spokesmen for numerous smaller states favor vesting operating powers and functions in an international organization or Authority as it is usually called. Others oppose this and support a simple licensing system on a first-come-first-take basis.

Under the proposal made by the United States, only states or groups of states, and their licensees would exploit the area. Under that prepared by Latin American states, an international agency, called the Enterprise, would alone have that right, presumably to be exercised through contracts with private companies or states. A third proposal is for states and their licensees to exploit the area under international regulations, with an international agency having also the power to do this when it has acquired the necessary technological and financial resources. As the U.S. negotiator on this issue has stated to a Senate Committee, which of these alternatives should be embodied in a Law of the Sea Convention is "the sine qua non of a successful progress of our negotiations".

When asked by Senator Metcalf with what kind of international regime industry could live, and in particular whether joint ventures with developing countries would be feasible, the Chairman of the Committee on Undersea Mineral Resources of the American Mining Congress replied:

"We have expressed concern about certain types of international regimes for deep seabed mining which have been strongly advocated by developing nations. Basically, these regimes vest all authority to explore and exploit the seabed in an international operating agency with right of access denied to individual nations and private enterprise organizations. In addition, strong production, marketing and price controls are an inherent part of these propositions.

"We believe industry could live with an international regime which guaranteed equal 'access to

exploitation of the seabeds to all states (and private enterprise within some of those states) on a first-in-time first-in-right basis. The regime would not be able to exercise any production, marketing, or price control. The basic system would be a licensing one with the terms of the licenses being reasonable and consistent with encouraging development of ocean resources. In fact, the provisions of S. 1134 could be a model for the licensing system. The instructions of the regime which would regulate activities should be simple but adequate to the task of regulation, administration, and dispute settlement. The basic control of these institutions must be kept away from the politics of the developing nations by some system which utilizes weighted voting by the developed states in the decision-making organ of the regime.'

"We see no virtue in and no justification for joint ventures with developing countries in ocean mining. Such joint ventures on land in the past have either been simple mechanisms to change the effective tax bite or have been part of a pattern of progressive takeover by the developing country of the enterprise. However, in these cases on land the resource was located in the country and was being exploited there, so that in all considerations the nation involved had and should have had fundamental control of its resources. Nevertheless, such resources are developed on the notion of a contract between the nation and the exploiter, and troubles have arisen because of arbitrary and unilateral changes in the contract terms up to and including expropriation without compensation. In the case of ocean mining, the question of joint ventures with developing countries has been extensively studied by industry and, when reduced to essentials, becomes a question of what values the LDC is capable of contributing to the venture. The resource is not located in the LDC, nor is the market for the product, the source of necessary reagents, skilled labor or (in general) a secure investment climate in which to locate a processing plant. Internal investment capital may be in short supply in the LDC or committed fully to more urgent

internal development projects. Except for the rare case (as in the case of certain oil-exporting LDC's) it is difficult to rationalize such a joint venture at the investment scale now contemplated."

Presumably the answer would have been much the same if the question had related to joint ventures with an international agency or "Enterprise". Although the risks of unilateral alteration of a contract with such an agency might be less if the Convention provided adequate safeguards for the protection of private investment, other aspects of such an arrangement would be objectionable. Thus, Latin American spokesmen have made it clear that they anticipate equal representation for the Enterprise on the board of directors of any joint venture and full access to all technological information and data. The door would thus be opened to future competition by the Enterprise itself, or perhaps by member states, whatever assurances might be given that such information would be kept "confidential". In return for this the Enterprise would provide access to the resources constituting the "common heritage of mankind". The prospective participant would have no choice but to come in on Enterprise terms or abandon the venture.

There is every indication that the United States will continue to insist on the first alternative, namely access to states, and through them to private enterprise, on a non-discriminatory licensing basis. The difference between a licensing system to states and private companies on one hand, and exclusive operating rights vested in an Enterprise, on the other, may, however, be more apparent than real, at least so long as the Enterprise does not possess the capital and technology necessary to conduct operations itself. Whether the Authority granted licenses to private companies or the Enterprise itself contracted with such companies to explore and exploit the deep seabed would not seem to be as important as the rights granted by such licenses or contracts. If the terms are satisfactory and the Enterprise were precluded from altering them without mutual consent, industry should have what it needs to conduct operations without political or commercial interference.

The notion of joint ventures, however, would appear to be unattractive and unrealistic, as the international Authority would contribute little if anything to a deep seabed

undertaking, while its constant presence would have an inhibiting effect on the freedom required by management to operate within the terms of its contract. This would be particularly true if, as appears likely, the governing organs in the international Authority functioned on the basis of one nation one vote.

Some doubt that a Law of the Sea Conference composed of some 140 or 150 sovereign states would approve a system of weighted voting such as that proposed by the United States or the Soviet Union, or any modification of equal representation for all states, large and small, rich and poor. What may emerge is a decision-making body composed of members representative of the various areas and interests involved in which each member would have one vote.

Nevertheless, the risks of adverse decisions or what may be just as bad, of weak, compromise decisions, or none at all, could seriously prejudice those who have very large sums committed to deep ocean mining. What is more significant is that insistence on joint ventures might be regarded by financial interests whose capital is sought in the hundreds of millions of dollars as presenting such serious risks of political interference as to render commitment unacceptable. This would not only inhibit development, with all the consequences adverse to our requirements for raw materials and our balance of payments that have been outlined at Congressional hearings, but would prejudice pioneering work already performed by American industry and leave the field to foreign enterprises subsidized by foreign governments.

What is proposed by the United States is that decisions of the organization be governed by rules and regulations which in the first instance would form a part of the Convention itself, being set out in an annex to the Convention. Amendments and additions would be formulated by a Rules and Recommended Practices Commission and submitted to the Contracting Parties to the Convention for their comments. After receiving comments, the Commission would then submit a revised text to the Council, which would adopt it or return it to the Commission for further study. If adopted, it would be submitted to the Contracting Parties and would become effective after a stipulated period unless more than one-third of such Parties registered disapproval within that period.

If such a system were adopted, the risk of interference with licenses or other forms of contract contrary to their terms would appear slight. Any action contrary to the rules or to such terms would also be safeguarded by the United States proposal that any person may bring a complaint to the Tribunal established by such proposal with regard to a decision directed to such person or of direct concern to it.

While the choice of alternatives between an operating Authority, on the one hand, and a simple licensing system, on the other, may thus appear to be one on which the Conference might founder, the opportunities for negotiating suitable compromises without departing from safeguards essential to high cost and high risk enterprises should result in a system for deep seabed mineral exploitation compatible with the following statements made by the U.S. Delegate to the U.N. Committee on August 10, 1972:

"... it is important to dispel any possible misconceptions that my government would agree to a monopoly by an international operating agency over deep seabed exploitation....

"An effective and equitable regime must protect not only the interests of the developing countries but also those of the developed countries by establishing reasonable and secure investment conditions for their nationals who will invest their capital and technology in the deep seabeds. In order to provide the necessary protections for all nations with important interests in the area, it is also necessary to establish a system of decision making which takes this into account and provides for compulsory settlement of disputes. We do not regard these objectives as inconsistent with the desire of other countries for equitable participation in deep seabed exploitation and its benefits."

The proposals relating to the Tribunal are discussed elsewhere in this Report.

INTERIM SEABED REGIME

Until such time as a consensus is reached on a new law of the sea treaty and it comes into force, which may be a considerable time, there arises the matter of an interim regime in relation to exploitation of the deep seabed nodules.

A Committee of the American Mining Congress has proposed legislation on which hearings have been held by Committees of both the House and the Senate the effect of which would be to protect American miners from encroachment by other Americans or from the nationals of other countries that adopt comparable legislation. The President in his May 1970 statement recognized that the negotiation of a treaty as complex as a Law of the Sea Convention is bound to be "may take some time". The President continued, "I do not, however, believe it either necessary or desirable to halt exploration and exploitation of the seabeds beyond a depth of 200 meters during the negotiating process". "I will", he stated, "propose necessary changes in the domestic import and tax laws and regulations of the United States to assure that our own laws and regulations do not discriminate against U.S. nationals operating" seaward of the 200 meter isobath.

Three and one-half years have passed without any initiative on the part of the Administration to enable U.S. nationals to compete with the nationals of those countries, notably West Germany and Japan, who are being given increasing governmental assistance to develop mineral mining techniques for application beyond the areas of coastal state jurisdiction.

The Administration has opposed enactment now of the bills sponsored by the American Mining Congress on the ground that rightly or wrongly they have become a symbol to some developing nations of an attitude of "go it alone" by the United States. This being the belief of these nations, enactment now could, the Administration concluded, affect adversely the law of the sea negotiations. The United States Congress has been assured by witnesses from the Executive Branch that implementing legislation for a prolonged interim period will be proposed. This is in accord with recommendations of the Stratton Commission,* the Committee on Deep Sea Mineral Resources of the American Branch

* Stratton Comm'n, Our Nation and the Sea: A Plan for National Action 156 (1969), also published as H.R. Doc. No. 42, 91st Cong., 1st Sess. (1969).

of the International Law Association* and the American Bar Association in resolutions adopted in 1968** and in 1973. This last

"RECOMMENDS that the United States implement its announced policy of encouraging exploration and exploitation of seabed resources beyond the limits of national jurisdiction during the negotiation of a treaty and supports the companion policy of seeking the provisional entry into force of the seabed mining aspects of any treaty that is agreed upon."

The Administration, while testifying on a bill before the 93d Congress (H.R. 9) to regulate mining pending international agreement, opposed enactment of that particular legislation at this time, stressed that "this does not mean we are unalterably opposed to legislation of any sort, or that we intend to disregard the problem of interim mining". The witness stated that, while the Administration would "spare no efforts to see that a successful Law of the Sea conference can be concluded on schedule", prudence "dictates that we also begin at once to formulate a legislative approach on a contingency basis."

The Administration indicated that if there were no agreement by the end of 1975 it would then support the enactment of interim mining legislation. The spokesman for the Administration apparently did not appreciate the problem of lead time. A witness for the Deep Sea Mining interests testified that at least two years lead time was necessary for the industry to begin mining after enactment of enabling legislation. Thus there could be no interim mining before 1975 even though legislation were enacted today. Those interested in deep sea mining are, therefore, requesting the Administration to come forward now with its proposal for interim legislation to be enacted with a

* Report of the Committee on Deep Sea Mineral Resources, in Proceedings and Committee Reports of the American Branch of the International Law Association, 1971-1972, at 79, 91-92 (1972).

** A.B.A. Res. 73(4), 93 Annual Report of the American Bar Association 371 (1968).

proviso that commercial mining could begin under the legislation only after 1975 and then only if a treaty to which the United States is a party has not become operative.

POLLUTION PREVENTION

World ocean space is a single ecological system. Pollutants entering therein observe no political boundaries. Recent reports commissioned by the United Nations show that ocean pollution has reached the point where it threatens their ability to support life. These reports indicate that the problem is not confined to discrete, limited local areas but rather is a problem of the global marine environment. The Food and Agriculture Organization, after studying the effects of pollution on the world's commercial fisheries, predicts the total destruction of the tuna, salmon, sturgeon and shrimp fisheries unless immediate and drastic action is taken on an international level to control marine pollution.

The principal sources of marine pollution are: (1) Land runoff. (2) Airborne chemicals. (3) Ocean activities, principally waste dumping, ship operations and exploitation of seabed resources.

Land and air sources of ocean pollution, which account for over 90% of all such pollution, are being excluded from the Law of the Sea Conference as principal subjects because the issues involved and the gathering of the needed technical expertise to deal with them are felt to be better manageable separately. Ocean dumping and oil spills on the high seas are already being handled by separate conventions. The Law of the Sea Conference will consider primarily other matters of pollution from ships, and seabed exploitation.

Navigation and Ship Source Antipollution Measures

All ships, especially oil tankers, are a potential pollution threat to the coasts near which they navigate. Hence coastal states desire ship source antipollution measures to minimize coastal pollution.

Such antipollution measures, to be effective, must include required standards of hull construction, navigational equipment, personnel qualifications, maximum quantity and methods for loading cargo, damage liability, etc. Enforcement measures, which as a practical matter must be administered by the coastal state, might include ship arrest and release under bond, forfeiture of ship or cargo under some circumstances.

Some coastal states are asserting the right to unilaterally promulgate antipollution ship standards which they would enforce within a broad zone, say 200 miles, off their coasts. The United States and others oppose this and seek international standards.

Unilateral antipollution ship standards enforced in broad coastal zones, straits and archipelago waters have the same, or even worse, potential, for unwarranted restrictions on navigation than would the other internationally unrestrained coastal state preferential rights discussed above. Such antipollution measures could impede all navigation to and from zone locked states. Nonuniformity of ship antipollution measures could severely hamper ships which on a typical voyage would normally pass through the zones of 15-20 states. Since many ships are designed for a wide variety of shipping routes, they would be potentially subject to the internationally unrestrained antipollution jurisdiction of as many as 120 coastal states during their operating lives.

International standards for ship source antipollution measures are essential to ensure that neither legitimate interest overrides the other. One way to achieve this might be to have the proponents of unilateral standards set forth what they believe they need for coastal protection and then have the other states consider whether they could accept those minimum standards as international.

Seabed Exploitation Antipollution Measures

Economic Resource Zone. The waters over the proposed seabed economic resource areas are biologically the richest marine areas. Oxygen producing plankton is abundant due to favorable factors, including upwelling of bottom

nutrients, light and temperature. This production occurs in the very shallow euphotic zone consisting of from two to three per cent of the upper waters, and as the basis of the food chain it powers ninety per cent of all ocean life. This area also contains concentrations of oil and gas mineral wealth. The most productive ocean waters are, therefore, most in danger of being polluted.

The Law of the Sea Convention must, if it gives the coastal state resource jurisdiction in this area, also impose upon that state the duty to act as custodian for all states of environmental quality in the area. Since the international community has such an interest in the biological health of these areas, the Convention should provide for minimum international environmental standards to guide resource production in the economic zone. Enforcement of such international standards would be primarily but not solely for the coastal state. If international inspection should indicate that such standards were not being enforced, the matter would go before the dispute settlement mechanism established by the Convention. Continued failure to enforce by the coastal state, would result in enforcement by the newly created International Seabed Resource Authority (ISRA) with expenses paid by a portion of the coastal states revenue obtained from the resource development.

Area Beyond National Jurisdiction. One of the principal reasons for the Law of the Sea Conference is that international law contains no clear rules governing the ownership of ocean mineral resources beyond the vague legal limits of the continental shelf. The U.S. has proposed that the international seabed area beyond the limits of national jurisdiction be governed by ISRA, which would have the power to regulate mineral development in that area.

The exploitation of seabed minerals, whether oil, gas, manganese nodules or whatever, presents serious potential environmental problems. Recent studies by U.S. oceanographers warn that while many parts of the ocean may be biologically barren, a cautious approach to resource development is justified due to our incomplete knowledge of marine life.

The United States has proposed that ISRA have jurisdiction to issue regulations to prevent pollution from

exploitation of the seabeds, whether in the coastal state economic zone or on the deep ocean floor. In the economic zone the coastal state would have the principle enforcement authority, while ISRA itself would have such authority in the area completely beyond national jurisdiction.

A basic weakness in the U.S. proposal is that there is no requirement for an environmental impact analysis by a proposed licensee of ISRA, or by a licensee of the coastal state in its resource zone. The trend in other international organizations is to build environmental impact analyses into the process of policy planning and review. Under the U.S. proposal, an applicant in asking for a license from ISRA must submit his plans for the proposed work, equipment and methods. The U.S. should modify its proposal to stipulate that ISRA should prepare an environmental impact statement open for public review prior to issuing a license. The Stockholm created environmental secretariat should have the duty to review these statements, along with reputable non-governmental organizations and review should include a right to appeal ISRA decisions to the dispute settling mechanism, if it appears an ISRA decision is arbitrary, capricious or in violation of fair standards of conduct.

The U.S. proposal also creates a conflict of interest within ISRA by giving it the responsibility to promote resource development and to protect environmental values as well. The latter function should be the principal obligation of the Stockholm established UN environmental secretariat

Finally in both the coastal state economic zone, and the deep seabed area, the Convention should provide for a right of injured parties to compensation for pollution damage. A variety of means could be devised for ensuring such compensation ranging from international compensation funds or insurance schemes, to private rights of action established under the laws of each state in accordance with internationally agreed obligations, and in appropriate circumstances to direct compensation by responsible states. What is important is that compensation be readily available and adequate to cover the damage suffered.

The danger to life in the ocean from pollution is a serious one, and the establishment of the above environmental safeguards within ISRA by the Law of the Sea Convention is essential if that Convention is to be more than

a "mining code" beneficial to resource developers and not the international community.

SCIENTIFIC RESEARCH

The maximization of fundamental scientific research relating to the oceans is of vital concern to every state that hopes to maintain or augment its standard of living through ocean resource development. In practice, this means maximum access for the international oceanographic research community to the seabed and superjacent waters up to the world's shorelines.

In the debate on the future law of ocean space the status of scientific research has been regarded as peripheral to the larger issues discussed above. Hence, the future of marine science will to some extent depend on the settlements that emerge with regard to these larger issues. For this reason, legal formulations which impinge however tangentially on the already restricted freedom of scientific research should be avoided wherever possible.

The 1958 Convention on the Continental Shelf was thought by its drafters to have safeguarded scientific research. Article 5(1) prohibits "any interference with fundamental oceanographic or other scientific research carried out with the intention of open publication". However, this language is qualified by Article 5(8) which inserts a requirement for coastal state consent and gives it the right to "participate or to be represented in the research".

In practice, oceanographic research has in recent years come under increasing impediments, mainly from the less developed coastal states. In many parts of the world an oceanographic research ship risks harassment or detention if it cruises within 200 miles of many coastlines, or collects data from continental shelves, without fulfilling the unilateral consent requirements of the coastal state. During the last 6 years sixteen U.S. oceanographic expeditions engaged in non-commercial research with the intent of open publication of results have been refused permission to operate on foreign continental shelves. Even when permission has been granted, consent requirements have grown more rigorous and prohibitive delays have

been caused by red tape.

The United States draft treaty tabled in Geneva in August 1970 -- a document of increasingly tenuous status -- purported to cover the status of scientific research, at least as regards the deep ocean floor beyond the limits of national jurisdiction. Article 3 of the draft treaty declared the international seabed area open to use by all states except as otherwise provided in the text -- a catch-all provision intended to safeguard all uses, including military, not connected with commercial exploitation. Article 24 of the draft treaty was the provision specifically concerned with scientific research and this provided that each contracting party agrees "to encourage, and to obviate interference with, scientific research". But in contrast to the 1958 Convention on the Continental Shelf, Article 24 not only uncoupled scientific research from open publication, but deliberately left the term undefined. It was open to the invidious interpretation that the article was designed to throw a protective mantle over commercial exploration, thereby aggravating the tendency of coastal states to lump fundamental research in the same category as commercial exploration. The distinction between fundamental research undertaken with intent of open publication and all other kinds of exploration and research -- so vital to allaying the concerns of the less developed countries -- was no longer present.

From the standpoint of the scientific community, the protection accorded to oceanographic research in the draft treaty can hardly be described as satisfactory. Article 3 was entirely too vague, and Article 24 was unsatisfactory for the reasons earlier stated. Open research is the keystone on which foundation of man's ability to use and conserve the marine environment rests. It needs maximum protection under international law. The absence of a clear line of demarcation between open research and other kinds of research and exploration therefore invited rejection of freedom of scientific research by the developing countries.

In July 1973, the single article on scientific research in the U.S. draft treaty was superseded by a complicated, verbose, and unsatisfactory group of eight draft articles which sought to appease the less developed countries by spelling out in detail the obligations to coastal states of oceanographic research enterprises operating within

any future economic resources zone. Unfortunately these articles also fail to (a) draw the vital distinction between research intended for open publication and all other kinds of research, and (b) clearly establish the principle of non-interference with such research in any future economic resources zone. However, the omission of these safeguards does not appear to have protected the articles from almost universal rejection when presented to the July-August meeting of the U.N. Seabed Committee, and the prospects for their adoption appear at the moment to be minimal.

This continues to leave freedom of scientific research, and with it the future of the International Decade of Ocean Exploration and other programs designed to give mankind greater knowledge of the marine environment, in the gravest of danger. The crucial question of the forthcoming Law of the Sea Conference will not be whether the international community accepts a few pious homilies endorsing international scientific cooperation, but whether in clear and unequivocal language it will give science the freedom it needs to open man's last natural frontier to rational and prudent development. To achieve these purposes, three steps are essential.

First, any future international agreement to establish an international regime for ocean space must contain an absolute prohibition against any interference with fundamental or other scientific research conducted with the intent of open publication, but coupled with the right of coastal state participation in the widest sense as set forth below.

Second, the agreement must draw an express and unequivocal distinction between fundamental or other scientific research conducted with the intent of open publication and every other type of research or exploration. This will separate research for the benefit of all from every kind of proprietary research, whether military or commercial.

Third, the legitimate needs of less developed countries must be satisfied by making due provision for (a) a program of cooperative oceanographic research under international auspices; (b) participation of coastal states in foreign oceanographic research projects off their shores; and (c) prompt publication of research results and reasonable access

for all interested parties to the data therefrom.

Even these measures, however, will probably not be enough. Suspicion of western technology is now so deeply ingrained in the developing countries that the principle of non-interference will continue to encounter hostile rejection unless the leaders of these countries can be convinced that scientific knowledge freely gathered and promptly disseminated is the key to rational development of their own marine resources. What is needed is a new program of technical assistance under international auspices aimed at providing coastal states with at least a modest capability for applying marine technology to their own needs. Without this capability, participation in foreign research programs and access to research results and background data would be regarded as hollow benefits.

The draft resolution proposed by the Ad Hoc Committee establishes the principle of non-interference with oceanographic research intended for open publication, subject to certain well-defined rights of the coastal state, which provide guidelines for the negotiation of specific articles.

DISPUTE SETTLEMENT

The ultimate cause of the current debate on the future law of ocean space is the felt necessity for standards of conduct, rights and duties under a new comprehensive treaty on ocean space uses as a foundation for the settlement of differences without political confrontation and the use of force. It being inherently impossible for a legal regime thus caused to escape from the parameters of human interaction which produce it, disputes arising under a new law of the sea treaty are inevitable. Therefore, a general system of compulsory dispute settlement for ocean space uses is the sub-foundation of a new world order in ocean space. If states cannot agree to be bound to settle their disputes and to obey the decisions which are given, then standards of conduct, rights and duties elaborated in a treaty will be of little practical value. International law will leave us with few satisfactory alternatives to assure that the treaty will be respected.

Any general system of compulsory dispute settlement leaves the parties to a dispute free to agree in advance or ad hoc on the method of dispute settlement. If the party or parties decide on one of the non-compulsory means of dispute settlement such as direct negotiation, good offices, mediation, conciliation or reference to an international organization, and are not satisfied with the result, then that party should be allowed at any time to resort to one of the compulsory means of settlement, such as arbitration or submission to a permanent Law of the Sea Tribunal.

If a dispute has not been referred to arbitration, a party should be entitled to submit the dispute to a permanent tribunal which can deal effectively with any dispute. It would also be prudent to set a time limit for the resolution of any dispute where no action has been taken or where there is an unreasonable delay by the parties in resolving their differences by use of non-compulsory means. If thirty (30) days after an invitation to settle the dispute, no action has been taken by the invited party to resolve a dispute, then the party which has initiated the proceedings should have the right to refer the matter to the permanent tribunal for consideration. Where the parties have not found it possible to reconcile their differences through a non-compulsory dispute settlement procedure within one hundred eighty (180) days, then any party should be allowed to refer the matter to a Law of the Sea Tribunal.

There are advantages to having a permanent tribunal. The permanent tribunal can act expeditiously in urgent cases and issue interim orders and thus damage to important state and private interests would be minimized. Power to act in interim emergency situations might be extended to those cases submitted to arbitration where there may be delay in establishing the arbitral tribunal and its rules of procedure. The decisions of the tribunal would be binding and there will be a general understanding to carry out in good faith any agreement providing for the compulsory settlement of international disputes.

The reason for establishing a special Law of the Sea Tribunal rather than resorting to the International Court of Justice is because such a tribunal should consist of judges with special expertise in the various fields covered

by the convention. Many questions will not relate to international law alone but to administrative aspects of the new Law of the Sea regime. Examples of similar special tribunals are the French Conseil d'Etat and the Court of the European Economic Community.

An even more important reason why a special tribunal should be established rather than using the International Court of Justice is the fact that the International Court can deal only with disputes between states. Many disputes relating to the interpretation or application of the Law of the Sea Convention will arise between a state and ISRA or between private persons and that Authority. The jurisdiction of the Tribunal should extend, in the first place, to disputes between the states parties to the treaty, especially those in which one party alleges that another party has failed to fulfill any of its obligations under the treaty. A second group of cases would involve disputes between the Authority and persons, public or private, licensed under the treaty to explore or exploit seabed resources. And, finally, there would be a group of cases which would involve disputes between private or public persons other than states or the Authority. This latter group might broaden the jurisdiction of the tribunal beyond acceptable limits. It would seem politic to have disputes between two private parties submitted to a national court or national administrative tribunal. The national court or administrative tribunal might request the Tribunal to give its advice on any question of interpretation of the seabed treaty or the validity of interpretation of any measure taken thereunder by the Seabed Authority.

What would the judgment of the Tribunal consist of? It might simply state that a violation has occurred and that the party concerned has the duty to comply. It might require the violator to pay damages or order a fine. It might involve suspending temporarily, in whole or in part, the treaty rights of the state failing to comply, or taking direct action against a private person or corporation. The violator may be a state and refuse to comply with the judgment. The matter, if it relates to the seabed, could then be referred to the principal Organ of the Seabed Authority which would decide upon what measure to take.

The nomination and election of the tribunal could be identical to that procedure used in electing the judges of the International Court of Justice. Members elected should

not necessarily be generalists in the field of international law, but must have some expertise in Law of the Sea matters. In addition, a special list could be compiled of technical experts from which the President of the Tribunal could choose several experts for each case. These technical experts could advise the tribunal without a vote.

Consideration should also be given to borrowing the judge ad hoc idea from the International Court of Justice. That is, each side to a dispute would have the right to select a judge qualified in the legal system adopted by it for the settlement of its own internal disputes.

Doubtless there will be expressed apprehensions of the untried compulsory aspect of international dispute settlement. If such apprehensions continue to be allowed to block the trying of it, whether it will work will never be known. If it does not work it can be undone. Global ocean space presents the best chance for compulsory international dispute settlement to work because global ocean space contains more of international concern and less of internal domestic concern than any other feature of the earth. The time has come when the trying of compulsory international dispute settlement is more important than continuing to shrink from it through apprehension of the untried.

Respectfully submitted,

December 1973

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