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NEW ISSUES AND NEW INTEREST IN THE LAW OF THE SEA

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The past 2 years have witnessed an intense national and international debate over major issues in the law of the sea. The legal questions connected with man's increasing desire to exploit the living and mineral resources of the seas and ocean floor have occasioned particular interest both domestically and abroad.

At home several bodies, which I will mention later, have devoted their activities to these questions. Internationally, the increased activities of the Intergovernmental Oceanographic Commission (IOC) and Intergovernmental Maritime Consultative Organization (IMCO) have been supplemented by debates at the 22nd Session of the General Assembly which resulted in a new 35-nation United Nations Ad Hoc Committee on the Seabeds. The United Nations General Assembly will again address these problems this fall. Indeed, each week brings a report of new scientific or commercial interest in the resources of the sea and ocean floor. The imagination of Jules Verne 100 years ago in *Twenty Thousand Leagues Under the Sea* is finally being outstripped by actual technology. The future is projected in the context of scientific research and technology infinitely more exciting than the literary entertainment of science fiction. Using the commonly accepted U.S. measure of importance—the almighty dollar—it is reported that current economic activity in just that portion of the sea area known as the Continental Shelf is in the magnitude of multibillions of dollars.

The dramatic increase in the national and international efforts being made in this area directly reflects the increased attention being focused on the Continental Shelf and deep ocean floor by previously disinterested nations. This increased interest and involvement carries important implications for many of the Navy's ocean-based activities.

If the deliberations on near shore and deep ocean seabed problems could be described in a single word, that word would be diversity; diversity of desires, of technological capabilities, and of expectations. In addition to navigational and related uses, the ocean waters and the bed of the sea are now commercially producing oil and gas, salt, bromine, magnesium, sulphur, and other minerals, not to mention the vast variety of products of the fishing industry. It is not surprising that legal principles proposed for this new frontier are as numerous and divergent as its material potential.

There are numerous national positions as to the importance and priority to be attached to the establishment of

legal principles in the ocean environment. Thus, it has unquestionably become an arena in which private and governmental interest is generating pressure for development and legal change.

Domestically such pressures resulted in passage of the Marine Resources and Engineering Development Act in 1966. This act established a Cabinet-level National Council on Marine Resources and Engineering Development and a Commission on Marine Science, Engineering and Resources. The Navy, from the Secretarial level down, has played a major role in the deliberations of the Council, Commission, and the many subordinated interagency working bodies established under them. The Office of the Judge Advocate General has been consulted more and more frequently as the legal facets of technological and scientific problems became apparent.

While the National Council and the Commission has focused primarily on the long-range needs of a national oceanographic program, there has been a dramatic increase in the tempo of ocean-oriented activities at all levels of the U.S. Government. New international involvement in the area of oceanography is well illustrated by the resolution introduced by Malta at the United Nations in the summer of 1967. This resolution proposed restricting use of the seabed to peaceful purposes and establishment of a legal regime which would insure that the proceeds of deep ocean mineral wealth would be used to aid developing countries.

This and other proposals pointed up the need in the U.S. Government for a high-level permanent interagency committee which could focus on the day-to-day problems of preparing and presenting U.S. positions in relation to the Continental Shelf and deep ocean floors in various international forums. This need was met this past February by the creation of the Interagency Committee on International Policy in the Marine Environment under the chairmanship of the Deputy Under-Secretary of State. The Assistant Secretary of the Navy (Research and Development) is the Department of Defense representative on this committee.

The Continental Shelf and deep ocean floor questions required immediate attention by the new Interagency Committee both because of the ongoing meetings of the United Nations Committee on the Seabeds, which was established following the Malta resolution, and because numerous private groups and Government agencies were urgently seeking clarification of the jurisdictional limits of the U.S. Continental Shelf. Accordingly, a Working Group on the Shelf and Deep Ocean Floor, abbreviated as SADOF, was established. I have been privileged to be appointed the Department of Defense representative on this working group.

The active role played by the Department of Defense, and particularly the Navy, in the long-range studies and policy planning work of the National Council, the Commission, and the Interagency Committee is surprising and disturbing to some. This reaction is based on the fact that most of the broad range of oceanographic problems concerns civil or peaceful uses of the oceanic environment, with particular emphasis on the extraction of its mineral and living resources. There are, however, several good reasons for the interest and concern of the Department of Defense and, in particular, the Navy.

First, the Navy manages numerous programs which have potential civilian as well as military applications. Its well-known Man-in-the-Sea program alone is developing numerous new techniques useful in many phases of the offshore oil industry. In fact, the Navy spends approximately half of all governmental monies available within the United States for scientific research and technology development which have oceanic applications.

Second, it is reasonable to assume that the military will play an important role in affording protection to U.S. citizens and to their personal property that may be placed on the seabed of the Continental Shelf, or beyond, to be used in scientific or extractive operations. It is important, therefore, for the Department of Defense to understand the needs and rights of such operators so that the protection afforded will be both reasonable and lawful and thus minimize the risk of conflict.

The third reason for our interest is that it is important that modes of accommodation be developed to insure that military activities do not unreasonably interfere with new usages or impede future progress made possible through new technology. Already, new means of coordinating oil drilling operations and Navy weapons testing along the California coast have been found.

The fourth and most compelling reason for the Navy's direct interest and concern with these developments is that implementation of many proposals would create an implicit acceptance of additional constraints and controls on military activities. Proposals which would, on the one hand, increase national jurisdiction over coastal waters, in a qualitative or quantitative sense, or, on the other hand, place the seabed of the deep oceans under the control of an international agency could have a significant impact on the historic principle of freedom of the seas. It is of particular importance to avoid arrangements which would result in the degradation of the right of warships and submarines to navigate on and under the high seas. Any arrangements—if they are to be reflective of our overall national interests—must recognize that the oceans are, and will continue to be, vital to our national security.

Thus, Navy participation in our national deliberations has been considered both necessary and desirable to ensure that national security interests are fully considered in the course of developing both long-range criteria and immediate policy initiatives.

During the past year it has become increasingly clear that fundamental issues of international law of the sea are intertwined with and underlie the development of a comprehensive oceanographic program. Virtually all arrangements being discussed either rely on or modify historic principles of international law. Accordingly, the lawyers within the various agencies have played an increasingly active role in the consideration of these issues.

The most immediate area of interest to international lawyers is the Continental Shelf. This area, in geological terms, is the extension of the continental mass which gently slopes out from the world's coasts. It extends in some places further than 200 miles before a sudden break in grade, normally located at about the 200-meter depth curve, plunges into the deep ocean abyss. The Continental Shelf is most easily accessible to man's developing marine technology; and lawyers are now compelled to consider its legal status by the burgeoning commercial and scientific activity made possible by its relatively shallow superadjacent waters.

The Shelf and Deep Ocean Floor Working Group referred to previously which, by the way, is composed primarily of lawyers, is presently engaged in developing recommendations on two fundamental questions of mixed policy and law. One is the question of how and where the outer limit of the regime of the Continental Shelf should be further delineated. The second is what type of legal regime should be negotiated regarding the ocean seabed and its resources beyond the outer limit of the Continental Shelf.

President Truman initiated the Continental Shelf regime in 1945 when he unilaterally proclaimed that the United States would exercise exclusive jurisdiction and control over the natural re-

sources of the seabed and subsoil of our adjacent Continental Shelf. In a press release which accompanied the Truman Proclamation, the area was described as including all of the ocean floor "contiguous to" the coasts of the United States to a depth of 600 feet—which is approximately 200 meters.

A mere 13 years later the Continental Shelf regime was codified by the 1958 Geneva Convention on the Continental Shelf. The Convention, however, describes the outer boundary of the regime in somewhat less than precise terms.

Article 1 provides that the term "Continental Shelf" refers to the seabed and subsoil of the submarine areas adjacent to the coasts but outside the area of the territorial sea to a depth of 200 meters or, beyond that limit, to where the depth of the superadjacent waters admits of the exploitation of the natural resources of the said areas. Thus the Continental Shelf regime becomes applicable beyond the 200 meter isobath as new technology such as new types of Texas Towers or even completely submerged installations allows commercial extraction of oil and gas resources at greater depths. This, of course, is an open ended definition—depth of 200 meters or depth of exploitability.

The exploitability test does not meet the normal legal requirements of certainty. However, it does have the advantage of flexibility and makes the Convention applicable without change to future situations brought about by new technology. Of course, this second criterion tends to make the scope of the Convention ambiguous and has already created heated discussions and divergent views among international lawyers.

As the U.S. Department of Interior has already leased areas beyond the 200 meter isobath, the question of the permissible scope of the exploitability test is no longer academic. Considering the emerging technological capabilities possessed by the United States and other leading maritime powers and the fact that the Convention by its own terms is open for amendment in 1969, the Department of Defense has agreed that the question should be examined as to how the rather vague exploitability criterion should be modified. Accordingly, the United States tabled several months ago a proposal before the United Nations Committee on the Seabeds that there should be established as soon as practicable an internationally agreed, precise boundary between the deep ocean floor and the regime of the Continental Shelf. This, then, is the basis for urgency behind the first of the specific tasks assigned to the Working Group on the Shelf and Deep Ocean Floor—to develop a recommended U.S. position on the question of how the Continental Shelf outer boundary should be established and where it should be.

At least four "legal" issues are basic to an evaluation of the relative desirability of various proposed outer boundaries, and the working group deliberations have revolved around these issues to date.

The first is an examination of the qualitative nature of the present Continental Shelf regime. That is, what rights and duties does the Convention on the Continental Shelf impose upon a nation possessing a Continental Shelf, and do these rights and duties apply to nonsignatory nations? Numerous questions remain under the Convention regarding types of allowable scientific research activities and other matters. The desirability of an outer boundary formula which produces a broad Continental Shelf depends, for a maritime nation with worldwide interests such as the United States, in large part upon the types of activities on and over the shelf regime which can be regulated and how they can be regulated. In this regard the relevancy of applicable domestic legislation must also be determined.

Closely related to this question is the effect which the location of a boundary will have on traditional freedoms of the sea exercised either within the waters over the shelf or outside the new boundary. What types of new limitations on transits by surface vessels will develop, for example? The establishment of a precise boundary in and of itself might stimulate nations to increase the degree of control they exercise over events landward of that boundary, but it might also tend to insure that events seaward of the boundary were protected from at least some types of claims to national jurisdiction.

Thirdly, what impact will the boundary have on the difficulties or chances of effectuating a satisfactory regime for the exploitation of the resources beyond the boundary? If the boundary is far seaward, for example, there are few known resources whose exploitation would be affected by a deep ocean regime in the near future.

Finally, by what methods or procedures may the boundary be changed? Is it possible, in other words, to establish a precise boundary through interpretation of the Shelf Convention, or is further legislation or a new treaty necessary to alter the status quo? In this regard it should be noted that though there is little specific reference to how far and how deep the shelf regime could extend under the exploitability criterion in the 1958 Convention working documents and debates, it would seem that the exploitability test of the Convention is, in fact, limited by the requirement of reasonable proximity to the coast and reasonable relationship to the geologic Continental Shelf.

The question as to what the most desirable limit should be—from the standpoint of national security—is a complex one. The qualitative nature of lawful restrictions upon military activities sought to be undertaken on a foreign Continental Shelf are not yet clearly defined. It is clear, however, that military activities may not be undertaken on or above a foreign shelf which would interfere with that nation's right to explore its shelf or exploit its resources.

The Navy is presently examining the military implications of various proposals for specific outer limits. These proposals range from 200 meters to 4,000 meters in depth and from 50 miles to 200 miles from shore or a combination of both depth and distance criteria. Without attempting to prejudge the conclusion of these Navy studies and the work of SADOF, the general conclusion appears warranted that a relatively narrow Continental Shelf regime would best serve the security interests of the United States. The conclusion that our military interests are best served by a restrictive definition is to a considerable extent, however, based upon the nature of an agreed deep ocean regime that will evolve beyond the Continental Shelf.

Our SADOF Working Group has also been tasked to develop recommendations regarding a regime for the deep oceans beyond the Continental Shelf. In this connection the United States recently tabled at the U.N. Committee on the Seabeds certain basic principles to be used as a basis for internationally agreed arrangements for the exploitation and use by states of the deep ocean floor and its subsoil. The fundamental principle proposed was that no state may claim or exercise sovereign rights over any part of the deep ocean floor.

This is not to say that the exploration and use of the deep ocean floor or the exploitation of its resources are prohibited. The deep ocean floor may be used for nonmilitary or military activities under existing principles of international law pursuant to the concept of the freedom of the seas—recognizing, of course, that reasonable regard must be given to the interest of other states in their exercise of high seas freedoms. In addition, there is agree-

ment among most international lawyers that minerals lying beyond the regime of the Continental Shelf may be lawfully exploited, and the exploiter is entitled to keep what he finds.

A question does exist, however, as to whether an individual or nation may claim some form of interest in areas adjacent to an exploitative activity and, if so, how large such areas can be. In this regard it is reasonable to conclude that in the not too distant future, clarification of such rights will be necessary in order to render deep ocean exploitative operations both feasible and profitable.

The development of a specialized system for the exploitation of resources varying from the high seas rights mentioned a moment ago is predicated on the assumption that a regime that vests an exclusive right to the resources only after they are extracted is not reflective of the economic needs of the exploiter of mineral resources. Quite frankly, it is also predicated on the assumption that a system should be devised which will permit all nations to share in the ocean's wealth—either directly or indirectly.

There are at present many possible regimes under consideration. They generally fall into the following categories:

First, the *Flag state proposal:* Under this system the nation would assume responsibility over an exploitative operation as if it were conducted on a vessel of its registry. The state of the exploiter would have a protective interest in the resource to be exploited within a reasonable area.

Secondly, an *International registry:* Under the system an international agency would register a national claim with some authority regarding competing claims, thus validating the state's claim.

Thirdly, complete *Internationalization:* Under this system an international agency would "own" the resources of the seabed of the deep oceans. In effect, permission from the agency would be necessary before any exploitation took place.

A combination of these alternatives is also possible. For example, some form of international registry of claims in conjunction with a system of flag state jurisdiction and control deserves serious consideration. From the national security standpoint, such a system might even be advantageous for it might tend to reduce the risk of economic conflict or territorial claims and, at the same time, not materially interfere with or constrain peacetime military activities and deployments.

The final choice of the most favorable deep ocean regime alternative has not been made in SADOF or other national forums. As with the question of a precise outer boundary for the Continental Shelf, much work remains before the solution most beneficial to our composite national interest is found. In the course of this work, however, one underlying fact stands out—the oceans are becoming more, not less, essential to the security and well-being of most, if not all, of the peoples of the world. And this fact alone dictates that we should be more, not less, deliberate at arriving at irreversible decisions.