

INTERNATIONAL LAW OF THE SEA

A REVIEW OF

STATES' OFFSHORE CLAIMS AND COMPETENCES

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INTRODUCTION

The sea constitutes some 70 percent of the Earth's surface. It and its riches have always challenged or charmed men into seeking to gain a livelihood from it—frequently at great risk. From classical times and even earlier, sympathetic magic, religion, and law have regulated man's uses of the sea. Today, however, as never before, science engineering and available capital are permitting new exploitations of the maritime environment and new means of gaining wealth, respect, knowledge, adventure, and power. As technology and investment in ocean activities progress, the legal rules which were evolved to meet less complex uses will have to be strained as the

outer limits of their purposes are passed and the necessary congruence between social fact and relevant legal concept become increasingly attenuated. Hence, unless new rules are formulated, either social facts created by the new maritime economic investments and technological developments will become dislocated or the existing rules debased into legal fictions. In either case those rules are transformed into impediments to further progress, either through their rigidity or through the uncertainties which fictions inevitably generate.

The international law of the sea lacks the many essential institutions and rules and even, to a large extent, the necessary language for effectively managing the maritime resources now or shortly

to become available to man. Accordingly, it threatens to prove inadequate as an impartial framework of claim and decision for equitably distributing competences, titles, rights, and values with respect to those resources and wealth, science, and technology that may develop from them.

This article will provisionally survey and appraise the main patterns of the traditional rules and institutions and critically indicate some novel state claims to exercise exclusive authority over offshore areas which have historically lain within the zones of the free and common high seas.

Traditionally, international law has divided the seas into two great legal categories: those under the sovereignty of coast states, for example, internal waters and territorial waters, and those beyond the sovereignty of any state and which are common to all states, these have been historically designated as the "free high seas." At the present time a number of new categories of state claims seeking to exercise exclusive coastal state authority over additional sea areas are being brought within the same class of exclusive jurisdictional claims as the traditional territorial sea and internal waters (including historical waters). These were unknown to traditional international law. Those which are receiving international legal recognition embrace: contiguous zones; special fisheries zones; zones of special jurisdiction, for example, customs zones; and zones in which exclusive control is claimed for various kinds of weapons testing (this last still including, in the case of France, nuclear and hydrogen weapons testing in maritime areas). In addition to the sea areas subject to the recognized claims of states, there are lawful seabed claims extending beyond territorial limits, namely those over adjacent continental shelves. Again, increasingly states are establishing conservation zones by agreement. There are other types of coastal state claims which

currently lack, even in this generally permissive world, the necessary recognition and acceptance that is essential to erect them into customary law concepts, namely the Chile-Ecuador-Peru (CEP) claims¹ and the "archipelago" claims of Indonesia and the Republic of the Philippines to draw baselines around their island systems from their outermost headlands and islands.²

MARITIME ZONES OF EXCLUSIVE STATE COMPETENCE

Internal Waters. In law, the status of internal waters tends to be assimilated to that of the land of the coastal state.³ That is, coastal states' authority with respect to seas which are classified as internal waters is, juridically speaking, assimilated to the sovereign authority over their land territory—except insofar as the nature of the actual quality of the watery medium or element may impose factual as distinct from juridical differences. These waters include historic bays and bays with straight base or closing lines of less than 24 miles breadth.⁴ Examples of historic bays abound: Chesapeake Bay is a very long-standing one. Again, when the State of California desired to establish the status of Santa Monica Bay as a historic bay,⁵ for the purpose of the Submerged Lands Act of 1953,⁶ she did so to ensure that its waters would not be characterized as territorial seas, but rather as internal waters. A consequence of such a holding would be to bring the submarine oil deposits of the bay and those out to 3 sea miles from the closing line of the bay under the State of California rather than the United States. When the U.S. Supreme Court found against California—in effect by deciding that Santa Monica Bay constituted part of the territorial sea of the United States rather than the internal waters of California—it permitted California to draw her seabed rights under the Submerged

Lands Act only 3 miles from the low-water mark.

Ports, Harbors, and Roadsteads. Ports, harbors, and roadsteads present a complicated picture. While ports and harbors are nearly always internal waters, roadsteads may be territorial waters or high seas. Coastal states have full control over (since harbors and ports fall within the category of internal waters) all vessels and activities within their ports and harbors. On the other hand, history and comity have brought them to subscribe, for reasons of convenience and reciprocity, to policies which recognize that control over the domestic discipline of ships in their harbors should be left to their masters, and so be governed by the laws of the flag state unless a matter involving the peace of the port is involved.⁷ What amounts to a matter involving the peace of the port is always for the port state to determine, for the flag state's authority results from the port state's discretionary withdrawal of jurisdiction for purposes of convenience, reciprocity, and amity. The flag state does not enjoy an international privilege or immunity within the ports of coastal states. Hence, in strict theory, the port state is entitled to treat all matters which affect the "peace of the port" as beyond its discretionary withdrawal of authority and subject to its domestic laws. Furthermore, it is not required to submit to, or permit, polluting and other harmful activities or activities contrary to its health and quarantine laws in its harbors contrary to its laws and policies.

Roadsteads are different from ports and harbors. They may fall within the regimes of either internal waters or the territorial sea or even the high seas (although this latter is doubtful since the historic regulation of traffic in the roadstead and its use for quarantine and customs inspection purposes will generally place such regions under

contiguous zones), depending on location.⁸

The Territorial Sea. This category is distinguishable from ports and harbors as well as from internal waters in that, while the territorial sea is subject to the sovereign power of the coastal state, it is also subject to the rights of shipping which may navigate freely through it—provided that navigation "is innocent." As traditional language phrases this situation, ships may exercise the right of innocent passage through the territorial sea of coastal states.⁹ Innocent passage may also be exercised by warships, according to the U.S. doctrine and according to the Geneva Conventions on the Territorial Sea and Contiguous Zones.¹⁰ This view of the right of innocent passage was shared by the International Court of Justice in the *Corfu Channel Case*. On the other hand, the Soviet Union does not recognize that warships are entitled to enjoy the right of innocent passage. But the Soviets' position on this is not altogether clear, as on so many other points of international law. Although ships may exercise the right of innocent passage, aircraft may not. Finally, ships may lose their right of innocent passage if during transit they disturb the peace of the coastal state in any way or engage in activities which are "non-innocent." Clearly, this would include any activities which the coastal state may regard as polluting its territorial or maritime environment, in addition to the more traditional criteria which turn on the peace, order, and good government of the coastal state.

At one time there was a widespread belief that the territorial sea was, with certain specific exceptions due to local practice, 3 miles in width. This belief in the uniform distance of the territorial sea received a mortal blow at The Hague Codification Conference 1930. The United Nations Conferences at Geneva on the Law of the Sea in 1958 and

1960, respectively, witnessed its death and burial. No agreements on any alternative distances have been achieved. Although some unquenchable optimists seek to assure us that the 1960 Conference asserted the existence of a "customary law" rule providing that states may assert their authority over a 6-mile territorial sea with a further 6-mile contiguous zone added thereto (the so-called "6 + 6 rule"), state practice points in the opposite direction. Today many states would appear to claim whatever breadth of territorial sea which may appear feasible, or even desirable, to them. At least international law would not seem to provide them with guidelines in the matter.*

Contiguous Zones. This legal category of seas under international law is distinguishable from the territorial sea on a basis which has been widely and surprisingly misunderstood. Many international lawyers tend to assimilate it to the territorial sea and refuse to make meaningful and necessary distinctions between these two regimes of offshore waters. In this they are completely and clearly wrong.¹¹ Contiguous zones, properly defined, consist of areas of waters offshore over which states may exercise specialized jurisdictions for specific purposes having direct or immediate effect within the territorial sea, internal waters, or adjacent dry land. For example, during Prohibition the United States proclaimed a contiguous zone for a width of 12 sea miles. Its purpose was to prevent "rumrunning." Since this zone extended beyond the limits of her territorial sea, U.S. Customs and other Federal authorities only exercised jurisdiction over ships on the free high seas, but within the zone, and provided only that their destination was within the United States. If a ship was navigating, say, from Halifax to Havana

without stopping at any intervening U.S. ports, and even though she made her progress through this particular stretch of waters off the U.S. shores, the U.S. authorities could not lawfully exercise any jurisdiction over the carrying, or even the drinking, of liquor aboard her; provided, of course, she was not an American-flag vessel.

The confusion is compounded today because the Geneva Convention on the Territorial Sea and Contiguous Zones limits the extent seaward of contiguous zones to 12 sea miles. The assumption underlying this limitation was that territorial seas would be no more than 3, or at the most, 6 sea miles in breadth. Since then, however, an inexorable trend has developed whereby a number of states have been claiming the outer limits of their territorial sea to be 12 sea miles and even beyond. Accordingly, the 12-mile limit of the contiguous zone is losing its significance as a means for expanding out from the low-water mark coastal states' specific claims to exercise specialized authority over events having direct results ashore. The 12-mile limit placed on such zones assumed the existence of a considerably narrower territorial sea.

In addition, there are contiguous zones which must be recognized and respected which extend far beyond 12 sea miles from the shore. For example, the United States has for a long period of time exercised authority over special customs zones and other special areas for distances of over 60 miles from our shores. Then there is also, of course, the ADIZ (Aircraft Defense Identification Zone), which is, to my way of thinking, an application of the contiguous zone concept under unique conditions. This zone extends some 500 sea miles offshore and provides for jurisdiction over aircraft only when they are approaching and intend to land within the United States. In the context of pollution and environmental protection, coastal states may, under general international law,

*See Appendix I.

only exercise authority to prevent polluting activities which have an impact on their land territory, internal waters, and territorial seas. They are not entitled to vindicate, in the contiguous zones, the universal moral claim for unpolluted high seas (or even contiguous zones!).

The Continental Shelf. The maritime zones I have discussed so far—apart from some types of contiguous zones—would all appear to be relatively traditional in nature. Although, in its general terms, the Continental Shelf Doctrine has come to be recognized as a form of customary international law, it is of relatively recent provenance.

Insofar as the Continental Shelf Doctrine (and the Convention which embodies it) reflect an acceptance of the inevitable by international lawyers,¹² one may regretfully assume, once technology made exploitation of submarine areas beyond territorial waters possible, that the only remaining question was how far out from their shores coastal states would be permitted to extend their jurisdiction over the resources of the seabed and subsoil, and at what point offshore the free high seas would provide a common regime. In either case, the environment is the main casualty. Where the latter rules, the tragedy of the commons provides the theme. In the case of the former, as the oil blowout in the Santa Barbara Channel in January 1969 and subsequent blowouts and fires in the Gulf of Mexico well illustrate, states are laggard in controlling pollution-prone activities. Be that as it may, political events arising out of the Union Oil Company's "miscalculation" in the geology of the Santa Barbara Channel tend to illustrate that a coastal state may more easily be held accountable for its actions in its own adjacent continental shelf region by a national constituency dedicated to protecting the environment than it would regarding activities on the high seas.

Such a constituency can generate more authority, it would appear, when it insists on its own polity's responsibility toward its continental shelf areas than when such areas are not open to be exploited by the nationals of other states who are in a position to invoke the freedom of the common high seas and seabed.

What is the continental shelf? First, it is necessary to distinguish between the physical geographical shelf, which is purely descriptive, and the legal idea of the shelf. The latter is the child of policy and is prescriptive. First, the concept in physical geography. Every dry landmass stands upon a pedestal which plunges down into the ocean abyss. The geological formation of this pedestal begins, generally speaking and with certain dramatic exceptions (for example, the west coast of South America and parts of the California coast, the coast of British Columbia and the southern coast of Alaska), as a fairly gentle gradient, or shoulder, extending out from the dry land under the sea to a point marine geographers have named the "break in slope." The seabed off the northwest coast of Australia, off the northern shores of the Soviet Union, and off the east coast of China provide examples of where the submarine shoulder has a very gradual gradient. These shelves extend out over 100 miles, and in some cases several hundred miles, before the 200-meter isobath is met. It is of interest to note that the Senkaku Islands (where a major oil find was made about 2½ years ago) would appear to be on the geographical shelf off mainland China. A dispute is brewing as to whether they are also exclusively within the mainland Chinese legal continental shelf.

Be the physical contrasts between the submarine regions off the western shores of South America and those off the eastern shores of China as they may, geographers tell us that standardly the break in slope between the continental

shelf and the continental slopes may occur at any point between 35 and 400 fathoms—or even 500 fathoms. But most frequently it seems to occur at around 100 fathoms or 200 meters of depth. (Lawyers have argued—in order to impose uniformity of measurement on a geographical concept which can only be accurately measured with difficulty and evidences no uniformity—that no matter where the break in slope may in fact occur, the continental shelf's legal boundary should be constituted by the 200-meter bathymetric contour line or isobath.) Beyond the break in slope, the shoulder disappears and the land-mass tends to plunge into the ocean abyss at far steeper gradients. At its foot the pedestal meets the bed of the ocean floor at depths of between 3,500 and 4,500 meters. Here a major geological change takes place. The chemical and geological formation of the seabed is different qualitatively from that of both dry land and the pedestal.

Secondly, although the legal definition of the continental shelf is enshrined in article 1 of the Continental Shelf Convention, this definition has a far wider reach of legal authority than merely among the states who have ratified the treaty. In 1969 the International Court of Justice laid down, in the *North Sea Continental Shelf Cases*,¹³ that the first three articles of the Convention codified preexisting customary international law. Accordingly, these provisions reflect norms binding on all states and not merely the adherents to the treaty alone.

Article 1 of the Continental Shelf Convention defines the outer limits of the legal continental shelf as being either at the 200-meter bathymetric contour line or, alternatively, where, beyond 200 meters of depth, the resources of the seabed are exploitable. This is an extremely open-ended definition; so much so that organizations like the National Petroleum Council are now arguing that the "true" location of the

continental shelf's outer limits under international law is not at the break in slope or shoulder of the shelf, let alone at the 200-meter bathymetric line indicated by article 1 of the Convention, but at the place of geological change, namely the foot of the pedestal and just beyond—this area being known as the continental rise. The National Petroleum Council's proposal for a definition of the shelf, not in terms of the 200-meter bathymetric contour line but of one which lies between 3,500 and 4,500 meters is the result of a seemingly plausible, but overelaborate, juggling with the "adjacency" and "exploitability" tests which article 1 of the Continental Shelf Convention provides. This prestidigitation has been due to the unreflectiveness of those who have sought to give "exploitability" its meaning and operational significance at which submarine holes can be drilled, regardless of the consequences—a singularly gross appraisal in this day and age when "exploitation" and its grammatical variants are tending to become pejorative terms.

The Santa Barbara Channel disaster of January-April 1969¹⁴ underlines for us all that it is easier to drill a submarine oil well than to cap it after a blowout. Again, if newspaper reports of the fire and blowout at the Chevron Oil Company's well near Venice, La.,¹⁵ are any indication, the lessons of Santa Barbara have not yet been learned. In my comments on Senator Pell's Senate Resolution 33 of 1969,¹⁶ I proposed that:

Senate Resolution 33 should contain a pledge that no exploration or exploitation activities will be espoused or licensed by states, or by any international organizations, at depths greater than the feasibility of closing of blow-outs. Nor should pipelines be permitted below . . . depths [at which they may be rapidly repaired].¹⁷

The pledge referred to in this quo-

tation is, of course, a promise by states who become parties to the "Declaration of Legal Principles" which Senator Pell included in his resolution that they would promulgate the necessary domestic legislation to prohibit drilling wells and pipelines below the depths of rapid and complete repair. Indeed, while "exploitability" remains a test for determining the outer limits of the continental shelf, the technological capacity to control the consequences of drilling holes in the seabed, rather than the mere capability of promiscuously inflicting them on the long-suffering environment, should set both the outer limit of exploitations and of the meaning of "exploitability" as a criterion of the extent of coastal states' continental shelves under article 1 of the Continental Shelf Convention.

Article 2 of the Continental Shelf Convention tells us that states may only exercise "sovereign rights" for the purpose of exploring their adjacent continental shelves and exploiting their "natural resources." Neither custom nor the Convention furnish coastal states with plenary sovereignty over their shelves, merely specific competences for the purpose of regulating exploration and exploitation activities with respect to "natural resources." And even this category is limited, applying only to minerals and "sedentary" species of living resources—namely "organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil" (article 2, paragraph 4). This definition has, as we may expect, given rise to an amusing if acrimonious dispute between Japan and the United States. We claim that the Alaskan king crab is a resource of the Alaskan continental shelf and, since it is a bottom crawler, is exclusively our resource. The Japanese claim that they can produce divers who can testify that they have seen the animal swimming. All this

seems rather reminiscent of the medieval philosophers' disputes over how many angels could dance on the point of a pin.

CATEGORIES OF EXCLUSIVE COASTAL STATE CLAIMS, NOT RECOGNIZED BY INTERNATIONAL LAW

The Chile-Ecuador-Peru (CEP) Claims.

Declaration of Santiago. The Latin American States have not formulated any regional conservation regime in terms of the 1958 Geneva Convention on Fisheries and Conservation of the Living Resources of the High Seas¹⁸ or those of proposals for fisheries management.¹⁹ On the other hand, the basic instrument of CEP policies, the Declaration of Santiago,²⁰ imperfectly, and perhaps on a number of mistaken premises, has sought to express a Latin American felt need for a regional solution of the problems created by permitting the fishery of the Humboldt (Peru)²¹ Current to be no more than a common (worldwide) property natural resource with unrestricted access. But once the point of approbation is made, it becomes necessary to question whether an adequate regulation and an equitable regime have been built on that foundation. The agreements constituting the declaration included a number of purported research and regulatory provisions and, most relevant for this discussion, a "Declaration on the Maritime Zone."²² In terms of this declaration, and following a preambulatory observation that governments have an obligation "to ensure for their peoples access to necessary food supplies and to furnish them with the means of developing their economy," this declaration invokes a duty incumbent upon governments to prevent "essential food and economic materials"²³ provided by the high seas off the coast

of the participating states "from being used outside the area of [their] jurisdiction."²⁴ These statements provide the premise of a proclamation asserting the parties' sovereignty over sea areas adjacent to each of them,²⁵ namely their claimed maritime zones "extending not less than two hundred nautical miles from"²⁶ their coasts, including the coasts of islands.²⁷ "[T]he innocent and inoffensive passage of vessels of all nations" through the claimed maritime zones was the sole exception to the assertion of exclusive rights.²⁸

"Bioma" and "Eco-system" Arguments. Perhaps the most complete statement of the CEP countries' juridical arguments justifying their claims is that given by Mr. Letts of Peru at the 486th Meeting of the United Nations General Assembly's Sixth Committee. He said:

The sea off the coast of Peru has certain peculiar and unique characteristics which are determined by the Peruvian Humboldt current. This current flows along the coast of Peru, Chile and Ecuador; it is the largest cold-water current and as it wells up from the depths of the sea it brings with it the detritus carried down by the rivers. This accounts for the immense biological wealth of the area which contains an extraordinary abundance of plankton and consequently a great concentration of edible fish. The Humboldt current also accounts for two geological factors which have a bearing on the case: firstly, the low rainfall and consequent aridity of the Peruvian littoral and, secondly, the valuable guano deposits produced by the enormous concentration of sea birds attracted by the fish.

Owing to the occurrence of these circumstances, Peru depends for its food supply mainly on the sea, that is to say directly on fish

and indirectly on the guano which is essential to the farmers in the small coastal valleys. This is Peru's underlying motivation: the close relationship between man, the mainland and the sea in a particular country where the ecology is such that the biological balance must not be upset . . . The protection and utilization of these resources, which are essential to the nation's livelihood, were fundamental reasons for the action by Peru and for similar action by many other countries.²⁹

Arguments, of which this statement is representative, have been compendiously designated "bioma" or "eco-system" theories.³⁰ Despite their rhetoric, however, this writer doubts whether these theories relate to a unique situation or, indeed, add very much to the general considerations which underpin regional fisheries agreements everywhere. If at all valid, the ecological underpinnings of the CEP states' argument may be tenuously relevant, not so much to regional arrangements as, possibly, to viewing the whole earth as a single ecological environment calling, ultimately, for a universal conservation and exploitation regime. While arguments of this kind may be consistent with an attempt to bring mankind within the scope of some conservation theories based on human ecological premises, they do not achieve the results which the CEP countries hope to derive from their "bioma" and "eco-system" theories. Because ecological arguments resting on ocean winds and currents ultimately have worldwide physical premises, those raised to justify CEP claims must in the long run either defeat the purpose for which they were developed or be cast aside as merely pseudoscientific. Finally, as the United States pointed out in the course of the 1955 Santiago negotiations:

The communities that live in the sea do not in any sense require

the coastal human populations to support their life. . . . Conversely while coastal communities, in some cases, may depend upon the products of the sea for their sustenance, the relationship is first of all limited, and secondly, is far from an intimate biological relationship as suggested. The relationship of coastal communities to the sea is . . . one of economic rather than biological character.³¹

Be that as it may, the CEP instruments and arguments just indicated illustrate an important regional concern for the conservation and rational use of a major resource of the region. Although not unique, they provide a paradigm of the vitality of regionalism in the establishment of fisheries regimes. Because a universal fisheries regime does not seem practicable for the time being, internationalism may be best served by taking regional approaches to such transnational problems as those of fisheries common to a group of states.

If the discussion appears to have lingered overlong with the CEP agreements, it is because international order may be better served by dropping some of the language of international idealism and by accommodating, in Orwell's terms, to the *realpolitik* of the averagely selfish. The discussion which follows is intended to adjust some of the current results of the average selfishness of states by pointing out a line of enlightened self-interest. On the other hand, the strength of national egoism is not undervalued in the benign hope that states may come to embrace altruistic policies.

The Archipelago Theory. Indonesia and the Philippine Republic invoke the "archipelago theory" in order to claim all waters within baselines joining the outer promontories of the outer islands of their groups as internal waters, and they measure their territorial seas outward from those baselines. Some

stretches of the water included within each of these separate assertions of territorial sovereignty are more than 60 miles from the nearest piece of dry land. Perhaps the most bizarre use to which this doctrine has been put was President Sukarno's "nationalization," on one occasion, of Dutch-flag merchant ships found within the proclaimed baselines of Indonesia's archipelago waters. This claim has not been recognized by any state.

"Closed Seas." The Soviet Union is known as a state which has continuously adhered to the Czarist claim of a territorial sea of 12 marine miles. Now, when the United States appears to be ready to negotiate regarding that claim,³² another category of exclusive claims has arisen over seas which Soviet Russia has inherited from the Czars, namely the so-called "closed seas." These would now appear to be left out of the U.S. calculations. It is very hard to pin down any exact meaning of this concept, but it would appear to indicate that the Soviet Union regards the following seas (and this list is neither complete nor closed against future additions) of internal waters: the White Sea, the Kara Sea, the Sea of Okhotsk, the Baltic Sea, the Sea of Japan.³³ In these seas, according to the Soviet view, only littoral coasts may exercise freedom of navigation. This claim is unrecognized by the Family of Nations, and the Soviet Union is not pressing it—for the moment. The Arab States have sought to adapt this Russian concept to the Gulf of Aqaba.

THE CANADIAN CLAIMS RESPECTING ARCTIC WATERS: A SPECIAL CASE?

Canada's recent declaration of a protection zone of 100 sea miles in width,³⁴ which is additional to her new territorial sea claim of a 12-mile belt, would appear to have been devised so as

to comply with the general international law right of abatement of high seas pollutions threatening a state's territory. That declaration (and its implementing legislation) has been misunderstood in the U.S. public press to the extent that it has been represented as an attempt to extend Canadian sovereign jurisdiction seaward in a manner resembling the maritime assertions of Chile, Ecuador, and Peru (as well as other South and Central American countries).³⁵ Canada is not claiming to exercise sovereignty over an offshore zone of 100 sea miles in width wherein she may exercise a comprehensive authority for all purposes, or even for a wide spectrum of purposes. Rather, she is merely designating an appropriate area in which she intends to exercise a limited authority to vindicate a specific national purpose, namely the protection of the delicate ecological balance of her Arctic tundra.³⁶ Be that as it may, this Canadian experiment in international law has not gone without criticism on the basis that if the theory of "creeping jurisdiction" is applied to it, it is tantamount to a claim of sovereignty.³⁷ There is a second Canadian thesis for underpinning her Arctic maritime pretensions, namely that coastal states have, where appropriate, a duty to the world community to exercise authority on the high seas off their coasts to control conduct which has the potential of creating pollution catastrophes. While I find the claim of a contiguous zone for antipollution purposes on balance acceptable, this latter thesis seems unbecomingly Pecksniffian. We all tend to suspect a man (or a state) who conveniently finds a duty where he desires to exercise a power.

CREEPING JURISDICTION— A COMMENT

"Creeping jurisdiction" or "Craven's Law,"³⁸ is being increasingly used as a pejorative phrase for indicating the danger of recognizing coastal states'

limited unilateral claims to exercise jurisdiction beyond zones sanctified by tradition or by international law. The propounders of this theory (or "law") tell us that whenever a state enjoys exclusive offshore rights for some purposes, it tends to acquire further exclusive rights for other and perhaps all purposes, jeopardizing regional, international, and community interests in the freedom of the seas. Professor Bilder's recent article on the Canadian Arctic Water Pollution Prevention Act provides an example:

The precedents established by the Act are clearly capable of widespread abuse by other, perhaps less responsible states, with potentially harmful consequences for traditional principles of freedom of the seas. If a nation of the international stature of Canada may establish a 100-mile contiguous zone to control pollution, other coastal states may also seek to do so; and the range of regulation justified under the rubric of pollution control may in practice differ little from that asserted under claims of sovereignty over such zones. Moreover, if 100-mile contiguous zones can be established for pollution control purposes, why not for other purposes as well.³⁹

One response to the "creeping jurisdiction" argument is that the Canadian claims of pollution control are predicated on the unique problems of Arctic ecology and on the extreme precariousness of the web of life in that region. Thus the title prescribes the act's purpose as being merely: "To prevent pollution of areas in arctic waters adjacent to the mainland and islands of the Canadian arctic." Again, the Canadian note handed to the U.S. Government of 16 April 1970 has been summarized as asserting, *inter alia*:

It is the further view of the Canadian Government that a

danger to the environment of a state constitutes a threat to its security. Thus the proposed Canadian Arctic waters pollution legislation constitutes a lawful extension of a limited form of jurisdiction to meet particular dangers and is of a different order from unilateral interferences with the freedom of the high seas such as, for example, the atomic tests carried out by the USA and other states which, however necessary they may be, have appropriated to their own use vast areas of the high seas and constituted grave perils to those who would wish to utilize such areas during the period of the test blast.⁴⁰

If this is held to be the core quality of the claim, then there can be very few states that can treat it as a precedent. The Canadian claim can only become a precedent, and that precedent then can only become a means of allowing coastal states to add to their maritime authority by means of "creeping jurisdiction," if the necessary restrictions of purpose placed on the definition of Canada's pollution control contiguous zone are lost sight of. But if those limitations of purpose are lost sight of, the fault does not lie with Canada's claim, but with those who fail to identify the points of necessary distinction and find in "creeping jurisdiction" an excuse for either their own ineptitude or pusillanimity. States' exclusive jurisdictions can only creep forward if the contraposed community interests withdraw before them. A failure of will should not be disguised behind a pseudolaw. There is, furthermore, a need to distinguish between Peck-sniffian claims in the name of pollution prevention (but whose real function is greed, bellicosity, or cartographical chauvinism) and the real article. "Creeping jurisdiction" theories are useful for absolving the timid from this invidious task.

COASTAL STATES' RIGHTS OF ABATEMENT BEYOND TERRITORIAL LIMITS

General International Law. Despite the apparently clear-cut situation outlined in the introduction to this section, writings about the international law doctrines of self-help, self-preservation, and self-defense testify to basic disagreements. The boundaries they set between these concepts are blurred. Indeed, it may well be that writers can only spuriously incorporate "self-preservation" into the body of international law, for it is an instinct rather than a legal right.⁴¹ Be that as it may, self-help permits a state confronted by a major calamity to exert sufficient, but no more than sufficient, force to avert the danger or abate its effects. Furthermore, the exercise of this right requires the observance of the rule of proportionality. The measure of this rule's application and scope was well prescribed (in a context of armed self-defense rather than in the type of abatement envisaged here, but still, nevertheless, instructive) by Secretary of State Daniel Webster in the case of *The Caroline*. He stated that a government taking defensive or abatement action must "show a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show also that it . . . did nothing unreasonable or excessive, since the act, justified by the necessity of self-defense, must be limited by that necessity and kept clearly within it."⁴² The *Torrey Canyon* casualty in March 1967 provided this writer with an application of Daniel Webster's standard:

A case, surely, could have been made for a swift abating action on the part of the British Government, provided it did not involve risking the lives of the stricken vessel's officers and crew. Could there have been a valid charac-

terization of such steps by the British Government to save its coasts, and the livelihood of its inhabitants, as the excessive, over-hasty use of force which the *Corfu Channel* case condemns as contrary to international law? A clear distinction can be drawn between the case where a country goes into the territorial sea of a distant nation and sweeps mines so that it can pass through that territorial sea, and the case where a coastal state, instead of passively awaiting catastrophe, destroys a potentially harmful entity off its shores but on the high seas. Would there have been doubts or delays if a disabled B-52 armed with hydrogen bombs had plunged into the waters adjacent to Pollard's Rock? The means of averting harm would have been different, naturally, but no one would have questioned haste.⁴³

A Recent Treaty Formulation of the 1969 Inter-Governmental Maritime Consultative Organization (IMCO) Public Law Convention. Although it points to a clearer and more definitive formulation of the rights of states to prevent and abate oil pollution damage arriving within their territories from the high seas, the IMCO Public Law Convention has not yet come into force. Accordingly it merely stands as a public document expressing the desires of the states which have signed it. Furthermore, even if it were to come into force, it would still only bind the states parties to it in any particular where it did not either formulate existing customary international law or constitute an instrument of change in customary law. The International Court of Justice's decision, in 1969, in the *North Sea Continental Shelf Cases*⁴⁴ underlines the difficulty of resorting to a treaty to establish both of these points, and most especially the latter. While the discussion which

follows reviews the IMCO Public Law Convention as *lex lata*, the treaty faces both the present of settled law and the future of legal change. It should be read, therefore, in the light of both its present status of being in the limbo of all treaties which have not yet been brought into force and its Janus-like quality of facing both the past and the future.

Before examining the IMCO Public Law Convention, perspectives should be formed by reviewing two earlier IMCO treaties on pollution of the ocean, namely the International Convention for the Prevention of the Pollution of the Sea by Oil,⁴⁵ and Amendments to the International Convention for the Prevention of Pollution of the Sea by Oil, 1954.⁴⁶ As their titles indicate, these treaties were drawn up as instruments for diminishing the rapid increase of the oil pollution of the sea. They prohibited the discharge of oil in stated zones⁴⁷ by almost all the most significant classes of ships.⁴⁸ These zones were, in the main, contiguous to coastal areas dependent on clean seas. The conventions' effectiveness was limited, however, since their enforcement lay within the jurisdiction of the states of registry.⁴⁹ They contained no recognition of a coastal state's right of abatement, even in the defined "prohibited zones." Nor did they deal with the vexed issues of liability for harm.

To remedy these defects, the Inter-Governmental Maritime Consultative Organization (IMCO) called an International Legal Conference on Marine Pollution Damage which met in Brussels from 10 to 29 November 1969. It prepared and opened for signature and accession two conventions: the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties,⁵⁰ and the International Convention on Civil Liability for Oil Pollution Damage.⁵¹ These conventions were accompanied by three resolutions: Resolution on International

Co-operation Concerning Pollutants other than Oil;⁵² Resolution on Establishment of an International Compensation Fund for Oil Pollution Damage;⁵³ and Resolution on Report of the Working Group on the Fund.⁵⁴ The Conference also set out, in an annex to article 8 of the Public Law Convention, rules governing the settlement of disputes by conciliation and arbitration procedures.

Of these instruments the Public Law Convention is the agreement calling for treatment in the present context. It authorizes the parties to take necessary measures on the high seas "to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution" or the threat of it by oil "following upon a maritime casualty or acts related to such a casualty."⁵⁵ Warships and other public ships engaged on "governmental non-commercial service,"⁵⁶ however, are not subject to such measures. After setting out consultation and notification requirements with which a coastal state must comply, except in cases of extreme urgency and before taking preventive or curative measures,⁵⁷ the Convention stipulates that those measures "shall be proportionate to the damage actual or threatened."⁵⁸

Were it to come into force, would this Convention change the customary international law rights, duties, and exposures of the parties? An answer to this question would center around four points: (1) the limitation of the Convention to "pollution by oil," (2) the article 3 provision of procedures for notification and consultation, (3) the article 5 requirement that measures should be "proportionate" to the damage, and (4) the article 6 obligation to pay compensation if the damage caused by the measures taken exceed what may be "reasonably necessary" to cure the harm.⁵⁹

Clearly the Convention can only be invoked in the case of oil pollution, but this does not of itself repeal the general

right of self-help in such matters. In addition, IMCO's Resolution on International Co-operation Concerning Pollutants Other than Oil recognizes that "the limitation of the Convention to oil is not intended to abridge any right of a coastal state to protect itself against pollution by any other agent."⁶⁰ It recommends that the contracting states exercise their general law rights in the light of the Convention's applicable provisions when confronted by pollution dangers from other agents. The procedures in article 3 for consultation and notification do not unduly limit or restrict the general law right of abatement. They provide the means of exercising, in an appropriate fashion, the rights recognized by general customary international law, and add the amenities of cooperation and good neighborliness while precluding the possibility of an Alphonse-Gaston routine preventing any positive action.⁶¹

The Public Law Convention's paragraph 1 of article 5 makes the general demand that the coastal state's response to a casualty and the ensuing harm of threat thereof shall be "proportionate." This, in itself, may be no more than the incorporation of the general customary law principle. Paragraphs 2 and 3 of the same article are as follows:

2. Such measures shall not go beyond what is reasonably necessary to achieve the end mentioned in Article 1 and shall cease as soon as that end has been achieved; they shall not unnecessarily interfere with the rights and interests of the flag State, third States and of any persons, physical or corporate, concerned.

3. In considering whether the measures are proportionate to the damage, account shall be taken of:

(a) the extent and probability of imminent damage if those measures are not taken; and

(b) the likelihood of those measures being effective; and

(c) the extent of the damage which may be caused by such measures.⁶²

Clearly these provisions do no more than spell out the general law requirements for the lawful exercise of the contemporary circumscribed right of self-help as applicable in the special case of averting or abating the consequences of a catastrophic casualty at sea.⁶³

Finally, the obligation under article 6 to pay compensation for harms caused by excessive measures is an embodiment of a very conservative view of customary international law. It may be that under special circumstances a case could be made for compensation when losses are inevitably incurred in the "proportional" exercise of force. Be that as it may, the conclusion from the consideration of these four points is that, insofar as the Public Law Convention is related to pollution by oil, it codifies the preexisting rights of coastal states to abate actual or threatened harms. It leaves the rights of these states untouched when the polluting agent is some substance other than oil.

THE FREE HIGH SEAS

History. Over against the proliferating legal categories which have just been adumbrated, and which are all alike in their function of clothing (or pretending to clothe) exclusive state claims with legal justifications for enclosing increasing areas of the high seas, there remain the free high seas. The doctrine which asserts this freedom clearly vindicates the long-term, common interests of all states.⁶⁴ Be that as it may, it is less than four centuries old and has only won universal recognition as a result of bitter struggles at sea and by bitter polemics at the negotiating table. In the Middle Ages and on through the Renaissance, and, indeed, into the 17th century, many states

claimed to exercise sovereignty over the special sea areas, for example: Venice claimed sovereignty over the Adriatic, as did Genoa over the Ligurian Sea; England over the English Channel, the North Sea, and the Atlantic between the North Cape (Stadland) and Cape Finisterre; Denmark and Sweden over the Baltic, the Dano-Norwegian Kingdom over the North Atlantic, and especially the waters between Iceland and Greenland. But, most extravagant of all, Spain and Portugal claimed to divide all the oceans between them under the Bull of Pope Alexander VI (the famous Borgia Pope) *Inter Caetera* (1493) and the Treaty of Tordesillas. Nor were these claims merely high-sounding rituals of sovereignty. They were vindicated with comparative success, given the technological developments in the weaponry of the time, for several centuries. For example, as late as 1636 the Dutch paid England 30,000 pounds for the privilege of fishing in the North Sea, and in 1674, under article 4 of the Treaty of Westminster, they acknowledged their vessels' obligation to salute the English flag within "British Seas" in recognition of English maritime sovereignty. It is of further interest to note the survival of this claim into an era not at all favorable to its recognition or enforcement. As late as 1805 the British Admiralty Regulations ordered that:

[W]hen any of His Majesty's ships shall meet with the ships of any foreign power within His Majesty's seas (which extend to Cape Finisterre) it is expected that the said foreign ships do strike their topsail and take in their flag, in acknowledgment of His Majesty's sovereignty in those seas; and if any do resist, all flag officers and commanders are to use their utmost endeavours to compel them thereto, and not suffer any dishonor to be done to His Majesty.⁶⁵

Hall comments on this claim that

because "no controversies arose with respect to the salute at a time when opinion had become little favourable" to it, one need not doubt that it had been "allowed to remain a dead letter."⁶⁶ Thus, it seems to have become merely vestigial and unenforced during the 18th century.

Despite the long survival of these special claims, the doctrine of the freedom of the high seas had become dominant⁶⁷ from the 17th century and had been championed even earlier. For example, in 1580 Queen Elizabeth I of England had asserted to the Spanish Ambassador when he complained about Sir Francis Drake's famous incursion into the Pacific Ocean, that the ships of all nations could navigate the ocean since the air and the sea were common to all. Indeed, in words almost identical to those which Grotius later used and upon which his reputation partly rests, she claimed that no title to the ocean could belong to any nation, since neither nature nor regard for the public use permitted any possession of the ocean. But the English position was ambiguous, and in the early 17th century a number of British writers attacked Grotius' bold assertion that the high seas cannot be the subject of any state's dominion, but that navigation and fisheries on them are free to all nations. Be these observations as they may, despite the earlier protestations of her scholars⁶⁸ and the vestigial survival in her Admiralty Regulations, England had, by the end of the 17th century, replaced the Netherlands as the leading champion of the freedom of the high seas.

The "Tragedy of the Commons."⁶⁹ Today the free high seas are still (but decreasingly so from their heyday in the 19th century) a common resource of all mankind. As with a common, so with the oceans, all the states see their greatest mutual advantage as stemming from the general exercise of restraint by

all, so that the high seas' resources and cleansing properties are not overstrained, and its areas lying near coastal states are not enclosed. On the other hand, each state sees its own individual profit as preempting to itself as much of the common resources as possible, of enhancing its own maximum and immediate use and abuse of the commons' resources, and of maximizing its own enclosures. Thus each state is impelled, in seeking its own short-term advantage, to work remorselessly against both the general welfare and its own long-term enlightened self-interest. This paradox of each state being impelled to work remorselessly and inevitably against its own interests justifies the designation of the competitive regime of the common as a "tragedy."

The contemporary trend of eroding the freedom of the high seas has stemmed from its largely negative character and its dependence on customary international law in an age which seeks to emphasize the concretization of justice and places a greater trust in public intervention than in private enterprise, than in the past. Being negative, the doctrine is largely one of prohibitions. So far it has not been built into institutions wherein the equal rights of all states provide the bases of affirmative policies of concrete distributive justice. This negative character, indeed, provides the ammunition for arguments that, like any common, the richer and more powerful states can obtain disproportionately greater benefits from the ocean at the expense of the smaller states. Its second weakness, that of its validity being largely based on customary international law, makes it dependent upon the continued practice and affirmation of states. Neither practice nor affirmation give it, today, the support it previously enjoyed. Its diminution today is also, in part, concurrent with the contemporary dwindling in significance of customary international law.⁷⁰ Furthermore, both of these

characteristics have (in the absence of special conservation treaties) permitted states to engage in unlimited high seas fisheries so that the survival of some species (for example, blue and sperm whales) is threatened. Again, the negative character of the doctrine has increased the use of the ocean as if it were an infinite sink for all kinds of damaging materials—from dumping fissionable waste and testing nuclear bombs, to the constant flow of raw sewage, mercury, and DDT into its waters. While the problems of open access to fisheries are of great and increasing importance, this presentation will necessarily concentrate on the problems which arise from the permissive climate of the law that permits conduct to be based on the assumption that the seas have an infinite capacity to absorb the world's garbage for the indefinite future. Before this is taken up, however, the tasks of international law in the environmental field might be discerned more clearly as the result of a brief survey of some emerging activities which might well become as sensitive to the need for legal change as a result of technological developments as have problems of oil pollution damage.

Laissez Faire and the Freedom of the Seas—A Plea for Reflection. There is a contemporary overstatement that the doctrine of the freedom of the seas favors dominant maritime states, since it is negative in effect and so favors the stronger states in competition for the oceans' use as a common. This is an unreflecting application of the fable "Every man for himself and the Devil take the hindmost" said the Elephant as he danced among the chickens." Such an oversimplified appraisal of the freedom of the high seas has been converted into an argument *à converso* for supporting the enclosure of the seas—supposedly by lesser developed countries. This perspective of the interactions of the uses of the seas and

developing states' economies overlooks the historical fact that Venice was a dominant seapower with considerable military authority over adjacent lands (as well as dependent territories) bordering the Adriatic Sea when she claimed sovereignty over that sea. Similarly, Spain and Portugal were Great Powers when they claimed their halves of the 1493 papal donation of the world's oceans. History apart, practical politics show that smaller states can best flourish when the high seas are free and open to their commerce and fisheries on an equal footing with those of the Great Powers. (It is also true that regional regulation, rather than unilateral exclusivism, provides the best means of restraining greedy powers from "strip mining" a fishery so as to destroy its productivity for many years.) Regional controls are thus available and appropriate to protect the fishery rights of the less powerful and predatory states and their fishermen.

Commerce can move across the seas more swiftly and cheaply—and hence with greater availability to poorer states and their domestic communities—when taxes and tolls are not exacted for the privileges of transit. Indeed, on the maintenance of cheap commercial transit the economic survival of the lesser developed (including landlocked) states may, in the long run, depend. When, as dominant seapowers, the Netherlands and England espoused the freedom of the high seas, they were not in a position to affirm claims of extensive maritime dominion because they were not also dominant land powers controlling the lands which surrounded or at least held the keys for controlling the seas. In addition, their long-term interests lay, as their diplomatic histories testify, on the side of the smaller nations, since they ultimately drew their strength from a worldwide web of commerce with these countries, not from concentrated military authority. Hence, for the past two centuries, the freedom

of the high seas has not provided an example of the tragedy of the commons. This has been due to a number of factors including the limitations of technology, the interests of English and

Dutch merchants in preventing maritime encroachments by coastal states, and the authority of the Royal Navy. Against that combination no state was able to hold any sea as a *mare clausum*.

FOOTNOTES

1. *I.e.*, the initials of Chile, Ecuador, and Peru—the original parties to the Santiago Declaration 1952 and the foundation members of the “200 Mile Club.” See § III A *infra*.

2. For an indication of this species of unrecognized offshore claim, see § III B *infra*.

3. Note, however, that art. 5, para. 2, Convention on the Territorial Sea and the Contiguous Zone, done at Geneva, art. 29, 1958, (1964) 2 U.S.T. 1606, T.I.A.S. no. 5639, 516 U.N.T.S. 205 (effective 10 September 1964) [Hereinafter cited as “Convention on the Territorial Sea”] derogates, in some cases, from the proposition in the text. It provides:

Where the establishment of a straight baseline in accordance with article 4 has the effect of enclosing as internal water areas, which previously had been considered as part of the territorial sea or of the high seas, a right of innocent passage, as provided in articles 14 to 23, shall exist in those waters.

4. Art. 7, para. 4, Convention on the Territorial Sea.

5. *United States v. California*, 381 U.S. 136 (1965). *Supplemental decree*, 382 U.S. 448 (1966), *rehearing denied*, 382 U.S. 889 (1966).

6. 67 Stat 29 (1953), 43 U.S.C. § 1301.

7. See, for example, *Cunard S.S. Co. v. Mellon*, 262 U.S. 100 (1923), and note especially *ibid.*, at 125; *Wildenhus' Case*, 120 U.S. 1 (1886), and note especially *ibid.*, at 11, 12; see also, *The Creole* (1853), 2 Moore, *Digest of International Law* 358, 361 (1906). This is often known as the “English Rule.” It originated in the dictum of Best J., in *Forbes v. Cochran*, 2 B & C 448, 467, 107 E.R. 450, 457 (K.B., 1824); *Caldwell v. Vanvliessen*, 9 Hare 415, 68 E.R. 571 (V. ch., 1851); and *Savarkar's case*, Scott, *The Hague Court Reports* 516 (1911). For some additional cases see *Reg. v. Keyn*, per Phillimore J., L.R. 2 Ex. D. 63 at 82 (C.C.R., 1876). The American cases would appear to favor the “English Rule”; see, for example, *Cunard S.S. Co. v. Vellon and Wildenhus' case*, *supra*. See also *Patterson v. Bark Eudora*, 190 U.S. 169 (1903). Frequently the “French” or “Continental Rule” is contrasted with it; see, for example, *The Sally and The Newton*, 5 *Bulletin des Lois de l'Empire Francais* 602 (4th ser., 1807); *The Tempest*, Dalloz, *Jurisprudence Generale* 92 (1859); 1 *Oppenheim* 502-4; Brierly, *The Law of Nations* 223-5 (6th ed., Waldock, 1963) [hereinafter cited as “Brierly”].

On the other hand, see, as a little known example of the “English Rule,” *In re Sutherland*, 39 N.S.W. *Weekly Notes* 108 (1922) and see, for a presentation and discussion of this case, Charteris, “Habeas Corpus in respect of the Detention of a Foreign Merchantman,” 8 *Journal of Comp. Legislation* 246 (3d ser., 1926). Briefly the facts were these, two French convicts who had been sentenced to transportation to New Caledonia, and who were named Tulop and Szibar, escaped from the French ship *El Kantara* whilst she was in the port of Newcastle, New South Wales, en route for the French penal colony. She sailed without them. The New South Wales authorities later arrested the convicts and handed them over to another private French ship, *La Pacifique*, in which they were destined to continue their voyage to Noumea. Before the vessel sailed, an application for a writ of habeas corpus rule on behalf of the convicts was made by Sutherland. The Full Court of the Supreme Court of New South Wales refused the rule on the ground that to grant it would be to ignore the immunity of matters of internal management aboard the French ship from Australian law. Sir William Cullen, the Chief Justice, said (*id* at 108-9): “If there were anything to show that the master of the French ship was acting without authority under French law, then the question might arise whether there was authority under Australian law for his keeping the men on board in Australian waters.” This Australian version of the “English Rule” was delivered whilst the Court was sitting *en banco*. The concurrence was unanimous. When such cases as *In re Sutherland* are said to exemplify the “English Rule,” it is submitted that perhaps the traditional distinction between the “English Rule” and the “Continental” or “French Rule” may well have become more a matter of formulation than of application and practice. See, for a discussion of this, and for a similar conclusion, Brierly at 225-6. Moreover examples abound which illustrate the point that terms such as the “public order” or the “tranquility” of the port are indeterminate, leaving their application to considerations of policy. To juxtapose the two Philippine cases of *People v. Wong Cheng*, 46 P.I.

729 (1922) and *United States v. Look Chaw*, 18, P.I. 373 (1910), will suffice to illustrate this point.

For examples of diplomatic action to protect the immunity of the internal management of foreign ships in port, see protests by Belgium, Denmark, Great Britain, Mexico, Netherlands, Norway, Portugal, Spain, Sweden, in 1923 against the assumption of jurisdiction by the United States over liquor carried (but not sold) aboard their ships whilst in U.S. waters and harbors, 1 *U.S. Foreign Relations* 113 (1923).

8. But see *People v. Wong Cheng*, 46 P.I. 729 (1922), distinguish *United States v. Look Chaw*, 18 P.I. 573 (1910).

9. For a definition of innocent passage see arts. 14-23 Convention on the Territorial Sea.

10. *Id.*, art. 4, para. 1. See also, *id.*, art. 23.

11. For a discussion of the solecism see Goldie, "International and Domestic Managerial Regimes for Coastal, Continental Shelf and Deep-Ocean Mining Activities," *The Law of the Sea: National Policy Recommendations* 226, 227-30 (Proceedings of the 4th Annual Conference of the Law of the Sea, 23-26 June 1969, University of Rhode Island, 1969).

12. Professor Georges Scelle was representative of the small band who refused to join the ranks of the international lawyers who saw virtue in the reception of the Continental Shelf Doctrine in international law or who were resigned, or complaisant, about its inevitability. See Scelle, "Plateau Continental et Droit International," 59 *Revue Generale de Droit International Public* 5 (1955) [hereinafter cited as "Scelle, 'Plateau Continental.'"] See also the report of his comments in [1956] 1 *Y.B. Int'l L. Comm'n* 133 which states: "Mr. SCHELLE observed that, as he did not attribute any scientific value, far less any legal validity, to the concept of the continental shelf, he welcomed any discussion which might further obscure the concept and thereby lead to its destruction."

13. [1969] I.C.J. 3.

14. See, generally, *The New York Times*, 31 January-3 April 1969.

15. See *The New York Times*, 2 March 1970, p. 17; 1-6.

16. S. Res. 33, 91st Cong., 1st Sess., 115 *Cong. Rec.* 1330 (1969), which recommends that the President should place a resolution endorsing basic principles for governing the activities of nations in ocean space before the United Nations Committee on the Peaceful Uses of the Seabed and Ocean Floor beyond the Limits of National Jurisdiction. Also printed in *Hearings on S. Res. 33 Before the Subcommittee on Ocean Space of the Senate Committee on Foreign Relations*, 91st Cong., 1st Sess. at 9 (1969).

17. Memorandum by L.F.E. Goldie on Senate Resolution 33, *Hearings on S. Res. 33, id.* at 290, 300.

18. Done 29 April 1958, [1966] 1 *U.S.T.* 138 *T.I.A.S.* No. 5969, 559 *U.N.T.S.* 285 (effective 20 March 1966).

19. See, e.g., Goldie, "The Oceans' Resources and International Law—Possible Developments in Regional Fisheries Management" 8 *Columbia J. Transnat'l L.* 1 (1969).

20. The Declaration on the Maritime Zone, Santiago, Chile, 18 August 1952. For an English translation of this and the parties' accompanying declarations and agreements (together constituting the "Santiago Declaration"), as well as subsequent and supplementary declarations and agreements, see B. MacChesney, *Situation, Documents and Commentary on Recent Developments in the International Law of the Sea* 265-89 (Naval War College Blue Book Series No. 51, 1956). See also B. Auguste, *The Continental Shelf—The Practice and Policy of the Latin American States with Special Reference to Chile, Ecuador and Peru* 187-92 (1960); S. Bayitch, *Inter-American Law of Fisheries, an Introduction with Documents* 42-47 (1957); U.S. Department of State, *Santiago Negotiations on Fishery Conservation Problems* (1955). For a polemical defense of the CEP claims and policies, see, e.g., Cisneros, "The 200 Mile Limit in the South Pacific: a New Position in International Law with a Human and Juridical Content," *ABA Section of Int'l & Comp. Law, 1964 Proceedings* 56 (1965). Note particularly the criticism of the CEP claims in Kunz, "Continental Shelf and International Law: Confusion and Abuse" 50 *Am. J. Int'l L.* 828, 835-50 (1956) hereinafter cited as "Kunz."

Until 1970 Chile, Ecuador, and Peru had been able to add only Nicaragua and El Salvador to their band—President Trejos having vetoed, on 21 November 1966, the ratification of the Declaration of Santiago by Costa Rica's Legislative Assembly. On the other hand, Argentina, by Law No. 18094, dated 4 January 1967, has asserted a double claim: out to 200 miles from the mainland coast, as well as from the coasts of islands, and out to the 200-meter isobath. While it is true that a number of South and Central American States have added to their continental shelf claims, claims to the "epicontinental sea" (i.e., the volume of the waters superincumbent upon their continental shelves) off their coasts, and to the superambient air above that "sea," this type

of claim is still asserted (albeit spuriously, cf. Continental Shelf Convention, art. 3) in terms of the international law regime of the continental shelf. Thus, this type of claim is distinguishable from the CEP type. So far the six "CEP countries" (including Argentina) have not been successful in persuading other Latin American States to assert specifically CEP claims to adjacent seas, nor has the Organization of American States adopted this position as that of the collectivity of Western Hemisphere nations. Indeed it has not as a body, recognized as valid state claims to epicontinental seas. Thus, for example, at the Inter-American Specialized Conference on "Conservation of Natural Resources: the Continental Shelf and Marine Waters," Ciudad Trujillo, Dominican Republic, 15-28 March 1956 (see the *Final Act of the Conference Organization of American States Conferences & Organizations Series*, No. 50, Doc. No. 34.1-E-5514 (1956)) the CEP states were unable to gain the Conference's agreement to the "bioma" and "eco-system" theories, or to declare that either the waters above a continental shelf region, or waters extending from the shores of a coastal state for some distance such as 200 sea miles, appertain to the coastal state either on the basis of the continental shelf doctrine or on some other theory. The Conference observed (in Resolution I of the Conference, the "Resolution of Ciudad Trujillo," *Final Act supra* at 13-14) that:

2. Agreement does not exist among the states here represented with respect to the juridical regime of the waters which cover the said submarine areas.

...

6. Agreement does not exist among the states represented at this Conference either with respect to the nature and scope of the special interest of the coastal state, or as to how the economic and social factors which such state or other interested states may invoke should be taken into account in evaluating the purpose of conservation programs.

...

Therefore, this Conference does not express an opinion concerning the positions of the various participating states on the matters on which agreement has not been reached . . .

For the views of inter-American legal experts, see *Inter-American Council of Jurists*, "Resolution XIII, Principles of Mexico City on the Juridical Regime of the Sea. § Conservation of the Living Resources of the High Seas," *Final Act of the Third Meeting* 37 (English CIJ-29) (1956). Note should be taken of Dr. Garcia Amador's comments (as the representative of Cuba) on the "Principle of Mexico City" at the Geneva Conference on the Law of the Sea, 1958: "As to the Principles of Mexico City, the validity of that document should be considered in the light of the resolution unanimously adopted by the Inter-American Specialized Conference held in Ciudad Trujillo in 1956." 3 U.N. Conf. of the Law of the Sea, Geneva 1958, *Official Records* 37, U.N. Doc. A/Conf. 13/39 (1958).

For the 1956 Resolution of Ciudad Trujillo to which Dr. Garcia Amador is referring, see *supra* this note. For comments of governments, see *id.* 50-59; *Inter-American Juridical Committee, Opinion on the Breadth of the Territorial Sea* 24-42, OEA/Ser. I/VI.2 (English CIJ-80) (1966).

For the U.S. point of view, see U.S. Department of State, *Santiago Negotiations on Fishery Conservation Problems* 1-15, 19-20, 26-30, 36-41, 50-58, 59-66 (1955) [hereinafter cited as *Santiago Negotiations*]. For the CEP countries' position and their criticism of the U.S. point of view, see *id.* 30-35, 41-44, 45-50.

Be that as it may, on 8 May 1970, Argentina, Brazil, Costa Rica, Ecuador, El Salvador, Nicaragua, Panama, Peru, and Uruguay participated in the Declaration of Montevideo on the Law of the Sea whereby the above-named states announced:

That in declarations, resolutions and treaties especially inter-American, as well as in multilateral declarations and agreements reached among Latin American states, juridical principles have been consecrated which justify the right of states to extend their sovereignty and jurisdiction to the extent necessary in order to conserve, develop and exploit the natural resources of the maritime zone adjacent to their coasts, its seabed and subsoil;

That, in accordance to said juridical principles, the signatory states have extended, because of their special circumstances their sovereignty or their exclusive jurisdictional rights over the maritime zone adjacent to their coasts, its seabed and subsoil, to a distance of 200 maritime miles, measured from the baseline of the territorial sea.

21. The southern portion of the Peru Current is sometimes called the Chile Current. With due deference to the countries concerned, this current will be called the "Humboldt Current" throughout this article.

22. See, *supra*, note 20.

23. Declaration on the Maritime Zone, Preamble, § 1, See MacChesney 266.

24. *Id.* § 3.

25. At the 1958 Geneva Conference, Mr. Ulloa Sotomayor insisted, however, that the Declaration of Santiago was of a "defensive character, and its sole object was the conservation of the living resources of the sea for the benefit of the populations of [the CEP] countries." 3 *U.N. Conf. Off. Rec.* 7, *U.N. Doc. A/CONF. 13/39* (1958). See also the restricted interpretation given by the representative of Chile at the 12th Meeting of the First Committee to the word "sovereignty" in the context of the claims made in the fulfillment of the Santiago Declaration, 3 *U.N. Conf. Off. Rec.* 33, *U.N. Doc. A/CONF. 13/39* (1958); the limited juridical scope intended for the claims to maritime zones in the declaration as enunciated by Peru's representative at the 5th Meeting of the Third Committee, 5 *U.N. Conf. Off. Rec.* 5-7, *U.N. Doc. A/CONF. 13/41* (1958); the assertion by the Ecuadorian representative at the 9th Meeting of the Third Committee that the Santiago Declaration was a "common policy for the conservation, development and rational exploitation of those resources and [the] joint machinery for the regulation of fishing in the areas in question," 5 *U.N. Conf. Off. Rec.* 18, *U.N. Doc. A/CONF. 13/41* (1958); and the expressions employed by the latter representative at the 12th Meeting of the Third Committee. 3 *U.N. Conf. Off. Rec.* 61-62, *U.N. Doc. A/CONF. 13/39* (1958). These CEP assertions of self-denial may be contrasted with the latest (as of the time of this writing, 17 February 1969) application of violent force by the Peruvian Navy against three American tuna boats on 14 February 1969, see, e.g., *The New York Times*, 15 February 1969, p. 1:1 and at 2:1. See generally Garcia Amador 73-79.

26. Declaration on the Maritime Zone, art. II, see MacChesney 266.

27. *Id.* art. IV.

28. *Id.* art. V.

29. 11 U.N. GAOR, 6th Comm. 31, *U.N. Doc. A/C.6/SR.486* (1956).

30. See also, e.g., Cisneros, 58-60; *Santiago Negotiations* 30-33, and note especially the statement:

This is, in short, the concept of biological unity from which is derived, in the scientific field, the preferential right of coastal countries. According to this concept, the human population of the coast forms part of the biological chain which originates in the adjoining sea, and which extends from the microscopic vegetable and animal life (fitoplankton and zooplankton) to the higher mammals, among which we count man. *Id.*

32.

31. United States, "Comments on the Proposals of Chile, Ecuador and Peru," *Santiago Negotiations* 37.

32. See Speech of Legal Adviser to Department of State Stephenson.

33. See W. Butler, *The Soviet Union and the Law of the Sea*, 116533 (1971); and W. Butler, *The Law of Soviet Territorial Waters* 19-25 (1967).

34. Arctic Waters Pollution Prevention Act, 18-19 Eliz. 2, c. 47 (Can. 1970). Royal Assent given 26 June 1970. This act has not yet been proclaimed as having come into force, see *id.* § 28. See also *The New York Times*, 9 April 1970, p. 13:6-8; *id.* 10 April 1970, p. 13:3-4; *id.* 16 April 1970, p. 6:1-2; *id.* 20 April 1970, p. 38:2 (Editorial); *id.* 26 April 1970, § 4 (Week in Review) p. 3:5-8.

35. See, *supra*, § III A for a discussion of these Latin American claims.

36. For a clear enunciation of the validity of the distinction relied upon here, see McDougal & Burke, *The Public Order of the Oceans* 518-19 (1962).

37. See, e.g., Bilder, "The Canadian Arctic Waters Pollution Prevention Act: New Stresses on the Law of the Sea," 69 *Mich. L. Rev.* 1 (1970). [hereinafter cited as "Bilder"]

38. For this appellation of creeping jurisdiction see Henkin, "The Continental Shelf," *The Law of the Sea: National Policy Recommendations* 171, 175-76 (Proceedings of the 4th Annual Conference of the Law of the Sea Institute, 23-26 June 1969, University of Rhode Island, 1969).

39. Bilder, *supra* note 37, at 30.

40. House of Commons Debates 6027 (17 April 1970). But see *R. v. Tootalik* EA-321, 71 W.W.R. (n.s.) 435 (Northwest Territorial Court 1970) *rev'd on other grounds*, 74 W.W.R. 740. Noted in Green, "Canada and Arctic Sovereignty," 48 *Can. B. Rev.* 740, 755-56, 773 (1970). See also Auburn, "International Law—Sea Ice—Jurisdiction," *id.* at 776-82.

41. This writer, for one, is most resistant to the uncivilized notion that self-preservation may justify making lawful that which would otherwise be unlawful. Professor Brierly was correct when he said, citing the cannibalism case of *R. V. Dudley and Stephens*, 14 Q.B.D. 273 (1884) in support of his argument:

The truth is that self-preservation in the case of a state as of an individual is not a legal right but an instinct; and even if it may often happen that the instinct prevails over the legal duty not to do violence to others, international law ought not to admit that it is lawful that it should do so.

Brierly 405. For clarity, and because of the important moral issues outlined by Brierly in the passage just quoted, it is necessary to distinguish between self-preservation on the one hand and self-help on the other. See McDougal & Feliciano, *Law and Minimum World Public Order* 213 n. 204 (1961) for a critique of the "subsumption of disparate things under a common rubric."

42. 2 Moore. *Digest of International Law* 409-14 (1906) [hereinafter cited as Moore]. See also Jennings, "The Caroline and McLeod Cases," 32 *Am. J. Int'l L.* 82 (1938). Hall characterizes the quoted formula as "perhaps expressed in somewhat too emphatic language . . . but perfectly proper in essence." See Hall, *A Treatise on International Law* 324 (8th ed. A. Higgins, 1924). [hereinafter cited as "Hall"] For reasons stated in the preceding footnote, Oppenheim-Lauterpacht's characterization of the case of *The Caroline* as "self-preservation" is respectfully disagreed with. See 1 Oppenheim 301. For a reasoned justification of the use of the term "self-defense" to describe the coercive protective measures open to the British Government in the *Torrey Canyon* casualty, see Utton, "Protective Measures and the 'Torrey Canyon'" 9 *B.C. Ind. & Com. L. Rev.* 613, 623 (1968). This writer, however, prefers the term "self-help" to indicate justifiable action in oil disasters of the type under discussion.

43. Goldie, Book Review, 1 *J. Maritime L. & Com.* 155, 158 (1969).

44. [1969] T.C.J. 3. See for a general discussion of this complex issue and of the different positions taken by the members of the Court on it, Goldie, "The North Sea Continental Shelf Cases—A Ray of Hope for the International Court?" 16 *N.Y.L. Forum* 325, 336-59 (1970).

45. Done 12 May 1954, [1961] 3 *U.S.T.* 2989, *T.I.A.S.* No. 4900, 327 *U.N.T.S.* 3 [hereinafter cited as the International Pollution Convention] (entered into force 26 July 1958).

46. Adopted 11 April 1962, [1966] 2 *U.S.T.* 1523, *T.I.A.S.* No. 6109 (entered into force as to amendments to arts. 1-10, 16 and 18, 18 May 1969 and as to art. 14, on 28 June 1967) [hereinafter cited as "Pollution Amendments"]. Further amendments were made in 1969, Amendments to the International Convention for the Prevention of Pollution of the Sea by Oil, 1954 (as amended), annexed to IMCO Ass. Res. A. 175 (VI) adopted 21 October 1969. See *Two Conventions and Amendments Relating to Pollution of the Sea by Oil (Message from the President, May 20, 1970)*, 91st Cong., 2d Sess., at 29-32. See also 62 *Dept. State Bull.* 756-57, 758-59 (15 June 1970).

47. See Annex A to the International Pollution Convention replaced by § 14 of the Pollution Amendments.

48. See the four exceptions listed in art. 2, para. 1 of the Pollution Amendment, *supra* note 46.

49. See art. 2 of the International Pollution Convention, *supra* note 29, as replaced by § 2 of the Pollution Amendments, *supra* note 30.

50. Done 29 November 1969, 9 *Int'l Legal Materials* 25 [1969] [hereinafter cited as the Public Law Convention].

51. Done 29 November 1969, 9 *Int'l Legal Materials* 45 [1969] [hereinafter cited as the "Private Law Convention."]

52. 9 *Int'l Legal Materials* 65

53. 9 *Int'l Legal Materials* 66.

54. 9 *Int'l Legal Materials* 67.

55. Public Law Convention art. 1, para. 1, *supra* note 34.

56. *Id.* para. 2.

57. *Id.* art. 3, art. 4 provides for the list of experts contemplated in art. 3.

58. *Id.* art. 5, para. 1. Paragraphs 2 and 3 set out the limits of state action.

59. Art. 7 saves all existing rights "except as specifically provided" in the Convention. *Id.* The question is, therefore, whether the express limitation of the Public Law Convention and the express provisions in arts. 3, 5, and 6 limit, or enlarge, the rights of coastal states.

60. *Supra* note 50.

61. The treaty among Belgium, Denmark, France, the Federal Republic of Germany, the Netherlands, Norway, Sweden, and the United Kingdom, the Agreement for Co-operation in Dealing with Pollution of the North Sea by Oil, done 9 June 1969, [1969] *U.K.T.S.* No. 78 (Cmd 4205) (entered into force 9 August 1969), formulates some of the amenities of good neighborliness in this context.

62. Public Law Convention, *supra* note 50, at 469.

63. This position has recently been affirmed by the United Nations General Assembly in paragraph 13 of the Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction, G.A. Res. 2749, 25 U.N. GAOR—(1970) which reads:

Nothing herein shall affect

....

(b) The rights of coastal States with respect to measures to prevent, mitigate or eliminate grave and imminent danger to the coast line or related interests from pollution or threat thereof resulting from, or from other hazardous occurrences caused by, any activities in the area, subject to the international regime to be established.

64. Professor Joseph Kunz cogently argues that "the long-established principle of the freedom of the high seas" is a norm *juris cogentis* of general customary international law, *see* Kunz, "Continental Shelf and International Law: Confusion and Abuse," 50 *Am. J. Int'l L.* 828, 844-45, 853 (1956).

65. Quoted from Hall 185.

66. *Id.*

67. *See, e.g. supra*, note 64 and the theory therein cited.

68. These were Gentilis, Welwood, Burrows, and Selden, of whom the last is the best known. Gentilis' defense was equally of Spanish and English claims. Selden is famous for his book *Mare Clausum*, the printing of which was commissioned by Charles I as a counterblast to Grotius' *Mare Liberum*. *See* I Oppenheim, *International Law* 585 (8th ed. Lauterpacht 1955).

69. For a discussion of this built-in tragic situation whereby each is forced, by his immediate dilemma, to work against his own long-term advantage, *see* Hardin, "The Tragedy of the Commons," *The Environmental Handbook* 31, 36-38 (G. DeBell ed. 1970).

70. *See* Devisscher, *Theory and Reality in Public International Law* 162 (rev. ed. Corbett transl. 1968) for an incisive and realistic, if possibly pessimistic, discussion of this point.