

## International Conference on the Deep Seas and Continental Shelf

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### Recommended Citation

(1970) "International Conference on the Deep Seas and Continental Shelf," *Cornell International Law Journal*: Vol. 3: Iss. 2, Article 4.  
Available at: <http://scholarship.law.cornell.edu/cilj/vol3/iss2/4>

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# International Conference On The Deep Seas and Continental Shelf

Held at  
The Cornell Law School, Ithaca, New York  
November 29 - 30, 1969

*CHAIRMAN OF CONFERENCE: HARROP A. FREEMAN*

## PARTICIPANTS

- Professor Herbert W. Briggs, Goldwin Smith Professor of International Law, Emeritus, Cornell University; Member of the International Law Commission, 1962 - 1966.
- Professor Edmund T. Cranch, Associate Dean, College of Engineering, Cornell University.
- Professor Milton J. Esman, John L. Knight Professor of International Studies; Director, Center of International Studies, Cornell University.
- Ambassador Jens Evensen, Director General of the Judicial Department of the Norwegian Ministry of Foreign Affairs; Representative of Norway to the Committee on the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction.
- Dean William Ray Forrester, Dean and Professor of Law at The Cornell Law School.
- Professor Harrop A. Freeman, Professor of Law at The Cornell Law School; Chairman with Ambassador Pardo of Law Seminar, Malta Conference on Ocean Regime, 1970.
- Mr. Fernando Labastida, Associate Legal Officer, General Legal Division, United Nations Secretariat.
- Professor Franklin A. Long, Henry R. Luce Professor of Science and Society; Director, Program on Science, Technology, and Society, Cornell University.
- Professor Stanley D. Metzger, Professor of Law, Georgetown University Law Center; Chairman, United States Tariff Commission, 1967-69.
- Professor Covey T. Oliver, Professor of Law, University of Pennsylvania Law School; Assistant Secretary of State for Inter-American Affairs, 1964-1966; Coordinator of Alliance for Progress, 1967.
- Mr. Richard Young, Attorney, Member of the New York State Bar; Board Member of the International Law Center; Chairman, Advisory Board, South Western Legal Foundation.

## SUMMARY PROCEEDINGS

*The following is a summary of the proceedings of the Conference on the Deep Seas and Continental Shelf. The statements included here represent neither a verbatim transcript of the discussions, nor a complete record of all comments made by the participants. Many of the issues and problems which were discussed at the Conference are treated in greater depth in the articles and notes appearing in this issue of the CORNELL INTERNATIONAL LAW JOURNAL.*

*Saturday, November 29th*

## THE STATE OF THE 1958 CONTINENTAL SHELF CONVENTION

PROFESSOR FREEMAN: Discussions on the Continental Shelf Convention frequently include reference to the views of Dr. Shigeru Oda of Japan. Dr. Oda believes that the 1958 Convention shelf definition would carry the coastal states' claims to mid-ocean if exploitable resources can be found there. I would disagree; the majority of states reject this view, as was illustrated by the United Nations discussions. The Convention notes "adjacency," meaning next to the shoreline, not an indefinite extension.

While most countries believe that areas beyond the shelf should be used for peaceful purposes and recognize the 12-mile limit, problem areas still exist. Does freedom of seas permit exploitation? What form will the regime take? What rules will govern archipelagos and islands and what different considerations should be given to fishing, minerals, and oil? Also, whether and to what extent could the law of the continental shelf be reversed? The present Convention definition of the shelf is 200 meters depth and where exploitable. This sounds open-ended.

PROFESSOR OLIVER: Has there now been newly discovered evidence or mistake of fact regarding the 1958 Convention? For example, the "have" nations have great continental shelves. Was this known in 1958? If not, this may be a good consideration upon which to open up the Convention. Can the "rule of reason" be applied to the Convention?

Next, what regime is possible? The oil companies favor national licensing over international licensing. State Department people prefer an international regime. Why not a World Bank type of organization? Yet, given the present trends at the U.N., there is now reluctance regarding international administration.

MR. LABASTIDA: Some 43 nations have now ratified the 1958 Convention and Professor Oda believes 30 more adhere to the principles set forth in the Convention.

PROFESSOR METZGER: As far as developing new rules for a re-

gime of the continental shelf is concerned, the issue has been foreclosed to the 200 meter depth point by the 1958 Convention, which codified the claims of coastal states made in the 1945-1958 period. Beyond the 200 meter point there is a much greater opportunity of developing new rules.

MR. YOUNG: The oil industries are interested in the continental shelf and slope, not in the deep ocean depths, at least as far as future needs and development may be foreseen today. It is the mineral interests which are primarily concerned with the deep seabed. There are manganese nodules and other exploitable minerals in these depths. I agree with Professor Metzger that it would be impossible at this late date to roll back the 200 meter claims of the coastal states to the continental shelf. This is because of the codification achieved in the 1958 Convention and the International Court's decision<sup>1</sup> stating that the continental shelf belongs to the coastal state as a natural prolongation of the territory of the coastal state.

I disagree with the point that the 200 meter point marks the furthest extent of claims, for in some parts of the world, exploitation has already gone beyond that point to greater depths.

AMBASSADOR EVENSON: (Commenting on the International Court's decision in the *North Sea Continental Shelf* case): I think that this decision is not judicially outstanding, for in its important points its language is vague and its meaning unclear. I have difficulty seeing the continental shelf as based on principles of customary international law. Similarly, it is difficult to see the claims based on conventional international law, for only about 40 states adhere to the Convention; it is conventional law only for them. The source of law for the continental shelf principle was a ripening—a general acceptance of principles of law to satisfy the need which arose following 1945.

I do not support a geological definition of continental shelf. International law can do better than that, but the present definition embodied in the 1958 Convention is already antiquated.

In reaching agreement on the regime of the continental shelf political interests must be considered; 50 miles distance is too narrow, 200 meters is too shallow. Perhaps 500 meters and 200 miles is a good compromise.

PROFESSOR BRIGGS: The Convention itself, Article 13, provides for revision after 5 years. Article 2 of the Convention gives exclusive rights and jurisdiction for exploitation to the coastal state. This issue is closed and is a fixed area of international law with no politically feasible chance of change. With 70 states accepting the principle of

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1. *North Sea Continental Shelf Cases* (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), [1969] I.C.J. Rep.; 8 Int'l Leg. Mat'ls 340.

coastal state jurisdiction over the shelf, denying it is just not feasible. I think that any substituted criteria for limits, for example, 50 miles or 200 meters, 200 miles or 500 meters, will be just as arbitrary as the present system.

PROFESSOR OLIVER: If the 1958 rules were made in ignorance, perhaps we should alter the rules. What is the present state of science?

PROFESSOR CRANCH: We have the technology today to explore the deep oceans, but our ignorance of what is there makes exact prediction of its usefulness impossible. It is important to distinguish between the two tests of exploitability: (1) technological ability and (2) economic feasibility. There is no doubt that exploitation in both senses of the term will greatly increase in the near future.

AMBASSADOR EVENSEN: Most of the states do not now look at the 200 meter limit of their rights, but use the "exploitability" test which they feel gives them greater national jurisdiction. If international agreement or compromise is to be reached, we must seek a political solution which appeals to the coastal states.

PROFESSOR FREEMAN: Considering Oliver's question of the state of knowledge in 1958, did we know what we were doing then?

PROFESSOR BRIGGS: There is no *rebus sic stantibus* question in the issue as far as I can see. The most that may possibly be said is that there was mutual mistake at the time permitting revision now.

PROFESSOR OLIVER: I will accept Professor Briggs' restatement.

AMBASSADOR EVENSEN: We were not ignorant geologically in 1958, but perhaps were ignorant politically.

MR. YOUNG: We knew the continental shelf areas in 1958, but the changes as far as exploitability were concerned came much more rapidly than expected.

PROFESSOR FREEMAN: Did the less developed countries know what they were giving up in 1958?

MR. LABASTIDA: As far as the Latin American states were concerned, they knew the geology in 1958. Their earlier Trujillo Resolution embodied the 200 meter and exploitability criteria.

PROFESSOR OLIVER: Was the degree of wealth foreseen? Even if the geological configuration was known in 1958, if the extent of the wealth was not then appreciated, perhaps the rich coastal states might be regarded in some areas as trustees for all states in sharing some of the wealth.

PROFESSOR FREEMAN: The oil-rich areas were pretty well known in 1958, but the mineral sites were not then known.

AMBASSADOR EVENSEN: Only recently have oil prospects been realized in the deep seas area. There is growing interest in the Arctic areas now.

PROFESSOR CRANCH: Since deep sea exploitability will greatly increase in the coming years, it is urgent to work from the deep seas and encroach the shelf areas. We should work toward the coast as much as possible in order to share more with the less developed countries.

PROFESSOR METZGER: Cranch's idea is good. For the poorer countries to gain leverage in negotiating a regime for the deep seabed, they should, as a tactical matter, reopen the continental shelf issue. It seems to me that it is in their best interests to share the wealth of the sea. Both the seabed and continental shelf issues should be joined.

AMBASSADOR EVENSEN: Malta made a proposal for the continental shelf issue to be reopened, but there was general opposition because the states were unwilling to compromise their shelf jurisdictions not knowing in advance what international regime would govern the seabed. Recognizing wide shelves may be politically wise and necessary to get coastal states' acceptance of an international regime for the deep seabed.

MR. YOUNG: Professor Metzger's idea of poor nations gaining leverage by threatening to reopen the continental shelf issue would probably not be possible because these states cannot get together as a bloc. Their interests are so divergent that such a tactic is impractical. I think that the present exploitation criteria takes us already to at least 400 meter depths. I agree with Dr. Evensen that there is no turning back on the existing shelf claims.

PROFESSOR ESMAN: Is there exploitation presently beyond 200 miles? If not, this might be the best outer perimeter leaving three-fourths of the Earth's waters to an international regime. Depth limit should not be a criterion for coastal state jurisdiction.

AMBASSADOR EVENSEN: Norway does not support a perimeter criterion but prefers a depth criterion. Two hundred miles will not be acceptable to all states; some feel the current definition gives them more. Australia, for example, has a shallow shelf extending far beyond the 200 mile perimeter. But a 200 mile limit may bring peace if it is advanced now. I suggested the 200 mile limit at the United Nations and the developing countries seemed to express their approval of this limit. The Soviet Union favors no international regime for the seabed. Freedom of the seas and seabed exploitation is their preference.

MR. YOUNG: The Soviet Siberian coastal shelf is very broad, so they are satisfied with the existing law.

Sunday, November 30th

#### ARCHIPELAGOS

PROFESSOR FREEMAN: There are interesting problems concerning islands and archipelagos. (Evenson is an expert on the archipelago issues.) Indonesians regard their country as composed of both land and water; semantically, it is such. The Philippines define the waters between the country's islands as internal waters and the islands as composing a geological unity. Micronesia resents the U.S. theory of the 3 mile territorial sea and the practice of granting permits for exploration and exploitation beyond that. Hawaii feels that the U.S. denied the Hawaiians' birthright by not fighting for the archipelago theory for Hawaii.

AMBASSADOR EVENSEN: The *Anglo-Norwegian Fisheries* case<sup>2</sup> held that if the islands are an entity, then baselines may be drawn around the outer perimeter of the island group for enclosing territorial waters. The Arctic states convention deals with both land and "territorial waters." Coastal archipelagos are, however, more acceptable than would be purely oceanic archipelagos such as Indonesia or Micronesia. There are problems of merchant lanes and innocent passage. Norway grants innocent passage through its coastal archipelago even though the International Court (in the *Anglo-Norwegian Fisheries* case) determined it was not necessary because the waters are internal.

Norway, Sweden, the U.K., Canada, the U.S., and the U.S.S.R. are all interested in the archipelago problems in the north. As to offshore archipelagos, Norway, the U.K., and Denmark agree Norway should fix its continental shelf from its coastal archipelago. Norway's Spitsbergen archipelago, however, poses difficult problems. Should the continental shelf be measured from it? Norway is trying to reach agreement with the U.S.S.R. Norway has asked oil companies to come in, but the U.S.S.R. is not happy about that. It may object as it has to Sweden. The U.S.S.R. is testing atomic weapons up there and fears electronic spy stations.

It is easier to see adjoining archipelagos as part of a mainland; ocean archipelagos pose different problems.

PROFESSOR METZGER: Isn't innocent passage guaranteed for newly enclosed areas?

PROFESSOR BRIGGS: Norway is not a party to the Territorial Seas Convention which includes that provision. Norway grants innocent passage between its skjaergaard, or rock rampart, and the mainland as a

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2. Fisheries Case (United Kingdom v. Norway), [1951] I.C.J. Rep. 116.

matter of policy, but not because it feels an international law obligation. Norway has ratified none of the four sea law conventions.

AMBASSADOR EVENSEN: Norway is not now a party to any of the four conventions, but may ratify all with reservations.

PROFESSOR OLIVER: What interests are involved for the archipelagos?

MR. YOUNG: The interests include the continental shelf, fishing rights, and national unity.

MR. LABASTIDA: An international convention might declare established sea lanes to be international straits to preserve free and open passage after recognition of the archipelagos.

PROFESSOR FREEMAN: Perhaps continental shelf or at least deep seabed resources benefits should be correlated to size of national populations rather than the size of national coasts.

PROFESSOR BRIGGS: You are talking about legislating against the inequities of geography. Will nations listen to the archipelago group now when they would not in 1958? The U.S. and the U.S.S.R. are interested in the maximum utilization of the high seas.

PROFESSOR METZGER: In 1958 the U.S. Navy was the leading advocate of the 3 mile view for territorial seas. Preserving the right of innocent passage in straits between high seas is in the interest of the U.S., as well as of many other nations—witness the Straits of Tiran. Conventions are repealable. The U.S. may prefer to rely on customary international law.

AMBASSADOR EVENSEN: These are turbulent times for customary law and a convention might add to the security of open shipping through the archipelagos.

#### MILITARY PROBLEMS

PROFESSOR FREEMAN: Let's turn to a consideration of the military problems involved in the shelf and seabed.

AMBASSADOR EVENSEN: I won't repeat what is in my paper, but will just note that the U.S. has mobile underwater missile site technology. Underwater mobile structures equipped with missiles could be put close to the Russian coast to cut down to one third the time for delivery with no hope of defense against them. The Russian proposal of March 19, 1969, would have banned "all military purposes," including monitoring and detection devices on the ocean floor. The U.S. wanted to limit the prohibition to fixed installations. The U.S.S.R. feared inspection and the U.S. wanted to protect the Polaris. The October 7th draft of the Peaceful Uses of Sea Bed Convention in Geneva prohibits in Article 1 the placing or implanting on or under the subsoil objects with nuclear or mass destruction devices and facilities for launching or storing them.

The Preamble declared that the provisions were not final or complete and that more work would follow. This draft went to the First Committee at the U.N. The Convention would cover the entire seabed beyond a 12 mile limit.

PROFESSOR LONG: Land-based missiles are vulnerable and are nearing obsolescence. Medium and short-range missiles would have better protection under water than in rocks. Major nations want to move into the 12 mile seas.

DEAN FORRESTER: What is being accomplished if technology can be adapted to achieve what the major states want despite the treaty?

AMBASSADOR EVENSEN: It does stop the armaments race on the ocean floor. It also prevents nations from moving up close to another country's shore and using short-range devices.

PROFESSOR LONG: We should look ahead to the technology and put a stop to the right to certain uses before the technology for them is developed.

AMBASSADOR EVENSEN: The draft Convention is going before the First Committee of the U.N. as a *fait accompli*. It was negotiated by the large powers and given to the smaller states on a ratify or refuse basis. Style and manner in such matters is important. All states should be given a sense of participation, so it is best to negotiate in the U.N. There is some sentiment to internationalize listening and tracking devices.

PROFESSOR FREEMAN: International monitoring and detection could lead easily to eventual international control.

MR. LABASTIDA: Some countries complain as to the language of the Peaceful Uses Convention. The reference to "contiguous zone" was intended to avoid direct mention of a 12 mile limit. Some Latin American states argue that such a reference would prejudice the extent of their existent jurisdiction.

#### SEABED REGIME

PROFESSOR FREEMAN: The problems posed in establishing a seabed regime include access, controls, liability, and profit-sharing.

PROFESSOR METZGER: Through a government consultation program, national governments could do the licensing. They would give notice of their intention to license to an international agency and the international community. A "stop order" could be issued if anyone objected. Then the licensing nation and its company could work things out with the objecting state. This way, a jurisprudential explanation would not be necessary to solve the *res nullius* or *res communis* problem. The world community should share in the profits.

PROFESSOR FREEMAN: Who would have the power to grant? And the authority to withdraw?

AMBASSADOR EVENSEN: There are three basic possible systems: registry, concession, and international exploitation.<sup>3</sup> I am afraid Metzger's plan is too much like registry. This results in a scramble of countries trying to apply first, so you might have to restrict time, size, etc. With enough of these provisions, registry ends up like licensing. Concessions by an international agency are preferable and necessary for order. Although developing states want international operation, it would waste time, money, etc., so I prefer the concessions system. Whether states or companies themselves are licensed is a detail.

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3. These three basic systems may be described as follows:

(1) An international registry agency for all of the seabed outside the 200 meter geological definition of the Continental Shelf could be formed. The employment of such an organization would clarify the sovereignty question by granting sovereignty over the claimed portion of the seabed to any state by applying the traditional rule of *occupatio terrae nulliae*. This proposal has been termed the "flag nation" approach or the "snatch and squat" approach. Under this system the registry agency would grant exclusive jurisdiction for appropriation of seabed territories and exploitation of mineral resources of the seabed within them beyond the 200 meter mark to the nation of the flag of the discovering expedition.

See generally — MIRA, *THE MINERAL RESOURCES OF THE SEA* (1965); Christy, *A Social Scientist Writes on Economic Criteria for Rules Governing Exploitation of Deep Sea Minerals*, 2 INT'L LAWYER 224 (1968); Ely, *American Policy Options in the Development of Undersea Mineral Resources*, 2 INT'L LAWYER 215 (1968); Goldie, *The Contents of Davy Jones Locker — A Proposed Regime for the Seabed and Subsoil*, 22 RUTGERS L. REV. 1 (1967); Young, *The Legal Regime of the Deep Sea Floor*, 62 AM. J. INT'L L. 641 (1968).

(2) The "concessions" system envisions an international leasing authority with vested property rights to the seabed beyond Continental Shelf limits. The leasing authority would control the mechanism by which a state may gain jurisdiction over the exploration and exploitation of seabed resources. It could be created and managed by the United Nations or a sub-agency thereof. The functioning principles of the leasing authority would include free access and equal opportunity. It has been proposed that this international leasing organization would (1) control and administer international marine resources, (2) hold ownership rights to the seabed and its resources, and (3) grant or lease these rights in accordance with the principles of economic efficiency. Such an agency should function with the independence and efficiency of the World Bank and would distribute the returns from the seabed resource exploitation in the manner set forth by the United Nations General Assembly.

See Young, *supra*, at 649, n. 27. See also Antarctic Treaty, December 1, 1959, (1961) 1 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71 (effective June 23, 1961); Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, January 27, 1967, T.I.A.S. No. 6347 (effective Oct. 10, 1967). Mr. Young suggests not to push the analogy too far because there are already existing interests in the ocean bottom.

(3) A system of international exploitation could be established pursuant to a declaration by the General Assembly that the rights to seabed exploration and exploitation are in the international community and that these rights may be exercised only by an international body. This third system may be distinguished from the second for, instead of creating an international leasing authority, an international agency would be set up with its own exclusive power to explore and exploit the seabed. Policies with respect to the resources extracted, the profits accumulated, and the scientific advances made, would be drawn up by the General Assembly of the United Nations. — I. Shepard, ed.

PROFESSOR METZGER: The less developed countries should share in any benefits from resources outside a 12 mile limit. I think granting concessions to divide up ocean floor territories would be a mistake. The system I suggested is licensing and more; it is not merely a "registry" system.

PROFESSOR OLIVER: My proposal would include the following points:

- (1) no national or company property in underwater territories, as such,
- (2) no weight given to contiguity of the applicant,
- (3) a special licensing agency with national participation, like the IMF or World Bank,
- (4) allocation of exploitation rights by a system of competitive, weighted bidding,
- (5) some mathematical phased division of profits, and
- (6) the international licensing agency would be the trustee for the U.N. Development Program (UNDP) and the International Development Agency (IDA).

MR. YOUNG: More than registry is needed; otherwise there would be a rush to register. I am against an international exploitation scheme. Where would the international body get the necessary funds? Capital is not all that readily available. We want to encourage rapid exploitation, so it should be made competitively attractive. My preference is to deal with states or combinations of states.

PROFESSOR FREEMAN: Should seabed exploitation be conducted along the lines of public utilities? Should a flat fee be charged for the rights given, a percentage of gross proceeds, royalties? How much profit should be given — 10%? Should the international agency have the power to hold back to regulate the world market? Could we get a fee to the international agency even between 12 and 200 miles if that were adopted as the continental shelf limit?

PROFESSOR CRANCH: We want to have exploration proceed rapidly. However, a strong international organization might be needed to slow down too rapid an exploration. We might wish to distinguish between the authority to explore and the right to exploit.

PROFESSOR METZGER: There should be early and maximum exploration. There will be great tension between the developed and the less developed states. My plan of tension resolution, I think, has merit. An agency used to control production and hold back reserves must have a representative, mediating board. (It is not like the IMF.)

PROFESSOR OLIVER: I am not pressing for a World Bank type of arrangement or a one country, one vote set-up. Exploration should be left in the hands of a completely technocratic agency, like the High Commission of the Common Market. The agency has to be initiating and

may require a "pusher" agency — perhaps GATT could be used — which could regulate the market.

MR. YOUNG: The wealth in the ocean is potentially enormous, but not necessarily readily available either in technological or economic terms. Deep sea interest is more for minerals than for oil. I have heard it said that the world's needs in manganese for a year could be taken from a 9 by 12 mile area of the ocean floor. An area 100 by 110 miles could meet the world's demand in nickel for a year. These may be optimistic estimates, but although we know little for sure, we do know the resources are very large.

MR. LABASTIDA: If the shelf goes to 200 miles, won't the states be producing most of what wealth would come under a possible seabed convention?

PROFESSOR FREEMAN and MR. YOUNG: Yes, except for nodules.

PROFESSOR FREEMAN: In return for a guarantee of coastal title to 200 miles of shelf, could we get the nations to voluntarily make contributions to the U.N. for the benefit of the less developed countries?

PROFESSOR OLIVER: "Nyet."

PROFESSOR CRANCH: Should the ocean floor be kept open to scientific exploration without regulation?

PROFESSOR FREEMAN: How do you distinguish pure from applied research? It's a difficult question.

MR. LABASTIDA: In this area too, the issue arises as to sharing with the less developed countries. Would they be given reports, reports plus analysis, or even samples?

PROFESSOR FREEMAN: I am afraid our time has run out. I think it has been a very fruitful and useful working session. Thank you for your participation. Perhaps we'll all get together at the larger conference in Malta in June.

