

The UN and the Law of the Sea: Prospects for the United States Seabeds Treaty

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As befitted the advent of the age of Aquarius, the year 1970 brought with it new moves to arrest the rapid erosion of the traditional legal order of the high seas. Some causes of the threatening disruption could be found in the omissions and the uncertainties in the Law of the Sea Conventions of 1958, but these failures were themselves symptomatic of the changing and multiple uses of the seas. In the days when the navigation of a few powerful maritime states was the principal use of the oceans they together could enforce their mutual interest in "freedom of the seas." As the uses multiplied, so have the number of nations whose differing interests must be accommodated if stability in the seas is to be achieved by general concurrence.

Of all the changing uses of the sea, the imminent prospect of riches from mineral exploitation of the seabed created the most adverse challenge to "freedom of the seas," setting against the maritime interest in the non-territorial status of the high seas, the economic interest of a growing number of coastal states in the wealth of their continental shelves.

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The opinions expressed in this article are solely those of the author and do not represent those of Senator Pell, or any U.N. body.

Last May 23, President Nixon issued a major statement of United States oceans policy directed toward maintaining freedom of movement on the high seas, in tandem with a proposal to establish an international regime to govern the exploitation of the seabed. The statement was followed, as promised, by a United States "Draft U.N. Convention on the International Seabed Area,"¹ presented to the August meeting of the U.N. General Assembly's Committee on the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction.

The United States draft convention, which emerged from protracted conflict within the United States government and outside it, was criticized by some, particularly the oil industry, as a "give-away" of United States rights to the resources of the Continental Shelf which they considered to extend to the edge of the continental margin, encompassing the continental shelf, the slope, and the rise.

To others, and to many foreign diplomats, the United States proposal was suspected of being some kind of rabbit in the hat trick, a view encouraged in part by the far from secret knowledge that the international aspects of the proposal had emerged victorious over other alternatives because of the insistence of the Department of Defense in maintaining "freedom of the seas" as an overriding priority. It is quite likely that had the military not asserted such vigorous opposition to any result which might encourage further jurisdictional claims in the seas, the United States proposals might well have taken a form more consistent with the views of the oil industry, and indeed with those of other developed states with substantial offshore riches, particularly oil and gas, and few Polaris submarines. One diplomat greeted the advent of the United States proposals with the warning "beware of the fat cat that feeds the mice." In fact the reasons for the fat cat's generosity are not hard to find. One was earlier summed up by the State Department's legal adviser, John N. Stevenson. In a major address on the law of the sea in February 1970 he said:

The international community must recognize that the entire issue of the seabed will be mooted unless there is agreement on the breadth of the territorial sea. The promise of an international regime for the seabed, and the bold experiment in providing the international revenues for international community purposes, will be shattered unless the nations of the world, acting as a unit, decide to protect

1. [Ed. note: For a thorough discussion of the American proposals, see Knight, *The Draft United Nations Convention on the International Seabed Area: Background, Description, and Some Preliminary Thoughts*, this volume at 459].

their common interest from a chaotic pattern of coastal state claims.

Ironically, the United States, which assigned such high priority to the preservation of narrow territorial claims, had itself been guilty of setting some of the precedents used to justify many expanded claims. The doctrine of the Truman Proclamation of 1945 which claimed for the United States jurisdiction over the resources of the continental shelf, with undefined limits, was later incorporated in the 1958 Geneva Convention on the Continental Shelf which, with equally open ended obscurity, established the jurisdiction of the coastal state in the shelf to a water depth of 200 meters or "beyond that limit to where the depth of the superjacent waters admits of the exploitation of the natural resources."

The Truman doctrine proclaimed in fact a "special interest" of the United States in offshore oil deposits, a precedent which the Latin Americans were not slow to borrow in support of other special interests. Peru, Ecuador, and Chile claimed exclusive fishing rights out to 200 miles. In the last year both Argentina and Brazil have extended their territorial sea to 200 miles and have tried to obtain both Latin American agreement, and agreement among other developing states to the doctrine that each state may within reason assert its claims in accordance with its "special circumstances." The proliferation of offshore oil leases being granted in various parts of the world including Indonesia and the Philippines, have led to still another set of "special circumstances." Those two states have claimed the right to draw their territorial sea from straight baselines connecting the outer reaches of their island archipelagos, thus purporting to acquire territorial rights over vast reaches of the Pacific ocean on the basis of their special and unique geography.

In some measure the problem of the boundaries in the sea is much like the fencing of the western prairies. The new and hopeful economic developers are impinging on the traditional freedom of the oceanic ranges, with, however, consequences that may not be confined to a local shoot out. Thus, the principle features of the United States proposals are intended to build bridges over the almost unbridgeable gulfs between rich nations and poor nations, maritime nations and other coastal states, shippers and producers, coastal and distant water fishing states. There would

be established a single legal regime for the seabeds beyond the 200 meter depth in recognition of the fact that pollution and other hazards of exploration to the ocean environment cannot be contained within geographic boundaries in the sea. At the same time, the Convention provides for two administering authorities, the Trustee coastal state whose rights, if limited and specific, are substantial, and the Authority whose regulatory authority is limited indeed.

The proposed trusteeship zone would encompass some 43 percent of the ocean beds, most of the foreseeable resource exploitation except for the still speculative mining of manganese nodules in the deep seas, and permit virtually exclusive coastal state jurisdiction despite the renunciation of national claims. One U.N. diplomat was prompted to inquire whether anyone would entrust his wife to such a trustee. But such criticisms may best be evaluated in terms of the interests to be accommodated putting together a workable international majority.

National Interests of Coastal and Other States

There is perhaps no more dramatic illustration of the instability of the seabeds issue in terms of time available to solve it than the almost complete reversal of roles in the past three years between the United States and the original proponents of an international solution.

When the Ambassador of Malta first propelled the seabeds question onto the international stage in 1967² he estimated that revenues from a regime such as he proposed could attain a level of five billion dollars annually by 1975. These estimates were based rather optimistically upon the same fees currently paid to national governments for offshore drilling leases, at the existing rate of development and upon all exploitation beyond a water depth of 200 meters on the continental shelf beyond the territorial sea. The principal features of his proposal were narrow limits of national jurisdiction and the creation of a means to equalize to some extent shares in the "common heritage."

2. One of the principal goals of the Maltese proposal in 1967 and that of Senator Pell, introduced in the United States Senate in the same year, was to forestall the possibility of nuclear installations in the seabeds. That issue was subsequently referred to the Conference Committee on Disarmament under whose auspices a limited treaty was negotiated banning the emplacement of nuclear weapons and other weapons of mass destruction in the seabed beyond a limit defined as 12 miles from the baselines used to measure the territorial area.

Both of these concepts are incorporated, if to a lesser extent, in the United States proposals. But by the time they were put forth the same Ambassador of Malta was suggesting that all nations now agree to a boundary in the sea and the seabed at a distance of 200 miles in what amounts to a negation of any hopes of confining claims of jurisdiction in the high seas. The reason for this apparent *volte face* was the Ambassador's belief, which may well be correct, that such a limit is the only remaining alternative to chaos resulting from claims at far greater distances.

It is this same fear that in large measure motivates the United States sense of urgency in seeking a new law of the sea conference, risking the hazards that established agreements might be called into question despite a carefully worded mandate, or that failure to agree might make a bad situation worse still. Despite the initial preference of the United States and the present preference of many other maritime states, for a separate settlement in "manageable packages" of the law of the sea questions, a majority of the U.N. membership was unwilling to abandon the bargaining value of linking a regime for the seabed to agreement on a limited territorial sea. For the same tactical reason national claims in the seabed and the high seas have multiplied in the past two years casting real doubt upon the capacity of any international conference to reach agreement in time to prevent such pragmatic claims from turning, as they seem inevitably to do, into unyielding claims of moral virtue, national honor, and international hazard.

One of the difficulties in putting together any equitable seabeds proposal is the basic inequity of the ocean's geography. In still another example of the rich getting richer, it is a fact that the largest and potentially most economically productive continental shelves are to be found off the coasts of northern and developed states, many of whom may be understandably reluctant to share such a boon with little return to them either in maritime advantage or share in the common fund. There is also the possibility, as suggested by some economists, that the immediate prospects for substantial economic returns for mining in depths beyond 200 meters are overstated, and that exploitation of that part of the seabed for the next decade or two will yield less than substantial sums to the fund which would benefit the developing nations and landlocked states, who should be most disposed to favor an international regime.

The usual and basic political division that exists within the United Nations between rich nations and poor nations is then, reinforced to some extent by the distribution of economic interests in the seabed, with one unusual variant: because of the United States interest in high seas mobility a greater accommodation of interests can, at least in theory, be made between the United States and a majority of Afro-Asian states, than can be made between the United States and other western and developed states, or between the Afro-Asian group and its usual allies, the Latin Americans. But the outlines of any regrouping of traditional alliances on the seabed issues are still hazy, nor can uncertainly perceived realities be counted upon to overcome longstanding political prejudices and regional alignments.

Because of this peculiar fall of the sticks, the United States plan must, and did attempt to offer on the one hand, financial incentives to Afro-Asian states most of whom do in fact share an interest in confined claims, if a regime assures them of participation in the seabed resources and, on the other, insure the support of developed industrial states whose agreement is essential to any workable arrangement. Hovering in the political shadows is the yet uncertain position of the Soviet Union.

Unlike the recently signed treaty banning the emplacement of nuclear weapons in the seabed, in which the interests of the Soviet Union and the United States were relatively easily reconciled, even if, in the view of some critics, such agreement was possible because the problem addressed was a non-problem, the same circumstances do not yet exist with regard to a regime for the seabed. The Soviet Union is a major naval power, certainly with substantial interest in freedom of transit through international straits. The U.S.S.R. also is endowed with a vast area of continental shelf which it is difficult to imagine either practically or ideologically, contributing to the common weal. Such conflicts suggest the delaying tactics which have characterized the Soviet position to date. Under pressure of isolation, the Soviet delegate voted for the General Assembly's resolution endorsing a minimum set of agreed principles to govern the uses of the seabed; they voted against the proposed Law of the Sea Conference, and it is possible that only the prospect of again being isolated and doing important damage to its self-proclaimed image as champion of the poor, would induce even minimal concurrence in a seabed proposal.

Next along the power scale is the necessity of seeking common ground with other important coastal states with extensive con-

tinental shelves of which happen, by accident of geography, to be Western and developed states, including, for example, Australia, Canada, Great Britain, France, Iceland, Ireland, Norway and the U.S.S.R., as well as a number of Latin States. In these circumstances geography tends to argue for broad coastal state jurisdiction to obtain maximum benefit from offshore resources. Such interests are modified to some extent by, for example, the various maritime interests of the United Kingdom and France, traditional supporters of "freedom of the sea," but states whose interests are less importantly military, and hence less likely to find their mobility constrained by varying applications of the doctrine of "innocent passage" than are nuclear ships or missile carrying submarines.

The trusteeship zone was designed to protect the interests of such states in the administration of their continental shelves and yet provide from them a source of international funds. One reason, though one not a politically persuasive one, for developed states to agree to such revenue sharing proposals would be the proposition that more turmoil is and will be caused by the inability of a majority of states to break the grip of poverty than by any specific international crisis. One other emerging consideration is the payment of revenues as an inducement to widespread agreement on internationally enforceable pollution and conservation measures, in which the developing states have a non-existent to totally negative interest. The prospect of some small state becoming an underwater Liberia as a sponsor of happily unregulated licensees may be far fetched but not impossible.

In a further accommodation of the interests of wide shelf states of the United States proposal sets the boundaries of Trusteeship Zone at the edge of the margin rather than at a fixed outer limit of 100 miles or a depth of 2500 meters proposed in the report of the Marine Science Commission two years ago, or setting an alternative lateral limit of national jurisdiction at 50 miles or 550 meters as suggested by Senator Claiborne Pell.³ Both of these more restrained proposals would add little to the rights of most states, but would lessen the inducement to the fortunate few to join in such a regime. There is also some view that a boundary marked

3. S. 33, 91st Cong., 1st Sess. (1969). Sen. Pell introduced a proposed draft treaty on ocean space in the senate in the fall of 1967.

in terms of miles is more subject to the hazards of "creeping jurisdiction" into the high seas above than one more directly related to its function, a contention that experience with the 12 mile "contiguous zone" might support.

The second principal thrust of the United States proposal is directed toward enlisting the support of a majority of states, both coastal and landlocked, principally Asian and African, whose shelves are either non-existent, or narrow, or which in any event do not promise great potential wealth. An international fund is the only real means by which these states will share in the uses of the seabeds, yet many, encouraged by the Latin bloc, have asserted variously extensive territorial sea claims as an attempt to insure their bargaining position and to protect them from the possibility that their share of the "common heritage" may yet turn out to be a mess of pottage. Such claims, once made, are difficult to retract. There are also some Afro-Asian states, such as Indonesia and the Philippines, with wide shelves and potentially vast mineral resources which coastal claims would protect, but these are a minority. Of the great majority of states which are coastal but with average to narrow shelves only four outside Latin American are western, and of the rest only Japan is an economically advanced state.

If the United States proposals were successful in enlisting support both from principal coastal states and from a majority of Afro-Asian states it would also succeed in isolating and minimizing the influence of the Latin American effort to precipitate an advance to 200 mile claims in which it has been joined by Iceland, in defense of its fishing industry, and others following just behind.

Clearly a demonstrable source of future funds, however imprecise, is a key element in obtaining the support of Afro-Asian states for restrained claims and assembling the requisite combination of voting numbers from them, and voting power from the appeal of other parts of the proposal. One possible means of reinsuring the substance of the common heritage would be to devise a system of license fees or royalties from still another, more provable, common heritage—the harvesting of fish.

In addition, an adjustment to some substantial degree of the permissible preferential fishing rights of coastal states has been an integral part of the United States law of the sea package, an offer which might do much to resolve the real problems of the Latin states, and certainly the real problems of the west coast Latin States if such an accommodation, adverse to the interests of dis-

tant water fishing states such as the U.S.S.R. and Japan, can be agreed upon, and agreed upon before the two hundred mile claims have become politically unretractable. Fees from licenses to fish within such preferential zones might also contribute to the international fund.

As could be expected from an effort to meld this view of mixed interests and mixed powers, the United States proposals offer something to everyone, not everything to anyone, and are occasionally inherently contradictory. The erosion of the three-mile limit was perhaps an inevitable consequence of the shifting uses of the seas and the decline of the days of naval empire, but a regime which grants to coastal states both extensive jurisdiction and self-policing powers over almost half the ocean beds would appear a somewhat drastic and uncertain means of insuring freedom of access over and under the superjacent waters. The idea of geographic boundaries in the seabed as distinct from the waters above stemming from the effort to give legal respectability to the Truman doctrine, is a concept wholly unsuited to the marine environment, yet military and nation state interests now require some such boundary if only to preclude further and indefinite ones.

Finally the entire concept of the United States seabeds proposal initially intended to reconcile maritime interests and interests in economic exploitation may have been overtaken by an increasingly important interest in the reservation of the marine environment. Yet, such a concern, the most truly international of all, would at the present time only further polarize rich nations and poor nations and perhaps accelerate the pebble throwing effect of unilateral claims.

Future Possibilities

If little else is clear about the meeting ground of interests in the seabed, it is safe to say that the dimensions of the problem in 1973 when the Law of the Sea Conference convenes are likely to be as different then as they are now from the few tips of the iceberg initially perceived in 1967. Apart from its substantive merits, the fate of a regime for the seabed poses the question as to whether any issue that derives from, and is related to, the rapid changes of a technological age can be effectively grasped in the plodding course

of diplomacy. Like feeding errant computers, one wonders if the solutions will ever catch up with the problem.

On the positive scale, perhaps one of the most extraordinary and largely unremarked successes of the U.N. Seabeds Committee has been the general acceptance over the past three years, by most states, for varying reasons, and with varying interpretations, of the doctrine that the seabed and its resources beyond some yet undefined limits of national jurisdiction are the "common heritage of mankind." If this concept sets in perspective the relative geographic importance of the global seas and man's islands, it may yet frame the elements of a widely acceptable regime for uses of the ocean environment which, one way or the other, must turn upon its capacity to readjust some equities in the oceans within the limits of practical possibility.

The oceans are 70 percent of the planet. From them the land derives its life support in ways which, in an age of space exploration, are remarkably uncharted and unknown. From the standpoint of the preservation of the marine environment, and from the standpoint of mankind's common interest in the successful multiple uses of the ocean, they are one. One cannot conceive of a city reservoir being subject to the individual uses of the structures that might abut it; an ocean's system directed toward the same goal is ultimately imperative.

By this standard any proposal, whether it be for the seabed or the high seas, or for conservation, pollution, or fisheries, must meet the test of taking at least one small step in this direction. A regime for the seabeds is such a step if it does not focus exclusively upon the accommodation of navigation and exploitation rights, as the laissez faire concept of freedom of the seas supported a single dominant maritime interest.

There are many possible variations in the United States draft proposals which might result in a workable arrangement, if as Mr. Stevenson urged, the nations of the world act in concert, and in compromise to protect their common interest. The spirit of compromise has not been notably evident in the three year existence of the U.N. Seabeds Committee and may be even less so at a law of the sea conference involving delegations uncertain of their interest, less than expert in the ramifications of the problem, and suspicious of all proposals put forth by those nations whose support of any regime is essential. The one immovable element is that of passing time which encourages a solution imposed by the consequences of power and technology rather than one of equity, a

circumstance which imposes upon the developing states the greater burden of compromise which may appear unfair but might in the long run secure the best of all possible alternatives.

The world community has now before it one concrete opportunity to create a new international system to deal with one of the many problems of the future whose global dimensions no national power can confine. It is interesting to speculate on what might have been had the Acheson-Lilienthal proposals for the control of atomic energy been adopted when they were offered. Like the internalization of atomic power, the concept of the management of resources of the seabeds as the "common heritage of mankind" is an idea whose time has come, and may too soon become an idea whose time has passed.