

THE CHANGING LAW OF THE SEA

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Introduction

Only 29% of the earth's surface is land; the remaining 71% is sea. Yet until recently the sea was a virtual legal vacuum. Whilst laws were piled on laws to regulate man's activities ashore, he was left to do almost as he pleased at sea, the basic principle of sea law in modern times being freedom. The sea was a "res nullius" which could be owned by no one and used by everyone.

The first comprehensive conventions on the law of the sea were those worked out in Geneva in 1958.¹ The inroads made by the conventions on the principle of freedom were relatively small and its function as the core of the law was reaffirmed. Since then, however, the political and economic importance of the sea has altered. The principle of freedom of the seas was mainly justified by the need for uninterrupted navigation. Although navigation has increased in absolute importance, its relative prominence has declined as new uses of the sea have emerged. New resources have been discovered and, more important, methods of exploitation have been developed or envisaged. Large areas of the deep ocean floor, particularly in the Pacific, have been found to be littered with manganese nodules, lumps of concentrated mineral rich in nickel, copper, cobalt, and manganese. These occur under the high seas. Freedom in that area means freedom for the rich and technologically-advanced nations to harvest this mineral source without direct benefit to the majority of nations who remain nonetheless theoretically free

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1 They are: Convention on the Territorial Sea and the Contiguous Zone (1964) 516 UNTS 205, Convention on the Continental Shelf (1964) 499 UNTS 311, Convention on the High Seas (1963) 450 UNTS 82, and Convention on Fishing and Conservation of the Living Resources of the High Seas (1966) 559 UNTS 285.

to take part. As the gap between rich and poor nations widens and concern about shortages of mineral resources grows, the desire of the poor nations to be guaranteed some share in these limited resources increases.

The living resources of the sea were once thought to be unlimited. This is now seen to be untrue. Not only is there not ample for everyone, but the methods of exploitation employed in the unregulated freedom of the high seas endanger these resources. Increasing human populations in limited land areas are growing ever more dependent upon the sea for a reliable source of food. Lack of conservation is not the only danger. Pollution of the seas by unregulated dumping or spillage, particularly of oil and nuclear waste, threatens enjoyment and use of the sea.

These and other problems have led to two claims: greater control by the coastal state of the seas off her coasts and greater international regulation and sharing on the high seas. Not surprisingly, the driving force behind these claims is the poor nations. The freedom of the seas is open to the same criticism as laissez-faire economics. As a paper by the Congress of Micronesia pointed out, Japan and Micronesia are equally free to send fishing boats to fish off the coasts of the other.² Translated into economic reality, Japan is free to fish in Japan and Micronesia, whilst Micronesia's activities are confined to her own waters where she has to compete with Japan's sophisticated equipment. Most states, therefore, want a greater width of sea off their coasts over which they will have exclusive control. Beyond any area of national control, they want the freedom of all nations to tap the mineral wealth of the high seas to be transformed into some sort of distribution of the real derived benefits amongst all nations, including particularly those without the means to take advantage of this freedom.

The latter principle received its first quasi-legal recognition when in 1970 the United Nations General Assembly adopted a resolution declaring the resources of the seabed beyond national jurisdiction to be the "common heritage of mankind", to be exploited for the benefit of everyone,

2 Fifth Congress of Micronesia, Joint Committee on the Law of the Sea, *Law of the Sea: The Preliminary Micronesian Position*, Saipan, Mariana Is., 14 May 1973.

particularly the developing countries.³ In other words, the resources of the high seabed, instead of belonging to no one, were to belong to everyone.

To attempt to produce a new law of the sea which could reflect the new aspirations, the *Third United Nations Conference on the Law of Sea* was held in Caracas in June 1974. It was realized before the Conference that just as the importance of the sea had increased, so had the complexity and number of sea-law issues. It was therefore not altogether surprising that when the ten weeks of negotiations and deliberations in Caracas concluded, the goal of a comprehensive new convention was still a long way off. However, agreement was achieved on some matters and issues clarified on others. It was decided to reconvene the Conference at Geneva in March 1975. The Geneva session has just been concluded and has brought us only a little nearer to a convention. At the close of the session an *Informal Single Negotiating Text* was produced in the form of a draft convention.⁴ As this article goes to press, it is too early to assess clearly the full implications of the Geneva session or of the *Text* (as I shall term it). However, it is clear that the *Text* is a mere procedural device and represents an assessment of the trend of the negotiations.⁵

Papua New Guinea was not one of the 149 states separately represented at Caracas but she did have five representatives attend as part of the Australian delegation, as well as one unofficial observer. When the Conference reconvened to continue its work in Geneva in 1975, Papua New Guinea was allowed separate representation, although only as an observer. An independent Papua New Guinea will have to determine its own negotiating position and the question, if the need arises, of whether or not to become a signatory to a new convention.

3 A/Res 2749 (XXV). See Robin Churchill, *et al.*, *New Directions in the Law of the Sea*, Vol. III, (1973) 122.

4 See Conference Document No. A/Conf. 62/WP.8. (1975). Provisions proposed by the *Text* are referred to in subsequent footnotes where they are relevant.

5 The nature of the *Text* was made clear by the President of the Conference in his instruction to the Three Committees: "[T]he President stressed that the single text should take account of all the formal and informal discussions held so far, would be informal in character and would not prejudice the position of any delegation nor would it represent any negotiated text or accepted compromise. (Footnote 5 continues.)

The purpose of this article is therefore to analyse, from a Papua New Guinea perspective, the implications of the negotiating positions taken prior to and at the Caracas session of the Conference.

The Existing Law

It is not entirely clear what the role of the existing law is expected to be under the new Convention. The present system is perceived as inadequate in some respects and unjust in others. This implies not merely additions to but changes in the old law. It has been suggested that all the old concepts should be scrapped and the new law start from fresh first principles. But states will resist any attempt to deprive them of existing rights and it may be that many elements of the old law will survive. It may be useful briefly to summarize the existing law affecting Papua New Guinea.

Sovereignty over Papua New Guinea (presently held by Australia; soon to be transferred to PNG) extends to a 3-mile wide belt of *territorial sea* which surrounds every piece of land territory. Within the territorial sea, the state has exclusive rights to airspace, resources of the sea water, and resources of the seabed and sub-soil. The legislative authority of the state extends to this area as if it were land, except that foreign ships have a right of innocent passage through it and that criminal and civil jurisdiction over such ships is limited. These restrictions are contained in the 1958 *Geneva Convention on the Territorial Sea and Contiguous Zone*,⁶ but the 3-mile width is not mentioned in the Convention and is not uniform for all states. Claims vary between 3 and 200 miles. Three miles is recognized by all states as a legitimate claim; it is not now recognized by many as the maximum to which a state is entitled.

Some areas of the sea (primarily bays and inlets) lie to the landward of the territorial sea and are called *internal*

5 (cont.)

It should, therefore, be quite clear that the single negotiating text will serve as a procedural device and only provide a basis for negotiation." *Ibid.*, at 1.

6 *Supra*, footnote 1.

waters. They are treated like land; the jurisdiction of the territorial sovereign over them is absolute. No right of innocent passage exists through them.

Narrow passages connecting two parts of the high seas and used for international navigation are known as *international straits*. St George's Channel between New Britain and New Ireland is an example. The Convention provides that whilst the right of innocent passage in the territorial sea generally may be temporarily suspended without discrimination if necessary for state security, this right may not be suspended in parts of the territorial sea which lie in international straits.

Limited jurisdiction extends beyond the territorial sea of Papua New Guinea in several ways. First, the *1958 Convention on the Continental Shelf*⁷ grants to the coastal sovereign the exclusive right to explore and exploit the resources of the seabed and subsoil from the coast outward until the water reaches a depth of 200 metres or, beyond that, to the extent that the resources are exploitable. However, regardless of exploitability, the state's sovereign rights over resources cannot extend beyond the end of the shelf as a geological prolongation of the land mass.⁸ Jurisdiction over the continental shelf does not imply any control over the water itself or air above it.

The Territorial Sea Convention⁹ also provides that a state may establish a *contiguous zone* up to twelve miles from the base-line from which the territorial sea is measured, so that in PNG's case the zone is nine miles wide. This zone is in no way an extension of sovereignty and only allows the state to take measures within that zone to prevent or punish infractions, taking place within the territorial sea, of the state's sanitary, immigration, fiscal, or customs regulations.

Although the extension of state control over fishing beyond the territorial sea is not governed by convention, a customary rule of international law has developed permitting a state to declare an exclusive fishing zone of up to twelve miles from the baseline. Australia has done this with respect to

7 *Supra*, footnote 1.

8 See the *Continental Shelf Cases* (1969) 8 ILM 340.

9 *Supra*, footnote 1.

Papua New Guinea,¹⁰ and in 1974 PNG assumed control of this zone as distinct from that of Australia,¹¹

The waters beyond the territorial sea of any state are the *high seas*. The *1958 Convention on the High Seas* codified customary law when it provided that the use and resources of the high seas are not subjectable to the sovereignty of any state. Fishing, navigation, flying, and laying cables and pipes are all expressly free and open to all nations. By implication, exploitation of the seabed resources is similarly unrestricted. Areas of the high seas which are within a contiguous zone, fishing zone, or continental shelf do not cease to be high seas, but freedom is limited to the extent of the control or specific exclusive rights vested in the coastal state. In every other respect they remain high seas. for example, PNG is able to arrest Taiwanese fishing boats for fishing 10 miles off the coast, but she could not claim an infringement of her airspace if a Taiwanese plane flew over the same spot.

The territorial sea, the contiguous zone, and the fishing zone are all measured from a single *base-line*. The *Territorial Sea Convention* provides that for most purposes the base-line is the low-water mark, so that it follows all the "sinuosities of the coast".¹³ That includes the coasts of islands, each island having its own zones, including, as applicable, its own continental shelf.¹⁴

A state may draw a straight base-line across the mouth of a bay as long as the mouth is less than 24 miles wide and the area of the bay is at least as great as that of a semi-circle the diameter of which is the straight base-line. The bay then becomes internal waters and the territorial sea, etc., are extended to seaward correspondingly. The Convention also provides that where a coastline is deeply indented or fringed by islands a system of straight base-lines joining outer features along the coast may be used. In the limited circumstances

10 *Fisheries Act 1952-67 (Com.)*.

11 *Fisheries Act 1974*.

12 *Supra*, footnote 1.

13 See the *Fisheries Case* (1951) ICJ Rep 116.

14 *Convention on the Continental Shelf 1958*, Art. 1.

where this method is applicable, such as Norway, British Columbia, or south-western New Zealand, the defined restrictions on bays are not applicable.¹⁵

The New Ideas

Four main proposals formed the foundation of the Caracas Conference:

1. Standardization of the territorial sea at 12 miles.
2. Establishment of a 200-mile exclusive economic zone adjacent to the coast of each state.
3. Organization of an Authority responsible for the exploitation of the resources in the international seabed area.
4. Formulation of rules for the protection of the marine environment; i.e., prevention of pollution and conservation of the sea's living resources.

Fundamental agreement on these four objectives concealed many differences of opinion as to how they should be achieved. The recurring reason for these differences was the issue of freedom versus regulation, which in most cases corresponded to the division between developed countries and developing ones, the latter outnumbering the former by about 2 to 1. Before the conference began it was realized that many of the issues to be discussed were interdependent. To take an obvious example, the breadth of the economic zone affected the size of the international seabed area, so the two issues had to be considered together. What was not accurately foreseen was that agreement on new sea law rules would depend not simply on trading concessions on each issue but in defining priorities. For example, it had been assumed that the new territorial sea and economic zone were to be taken for granted as concepts, and concessions would start from that point. But the coastal states failed to realize that for the landlocked states the issues of primary importance were access to the sea and participation in resources. They were willing

15 *Convention on the Territorial Sea* 1958, Art. 4.

to accept the territorial sea and economic zone but only if their principles were recognized first. The consensus on main issues, in other words, showed that most states were prepared to agree to common concepts; what it did not show was the price each would demand for its agreement.

Extension of the Territorial Sea

Rich countries with large merchant and naval fleets have long favoured a narrow territorial sea which gives their ships maximum freedom of movement. Weak countries feel insecure and at the mercy of rich maritime countries and prefer a wider territorial sea to protect them. It is somewhat surprising that countries with large vested interests in a narrow sea such as the United States and the United Kingdom should have come to Caracas prepared to accept a 12-mile territorial sea, but the fact is that almost without exception rich and poor alike were prepared to accept this new uniform width.¹⁶

International Straits

The rich countries, however, made it plain that their acceptance was conditional upon the Convention including guarantees of free navigation through the 120 straits used for international navigation which would cease to be part of the high seas under a 12-mile territorial sea.

Article 14 of the 1958 Territorial Sea Convention provides a right of *innocent* passage in the territorial sea generally but it is imprecisely defined and its application to warships is not clear.¹⁷ The shipping states want a clear guarantee of *free* passage for all ships in international straits defined

16 Nigeria wanted 30 miles. Latin American claims may amount to demands for a 200-mile territorial sea. See the discussion, *infra*, on the status of the economic zone. The *Text* provides for a territorial sea of a maximum width of 12 miles. Part II, Art. 2. The baseline remains the low-water mark (except where straight baselines may be drawn), but the *Text* provides an innovation: "In the case of islands situated on atolls or of islands having fringing reefs, the baseline ... shall be the seaward edge of the reef...." Part II, Arts. 4 and 5.

17 But the International Court of Justice applied the right to warships in international straits in the *Corfu Channel Case* (1949) ICJ Rep 4. The *Text* extends it to warships. Part (Footnote 17 continues)

in such a way that prohibited activities during passage are specified.¹⁸ They fear the discretionary power of the coastal state to interfere with passage which it deems not innocent

17 (cont.)

II Art. 29(2), p. 13. Innocent passage is also defined more precisely. The framework of the 1958 Convention is used, the *Text* providing that passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal state. But then it is provided in Part II, Art. 16(2) that passage of a foreign ship shall be considered to be prejudicial to the peace, good order, or security of the coastal state, if in the territorial sea it engages in any of these activities:

- (a) any threat or use of force against the territorial integrity or political independence of the coastal state or in any other manner in violation of the Charter of the United Nations.
- (b) any exercise with weapons.
- (c) espionage.
- (d) propaganda.
- (e) launching, etc., of aircraft.
- (f) launching, etc., of any military device.
- (g) embarking or disembarking anything contrary to the customs, fiscal, or sanitary regulations of the coastal state.
- (h) wilful pollution.
- (i) research or survey activities.
- (j) attempted interference with coastal state communication systems, or other facilities or installations.
- (k) any other activity not having a direct bearing on passage.

The powers of a coastal state to legislate with respect to innocent passage through the territorial sea include the prevention of pollution, but "such laws and regulations shall not apply to or affect the design, construction, manning, or equipment of foreign ships or matters regulated by generally accepted international rules...." Part II, Art. 18.

18 See Churchill, *op. cit.*, at 145.

as being in some way "prejudicial to the peace, good order or security of the coastal State".¹⁹ They would of course require a guarantee like that of the existing Article 16(4) that this right of free passage could not in any circumstances be suspended.²⁰ The three main areas of concern in straits are first, the safety and security of navigation; second, control of pollution; and third, the security of the coastal state. The shipping states are primarily interested in the first; the coastal states in the second and third. A certain amount of regulation by the coastal state appears to be acceptable, particularly the provision of traffic separation schemes. Two points of disagreement appeared at the Conference. The coastal states want the right to prescribe pollution standards, but because such a right is subject to discriminatory abuse by, for instance, continually varying ship construction requirements, the shipping states want these standards to be internationally prescribed. They are not even keen to trust enforcement to the coastal state, preferring that the flag state fulfil this function.²¹ Again, they are afraid of wasteful interference with the flow of shipping.

In my opinion, however, the only serious stumbling block to agreement on the international straits issue is the question of warships. Third world countries are almost uniformly opposed to guaranteeing warships a *right* of free passage, and

19 *Convention on the Territorial Sea* 1958, Art. 14(4).

20 The *Text* provides for a right of *transit passage* through all international straits. Part II, Art. 38. This cannot be suspended. Art. 43. Ships must proceed expeditiously and without interference with the coastal state, which has limited powers of legislation over ships in transit, including designation of sealanes and traffic separation schemes. Arts. 39-41.

21 However, the *Text* provides a regulated right of enforcement, including arrest and fine, by the coastal state. Part III, Art. 25. The coastal state can legislate for the prevention of pollution, "giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait". Part II, Art. 41(1)(b). "Such laws and regulations shall not discriminate in form or fact among foreign ships, nor in their application have the practical effect of denying, hampering or impairing the right of transit passage" Art. 41(2).

would require prior authorization by the coastal state. How, they ask, can an extended territorial sea increase our security if the navies of the super-powers may still pass through parts of it at will? There is also general resentment against what is seen as the threat to world peace represented by these great fleets. Perhaps the deadlock can be resolved by a compromise formula requiring notification instead of authorization.²² Although the closing of straits would also affect aerial navigation, there seemed to be no great interest in providing for it in a sea law convention. It would, however, be awkward if the territorial sea were extended without at the same time making provision for transit of aeroplanes.²³

Contiguous Zone

Some states assume that with an extension of the territorial sea, the old contiguous zone would be absorbed and the concept could disappear. Others argue convincingly, albeit to the despair of those worried by "creeping jurisdiction", that since the zone was developed to help a state police its territorial sea and land territory, there is no reason why the same protective belt should not surround the new 12-mile sea.²⁴

Archipelagos

Both the extended territorial sea and the new economic zone will be measured from the old base-line. However, it is likely that another category of straight baselines will be added --- that of archipelagos. There is general agreement that archipelagic states be allowed to draw straight baselines around their perimeters. But the definition of "archipelagic state" has created problems. India and Greece, for example, favour including mainland states with adjacent archipelagos in the definition. Many states object to such a wide opportunity for extension of territory, so the Philippines, an obvious archipelago by any definition and one of the chief proponents of

22 The right of transit passage is expressed in the *Text* to extend to *all* ships, but warships are not expressly included, whereas the right of innocent passage is expressly extended to them. See Part II, Art. 38.

23 The *Text* extends the right of transit passage through straits to aircraft. Part II, Art. 38.

24 The *Text* provides for a contiguous zone of 24 miles from the baseline. Part II, Art. 33.

the theory, would limit the definition to states composed of a group of islands forming an intrinsic geographical, political, and economic unit, historically regarded as such. The United Kingdom has offered a formula which would define archipelagos mathematically, the two requirements being a maximum base-line of 48 miles and ratio of sea to land not exceeding 5:1.²⁵

The next problem is the status of the considerable areas of water which could be enclosed. If traditional concepts are used, they should be internal waters with not even a right of innocent passage. But, as with the 12-mile territorial sea, the support of shipping states for the archipelagic idea is conditional upon reasonable guarantees for international navigation. It would be inconvenient if the entire sea areas of the Phillipines and Indonesia were closed to international navigation. The United Kingdom proposes that "archipelagic waters" form a category distinct from territorial sea or internal waters. She wants a right of innocent passage in archipelagic waters generally, and a right of free passage in designated international transit routes through archipelagic waters for ships and aircraft. The Philippines is against a right of passage of any sort for ships in archipelagic waters, except for innocent passage through proclaimed international sea routes. She appears adamantly opposed to any right of

25 J.R. Stevenson and B.H. Oxman, "The Preparations for the Law of the Sea Conference" (1974) 68 AJIL 1 at 13. See also Stevenson and Oxman, "The Third UN Conference on the Law of Sea: the 1974 Caracas Session" (1975) 69 AJIL 1. The *Text* provides for archipelagos. It defines an archipelago as "a group of islands, *including parts of islands*, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographic, economic, and political entity *or* which historically have been regarded as such". (My emphasis). Part II, Art. 117(2)(b). However, the *Text* rejects the Indian-Greek definition of an archipelagic state and provides instead: "'archipelagic state' means a state constituted wholly by one or more archipelagos and may include other islands". [sic] Art. 117(2)(a). Straight baselines can only be drawn *around an archipelago* and must enclose the main islands. The ratio of sea to land enclosed must be between 1:1 and 9:1 and baselines cannot exceed 80 miles, except that an as-yet unspecified percentage of them may be up to 125 miles long. Art. 118(1).

flight over land or water under Philippine sovereignty.²⁶

The attitude Papua New Guinea should adopt on the archipelago issue is not clear. As most of the country is half of one very large island, would the appended Bismarck and Solomon archipelagos be sufficient to qualify it as an archipelagic state under the Philippines definition, or would it only qualify if the Indian/Greek idea were adopted? Since the Bismarck Archipelago is geographically distinct from the Solomon Islands, the northern two of which -- Bougainville and Buka -- are in PNG, and since Papua and New Guinea has even to the present day been to varying degrees politically distinct, is the country likely to be accepted as "a group of islands forming an intrinsic geographical, political, and economic unit, historically regarded as such"? The trouble is that if PNG supports the claim of continental states to enclose coastal archipelagos and so enclose her own islands, it is conceivable that Australia could enclose the Torres Strait Islands, although she has denied any intention to make archipelagic claims. However, such a legal right could weaken PNG's bargaining position in her attempt to obtain rights over the seabed in part of the Torres Strait. From an economic, as opposed to a security, point of view, PNG would be very nearly as well off with a 200-mile economic zone around each island, although the Torres Strait problem would remain.²⁷

26 The *Text* provides that ships of all states shall have the right of *innocent* passage in archipelagic waters, but that any archipelagic state *may* designate sealanes and air routes suitable for the safe, etc., passage of foreign ships and aircraft through its archipelagic waters. If such sealanes and air routes are designated then ships and aircraft shall have what amounts to a right of *transit* passage through them. It would seem that what is meant is that an archipelagic state *must* designate such routes; otherwise the assurance of a right of uninterrupted passage for ships and any right of passage at all for aircraft would depend upon the whim of the archipelagic state. Part II, Arts. 123 and 124.

27 The Bismarck and Solomon Seas would be completely covered by such economic zones. But the status of islands is unclear. See a discussion of this subject under "Delimitation", *infra*.

The Economic Zone

While the extended territorial sea is simply an alteration of an old idea, the economic zone is a new concept. It was first proposed by Malta to the United Nations. It was evident at the Caracas Conference that acceptance of the new idea has spread to almost all countries, even those of North America and Western Europe. Roughly, the economic zone is a belt of exclusive jurisdiction over resources of the seabed and water surrounding a state. Various widths have been proposed, but consensus appears to be emerging on a width of 200 sea miles.²⁸

Status

Most states see this zone as one of limited jurisdiction, rather than of sovereignty. However, Latin America represents a vocal and intransigent minority. Many states of that region have long claimed territorial seas of 200 miles. In their view the economic zone or patrimonial sea, as they prefer to call it, will be or indeed already is a zone of absolute territorial sovereignty, limited only to the extent that the state agrees. In the view of the majority, which includes most of Africa, the zone would remain high seas for all purposes except exploitation and conservation of its resources. In the Latin American view any right of navigation would be conferred by the coastal state. The divergence in view sounds wide in theory but in practice most exponents of the sovereignty idea, like El Salvador, Uruguay, and Ecuador, are willing to grant free passage in the outer 188 miles of the zone and innocent passage in the inner twelve.

Given these concessions, is the dispute purely one of semantics? It looks as though the practical result would be the same, whatever the theoretical characterization. And yet this point has produced the most heat and has most potential for preventing agreement on the economic zone idea. This is because of different attitudes to the residuum of power. States which already claim a 200-mile territorial sea are not willing to part with the *sovereignty* they think they have established, although they may be willing to relinquish control over specified matters. Other states distrust this

28 The *Text* provides for an Exclusive Economic Zone of 200 miles from the territorial sea baseline, Part II, Arts. 45 and 46.

"auto-limitation" of sovereign power. Even if the coastal state grants a right of free passage, what is to stop it conducting activities which could reduce the value of this right? The conduct of military exercises, the regulation of navigation, or the imposition of pollution restrictions would be within the jurisdiction of the territorial sovereign but could substantially interfere with free navigation.²⁹ These fears are all the more understandable if "free passage" is to exclude warships, as has been suggested for international straits.³⁰ Madagascar proposed a compromise concept, that of a "national maritime zone". This would be a single 200-mile belt with different state competencies defined in different parts of it. It is difficult to see how this is more than a verbal solution; the problem of residual powers remains.

Continental Shelf

What is the role of the "continental shelf" idea under the new proposals? This question created a rift, although not as serious a one as might have been expected. Part of the objective of the new law is to ensure more opportunity for international sharing in world sea resources, particularly by developing countries.³¹ The larger the areas of national jurisdiction, the smaller the international area where this sharing can take place. At the beginning of 1973, no oil had been discovered more than 200 miles to seaward of the

29 See L.D.M. Nelson, "The Patrimonial Sea" (1973) 22 ICLQ 668 at 679.

30 The *Text* does not grant the coastal state sovereignty over the Exclusive Economic Zone, but rather "sovereign rights for the purpose of exploring and exploiting" Part II, Art. 45(1)(a), p.19. However, it should be borne in mind that the 1958 Continental Shelf Convention used the same phrase, which has been turned by some states to mean "sovereignty". As to navigation, the *Text* provides for all states the freedoms of navigation and overflight in the economic zone. Art. 47(1), p.19.

31 UN Declaration of 1970, *supra*, footnote 3.

coast.³² Although the amount estimated to exist in that area is a small proportion of world undersea oil reserves, all but an insignificant part of that proportion is thought to be on the continental margin.³³ In other words, the only hope for oil in the international area is if some of the continental margin is in that area. Those states like Australia and Canada with continental shelves extending beyond 200 miles want to keep shelf rights and at the same time claim an economic zone of 200 miles. The Latin American States support this view; the African ones are against it. The chief argument of those in favour is that they already have sovereignty over the shelf and that cannot be taken away. That is questionable reasoning. First, the 1958 *Convention on the Continental Shelf* talks not about sovereignty but about "sovereign rights for the purpose of exploring it and exploiting its natural resources".³⁴ Second, those rights were created by the Convention, except to the extent that it codified post-war customary law; they are in any case of comparatively recent origin. Third, the object of the Conference is to produce new rights and duties which necessarily means reducing other rights. Creation of an exclusive right in Australia to the resources within 200 miles of her coast will mean the loss of a right, currently held by all other states, to exploit that area. But whatever its logical deficiencies, there is political force behind the argument and it is difficult to see the affected states agreeing to a Convention which deprives them of what they have come to regard as part of their sovereign territory. Perhaps it is for this reason that the majority of states, which do not have shelf beyond 200 miles, have been surprisingly restrained in their statements on this issue.

Combined with the retention arguments of states like Australia is a proposal that the continental shelf be redefined.

32 Report of the Secretary-General to the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the limits of National Jurisdiction, *"Economic Significance, in Terms of Sea-Bed Mineral Resources, of the Various Limits Proposed for National Jurisdiction"* (1973) A/AC. 138/87 at 15.

33 The shelf, slope, and rise are together known as the continental margin and represent the whole of the underwater extension of the continent before it gives way to the deep ocean floor.

34 Article 2.

The old definition was an extension of the continent to a depth of 200 metres or beyond that to the limit of exploitability. Everyone seems agreed that the exploitability criterion is no longer workable, but there are two possible new criteria put forward. One is that the edge of the shelf under national jurisdiction be defined as a fixed depth, for instance 200 metres. The other is that national jurisdiction extend to the outer edge of the underwater continent, which would mean that the whole of the continental margin would be subtracted from the international area. That area would only begin where continental rock (a recognizable formation) gives way to the different material of the abyssal plain. Australia favours the latter definition, so that not only would her existing rights to the shelf be retained, but the definition of the shelf, and consequently the quantity of the state's rights, are to be greatly extended. This result is inconsistent with the spirit of the UN Declaration and particularly harsh on the land-locked countries, but seems likely to occur.³⁵

Fishing

The resource most affected by introduction of the economic zone will be fish. At present Papua New Guinea, like most countries, relies upon a rule of customary international law and enforces her claim to a 12-mile-wide exclusive fishing zone.³⁶ This zone would be swallowed by the economic zone. Extension of exclusive coastal fishing rights to 200 miles has caused concern because whilst the sophisticated fishing fleets of countries like Japan and Russia can on the one hand be regarded as exploiters, on the other hand they do produce large amounts of vital protein which finds its way to world markets and contributes to feeding world populations. The worry is that if these sophisticated fleets are excluded from a very large proportion of their current operating grounds,

35 The *Text* provides for a retention of the continental shelf concept as distinct from the economic zone. The Shelf is redefined to mean the seabed and subsoil to 200 miles or to the outer edge of the continental margin, whichever is greater. Part II, Art. 62. The only concession to the International Area is that the coastal state is required to pay an as-yet unspecified proportion of the proceeds of the exploitation of non-living resources on the shelf beyond 200 miles to the Authority. Art. 69.

36 *Fisheries Act 1974*, s.2.

the coastal states will in many cases be incapable of harvesting comparable quantities, so the supply of fish will decrease in a world of ever-increasing demand for food. There are thus two schools of thought. The first, led by the distant-water fishing nations, would require the coastal state to license other states to fish the surplus, up to the optimum sustainable yield, which the coastal state cannot take itself. The second, adhered to by most developing countries jealous of limitation of sovereign rights, argues that there is no need for such a restriction. It will be in the self-interest of every state, they say, to make money out of this surplus by selling licences to other states capable of exploiting it.

Although it seems increasingly unlikely that any provision on the surplus will be included in the convention, there appears to be more support for the idea that a state has a duty to allow neighbouring developing countries to fish in its economic zone, particularly if the neighbours are landlocked. This could place some duty on Papua New Guinea to co-operate with Indonesia and the British Solomons, but presumably only if they are comparatively disadvantaged. But it would mean that PNG could obtain fishing rights in the zone of richer neighbours like Australia.³⁷

Pollution

The international legal control of maritime pollution is one of the objectives of the Conference. A thorny problem is the force of international pollution rules within the territorial sea and economic zone. This problem has two aspects. First, to what extent is the state bound to obey rules preventing pollution within those zones? Second, to what extent do those rules limit the stringency of the state's own anti-pollution legislation?

On the first question, developing states say it is unfair that their industries should have to obey the same standards as those imposed upon the developed countries, because the cost of obedience would be so high as to make the development of competitive industry even more difficult than it is at

37 The *Text* provides that a state must not over-exploit the living resources in its Economic Zone and that it must allow other states to fish the surplus up to optimum yield. Part II, Arts. 50(2) and 51(2). Art. 58 provides for a limited right of preference for developing countries, but only if they have no economic zone or are particularly dependent upon the economic zones of their neighbours in a region.

present. The rich countries with their money, expertise, and head start, can afford to adhere to rigid anti-pollution standards but the poor nations cannot. Developed countries counter with the argument that pollution knows no boundaries in the sea. Waste pouring from the Jaba River on Bougainville may affect beaches in the Solomons or fishermen in Queensland.

On the second question, it is argued that international standards may in some cases not be high enough. Canada insists upon a right to protect the very sensitive ecology of the Arctic by even higher standards.³⁸ The shipping states fear that freedom to impose higher standards could interfere with navigation. Ships could find it impossible to conform to a variety of construction requirements as they pass from one state to another.

Functional distinctions have been suggested as compromises for both these problems. To accommodate the developing countries, international standards would apply to sea-based but not to land-based pollution. So states everywhere would have to adhere to rules preventing discharges from ships, but would not be bound to the same extent to prevent effluent from factories ashore entering the sea. Under that distinction, international law would regulate a PNG ship pumping her bilges wherever she was but it would not regulate the marine effects of the Bougainville operation. Possibly developing countries would accept, not total exemption from international regulation of land-based pollution, but a more relaxed standard. Perhaps eventually a sliding scale of compliance could be developed, strictness increasing with gross national product per capita.

As stated above, shipping states are afraid of unlimited freedom of coastal states to impose pollution standards in the economic zone and territorial sea. The functional distinction suggested here is between discharges, dumping, and traffic separation on the one hand, which the state could regulate by its own standards, and ship design, construction, and manning, on the other hand, which would only be subject to a uniform

38 Indeed she has anticipated the Convention by proclaiming an Arctic waters anti-pollution zone of 100 miles, authorized by the *Arctic Waters Pollution Prevention Act* 1970. See Churchill, *op. cit.*, at 249.

international code of regulations. This distinction, supported by Norway and Canada, would not impose intolerable conditions upon shipowners but would allow the coastal state a certain freedom to impose pollution controls appropriate to the peculiarities of its marine environment.³⁹

The powers of the coastal state to control pollution may not be as extensive in the economic zone as they are in the territorial sea. In the limited jurisdiction of the zone, both national and international rights exist. It is reasonable to give the state some power to protect the resources over which it has exclusive control, but this must be balanced against the rights of the international community to free passage. Inside the 12-mile limit, where the state has sovereignty, and ships are limited to innocent passage, state control can be expected to be greater.⁴⁰

Another problem of pollution control in areas of national jurisdiction is enforcement. The developing countries, jealous of their sovereignty, favour enforcement by the coastal state. Shipping countries like Japan fear needless delays and interference with the flow of shipping and would have both the duty and the right to enforce pollution laws placed by the convention upon the flag state.

Delimitation

How is the boundary to be defined between Papua New Guinea's continental shelf, economic zone and territorial sea and those of her three neighbours, Australia, Indonesia, and the British Solomons? The 1958 Conventions provide for agreement between states on this question and, in the absence of agreement, drawing of the boundary at points of equidistance. In spite of the increased emphasis given by the International Court to the duty to negotiate and agree according to "equitable

39 This distinction is adopted by the *Text* expressly with respect to the territorial sea and by implication with respect to international straits. See Part II, Arts. 18 and 41(2). The *Text* is vague as to the content of international rules on pollution, requiring states to enter into agreements to establish them in consultation with the "appropriate" international organizations but not apparently vesting authority for rule-making in any particular organization. See Part III, Chapters one and two.

40 The *Text* provides that the coastal state shall have the right of enforcement against "vessels and aircraft engaged in dumping within the economic zone and continental shelf...." Part III, Art. 25(c).

principles",⁴¹ proposals in Caracas indicate that the principle of equidistance retains great appeal as a sure and simple method failing agreement.⁴² A theoretical problem could arise if the continental shelf survives as a concept distinct from the economic zone. Imagine two states 360 miles apart. There is a continental shelf between them but it is broken by a long deep, narrow trench parallel to the coasts.⁴³ The trench is 100 miles from state A and 260 miles from state B. It is not the *same* continental shelf which is adjacent to the coasts of both states, so the boundary would be at the trench, not at the line of equidistance.⁴⁴ However, in delimiting the economic zone, the trench would be disregarded and the dividing line would be that of equidistance. It would thus be 180 miles from each coast. A's economic zone would encroach by 80 miles onto B's continental shelf and her "existing rights" there. Which concept is to take precedence? The logical, if surprising, answer is that in that 80-mile zone B would have the exclusive right to the resources of seabed and subsoil, while A would have the exclusive right to the resources of the water.

Islands

What importance is to be given to islands in delimiting Papua New Guinea's economic zone? The 1958 *Continental Shelf*

41 *The Continental Shelf Cases, supra*, footnote 8.

42 The median-line principle survives in the *Text*. In the case of the territorial sea, no state, failing agreement, is entitled to extend its territorial sea beyond the median line, *unless* historic title or other special circumstances make it necessary to delimit the territorial sea in some other way. Part II, Art. 13(1), p. 7. In the case of the economic zone, the *Text* provides that delimitation shall be by agreement, in the absence of which States shall resort to measures provided by the Convention for the settlement of disputes, but that *pending agreement* no state shall be entitled to extend its economic zone beyond the median line. Part II, Art. 61, p.25. The same temporary role for the principle of equidistance is provided for the continental shelf by Part II, Art. 70, p.28, although, presumably through a typing error, this Article refers in places to the economic zone in place of the continental shelf.

43 The shelf under the Timor Sea between Australia and Timor is broken in this way.

44 Continental Shelf Convention, Art. 6.

*Convention*⁴⁵ provides that each island of a state's territory is capable of having its own shelf. One of the reasons why Argentina persists in her claim to the Falkland Islands is that they lie on her continental shelf. If they are British, half the shelf between them and the mainland would be British as well. Many states are critical of this equal status for islands. Why, they ask, should a tiny island on a common continental shelf carry an enormous extra chunk of shelf to its owner? Similar reservations are felt about allowing islands to generate their own economic zones. A rock in mid-ocean could be entitled to a circle of economic zone 400 miles in diameter. But island states say it is precisely because they are poor in land resources that they should be entitled to a large share of the sea. Papua New Guinea is in a bit of a dilemma. She would like to support full status for islands in determining the economic zone as far as her own islands are concerned, but in the Torres Strait application of that principle would result in the entire strait being in Australia's economic zone, since the islands are under Australian sovereignty to within a few hundred yards of the Papuan coast. Fiji and Greece favour the full-status theory, Fiji as a mid-ocean island state and Greece because her islands close to the Turkish coast would give her a large slice of the economic zone which otherwise would belong to Turkey. Rumania and New Zealand have proposed a compromise which would suit PNG well. They say islands should have full capacity to generate an economic zone except when a problem of delimitation between neighbours arises. Then they should not be counted. A variation on this idea is that some sort of weighting should be applied to islands in delimitation. Size, population, and nature and extent of economic activity could entitle an island to greater consideration. Ireland proposed a mechanical formula: an island should only be considered in delimitation if it is inhabited and less than the breadth of the territorial sea from the coast *or* if it contains more than one tenth of the land area and population of the state.⁴⁶

45 Art. 1.

46 The *Text* provides that islands shall be treated like continental land except that "rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf". Part II, Art. 132, p.47.

The International Area

The Authority

The United Nations resolution on the high seabed establishes the principle of the common international ownership of the Area's resources.⁴⁷ It is accepted that the present Conference must work out the machinery for exploitation of those resources. It is also agreed that a body (commonly called "The Authority") should be established with responsibility for the resources of the Area. But deep differences have emerged as to just what functions this Authority should exercise. Again, the division roughly corresponds to that between developing and developed countries. The former want the Authority to be an operating exploiter of the resources, whilst the latter, typified by the USA and Japan, envisage it as a purely regulatory body which would license states to carry out actual exploitation.

The argument of the developing nations is this: if the Authority is required to license, only the few rich nations with the necessary technology will in fact take part. If Bolivia, for example, is entitled to a licence over part of the seabed, she will have no choice but to contract the actual work out to one of the handful of firms capable of doing it. If the Authority is an operator, it is true that initially it too will have to rely heavily on contracts with those firms, but if control of the operation remains in its hands, it will be able to insist upon transfers of technology from the firms to itself as part of the contract, so eventually it will be equipped to take over actual mining itself. Since the Authority will have a widely international composition, the developing nations will gain not merely financial benefits, but expertise and experience as well.

Many rich nations, apart from being self-interested because they have the technology, prefer a licensing system because they are afraid the Authority, being an international governmental organization, will be too cumbersome an instrument for efficient exploitation of seabed resources. They are afraid that the result will be that no state has the right to exploit and the Authority is incapable. The vital resources will not reach world markets and no one will benefit.

47 *Supra*, footnote 2.

In fact there is more than one alternative to a pure licensing system.⁴⁸ Under such a system only states would have the right to exploit. Under the first alternative, states would have the right to exploit, but the Authority would be able to operate alongside them. This proposal draws the criticism from Peru that the Authority would never in its initial phases be able to survive competition of this sort. The second idea is that the Authority would be the sole operator, but any service contracts must be made with states. This is seen by critics as an attempt to fetter the Authority's autonomy with the weighty powerful governments could bring to bear. The most popular idea, in terms of numbers of states supporting it, is the third alternative. Under it the Authority would have the sole and unfettered right to exploit, and could contract as it saw fit with states, individuals, and companies. Because it would not confer the property rights implicit in licences, it would keep control of disposal of products and rate and method of exploitation.

In spite of their numerical strength, however, the developing states may have to compromise. They are faced with the unpleasant truth that there is little incentive for the rich nations to give up their present de facto monopoly on deep seabed resources. If the poor nations drive too hard a bargain, the rich nations always have the sanction available of refusing to accede to the Convention. The poor nations desperately want them to accede. Since under the present law the poor are entitled to nothing, they may agree to less than ideal terms rather than see the talks collapse.⁴⁹

Effects of Seabed Production

Another problem is the effect which production of seabed minerals may have on competitive land-based minerals. In many cases developing countries are heavily dependent upon exports of the minerals which will be produced from manganese nodules. Papua New Guinea is, of course, a case in point.

48 Stevenson and Oxman, *op. cit.* at 6.

49 The *Text* opts for a powerful authority, in other words the third alternative above. Part I, Article 22, says "Activities in the Area shall be conducted directly by the Authority", but goes on to provide that the Authority may, if it considers it appropriate, carry out activities through "States Parties to this Convention, or State enterprises, or persons natural or juridical which possess the nationality of such States or are effectively controlled by them or their (Footnote 49 continues)

Copper sales are the mainstay of her new economy. If nodule production floods the world copper market and reduces prices, PNG will suffer more in lost earnings than she will gain by sharing in the revenues of the international area. Again, the main beneficiaries would be the rich nations, the major consumers of copper. The United Nations estimates that copper production from nodules will not have a large effect by 1985. Expected production then is 200,000 tons, 6% of required net imports of developed countries.⁵⁰ However, UNCTAD reported in Caracas that in the longer term seabed production is expected to cause a less rapid growth in the price of cobalt, nickel, and manganese and possibly even a decline in price for copper.⁵¹

It is very difficult at this early stage for the effects of seabed production to be gauged with any accuracy, but there is general agreement that the possibility of reduction of land-based production revenues exists. That being so, some formula should be provided to counteract it. Two possible approaches are envisaged. One is compensation: revenue of the Authority would be used for lump-sum transfers to the developing countries affected. The other is prevention, which could take three forms. First, the Authority could be required to *fix its prices* so that revenue to developing producers would be stabilized, although of course it could not be expected to put the land producers in the same position as if there were no seabed production. Second, it could *control its output* to achieve the same effect. Third, *commodity agreements* for the affected minerals could be incorporated in the Convention to provide machinery for fixing quotas of world producers, including the Authority. Zaire purported to speak for the developing countries of Africa when she said she would prefer prevention to compensation. For one thing, it is not certain that the profits of the Authority would be sufficient to compensate all affected producers. Another reason is that the side benefits of general economic development which accompany a healthy mineral export industry would be lost if

49 (cont.)

nationals" by entering into any type of association with them which assures direct and effective control by the Authority.

50 Report by the representative of the Secretary-General of the United Nations to the Caracas Session (1974).

51 The initials UNCTAD stand for United Nations Conference on Trade and Development.

the country were put on a sort of dole.⁵²

The UN resolution speaks only of common ownership of the resources of the seabed beyond the limits of national jurisdiction. It says nothing about the ownership of the resources of the water. However, it has become increasingly evident that protection of the living resources within a state's economic zone cannot be accomplished without some regulation of pollution and conservation on the high seas. It seems to be accepted that the Authority should be the body responsible for this regulation. Is it only a short step from there to extending the principle of common ownership to the living resources of the high seas as well? This was suggested by Bangladesh. There is perhaps no logical reason why the principle of "res communis" should not replace "res nullius" in the water as well as on the seabed. However, a practical difference is that the freedom to exploit the high seabed has only just begun to be used, while states have for centuries fished on the high seas. Given the proposed encroachments on the high seas by extensions of national jurisdiction, they may be unwilling to surrender this last freedom.⁵³

52 The *Text* requires that the Authority carry out its exploitation of the mineral resources of the Area to "avoid or minimize any adverse effects on the revenues and economies of the developing countries" which produce the same minerals. Part I, Art. 9(1)(b), p.4. This suggests prevention rather than compensation. The measures are to be left to the Economic Planning Commission, an organ of the Council of the Authority. Part I, Art. 30, p.16.

53 The *Text* confines the meaning of the Area to the seabed only and provides that the status of water and air is unaffected. The definition of resources of the Area does not include fish, even those which live on the bottom. Part I, Arts. 1, 2, and 15.