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Law of the Continental Shelf And Ocean Resources--An Overview

HARROP A. FREEMAN*

I. INTRODUCTION

In the innumerable conferences and seminars now being held on the continental shelf and seabed one senses a general proposition: the stalwarts of the great maritime powers fought a winning battle in 1945-60 to parcel out the sea and its resources; the most that now remains is the task of "tidying-up" such issues as the breadth of the territorial sea, the outer limit of the continental shelf, the extent of fishing rights, the nature of islands and archipelagos, and the kind of ocean regime required. There is an assumption that most of the law is "fixed." My reading suggests a contrary conclusion; the concepts of the law of the sea should be developed around a theory that answers the political-ecological needs of mankind.

It is generally recognized, jurisprudentially, that the concepts of "property" and "sovereignty" were originally applications of "grab law," "occupancy and dominion," "sole and despotic dominion," "capture and domestication," "possession is nine points of the law," "to the victor belong the spoils," and so on. But the concepts of both property and sovereignty are changing.¹ We now recognize a social obligation, a right in others, a lack of absoluteness in property. I feel, therefore,

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1. See generally International News Service v. The Associated Press, 248 U.S. 215 (1918); U.S. v. Perchemon, 32 U.S. (7 Pet.) 51 (1833); 2 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND ch. 1 (8th ed. 1778); W. FRIEDMANN, O. LISSITZYN & R. PUGH, INTERNATIONAL LAW 466 *et seq.* (1969); H. GROTIUS, De Jure Belli ac Pacis, Libri Tres (1625) (remember this started as a brief by an attorney for the Dutch East India Company to justify seizure); O. HOLMES, THE COMMON LAW, Lecture VI (1881); 2 JUSTINIAN, INSTITUTES, Table I; 2 J. LOCKE, TWO TREATIES OF GOVERNMENT ch. 5 (London, 1884).

that it is too late in the game for the "powers" of the world to seize the sea, to parcel it out as Pope Alexander VI did, or as the nations in 1910 parcelled out Africa. Nor would it seem proper for the developed nations to establish a new "colonialism" under the doctrine that control follows the ability to exploit.

Rights in the seabed, including the so-called continental shelf, should belong to and serve mankind generally. This is a social-ecological-political determination, and "Law" should so conform. Such a determination would tend to limit the power struggle, give us a way to raise the underdeveloped countries closer to equality, and allow the tremendously increased population to use the total globe more nearly as one family. To that end, I would declare the right to the seabed to be vested in mankind. Following from this proposition, an international regime could license exploration and collect license fees; no exploration would give permanent rights and the social interest could be the main criterion. The regime could distribute its income in inverse ratio to the GNP, territorial wealth, and the standard of living of nations, thus raising the dispossessed and less developed nations. I see nothing in the established law to prevent this. This is not to suggest that it will be unnecessary to distinguish between "security," "fishing," and "mining" demands, but is rather to establish a broad legal doctrine on which specific rules will be grounded.

It would appear that the whole drive for claiming the continental shelf, for defining fishing rights, and for making "exploitability" the test has been primarily supported by representatives of America's fish, oil, and mining industries, rather than by any basic theory of human, world, or even U.S. needs.

II. EARLY THEORIES ON THE REGIME OF THE SEA

A. IN ANTIQUITY

The ancient peoples, including the Greeks and Romans, made the sea their own by force whenever it served their political or economic ends and continued to rule it to the extent that the vessels of those times permitted and so long as no stronger power came to usurp their positions. The sea was theirs because no one was able to challenge them, and the resources that might be taken from the sea were claimed as a consequence of state power. The history of this period contributes nothing of importance as far as the juridical conception of the areas of the

sea is concerned. Any assertion of sea "rights" was purely metaphysical.²

This view is confirmed by the writings of ancient Roman jurists on the rights over the sea. Gaius described the sea as *res nullius*, asserting that it belonged to the first occupant. Celsus advocated the free use of the sea: *mare communum usum omnibus hominibus*. Justinian, in his *INSTITUTES*, asserted the thesis that the sea and its shores rank among the things common to all men, that the sea is open to public use and is nobody's property. (The concept of freedom of the seas, since its formulation, has always been regarded as applying both to navigation and trade and to the use and exploitation of the natural resources of the sea.³) But as Raestad has pointed out, these concepts were part of the *jus gentium* and were laid down as defining obligations of a private nature. Since Rome at the peak of its power subjected all the peoples on the Mediterranean shores to its sovereignty, the concept of *mare nostrum* extended Roman sovereignty over the entire sea as well.⁴ When the Goths overcame Rome they promulgated Roman private law, including *jus gentium* as controlling the sea and fisheries.⁵

B. IN THE MIDDLE AGES

Feudal law was essentially land law, and except for regarding fish as *ferae naturae*, took little account of the sea. The idea of a maritime area, zone, or belt of sea over which a coastal state might exercise sovereign power emerged when certain medieval sovereigns and cities began to lay claims for specific purposes to certain parts of the sea adjacent to their territories. The first recorded claim was for rights to fishing and salt extraction made by Byzantium under Emperor Leo (889-911 A.D.). In a deliberate departure from the principle of free use of the seas set out in the *INSTITUTES*, the owner of the shore was to enjoy sole fishing and salt extraction rights for a certain distance from the shore. Five centuries later (1432), the King of Denmark and Norway maintained in a dispute with the English King that foreigners had never been allowed to fish in Norwegian waters without special permission. According to Norwegian law, the owner of the national sea frontier was also owner of the seabed and nearby sea up to the line at which the great depths begin. Old English law similarly accorded the coastal owner

2. Anglo-Norwegian Fisheries Case, [1951] I.C.J. Rep. 116; F. GARCIA AMADOR, *THE EXPLOITATION AND CONSERVATION OF THE RESOURCES OF THE SEA* 14-15 (2d ed. 1959); D. JOHNSTON, *THE INTERNATIONAL LAW OF FISHERIES* 159 (1965).

3. F. GARCIA AMADOR, *supra* note 2, at 19-21.

4. A. DE BUSTAMANTE, *THE FREEDOM OF THE SEAS IN HISTORY, LAW AND POLITICS* 16 (1924); A. RAESTAD, *LA MER TERRITORIALE* (1913).

5. D. JOHNSTON, *supra* note 2.

exclusive *usufruct* of the parts of the coast where he customarily fixed his gear for sedentary fishing.⁶ The cases excluded foreigners in favor of coastal owners. They did not claim sovereignty or ownership for the state. This qualified and special nature of the claims prevents them from being regarded as defining the "territorial sea" or "continental shelf."

By the thirteenth century nations began to assert the interest of the body politic in the coastal seas. The Republic of Venice promulgated public health regulations subjecting all ships coming from the Levant to a fortnight's isolation. Later, Genoa (1467), Mallorca (1471), and Marseilles (1476)⁷ adopted similar measures to combat contagious diseases. Venice claimed dominion over the Adriatic Sea and at the peak of her power won recognition of her claims from other sovereigns. Denmark declared its right over the Baltic straits of the Sund and the Belt and, at one point, over the entire Baltic itself. For a time, Denmark succeeded in levying duties on ships passing through the Belt. Her claims went so far as to assert dominion over all the sea between the Norwegian coast and the coasts of Iceland and Greenland. The most sweeping claim to maritime dominion was that made by Spain and Portugal in the 1494 Treaty of Tordecillas (based on Pope Alexander VI's Bull *Inter Caetera*, issued in 1493), under which the land and the sea which had been, or might be discovered was partitioned between the two countries according to whether it lay to the east or to the west of a straight line drawn one hundred leagues west of the Cape Verde Islands.⁸

C. DEVELOPMENT OF THE THEORIES OF MARE LIBERUM AND MARE CLAUSUM

The jurists of the time seem to have accepted the large areas sometimes claimed by the states and thereby laid the theoretical foundations of the modern international law concept of the "territorial sea." Bartelo de Saxaferrato (1319-1357) maintained that the coastal state exercised jurisdiction over the sea and over the islands in it for a distance equal to two days sailing, or approximately one hundred miles. (Raestad believes that this distance was accepted by the majority of fifteenth century jurists.⁹) Angelo de Perusio wanted jurisdiction extended to any part of the sea not in the immediate neighborhood of another state, and

6. T. FULTON, *THE SOVEREIGNTY OF THE SEA* ch. II, §1 (1911); 2 JUSTINIAN, *INSTITUTES*, Table I, 12-16; I. LATOUR, *LA MER TERRITORIAL* 129 (1889); A. RAESTAD, *supra* note 4, at 11-12, 150-51.

7. I. LATOUR, *supra* note 6.

8. I. G. GIDEL, *LE DROIT INTERNATIONAL PUBLIC DE LA MER* 130-33 (1932); A. RAESTAD, *supra* note 4, at 55 *et seq.*

9. A. RAESTAD, *supra* note 4.

Guillermo de Perno advocated a distance of as far as the eye could reach.

Baldus of Ubaldi (1327-1406) and Alberico Gentili (1552-1608) began distinguishing use of the sea, property in the sea, and jurisdiction. Adjacent sea was *res communes*, belonging to all, its products exploitable by anyone, though the area might be under the jurisdiction (as for health reasons) of the adjoining state. The feudal law of the King's *jus regalia* permitted the giving of exclusive fishing rights in adjacent seas, and finally *territorium* was applied to land and neighboring sea.¹⁰

The sixteenth and seventeenth centuries saw the development of the concept of the "high seas," which was implicit in the principle of freedom of the seas enunciated in opposition to the exaggerated claims to maritime jurisdiction mentioned above. It was formulated by Francisco Alfonso de Castro, Fernando Vasquez de Menchaca, Francisco de Vitoria, and Hugo Grotius. De Vitoria, in his *relictio de indis*, challenged the rights of Popes to grant maritime privileges to certain peoples in a way contrary to the *jus communicationis*. Vasquez and Castro denied the legal validity of the claims of Venice and Genoa as well as those of Spain and Portugal. Both argued that it was contrary to natural law and elemental principles of international relations to claim the sea and its waters as the private property of one nation. The use of the sea should be common to all nations.¹¹ The concept was well stated by Queen Elizabeth of England in a reply to protests by the Spanish Ambassador against the passage of Drake's vessels through the seas reserved for Spain under the Papal Bull:

The use of the sea and air is common to all. Neither can title to the ocean belong to any people or private persons inasmuch as neither nature nor public use and custom permiteth any possession thereof.¹²

Hugo Grotius, in *MARE LIBERUM* (1608) and *DE JURE PRAEDAE* (1609) stated the principle of freedom of the seas, for the sea was *res communes* adapted for the use of all, whether considered for the purpose of navigation or for fisheries. This position came in conflict with the claims of James I of England (and later with those of the Stuarts and the Interregnum) to fishing rights in "British seas." Grotius' thesis was attacked by John Selden in *MARE CLAUSUM SINE DOMINIO MARIS*, in which the right of the state to assert its sovereignty over seas adjacent to its territory was placed on the ground of appropriation, dominion, and

10. 3 A. GENTILE, *DE JURE BELLI, LIBRI TRES* ch. 17 (1598); D. JOHNSTON, *supra* note 2, at 161-62.

11. F. GARCIA AMADOR, *supra* note 2, at 16.

12. A. HIGGINS & C. COLOMBUS, *THE INTERNATIONAL LAW OF THE SEA* 16-17 (2d ed. 1951).

uncontested use.¹³ Grotius, by 1625 in *DE JURE BELLI AC PACIS, LIBRI TRES* had admitted that *liberum* might not apply to the adjacent sea, and a successor, Johannes Potanus, finally also conceded this.¹⁴ By the end of the seventeenth century the concepts of the "high seas" and the "territorial sea" had emerged as fairly well defined notions whose influence was to dominate modern international law.

III. LATER THEORIES

Very little happened for the next two hundred to two hundred and fifty years in the areas of territorial waters and the adjacent belt. In a series of cases, many decided by the United States Supreme Court, the rule of "freedom of the seas" became well established and its content defined as to rights of search, control of piracy, and free passage.¹⁵ The writers of the eighteenth century were formulating the distinction between *mare liberum* and *mare clausum*. Pufendorf, in *DE JURE NATURAE ET GENTIUM* (1672), recognized the special rights of the coastal states based on fishing and defense; Bynkershoek (1702) fixed on three nautical miles as the distance of cannon shot for delimiting territorial waters; Vattel (1758) argued for dominion by consent or tolerance as creating a customary right.¹⁶ The Scandinavians asserted rights from one to three nautical leagues (four to twelve miles) off their coasts; Jefferson used three miles or a marine league (four miles) as an approximation. By the nineteenth century this was generally recognized, though for some nations and some causes (e.g. smuggling) a three league or twelve

13. See W. WELWOOD, *AN ABRIDGEMENT OF ALL THE SEA LAWS* (1613); see also T. FULTON, *supra* note 6, at 66-85, 366-77.

14. All property, Grotius argued, was based on possession (occupation). That which cannot be seized or enclosed — the open sea for example — is incapable of becoming property and remains common to all mankind. Property rights derived from prescription or from custom cannot be acquired in the sea, for no one has power to grant a privilege to mankind in general; and mankind in general cannot be assumed to have granted a concession in the sea. The sea can neither be bought nor sold, nor otherwise legally acquired, for it is under God's dominion alone. Agreements among maritime states to apportion certain areas of the sea in order to facilitate the suppression of pirates are binding only on those who are parties to them and give no right of ownership over the seas. Such tributes as the sovereign may levy under the *jus regalia* are imposed not on the sea or on fisheries but on the subjects of the sovereign, i.e. nationals and not on foreigners over whom the sovereign has no authority. See H. GROTIUS, *MARE LIBERUM* 27-36 (1609); *DE JURE BELLI AC PACIS, LIBRI TRES* 37 (1625); Potanus, quoted in T. FULTON, *supra* note 6, at 376.

15. J. MOORE, *DIGEST OF INTERNATIONAL LAW* §309 *et seq.* (1906). See also note 4 *supra*.

16. C. BYNKERSHOEK, *DE DOMENIO MARIS DISSERTATIO* ch. 3 (1702); 4 S. PUFENDORF, *DE JURE NATURAE ET GENTIUM* ch. 5, §7 (1672). See also 1 E. VATTEL, *LE DROIT DES GENS* ch. 23 (1758); Kent, *Historical Origins of the Three-Mile Limit*, 48 *AM. J. INT'L L.* 537 (1954); Walker, *The Common-Shot Rule*, 22 *BRIT. Y. B. INT'L L.* 210 (1945).

mile limit was asserted.¹⁷ It is to be observed that some local laws and cases tried to clarify the issue of territorial waters and extended fishing rights, that a Convention of 1930 attempted some codification, and a few writers recognized the need for clarifying freedom of the seas as compared to territorial waters and fishing rights. But generally, prior to World War II there were no clear government positions on territorial waters, no attention to the "continental shelf," no authoritative international cases, no uniformity as to fishing claims, and no realization of the importance of a law of the sea to cover all these issues.¹⁸

A. PRESIDENT TRUMAN'S TWO PROCLAMATIONS (1945)

The catalyst for exclusive claims to the resources of the continental shelf and for opening the fisheries question was the issuance of President Truman's Proclamations of September 28, 1945.¹⁹ They stated that the United States regarded the natural (including fishery) resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coast of the United States as subject to its jurisdiction and control. The character of high seas of the water above the continental shelf and the right to free and unimpeded navigation were in no way to be affected. While memoranda of law by William Bishop tried to connect the Proclamations to plans of President Roosevelt as far back as 1937, one is impressed with their lack of legal justification.

It behooves us to recall how the Proclamations came to be issued and what occurred between their issuance and the 1958 Geneva Conventions.

17. P. JESSUP, *LAW OF THE TERRITORIAL WATERS AND MARITIME JURISDICTION* 73 (1927); D. JOHNSTON, *supra* note 2, at 173-74.

18. One may see this from American casebooks and textbooks. For example, M. HUDSON, *CASES ON INTERNATIONAL LAW* (2d ed. 1937), has four local cases, the Hague Convention of 1930, and the North Atlantic Coast Fisheries Arbitration on "Maritime Frontier;" W. BISHOP, *INTERNATIONAL LAW* (1953) treats the whole "territorial waters" as a question of jurisdiction of vessels (24 pp.), but does not note the "hovering laws" and 12 mile limit; compare this to the new W. FRIEDMANN, O. LISSITZYN, & R. PUGH, *INTERNATIONAL LAW* (1969), with about 100 pages on territorial waters (archipelago, baseline, historic, islands, etc.) continental shelf, fishing rights, jurisdiction etc. I find no casebook or textbook giving attention to the continental shelf or rights in the deep seabed prior to 1945. I G. HACKWORTH, *DIGEST OF INTERNATIONAL LAW* (1940), devotes 100 pages to territorial waters, mentions contiguous zones, does not refer to continental shelf and has a very brief note on oil under territorial waters; J. MOORE, *DIGEST OF INTERNATIONAL LAW* (1906), deals almost entirely with the high seas. I F. WHARTON, *INTERNATIONAL LAW DIGEST* (2d ed. 1887) has one section on high seas and territorial waters and fifteen sections on bays, ports, rivers, etc. Finally, not until 4 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* (1965) does the State Department treat territorial sea and contiguous zone (ch. IX), high seas (ch. X), continental shelf (ch. XI), and fisheries (ch. XII).

19. Presidential Proclamation 2667, Sept. 28, 1945, 59 Stat. 884, 10 Fed. Reg. 12303 (1945); Presidential Proclamation 2668, Sept. 28 1945, 59 Stat. 885, 10 Fed. Reg. 12304 (1945).

Wilbert Chapman, who did much of the State Department work, relates²⁰ that the fisheries industry had almost collapsed in 1937 in the face of Japanese fishing in Bristol Bay (discontinued in 1938) and that the oil industry learned the extent of pools under the continental shelf during World War II. These interests, he believes, forced the Proclamations. They were being defeated, however, by the Japanese fishermen and South American legal claims. So, by a *legerdemain* the U.S. State Department put off an OAS vote on this matter, proposing instead an international conference (which was never held), and finally agreeing to a U.N. Conference (1958) which it felt it could control.

B. AFTERMATH OF THE PRESIDENTIAL PROCLAMATIONS

Truman's Proclamations had legal consequences both domestically and internationally. Domestically, they settled the controversy between the federal government and the various coastal state governments which claimed sovereignty over the areas beyond their coastlines. Federal jurisdiction was conclusively upheld by the United States Supreme Court decisions of *United States v. California*,²¹ *United States v. Texas*,²² and *United States v. Louisiana*.²³ During the Eisenhower Administration, legislation was passed which quit-claimed to the states the rights of the federal government to that part of the tidelands situated within the three mile territorial sea or to where the states could show an historic boundary; the outer continental shelf was retained by the federal government.²⁴ In subsequent Supreme Court decisions, the paramount claim of the federal government to the continental shelf beyond three miles was recognized with regard to Louisiana, California, and Mississippi.²⁵ A twelve mile limit was recognized as to Texas,²⁶ while nine leagues was the boundary established for Florida.²⁷

Internationally, the American claim was followed by similar claims by the United Kingdom as affecting offshore claims to certain overseas possessions. Saudi Arabia, Iran, Pakistan, India, the Philippines, Australia, Bulgaria, Israel, the United Arab Republic, and Iraq also followed the American example in claiming jurisdiction over the resources of the seabed contiguous to their coasts.²⁸ Latin American claims were made

20. Proceedings of the Third Annual Conference of the Law of The Sea Institute (June 24-27, 1968), *THE LAW OF THE SEA 35 et seq.* (L. Alexander ed. 1969).

21. *U.S. v. California*, 332 U.S. 19 (1947).

22. *U.S. v. Texas*, 339 U.S. 707 (1950).

23. *U.S. v. Louisiana*, 339 U.S. 699 (1950).

24. 43 U.S.C. §§1301-15 (1964).

25. *U.S. v. Louisiana*, 363 U.S. 1 (1959).

26. *U.S. v. Texas*, 363 U.S. 1 (1959).

27. *U.S. v. Florida*, 363 U.S. 121 (1959).

28. Orders in Council extending the boundaries of Trinidad, Tobago, and the

to reserve maritime areas of two hundred miles from shore for exclusive control to protect the resources of the sea. There may be some slight ground in ancient law for their claim, primarily as to fish. Certain nations asserted an island or archipelago theory in extension of contiguous zone control.²⁹

In 1955 the International Law Commission proposed a law of the sea code,³⁰ and after notice to member states this was debated at Geneva in 1956. The code stated that the territorial sea was not less than three nor more than twelve miles wide. South America still insisted on two hundred miles for fishing, but this was procedurally buried by the United States at Mexico City and Ciudad Trujillo in 1956. Russia's position later shifted because of greatly expanded fishing and security interests. This shift dominated the 1957 and 1958 Assemblies, and the 1958 and 1960 Law of the Sea Conferences where the Soviet Union consistently voted with the United States. The fight over the width of the territorial sea was the major issue.

C. THE GENEVA CONFERENCE AND THE SHELF CONVENTION

Eighty-six nations were represented at the 1958 United Nations Conference on the Law of the Sea held in Geneva in 1958. It has often been said that political issues were involved, yet the participants were international lawyers. Four conventions were adopted at this conference covering the continental shelf, territorial sea and contiguous zone, high seas, and fishing.³¹ These fairly adequately restated most existing law.

Bahamas, I U.N. LEGIS. SERIES; Law and Regulations on the Regime of the Territorial Sea 30-31 (1951); Jamaica, *Id.* at 32; British Honduras, *Id.* at 66; and Falkland Islands, *Id.* at 305. Similar Orders in Council were issued for the Persian Gulf, *Id.* at 27-30; Saudi Arabia, *Id.* at 22; Iran, *Id.* at 81; Pakistan, *Id.* at 303; India, *Id.* at 13-14; Philippines, *Id.* at 19; Australia, U.S. Naval War College, International Law Sit. and Doc 441-444 (1961); Bulgaria, *Id.* at 445-47; Israel, *Id.* at 475; United Arab Republic, 54 AM. J. INT'L L. 491 (1960); and Iraq, 14 REVUE EGYPTIENNE DE DROIT INTERNATIONAL 406 (1958).

29. See B. AUGUSTE, THE CONTINENTAL SHELF: THE PRACTICE AND POLICY OF THE LATIN AMERICAN STATES WITH SPECIAL REFERENCE TO CHILE, ECUADOR AND PERU 80 (1960); F. GARCIA AMADOR, *supra* note 2, at 73-79. See also W. FRIEDMANN, O. LISSITZYN, & R. PUGH *supra* note 1, at 550-52; U.N. Doc. No. A/Conf. 13/18 (1959) by J. Evensen.

30. [1955] I Y. B. INT'L L. COMM'N 72-73, U.N. Doc. A/CN.4/SER. A/(1955) (reference to width of territorial sea).

31. The following is a brief synopsis of the latter three conventions not treated in this article:

(1) The Convention on the Territorial Sea and the Contiguous Zone (*done* April 29, 1958, [1964] 2 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205 [effective Sept. 10, 1964]) establishes the sovereign rights of the state beyond its land area over a belt of sea adjacent to its coast. The exact width of these belts was not fixed in the Convention. The states' sovereignty extends to the airspace above the territorial sea and to the bed and subsoil of this area as well. The conference was successful in adopting a system for determining the baseline from which the territorial sea is measured. The Geneva Conference followed the opinion of the International Court in the Anglo-

A decision could not be reached, however, on the matters of the breadth of the territorial sea and control of deep sea fishing even after the second

Norwegian Fisheries Case, [1951] I.C.J. Rep. 116, in allowing the establishment of straight baselines in "localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast." The Convention provides for the right of innocent passage for vessels of all states through the territorial waters of a coastal state. Passage is innocent when it is "not prejudicial to the peace, good order, or security of the coastal state." Some nations, notably the Soviet Union, Hungary, Rumania, Bulgaria, and Colombia, contend that prior authorization is necessary from the coastal state before a warship can have the right of innocent passage. These nations have made reservations to the convention in this regard. Other nations contend that only prior notification is necessary while still others maintain that no notification or authorization is required. See Jessup, *The United Nations Conference on the Law of the Sea*, 59 COLUM. L. REV. 234 (1959). The Convention itself does not provide expressly that prior notification or authorization for warships is required, except that "submarines are required to navigate on the surface and show their flag" when passing through the territorial sea. The convention codified the long established customary international law rule that enforcement of domestic regulations and laws dealing with anti-smuggling, sanitary, fiscal, and immigration activities by the coastal state may extend beyond the state's territorial sea limits into portions of the high seas contiguous to the territorial sea. This right of limited jurisdiction for the prevention and punishment of specific violations is recognized within the area of the contiguous zone, which may not extend beyond twelve miles from the baseline of the territorial sea. This Convention provision in no way limits the right of hot pursuit onto the high seas for violations occurring within the coastal state's territorial sea.

(2) The Convention on the High Seas (*done* April 29, 1958, [1962] 2 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82 [effective Sept. 30, 1962]) codified the customary international law of the sea which recognizes that the high seas is the area beyond the territorial seas or internal waters of a state which may not be subjected to the sovereignty of any state. The freedoms which all states may exercise on the high seas are the freedom of navigation, fishing, laying submarine cables and pipelines, and flying over the high seas. These freedoms and others which may be recognized by the general principles of international law may be exercised with reasonable regard for the interests of other states. The Convention provides merely that a state situated between the sea and a state having no seacoast need only grant a right of transit and of equal treatment in its ports by common agreement with the landlocked country, on a basis of reciprocity and in conformity with existing international conventions. The Convention authorizes the practice of "flags of convenience" by which vessels owned by the nationals of one state may register and fly the flag of another state, so long as there is a "genuine link" between the flag state and the ship. This link includes the effective exercise of jurisdiction and control.

(3) The Convention on Fishing and Conservation of the Living Resources of the High Seas (*done* April 29, 1958, [1966] 1 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 285 [effective March 20, 1966]) is the first comprehensive piece of international legislation complete with arbitration procedures on the subject. (See Dean, *The Geneva Conference on the Law of the Sea: What was Accomplished*, 52 AM. J. INT'L L. 607 (1958).) Conservation is defined in the convention as "the aggregate of the measures rendering possible the optimum sustainable yield from those resources so as to secure a maximum supply of food and other marine products." While the Convention recognizes a broad general right of all fishing states to fish on the high seas, it exacts a requirement that they assume a positive duty to adopt for themselves or in cooperation with other nations, measures which are necessary for conservation. If agreement cannot be reached on proposed conservation measures within a specified time, the Convention's arbitration procedures may be invoked by any interested party. The special right of the coastal state in regard to conservation measures or research conducted in the sea adjacent to the coast was recognized, even though the nationals of

(1960) Conference. The Continental Shelf Convention³² formulated new law. It recognized that the coastal state exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources. The term "continental shelf" refers to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of two hundred meters or to where the depth of the superjacent waters admits of the exploitation of the natural resources of the area. Most of the following discussion will center on this convention.

It can easily be seen that this definition of the outer limit of the continental shelf was the result of a short-term compromise hammered out during more than seven years of discussion in the International Law Commission and the Geneva Conference. With the expansion of technology and world markets, the delimitation of the continental shelf under the Geneva Convention definition has become the subject of serious international concern, as has the width of the territorial sea and contiguous zone when the 1960 compromise of six and twelve miles missed passing by one vote. At least eighteen nations are now reported to possess offshore commercial production of gas and oil, while sixty are engaged in exploration and development. Eleven percent of the world's oil and six percent of its gas comes from offshore areas.³³ Apart from oil and gas, sulphur, sand, gravel, oyster shells, tin, diamonds, manganese nodules, and phosphate rock are among the commercially valuable minerals present on the sea floor. Exploration and exploitation is constantly moving farther seaward as new devices and techniques become available.³⁴

Whether the Convention allocates mineral rights in a relatively narrow area or allocates all submarine areas of the world among coastal states has given rise to controversy. The records of the Geneva Conference and the International Law Commission suggest that delegates did not think in terms of the bed of the deep sea. Professor Oda, in his *INTERNATIONAL CONTROL OF SEA RESOURCES* (1963), suggests that whatever the delegates

that state do not carry on fishing activities in the area. The coastal state may demand that states fishing off the coast agree to conservation measures in harmony with those adopted by the coastal state. If agreement is not reached, the arbitration procedures may be invoked. — J. Meurling, ed.

32. Convention on the Continental Shelf, done April 29, 1958 [1964] 1 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311 (effective June 10, 1964). See also F. GARCIA AMADOR, *supra* note 2, at 108-21.

33. See Young, *The Legal Regime of the Deep Sea Floor*, 62 AM. J. INT'L L. 641 (1968).

34. Undersea Technology Washington Letter, Sept. 4, 1967, 1. A wealth of materials has been published on the science and technology of exploiting the deep sea including S. HULL, *THE BOUNTIFUL SEA* (1964); J. MERO, *THE MINERAL RESOURCES OF THE SEA* (1965); F. SHEPARD, *SUBMARINE GEOLOGY* (1963); U.S. DEP'T OF COMMERCE, *DEVELOPMENT POTENTIAL OF U.S. CONTINENTAL SHELVES* (1966).

at the Conference had in mind, the only logical interpretation of the provision is that it allocated all submarine areas of the world among the coastal states.³⁵

D. ANALYSIS OF POSITIONS OF STATES VOTING ON THE DRAFT OF THE CONTINENTAL SHELF CONVENTION

Article 1 of the Convention, which embodies the definition of the limit of the continental shelf, was approved by the Fourth Committee

35. The views of Professor Shigeru Oda of Tohoku University, Japan, on the law of the deep sea resources are highly controversial. Oda challenges the supposition that there even exists an area of the deep seabed upon which an international regime can be built. The Continental Shelf Convention of 1958, Oda maintains, already determines the total disposition of ocean floor resources and has divided the submarine areas of the entire ocean among the coastal states at the deepest trenches. Oda claims that it first would be necessary to revise the 1958 Convention before any international regime could be established. (Oda, *Proposals for Revising the Convention on the Continental Shelf*, 7 COLUM. J. TRANSNAT'L L. 1, 9-10 (1968).) He questions the competency of the U.N. Committee on the Peaceful Uses of the Sea-bed and the Ocean Floor Beyond the Limits of National Jurisdiction to initiate such a revision. (U.N. Doc. A/AC.138/SC.1/SR.10 at 112-13 (1969).) At the same time, Oda has complained that the drafts of non-governmental bodies on possible future regimes for the ocean floor are "too utopian," and only raise additional problems. (Lecture by S. Oda, The Hague Academy of International Law, Summer, 1969.) Oda takes no position regarding feasible future regimes, in case the Convention were to be revised. Nevertheless, he has stated that the principle of freedom of the high seas is applicable to the exploration and exploitation of mineral resources of the ocean floor. (U.N. Doc. 138/SC.1/SR.14 at 24 (1969).) In several of his writings, he has also proposed that all crustacea and sedentary fish be eliminated from the category of seabed resources and be considered as freely exploitable marine resources. (E.g., S. ODA, INTERNATIONAL CONTROL OF SEA RESOURCES 181 (1963).) The Japanese delegation to the U.N., headed by Oda, holds the view that the exploitation of the deep sea resources should proceed as rapidly as possible. (U.N. Doc. A/AC.13 S.I.Add.3 (1968).) Oda has emphasized the high economic risks and technological demands involved and appears to believe that a registry arrangement with its profit incentive would be most acceptable to the developed states. (U.N. Doc. A/AC.138/SC.1/SR.20 at 117-20 (1969).)

His position suits the Japanese and many other technologically developed and coastal states very well. National oil industries would like to see the jurisdiction of the continental shelf extend as far as possible because they prefer to deal with individual states as they have done in the past rather than with an international regime.

Opposed to Oda's views are those who believe that the ocean floor is, or should be, considered a *res communes*, the title or benefits of which are to be shared by all. This notion is opposed to the concept of individual national dominion and also to that of *res nullius*, allowing for free use by anyone as in the regime of the high seas. (U. N. Doc. A/AC.138/SC.1/SR.6 (1969).) Although Oda's interpretations of present international law lead him to favor national dominion or *res nullius*, he admits that the legal regime could be changed as *lex ferenda*. Nations must first revise the Continental Shelf Convention which by now, Oda believes, must be considered as international customary law. —M. Platzer, ed.

See also Remarks by Professor Scelle, Sir Gerald Fitzmaurice, and Dr. Garcia Amador [1956] 1 Y. B. INT'L L. COMM'N 135, 137, 167-68. See also Burke, *Legal Aspects of Ocean Exploitation — Status and Outlook*, 1 TRANSACTIONS OF THE MARINE TECHNOLOGY SOC'Y 13-14 (1966).

of the United Nations Conference on the Law of the Sea by a vote of fifty-one to nine with ten abstentions.³⁶ However, the vote does not indicate that there was a consensus among the delegates as to what the provision meant.

Voting for the Draft: The Dominican Republic argued that proximity was the decisive criterion and that exploitation beyond that was ineffective.³⁷ The Norwegian delegate believed delimitation of the continental shelf in terms of distance from the coast would be fairer. The United Arab Republic and Yugoslavia agreed.³⁸ Yugoslavia submitted a draft which would have limited the continental shelf to one hundred miles from the edge of the territorial sea, fifty miles in cases where the depth exceeded two hundred meters at a point less than fifty miles.³⁹ India, while not objecting to the equitable sharing of sea areas, favored some definite depth limit; one thousand meters was first proposed, then five hundred and fifty meters.⁴⁰ Canada, regretting both the uncertainty of the exploitability criterion and its bias in favor of the more advanced nations, proposed a definite limit based on the point where a substantial break occurs in the sea floor leading to the abyssal ocean depths, or in its absence, the two hundred meter isobath.⁴¹ Guatemala and Panama favored including both constituent parts of the continental terrace (the continental shelf proper and the continental slope).⁴²

At the other extreme, Ghana advocated exploitability as the sole criterion.⁴³ The United States waived. It thought "exploitability" was limited to the shelf and slope ("the continental slope fell away steeply and rapidly, so that exploitation beyond a certain limit would not be an economic proposition").⁴⁴ A group of nine states, (Australia, Chile, Columbia, Cuba, El Salvador, Indonesia, Ireland, Mexico, and Peru) wanted to preserve intact the original International Law Commission draft. Chile was primarily concerned with ensuring the exclusive right in submarine coal deposits mined from land at submarine depths greater than two hundred meters.⁴⁵ Columbia was anxious to preserve the exploitability criterion as a device for automatic revision of the shelf limit in light of technological advance,⁴⁶ while Cuba emphasized that the

36. VI U.N. CONFERENCE ON THE LAW OF THE SEA 47 (1958).

37. *Id.* at 9.

38. *Id.* at 4, 5, 27.

39. *Id.* at 32.

40. *Id.* at 42, 134-35.

41. *Id.* at 30, 37, 135.

42. *Id.* at 31, 127.

43. *Id.* at 37.

44. *Id.* at 19, 40.

45. *Id.* at 16.

46. *Id.* at 10.

wording of the International Law Commission draft reflected the widest possible measure of agreement.⁴⁷

Voting Against the Draft: Nine states voted against the draft proposal. Seven were clearly opposed to the inclusion of the exploitability criterion. Argentina preferred a single geographical criterion.⁴⁸ The Federal Republic of Germany opposed the whole notion of exclusive rights for the coastal states and advocated a regime of regulated freedom.⁴⁹ Japan also opposed vesting a monopoly in the coastal states.⁵⁰ France strongly opposed the exploitability criterion and feared that in time its adoption would nullify the principle of freedom of the seas.⁵¹ Italy, while expressing willingness to accept reasonable modifications of the two hundred meter limit, demanded that the limit must remain a definite fixed quantity.⁵² The Netherlands also wanted a definite depth limit and proposed five hundred and fifty meters.⁵³ Pakistan feared a limitless extension of the continental shelf on the basis of exploitability and foresaw disagreements because of the absence of a fixed limit.⁵⁴ The remaining two negative votes were those of Belgium, which gave no reason for rejecting the draft, and Korea, which opposed it because the depth and exploitability criteria were inconsistent.⁵⁵ (Korea had earlier proposed the deletion of the depth criterion.)

Abstentions: Ten states abstained from voting and three (Lebanon, Panama, and Vietnam) did not take part in the voting. Of these thirteen states, six were clearly opposed to the exploitability criterion: Greece, Lebanon, Panama, Turkey, the United Kingdom, and Vietnam.⁵⁶ A seventh state, Monaco, considered the continental shelf articles as being adequate merely as an interim solution pending establishment of an international maritime organization.⁵⁷ The remaining six states — Burma, Iceland, Iran, the Philippines, Poland, and Switzerland — abstained for a variety of reasons and the record shows no evidence that any of them supported the exploitability criterion. In fact, the positions taken by all states underlines the flexibility and vagueness of the language used, and the fact that there is little "agreed law."

Interim Occurrences: Since the 1958-60 period a great deal has changed. Coastal states, both parties and non-parties to the convention, have

47. *Id* at 25.

48. *Id* at 33, 46.

49. *Id* at 7-8, 37-38, 125, 138.

50. *Id* at 14.

51. *Id* at 2, 31-32, 43, 128.

52. *Id* at 16-17, 133.

53. *Id* at 6-7, 35, 44, 45-46, 131, 135.

54. *Id* at 19.

55. *Id* at 23, 32.

56. *Id* at 5-6, 32; *Id* at 14, 34, 38, 129; *Id* at 5, 32-33, 127; *Id* at 12; *Id* at 4, 35-36, 45, 46, 132-133, 135-136; *Id* at 24.

57. *Id* at 18.

adopted municipal legislation extending their respective jurisdictions to the area covered by the Convention's definition of continental shelf. This legislation has broad and flexible language easily adaptable to any subsequent developments on the international level concerning the outer limit of the continental shelf.⁵⁸

The fisheries issue has greatly changed. The United States has adopted a twelve mile fishing jurisdiction, and most of the nations have followed suit. Russia and Japan lead in long ranging fishing fleets but many other countries are making serious inroads (Bulgaria, Ceylon, Cuba, Ecuador, Egypt, Ghana, Rumania, Thailand). Canada and the United States have dropped in fish production and now adopt the "coastal states" argument. An undeclared "peace" exists between the United States, Canada, Japan, and the Soviet Union as to fishing, although Japan still protests "abstention." Even boat seizures off Ecuador and Peru are tolerated and no one wants to submit the issue to the World Court. The fish-catch of the world has trebled since 1945, yet only Iceland seems fish-dependent.

The international climate has immensely changed. The world is not as polarized; there has been a shift in the balance of power; many new nations have come into the world community; the Straits of Tiran and Suez are now "determined" so that new considerations govern the ten to twelve votes of the Middle East. Whereas you could predict within three to four the votes of the eighty six nations in 1958, as is shown by the votes in the Sea-bed Committee, no prediction is now possible.

The peaceful uses of the seabed has now become one of the central issues. The other two emphases are the fixing of boundaries and establishing a World Regime.

E. PROPOSALS FOR THE FUTURE REGIME OF THE DEEP SEABED

Although the hypothetical possibilities of future regulation of the resources of the deep sea floor are myriad, it may be of value in concluding this survey to focus on some of the more recent proposals studied and recommended by international organizations or internationally minded groups. In 1965 the Committee on Natural Resources, Conservation, and Development of the National Citizen's Commission on International Cooperation proposed a solution which would treat as common property all the high seas mineral resources for the benefit of all mankind, and would entrust the allocation of the right of exploitation to a specialized United Nations agency.⁵⁹ In 1966 the Commission to Study the Organiza-

58. See Broun, *The Outer Limit of the Continental Shelf*, 1968 JURID. REV. 130. Note, *The Soviet Union and the Continental Shelf*, 63 AM. J. INT'L L. 103 (1969).

59. NATIONAL CITIZENS' COMMISSION ON INTERNATIONAL COOPERATION, REPORT OF THE COMMITTEE ON NATURAL RESOURCES, CONSERVATION AND DEVELOPMENT 4-7 (1965).

ton of Peace proposed that the deep sea areas be internationalized and that there be established a special United Nations agency which would regulate them.⁶⁰

The Dutch branch of the International Law Association organized a Deep Sea Mining Committee in 1966 which suggested in its report that a body of international law affecting the deep seas might be developed and administered by an international agency.⁶¹ Under this system, exploration and exploitation fees would be levied for the direct benefit of the entire community of nations. The World Peace through Law Center in a 1967 resolution recommended that the United Nations General Assembly issue a proclamation declaring that the non-fishing resources of the high seas and the bed of the sea beyond the continental shelf appertain to the United Nations and are subject to its jurisdiction and control.⁶² In 1967 the Representative of Malta proposed and on December 18, 1967, the United Nations General Assembly passed a resolution to examine the question of the reservation, exclusively for peaceful purposes, of the resources of the seabed, ocean floor, and the subsoil underlying the high seas beyond the limits of present national jurisdiction in the interest of mankind.⁶³ Since then, a permanent Committee of forty-two has carried on and addressed itself particularly to the legal principles which should govern the use of the seabed, as well as the implications of any future machinery to govern its use, and oceanographic research.⁶⁴ Senator Claiborne Pell, partly as a result of the Law of the Sea Institute Proceedings,⁶⁵ proposed U.S. legislation to implement this plan.⁶⁶

In 1968 the Center for Study of Democratic Institutions held a series of conferences of engineers, geologists, businessmen, lawyers, and congressmen to discuss the needs for new approaches to the law of the sea. The result was a draft charter together with a rationale for an ocean regime. The Center and Ambassador Pardo of Malta proposed to hold a world representative assembly in Malta, June 1970, to develop and set up such a regime.

60. NEW DIMENSIONS FOR THE UNITED NATIONS: THE PROBLEMS OF THE NEXT DECADE 36-41 (1966).

61. Netherlands Branch Committee, International Law Association, THE EXPLORATION AND EXPLOITATION OF MINERALS ON THE OCEAN BED AND ITS SUBSOIL, in THE INTERNATIONAL LAW ASSOCIATION, REPORT OF THE FIFTY-SECOND CONFERENCE 793, 797-98 (1967).

62. See UNITED NATIONS CHARTER COMMITTEE OF THE WORLD PEACE THROUGH LAW CENTER REPORT (1967).

63. G. A. Res. 2340, 22 U.N. GAOR, Supp. 16 at 14, U.N. Doc. A/6716 (1967).

64. See U.N. Doc. A/AC. 138/SC. 1/4 (1969).

65. See note 19 *supra*.

66. S2604, 2612, 90th Cong., 2d Sess. (1968).