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The Continental Shelf and the Freedom of the High Seas

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I. INTRODUCTION

The Convention on the Continental Shelf, done at Geneva, on 29 April 1958,[1] has given expression to new developments in the international law of the sea. It has responded to the emergence of a whole area of intense national interest in granting the coastal State exclusive rights over the resources of the continental shelf.[2] Such exclusive rights are not without precedent, as they do not essentially differ from the exclusive character attributed under general international law to the so-called historic rights over fisheries. But the wider limits and scope of the coastal State's rights under the Convention introduce novel problems in the light of the time-old principle of freedom of the high seas.

Valid national interests are found on both sides of the conflict between exclusive and non-exclusive rights in the law of the sea. A new synthesis or accommodation of these interests would appear to be emerging in a new legal order of the oceans. Yet many of the desirable solutions are only propositions waiting to be tested and measured by the realities and expectations of today's international life. This article attempts to examine some of the emerging questions posed by the regime of the continental shelf in the general framework of the traditional law of the sea.

II. THE CONTINENTAL SHELF AND THE SUPERJACENT WATERS

The purpose of the continental shelf doctrine was to extend the

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1. 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).

2. *Id.*, art. 2.

authority of the coastal State, beyond the limits of the territorial sea, over the submarine areas adjacent to its coast. The original enunciation, appearing in the Proclamation of President Truman of September 28, 1945, states that:[3]

> Having concern for the urgency of conserving and prudently utilizing its natural resources, the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control.

Thirteen years later, Article 2 (1) of the Convention on the Continental Shelf further provided that the coastal State exercise over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources. The Convention then went on to state in Article 3 the principle that "the rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters as high seas, or that of the air space above these waters."

Nevertheless, the regime of the continental shelf tends to have a detrimental effect at the expense of all other activities pertaining to the regime of the high seas. A measure of interference is sanctioned by the Convention itself while it attempts to grapple, in Articles 4 and 5, with the conflicts between the exploration of the continental shelf and the exploitation of its natural resources with the laying or maintenance of submarine cables or pipelines on the continental shelf; with navigation, fishing, or the conservation of the living resources of the sea; or with fundamental oceanographic or other scientific research carried out with the intention of open publication. In paragraph 6 of Article 5, the Convention protects the use of recognized sea lanes *essential* to international navigation from interference that may result from the establishment of installations, devices, or safety zones around them necessary for the exploration or exploitation of the continental shelf.

Despite those provisions, the potential conflicts they envisage would seem to require further and more precise regulation. The existing rules do not tell us the precise meaning of "unjustifiable interference." What would then be the degree of interference that is to be deemed unjustifiable and thus prohibited? Should considerations as to cost and risk involved in operations on the continental shelf be permitted to justify any interference with other activities and uses of the sea? One may note that the interests here in conflict are not exactly the same. On one side, the rights to the continental shelf are specific and derive from the Convention on the Continental Shelf. On the other, the various freedoms

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3. Presidential Proclamation 2667, Sept. 28, 1945, 59 Stat. 884, 10 Fed. Reg. 12303 (1945).

of the high seas are recognized by the general principles of international law. Conflicts in the exercise of such freedoms are subject to the principle of reasonable regard to the interests of other States in their exercise of the freedom of the high seas, enumerated in Article 2 of the Convention on the High Seas.[4] The conflict between the freedom of the high seas and the exclusive rights over the continental shelf are technically regulated by the principle of "unjustifiable interference."[5]

Ideally, interference might be avoided or reduced to a minimum through the development of improved exploration and exploitation techniques.[6] Agreed standards of conduct for individaul nations and operators would ensure the application of sound and tested methods. The hazards posed by installations can be minimized by the use of safety zones. Cooperation and accommodation may hopefully assign safe fairways and lanes to navigation without too much interference or disruption. Finally, in the case of controveries, the multiple users might wish to resort to settlement procedures available at the international level.[7] If in the nature of the exploration and exploitation of the continental shelf some interference might be unavoidable, it should and can be reduced to a minimum in order to coexist harmoniously with the multiple uses or freedoms of the high seas.

III. THE BOUNDARIES OF THE CONTINENTAL SHELF

The greatest uncertainty created by the continental shelf principle is probably the lack of a precise boundary. As stated before, the doctrine of the continental shelf laid claim only to the submerged areas that might be regarded as an extension of the land mass. The basic idea was the contiguity between the dry land and the submarine areas.[8] The Geneva Convention neither contemplated nor intended to deal with the whole of the vast ocean depths. Despite the absence of fixed limits in that definition, the submarine areas it envisaged were conceived in relation to the adjacent coast.[9]

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4. 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. 11 (effective Sept. 30, 1962).

5. Also relevant to the conflict of uses of the high seas and the continental shelf is the 1884 Convention on the Protection of Submarine Cables, March 14, 1884, 24 Stat. 989, T.S. No. 380 (effective Jan. 1, 1887).

6. Nondynamite seismic energy sources that do not seem to have an adverse effect on fish life are now being used for seismic exploration in the oceans. NATIONAL PETROLEUM COUNCIL, PETROLEUM RESOURCES UNDER THE OCEAN FLOOR 80 (1969).

7. Parties to any one or more of the conventions on the Law of the Sea held at Geneva from 24 February to 27 April 1958 may resort to the optional Protocal of Signature Concerning the Compulsory Settlement of Disputes.

8. Presidential Proclamation, *supra* note 3.

9. Article 1 of the Convention on the Continental Shelf; *see* Multilateral Treaties in

The question arises whether the requirement of adjacency has not been nullified in practice by the reliance on exploitation. It would seem to be meaningless to restrict the legal regime of the shelf to the adjacent areas if the rights of the coastal State are going to expand continuously as exploitation advances further along the bed of the sea up to the point where it encounters the rights of an opposite coastal State. In that case, under Article 6 (1) of the Geneva Convention, the boundaries of the respective continental shelves appertaining to such States would be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary would be the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

The legislative history of the definition does not resolve the problem of its limits.[10] Neither the International Law Commission nor the Conference in Geneva in 1958 considered appropriate the establishment of fixed geographical limits in the legal definition of the continental shelf. Nevertheless, they used pertinent geographical and geological considerations to describe the area subject to the exclusive rights of the coastal State. Thus the use of the term "adjacent" and the very retention of the term "continental shelf" as opposed to the expression "submarine areas" are indicative of a certain character of the seabed regions that were contemplated for inclusion in the definition of the continental shelf. The International Law Commission pointed out that the words "submarine areas" did not give a sufficient indication of the nature of the areas in question. If adjacency was an essential part of the definition, was the intention of the Geneva Conference to restrict geographically the rights of the coastal State? If so, what would be the use of the exploitability test?[11] There is a great need to establish more precise limits to the continental shelf. The alternative may be nothing less than the division of the ocean floor among coastal States and islands.

IV. THE PROBLEM OF BOUNDARIES AND THE FLOOR OF THE DEEP SEA

The need or convenience of fixing precise limits to the continental shelf has acquired relevance in the light of discussions relating to the

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respect of which the Secretary-General Performs Depositary Functions — List of Signatures, Ratifications, Accessions, etc. as of 31 December 1968, U.N. Doc. ST/LEG/SER.D/2.

10. For the legislative history of art. 1 of the Convention, see U.N. Doc. A/AC. 135/19, paras. 13-22 (1968).

11. Convention on the Continental Shelf, art. 2 (3).

legal regime of the bed of the ocean beyond national jurisdiction.[12] As technology could render exploitable the floor and subsoil of virtually every ocean, the danger exists that by expanding national sovereignty to the midpoints of ocean basins there may be nothing left for the establishment of an agreed international regime beyond the continental shelf. National and international interests concerned with the establishment of such a regime could set in motion the procedure under Article 13 of the Convention to amend or interpret the definition of the continental shelf. The fixing of a demarcation line could be based either on specific depths of water, on a certain distance from shore, or on a combination of both criteria.

The problem of establishing fixed boundaries is only partially a legal question. Above all, it is a political problem and in the context of the seabed it touches upon the interests of States to secure for themselves increasing reserves of food and minerals in the face of endless industrial demands to feed and serve mounting populations. To the extent that these national interests become the main concern of the international community as well, the alternative to the extension of national sovereignty over the whole ocean floor would be the establishment of an international authority with sovereignty, jurisdiction, or control to develop and manage the reaches of the seabed beyond the continental shelf. Current information may not be adequate to warrant a definite commitment to this course. More information is needed to delineate the features of such a regime. What seems to be rather clear are the immediate consequences of extending to the ocean basin the conflicts and rivalries of competing national interests. The impact of the regime of the continental shelf on the superjacent waters casts an ominous shadow on the position of freedom of the high seas, should the entire bed of the ocean be parcelled out among coastal nations.

Coastal States, in general, would be reluctant to accept a precise demarcation of their continental shelves if they feel that they are just going to give up for others the reaches beyond such demarcation. These misgivings are equally valid for both the technologically advanced and the less advanced countries. Foreign investment or technical assistance are likely to be available with a view towards the exploitation of the submerged areas which States would claim under the open-ended standard of exploitability, although developing countries would continue to be subject to the well-known inconveniences and pressures of foreign

12. For the relevant discussions at the United Nations, see Report of the Ad Hoc Committee to Study the Peaceful Uses of the Sea-bed and the Ocean Floor Beyond the Limits of National Jurisdiction, 23 U.N. GAOR, U.N. Doc. A/7230 (1968).

See also Report of the Committee on the Peaceful Uses of the Sea-bed and the Ocean Floor Beyond the Limits of National Jurisdiction, 24 U.N. GAOR, U.N. Doc. A/7622 and add. 1 (1969).

investment. States are not going to accept fixed limits if they do not know what legal regime will apply beyond those limits. Accordingly, an acceptable regime beyond national jurisdiction must induce the coastal State to restrain its claims by acknowledging and protecting its legitimate interests, mainly in the vicinity of the continental shelf under national jurisdiction. A clearly demarcated shelf would not be so difficult to accept if the coastal State were to share rather than give up the resources in the neighboring areas and indeed in the whole seabed under the oceans.

Whatever the advantages of national over international jurisdiction beyond the continental shelf, the potential benefits would not accrue equally to all States. Land-locked countries would gain nothing from a wide extension of limits, while little would be gained by those situated on small seas or confronting islands belonging to other sovereign States lying between them and the open seas. Recent studies estimate that two dozen States would receive moderate gains from extensions and perhaps another two dozen would make excessive gains.[13] Sufficient knowledge of all these facts and of the other political and economic realities affecting the use of the ocean is essential to generate awareness of the advantages and difficulties in establishing an equitable international regime for the deep seabed, rather than having it become subject to the national jurisdictions of the coastal States.

V. THE FREEDOM OF THE HIGH SEAS AND THE ESTABLISHMENT OF A SEPARATE REGIME FOR THE SEABED

The search for the acceptable international regime for the seabed is partially the result of certain dissatisfaction with the present status of international law on the high seas. From a legal viewpoint States might find in the freedom of the high seas sufficient ground to undertake exploitation of seabed resources at some point beyond national jurisdiction. Few restrictions would exist for them other than the general obligation to show a reasonable regard to the interests of other States in their exercise of the freedom of the high seas. The operations would be safely conducted under the laws and regulations of the flag State, which would be the main beneficiary. But this approach is marred by immense difficulties of a practical and legal nature. It would in effect sanction a system of unrestricted access and competition among the technologically advanced countries. Developing nations could hardly participate in those activities nor could they derive any significant benefits. Prospectors would quarrel about promising tracts and the overlap

13. COMMISSION TO STUDY THE ORGANIZATION OF PEACE, Nineteenth Report, (1968).

of jurisdictions. Over-capitalization would diminish or nullify returns. International markets could be flooded and prices might collapse. And last, but not least, the applicability of the principle of the freedom of the high seas to the seabed and ocean floor would not go without challenge.[14]

To meet the shortcomings of unrestricted competition while preventing an extension of national limits at the same time, States are seeking a better alternative in the establishment of some form of international machinery. The central idea behind this proposal is the setting up of an organ or body with authority to prevent the anticipated conflicts and regulate some aspects of the exploration and exploitation of the seabed. Differences of opinion exist as to the nature and scope of the functions and powers to be vested in the international machinery. The various suggestions can be narrowed down to the following three types of machinery:[15]

(1) International registration for national claims, possibly along with some international controls and some provisions for preventing or resolving problems.

(2) An international agency for the leasing or granting of concessions with authority to regulate exploration and exploitation, collect fees and royalties, resolve conflicts, and accommodate seabed activities with navigation, fishing, and other uses of the sea.

(3) An international operational agency to conduct exploration and exploitation activities itself.

With or without international machinery, exploitation must be considered a very near possibility. This in itself may not be prejudicial to the establishment of an international authority, although it is bound to have an important impact on the eventual structure, powers, and functions of such a body. The State capable of engaging in exploitation will defend its right to do so under the freedom of the high seas and will not be willing to part with it or accept restrictions to it unless it receives in exchange a fair participation in the work of the international authority and until it is satisfied that the eventual authority is viable, efficient and acceptable to a great majority of countries.

It would not be logical to expect that some States will agree to participate in an international scheme if some others are going to fare better by refusing to join such arrangements. Let us not forget that States are likely to participate in common efforts in view of the benefits

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14. *See, e.g.,* Report of the Committee on the Peaceful Uses of the Sea-bed and the Ocean Floor Beyond the Limits of National Jurisdiction, 24 U.N. GAOR, U.N. Doc. A/7622 (1969).

15. *See* Young, *The Legal Regime of the Deep-Sea Floor,* 62 AM. J. INT'L L. 647 (1968).

that they expect to receive and not so much for the common cause they are expected to achieve. While idealism will have some role to play, it can be no substitute for the hard realities of the national interests of States. From this perspective one may conclude that an international registry with regulatory powers would be more readily acceptable to States capable of exploitation than a licensing agency, and that an operational authority will be, for the time being, least acceptable to them. In other words, if the cost of an operational authority would be the prohibition of all exploitation by States, they would demand in return a great measure of participation in the decision-making organs of such authority. It would seem a natural reaction that States already engaged or about to engage in exploitation should aspire to the controlling positions. Presumably a weighted voting system would have to be established. If the price for creating a licensing agency or a registry would not mean the total surrender of state exploitation, they would be easier to negotiate and organize, subject, however, to the relationship between the degree of power accorded to the agency itself, the extent of freedom retained by individual States, and the measure of control which participating States will assume in the registry or agency.

VI. CONCLUSIONS

The process of negotiation and the decisions that will have to be taken to establish the new regime and its boundaries with the continental shelf will be complicated and difficult to achieve. The lack of sufficient knowledge about the scientific and technical aspects of exploration and exploitation of the seabed only adds to the problems and shortcomings of the law. One may note with concern the political pressures. Security reasons, the urgency to speed up economic development, or even considerations of prestige might force States to start exploitation to avoid lagging behind in the technological or military race. If the freedom of exploitation should be subject to serious challenge, the States concerned might have no alternative but to extend the limits of their continental shelves in order to protect exploitation activities. Existing conditions call for rapid action to achieve sound and practical arrangements with a sense of balance of all interests and legal rights involved. The final objective should be a comprehensive solution that would ensure all reasonable uses of the oceans while providing for the equitable sharing by all States of the benefits of seabed and ocean use.