The 1973 Law of the Sea Conference: Significant Issues

The series of resolutions on the law of the sea passed by the General Assembly of the United Nations in 1970[1], especially its decision to convene a conference in 1973, is likely to have a profound influence on the future development of this area of international law. Among the tasks of the Conference will be "the establishment of an equitable regime—including an international machinery—for the area and the resources of the sea-bed and the ocean floor and the subsoil thereof beyond the limits of national jurisdiction, and a precise definition of the area."[2] Other related questions are also to be discussed, among them being the regime of the high seas, the continental shelf, the territorial sea, the contiguous zone and fishing.[3] There is, however, one qualification: the date of the conference may be reviewed at the 1971 and 1972 sessions of the Assembly, and if progress in the preparatory work for the Conference is insufficient, it may be postponed.[4] The Assembly also resolved that the existing Committee on the Peaceful Uses of the Sea-Bed be enlarged from 42 to 86 members and should have the task of preparing the draft treaty articles on the subjects mentioned above.[5]

The deliberations of the United Nations Sea-bed Committee and of other bodies which during the last four years have stressed the need for the establishment of an international regime to govern the resources of the sea-bed outside national jurisdiction, have provided the main impetus for the convening of the Conference. In 1967, Ambassador Pardo of Malta proposed to the United Nations his "heritage of mankind" doctrine which led to the setting up of the initial United Nations committee to study the question.[6] More recently, the United States has, in a draft treaty presented to the Sea-bed Committee,[7] come down in favour of a liberal application of the doctrine—which carries with it a commitment to the needs of developing countries—but with a concession to the coastal states' interests in the form of an intermediate trusteeship zone which is intended to assuage the fears of a number of these states that their present rights under the Convention on the Continental Shelf or customary international law may be adversely affected by an international regime. However, the United States has been giving increasing emphasis to two other matters which it considers should be dealt with as matters of priority at the Conference: the limits of territorial waters and the related question of the right of innocent passage through straits, and the extent of the coastal states' fisheries jurisdiction in contiguous waters.[8] Indeed, it may be that, in the light of a recent claims advanced by a number of states to extended areas of maritime jurisdiction,

1. Resolutions 2749(XXV), 2750(XXV) A, B, and C. These are to be found in 10 *International Legal Materials* (1971) 220–230.
2. Resolution 2750(XXV), C, C1.2, 10 *International Legal Materials* (1971) at 228.
3. *Ibid.*
4. Resolution 2750(XXV), C, Cl.3(at 228).
5. Resolution 2750(XXV), C, Cl.5(at 228). The Committee at its first meeting in March 1971 established three sub-committees, the first to deal with the sea bed, the second with a group of matters including fisheries and the territorial sea, and the third with the maritime environment.
6. Resolution 2340(XXII), 7 *International Legal Materials* (1968) 174.
7. U.N. Doc. A/AC. 138/25. The draft Treaty is summarized in 65 A.J.I.L. (1971) 179–186.
8. See "Statements Concerning Oceans Policies" 9 *International Legal Materials* (1970) 806 *et seq.*

the questions of innocent passage and fisheries will assume a greater importance for, hand in hand with the recognition of the importance of these matters, there are already some gloomy prophecies that the discovery and extraction of vast mineral resources in the sea-bed beyond national jurisdiction generating a revenue which can be used to assist the developing countries is not likely to occur for a long time.[9]

In due course, the draft treaty articles on these questions will be prepared by the Committee. One matter which invites speculation is whether they will take the form of revisions of the Geneva Conventions on the Law of the Sea of 1958, or will be autonomous or operate as new arrangements. In so far as the thorny questions now giving rise to disputes involve vagueness or gaps in the provisions of these Conventions, there would seem to be a need for the revision of them and consequently an adherence to their general structure.[10] However, in so far as an international regime of the sea-bed beyond the limits of national jurisdiction would involve a form and content quite foreign to the existing Convention on the Continental Shelf, it would seem appropriate for a new treaty to be negotiated on this issue.[11]

Among articles of the existing Conventions which stand in need of revision are Article 1 of the Convention on the Territorial Sea and Contiguous Zone (which does not specify the breadth of the territorial sea), Articles 4–7 dealing with the demarcation of internal waters, Articles 14–17 which are concerned with the right of innocent passage, and possibly Article 24 dealing with the contiguous zone. As to the Convention on the Continental Shelf, some revision of Article 1 (definition of continental shelf) will be necessary if the international regime makes provision for an area of international jurisdiction incompatible with this definition. Various articles of the Convention on Fishing and Conservation of the Living Resources of the High Seas will need to be re-examined to see whether they provide adequate protection to the interests of coastal states in conserving fishery resources in adjacent waters. It is now proposed to discuss each of these matters.

I THE DEEP SEABED

At its meeting in 1970, the General Assembly adopted a "Declaration of Principles Governing the Seabed and Ocean Floor, and the Subsoil thereof, beyond the Limits of National Jurisdiction."[12] The basic features of this Declaration are that the area is, as it were, dedicated to mankind, that it is to be reserved for peaceful purposes, and that its resources must be used for the benefit of all states (including landlocked states) taking account especially of the

9. See Chapman, "The Ocean Regime of the Real World" *Proc. 4th Ann. Conf. Law of the Sea Institute* (*Rhode Island*) (1969) 446 at 452 *et seq.*
10. The procedure set out in the Conventions for their revision is that a request may be made to the Secretary General after the expiration of a period of 5 years (from the time when the particular Convention came into force) by any contracting party. The Assembly then decides on the steps to be taken in respect of the request. All four Conventions came into force at dates more than 5 years ago.
11. This seems to underlie the United States position that the issues be dealt with in "manageable packages". See "U.S. Position on Convening an International Conference on the Law of the Sea", 9 *International Legal Materials* (1970) 883 at 836.
12. Resolution 2749(XXV) set out in 10 *International Legal Materials* (1971) 220. For a discussion of the United Nations work since 1967 see Pardo, "Development of Ocean Space: An International Dilemma", 31 Louisiana Law Review (1970) 45.

interests and needs of developing countries.[13] As to the type of regime to be adopted to govern the area, its purpose must be "to provide for the orderly and safe development and rational management of the area and its resourses, and for expanding opportunities in the use thereof and to ensure the equitable sharing by states in the benefits derived therefrom, taking into account the interests and needs of developing countries whether land-locked or coastal."[14] Other aspects of the Declaration are the emphasis on freedom of scientific research in the area,[15] the prevention of pollution and the conservation of the marine environment and its resources.[16]

The Declaration was not, of course, intended to descend to particular prescriptions: this will be the task of the Committee. It does, however, buttress the developments which have occurred since 1967 emphasizing the "common heritage" doctrine and thus implies support for an international regime which would ensure adequate returns to the international community from the profits accruing from exploitation of the resources of the area, as well as inclining to a "generous" area beyond national jurisdiction which would be governed by the regime. It will therefore be the task of the Committee to resolve two central issues: (a) the boundary (or the manner of defining it) of national jurisdiction, and (b) the type of regime which will operate in the area of international jurisdiction so defined.

(a) The boundary or limits of national jurisdiction

There has already been much discussion of this question in the literature.[17] Its future determination depends to some extent on the present state of international law, both conventional and customary, and the decision of the International Court of Justice in the *North Sea Continental Shelf Cases*.

It is recognized by most commentators that Article 1 of the Convention on the Continental Shelf, in defining the shelf as extending to the 200 metre line or beyond that line "to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas", has superimposed on a geological definition a more flexible standard by which the coastal state may extend its jurisdiction to areas beyond the geological limit.

The submerged portion of the seabed adjacent to land is referred to as the continental margin. It comprises three areas: the continental shelf which extends on an average gradient up to $\frac{1}{10}°$ to an area where there is a sharp break in the declivity, this usually occurring at depths between 130 and 200 metres; the continental slope which descends on an average gradient of 3° to 6° to a depth of between 1500 and 4000 metres; and the continental rise descending on an average gradient of $\frac{1}{10}$ to 1° to a depth of between 4000 and 5000 metres where

13. Resolution 2749(XXV) Cls.1–8, 10 *International Legal Materials* (1971) at 221.
14. Cl.9, *ibid.*, at 222.
15. Cl.10, *ibid.*, at 222.
16. Cl.11, *ibid.*, at 222.
17. See in particular the annual proceedings of the Law of the Sea Institute (Rhode Island) edited by L.M. Alexander, in particular, *Proceedings of the 4th Annual Conference* (1969), 2 *et seq.*
See also Jennings, "The Limits of Continental Shelf Jurisdiction: Some Possible Implications of the *North Sea Case* Judgment" 18 I.C.L.Q. (1969) 819; Brown, "The Outer Limit of the Continental Shelf" Juridical Review (1968) 111; Henkin, *Law for the Seas Mineral Resources*, (1968) 42 *et seq.*; Goldie, "Where is the Continental Shelf's Outer Boundary?" 1 Journal of Maritime Law and Commerce (1970) 461; Goldie, "The Continental Shelf's Outer Boundary – A Postscript" 2 Journal of Maritime Law and Commerce (1970) 173.

it reaches the abyssal plain.[18] The 200 metre line has been adopted in the Convention as the depth marking the geological extent of the shelf. The question is, however, to what greater extent the "legal" continental shelf is extended by the concept of "exploitability" contained in Article 1.[19]

There are two possible alternative definitions of "exploitability." The term may mean that the resources are physically exploitable, that is to say, that they may be extracted from the seabed or subsoil. According to this meaning, as engineering techniques enable a particular mineral resource to be taken from the seabed at a particular depth (whether by "submarine" or surface techniques), then such a resource is exploitable, and consequently sovereign rights of the coastal state are extended to that depth, at least in relation to that resource.[20] The alternative test would be an economic one. This would require a mineral to be recoverable in sufficient amounts and at reasonable costs so as to allow it to be processed and sold on a commercial basis. The difficulty with this latter criterion is that it is dependent on economic theory and practice which is contentious: economists differ among themselves on the methods and standards, to be used in assessing such factors as market value (particularly where there is a fundamental disequilibrium as between a state-controlled and free enterprise economic system). Physical exploitability is therefore more subject to assessment and determination by scientific and engineering techniques and practice, although it must be recognized that it is a concept which is tied to the particular mineral which is the subject of exploitation: the methods used for extracting hydrocarbons from the subsoil would differ from those used in extracting manganese nodules from the sea floor.

Whatever the test to be applied, it is generally admitted that Article 1 allows the coastal state to extend its jurisdiction over the exploitation of resources beyond the 200 metre line.[21] There are suggestions, however, that the exploitability criterion may be rendered superfluous as a test for determining a coastal state's rights by the decision of the International Court in the *North Sea Continental Shelf Cases,* where it was recognized that "the rights of the coastal state in respect of the area of the continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources."[22] Some see this statement as tending to support rights of the coastal state over the continental slope as being an appurtenant area according to this definition.[23]

The expansive interpretation of the rights of the coastal state has led some writers to assert that an international regime for the deep sea area must be based on a recognition of existing or potential rights of the coastal nation over the seabed adjacent to its coast, and that any treaty which denies this recognition would stand no chance of ratification by the majority of states. Those who

18. These data are taken from the Report of the Australian Branch Committee on Deep Sea Mining to the International Law Association (1970) at 8.
19. See Goldie, "The Exploitability Test—Interpretation and Potentialities" 8 Natural Resources Journal (1968) 434.
20. This type of extraction must be distinguished from the taking of test samples which would be considered to be part merely of the process of *exploration.*
21. Provided, of course, that the limiting criterion of adjacency in Article 1, vague as it is, is adhered to.
22. (1969) *I.C.J. Reports* 3 at 22.
23. Jennings, *op. cit.*, n. 17 at 829.

adopt this view are firm adherents to what has been termed the "wide shelf" approach.[24]

On the other hand, the advocates of the "narrow shelf" approach argue that an international regime for the deep seabed would be viable only if the world community were assured of benefit from mineral discoveries in those areas (i.e. the slope and possibly the rise) which in the foreseeable future might be successfully exploited, and that the common heritage of mankind must be protected by establishing as soon as possible a boundary of national jurisdiction ending at the 200 metre line (linked with a "distance from shore" alternative definition) before exploitation takes place in deeper waters.[25]

A compromise between the "wide" and "narrow" shelf positions involving an intermediate trusteeship zone in which the coastal state would have exclusive rights of licensing exploration and exploitation but would share the revenues derived therefrom with the international community is embodied in the draft treaty of the United States referred to previously.[26] Under this proposal, the intermediate zone would commence at the 200 metre line and would extend to a line (to be worked out on the basis of expert advice) somewhere beyond the continental slope.[27]

To return to the debate between the "narrow shelf" and "wide shelf" proponents, it may be noted that there is general agreement among members of the former group that states without any, or with only a narrow geological shelf, would be disadvantaged by a definition based merely on water depth: they are therefore prepared to incorporate an appropriate distance from coast criterion ranging from 30 to 200 miles in their definition of the seabed area over which the coastal state has soverign rights, the coastal state being able to adopt that of the two alternative methods of demarcation which brings a greater area of seabed under its control.[28]

(b) International regimes

The types of international regime which have been suggested for the area of the deep seabed fall into three broad categories:[29]

(1) International Registration Agency.
(2) International Licensing Authority.
(3) International Operating Authority.

The third category—the international operating authority—is probably the least appealing. It would involve the establishment of an international body with a capital and management structure to undertake mineral exploration and exploitation work. Such an international body might fare well in terms of commercial operation but that is a matter of doubt. It would be difficult, however, to envisage states agreeing on the corporate structure including staffing and financial contributions which would get such a body off the ground.

24. See for example, Hedberg, "Limits of National Jurisdiction over the Natural Resources of the Ocean Bottom" *Proc. 4th Ann Conf. Law of the Sea Institute* (1969) 159; and Finlay, "The Outer Limit of the Continental Shelf: A Rejoinder to Professor Louis Henkin" 64 A.J.I.L. (1970) 42.
25. See Andrassy, *International Law and the Resources of the Sea* (1970) at 117; and Henkin, *Law for the Seas' Mineral Resources* (1968) at 73. Henkin, however, does initiate a suggestion of a buffer zone "as a happy compromise". *Ibid.*, at 72.
26. *Draft Convention on the International Seabed Area* Ch.111, Articles 26–30.
27. Article 26.
28. See Andrassy, *International Law and the Resources of the Sea*, 117–120.
29. Henkin, *Law for the Seas' Mineral Resources*, 62–68.

Basically, it will be a matter of making a choice between the first and second alternatives—a registration or licensing authority The distinction between these two regimes is described by Henkin in this way:

> The principal difference would be that in one system a state is free to decide where and when it will exploit, subject to the ground rules and the requirements of registration and payment of a fee. In the other, a state may operate only after approval or designation by the international authority, although the approval may be virtually automatic.

He continues:

> The difference may not be critical. Still, a proposal may be more acceptable to some—and less so to others—if it is seen as an international regime with concessions to nationalism rather than the reverse. And the premiss and starting point may be important, if only because they tend to influence what comes out. I should guess that a system in which states cannot proceed on their own but require international permission from the beginning is likely to develop in the direction of increased international control rather than increased national autonomy.[30]

The major difference is therefore between a licensing body which will have the right to allocate[31] rights to explore for and exploit particular resources in specified areas of the seabed, and a registration body which could act merely as a recording agency of claims made by individual states (to which a duty of recognition on the part of other states would be attached).[32] The draft United States Treaty proposes an International Seabed Licensing Authority with powers of licensing.[33] As this draft Treaty is one of the most detailed proposals so far presented for a deep sea regime, it will be of interest to set out its main features.

Area

It is proposed that the International Seabed Area shall compass all areas of the seabed and subsoil of the high seas seaward of the 200 metre isobath. The coastal state has the task of delineating the precise inner boundary of this Area (which will constitute the limits of national jurisdiction) by straight baselines not exceeding 60 miles in length subject to review by a Boundaries Commission which is a constituent unit of the proposed Authority.[34]

Part of this Area is designated as the International Trusteeship Area. The Trusteeship area comprises that part of the continental margin between the 200 metre line (as determined above) and a line, *beyond the base of the slope,*

30. *Ibid.*, at 68.
31. Which would be based on some principle of allocation e.g. competitive bidding.
32. As contrasted with the licensing system this would be based on the "first-come, first-served" principle. However, as Evenson points such a system may result in a scramble as a number of countries try to be the first to apply. This would generate a need to impose regulations as to time, size of block etc. With enough of these powers the registry proposal ends up like licensing. See 3 Cornell International Law Journal (1970) 149.
33. *Draft U.S. Convention on the International Seabed Area*, Art. 13. The draft Convention is examined by Auburn, "The International Seabed Area", 20 I.C.L.Q. (1971) 173. Stone, "The United States Draft Convention on the International Seabed Area", 45 Tulane Law Review (1971) 527.
Ratiner, "United States Ocean Policy – An Analysis", 2 Journal of Maritime Law and Commerce (1971) 225 at 250 *et seq.*
34. Art. 1. Provision is made for the drawing of boundary lines according to a mathematical formulae across troughs of more than 200 metres in depth separating the 200 metre area from other adjacent areas within this depth. See Article 1(3).

where the downward inclination of the surface of the seabed declines to a certain gradient (to be determined by the coastal state in consultation with technical experts).[35] The determination of this boundary is also subject to review by the Boundaries Commission.[36]

Within the Trusteeship Area, the coastal state has the right as trustee of the international community to issue mineral exploration and exploitation licenses.[37] As such, it is referred to as the Authorizing Party. Within the area beyond the Trusteeship zone, the International Seabed Resource Authority is the licensing authority issuing licenses through the medium of states which in this context are described as Sponsoring Parties.[38]

The International Seabed Resource Authority

The proposed Authority consists of a number of organs: an Assembly[39] composed of all the contracting parties, a Council[40] of 24 members whose composition is to be determined on the basis of certain criteria (economic and geographic), a Tribunal,[41] and three important commissions—a Rules and Recommended Practices Commission, an Operations Commission, and a Boundaries Review Commission. While the Assembly is the deliberative body with power to approve the Budget[42] (which is proposed by the Council), considerable power lies with the Council, the executive body, which, inter alia appoints the members of the Commissions, adopts rules and practices for mineral exploration and exploitation operations, and issues orders to prevent damage to the marine environment.[43] The Tribunal is the judicial body whose task it is to decide disputes and advise on questions relating to the interpretation and application of the Convention.[44]

As to the functions of the Commissions, the Rules and Recommended Practices Commission has the power to recommend to the Council a code of rules for the conduct of operations (including safety measures and fee requirements),[45] the Operations Commission has control over the issuing of licenses for operations in the Area, as well as supervising activities of licensees and arranging for the collection of fees[46], while the Boundaries Review Commission reviews the delimitation of the boundaries of the Area delimited by coastal states.[47]

Revenue

Provision is made for the revenue derived by the Authority from the seabed to be used for the benefit of all mankind, particularly to promote the economic advancement of the developing countries. A portion is to be used for marine research and related purposes.[48] The proposed revenue will consist of various fees (application as well as rental fees) and bonus payments on production. As

35. Art. 26(2).
36. Article 26(3).
37. Article 27.
38. Appendix B.
39. Article 34.
40. Article 36.
41. Article 47.
42. Article 35.
43. Article 40.
44. Article 46.
45. Article 43.
46. Article 44. Under draft rules set out in an Appendix it is proposed that the procedure for allocating of licenses should be based on competitive bidding.
47. Article 45.
48. Article 5.

to the fees, a proportion left unspecified but between 33⅓% and 50% will be retained by the Trusteeship (Authority) Party or the Sponsoring Party (as the case may be) and the remainder forwarded to the Authority. As to the bonus payments on production, it is provided that an Authorizing Party shall (in respect of production in its Trusteeship area) retain a similar proportion and forward the remainder to the Authority. On the other hand, a Sponsoring Party shall (in respect of production in the area outside the Trusteeship zone) forward all bonus payments to the Authority.[49] Under an Annexe attached to the Treaty it is proposed to divide the revenue among international and regional development organisations according to fixed percentages.[50]

The elaborate scheme of the draft Treaty will no doubt receive critical commentary and analysis at the meetings of the Committee leading up to the Conference. It certainly involves an internationalist solution in its adherence to the "narrow shelf" concept but with its concession to coastal state interests in the form of the intermediate zone. It also opts for the establishment of a licensing authority and indeed, in its provision for a multiplicity of organs, permits detailed regulation of exploitation activities. Its generous allocation of revenue not only from the outer zone but also from the Trusteeship area ensures the participation of the international community in the financial rewards accruing from successful discoveries.

The context of the debate in the next two years can be clearly foreseen. It will involve a determined stand on the part of a number of states to hold on to as much as they deem they already have under existing customary international law or under the Convention on the Continental Shelf against the "internationalists" who would view the needs of developing states (and landlocked countries) as a primary justification for an international regime. The intermediate trusteeship zone is therefore designed to achieve a compromise between the views of those who would recognize the coastal state as having a potential jurisdiction extending at least to the bottom of the continental slope, and of those who would terminate national jurisdiction at the 200 metre line. While making provision for the allocation or revenue derived from discoveries on the slope to an international fund, it nevertheless ensures that the coastal state will determine the participants in seabed mining on the slope.

II TERRITORIAL WATERS, INNOCENT PASSAGE AND RELATED ISSUES

A second cluster of issues on which it will be important to secure agreement at the Conference centre on the Convention on the Territorial Sea and Contiguous Zone.[51] They comprise:

A the recognition of a fixed belt of territorial waters, an issue which was not resolved at either the 1958 or 1960 Conferences,

B the definition of right of innocent passage through territorial waters and the classification of certain stretches of waters as straits,

C the method of determining the baselines from which territorial waters are to be measured (and therefore the *outer* limits of internal waters),

D the determination of whether a contiguous zone should be recognized outside any newly defined belt of territorial waters.

49. See Art. 23 Appendix A, Cls.3(1), 4(1), 6(4), and 10(3).
50. Appendix D.
51. The best discussion of the provisions of this Convention is to be found in McDougal and Burke, *The Public Order of the Oceans* (1962).

(A) Breadth of territorial waters

Article 1(1) of the Convention on the Territorial Sea and Contiguous Zone provides that "the sovereignty of a state extends to a belt of sea adjacent to its coast, described as the territorial sea." As is well known, a proposal at the 1960 Conference to establish a 6 mile territorial sea and a 6 mile exclusive fisheries zone was defeated by a small margin and no agreement on breadth was reached.[52] A number of states thereupon re-affirmed their adherence to the traditional 3 mile limit.

Since that time state practice has brought about a change in international law with at least 75 nations claiming an exclusive fisheries jurisdiction to a distance of 12 miles from the coastline. Consequently a 12 mile exclusive fisheries zone[53] must now be regarded as sanctioned by customary international law. Moreover, more than 50 nations now claim a territorial sea of 12 miles (or more). In view of this wide acceptance of a 12 miles territorial sea, it has been suggested that no international tribunal would declare illegal any state claim which extended to that limit.[54] On the other hand, it would be true to say that, in so far as the United Kingdom and the United States still adhere to the 3 mile territorial limit as buttressing the fundamental principle of freedom of navigation (enshrined in the Convention on the High Seas), such nations are not obliged to recognize more extensive claims unless the right of innocent passage through the enlarged territorial waters (or at least through those waters characterized as straits) is guaranteed by a new international convention.[55] These countries are therefore supporting international rights of navigation in waters which, if brought within the territorial regime without corresponding acceptance of full rights of innocent passage, might be subjected to a "regulatory" control which could end in prohibition.

(B) Innocent passage

The questions arising in this context are directed to certain articles in the Convention on the Territorial Sea and the Contiguous Zone, particularly Articles 14 and 17. At the outset, we may pinpoint two crucial issues: (i) the definition of "innocent" in Article 14(4) associated with the question whether the right of innocent passage applies to foreign warships, and (ii) the controls which the coastal state may exercise over passage of a foreign vessel and the extent to which straits are subject to these controls.[56]

(i) Innocent passage and warships

The structure of the Articles of the Convention relating to innocent passage

52. See Dean, "The Second Geneva Conference on the Law of the Sea", 54 A.J.I.L. (1960) 751 at 772 *et seq.*
53. Either as a fisheries zone or as part of the territorial sea. See Eisenbud, "Understanding the International Fisheries Debate", 4 Natural Resources Journal (1971) 19 at 23; Burke, "A Contemporary Legal Problem in Ocean Development", 3 International Lawyer (1969) 536 at 539. In some cases as with the European countries and the United Kingdom which are parties to the European Fisheries Convention of 1964, historic fishing rights (in this case in the outer 6 miles) are recognized. The fisheries jurisdiction created by the European Fisheries Convention is made subject however to the Treaty of Rome, and the fisheries policy of the European Economic Community is more liberal in terms of access to waters within national fisheries limits.
54. Bilder, "The Canadian Arctic Waters Pollution Prevention Act: New Stresses on the Law of the Sea", 69 Michigan Law Review (1970) 1 at 19.
55. For a study of some of the interests underlying the United States position see Ratiner, "United States Ocean Policy: An Analysis", 2 Journal of Maritime Law and Commerce" (1971) 225 at 231–233.
56. See generally McDougal and Burke, *The Public Order of the Oceans*, 214 *et seq.*

throws some light on the question of the rights of warships to use the territorial sea.

Part III of the Convention is headed "Rights of Innocent Passage" and contains 4 sub-sections. Sub-section A (Articles 14–17) is headed "Rules applicable to all ships", Sub-section B (Articles 18–20) "Rules applicable to Merchant Ships", Sub-section C (Articles 21–22) "Rules applicable to Government ships other than warships" and Sub-section D (Article 23) "Rules applicable to Warships". The specific reference in Article 23 to warships suggests that the general rules (Articles 14–17) applicable to all ships would also apply to warships subject only to the extent to which Article 23 restricts those rules.

Article 14 provides that "subject to the provisions of these Articles, ships of all states, whether coastal or not, shall enjoy the right of innocent passage through the territorial sea".[57] Passage may be of three types: traversing, proceeding to internal waters, making to the high seas from internal waters.[58] Innocent passage is described as passage which "is not prejudicial to the peace, good order or security of the coastal state."[59]

Article 23 provides that "if any warship does not comply with the regulations of the coastal state concerning passage through the territorial sea and disregards any request for compliance which is made to it, the coastal state may require the warship to leave the territorial sea."

It would seem to be a literal reading of the Convention that warships like all other vessels have the right to traverse territorial waters provided that their passage is innocent and provided that there is compliance with any regulations concerning passage.[60]

However the Soviet Union has argued that warships do not have a right of innocent passage, but must receive permission from the coastal state to traverse the territorial sea. Consequently, they do not have a "right" but merely a "privilege".[61] The difference between this view and the opposed view held by the United States that there is a right of innocent passage for warships lies in the requirement of authorization as contrasted with notification.[62] The requirement of the Soviet Union is that thirty days advance notice must be given for the passage of warships through Soviet territorial waters and that there is a discretion in the coastal state to decide whether to accede to the notified passage. The view of the United States is that notification alone is sufficient and that a warship complying with the regulations of the coastal state relating to passage has a right to traverse the waters.[63] This view is supported by the decision of the International Court of Justice in the *Corfu*

57. Coupled with this Article is Article 15 which imposes a duty on the coastal state not to hamper innocent passage through the territorial sea.
58. Art.14(2).
59. Art.14(4). There are specific provisions relating to foreign fishing vessels the passage of which is not considered innocent if they do not observe such laws and regulations as the coastal state may make in order to prevent these vessels from fishing in the territorial sea [Art.14(5)], and relating to submarines which are required to navigate on the surface and to show their flags (Art.14(6)].
60. e.g. provisions relating to the route to be followed.
61. See Butler, *The Law of Soviet Territorial Waters* (1967) Ch. 5, 35 *et seq.*
62. McDougal and Burke, *The Public Order of the Oceans* 219–221.
63. *Ibid.*, 216 *et seq.*
See also Pharand, "Innocent Passage in the Arctic" (1968) *Canadian Year Book of International Law*, 3 at 28 et seq.

Channel case[64] when it was accepted that the passage of British warships through the Corfu Strait was not subject to special authorization by Albania.[65]

That case recognized the right of innocent passage of warships in waters joining parts of the high seas. In upholding the particular passage of British warships on October 22 1946 as "innocent", the Court was not prepared to allow defence policies of the coastal state based on an exaggerated concept of security[66] to determine the nature of passage of vessels through territorial waters which connected parts of the high seas. However, O'Connell points out that the words "prejudicial to security" in Article 14(4) of the Convention may constitute a narrower definition of innocent passage compared with that adopted by the International Court.[67] Moreover, while accepting that the better interpretation of Article 14 is that the right of innocent passage applies to warships he concedes that it is "just arguable" that Article 14(6) (requiring submarines to navigate on the surface and to show their flags) and Article 23 both operate only in respect of warships which have been authorized.[68]

(ii) Control of passage and international straits

Articles 16, 17 and 23 of the Convention make it clear that the right of innocent passage is not an uncontrolled right but is subject to regulation by the coastal state. Article 17 provides that foreign ships exercising the right of passage must comply with laws of the coastal state (which are "in conformity with these Articles and other rules of international law") in particular laws relating to transport and navigation. Article 23, as we have seen, spells out the duty of warships to comply with such regulations and empowers the coastal state, in the event of default by the foreign vessel, to require it to leave the territorial sea.

Article 16 is probably the most important section. It provides that the coastal state may take necessary steps in the territorial sea to prevent passage which is not innocent. It may (without discrimination among foreign vessels) suspend temporarily in *specified areas* of the territorial sea the innocent passage of foreign ships if "such suspension is essential for the protection of its security but only if the suspension is duly published." However, Article 16(4) provides that "there shall be no suspension of innocent passage of foreign ships through straits that are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign state."

It is clear that regulations affecting navigation may be imposed by a coastal state e.g., that a foreign vessel shall follow a particular route or have the assistance of a pilot. For "security" reasons a temporary suspension may be imposed in relation to specified areas but such suspension cannot be applied to straits as defined in Article 16(4).

The effect of Article 16(4) is therefore to guarantee a greater freedom of navigation through certain types of territorial waters as compared with others. It is designed to protect international navigation by preventing the closure of

64. (1949) *I.C.J. Rep.* 4. See O'Connell, *International Law* (2nd Ed.) Vol. 1, 499–500. While the Court held that the first passage of the warships was innocent, a later minesweeping operation was not so regarded.
65. (1949) *I.C.J. Rep.*, at 28.
66. For a recent discussion of the concept in the light of the seizure by the North Korean Government of the U.S. "Pueblo" engaged in "electronic eavesdropping" in waters contiguous to the North Korean coastline see "Panel: The Pueblo Seizure: Facts, Law, Policy" 63 Proceedings of the American Society of International Law (1969) 2 *et seq.*
67. *International Law* (2nd Ed.) Vol. 11, 637.
68. *Ibid.*, 638.

straits. The *Corfu Channel* case considered a strait to be a stretch of water connecting two parts of the high seas,[69] but Article 16(4) extends the definition by including stretches of water connecting the high seas with the territorial sea of a foreign state. Thus a voyage from the high seas ending in the territorial sea of a state beyond the entrances to the strait would be protected.[70]

The geographical element of connection is one part of the definition; the other requirement for designating a stretch of water as a strait, under Article 16(4), is "use". Does this mean that the stretch of water must be recognized by maritime nations as an ordinary route for navigation and is in effect used regularly by a considerable number of vessels? Such a definition of "use" appears to be too onerous and would exclude the opening up of new routes for technological development.[71] In the *Corfu Channel* case, the fact that an alternative route to the Corfu Channel was available, which did not involve a detour causing any great inconvenience, did not prevent the International Court from recognizing the Corfu Channel as a strait.[72]

It may also be noted that there is no provision in the Convention for the right of overflight[73] over territorial waters. An extension of the breadth of territorial waters, may make it more difficult for aircraft to utilize convenient routes, parts of which are at the present time subject to the regime of the high seas. Consideration must be given to the question whether the right of "innocent" overflight should be incorporated into any new Treaty.

(C) Internal waters

There are two Articles in the Convention on the Territorial Sea and the Contiguous Zone dealing with the drawing baselines which ought to be re-examined at the Conference: Article 4 dealing with straight baselines and Article 7 relating to closing lines across bays. Under these Articles baselines may be drawn which have the effect not only of demarcating the inner limits of the territorial sea but also the outer limits of territorial waters. It is apparent that if agreement is reached on the recognition of a 12 mile territorial sea, the existing law on baselines must be scrutinized to see whether it offers any opportunities to coastal states to increase their internal waters by excessive baseline enclosures.[74]

Article 4 allows a departure from the normal method of establishing baselines laid down in Article 3 (the low water line of the coast) in two situations viz. (a) in localities where the coastline is deeply indented or cut into or (b) if there is a fringe of islands along the coast in its immediate vicinity. In such cases baselines joining "appropriate points" may be used in drawing the baselines of the territorial sea. It is expressly provided, however, that the drawing of such baselines must not depart to any appreciable extent from the general direction of the

69. (1949) *I.C.J. Rep.* 28.
70. e.g., as in the case of the Strait of Tiran. See Gross, "The Geneva Convention on the Law of the Sea and the Right of Innocent Passage through the Gulf of Aquaba", 53 A.J.I.L. (1959) 564.
71. See Bilder, "The Canadian Arctic Waters Pollution Act: New Stresses on the Law of the Sea", 69 Michigan Law Review (1970) 1 at 22 n. 84.
Pharand, "Innocent Passage in the Arctic (1968) *Canadian Year Book of International Law* 3 at 41 *et seq.* (On innocent passage through the Northwest Passage.)
72. See O'Connell, *International Law*, (2nd Ed.) Vol. 1, 497.
73. That right is expressly mentioned as one of the high seas freedoms in the Convention on the High Seas, Art. 2.
74. On the interpretation of these articles of the Convention on the Territorial Sea and Contiguous Zone see McDougal and Burke, *The Public Order of the Oceans*, Ch. 4, 305 et seq.

coast and the sea areas lying within the lines must be "sufficiently closely linked to the land domain to be subject to the regime of internal waters."[75] There is also some recognition of the relevance of economic interests to the application of straight baselines in Article 4(4) which provides: "Where the method of straight baselines is applicable under the provisions of paragraph 1, account may be taken, in determining particular baselines, of economic interests peculiar to the region concerned, the reality and importance of which are clearly evidenced by a long usage." This factor is of course a subsidiary one to be taken into account only if the method is applicable on the basis of geographical criteria.

Article 4 is based on the decision of the International Court in the *Anglo-Norwegian Fisheries case*.[76] The skjaergaard or rampart off the Norwegian coast is the type of geographical configuration to which the straight baseline method is ideally applicable but there is no doubt that there are many other coastline localities to which the Article may be applied.[77]

As we have said, Article 4 imposes geographical limitations on the drawing of straight baselines. These are based on the locality requirement, viz., that the system is applicable to localities and not to whole coastlines merely because one part thereof satisfies the operative criteria. These operative criteria consist of an area of coastline which is deeply indented (as distinct from a coastline with slight curvatures) or which is fringed by islands in its immediate vicinity (as distinct from a situation where a number of islands lie near a coast without constituting a "fringe").[78] The further more general limitations which are too vague to be of much assistance are that straight baselines must not depart to any appreciable extent from the general direction of the coast, and (as a corollary) the sea areas lying within the lines must be sufficiently closely linked to the land domain.

There is, it can be seen, a degree of uncertainty in these requirements to permit "over-generous" use of straight baselines by individual states. One major defect is that no maximum length of baselines has been prescribed nor is any "distance from the coast" criterion laid down. At the Geneva Conference in 1958 an article drafted by a preparatory committee provided for a maximum length of 15 miles (subject to certain qualifications) but this was not accepted by the plenary committee.[79]

It may also be noted that no attempt was made at the 1958 Conference to

75. Art. 4(2). Under Art. 4(3) baselines must not be drawn to or from low-tide elevations unless lighthouses or similar installations which are permanently above sea level have been built on them. This is subject to the qualification expressed in Article 11(1) that low-tide elevations within territorial waters may be used for this purpose. For a discussion of these Articles see Lumb, *The Law of the Sea and Australian Off-Shore Areas* (1966), Ch. III.

    Under Art. 4(5) the system of straight baselines cannot be applied by a state in such a manner as to cut off from the high seas the territorial sea of another state.

76. (1951) *I.C.J. Rep.* 116.

77. Pharand, "The Waters of the Canadian Arctic Islands", 3 Ottawa Law Review (1969) 414 at 417.

78. McDougal and Burke, *The Public Order of the Oceans*, 406–407.

79. *Ibid.*, at 406. In the *Anglo-Norwegian Fisheries Case* the International Court did not consider that any practice constituting a rule of international law on the permitted length of baselines has been proved. One baseline accepted by the Court exceeded 50 miles in length. See Waldock, "The Anglo-Norwegian Fisheries Case" 28 B.Y.I.L. (1951) 114 at 146.

    See also Morin, Le progrès technique, la pollution et l'évolution récente du droit de la mer au Canada, particulièrement á l'égard de l'Arctique", (1970) *Canadian Year Book of International Law* 158 at 164–173.

define a baseline procedure for outlying or mid-ocean archipelagoes.[80] Suggestions have been made for maximum lines of 10 to 15 miles in length,[81] but the question has never been resolved. Both the Philippines and Indonesia have enacted laws which "box-in" waters by drawing lines joining the outer islands of their island groups (the lines in a number of instances being well over 15 miles) but these acts have been the subject of protests from other countries.[82]

Historic Bays

Article 7 of the Convention allows a coastal state to claim as internal waters bays which have a certain geographical configuration, a bay being defined as a "well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and to constitute more than a mere curvature of the coast." A maximum closing line of 24 miles may be drawn between the low-water marks of the entrance points of such bays (or within it up to this length under Article 7(5) if such points are in excess of 24 miles). But Article 7(6) provides that these rules do not apply to historic bays.[83]

It has been pointed out by a number of commentators that the provision for a 24 mile closing line has enabled states to claim as internal waters bays, which, on the basis of previous prescriptions as to closing lines, could only be claimed on "historic" grounds. It has thus removed to a large extent the need to invoke the "historic bay" concept as a basis for national claims in so far as most of the bays previously claimed on historic grounds have closing lines of less than 24 miles and therefore fall within the ordinary rules.[84] The two major examples of claims to historic bays which have openings well in excess of 24 miles are the Soviet Union's claim to St. Peter the Great Bay and Canada's claim to Hudson's Bay. The latter claim[85] is probably supportable in terms of the criteria laid down for invoking historic title, viz., an exercise of authority over the area by the claimant (or its predecessor) for a long period of time which is acquiesced in by other states. The claim of the Soviet Union to the whole of St. Peter the Great Bay (as distinct from parts within it) appears to rest on less secure foundations and has been disputed by a number of countries.[86]

There is still the possibility of a rebirth of claims to bays on historic grounds especially in the light of the concept of "vital interest" which has always hovered in the background,[87] and the existing law is sufficiently vague to raise the question as to its need for re-examination at the Conference.

80. McDougal and Burke, *The Public Order of the Oceans* 411–419;
Dean, *The Second Geneva Conference on the Law of the Sea* 54 A.J.I.L. (1950) at 765–767.
81. McDougal and Burke, *The Public Order of the Oceans*, 416, 418.
82. O'Connell, *International Law* (2nd Ed.), Vol. 1, 482, n. 6.
83. On the law relating to historic bays see Blum, *Historic Titles in International Law* (1965) Ch. VI, Bouchez, *The Regime of Bays in International Law* (1964) Ch. IV. Strohl, *The International Law of Bays* (1963) Chs. 6–8. *Juridical Regime of Historic Waters* (1962) U.N. Doc. A/CN 4/143.
84. McDougal and Burke, *The Public Order of the Oceans*, 357–358; Pharand, "Historic Waters in International Law with Special Reference to the Arctic", 21 University of Toronto Law Journal (1971) 1 at 14.
85. See Johnston, "Canada's Title to Hudson Bay and Hudson Strait", 15 B.Y.I.L. (1934) 1; Strohl, *The International Law of Bays*, 223 *et seq.*; Morin, "Les eaux territorials du Canada au regard du droit international" (1963) Canadian Year Book of International Law, 82 at 123 *et seq.* Morin also considers the question of historic claims to other bays such as the Bay of Fundy.
86. Strohl, *The International Law of Bays* 366.
87. Pharand, "Historic Waters in International Law with Special Reference to the Arctic", 21 University of Toronto Law Journal (1971) at 11–13.

(D) The doctrine of the contiguous zone

It remains for us to consider the status of the contiguous zone.[88] Article 24 of the Convention on the Territorial Sea and the Contiguous Zone provides: "1. In a zone of the high seas contiguous to its territorial sea, the coastal state may exercise the control necessary to:

(a) prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea;
(b) punish infringement of the above regulations committed within its territory or territorial seas.

2. The contiguous zone may not extend beyond 12 miles from the baselines from which the breadth of the territorial sea is measured."

It is clear that any recognition of a 12 mile territorial sea would swallow up the existing contiguous zone and therefore would make applicable the coastal states' sovereignty (subject only to the right of innocent passage) to all aspects of territorial sea use and not merely to the four matters (customs, fiscal, immigration and sanitary matters) mentioned in Article 24.

Recently, Canada has enacted comprehensive anti-pollution legislation applying to a zone stretching 100 miles from the Canadian coastline in the Arctic region.[89] This amounts to a type of "sanitary zone" well in excess of the limits laid down in Article 24. Canada's case is founded to a large extent on its asserted urgent need to protect the Arctic coast-line from pollution from vessels (such as "super-tankers" or nuclear-powered vessels) which might use these waters and thus is directed to the protection of its Arctic environment.[90] Its great weakness, however, is that it interferes directly and fundamentally with the freedom of the high seas enshrined in the Convention on the High Seas. This interference arises from those provisions of the Act[91] which enable the Government to specify safety and other standards for vessels passing through Arctic waters (and to enforce those standards) and which bring vast areas of the ocean under this anti-pollution control. It also tends to undermine the achievements of the last three years reflected in the negotiation of multilateral conventions on marine pollution which have led to agreement on the unilateral measures which a state may take to protect its coastline from certain types of pollution.[92]

No doubt, however, this claim will lead to the consideration of the question as to the adequacy of Article 24 of the Convention on the Territorial Sea and the Contiguous Zone and whether any contiguous zone wider than 12 miles should be recognized in the event of agreement being reached on a 12 miles territorial sea.

88. See O'Connell, *International Law* (2nd Ed.) Vol. 11, 639 *et seq.*
Fell, "Maritime Contiguous Zones", 62 Michigan Law Review (1962) 848.
89. The legislation which is set out in 9 *International Legal Materials* (1970) 543 is discussed by Henkin, "Arctic Anti-Pollution; Does Canada Make or Break International Law?" 65 A.J.I.L. (1971) 131. Bilder, "The Canadian Arctic Waters Pollution Prevention Act: New Stresses on the Law of the Sea" 69 Michigan Law Review (1970) 1. Cf. Legault, "The Freedom of the Seas: A License to Pollute?", 21 Un. of Tor. L.J. (1971) 211.
90. *Ibid.*, at 33.
91. *Arctic Waters Pollution Prevention Act*, S.12.
92. In particular the International Convention relating to Intervention on the High Seas in cases of Oil Pollution Casualties (1969) reprinted in 64 A.J.I.L. (1970) 471.

III FISHERIES

Fisheries may turn out to be the most important issue to be debated at the Conference.[93] The prime thrust of extended maritime claims has been in this direction. The extension of jurisdiction beyond 12 miles has occurred particularly among the Latin American States, a number of which have extended their jurisdiction to 200 miles. Recently, Canada has proclaimed fisheries zones which extend beyond the 12 mile limit.

The Latin-American claims amount to an assertion of jurisdiction over the resources of the sea coupled with the right to determine the limits of maritime sovereignty and jurisdiction. These claims have been formulated in two recent Declarations—the Declaration of Montevideo[94] and the Declaration of Lima.[95] The primary rights affirmed in the latter Declaration are

(1) "the inherent right of the coastal state to explore, conserve, and exploit the natural resources of the sea adjacent to its coasts, and the soil and subsoil thereof, likewise of the continental shelf and its subsoil, in order to promote the maximum development of its economy and to raise the level of living of its people" and

(2) "the right of the coastal state to establish the limits of its maritime sovereignty and jurisdiction in accordance with reasonable criteria, having regard to its geographical, geological and biological characteristics, and the need to make rational use of its resources."[96]

The extension of Canadian fisheries jurisdiction is more limited: it is a claim to exclusive fisheries jurisdiction in contiguous areas in gulfs and semi-enclosed waters around the Canadian coastline. Closing lines have been drawn across the entrances to the Gulf of St. Lawrence, the Bay of Fundy, Queen Charlotte Sound and Dixon Entrance—Hecate Strait under powers conferred by the *Territorial Sea and Fishing Zones Act* which empowers the Governor-General to proclaim exclusive fishing zones.[97] In announcing the promulgation of these fisheries closing lines, the Canadian Minister of Fisheries commented:

> Exclusive rights to harvest may be necessary but they are not an end in themselves. The end we have in mind is conservation and rational management and for this purpose we require jurisdiction. That jurisdiction, however, does not rule out the possibility of sharing exploitation with other countries. It does, however, allow us to set rules for that exploitation, to impose licensing requirements if necessary and thus to share the financial burden of conservation as well as the financial rewards of exploitation."[98]

93. For a discussion of legal problems relating to fisheries see Johnston, *The International Law of Fisheries* (1965); Oda, *International Control of Sea Resources*, (1963); Garcia Amador, *The Exploitation and Conservation of the Resources of the Sea* (2nd Ed., 1963). For a discussion of recent developments see Burke, "A Contemporary Legal Problem in Ocean Development", 3 International Lawyer (1969) 531; Eisenbud, "Understanding the International Fisheries Debate", 4 Natural Resources Lawyer (1971) 19; Goldie, "The Ocean's Resources and International Law: Possible Developments in Regional Fisheries Management" 8 Columbia Journal of Transnational Law (1969) 1. Proceedings of the Annual Conferences of the Law of the Sea Institute in particular *Proc. 4th Ann. Conf.* (June 23–26, 1969) 286 *et seq.*
94. 9 *International Legal Materials* (1970) 1081.
95. 10 *International Legal Materials* (1971) 207.
96. *Ibid.*, at 208.
97. The provisions of this Act are set out in 9 *International Legal Materials* (1970) 553, and the Order defining the zones (and map) in 10 *International Legal Materials* (1971) 438–440.
98. 10 *International Legal Materials* at 437.

Contrast the reaction of the United States Government to the proclamation of these zones:

> The United States deeply regrets this action. The United States regards this unilateral act as without foundation in international law. It firmly opposes such unilateral extensions of jurisdiction and believes that outstanding issues concerning the oceans can only be resolved by effective international action.[99]

Despite the increase in unilateral claims to extended fisheries zones beyond 12 miles, there are in existence one general convention and a number of regional conventions relating to the conservation which permit regulation of fisheries in high seas areas. The Convention on Fishing and Conservation of the Living Resources of the High Seas[100] was the last of the four Geneva Conventions to come into force. It imposes a duty of co-operation on states whose nationals fish in the same area of the high seas to adopt measures for the conservation of the living resources of those seas. Conservation in this context is defined as "the aggregate of measures rendering possible the optimum sustainable yield from these resources so as to secure a maximum supply of food and other marine resources."[101] Steps towards the adoption of conservation measures are initiated when a request is made by one state to another to enter into negotiations.[102] If agreement is not reached within 12 months on the measures to be adopted, an arbitration procedure laid down in the Convention may be invoked.[103] But the significant feature of the Convention is its recognition of the special interest of the coastal state in the maintenance of the stocks of fish in areas of the high seas adjacent to its territorial sea.[104] Article 6 of the Convention imposes a duty in other states whose nationals fish in these areas to enter into negotiations with the coastal state at its request with a veiw to adopting conservation measures. Failing agreement within 12 months, the prescribed arbitration procedure may be invoked. However, in one situation, the Convention permits the coastal state to adopt *unilateral* conservation measure if negotiations have not led to agreement within 6 months. Under Article 7, this may be done where the coastal state can demonstrate:

(a) that there is a need for urgent application of conservation measures in the light of the existing knowledge of the fishery,
(b) that the measures adopted are based on appropriate scientific findings,
(c) that they do not discriminate in form or in fact[105] against foreign fishermen.

If, however, the other states do not agree with these measures, they may challenge them under the prescribed arbitration procedure.

The arbitration procedure consists of a determination of the validity of the measures by a special Commission of five members unless the parties agree to such a solution by another method of peaceful settlement as provided for in Article 33 of the U.N. Charter. If the parties cannot agree on the composition

99. *Ibid.*, at 441.
100. For an analysis of the articles of the Convention see Bishop "The 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas" 62 Columbia Law Review (1962) 1206.
101. Art.2.
102. Art.4(1).
103. Art.4(2).
104. Art.6.
105. A conservation measure may be framed in such a way that, although no discrimination appears on its face, it may nevertheless discriminate against foreign fishermen. An example could be prohibition of the use of certain types of equipment or vessels which were used only by foreign fishermen and not by fishermen from the coastal state.

of the Commission, the members shall be chosen by the Secretary-General of the United Nations in consultation with the President of the International Court of Justice and the Director General of the Food and Agriculture Organization from among persons qualified in the matters forming the basis of the dispute.[106]

The criteria to be adopted by the Commission in settling disputes under Article 7 where there is a challenge to the unilateral measures of a coastal state are set out above: they depend primarily on the coastal state showing that there is an urgent need for the application of the measures. The criteria to be adopted by the Commission in settling the other disputes are that

(a) scientific findings demonstrate the necessity of conservation measures,
(b) that the specific measures are based on scientific grounds and are practicable,[107] and
(c) that the measures do not discriminate in form or in fact against fishermen of other states.

It can be seen therefore that a more difficult onus of proof is cast on the coastal state to prove the validity of unilateral measures. In any case, the measures may not discriminate against foreign fishermen. Thus the Convention is incompatible with any unilateral extensions of jurisdiction which ex facie discriminate in favour of the coastal state.

Unfortunately, the Convention has not gained the support given to the other Geneva Conventions. Some of the reasons for this lack of enthusiasm for the Convention are a suspicion of its arbitration procedure and its failure to provide for criteria on the basis of which a preferential share in off-shore resources could be allocated to the coastal state in the light of its "special interest".[108] On the other hand, its positive merits are recognized in its affirmation of the goal of conservation and its imposition of a duty of co-operation on fishing states to achieve this goal.[109]

As far as regional fishing conventions are concerned, there are in existence a number of these conventions controlling the exploitation of fisheries in various regions of the world's oceans. Among the most important are the North-East Atlantic Fisheries Convention (1959),[110] the International Convention for the North West Atlantic Fisheries (1949),[111] and the International Convention for the High Sea Fisheries of the North Pacific Ocean (1952).[112] The main value of these Conventions is they establish an inter-nation forum for the resolution of conflicts of interests according to standards of conservation backed up by scientific research.

Regional fisheries conventions may create commissions to institute and oversee the carrying out of conservation measures. In some cases these agencies have merely recommendatory powers, in some cases they have power to adopt

106. Art.9.
107. This would appear to mean that they can be effectively observed in the light of existing fishery practices.
108. See Anderson, "The Geneva Convention: Ten Years Later", 3 *Proc. 3rd Ann. Conf. of the Law of the Sea Institute* (1968) 77–78.
109. Bishop, *op. cit.*, n. 100 at 1228–1229.
110. See Johnston, *International Law of Fisheries*, 363–365. The European Fisheries Convention of 1964 differs from this Convention in that it is concerned with defining zones of jurisdiction of the coastal state.
111. See Johnston, *International Law of Fisheries* 366–369.
112. This Convention is discussed in "North Pacific Fisheries Symposium", 43 Washington Law Review (1967) 1 *et seq.* As constrasted with the other Conventions it is based on the contentious doctrine of abstention. See Johnston, "The Japanese—U.S. Salmon Conflict", 43 Washington Law Review (1967) at 27.

measures by regulation. As far as enforcement is concerned,[113] under some conventions this may be vested in the flag state; in other cases an international "control system" may be established whereby authorized officers of a Contracting Party may board a vessel of another Party to see if there has been an infringment of the prescribed measures, but the conferment of a right of seizure is rare.[114]

Any evaluation of the present international law of fisheries must take account of three features:

(a) the adequacy of the concept of conservation and the measures adopted to achieve the end,
(b) the machinery by which these measures are to be carried out,
(c) the need for the recognition of preferential rights for the coastal state.

The concept of "optimum sustainable yield" has long been recognized as a basic standard to be applied in international fisheries negotiations. Its appeal lies in the fact that it is a scientific concept which can be subject to experimental analysis. It takes account, inter alia, of the movement of species of fish in various areas of the world's oceans, their breeding habits, the effects of fishing activity and the use of various types of gear. When such observations reveal that the present or imminent level of fishing activity in a particular stock will lead to a decline in that stock, then the standard of maximum sustainable yield may be invoked to impose some check on the activity.

The measures which may be adopted to achieve this end have been classified into:

A. Regulations affecting Minimum Age and Size, among which may be noted control of gear (particularly the mesh of nets and catching apparatus) and the imposition of size limits and the preservation of nursery areas which are designed to assist the younger species to maturity.

B. Regulations affecting Fishing Mortality. Some of the measures falling within this category are: closed areas, closed seasons, efficiency reduction, control of the number of vessels, and quotas.[115] All of these measures are designed to achieve a reduction in fishing intensity in order to preserve stock.

A criticism, however, directed against most of these methods is that, tied as they are to the concept of maximum biological yield, they ignore important economic aspects of fishing e.g. profitability of the operations in the light of the measures adopted. For example, it is pointed out that area closures may be effective in reducing mortality but they have the effect of forcing fishing vessels to go greater distances, thus increasing the cost of fishing operations. Likewise, restrictions on the use of certain types of gear may conduce to inefficiency.[116]

However, one particular method which has been suggested as giving adequate protection to the biological goal as well as ensuring that fishing nations can derive economic benefit from the adoption of conservation policies is an overall catch limit coupled with national quotas, which permits overall regulation of the

113. For a study of different control systems see Carroz and Roche, "The International Policing of High Seas Fisheries" (1968) *Canadian Year Book of International Law* 61.
114. *Ibid.*, at 73.
115. See Eisenbud, "Understanding the International Fisheries debate" 4 *Natural Resources Lawyer* (1971) 1 at 28–30.
Crutchfield, "National Quotas for the North Atlantic Fisheries: An Exercise in Second Best", *Proc. 3rd Ann. Cont. Law of the Sea Institute* (1968) 263.
116. Crutchfield, *op. cit.* at 266.

catching of a stock combined with a system of allocating the catch among individual states.[117]

A United States Commission on Marine Science, Engineering and Resources which issued a Report in 1969 favours this method of conservation.[118] In its Report the Commission set out what it considered to be the desiderata of a fisheries policy:

(a) It must encourage the development of the vast food resources of the sea at the lowest possible cost in order to combat world hunger,
(b) It must promote the orderly and economically efficient exploitation of the living resources of the sea, with adequate regard for their conservation,
(c) It must not provoke international conflict but rather contribute positively to international order, welfare and equity.[119]

Various alternative policies were considered by the Commission. There would appear to be three major alternative regimes which can be applied to international fisheries. In the first place there are the national solutions involving the extension of the territorial sea or exclusive fisheries zone to a fixed line, or establishing such jurisdiction over waters covering the continental shelf or over waters in geographical contiguous areas (as with Canada). One argument against this type of unilateral control is that fish are migratory and therefore catching cannot be effectively regulated by the creation of such zones: in any event, it is said, this would lead to overfishing in areas just outside these zones.[120] If, however, the zone is wide enough or encompasses a fisheries species dependent for its nutriment on coastal waters throughout its life cycle then an extended national fisheries jurisdiction may well achieve its purpose of reserving the fish for the coastal state. The major argument against such extension must surely be that the freedom of the high seas is impaired and weakened by the recognition of exclusive zones beyond 12 miles and that the coastal states' special interest can be protected in other ways.[121]

At the other extreme is the idea that management of high seas fisheries should be vested in an international organization or agency.[122] Such a proposal does not seem compatible with the present climate of international opinion. It would be vehemently resisted by both deep sea fishery states as well as those states with an interest in near-shore fishing on the ground that it would deprive them of rights which they already have under international law. There are doubts whether such a body could effectively carry out commercial and management policies associated with its responsibilities or make an appropriate distribution of profits derived from catches among participant states.

One possible structure, however, which deserves further study is the creation of international companies or some other form of co-operative system in which participatory states would contribute capital (retaining proportionate shareholding control) to engage either in fishing or in the marketing of the catch.

117. *Ibid.*, at 269 *et seq.*
118. *Our Nation and the Sea: A Plan for National Action* (Washington: U.S. Government Printing Office, 1969). The Report is discussed in *Proc. 4th Ann. Conf. Law of the Sea Institute* (1969) 286 *et seq.* A particular recommendation was that it could be applied in the first place to the cod and haddock fisheries in the North Atlantic.
119. *Ibid.*, at 286.
120. Eisenbud, *op. cit.*, at 41.
Kask, "Marine Science Commission Recommendations on International Fisheries Organization" *Proc. 4th Ann. Conf. Law of the Sea Institute* at 288–289.
121. See Chapman, "The Ocean Regime of the Real World", *ibid.* 446 at 460–461.
122. Kask, *op. cit.*, at 289.

Such "joint venture" bodies would ensure a rational use of resources (e.g. vessels) and an equitable sharing of profits.[123]

The international regime favoured by the United States Marine Resources Commission and by a number of commentators is the establishment and expansion of regional fishery bodies to supervize and control the fishing of particular stocks in the areas coming within their jurisdiction.[124] Such bodies would have certain regulatory powers, would be backed by adequate financing plans for fisheries research, and would be staffed by scientists as well as administrators. They would consider all appropriate measures of conservation and would also have the power of allocating quotas if these were adopted as an appropriate method of conservation. As one commentator puts it:

> Negotiations in such a situation should be based on the fact that the only alternative to the acceptance of a compromise share in a reasonably efficient fishery managed by a group owner is the depletion of the fish stock and economic loss that will result from unrestricted fishing effort.[125]

In this regard one particular suggestion may be noted: that if national quotas are adopted as appropriate conservation methods, then a preference should be granted in the allocation of the quotas to the coastal state in relation to resources in areas near its coast.[126] This, it is suggested, would go some way to damping down the tendency to claim wide territorial seas or exclusive fishing zones.

This suggestion may, however, cause some controversy.[127] Some would argue strongly that the best approach is to give support to moves to secure wider acceptance of the Geneva Convention on Fishing and use of its arbitration procedure.[128] This would protect freedom of fishing but would allow non-discriminatory conservation measures to be adopted where necessary. However, it may be that any system of conservation controls which does not take account of the right of the coastal state to some preference in fishing resources in contiguous areas (such preference involving discrimination in its favour) may not be acceptable in the light of the increasing tendency to claim extended fisheries zones.[129]

CONCLUSIONS

At this stage, it is difficult to speculate on the final form of the draft treaty or treaties which will be presented to the Conference. Nevertheless, we may offer some comment on the policies involved in any revision of the existing Conventions.

123. Goldie, "The Ocean Resources and International Law: Possible Developments in Regional Fisheries Management" 8 Columbia Journal of Transnational Law (1969) 1 at 47–51.
124. Burke, "A Contemporary Legal Problem in Ocean Development", 3 International Lawyer (1969) 531 at 548. Nomura, "Fisheries Jurisdiction beyond the Territorial Sea with Special Reference to the Policy of the United States", 44 Washington Law Review (1968) 307 at 332 *et seq.*
Eisenbud, "Understanding the International Fisheries Debate", 4 Natural Resources Lawyer (1971) 1 at 45 *et seq.*
125. Eisenbud, *op. cit.*, at 44–45.
126. See "Marine Science Commission Recommendations on International Fisheries Organisations", *Proc. 4th Ann. Conf. Law of the Sea Institute* 286 at 294.
127. See Goldie, *op. cit.*, n. 122 at 44.
128. Schaefer, *Proc. 4th Ann. Conf. Law of the Sea Institute* 305 at 307, Chapman, *ibid.*, at 464–465.
129. Kask, *ibid.*, at 294–295.

Deep Seabed

It would seem that the choice lies between the acceptance of an intermediate zone (with mixed national and international features) commencing at the 200 metre line and proceeding at least to the bottom of the continental slope or an international regime commencing at the bottom of the slope or rise. It is unlikely that any attempt to establish a complete international regime from the 200 metre line (even with, say, a 100 mile "distance from shore" alternative means of demarcation) would be acceptable as it would deprive states of their rights under the Convention on the Continental Shelf and customary international law.

As to the form of agency or body to be established with powers over the international area, it would seem that the narrower the area within exclusive national jurisdiction, the greater need there is for a licensing authority as distinct from a registration agency. This would be because of the likelihood of competing claims to exploit minerals in those areas which are closer to the coastline. On the other hand, the proponents of the "wide shelf" doctrine would be more likely to favour a body with power to register or record claims and possibly with some control over exploitation activities. It is apparent that the financial benefits to be derived from exploitation of resources in the deep sea area remaining after national jurisdiction has been extended down the slope—which the 'wide shelf" school favours—would be far less than that derived from an international regime operating from the 200 metre line and therefore an elaborately-structured body to deal with licensing and other arrangements would not be necessary if national jurisdiction is extended down the slope.

Apart from questions of control and licensing it is the financial benefit argument which will assume the greatest importance in the deliberations at the 1973 Conference. Assuming that technological development beyond the slope will not occur for decades, the only prospect of successful operations would be on the slope. Therefore, whatever may be the final form of the regime, the international community can only look forward in the foreseeable future to sharing revenue derived from exploitation of slope resources. It will of course be difficult to secure agreement on the criteria to be adopted for distributing such revenue: it may be noted that the United States proposal is to have it distributed to international and regional developmental organizations. The expectation is that the developing countries will be favourably inclined to such a regime because of its strong emphasis on their needs. However in so far as a number of these countries have already granted licenses for operations on their shelves, it may be that they would prefer to participate in the wealth derived from any discoveries on their slopes by negotiation with possible licensees under their own national law rather than participate in an international regime, the financial benefits from which cannot be foreseen as coming back to them directly.

Territorial waters, innocent passage and related matters

As we have suggested already, from the point of view of a clash of interests, it is this area and fisheries which may emerge as the most important matters to be resolved at the Conference. We have seen that certain ambiguities and omissions are to be found in the Convention on the Territorial Sea and the Contiguous Zone. If the Conference sanctions a 12 mile territorial limit, there ought to be a more exact definition of the right of innocent passage through such waters and the right of overflight over such waters or at least over those which are classified as straits. It would also seem necessary to spell out that the right of innocent passage applies to warships. Associated with this is the meaning of the

term "innocent" and the rights of the coastal state to regulate such passage. The existing criteria in the Convention are sufficiently vague to permit the coastal state to take action which may jeopardize the freedom of navigation. Finally, the right of passage through straits will need to be considered. This is a most difficult question. It may well be that the word "strait", conjuring up as it does stretches of water joining two seas or oceans should be replaced by some more comprehensive terminology such as "sealane" or "waterway". Certainly, existing volume of use should not be allowed to dominate the definition: the possibility of new sea routes being opened up must be accepted. The question here will be to determine how much descriptive content to include in any attempted modification of Article 16(4).

An acceptance of a 12 mile territorial sea ought to be accompanied by some more explicit indication of the nature of the baselines from which the territorial sea is to be measured. It may be possible to reach agreement despite failure at the 1958 Conference on a combination of length of baseline and "distance from the coast" criterion: failing that, some specification of maximum length would be valuable in resolving the existing uncertainty: something between 15 and 25 miles might afford a reasonable accommodation of interests.

As far as historic bays are concerned, some attempt might be made to spell out the traditional rules founding a claim to such bays. In the past, proposals have been made for setting up an International Registry with which states might register claims. The defects in this suggestion have been noted in the Report prepared for the United Secretariat in 1962 on the status of historic bays[130] but it could be looked at again. Failing this, the suggestion in the Report that a method of resolving disputes arising over such claims such as arbitration or judicial settlement could be incorporated in any revision of the law.[131]

As to contiguous zones the main issue will be whether a "sanitary" or "anti-pollution" zone extending more than 12 miles from a coastline and subject to the jurisdiction of the coastal state should be sanctioned. In so far as marine pollution is already the subject of multilateral treaties, and will also be a subject for discussion at the United Nations Conference on the Environment in 1972, it would seem preferable not to sanction in a general law of the sea convention an extension of exclusive coastal state jurisdiction which might undermine the freedom of the high seas.

Fisheries

Debate in this context will centre on the adequacy of the Convention on Fishing and Conservation of the Living Resources of the High Seas. We have discussed the provisions for negotiation and arbitration contained in this Convention and also the limited case in which unilateral measures may be imposed by the coastal state. The requirement of non-discrimination has been said by some not to give adequate protection to the interests of the coastal state. Assuming that the maximum sustainable yield has been or is about to be reached in relation to a species of fish in an adjacent zone and that a catch limit plus national quota system is the most practicable method of conserving such species outside the 12 miles zone, [132] there is some justification for allocating to the coastal state a preferential participation on the basis of special interest. This

130. *Juridical Regime of Historic Waters including Historic Bays*, U.N. Doc. A/CN. 4/143, pp. 67–70.
131. *Ibid.*, 70–71.
132. This does not mean that other methods of conservation (e.g. gear control) might not be more practicable in some cases.

special interest could be based on fishing effort or economic dependence but, as these are rather vague criteria, it would be better to base the justification on biological[133] associated with geographical criteria.[134]

These criteria could be clearly spelt out in any revision of the articles of the Convention on Fishing (e.g. Article 6) and as grounds for determining the validity of conservation measures which would be subject to review under the arbitration procedure. To this limited extent, the non-discrimination requirement in the Convention could be amended. However, very careful drafting would be necessary; otherwise there is a danger that preferential rights might be converted into exclusive claims.

Provision having been made for the special interest of the coastal state in the exploitation and conservation of fisheries in adjacent waters, the emphasis should then be placed on the improvement of the existing regional fishery arrangements. The establishment of an international fisheries organization would be premature, but the possibility of regional groupings being unified in some wider association in the decades to come should not be ruled out.

R.D. LUMB*

133. For instance, that the fish were spawned in the waters and streams of the coastal state.
134. For instance, that the configuration of the coastline offers a species of fish a special environment for the continuation of its life cycle. In this respect bays and semi-enclosed areas of waters which do not come within the definition of internal waters under the Convention on the Territorial Sea could nevertheless be treated as fishing conservation zones. The Canadian legislation is based on this geographic principle but its defect lies in the fact that it purports to create exclusive fishing zones and not conservation zones. The combination of biological and geographic criteria as a basis for conservation zones would seem to especially apply to species of crustaceans which do not come within the definition of sedentary resources in the Convention on the Continental Shelf but which because of their dependence for their nutriment on the effluvia of coastal streams and their limited movement capabilities are likely to be concentrated in coastal areas, particularly in coastal indentations.

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