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THE LAW OF THE HIGH SEAS

IN TIME OF PEACE

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It perhaps requires no emphasis to this professional audience that the preceding lecture on "coastal state interests" (making reference to internal waters, the territorial sea, the contiguous zone, and the Continental Shelf) and our topic for today, the "freedoms" of the high seas in time of peace, are but two sides of the same coin. The exclusive interests of coastal states in the enjoyment of proximate waters and the inclusive interests of all states, even including the landlocked, in the enjoyment of the oceans of the world are entirely complementary: when exclusive interests are expanded and inflated, inclusive interests must be contracted and deflated. The principal and continuing task of the whole law of the sea, of the public order of the oceans, is thus that of achieving in every particular context, a balancing or accommodation of these complementary interests which will best promote the long-term common interests of all peoples, while rejecting any claims of special interest destructive of such common interests.

You are all familiar with the tremendous technological changes in recent decades that are permitting multiple new uses, both constructive and destructive, of the vast potential reservoir of values that we call the oceans. You are also familiar with the increasing demands that different peoples about the world are making upon the oceans for the enjoyment of both old and new uses. Unhappily, many of these demands are not being made in terms of a common interest—designed to secure

the utmost productive use of a great sharable resource through practices of reciprocity and mutual tolerance—but rather in terms of special interest, for unilateral monopolization of the resource and the destruction of shared competence and enjoyment. It is but one of the paradoxes of our time that the most extravagant claims to monopolistic control over the oceans are being put forward in the guise of preserving "the common heritage of mankind."

Some 10 years ago Professor William T. Burke and I wrote a book, *The Public Order of the Oceans: a Contemporary International Law of the Sea.* Among other things, we sought to examine and appraise the historic record of the international law of the sea. The conclusion to which we came, after a survey of the record, was that this law, with a minimum of centralized organization and an economic body of none-too-complex rules, had served, and continues to serve, mankind well in an inestimably greater production and wider distribution of shared values than might have been, or might be, achieved by monopolistic control.

Today it would appear that we may be confronted, in a widespread disintegration of perceptions of common interest, with the imminent dissolution of the principles and institutions which in recent decades at least have served the whole of mankind so well. With strong preferences for the protection of common and rejection of special interests and for a balancing in favor of inclusive rather than exclusive interests, I confess that I may appear before you today as a pleader for forlorn, lost causes.

In developing this theme of contemporary disintegration, I propose to proceed under the following four main heads:

- The Specification of the Unique Problems of the High Seas
- The Clarification of Basic General Community Policies
- Trends in Past Decisions with Respect to the Different Types of Problems
- Possible Alternatives with Respect to Emerging and Future Problems

I

We begin with the specification of problems.

To make certain that we communicate, I must be sure that we share the same conceptions of international law and of the law of the sea. By international law I mean the comprehensive process of authoritative decision, transcending all territorial boundaries, by which the peoples of the world clarify and implement their common interests. When we look at any community, that is, any group of people exhibiting interdeterminations and interdependences, we can observe a process of effective power in the sense that decisions are taken and enforced whether particular people like it or not. Such a process is observable on a global scale. Even the Russians, the Communist Chinese, and ourselves are scorpions in the same bottle who must take each other's decisions into account.

When we look closely at effective power decisions, we can see that they are of two different kinds. Some are taken by naked power, by sheer calculations of expediency in self-interest; but others are taken in accordance with general community expectations. These latter decisions are taken by the people who are expected to take them and in arenas of constituted authority, such as courts, legislatures, and executive departments. They are taken in accordance with community expectations about how they should be made—about appropriate policies and criteria. They are taken by established procedures and enforced in sufficient degree to be of community consequence; they have adequate sanctions in common interest, reciprocity, and retaliation.

It is this latter flow of decisions,

those taken and enforced in accordance with general community expectations, which—when projected on a transnational scale—we mean by international law. International law is much more than, as sometimes described in the books, a body of abstract rules. The rules merely describe, and often most inadequately, past decisions. International law is a living, contemporaneous process of choice, which includes both the perspectives of community members about such choices and the operations or authoritative practices by which such choices are put into controlling effect.

When we look more carefully at the flow of authoritative decision in the global community, as in any community, we can see that it is composed of two different kinds of decisions. The first are the decisions which establish and maintain the most comprehensive process of authoritative and controlling decision. We may call these the "constitutional" or, preferably, the constitutive decisions. These are the decisions which determine who the authorized decision-makers are; what policies they are to follow; in what structures of authority they are to act; what their bases of power for sanctioning purposes are to be; and what procedures they are to follow in making all the different kinds of decisions necessary to clarifying and implementing general community policy. In the global community, as in most communities (even those with written constitutional documents), this constitutive process is largely a product of the expectations people create in each other by their continuous cooperative behavior.

The second kind of decisions, embraced within any comprehensive process of authoritative decision, are those that emerge from constitutive process for the regulation of all the community's various value processes. These are the decisions by which resources are allocated, planned, developed, and exploited; by which an environment is protected or devastated; by which populations are protected, regulated, and controlled; by which an economy is maintained or destroyed; by which health is fostered or neglected; by which human rights are protected or deprived; by which enlightenment is encouraged or retarded; and so on. One might describe this second kind, or category, of decisions in many different ways. For convenience we refer to them as "public order" decisions.

What we mean by "the law of the sea" may now be made clear. The law of the sea comprises the "public order" decisions which a global constitutive process, established and maintained by all states, even including the landlocked, prescribes and applies for clarifying and securing the common interests of all peoples in the enjoyment of the oceans. In comparable terms, we might speak of the law of outer space, the law of international rivers, the law of the polar regions, and so on.

Before moving to the details of the law of the sea, I should like to refer briefly to certain features of the larger global constitutive process of especial relevance. Most importantly, in recent decades we can observe a tremendous democratization. In addition to nation-states, international governmental organizations, political parties, pressure groups, private associations, and even individual human beings have begun to play significant roles. With this increase in the range of effective participants has come a large proliferation in the number of territorial and functional entities demanding and being given voice. On problems other than with respect to the oceans, one might discern an increasing emphasis upon the necessity for protecting common interests, with rejection of all claims of special interest. Witness the provisions of the United Nations Charter, article 2(4) for the minimization of coercion, the elaborate clarification of individual human rights in many declarations and covenants, and the

projected policies for the shared enjoyment of international rivers, the polar regions, and outer space and for the protection of the environment more generally. One might observe also an enormous increase in organized, inclusive structures of authority—as in the United Nations and the specialized and regional agencies—with some trend toward openness in access and making appearance compulsory for participants whose choices in fact affect community policy. There would appear also a modest trend toward allocating to representatives of the inclusive community both the authority and other assets required for the better securing of demanded public order. The authority and control of the United Nations and the specialized agencies are being increasingly enhanced by the demands, identifications, and expectations of the peoples of the world.

One critical feature of the larger constitutive process relates to how international law, including the law of the sea, is made. Historically, international law has been made largely in two different ways. One way is by an explicit agreement process in which varying numbers of states get together and project a common policy in relatively deliberate, explicit form. The other, and by far the most important, way has been by unarticulated, habitual cooperative behavior in different kinds of activities from which expectations about authority and control are derived. In this latter modality of lawmaking, it is not, as some recent clamant voices have asserted, the *unilateral* claim by one state that makes law, but rather the parallel claims by many states made in a context of expectations of reciprocity and mutual tolerance. Fortunately, the practices of the United Nations have given a great assist to both these traditional modes of lawmaking and are beginning to add an institutional dimension more closely approximating genuine parliamentary enactment.

With this background in constitutive process, we are now in a position to return to our initial task of delimiting the unique features and problems of the law of the sea which is prescribed and applied by such process. What makes the law of the sea unique is the difference in the degree to which the oceans and landmasses of the world admit of shared, noncompetitive enjoyment in the production and distribution of values.

The oceans admit of shared enjoyment in high degree. Many of the resources of the oceans are vast, nonconsumable, nonexhaustible, or renewable; by appropriate rules of the road, their enjoyment can be made noncompetitive, while remaining economic. Where one ship has just been, another can soon come. When the initiative, energies, capital, and skills of all peoples can be brought to bear upon the enjoyment of such a resource, the production and distribution of values can, in a "multiplier" effect, be enormously enhanced for the benefit of all.

The landmasses of the earth do not admit of shared enjoyment in the same degree. Their relative solidity facilitates the establishment of permanent sedentary communities with exclusive claims, and their natural barriers such as mountains, streams, bodies of waters, and deserts inhibit freedom of movement. Hence, the global constitutive process has honored the exclusive appropriation, through the organization of territorial communities, of most landmasses. Even so, one observable function of what is called private international law is an effort to make the landmasses as sharable as possible by building and maintaining a world economy.

The different territorial communities do, of course, require some protection from, and enjoyment of, the immediately proximate oceans for the safe, healthy, and secure functioning of their internal value processes. It is for this reason that the global constitutive

process honors their claims in relation to internal waters, the territorial sea, contiguous zones, and occasional exercises of a unilateral competence in self-defense even upon the high seas. Such claims are rooted in different exclusive interests in the sense that no two states have precisely the same coastlines or precisely the same requirements in internal waters, territorial sea, contiguous zones, or self-defense. They are, however, common interests in the sense that every coastal state has an interest in the effective protection of the activities on its landmasses from activities on the oceans. The claims become expressive of special interest, and hence requiring rejection, only when they are asserted beyond need and irrespective of their impact upon others.

It is the complementary inclusive interests of all peoples in the shared enjoyment of the oceans, interests that are commonly subsumed under the label "freedom of the seas" for summary contrast with the exclusive coastal state interests, that are our especial concern in this discussion today. For systematic examination and appraisal of the clamant contemporary assertions that—because of changed conditions in the exploitation of the oceans and because of the more general desperate economic needs of the developing countries—the "freedom of the seas" has become outmoded and that it has become necessary greatly to curtail the protection that world constitutive process affords inclusive interests, I propose to organize our discussion in terms of the more important types of claims that states have traditionally made against each other for the protection of their inclusive interests. These claims may be briefly itemized as follows:

- Claims relating to delimitation of the boundaries between inclusive and exclusive interests.
- Claims relating to freedom of access to the oceans for use.
- Claims relating to the exclusive appropriation of resources.
- Claims relating to jurisdiction (the making and application of law) with respect to activities upon the oceans.
- Claims relating to the maintenance of minimum order (prevention of unauthorized violence) upon the oceans.
- Claims relating to the promotion of optimum order (maximum production of values) in the enjoyment of the oceans.

Each of these claims is distinguishable in that certain unique policies apply to it; yet all are interrelated in that the decisions about them, taken as a whole, determine the aggregate public order of the oceans and, hence, require the most explicit and careful relation to basic general community policies.

II

We turn now to the clarification, from the standpoint of an observer who seeks to identify with the whole larger community of mankind, of basic, general community policies.

It is necessary to begin with highest level abstractions, since how we perceive the whole vitally affects how we perceive the part. The first proposition I would advance is that it is the prime responsibility of global constitutive process in relation to the public order of the oceans, as in relation to any other aspect of transnational public order, to clarify and protect the common interests of all peoples and to reject all claims of special interests. By common interests I refer to shared demands for values whose achievement is affected by conditions of interdependence or interdetermination. By special interests I refer to those which are destructive of common interests, in the sense that the demand for values cannot be shared even in equivalencies and that their achievement is violative of the conditions of interdependence, imposing unnecessary harm upon others.

The common interests of all peoples in the enjoyment of the oceans are, as already emphasized, of two different kinds: inclusive and exclusive. By inclusive I refer to interests in activities that have significant transnational effects, that is, which importantly affect more than one territorial community. By exclusive I refer to interests in activities which predominantly affect only one territorial community.

The inclusive interests of peoples in the enjoyment of the oceans may be described as relating to both minimum order and optimum order. By minimum order I refer to the conduct of activities by the processes of persuasion and agreement, with a minimum of unauthorized violence and other coercion. By optimum order I refer to cooperative activity in the greater production and wider distribution of all values, in the maintenance of a world economy and society.

The exclusive interests of peoples may be described, similarly, in terms of both minimum and optimum order. Every coastal state has an interest in protecting its own internal minimum order, its relatively unique processes of cooperative activity, from unauthorized coercion, whether such coercion comes from internal or external sources. Every state has also an interest in its own internal optimum order, in the healthy functioning of its relatively unique processes for the shaping and sharing of all values.

In very recent times it has been strongly urged that the developing countries should be accorded a special width of territorial sea and other concessions, beyond what has traditionally been regarded as in common interest, because of their special economic needs and as a way of righting the wrongs of a historic maldistribution of income. It is explicitly recognized that these claims cannot be made with a promise of reciprocity to others and that they cannot be honored except by severe restriction of the previously protected inclusive rights of all. It may be suggested that these claims on behalf of the developing states are most misguided in relation to common interest. The developing states could win by such extensions of their protected interests only if other states acquiesced and did not make comparable demands for extension. If a large number of other states make comparable demands, the sharable resource that lays the golden egg in multiplying the production of values can no longer be shared and everybody, including the developing states, will lose. The history of the law of the sea in recent decades, when not distorted for partisan purposes, demonstrates that the oceans can be maintained as a sharable resource open to all with the necessary initiative, skill, and capital, with tremendous benefits for all in the production and distribution of values. The claims on behalf of the developing states are claims of special interests both in that their demands for values cannot be shared even in equivalences and that the conditions of their achievement must violate interdependences with others. The historic inequities in the distribution of income might be better remedied by appropriate reorganization upon the landmasses than by destroying the multiplier potential of the oceans.

The implications of these broad policies for decision about specific problems will be made apparent below.

III

Let us turn next to the description of past trends in decision with respect to the different kinds of problems.

We begin with the problem of establishing boundaries between inclusive and exclusive interests. For many decades, until very recent times at least, our global constitutive process indulged a strong presumption in favor of inclusive interests, limiting the area of exclusive

coastal interests as much as possible and permitting their expansion only as particular urgent purposes might require.

Thus, the baseline which marked the outer boundary of "internal waters," from which the territorial sea was measured, was required to follow the sinuosities of the coast, with only modest exception for bays. It was not until the *Norwegian Fisheries case*,[1] which rightly or wrongly found certain special needs in Norway for fish, that this requirement began to be relaxed.

Similarly, prior to the 1960 Geneva Conference, it was generally agreed that the width of the territorial sea had to be very narrow, with most states claiming only 3 miles. Even at the Geneva Conference it was agreed that states had no unilateral competence to extend their territorial sea at the expense of the public domain, and 12 miles was regarded as the utmost limit that anybody thought lawful. All this consensus was in wise recognition that the territorial sea has largely ceased to serve any common interest in the protection of exclusive coastal interests. The two principal justifications of a territorial sea have been traditionally formulated in terms of security and the need for fish. Yet the width of the territorial sea has today practically no relation to military security: attacks can come from anywhere on the oceans or from the other side of the moon. When special security needs arise, they can be taken care of by contiguous zones or equivalent concepts. The width of the territorial sea has, again, almost equally little relation to the exploitation of fisheries. Most fish simply do not move, breed, and live within narrow bands of water off the coasts. It would require an enormous expropriation of the "common heritage" for any single state to obtain control over important stocks of fish. It is for these reasons that I continue to tell my classes that the most rational width of the territorial sea would end at the low-water mark.

The extension of unilateral competence through the device of "contiguous zones" has also been strictly limited to distances regarded as "reasonable" for the particular purposes for which such zones are claimed. States making special claims for the protection of their security, customs and fiscal regulations, immigration laws, health, and so on have been required to tailor the zones claimed quite precisely to fit the special needs asserted, with the least possible infringement of inclusive interests. The Geneva Convention on the Territorial Sea and the Contiguous Zone goes so far, quite irrationally and impractically I think, as to limit all such claims to "twelve miles from the base line from which the breadth of the territorial sea is measured." Whether irrational and impractical or not, this asserted limit does demonstrate that its framers had not the slightest dream of the lawfulness of the contemporary extravagant claims about the width of the territorial sea.

The recent expansion of exclusive coastal state interests through the concept of the "Continental Shelf" has, as in the case of contiguous zones, been limited more by purpose than by distance. It may be recalled that the Convention on the Continental Shelf, despite its reference to a depth of 200 meters, in express terms limits the width of the shelf only by requirements of "adjacency" and "exploitability," which are somewhat open ended. The limits in terms of purpose are, however, clear and important. The monopoly of the coastal state is extended only to certain exhaustible stock resources, that is, "the mineral and other non-living resources of the seabed and subsoil," and to certain relatively immobile organisms. The policies for distinguishing these resources relate, quite rationally in common interest, to the economy and technology of exploitation, to dangers of pollution, and to potential threats to security from fixed, relatively per-

manent installations. It is expressly provided in the convention that this limited monopoly in the coastal state is not to affect the legal status of the superjacent waters or airspace and is not to be exercised in ways interfering with traditional inclusive interests.

The contemporary disintegration in perceptions of common interest, referred to above, is reflected both in widespread assertions of a unilateral competence to extend all these areas of exclusive interest and in occasional suggestions that there are no good reasons for maintaining the nice historic discriminations in the purposes for which the different areas are protected, that is, that global constitutive process should honor a single broad area of exclusive coastal interest.

Turning to problems of access to areas agreed to be within the inclusive domain, we can observe that in recent decades global constitutive process has sought the utmost freedom of access for all peoples for the greatest variety of purposes. Thus, the Geneva Convention on the High Seas not only explicitly stipulates for protection such traditional freedoms as those of navigation, fishing, laying of submarine cables and pipelines, and flying over the high seas, but also adds an *inter alia*, which provides protection for the great host of emerging new uses. The potentialities of these emerging new uses—in the production and distribution of values for the benefit of all peoples—must stagger even an informed imagination: contemporary anticipations make reference to imminent developments in exploitation of the mineral and other resources of the deep seabed, improved fisheries, underwater transportation, scientific inquiry, weather forecasting and climate control, ecological conservation, power development, sea farming, storage and disposal, undersea residence, floating cities, recreation and therapy, and so on.

Fortunately, the contemporary uninformed attacks upon the "freedom of the seas" do not directly question the importance either of equal access or of the protection of open-ended purposes in the enjoyment of the "high seas." What these attacks fail to perceive is that the more comprehensive the area in which such freedom of access and multiplication of activities are protected (that is, the greater the area included within the "high seas"), the greater the multiplier effect from shared enjoyment in the production and distribution of values.

The particular resources of the oceans, which may be held open for inclusive enjoyment or subjected to exclusive appropriation, are of very different kinds in terms of their characteristics bearing upon the potentialities of shared use. There are "space-extension" resources whose distinctive characteristic is their utility as media of movement, transportation, and communication. There are "flow" or renewable resources, of which different quantities become available at different times and which may or may not be increased or diminished by human action. Finally, there are "stock" resources, of which the quantity is relatively fixed and which may be abundant or scarce.[2]

It has been a principal function of the doctrine of the "freedom of the seas" to maintain space-extension resources, within the area of the inclusive domain, open for shared enjoyment by all. Since any particular use of a space-extension resource need not interfere with other uses or reduce productivity, the larger the number of participants who engage in use, the greater is the production and distribution of values. Hence, global constitutive process has long enforced a strong presumption in favor of inclusive enjoyment of navigation, flying, cable-laying, pipe-laying, scientific inquiry, and so on.

The principal flow or renewable resources are, of course, fish. Different kinds of fish apparently differ in

measure in the degree to which their renewability is affected by the activities of man and have a critical point in their exploitation. Most kinds of fish would appear, however, to inhabit the oceans in such abundance as to require only modest, if any, measures in conservation for shared enjoyment. Hence, global constitutive process has, again, decreed a strong presumption in favor of such enjoyment. Particular states have been accorded exclusive preferential rights only in cases of exceptional need, and restrictive measures for purposes of conservation have, except for a few species, been of minimai impact. One consequence of this shared enjoyment has been an accelerating increase in the production of food from the oceans, though many areas of the oceans still remain largely unexplored.

The established processes of decision have, as yet, had but little experience with allocation of the "stock" resources (petroleum and other minerals) of the oceans. The reservation of such resources beneath Continental Shelves to the coastal states has already been mentioned. The disposition of such resources beneath the surface of the deep seabed is presently a matter of urgent discussion in the global arena, and certain alternatives will be examined below.

The most insistent contemporary misconceptions of common interest are comprised of increasing demands for preferential rights for coastal states with respect to fish. If agreement for an organized, inclusive enjoyment fails, comparable demands may shortly be made with respect to the stock resources of the deep seabed.

It should not be surprising, in a relatively decentralized and unorganized world, that peoples should find the best guarantee of inclusive enjoyment in inclusive competence. For the making and application of law with respect to activities upon the oceans, global constitutive process delegates a highly shared competence to particular states. For decades a few relatively simple rules and a minimum of organization have been employed both to maintain order and to promote optimum enjoyment.

The few rules are built upon the basic constitutive prescription that everybody is entitled to free access to the oceans and that nobody is authorized to exclude anyone else from shared enjoyment. The first rule is that every state may make and apply law to the activities of its own ships and nationals. The second rule is that no state may make and apply law to the ships of other states except for violations of international law—violations relating to piracy, slavetrading, infringements of contiguous zones, threats to security, and so on. The third rule, and the linchpin which has held the whole simple structure of shared competence and enjoyment together, is that every state may ascribe its nationality to a ship and that no state may, for whatever reason, question this ascription of nationality.

The principal attack upon this structure of shared competence has come in the Geneva Convention on the High Seas (article 5) which provides for a "genuine link" between a state conferring nationality and a ship. This concept was derived from the *Nottebohm* case,[3] which fashioned it to deprive an individual human being of access to a tribunal for a hearing on the merits of alleged mistreatment, and no one has ever suggested any rational meaning that might be given to it in relation to ships. At first it was feared that the concept might be employed to permit states unilaterally to question each other's competence to confer nationality on ships. So far these fears have proved unfounded, and it is to be hoped that they will remain groundless. This is not to suggest that there are not problems about labor relations, taxation, safety, and health requirements in relation to ships that require attention.

It is rather to suggest that each of these problems has its own unique remedies and cannot be resolved by destroying the linchpin that holds the entire structure of shared competence together.

The prevalence of shared military uses makes the maintenance of minimum order, that is, the prevention of unauthorized violence, even more complex upon the oceans than upon the landmasses. The basic policies of the United Nations Charter and associated prescriptions apply equally to the oceans as to the landmasses, and the basic distinction between impermissible coercion ("aggression," "threats to the peace," "intervention," et cetera) and permissible coercion ("self-defense," "police action," "reprisals," "sanctions," et cetera) is equally relevant.

The application of these policies remains, however, largely decentralized, and the special circumstances of interaction upon the oceans make assessments of lawfulness and unlawfulness peculiarly difficult. Every state is held responsible for the lawful behavior of the ships to which it ascribes nationality, and when ships are responsible to no state, the historic, but still important, law of piracy becomes applicable.

In very recent days there has been some insistence with respect to the oceans, as with respect to outer space, that "peaceful uses" do not include any military uses. The perception that the present precarious "peace" of the world is dependent not so much upon the prescriptions of the United Nations as upon a very delicate global balancing of power, in which the military uses of the oceans play an important role, has, however, precluded this insistence from being made effective. Some modest steps toward a balanced demilitarization of the oceans have been achieved in the prohibition of nuclear tests and an emerging prohibition of fixed nuclear installations.

For the promotion of optimum order, that is the maximum production and distribution of values, the law of the sea maintains a great variety of prescriptions and institutions. For resolving conflicts between different inclusive uses, between inclusive and exclusive uses, and between different exclusive uses, the overriding aspiration is to achieve an economic accommodation through a systematic, contextual analysis of relative impacts and of the policy consequences of alternatives in decision. This general approach is reflected in comprehensive and detailed prescriptions about a host of problems, such as the allocation of jurisdiction, imposition of liability for injury, rules of the road, conformity with international standards, safety of life at sea, signal codes, assistance to persons and ships in distress, nuclear-powered ships, pollution, and so on. The role of the Inter-Governmental Maritime Consultative Organization in the modernization and administration of these prescriptions is well known.

IV

We come, finally, to the new, emerging problems and possible alternatives for their solution.

A call is being made by the General Assembly for a new United Nations conference on the law of the sea in 1973. At this conference the whole allocation of interests and competences between the inclusive community and coastal states will undoubtedly be brought up for review, and, given the arrogant contemporary perspectives of nationalism and misperceptions of common interest, disaster may impend.

The problems that, thanks to an assist from Ambassador Pardo of Malta, have precipitated this comprehensive review of the law of the sea are those that derive from the newly achieved accessibility of the deep seabed and its resources. From an anthropological perspective, these particular problems might appear to admit of solution either by an extension of the exclusive com-

petence of states or by retention of inclusive competence, with a choice among a number of specific alternatives under each general option.

One alternative in exclusive competence might be to permit coastal states, under the "exploitability" criterion in the Continental Shelf Convention, to extend their authority and control over seabed resources up to a point in the middle of the ocean, where they might confront each other. This approach would require an interpretation of the Continental Shelf Convention not now generally accepted and would, of course, give the bulk of the riches of the deep seabed to only a few states.

Another alternative in exclusive competence might be to regard the surface of the seabed and its underlying riches, as the landmasses were once regarded, as *res nullius* and to honor permanent, exclusive appropriation of areas effectively occupied. This would, of course, reward the strong and technologically advanced states at the expense of others and might lead to intense conflicts as states sought to establish new domains of sovereignty.

Alternatives in inclusive competence would appear to admit of an infinite variety in degrees of organization. The least organized form would be to treat the riches of the seabed as *res communis*, like fish, and to allow participants in the enjoyment of the oceans to stake out claims for limited competence over identifiable and finite submarine areas for the purpose of exploitation. The adoption of this alternative would require states to prescribe and apply mining laws, such as have prevailed upon the landmasses: claimants would be required to give public notice of the areas claimed, to identify and mark the area of operation as clearly as possible, and to commence and complete exploitation of the designated area within a reasonable time. Such a system could be administered without a vast international bureaucracy, and, if agreement upon more organized inclusive competence fails, it could be this alternative with which the peoples of the world will actually operate.

More organized inclusive competence could range from the mere provision of recording or registration facilities and dispute settlement to a monopoly of production and distribution activities by international agencies. There are literally dozens of potential models both in variety of purpose and machinery of administration. Within very recent years the United States, through the initiative of President Nixon, has put forward for consideration by the United Nations one such model which would appear both magnanimous in purpose and highly complex in its prescription and projected administration. This proposal would mark the outer limit of comprehensive, exclusive coastal competence over the resources of the seabed at the point where the waters reach 200 meters in depth, establish a shared competence between coastal states and the general community over the resources of the continental margin beyond the 200-meter point, and provide an international machinery for control of exploration and exploitation beyond the continental margin. From all exploitation beyond the 200-meter point, royalties would be collected for the benefit of the developing countries. It can be expected that many comparable models will burgeon from many other sources, official and nonofficial.

Any rational choice among the options in unorganized and organized exploitation of the resources of the deep seabed must, of course, depend upon the kind and quality of the organization that states can negotiate. The high potentials in, and the necessity for, the most intense cooperation, if all possible multiple uses are to be enjoyed and protected, would appear, however, to establish a strong presumption in favor of a high degree of organized, inclusive competence.

A rational decision about establishing the boundaries between exclusive coastal competence and inclusive general community competence over the resources of the seabed must equally depend upon the purposes and administrative machinery that states can negotiate. Given the legislative history of the Continental Shelf Convention and subsequent practice and authoritative communication, including the *North Sea* case,[4] there would appear little doubt that coastal states may, within the limits of "adjacency" and under the benefits of "exploitability," extend their exclusive competence to the full width of the geologic margin. If, however, states can negotiate purposes and administrative machinery, adequate to ensure the security and other shared exclusive interests of coastal states, to provide for both representative and responsible participation on an inclusive basis, and to afford reasonable promise of an enhanced and economic production of values with an equitable distribution, then common interest might suggest drawing the outer limits of exclusive competence somewhat closer to the shore.

One final emphasis might be that the problem of remedying a global maldistribution of income should not be permitted to blind peoples to the inherent exigencies of a productive use of the oceans. When large portions of a potentially sharable resource are brought under exclusive, monopolistic competence and control, there can only be a diminishing of production. No matter how equitable the formula for distribution, when the total "pie" available to be divided is small, a share may not be worth very much. The special problems involved in allocating a percentage of the oceans' wealth for the benefit of the developing states or for the support of the United Nations can and should be considered on their merits, without their being intermingled with considerations about the most productive and economic employment of resources.

In conclusion, I should like to strike hard the same note with which I began. Law in any community serves the function of clarifying and protecting the common interests of the members of that community. The quality of law that a community can achieve depends most fundamentally upon the perspectives of its members about their common interests: What values they demand, how deeply they identify with the whole community, and the comprehensiveness and realism of their expectations about the conditions under which they can secure their values. For one who seeks to identify with the whole community of mankind and is concerned with the global common interest, the most urgent task is that of clarifying for the peoples of the world the continuing tremendous advantages in maintaining the utmost inclusive competence over, and enjoyment of, the oceans. In peroration about the beauties of a narrow territorial sea, Professor Burke and I made an argument which applies, I think, equally to all the resources of the oceans. We put it this way:

> The positive form of the argument for maintaining the oceans of the world open in the greatest degree possible for inclusive use can be related in detail to every phase of the process of interaction by which the oceans are in fact used and enjoyed. Most importantly, the physical characteristics of the resources sought to be enjoyed—of the oceans as a spatial-extention resource, principally useful as a domain for movement, and of the fisheries as, for the most part, a flow or renewable resource, without a critical zone below which depletion is technologically irreversible—establish that such resources are sharable in highest degree, promising maximum gains to all, with a minimum

of particular losses, from inclusive use. The world social process exhibits many territorial communities, private associations, and individuals with the capabilities, and potential capabilities, of assisting in the exploitation of the riches of the oceans. The ocean areas are so vast that simultaneous activities may go forward, at the cost of only minor physical accommodations, even in the waters closest to coasts. Inclusive access to the oceans both significantly enhances the base values of all participants in their enjoyment and increases the aggregate base values brought to bear by the general community upon exploitation. The strategies by which resources so vast are exploited can be noncompetitive and cooperative, with a minimum of mutual interference and deprivation. The outcomes of inclusive, cooperative enjoyment—as several centuries have demonstrated—can be genuinely integrative, with all winning and none losing, in a tremendous production and wide sharing of benefits.

It is at least incumbent upon those who dispute this position either to give reasons based upon common interest or explicitly to reject common interest as a basis for decision.[5]

FOOTNOTES

1. The Hague, International Court of Justice, "Fisheries Case, Judgment of December 18, 1951," *ICJ Reports* (Hague: 1951), p. 116. The Court, recognizing the unusual configuration of Norway's coast, upheld over United Kingdom challenge a Norwegian territorial sea delimitation that used straight baselines protruding from the outermost points of its land not continuously covered by the sea.

2. The concepts of "flow" and "stock" resources are borrowed from Siegfried von Ciriacy-Wantrup, *Resources Conservation—Economics and Policies* (1952). For further explication of all these types of resources, see Myres S. McDougal, et al., *Law and Public Order in Space* (New Haven: Yale University Press, 1963), p. 776, et seq.

3. The Hague, International Court of Justice, "Nottebohm Case (second phase) Judgment of April 6, 1955," *ICJ Reports* (Hague: 1955), p. 4. Nottebohm, a German citizen resident in Guatemala 34 years, became a naturalized citizen of Liechtenstein in October 1939. Rejecting his claim that Guatemala ignored this Liechtenstein citizenship in illegally deporting him later in the war, the Court held his association with Liechtenstein was too tenuous to justify other states' recognition of that citizenship, which was obtained merely for his protection.

4. The Hague, International Court of Justice, "North Sea Continental Shelf, Judgment," *ICJ Reports* (Hague: 1969), p. 3. The Court found that boundary lines for division of the North Sea Continental Shelf were to be drawn equitably among Germany, Denmark, and Holland. The Court rejected an argument that the 1958 Geneva Convention on the Continental Shelf controlled the division and also held that the principle of equidistant delimitation was not a rule of customary international law.

5. Myres S. McDougal and William T. Burke, *The Public Order of the Oceans* (New Haven: Yale University Press, 1962), p. 564.

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