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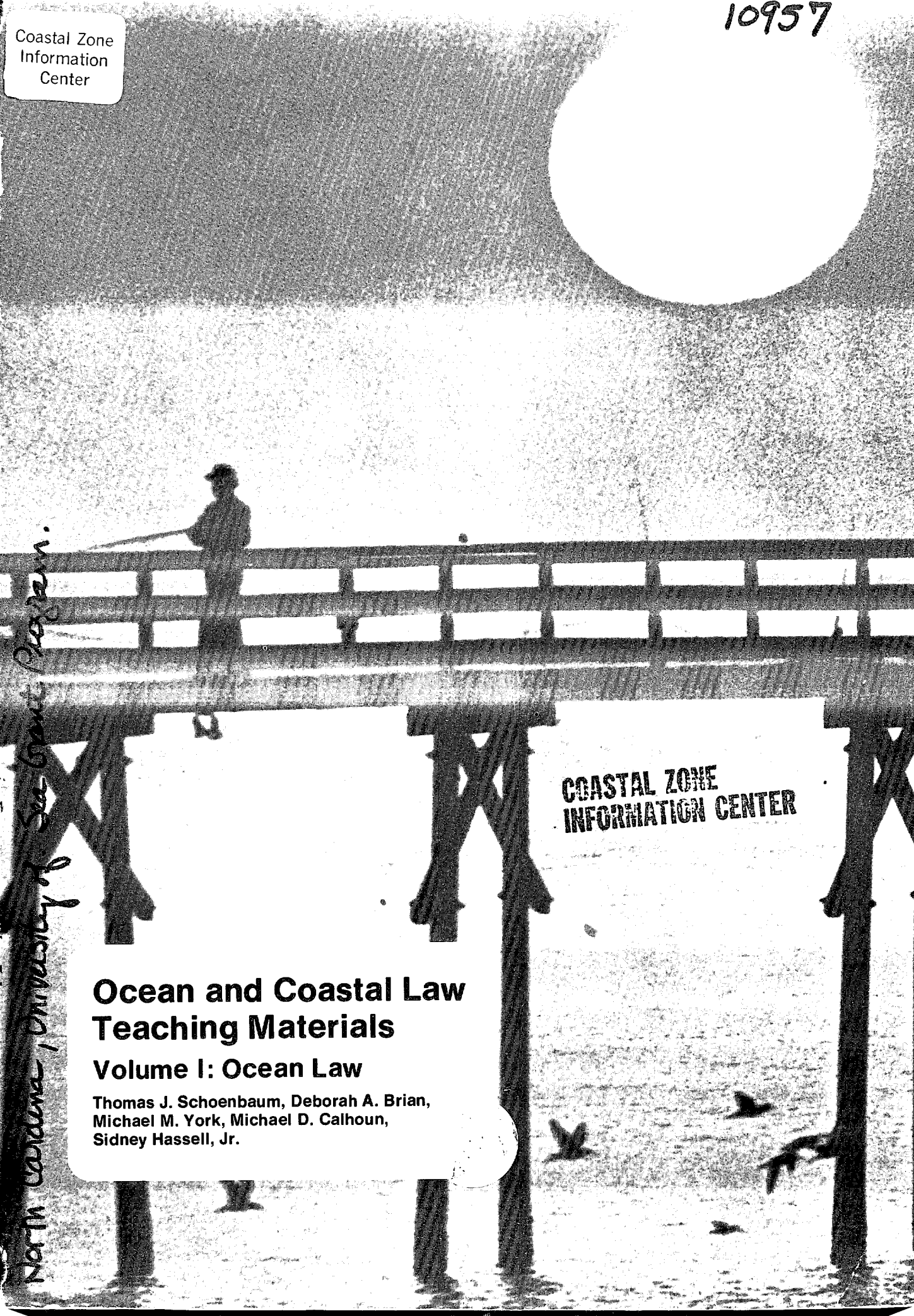

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Ocean and Coastal Law Teaching Materials

Volume I: Ocean Law

Thomas J. Schoenbaum, Deborah A. Brian,
Michael M. York, Michael D. Calhoun,
Sidney Hassell, Jr.

North Carolina, University of, Sea Grant Program.

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OCEAN AND COASTAL LAW TEACHING MATERIALS

VOLUME I: OCEAN LAW

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OCEAN AND COASTAL LAW
TEACHING MATERIALS

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FOREWORD

This book of materials is a response to the need for a teaching tool showing the interrelationship between the law of the sea and coastal legal problems. It is a reflection of the growing awareness that the contemporary emphasis on new and improved uses of the resources of the oceans will have a profound impact on the character of our coastal areas. Conversely, coastal planning decisions will affect our choices in the development of ocean resources.

The immediate stimulus for the compilation of these materials was to provide a ready set of readings for students enrolled in the Ocean and Coastal Law course at the University of North Carolina School of Law. This book is the product of second-and-third-year law students working under my supervision and direction. It is a totally volunteer effort, and its successful completion is due to the high degree of interest and hard work of the students involved. For my part, I have thoroughly enjoyed the association with them both on a professional and a personal level.

I want to express my gratitude as well to Dr. B. J. Copeland of the University of North Carolina Sea Grant Program for encouraging this project.

Thomas J. Schoenbaum

CHAPTER ONE

OCEAN SPACE

SECTION 1. INTRODUCTION

Christy, "Property Rights in the World Ocean"

15 NATURAL RESOURCES JOURNAL 695 (1975)

* Reprinted with permission from 15 NATURAL RESOURCES J. 695 (1975), published by the University of New Mexico School of Law, Albuquerque, N.M. 87131

Property rights in the world ocean are undergoing a major transition as the principle of the freedom of the seas comes under increasing pressure from economic and political forces. The freedom of the seas means, in essence, that the ocean's resources are exploited under the conditions of common property. This did not produce significantly detrimental consequences until after the Second World War, when demand for ocean resources increased very rapidly. The economic waste resulting from the common property condition is now very high. But there are, in many instances, considerable difficulties and costs associated with the removal of the conditions of common property, and it is not clear that the benefits are sufficient to cover the costs. But whether or not removal of the common property condition is economically justifiable, the political pressures for acquiring exclusive rights can be considered inexorable. The problem is one of accommodating these pressures while minimizing conflict and economic waste.

INTRODUCTION

The subject of property rights in the oceans is both timely and complex. It is timely because the resources of the oceans are in a state of transition from the condition of no one's jurisdiction to that of someone's jurisdiction. This process of transition is occurring both because of the rapid growth of economic pressures on the seas' resources and because of the sudden interest in the seas' wealth expressed by a host of newly emerging nation-states. The subject of ocean property rights is now being addressed by the third United Nations Conference on the Law of the Sea, the third session of which was held in March and April of this year in Geneva.

The complexity of the subject is due not only to the unclear status of jurisdiction but also to the wide variety of ocean resources and uses that are now requiring the exercise of jurisdiction by some agent, whether that agent be some group within a nation, the nation itself, some group of nations, or the world community. For fisheries

*Resources for the Future, Inc.

there are special complications deriving from the fugitive nature of the resource and the fact that fish do not respect man's boundaries.

Because of these complexities it is impossible to deal in detail with all of the many important problems associated with the acquisition and exercise of property rights in the oceans.[1] Instead, this paper will briefly sketch the background and focus attention on a few of the problems believed to be of greatest interest; that is, the problems associated with the transaction costs of acquiring and enforcing satisfactory property rights.

FREEDOM OF THE SEAS AND COMMON PROPERTY

As stated above, the resources of the ocean are going through a fundamental transition, from being subject to no one's jurisdiction to becoming subject to someone's jurisdiction. In the former situation, property rights do not exist in any meaningful sense; in the latter situation, satisfactory property rights may or may not exist, depending upon how the jurisdiction is exercised.

The absence of satisfactory property rights means that the resources are essentially treated as common property resources. Because of the importance of this term for a discussion of property rights it seems useful to specify the significant characteristics of a common property natural resource.

A. It is a natural resource whose flow of services has economic value.
B. The flow of services is treated as indivisible.
C. The flow of services can be used by any individual economic unit within a group of economic units.
D. There is no agent that controls access within the group of economic units to the flow of services from the resource.

At the international level for those resources found beyond national jurisdiction common property resources include fisheries, the minerals of the deep sea bed, the use of ocean space for maritime commerce in areas of congestion (such as the English Channel), and the assimilating capacities of the oceans for waste disposal. The group of economic units is the nation-states of the world community. The condition of common property emerges from the principle of the freedom of the seas which guarantees free and open access to all nations.

At the national level treatment of a resource as common property depends, in part, upon the choice of the government. Fisheries, for

1. For an excellent introduction to the literature on the law of the sea in general, see A. Hollick, Marine Policy, Law and Economics (1970).

example, are generally treated as common property in the United States and western Europe, but are not common property in Japan, the Soviet Union, and the Eastern Bloc countries, where access is controlled. Other resources in the United States that are, or have been, treated as common property include common oil pools, the radio spectrum, air, bodies of water, recreational lands, and wildlife. For some of these, the common property characteristic has been removed by making the flow of services from the resource divisible or by controlling access. It should be noted that in some cases the control of access may be insufficient to prevent the wasteful consequences of exploiting a common property resource.

Distinctions should be made between the term "common property" and the terms "public property" and "the commons" "Common property" relates specifically to the conditions governing access to the resource, not to the nature of the owners or of those who exercise jurisdiction or control over the resource. Thus, public property is sometimes treated as common property and sometimes not. Examples of the former treatment are the many outdoor recreation areas that are publicly owned and freely accessible to all members of the public. Examples of the latter are the National Forest grazing lands and timber lands. These are also publicly owned, but the flow of services is made divisible and access is restricted to individual economic units by leases and other techniques.

With regard to the commons the condition of common property was generally removed when the commons were used for pasture. H. Scott Gordon, the first economist to analyze the common property condition in fisheries, pointed out that the commons usually became "stinted."[2]

> Perhaps the most interested similar case is the use of common pasture in the medieval manorial economy. Where the ownership of animals was private but the resource on which they fed was common (and limited), it was necessary to regulate the use of common pasture in order to prevent each man from competing and conflicting with his neighbors in an effort to utilize more of the pasture for his own animals. Thus the manor developed its elaborate rules regulating the use of common pasture or "stinting" the common: limitations on the number of animals, hours of pasturing, etc., designed to prevent the abuses of excessive individualistic competition.[3]

2. The noun, stint, is defined as "the limited number of cattle, according to kind, allotted to each definite portion into which pasture or common land is divided, or to each person entitled to the right of common pasturage." The Oxford Universal Dictionary on Historical Principals (3rd ed. rev. with addenda 1955).

3. Gordon, *The Economic Theory of a Common-Property Resource: The Fishery*, 62 J. Pol. Econ. 135 (No. 2, 1954).

The use of the commons for recreational purposes generally remains unstinted. Even though it may be limited to a group or community, access by members of the group is still free and open.

Even in primitive societies it is apparent that the common property condition did not persist when the resources became scarce. "Speaking generally, we may say that stable primitive cultures appear to have discovered the dangers of common-property tenure and to have developed measures to protect their resources."[4]

Distinctions might also be made between the term common property and the terms *res nullius* (things unowned) and *res communes* (things owned in common). But as Professor Douglas Johnston has said, "The academic dispute between *res nullius* and *res communes* is now almost—but not quite—silenced. Through the centuries it has continued to shed light on the legal mind, but failed to provide a lasting basis for the settlement of fishery disputes . . . (The) question whether the seas, or the high seas, are *res nullius* or *res communes* is improper; both terms should be rejected, for they merely confuse a question which is already complicated enough as it is."[5]

Generally, the condition of common property exists where the costs (social, political, or economic) of acquiring and enforcing rights of property are greater than the benefits that can be obtained. The costs of acquiring and enforcing property rights may be high for a wide variety of reasons, including the large spatial extent or the fugitive nature of the resource, the desire to maintain freedom of use, and objections by those who might be excluded. Benefits of acquiring property rights may be low in situations where the flow of services is abundant relative to the demand.

As long as the flow of services is so abundant that use by one economic unit does not diminish the value of use by others, the consequences of maintaining the common property condition are not particularly damaging. But when use by one impinges on use by others, inefficiencies will result. These inefficiencies may be in the form of physical wastes such as depletion of a stock of fish or congestion of traffic in a narrow strait. Or they may be of an economic character because of the attraction of redundant amounts of capital and labor. Under common property conditions, no individual user can afford to take future returns into account. He has no incentive to restrain current use for the benefit of future returns because there is

4. *Id.* 134-35. *See also* B. Malinkowski, Crime and Custom in Savage Society 17 (1959); Davidson, *Family Hunting Territories in Northwestern North America,* Indian Notes and Monographs 19-22 (No. 46, 1928).

5. D. Johnston, The International Law of Fisheries: A Framework for Policy-Oriented Inquiries 303 (1965).

assurance that he will capture a satisfactory share of the returns. Also, under common property conditions, capital and labor will inevitably flow in until total costs and revenues, rather than marginal costs and revenues, are equal.

For ocean resources these consequences are most clearly demonstrated in the exploitation of fisheries and marine mammals. Numerous stocks throughout the world have been depleted—fished to the point where the annual yield is less than the maximum that can be sustained. In some cases conservation controls have been imposed and have been relatively effective in restoring yields to their maximum. With only one or two exceptions, however, these controls have not significantly changed the common property condition. Indeed, many of these controls have exacerbated economic waste rather than alleviated it, as illustrated in the following examples.

One form of conservation control is that of raising costs (or preventing declining costs) by imposing technological inefficiencies on fishing effort. At the turn of the century, when steam power came into general use for fishing vessels, Maryland prohibited dredging oyster beds in the Chesapeake Bay by automotive power. While most other states developed a system of private property rights for oyster farming, Maryland persisted in treating the beds as common property. As a result, Maryland has the last remaining commercial sailing fleet in the United States. While this archaic harvesting technique is manifestly inefficient and Maryland's oyster catch is ten percent of former yields (for a variety of reasons), it must be admitted that society receives some value from the maintenance of the lovely skipjacks and bugeyes and the preservation of an independent and individualistic way of life.

A more direct conservation tool is that of limiting total catch. Under this approach, a total quota is announced at the opening of the season and, when the quota is reached, all fishing ceases until the next season. This approach induces each fisherman to build more, larger, and faster vessels in order to get as large a share for himself before the total quota is reached and the season closes. Since all fishermen operate under the same incentive, excessive units of capital and labor are employed, and the season shortens.

In 1967 a total quota was imposed on the catch of yellowfin tuna in the regulatory area of the Inter-American Tropical Tuna Commission. Up until 1967 the total size of the tuna fleets of all countries in the area was fairly steady at about 45,000 tons of capacity. By 1973 capacity had increased about three-fold, to 133,000 tons.[6] The size

6. S. Saila and V. Norton, Tuna: Status, Trend, and Alternative Management Arrangements 40 (1974).

of the total quota was also increased, but by less than 100 percent, with the result that the season dropped from its usual nine or ten months to about three months. In addition to the inefficiencies manifested by the redundant units of effort, this system has had global ramifications. At the close of the yellowfin season in the eastern Pacific the vessels move to the Atlantic, where they have placed further pressures on tuna stocks that are already at, or beyond, the point of maximum sustainable yield. It might be noted that in the three major oceans—Atlantic, Pacific, and Indian—skipjack is the only major species of tuna that has opportunities for further increases in yield.

These kinds of controls exacerbate the economic waste that is already present as a result of the common property condition. Virtually all economic studies of fully utilized fisheries have demonstrated that there are redundant amounts of capital and labor and that the costs associated with these can be considerable. For example, it was estimated in the mid-60's that the same amount of salmon (and same gross revenues) could be taken with $50 million less capital and labor than was annually employed at that time.[7] With a three-fold increase in price and a decline in catch since then, the current amount of redundant capital and labor is likely to be considerably larger.

British Columbia, Alaska, and Washington have all adopted controls over access to salmon fisheries. Only the British Columbia scheme has been in effect long enough to produce results. In 1968 the number of vessels that could be licensed to fish for salmon was limited. The scheme has been so effective that the value of a license has reached levels of $5,000 to $6,000 per ton of vessel. Thus a new entrant with a 25 ton vessel must buy out previous owners at a cost of $125,000 simply for the privilege of fishing.

With a few exceptions, the license limitation systems in Alaska and Washington are the only ones in effect for marine fisheries in the U.S. While economic waste in other U.S. fisheries is not likely to be as large as that for salmon, it is still pervasive.[8] There are no esti-

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7. J. Crutchfield and G. Pontecorvo, The Pacific Salmon Fisheries: A Study of Irrational Conservation 174 (1969).

8. *See* Crutchfield and Zellner, *Economic Aspects of the Pacific Halibut Fishery*, 1 Fishery Industrial Research (No. 1, 1963); E. Lynch, R. Doherty, & G. Drahelm, The Groundfish Industries of New England (U.S. Fish and Wildlife Service Cir. 121, 1961); V. Arnold, An Analysis to Determine Optimum Shrimp Fishing Effort by Area (U.S. Bureau of Commercial Fisheries Working Paper No. 40, 1970); F. Bell, Estimation of the Economic Benefits to Fishermen Vessels and Society From Limited Entry to the Inshore U.S. Northern Lobster Fishery (Bureau of Commercial Fisheries, Working Paper No. 36, 1970).

mates for the total amount of economic rents being dissipated in the United States, much less for the world as a whole.

It is much more difficult to measure the wastes associated with the use of other common property resources of the oceans. The minerals of the sea bed of the high seas have not yet been commercially exploited and are not likely to be exploited under common property conditions unless there is total failure at the United Nations Conference on the Law of the Sea. Wastes from marine pollution, where use of one set of flow of services interferes with another, are present and may be considerable in inshore areas. Congestion of commercial shipping in narrow straits and around headlands produces costs in terms of lost time and increased risk of collision.

In summary, it is clear that the common property condition that governs the use of most ocean resources is a source of economic waste. The amount of waste may be quite large for marine fisheries and may be important, though presently immeasurable, for other resources and uses of the seas. These wastes reflect the value that might be achieved by removing the condition of common property, either directly or indirectly.

However, the condition of common property is not removed without cost, and the question remains whether the transaction costs of achieving satisfactory property rights by making the flow of services divisible or by controlling access are less than the values that can be gained.

THE PRESENT STATUS OF PROPERTY RIGHTS IN THE WORLD OCEAN

The principle of the freedom of the seas emerged from the arguments presented in the early 1600's when Hugo Grotius defended the right of the Dutch to navigate the Indian Ocean, which the Portuguese claimed to be their exclusive territorial waters.[9] One of the main arguments made by Grotius and his followers was that the costs and difficulties of acquiring and enforcing exclusive rights in the high seas were greater than the benefits that could be obtained. They argued that the vastness of the seas precluded effective enforcement of rights except over a narrow coastal margin: *"imperium terrae finiri ubi finitur armorum potestas"* (the dominion of land ends where the power of arms ends).[10] This was assumed to be the limit of a cannon shot. It was also argued that the seas' resources were so abundant that there was little or no value to exclusive rights: "The extent of

9. C. Fenwick, International Law 292 (1924); Grotius, Mare Liberum (1608); Grotius, De Jure Belli ac Pacis (1625).

10. C. van Bynkershock, Questiones Juris Publici (1737) in A. Volkov, Maritime Law (1969).

the ocean is in fact so great that it suffices for any possible use on the part of all peoples for drawing water, for fishing, for sailing."[11]

The arguments of Grotius and his followers prevailed and "by the mid-eighteenth century it was clear that the era of claim to exclusive sovereignty over extensive areas of the sea had passed, and virtually every textwriter who touched upon the subject accepted Grotius' basic premises: the open sea cannot be occupied; it is indivisible, inexhaustible, and productive without the increment of man's labor, it cannot be allotted or appropriated; and there is no moral excuse for abandoning the original community of goods."[12]

For more than two centuries the ocean and its resources beyond narrow limits of national jurisdiction have been treated as the common property of the world community. For most of the ocean's resources over most of this period the consequences have not been excessively damaging. While there was evidence that certain fish stocks in certain localities were over-fished and depleted and conflicts over fishing rights broke out from time to time, the fishermen could often find opportunities further afield. But in the period since the Second World War changes of such great nature have taken place that the viability of continued maintenance of the common property condition for ocean resources is doubtful.

The changes have both economic and political characteristics. For fisheries a rapid increase in demand, particularly for fish caught for fish meal, led to a rate of increase in world catch of about six to seven percent per year and to extension of effort worldwide by several countries. In 1969, however, total world catch was lower than it was in 1968. The current projections indicate that the future rate of increase will probably be no more than three percent per year and may actually be much lower. Most of the species for which there is an effective demand are already being fully utilized. There are no significant opportunities for cultivation of marine fisheries and increasing the annual yields. While there are a few stocks that can be further developed—in the Indian Ocean and off the coast of Argentina—the amounts that can be caught are not particularly large relative to the total world catch. One possible exception is that of krill—a small, shrimplike animal—in the Antarctic. But even if this leads to dramatic increases in total world catch, it will do little to reduce the pressures and problems associated with most of the world's fisheries.

There are several important consequences arising from the pressures of demand on supply. Biological waste has become more prev-

11. Grotius, De Jure Belli ac Pacis (1625) in D. Johnston, *supra* note 5, at 166.
12. Johnston, *supra* note 5, at 173.

alent and more rapid. A particular stock of fish may now become depleted within a few seasons of fishing. Economic waste is also becoming more widespread. In addition, several countries, particularly the Soviet Union and others in the Eastern Bloc but including some from western Europe and a few developing countries as well, have developed far-ranging, technologically efficient fishing fleets that are capable of intensive fishing off the coasts of all countries of the world. Finally, there has been a significant increase in the value of obtaining exclusive rights over fish stocks.

Petroleum resources underlying the continental shelf and slope are also attracting increasing attention. There has been a fairly steady advance of oil rigs into deeper and deeper waters, raising the question as to where the limits of coastal nation jurisdiction should be drawn.

A unique problem of establishment and enforcement of property rights has been created by the recent commercial interest in the manganese nodules that cover vast areas of the sea bed. These nodules, high in content of nickel, copper, cobalt, and manganese, are richest in the deeper waters—15,000 feet and below. Most of the deposits currently being explored for possible exploitation lie in the Pacific Ocean beyond 200 nautical miles from land and, consequently, beyond what is likely to be the maximum extent of national jurisdiction.

Since commercial exploitation has not yet taken place (though it may be attempted within the next few years), there are still wide differences of opinion as to the likely economic conditions and consequences of the ventures. Some maintain that the deposits are so uniform in value over such large areas that exclusive rights are not necessary for the purposes of preventing claim-jumping. Others point out that satisfactory title is necessary in order to acquire financing. In addition, a major area of contention at the United Nations Conference is whether the sea-bed agency should or should not have the right to exploit the resources itself.

Changes in political conditions are also affecting the principle of the freedom of the seas and the characteristics of property rights in the world ocean. Some of these lead to demands for minimizing the extent and content of national jurisdiction. In particular, military interests in the U.S. and USSR are anxious to maintain the maximum freedom of transit for military craft. The importance of the ocean to the strategy of nuclear deterrence increased rapidly with the development of relatively silent, deep-running, and wide-ranging nuclear submarines. If coastal nations acquire the right to require submarines to pass through their waters on the surface, rather than

submerged, this would facilitate the tracking of submarines and diminish the value of the ocean's opacity.

In this regard, the military is joined by commercial shipping interests. They fear that extension of the rights of nations to impose pollution controls would seriously disrupt the movement of shipping, particularly through narrow straits currently considered international.

There is also strong political opposition to maintaining the principle of the freedom of the seas. While this principle provides all nations with free and equal access to the ocean's wealth, it means, in reality, that the distribution of wealth favors the wealthy. Under the principle the benefits of ocean resources can only be acquired by those who exercise their right of access. Those who do not have the capital or the technology to exercise this right receive few or no direct benefits from use of the ocean and its resources beyond their jurisdiction.

The recent emergence of a large number of new nations, virtually all of which fall into the "have-not" category, has produced a major political force that finds the principle of the freedom of the seas wanting. While not all of these nations would be benefited uniformly by any particular proposal for establishing property rights over ocean resources, they all share in the demand for the abolishment of the freedom of the seas as interpreted by the major maritime states, and in demand for a distribution of the seas' wealth more in their favor. These political pressures for change can be considered inexorable, even if the results of the change cannot be anticipated fully.

As can be seen, the present status of property rights in the world ocean is one of flux. For many of the ocean's resources, the conditions that permitted the maintenance of common property no longer exist. The value of acquiring and enforcing exclusive rights has risen considerably. At the same time, costs and difficulties have fallen. Politically, claims to extended areas of jurisdiction have increasing legitimacy. Economically, the use of aircraft and high powered vessels has reduced the costs of enforcement, although it should be noted that these costs may still be high.

ALTERNATIVE JURISDICTIONAL PATTERNS

It is generally agreed that the jurisdiction of nations should not extend to the mid-points of the oceans but should terminate at some uniform limit and that, beyond that limit, the international character of the oceans should remain. There is no general agreement, however,

as to where the limit should be drawn, nor, more importantly, is there general agreement as to the authority of a nation within the limit.

Most observers feel that there is a general movement toward a 200 nautical mile limit of national jurisdiction. It may be that this limit will be extended to the edge of the continental shelf or of the continental margin in the few cases where these lie beyond 200 nautical miles. Assuming that the limits are drawn somewhat along these lines, there are then two sets of jurisdictional questions—those dealing with the rights governing resource use in the high seas beyond national limits and those dealing with the rights within the coastal margins. These will be treated separately below.

High Seas

The manganese nodules of the deep sea-bed represent the only tangible items of wealth in the world that are clearly non-national in character. They thus provide particularly intriguing and difficult questions for the determination of the jurisdiction that will govern their use. It would appear that some interests assume that the sea-bed nodules are unowned and therefore "up for grabs" by the first exploiter, whether private entrepreneur or national government. This appears to be the view of Deep Sea Ventures, Inc., a subsidiary of Tenneco, which has laid claim to an area in the Pacific that is about the size of Ireland. A more prevalent view is that the nodules should be considered part of the "common heritage" of mankind—with some of mankind more equal than others. According to the United Nations Declaration of Principles adopted in 1970, "the exploration of the (deep sea-bed) area and the exploitation of its resources should be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States, whether land-locked or coastal, and taking into particular consideration the interests and needs of the developing countries."[13]

These alternative definitions find expression in proposals relating to creation of an international sea-bed resources agency. With regard to problems of allocating exploitation rights and distributing benefits (just two of the numerous problems raised), there are three major variations: an enterprise system, a licensing scheme, and unilateral protection of national entrepreneurs.

The enterprise system would give the sea-bed agency authority not only to license exploitation ventures but also to undertake exploitation itself. This proposal before the United Nations Conference is

13. UNGA Resolution 2749 (XXV).

advanced by developing countries for two reasons. First, they feel that this would provide them more direct participation in sea-bed mining than a license system. Second, several developing countries that produce and export the metals contained in the nodules wish to control production from the sea-bed to minimize the impact on their markets.

The enterprise system is strenuously opposed by the developed countries that anticipate engaging in sea-bed mining (the United States, Japan, and West Germany, in particular). These countries tend to support a system that would license entrepreneurs on a "first-come, first-served" basis and that would extract some degree of economic rent from the exploiters to be used for the benefit of mankind.

The third variant was raised in the ninety-third Congress of the United States as Bill S. 1134 Amendment 946. This Bill, designated an "interim" measure, is designed to provide sufficient protection for U.S. investments so that the necessary capital can be raised. It would reimburse U.S. companies for the value of their investment taken or impaired by the adoption of an international convention on sea-bed mining.

Although the eventual outcome cannot be anticipated, it is possible to raise some speculations about the consequences of the three different approaches. Adoption of a sea-bed mining bill similar to that described above could well lead to failure of the United Nations Conference. Even though this is stated to be an "interim" measure, its passage would probably be considered a unilateral action by most of the Conference delegations. It might be interpreted as unwillingness on the part of the United States to negotiate its interests at the Conference and would probably stimulate a rash of unilateral actions by other countries on the range of issues being considered.

The controversy with regard to the enterprise versus the licensing system has developed a strong ideological cast. The developing countries feel that they have a particularly strong interest in deep sea-bed resources. They are aware that, without controls, the benefits will accrue not only to the producers but also, through lower prices, to the consumers of the metals that are produced, and that both producers and consumers will be primarily the developed countries. They also fear that a licensing system would impede eventual development of the technological capacity to exploit the resources themselves. Even though an enterprise system might reduce the economic rents that can be extracted for their benefit, they are willing to trade these off for a "piece of the action" and a more direct participation in sea-bed mining.

Advocates of the licensing system, on the other hand, fear that the enterprise system would leave them with the risks but not the profits; that it would deprive them of an assured source of scarce materials, leaving them vulnerable to OPEC-type actions by the raw material producing countries; and that it would mean maintenance of high prices for consumers.

In resolving this controversy, it would be useful to evaluate the expected benefits of the licensing system and measure these against the costs that might be incurred by antagonizing a large part of the world community.

In addition to manganese nodules, there are certain other resources that occur behond the 200 mile limit, the most important of which are whales, salmon, and tuna. For some stocks of these species certain forms of property rights of a *de facto* nature already exist. These are rights of presumed or actual exclusion obtained through the techniques of national quotas and the "doctrine of abstention."

The technique of national quotas provides for allocation of shares of the total allowable yield to participating countries. In the case of the whales of the Antarctic, shares were divided on the basis of past records of catch and were distributed to whaling fleets that were then in use. The *de facto* property rights were sufficiently firm to permit a market for the quotas, as indicated by ability of the Japanese to purchase the quotas of the Dutch and the British by buying their fleets.

National quotas are also in effect for a number of other fisheries, several of which fall within 200 miles of shore.[14] This system, however, can only succeed if there are no new entrants (or in the case of the Northwest Atlantic agreement, if the new entrants do not take up more than the amount reserved for their use). It is thus based on the presumed exclusion of new entrants, even though, under the principle of the freedom of the seas, there is no legal basis for enforcing exclusion.

The "doctrine of abstention" has been applied to certain salmon stocks. Where a stock is fully utilized by one or more countries and where investments are being made in conservation and management, the doctrine requires that other countries should abstain from fishing the stock. The most significant application of this so-called doctrine is found in the 1952 agreement under which Japan abstains from taking salmon on the high seas east of the 175°W meridian. Japan's agreement was given in exchange for the U.S. signature on the Peace

14. *See* Christy, *Northwest Atlantic Fisheries Arrangements: A Test of the Species Approach*, 1 Ocean Development & Int'l. L.J. (No. 1, 1973).

Treaty, and thus it might be said that there was a market of sorts for the resource.

As in the case of national quotas, the success of this means of acquiring "property rights" depends upon exclusion of non-signatories—an exclusion that is increasingly difficult to maintain as a growing number of countries extend their fishing efforts into far distant waters.

At the United Nations conference the United States has proposed separate treatment for salmon and tuna. It has proposed that anadromous species, such as salmon, which spawn in fresh water and live in the ocean, be subject to the exclusive control of the host state and that there be no harvesting of the resource on the high seas. In essence, the proposal provides that the salmon stock should be the "property" of the country in whose waters it is spawned. This proposal is opposed by those countries which have an interest in salmon but do not have spawning streams.

Separate treatment is also suggested for "highly migratory species" such as tuna because these species swim inside and outside a 200 mile limit and may cover an entire ocean. It is maintained that satisfactory controls cannot be exercised by coastal nations if their jurisdiction ends at 200 miles and that there must be an international agency made up of fishing states and coastal states. In response, it is argued that the coastal nations alone should exercise the necessary controls in a contiguous zone that covers the entire range of the stocks.

As can be seen in each of the above cases, attempts are underway to remove the common property condition for the resources of the high seas. There are attempts to make the resource or its flow of services divisible and attempts to control access. Since the manganese nodules, being fixed in place, are readily divisible, the common property condition is likely to be removed. Even if the Conference fails to arrive at an agreement for a sea-bed agency, the resources are so vast that they could probably be exploited without specific exclusive rights for some time to come. The absence of satisfactory machinery, however, may well have other detrimental effects on the world community interest in sea-bed mining.

For the whales of the Antarctic, the presumed exclusion of new entrants may continue simply because the resources have become so severely depleted that they are not likely to attract newcomers. Salmon fisheries are of interest only to a handful of countries in the northern latitudes. The countries in whose waters the salmon spawn are likely to be able to acquire and maintain exclusion of others by the use of sanctions or trade-offs of one kind or another. In some of

these countries, however, the common property condition may remain at the domestic level.

For tuna fisheries, however, it is quite possible that the common property condition will persist, both internationally and intra-nationally. Vessel construction is growing rapidly in many countries in response to rising prices. The intentions of these countries are such that agreement on a system of national quotas is unlikely. They would be unwilling to divide up the yields on the basis of present or past records of catch. And the aggregate of their anticipated levels of catch is probably greater than the yields that can be sustained. But even if the tuna fishing countries could reach agreement among themselves, it is not likely that the agreements would satisfy the many countries through whose claimed waters the tuna swim. It is not impossible that failure to reach agreements on national quotas or on controls over access will precipitate collapse of the present conservation arrangements, so that in addition to over-capitalization, the fisheries will become depleted.

Coastal Margin

Rights over the resources of the coastal margin are generally treated in two different categories—those governing the exploitation of the sea-bed resources of the continental shelf and those governing all other resources and uses in the superjacent waters. In neither case are the rights uniformly defined, either in extent or in content.

For the resources of the sea-bed, the 1958 Geneva Convention on the Continental Shelf provides coastal states with fully exclusive jurisdiction out to the depth of 200 meters or beyond "to where the depth of the superjacent waters admits of exploitation." There is general agreement that the 200 meter limit is too narrow and that there should be some fixed limit at a greater depth. While several countries have suggested the edge of the continental margin, where the ocean abyss begins, this would be hard to determine in many areas and in other areas would mean a vast extension of rights to several hundred miles. An alternative approach is to fix the limit at a certain depth, such as 2500 meters. While this might not fully incorporate the continental margin in certain regions, it is probably sufficient to govern exploitation for many years to come.

With regard to the content of the rights, the United States has proposed that the coastal state have full control over access in the area beyond 200 meters, but that it share any revenues with the international community. This proposal has not received much support except from some of the landlocked countries and is now

being reappraised within the U.S. government. The proposal will probably be dropped, and the jurisdiction of coastal states over sea-bed resources will probably be fully exclusive out to whatever limit is accepted.

Above the sea-bed the resources are subject to the regime of the territorial sea and contiguous zone. The territorial sea provides coastal states with fully exclusive jurisdiction over all resources and use of the sea, with the exception that foreign vessels have a right of innocent passage. Currently, claims to the territorial sea range from three to two hundred nautical miles. The concept of the contiguous zone was designed to provide coastal nations with exclusive rights over fisheries to the distance of 12 miles.

A more recent concept is that of the economic zone or the patrimonial sea. This would cover an extensive area—probably 200 nautical miles—but limit the coastal state's jurisdiction to something less than that of a territorial sea. While there is a trend towards agreement on a 200 mile limit, there are no clear indications of a consensus regarding the content of jurisdiction.

For fisheries, some countries propose fully exclusive rights under which they may, if they wish, permit foreign fishing. Others have proposed that the coastal state be required to let foreigners fish for stocks that are not fully utilized by its own fishermen. They assert that the right of the coastal state should be limited to the amount that it is capable of taking.

The use of the capacity criterion would make the flow of services from the resources divisible into national quotas and would provide a degree of control over access. It is, however, an open-ended criterion dependent upon the coastal country's investment in fishing effort. The natural incentive would be to increase capacity in order to increase the share of the yield. Thus, it would not provide an effective division of the resources, and the common property would remain —at least until the coastal nation had acquired the capacity to take the total allowable catch.

But even if the capacity criterion is not adopted and the coastal state can dispose of the fisheries as it wishes, there will still be numerous situations where control over access may be ineffective. These occur where stocks migrate along coastlines and swim through the zones of two or more neighboring countries. In these situations, the common property condition can only be removed by joint arrangements between the countries sharing the stocks. The extension of jurisdiction provides coastal states with authority to control access by distant water fishing countries but does not remove the necessity for regional agreements among neighboring countries.

An additional difficulty lies in enforcement of controls. While enforcement technology has increased considerably since the days of Grotius, costs may still be very high for an area extending to 200 miles from shore. The amount of cost depends upon the kinds of controls that are imposed, as well as upon the migratory patterns of the stocks. For example, some controls simply require surveillance by aircraft, whereas others may require inspection on board the fishing vessel. Enforcement against foreigners in one's own waters is easier to achieve than enforcement in the waters of a neighboring state. For enforcement to be successful the essential requirement is good faith between parties. If good faith does not exist, it may well be that the costs of enforcing controls are greater than the returns that can be achieved.

Finally, the task of removing the condition of common property for fisheries has an extremely important intra-national dimension that has been mentioned only briefly. If a country acquires a guaranteed share of the yield from a stock of fish through the national quota approach or acquires the right to control foreign access, it gains the ability to remove the common property condition for its own fishermen. Whether or not it takes advantage of that ability depends upon a host of factors that cannot be considered fully here.[15]

The challenge is particularly urgent within the United States, where many fisheries are economically depressed and marked by overage vessels, inefficient regulations, and high management costs. Provision of some form of property rights through license limits, taxes, or fisherman quotas raises numerous questions of an economic, political, and social nature. These questions need considerable attention in order to determine the desirability of access controls and the best means of achieving them.

SUMMARY

There are two factors involved in the move toward establishment and enforcement of jurisdiction over ocean resources—the economic desirability of creating satisfactory property rights and political pressures for redistributing the seas' wealth. With regard to the first factor, it is clear that considerable economic wastes result from the present common property condition. It is not clear, however, whether the costs of acquiring and enforcing some form of satisfactory property rights are less than the benefits that can be achieved.

15. *See* Christy, *Fisheries Goals and Rights of Property*, 98 Transactions of the Am. Fisheries Soc'y. (No. 2, 1969); Christy, *Fisherman Quotas* (Law of the Sea Institute, Occasional Paper No. 19, 1974).

This is a particularly difficult calculation to make for many fishery resources, especially those that swim freely across man's boundaries. It is less difficult for the minerals of the sea-bed, but there are ancillary problems that will require a great deal of effort to resolve.

Whether or not the calculations indicate that acquisition and enforcement of jurisdiction is desirable, the political pressures are such that attempts to acquire jurisdiction can be considered inexorable, at least for resources of the coastal margin. These pressures are now being expressed at the Third United Nations Conference on the Law of the Sea, which has delegates from almost every nation in the world. The complexities of the issues, together with the participation of such a large number of countries, make the outcome unclear.

The Conference could fall apart if impatience drives an increasing number of countries to take unilateral actions. It could fail if the majority reaches decisions that are unacceptable to the powerful maritime states, such as the United States and the USSR. It could also fail if the decisions reached are so general that they provide insufficient guides for future management and distribution of the seas' wealth.

But the outcome of the Conference will not affect the drive toward extended and enlarged authority of coastal nations over the ocean's resources. Nor will the Conference, even if successful, fully resolve the problems associated with exercise and enforcement of that authority. The transition from the principle of the freedom of the seas to establishment of effective property rights is an extremely difficult one, and steps currently being taken should only be considered the first steps along a torturous path.

SECTION 2. THE TERRITORIAL SEA

A. Definition; Baselines

NOTE FROM SEC. OF STATE THOMAS JEFFERSON TO THE BRITISH MINISTER, MR. HAMMOND, Nov. 8, 1793

I Moore, International Law Digest 702-03(1906)

"The President of the United States, thinking that, before it shall be finally decided to what distance from our seashores the territorial protection of the United States shall be exercised, it will be proper to enter into friendly conferences and explanations with the powers chiefly interested in the navigation of the seas on our coasts, and relying that convenient occasions may be taken for these hereafter, finds it necessary in the meantime to fix provisionally on some distance for the present government of these questions. You are sensible that very different opinions and claims have been heretofore advanced on this subject. The greatest distance to which any respectable assent among nations has been at any time given, has been the extent of the human sight, estimated at upwards of twenty miles, and the smallest distance, I believe, claimed by any nation whatever, *is the utmost range of a cannon ball*, usually stated at one sea league. Some intermediate distances have also been insisted on, and that of three sea leagues has some authority in its favor. The character of our coast, remarkable in considerable parts of it for admitting no vessels of size to pass near the shores, would entitle us, in reason, to as broad a margin of protected navigation as any nation whatever. Reserving, however, the ultimate extent of this for future deliberation, the President gives instructions to the officers acting under his authority to consider those heretofore given them as restrained for the present to the distance of one sea league or three geographical miles from the seashores. This distance can admit of no opposition, as it is recognized by treaties between some of the powers with whom we are connected in commerce and navigation, and is as little, or less, than is claimed by any of them on their own coasts.

"For the jurisdiction of the rivers and bays of the United States, the laws of the several States are understood to have made provision, and they are, moreover, as being landlocked, within the body of the United States."

CONVENTION ON THE TERRITORIAL SEA AND THE CONTIGUOUS ZONE

516 U.N.T.S. 205, 15 U.S.T. 1606, T.I.A.S. No. 5639

In force Sept. 10, 1964

The States Parties to this Convention

Have agreed as follows:

PART I

TERRITORIAL SEA

SECTION I. GENERAL

Article 1

1. The sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea.

2. This sovereignty is exercised subject to the provisions of these articles and to other rules of international law.

Article 2

The sovereignty of a coastal State extends to the air space over the territorial sea as well as to its bed and subsoil.

SECTION II. LIMITS OF THE TERRITORIAL SEA

Article 3

Except where otherwise provided in these articles, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State.

Article 4

1. In localities where the coast line is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.

2. The drawing of such baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the régime of internal waters.

3. Baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them.

4. Where the method of straight baselines is applicable under the provisions of paragraph 1, account may be taken, in determining particular baselines, of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by a long usage.

5. The system of straight baselines may not be applied by a State in such a manner as to cut off from the high seas the territorial sea of another State.

6. The coastal State must clearly indicate straight baselines on charts, to which due publicity must be given.

Article 5

1. Waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State.

2. Where the establishment of a straight baseline in accordance with article 4 has the effect of enclosing as internal waters 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.

Article 6

The outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea.

Article 12

1. Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The provisions of this paragraph shall not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance with this provision.

2. The line of delimitation between the territorial seas of two States lying opposite to each other or adjacent to each other shall be marked on large-scale charts officially recognized by the coastal States.

John R. Stevenson, "INTERNATIONAL LAW AND THE OCEAN"

62 Dep't State Bull. 339, 340-41

Breadth of the Territorial Sea

In 1958 the international community completed an impressive codification of the law of the sea which resulted in four law of the sea conventions: on the territorial sea and contiguous zone, the high seas, the continental shelf, and fishing and conservation of living resources of the high seas.[2] However, these conventions did not resolve the question of the breadth of the territorial sea or the precise outer limit of the continental shelf. With respect to the former question a second, unsuccessful, conference was held in 1960, at which a U.S. compromise proposal of a 6-mile territorial sea and an additional 6-mile exclusive fishery zone failed by one vote to obtain the necessary two-thirds majority. The United States has consequently adhered to the traditional position that 3 miles is the maximum breadth of the territorial sea. It has accepted a 12-mile exclusive fisheries zone in view of the overwhelming practice of states but does not recognize coastal state jurisdiction over fisheries beyond that limit.

While no state, in our view, is obliged to recognize territorial seas exceeding 3 miles, there is nothing like uniform agreement on this figure. About 30 states claim 3 miles, another 15 between 4 and 10 miles, and about 40 claim 12 miles. Approximately 11 states claim some sort of jurisdiction over the waters beyond 12 miles, usually fisheries jurisdiction but in some cases full territorial jurisdiction as far out as 200 miles.

Given this state of affairs, it can readily be seen, as the President pointed out in his foreign policy message to Congress today, that it is urgent that international agreement be reached on the breadth of the territorial sea to head off the threat of escalating national claims over the ocean.[3]

In the course of the last 2 years the United States has consulted with a large number of nations regarding the desirability of making a new attempt to achieve widespread agreement on the breadth of the territorial sea and has accelerated the pace of these discussions in the last year.

It appears that there is widespread support for fixing the breadth of the territorial sea at 12 nautical miles. However, the extension of the territorial sea to 12 miles would place many important international straits, which with a 3-mile limit have high seas areas running through them, within the territorial sea of the coastal state. This would mean that vessels could only traverse these straits in innocent passage; furthermore, there is no established right of innocent passage for aircraft in the airspace over straits within territorial waters. In the view of many countries this is not a satisfactory situation. The freedom of the seas would have a far more restrictive meaning indeed if rights to traverse straits are not clear and secure. A significant number of nations agree that this problem requires solution if a 12-mile territorial sea is to be accepted.

An additional problem directly affected by the breadth of the territorial sea is the conduct of high seas fisheries. Many nations do not believe that mere conservation of such fisheries adequately protects their interests. Large and mobile high seas fleets can move in on an area, seriously overfish the stocks, and move on. This can result in economic dislocations in a coastal state, or a region thereof, which is dependent on such fisheries for its livelihood. We believe these economic pressures have contributed significantly to the trend toward expanded unilateral jurisdictional claims and that many nations will insist that these problems be dealt with in conjunction with agreement on the breadth of the territorial sea.

As a result of our consultations we believe the time is right for the conclusion of a new international treaty fixing the limitation of the territorial sea at 12 miles and providing for freedom of transit through and over international straits and carefully defined preferential fishing rights for coastal states on the high seas. We intend to work closely with the many other nations who share our views in these matters at the U.N. this fall as a matter of high priority.

THIRD U.N. CONFERENCE ON THE LAW OF THE SEA

SECOND COMMITTEE, 5TH MEETING

17 July 1974

Territorial sea (*continued*)

[*Agenda item 2*]

1. Mr. CALERO RODRIGUES (Brazil) said that the drafts before the Committee, which provided that the sovereignty of the coastal State gave it jurisdiction over a belt of sea adjacent to its land territory, were only restating existing international law. Another principle of international law was that the breadth of the territorial sea was established by the coastal State itself. There was no rule of customary or conventional international law which established either the breadth of the territorial sea or a limit beyond which States could not establish for themselves the breadth of that sea. When the old customary limit of 3 miles had become obsolete and wider limits had become customary, three international conferences had been unsuccessful in establishing new limits.

2. When several countries, including his own, had established a 200-mile limit for their territorial sea, they had taken into account three legal considerations: first, a territorial sea was recognized by international law; secondly, international law empowered the coastal State itself to establish the breadth of its territorial sea; thirdly, international law did not set a maximum limit for the breadth of the territorial sea. The 200-mile limit had therefore been established within the framework of existing international law. The extensions had been made with a view to giving effect to the Declaration of Lima adopted in 1970,[1] which recognized, *inter alia*, the inherent right of the coastal State to "explore, conserve and exploit the natural resources of the sea adjacent to its coasts and the soil and subsoil thereof, likewise of the continental shelf and its subsoil, in order to promote the maximum development of its economy and to raise the level of living of its people". Neither the Declaration of Lima nor the Declaration of Montevideo of 1970[2] laid down a 200-mile limit as a general criterion. Both stated that the limits must be set in accordance with the geographical, geological and biological conditions of the area and the need for a rational utilization of its resources.

3. The "legitimate priority" of the interests of the coastal States mentioned in the Declaration of Montevideo was now universally recognized. Few delegations, if any, would deny the need to spell out in the convention the Conference was to adopt the rights of the coastal State over an adjacent sea-belt up to 200 miles in breadth.

4. Some delegations held the view that a 12-mile limit and the traditional régime should be accepted. In that belt of sea the coastal State was sovereign and it had only to allow innocent passage of foreign ships. For the zone beyond the 12-mile limit, there were various schools of thought. In the view of some delegations, the coastal State would have sovereign rights with regard to the exploration and exploitation of the natural resources or over the resources themselves within an area not exceeding 200 miles in breadth, which would be called the patrimonial sea or the exclusive economic zone. As he understood it, most of the delegations that accepted that view agreed that the coastal State would have sovereign rights in the zone between the limits of its territorial sea and the limit of its economic zone. However, other delegations, which were willing to accept the concept of the patrimonial sea or the exclusive economic zone, clearly wished that belt to be considered a part of the high seas in which the coastal State would have only certain specified preferential rights, not as a projection of its sovereignty but as a kind of contractual concession in a foreign area.

5. Lastly, there were others which considered that the belt of adjacent sea up to 200 miles in breadth was under the jurisdiction of the coastal State as a consequence of its sovereignty. For those delegations there were only two fundamental zones in the oceans, a national sea, extending up to 200 miles in breadth, and an international sea beyond that limit. Most of the countries which held that view called the waters adjacent to the shores of the coastal State its territorial sea. The proposal submitted by the representative of Ecuador at the previous meeting (A/CONF.62/C.2/L.10) was designed to make those views clear, and the Brazilian delegation therefore supported it. However, the concept of the territorial sea upheld by those countries was different from that of the traditional territorial sea. Some of the countries which claimed a 200-mile limit for their territorial sea were willing to recognize freedom of navigation and overflight in that zone; others, of which Brazil was one, had liberalized their concept of innocent passage so as to ensure that there would be no impediment to the passage of ships and aircraft, a necessity for international navigation, transport and communications.

6. One of the main handicaps with which delegations had to deal was the fact that they were trying to work out new concepts using a traditional terminology. Although the list of subjects and issues before the Conference (see A/CONF.62/29) mentioned the territorial sea and the contiguous zone before the high seas, and also mentioned the economic zone, it seemed likely that the Conference would end up by defining only two broad zones, each under a precise legal régime, the international sea and the national sea. For one as for the other an adequate set of legal rules had to be established, and even the traditional freedoms of the seas would have to be subject to regulation in the international zone. The common interest in such activities as navigation, fisheries, the exploitation of mineral resources and the control of pollution would impose mandatory norms of behaviour on all States exercising any activity in that zone. Without prejudice to the competence of international bodies, the residual powers not falling within the set of norms he had mentioned could be exercised by all States. In the same way, the rights and duties of States in the national maritime zone would have to be spelt out. In his view, it was possible to prescribe norms that would guarantee the legitimate interests of both the coastal State and of third States with regard to navigation, fisheries, the laying of cables and pipelines and any other reasonable matter.

[1] Document A/AC.138/28 of 14 August 1970.

[2] Document A/AC.138/34 of 30 April 1971.

8. The comprehensive approach that he had outlined might be summarized as follows. First, the convention should define as specifically as possible rights and duties for the whole of the ocean space. Secondly, such rights and duties should be basically different for the two zones, national and international. Thirdly, in a national maritime zone the residual powers should be reserved for the coastal State; in the international maritime zone they should belong to all States. The Committee should bend its efforts to framing a specific definition of the rights and duties of each State in each of the two maritime zones. That should be done without attempting to tie the rights and duties to any particular basic position held by delegations. Only after the rights and duties had been defined should an attempt be made to fit them into a general framework, which should encompass as many of the basic positions as possible. The Committee should have in mind Hans Kelsen's distinction between norms of international law, which were statements of mandatory behaviour, and rules of international law, which were legal concepts used to describe international law.[3] If the Conference was to be successful in its task, it should go straight to the heart of the matter and concentrate on drafting a truly normative order for the sea.

DEP'T OF DEFENSE PRESS RELEASE

25 February 1970

United States Outlines Position on Limit of Territorial Sea

Department Statement[1]

The United States Government has recently been discussing the question of the proper limit for territorial seas with many nations. Widespread disagreement on the proper breadth of the territorial sea makes it urgent that the community of nations attempt once again to fix a limit. The United States supports the 12-mile limit as the most widely accepted one, but only if a treaty can be negotiated which will achieve widespread international acceptance and will provide for freedom of navigation through and over international straits. At the same time the United States will attempt to accommodate the interests of coastal states in the fishery resources off their coasts.

The United States Government hopes this initiative will be successful. Until that objective is realized, the United States will continue to adhere to the position that it is not obliged to recognize territorial seas which exceed 3 miles.

U.N. Doc. A/CONF. 62/WP. 8/REV.1/PART II

3d Official Records 5, 154-56

(Informal Single Negotiating Text)

Chapter I: The territorial sea and the contiguous zone

SECTION 1. GENERAL

Article 1

Juridical status of the territorial sea, of the air space over the territorial sea and of its bed and subsoil

1. The sovereignty of a coastal State extends beyond its land territory and internal waters, and in the case of an archipelagic State, its archipelagic waters, over an adjacent belt of sea described as the territorial sea.

2. This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil.

3. The sovereignty over the territorial sea is exercised subject to the present Convention and to other rules of international law.

SECTION 2. LIMITS OF THE TERRITORIAL SEA

Article 2

Breadth of the territorial sea

Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with the present Convention.

Article 3

Outer limit of the territorial sea

The outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea.

Article 4

Normal baseline

Except where otherwise provided in the present Convention, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State.

Article 5

Reefs

In the case of islands situated on atolls or of islands having fringing reefs, the baseline for measuring the breadth of the territorial sea is the seaward low-water line of the reef, as shown by the appropriate symbol on official charts.

Article 6

Straight baselines

1. In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.

2. Where because of the presence of a delta and other natural conditions the coastline is highly unstable, the appropriate points may be selected along the furthest seaward extent of the low-water line and, notwithstanding subsequent regression of the low-water line, such baselines shall remain effective until changed by the coastal State in accordance with the present Convention.

3. The drawing of such baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the régime of internal waters.

4. Straight baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them or except in instances where the drawing of baselines to and from such elevations has received general international recognition.

5. Where the method of straight baselines is applicable under paragraph 1, account may be taken, in determining particular baselines, of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by a long usage.

6. The system of straight baselines may not be applied by a State in such a manner as to cut off from the high seas or the exclusive economic zone the territorial sea of another State.

Article 7

Internal waters

1. Except as provided in Chapter VII, waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State.

2. Where the establishment of a straight baseline in accordance with article 6 has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage as provided in the present Convention shall exist in those waters.

Article 8

Mouths of rivers

If a river flows directly into the sea, the baseline shall be a straight line across the mouth of the river between points on the low-tide line of its banks.

Article 10

Ports

For the purpose of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system are regarded as forming part of the coast. Offshore installations and artificial islands shall not be considered as permanent harbour works.

Article 11

Roadsteads

Roadsteads which are normally used for the loading, unloading, and anchoring of ships, and which would otherwise be situated wholly or partly outside the outer limit of the territorial sea, are included in the territorial sea.

Article 12

Low-tide elevations

1. A low-tide elevation is a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide. Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea.

2. Where a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it has no territorial sea of its own.

Article 13

Combination of methods for determining baselines

The coastal State may determine baselines in turn by any of the methods provided for in the foregoing articles to suit different conditions.

Article 14

Delimitation of the territorial sea between States with opposite or adjacent coasts

Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. This article does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance with this provision.

Article 15

Charts and lists of geographical co-ordinates

1. The baselines for measuring the breadth of the territorial sea determined in accordance with articles 6, 8 and 9, or the limits derived therefrom, and the lines of delimitation drawn in accordance with articles 11 and 14, shall be shown on charts of a scale or scales adequate for determining them. Alternatively, a list of geographical co-ordinates of points, specifying the geodetic datum, may be substituted.

2. The coastal State shall give due publicity to such charts or lists of geographical co-ordinates and shall deposit a copy of each such chart or list with the Secretary-General of the United Nations.

FISHERIES CASE (UNITED KINGDOM V. NORWAY)

/1951/ I.C.J. Rep. 116, 124-33, 138-43

The facts which led the United Kingdom to bring the case before the Court are briefly as follows.

The historical facts laid before the Court establish that as the result of complaints from the King of Denmark and of Norway, at the beginning of the seventeenth century, British fishermen refrained from fishing in Norwegian coastal waters for a long period, from 1616-1618 until 1906.

In 1906 a few British fishing vessels appeared off the coasts of Eastern Finnmark. From 1908 onwards they returned in greater numbers. These were trawlers equipped with improved and powerful gear. The local population became perturbed, and measures were taken by the Norwegian Government with a view to specifying the limits within which fishing was prohibited to foreigners.

The first incident occurred in 1911 when a British trawler was seized and condemned for having violated these measures. Negotiations ensued between the two Governments. These were interrupted by the war in 1914. From 1922 onwards incidents recurred. Further conversations were initiated in 1924. In 1932, British trawlers, extending the range of their activities, appeared in the sectors off the Norwegian coast west of the North Cape, and the number of warnings and arrests increased. On July 27th, 1933, the United Kingdom Government sent a memorandum to the Norwegian Government complaining that in delimiting the territorial sea the Norwegian authorities had made use of unjustifiable base-lines. On July 12th, 1935, a Norwegian Royal Decree was enacted delimiting the Norwegian fisheries zone north of 66° 28.8′ North latitude.

The United Kingdom made urgent representations in Oslo in the course of which the question of referring the dispute to the Permanent Court of International Justice was raised. Pending the result of the negotiations, the Norwegian Government made it known that Norwegian fishery patrol vessels would deal leniently with foreign vessels fishing a certain distance within the fishing limits. In 1948, since no agreement had been reached, the Norwegian Government abandoned its lenient enforcement of the 1935 Decree; incidents then became more and more freqent. A considerable number of British trawlers were arrested and condemned. It was then that the United Kingdom Government instituted the present proceedings.

* * *

The Norwegian Royal Decree of July 12th, 1935, concerning the delimitation of the Norwegian fisheries zone sets out in the preamble the considerations on which its provisions are based. In this connection it refers to "well-established national titles of right", "the geographical conditions prevailing on the Norwegian coasts", "the safeguard of the vital interests of the inhabitants of the northernmost parts of the country"; it further relies on the Royal Decrees of February 22nd, 1812, October 16th, 1869, January 5th, 1881, and September 9th, 1889.

The Decree provides that "lines of delimitation towards the high sea of the Norwegian fisheries zone as regards that part of Norway which is situated northward of 66° 28.8′ North latitude .... shall run parallel with straight base-lines drawn between fixed points on the mainland, on islands or rocks, starting from the final point of the boundary line of the Realm in the easternmost part of the Varangerfjord and going as far as Træna in the County of Nordland". An appended schedule indicates the fixed points between which the base-lines are drawn.

The subject of the dispute is clearly indicated under point 8 of the Application instituting proceedings: "The subject of the dispute is the validity or otherwise under international law of the lines of delimitation of the Norwegian fisheries zone laid down by the Royal Decree of 1935 for that part of Norway which is situated northward of 66° 28.8′ North latitude." And further on: " .... the question at issue between the two Governments is whether the lines prescribed by the Royal Decree of 1935 as the base-lines for the delimitation of the fisheries zone have or have not been drawn in accordance with the applicable rules of international law".

Although the Decree of July 12th, 1935, refers to the Norwegian fisheries zone and does not specifically mention the territorial sea, there can be no doubt that the zone delimited by this Decree is none other than the sea area which Norway considers to be her territorial sea. That is how the Parties argued the question and that is the way in which they submitted it to the Court for decision.

The Submissions presented by the Agent of the Norwegian Government correspond to the subject of the dispute as indicated in the Application.

The propositions formulated by the Agent of the United Kingdom Government at the end of his first speech and revised by him at the end of his oral reply under the heading of "Conclusions" are more complex in character and must be dealt with in detail.

Points 1 and 2 of these "Conclusions" refer to the extent of Norway's territorial sea. This question is not the subject of the present dispute. In fact, the 4-mile limit claimed by Norway was acknowledged by the United Kingdom in the course of the proceedings.

Points 12 and 13 appear to be real Submissions which accord with the United Kingdom's conception of international law as set out under points 3 to 11.

Points 3 to 11 appear to be a set of propositions which, in the form of definitions, principles or rules, purport to justify certain contentions and do not constitute a precise and direct statement of a claim. The subject of the dispute being quite concrete, the Court cannot entertain the suggestion made by the Agent of the United Kingdom Government at the sitting of October 1st, 1951, that the Court should deliver a Judgment which for the moment would confine itself to adjudicating on the definitions, principles or rules stated, a suggestion which, moreover, was objected to by the Agent of the Norwegian Government at the sitting of October 5th, 1951. These are elements which might furnish reasons in support of the Judgment, but cannot constitute the decision. It further follows that even understood in this way, these elements may be taken into account only in so far as they would appear to be relevant for deciding the sole question in dispute, namely, the validity or otherwise under international law of the lines of delimitation laid down by the 1935 Decree.

Point 14, which seeks to secure a decision of principle concerning Norway's obligation to pay to the United Kingdom compensation in respect of all arrests since September 16th, 1948, of British fishing vessels in waters found to be high seas, need not be considered, since the Parties had agreed to leave this question to subsequent settlement if it should arise.

The claim of the United Kingdom Government is founded on what it regards as the general international law applicable to the delimitation of the Norwegian fisheries zone.

The Norwegian Government does not deny that there exist rules of international law to which this delimitation must conform. It contends that the propositions formulated by the United Kingdom Government in its "Conclusions" do not possess the character attributed to them by that Government. It further relies on its own system of delimitation which it asserts to be in every respect in conformity with the requirements of international law.

The Court will examine in turn these various aspects of the claim of the United Kingdom and of the defence of the Norwegian Government.

The coastal zone concerned in the dispute is of considerable length. It lies north of latitude 66° 28.8′ N., that is to say, north of the Arctic Circle, and it includes the coast of the mainland of Norway and all the islands, islets, rocks and reefs, known by the name of the "skjærgaard" (literally, rock rampart), together with all Norwegian internal and territorial waters. The coast of the mainland, which, without taking any account of fjords, bays and minor indentations, is over 1,500 kilometres in length, is of a very distinctive configuration. Very broken along its whole length, it constantly opens out into indentations often penetrating for great distances inland: the Porsangerfjord, for instance, penetrates 75 sea miles inland. To the west, the land configuration stretches out into the sea: the large and small islands, mountainous in character, the islets, rocks and reefs, some always above water, others emerging only at low tide, are in truth but an extension of the Norwegian mainland. The number of insular formations, large and small, which make up the "skjærgaard", is estimated by the Norwegian Government to be one hundred and twenty thousand. From the southern extremity of the disputed area to the North Cape, the "skjærgaard" lies along the whole of the coast of the mainland; east of the North Cape, the "skjærgaard" ends, but the coast line continues to be broken by large and deeply indented fjords.

Within the "skjærgaard", almost every island has its large and its small bays; countless arms of the sea, straits, channels and mere waterways serve as a means of communication for the local population which inhabits the islands as it does the mainland. The coast of the mainland does not constitute, as it does in practically all other countries, a clear dividing line between land and sea. What matters, what really constitutes the Norwegian coast line, is the outer line of the "skjærgaard".

The whole of this region is mountainous. The North Cape, a sheer rock little more than 300 metres high, can be seen from a considerable distance; there are other summits rising to over a thousand metres, so that the Norwegian coast, mainland and "skjærgaard", is visible from far off.

Along the coast are situated comparatively shallow banks, veritable under-water terraces which constitute fishing grounds where fish are particularly abundant; these grounds were known to Norwegian fishermen and exploited by them from time immemorial. Since these banks lay within the range of vision, the most desirable fishing grounds were always located and identified by means of the method of alignments ("*meds*"), at points where two lines drawn between points selected on the coast or on islands intersected.

In these barren regions the inhabitants of the coastal zone derive their livelihood essentially from fishing.

Such are the realities which must be borne in mind in appraising the validity of the United Kingdom contention that the limits of the Norwegian fisheries zone laid down in the 1935 Decree are contrary to international law.

The Parties being in agreement on the figure of 4 miles for the breadth of the territorial sea, the problem which arises is from what base-line this breadth is to be reckoned. The Conclusions of the United Kingdom are explicit on this point : the base-line must be low-water mark on permanently dry land which is a part of Norwegian territory, or the proper closing line of Norwegian internal waters.

The Court has no difficulty in finding that, for the purpose of measuring the breadth of the territorial sea, it is the low-water mark as opposed to the high-water mark, or the mean between the two tides, which has generally been adopted in the practice of States. This criterion is the most favourable to the coastal State and clearly shows the character of territorial waters as appurtenant to the land territory. The Court notes that the Parties agree as to this criterion, but that they differ as to its application.

The Parties also agree that in the case of a low-tide elevation (drying rock) the outer edge at low water of this low-tide elevation may be taken into account as a base-point for calculating the breadth of the territorial sea. The Conclusions of the United Kingdom Government add a condition which is not admitted by Norway, namely, that, in order to be taken into account, a drying rock must be situated within 4 miles of permanently dry land. However, the Court does not consider it necessary to deal with this question, inasmuch as Norway has succeeded in proving, after both Parties had given their interpretation of the charts, that in fact none of the drying rocks used by her as base points is more than 4 miles from permanently dry land.

The Court finds itself obliged to decide whether the relevant low-water mark is that of the mainland or of the "skjærgaard". Since the mainland is bordered in its western sector by the "skjærgaard", which constitutes a whole with the mainland, it is the outer line of the "skjærgaard" which must be taken into account in delimiting the belt of Norwegian territorial waters. This solution is dictated by geographic realities.

Three methods have been contemplated to effect the application of the low-water mark rule. The simplest would appear to be the method of the *tracé parallèle*, which consists of drawing the outer limit of the belt of territorial waters by following the coast in all its sinuosities. This method may be applied without difficulty to an ordinary coast, which is not too broken. Where a coast is deeply indented and cut into, as is that of Eastern Finnmark, or where it is bordered by an archipelago such as the "skjærgaard" along the western sector of the coast here in question, the base-line becomes independent of the low-water mark, and can only be determined by means of a geometric construction. In such circumstances the line of the low-water mark can no longer be put forward as a rule requiring the coast line to be followed in all its sinuosities ; nor can one speak of exceptions when contemplating so rugged a coast in detail. Such a coast, viewed as a whole, calls for the application of a different method. Nor can one characterize as exceptions to the rule the very many derogations which would be necessitated by such a rugged coast. The rule would disappear under the exceptions.

It is true that the experts of the Second Sub-Committee of the Second Committee of the 1930 Conference for the codification of international law formulated the low-water mark rule somewhat strictly ("following all the sinuosities of the coast"). But they were at the same time obliged to admit many exceptions relating to bays, islands near the coast, groups of islands. In the present case this method of the *tracé parallèle*, which was invoked against Norway in the Memorial, was abandoned in the written Reply, and later in the oral argument of the Agent of the United Kingdom Government. Consequently, it is no longer relevant to the case. "On the other hand", it is said in the Reply, the *courbe tangente*—or, in English, 'envelopes of arcs of circles'—method is the method which the United Kingdom considers to be the correct one".

The arcs of circles method, which is constantly used for determining the position of a point or object at sea, is a new technique in so far as it is a method for delimiting the territorial sea. This technique was proposed by the United States delegation at the 1930 Conference for the codification of international law. Its purpose is to secure the application of the principle that the belt of territorial waters must follow the line of the coast. It is not obligatory by law, as was admitted by Counsel for the United Kingdom Government in his oral reply. In these circumstances, and although certain of the Conclusions of the United Kingdom are founded on the application of the arcs of circles method, the Court considers that it need not deal with these Conclusions in so far as they are based upon this method.

The principle that the belt of territorial waters must follow the general direction of the coast makes it possible to fix certain criteria valid for any delimitation of the territorial sea ; these criteria will be elucidated later. The Court will confine itself at this stage to noting that, in order to apply this principle, several States have deemed it necessary to follow the straight base-lines method and that they have not encountered objections of principle by other States. This method consists of selecting appropriate points on the low-water mark and drawing straight lines between them. This has been done, not only in the case of well-defined bays, but also in cases of minor curvatures of the coast line where it was solely a question of giving a simpler form to the belt of territorial waters.

It has been contended, on behalf of the United Kingdom, that Norway may draw straight lines only across bays. The Court is unable to share this view. If the belt of territorial waters must follow the outer line of the "skjærgaard", and if the method of straight base-lines must be admitted in certain cases, there is no valid reason to draw them only across bays, as in Eastern Finnmark, and not also to draw them between islands, islets and rocks, across the sea areas separating them, even when such areas do not fall within the conception of a bay. It is sufficient that they should be situated between the island formations of the "skjærgaard", *inter fauces terrarum.*

The United Kingdom Government concedes that straight lines, regardless of their length, may be used only subject to the conditions set out in point 5 of its Conclusions, as follows :

> "Norway is entitled to claim as Norwegian internal waters, on historic grounds, all fjords and sunds which fall within the conception of a bay as defined in international law (see No. (6) below), whether the proper closing line of the indentation is more or less than 10 sea miles long."

A preliminary remark must be made in respect of this point.

In the opinion of the United Kingdom Government, Norway is entitled, on historic grounds, to claim as internal waters all fjords and sunds which have the character of a bay. She is also entitled on historic grounds to claim as Norwegian territorial waters all the waters of the fjords and sunds which have the character of legal straits (Conclusions, point 9), and, either as internal or as territorial waters, the areas of water lying between the island fringe and the mainland (point 11 and second alternative Conclusion 11).

By "historic waters" are usually meant waters which are treated as internal waters but which would not have that character were it not for the existence of an historic title. The United Kingdom Government refers to the notion of historic titles both in respect of territorial waters and internal waters, considering such titles, in both cases, as derogations from general international law. In its opinion Norway can justify the claim that these waters are territorial or internal on the ground that she has exercised the necessary jurisdiction over them for a long period without opposition from other States, a kind of *possessio longi temporis*, with the result that her jurisdiction over these waters must now be recognized although it constitutes a derogation from the rules in force. Norwegian sovereignty over these waters would constitute an exception, historic titles justifying situations which would otherwise be in conflict with international law.

As has been said, the United Kingdom Government concedes that Norway is entitled to claim as internal waters all the waters of fjords and sunds which fall within the conception of a bay as defined in international law whether the closing line of the indentation is more or less than ten sea miles long. But the United Kingdom Government concedes this only on the basis of historic title; it must therefore be taken that that Government has not abandoned its contention that the ten-mile rule is to be regarded as a rule of international law.

In these circumstances the Court deems it necessary to point out that although the ten-mile rule has been adopted by certain States both in their national law and in their treaties and conventions, and although certain arbitral decisions have applied it as between these States, other States have adopted a different limit. Consequently, the ten-mile rule has not acquired the authority of a general rule of international law.

In any event the ten-mile rule would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast.

The Court now comes to the question of the length of the base-lines drawn across the waters lying between the various formations of the "skjærgaard". Basing itself on the analogy with the alleged general rule of ten miles relating to bays, the United Kingdom Government still maintains on this point that the length of straight lines must not exceed ten miles.

In this connection, the practice of States does not justify the formulation of any general rule of law. The attempts that have been made to subject groups of islands or coastal archipelagoes to conditions analogous to the limitations concerning bays (distance between the islands not exceeding twice the breadth of the territorial waters, or ten or twelve sea miles), have not got beyond the stage of proposals.

Furthermore, apart from any question of limiting the lines to ten miles, it may be that several lines can be envisaged. In such cases the coastal State would seem to be in the best position to appraise the local conditions dictating the selection.

Consequently, the Court is unable to share the view of the United Kingdom Government, that "Norway, in the matter of base-lines, now claims recognition of an exceptional system". As will be shown later, all that the Court can see therein is the application of general international law to a specific case.

The Conclusions of the United Kingdom, points 5 and 9 to 11, refer to waters situated between the base-lines and the Norwegian mainland. The Court is asked to hold that on historic grounds these waters belong to Norway, but that they are divided into two categories: territorial and internal waters, in accordance with two criteria which the Conclusions regard as well founded in international law, the waters falling within the conception of a bay being deemed to be internal waters, and those having the character of legal straits being deemed to be territorial waters.

As has been conceded by the United Kingdom, the "skjærgaard" constitutes a whole with the Norwegian mainland; the waters between the base-lines of the belt of territorial waters and the mainland are internal waters. However, according to the argument of the United Kingdom a portion of these waters constitutes territorial waters. These are *inter alia* the waters followed by the navigational route known as the Indreleia. It is contended that since these waters have this character, certain consequences arise with regard to the determination of the territorial waters at the end of this water-way considered as a maritime strait.

The Court is bound to observe that the Indreleia is not a strait at all, but rather a navigational route prepared as such by means of artificial aids to navigation provided by Norway. In these circumstances the Court is unable to accept the view that the Indreleia, for the purposes of the present case, has a status different from that of the other waters included in the "skjærgaard".

Thus the Court, confining itself for the moment to the Conclusions of the United Kingdom, finds that the Norwegian Government in fixing the base-lines for the delimitation of the Norwegian fisheries zone by the 1935 Decree has not violated international law.

* * *

It does not at all follow that, in the absence of rules having the technically precise character alleged by the United Kingdom Government, the delimitation undertaken by the Norwegian Government in 1935 is not subject to certain principles which make it possible to judge as to its validity under international law. The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law.

In this connection, certain basic considerations inherent in the nature of the territorial sea, bring to light certain criteria which, though not entirely precise, can provide courts with an adequate basis for their decisions, which can be adapted to the diverse facts in question.

Among these considerations, some reference must be made to the close dependence of the territorial sea upon the land domain. It is the land which confers upon the coastal State a right to the waters off its coasts. It follows that while such a State must be allowed the latitude necessary in order to be able to adapt its delimitation to practical needs and local requirements, the drawing of base-lines must not depart to any appreciable extent from the general direction of the coast.

Another fundamental consideration, of particular importance in this case, is the more or less close relationship existing between certain sea areas and the land formations which divide or surround them. The real question raised in the choice of base-lines is in effect whether certain sea areas lying within these lines are sufficiently closely linked to the land domain to be subject to the regime of internal waters. This idea, which is at the basis of the determination of the rules relating to bays, should be liberally applied in the case of a coast, the geographical configuration of which is as unusual as that of Norway.

Finally, there is one consideration not to be overlooked, the scope of which extends beyond purely geographical factors: that of certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage.

Norway puts forward the 1935 Decree as the application of a traditional system of delimitation, a system which she claims to be in complete conformity with international law. The Norwegian Government has referred in this connection to an historic title, the meaning of which was made clear by Counsel for Norway at the sitting on October 12th, 1951: "The Norwegian Government does not rely upon history to justify exceptional rights, to claim areas of sea which the general law would deny; it invokes history, together with other factors, to justify the way in which it applies the general law." This conception of an historic title is in consonance with the Norwegian Government's understanding of the general rules of international law. In its view, these rules of international law take into account the diversity of facts and, therefore, concede that the drawing of base-lines must be adapted to the special conditions obtaining in different regions. In its view, the system of delimitation applied in 1935, a system characterized by the use of straight lines, does not therefore infringe the general law; it is an adaptation rendered necessary by local conditions.

In the light of these considerations, and in the absence of convincing evidence to the contrary, the Court is bound to hold that the Norwegian authorities applied their system of delimitation consistently and uninterruptedly from 1869 until the time when the dispute arose.

From the standpoint of international law, it is now necessary to consider whether the application of the Norwegian system encountered any opposition from foreign States.

Norway has been in a position to argue without any contradiction that neither the promulgation of her delimitation Decrees in 1869 and in 1889, nor their application, gave rise to any opposition on the part of foreign States. Since, moreover, these Decrees constitute, as has been shown above, the application of a well-defined and uniform system, it is indeed this system itself which would reap the benefit of general toleration, the basis of an historical consolidation which would make it enforceable as against all States.

The general toleration of foreign States with regard to the Norwegian practice is an unchallenged fact. For a period of more than sixty years the United Kingdom Government itself in no way contested it. One cannot indeed consider as raising objections the discussions to which the *Lord Roberts* incident gave rise in 1911, for the controversy which arose in this connection related to two questions, that of the four-mile limit, and that of Norwegian sovereignty over the Varangerfjord, both of which were unconnected with the position of base-lines. It would appear that it was only in its Memorandum of July 27th, 1933, that the United Kingdom made a formal and definite protest on this point.

The United Kingdom Government has argued that the Norwegian system of delimitation was not known to it and that the

system therefore lacked the notoriety essential to provide the basis of an historic title enforceable against it. The Court is unable to accept this view. As a coastal State on the North Sea, greatly interested in the fisheries in this area, as a maritime Power traditionally concerned with the law of the sea and concerned particularly to defend the freedom of the seas, the United Kingdom could not have been ignorant of the Decree of 1869 which had at once provoked a request for explanations by the French Government. Nor, knowing of it, could it have been under any misapprehension as to the significance of its terms, which clearly described it as constituting the application of a system. The same observation applies *a fortiori* to the Decree of 1889 relating to the delimitation of Romsdal and Nordmöre which must have appeared to the United Kingdom as a reiterated manifestation of the Norwegian practice.

Norway's attitude with regard to the North Sea Fisheries (Police) Convention of 1882 is a further fact which must at once have attracted the attention of Great Britain. There is scarcely any fisheries convention of greater importance to the coastal States of the North Sea or of greater interest to Great Britain. Norway's refusal to adhere to this Convention clearly raised the question of the delimitation of her maritime domain, especially with regard to bays, the question of their delimitation by means of straight lines of which Norway challenged the maximum length adopted in the Convention. Having regard to the fact that a few years before, the delimitation of Sunnmöre by the 1869 Decree had been presented as an application of the Norwegian system, one cannot avoid the conclusion that, from that time on, all the elements of the problem of Norwegian coastal waters had been clearly stated. The steps subsequently taken by Great Britain to secure Norway's adherence to the Convention clearly show that she was aware of and interested in the question.

The Court notes that in respect of a situation which could only be strengthened with the passage of time, the United Kingdom Government refrained from formulating reservations.

The notoriety of the facts, the general toleration of the international community, Great Britain's position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway's enforcement of her system against the United Kingdom.

The Court is thus led to conclude that the method of straight lines, established in the Norwegian system, was imposed by the peculiar geography of the Norwegian coast; that even before the dispute arose, this method had been consolidated by a constant and sufficiently long practice, in the face of which the attitude of governments bears witness to the fact that they did not consider it to be contrary to international law.

The question now arises whether the Decree of July 12th, 1935, which in its preamble is expressed to be an application of this method, conforms to it in its drawing of the base-lines, or whether, at certain points, it departs from this method to any considerable extent.

The schedule appended to the Decree of July 12th, 1935, indicates the fixed points between which the straight base-lines are drawn. The Court notes that these lines were the result of a careful study initiated by the Norwegian authorities as far back as 1911. The base-lines recommended by the Foreign Affairs Committee of the Storting for the delimitation of the fisheries zone and adopted and made public for the first time by the Decree of July 12th, 1935, are the same as those which the so-called Territorial Waters Boundary Commissions, successively appointed on June 29th, 1911, and July 12th, 1912, had drawn in 1912 for Finnmark and in 1913 for Nordland and Troms. The Court further notes that the 1911 and 1912 Commissions advocated these lines and in so doing constantly referred, as the 1935 Decree itself did, to the traditional system of delimitation adopted by earlier acts and more particularly by the Decrees of 1812, 1869 and 1889.

In the absence of convincing evidence to the contrary, the Court cannot readily find that the lines adopted in these circumstances by the 1935 Decree are not in accordance with the traditional Norwegian system. However, a purely factual difference arose between the Parties concerning the three following base-points: No. 21 (Vesterfallet i Gaasan), No. 27 (Tokkebaaen) and No. 39 (Nordböen). This difference is now devoid of object. A telegram dated October 19th, 1951, from the Hydrographic Service of Norway to the Agent of the Norwegian Government, which was communicated to the Agent of the United Kingdom Government, has confirmed that these three points are rocks which are not continuously submerged. Since this assertion has not been further disputed by the United Kingdom Government, it may be considered that the use of these rocks as base-points is in conformity with the traditional Norwegian system.

Finally, it has been contended by the United Kingdom Government that certain, at least, of the base-lines adopted by the Decree are, irrespective of whether or not they conform to the Norwegian system, contrary to the principles stated above by the Court as governing any delimitation of the territorial sea. The Court will consider whether, from the point of view of these principles, certain of the base-lines which have been criticized in some detail really are without justification.

The Norwegian Government admits that the base-lines must be drawn in such a way as to respect the general direction of the coast and that they must be drawn in a reasonable manner. The United Kingdom Government contends that certain lines do not follow the general direction of the coast, or do not follow it sufficiently closely, or that they do not respect the natural connection existing between certain sea areas and the land formations separating or surrounding them. For these reasons, it is alleged that the line drawn is contrary to the principles which govern the delimitation of the maritime domain.

The Court observes that these complaints, which assumed a very general scope in the written proceedings, have subsequently been reduced.

The United Kingdom Government has directed its criticism more particularly against two sectors, the delimitation of which they represented as extreme cases of deviation from the general direction of the coast: the sector of Sværholthavet (between base-points 11 and 12) and that of Lopphavet (between base-points 20 and 21). The Court will deal with the delimitation of these two sectors from this point of view.

The base-line between points 11 and 12, which is 38.6 sea miles in length, delimits the waters of the Sværholt lying between Cape Nordkyn and the North Cape. The United Kingdom Government denies that the basin so delimited has the character of a bay. Its argument is founded on a geographical consideration. In its opinion, the calculation of the basin's penetration inland must stop at the tip of the Sværholt peninsula (Sværholtklubben). The penetration inland thus obtained being only 11.5 sea miles, as against 38.6 miles of breadth at the entrance, it is alleged that the basin in question does not have the character of a bay. The Court is unable to share this view. It considers that the basin in question must be contemplated in the light of all the geographical factors involved. The fact that a peninsula juts out and forms two wide fjords, the Laksefjord and the Porsangerfjord, cannot deprive the basin of the character of a bay. It is the distances between the disputed base-line and the most inland point of these fjords, 50 and 75 sea miles respectively, which must be taken into account in appreciating the proportion between the penetration inland and the width at the mouth. The Court concludes that Sværholthavet has the character of a bay.

The delimitation of the Lopphavet basin has also been criticized by the United Kingdom. As has been pointed out above, its criticism of the selection of base point No. 21 may be regarded as abandoned. The Lopphavet basin constitutes an ill-defined geographic whole. It cannot be regarded as having the character of a bay. It is made up of an extensive area of water dotted with large islands which are separated by inlets that terminate in the various fjords. The base-line has been challenged on the ground that it does not respect the general direction of the coast. It should be observed that, however justified the rule in question may be, it is devoid of any mathematical precision. In order properly to apply the rule, regard must be had for the relation between the deviation complained of and what, according to the terms of the rule, must be regarded as the *general* direction of the coast. Therefore, one cannot confine oneself to examining one sector of the coast alone, except in a case of manifest abuse; nor can one rely on the impression that may be gathered from a large scale chart of this sector alone. In the case in point, the divergence between the base-line and the land formations is not such that it is a distortion of the general direction of the Norwegian coast.

Even if it were considered that in the sector under review the deviation was too pronounced, it must be pointed out that the Norwegian Government has relied upon an historic title clearly referable to the waters of Lopphavet, namely, the exclusive privilege to fish and hunt whales granted at the end of the 17th century to Lt.-Commander Erich Lorch under a number of licences which show, *inter alia*, that the water situated in the vicinity of the sunken rock of Gjesbaaen or Gjesboene and the fishing grounds pertaining thereto were regarded as falling exclusively within Norwegian sovereignty. But it may be observed that the fishing grounds here referred to are made up of two banks, one of which, the Indre Gjesboene, is situated between the base-line and the limit reserved for fishing, whereas the other, the Ytre Gjesboene, is situated further to seaward and beyond the fishing limit laid down in the 1935 Decree.

These ancient concessions tend to confirm the Norwegian Government's contention that the fisheries zone reserved before 1812 was in fact much more extensive than the one delimited in 1935. It is suggested that it included all fishing banks from which land was visible, the range of vision being, as is recognized by the United Kingdom Government, the principle of delimitation in force at that time. The Court considers that, although it is not always clear to what specific areas they apply, the historical data produced in support of this contention by the Norwegian Government lend some weight to the idea of the survival of traditional rights reserved to the inhabitants of the Kingdom over fishing grounds included in the 1935 delimitation, particularly in the case of Lopphavet. Such rights, founded on the vital needs of the population and attested by very ancient and peaceful usage, may legitimately be taken into account in drawing a line which, moreover, appears to the Court to have been kept within the bounds of what is moderate and reasonable.

As to the Vestfjord, after the oral argument, its delimitation no longer presents the importance it had in the early stages of the proceedings. Since the Court has found that the waters of the Indreleia are internal waters, the waters of the Vestfjord, as indeed the waters of all other Norwegian fjords, can only be regarded as internal waters. In these circumstances, whatever difference may still exist between the views of the United Kingdom Government and those of the Norwegian Government on this point, is negligible. It is reduced to the question whether the base-line should be drawn between points 45 and 46 as fixed by the 1935 Decree, or whether the line should terminate at the Kalsholmen lighthouse on Tenholmerne. The Court considers that this question is purely local in character and of secondary importance, and that its settlement should be left to the coastal State.

For these reasons,

THE COURT,

rejecting all submissions to the contrary,

Finds

by ten votes to two,

that the method employed for the delimitation of the fisheries zone by the Royal Norwegian Decree of July 12th, 1935, is not contrary to international law; and

by eight votes to four,

that the base-lines fixed by the said Decree in application of this method are not contrary to international law.

Chapter VII. Archipelagic States

Article 118

Use of Terms

For the purposes of the present Convention:

(*a*) "Archipelagic State" means a State constituted wholly by one or more archipelagos and may include other islands;

(*b*) "Archipelago" means a group of islands, including parts of islands, inter-connecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such.

Article 119

Archipelagic baselines

1. An archipelagic State may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago provided that within such baselines are included the main islands and an area in which the ratio of the area of the water to the area of the land, including atolls, is between one to one and nine to one.

2. The length of such baselines shall not exceed 80 nautical miles, except that up to one per cent of the total number of baselines enclosing any archipelago may exceed that length, up to a maximum length of 125 nautical miles.

3. The drawing of such baselines shall not depart to any appreciable extent from the general configuration of the archipelago.

4. Such baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them or where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the nearest island.

5. The system of such baselines shall not be applied by an archipelagic State in such a manner as to cut off from the high seas or the exclusive economic zone the territorial sea of another State.

6. The archipelagic State shall clearly indicate such baselines on charts of a scale or scales adequate for determining them. The archipelagic State shall give due publicity to such charts and shall deposit a copy of each such chart with the Secretary-General of the United Nations.

7. If the drawing of such baselines encloses a part of the sea which has traditionally been used by an immediately adjacent neighbouring State for direct access and all forms of communication, including the laying of submarine cables and pipelines, between two or more parts of the territory of such State, the archipelagic State shall continue to recognize and guarantee such rights of direct access and communication.

8. For the purposes of computing the ratio of water to land under paragraph 1, land areas may include waters lying within the fringing reefs of islands and atolls, including that part of a steep-sided oceanic plateau which is enclosed or nearly enclosed by a chain of limestone islands and drying reefs lying on the perimeter of the plateau.

Article 120

Measurement of the breadth of the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf

The breadth of the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf shall be measured from the baselines drawn in accordance with article 119.

Article 121

Juridical status of archipelagic waters, of the air space over archipelagic waters and of their bed and subsoil

1. The sovereignty of an archipelagic State extends to the waters enclosed by the baselines, described as archipelagic waters, regardless of their depth or distance from the coast.

2. This sovereignty extends to the air space over the archipelagic waters, the bed and subsoil thereof, and the resources contained therein.

3. This sovereignty is exercised subject to this Chapter.

Article 122

Delimitation of internal waters

Within its archipelagic waters, the archipelagic State may draw closing lines for the delimitation of internal waters, in accordance with articles 8, 9 and 10.

Article 123

Existing agreements, traditional fishing rights and existing submarine cables

1. Without prejudice to article 121, archipelagic States shall respect existing agreements with other States and shall recognize traditional fishing rights and other legitimate activities of the immediately adjacent neighbouring States in certain areas falling within archipelagic waters. The terms and conditions of the exercise of such rights and activities, including the nature, the extent and the areas to which they apply, shall, at the request of any of the States concerned, be regulated by bilateral agreements between them. Such rights shall not be transferred to or shared with third States or their nationals.

2. Archipelagic States shall respect existing submarine cables laid by other States and passing through their waters without making a landfall. Archipelagic States shall permit the maintenance and replacement of such cables upon receiving due notice of the location of such cables and the intention to repair or replace them.

Article 124

Right of innocent passage

1. Subject to article 125, ships of all States enjoy the right of innocent passage through archipelagic waters, in accordance with section 3 of Chapter I.

2. The archipelagic State may, without discrimination in form or in fact amongst foreign ships, suspend temporarily in specified areas of its archipelagic waters the innocent passage of foreign ships if such suspension is essential for the protection of its security. Such suspension shall take effect only after having been duly published.

Article 125

Right of archipelagic sea lanes passage

1. An archipelagic State may designate sea lanes and air routes suitable for the safe, continuous and expeditious passage of foreign ships and aircraft through or over its archipelagic waters and the adjacent territorial sea.

2. All ships and aircraft enjoy the right of archipelagic sea lanes passage in such sea lanes and air routes.

3. Archipelagic sea lanes passage is the exercise in accordance with the present Convention of the rights of navigation and overflight in the normal mode for the purpose of continuous and expeditious transit between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.

4. Such sea lanes and air routes shall traverse the archipelago and the adjacent territorial sea and shall include all normal passage routes used as routes for international navigation or overflight through the archipelago, and, within such routes, so far as ships are concerned, all normal navigational channels, provided that duplication of routes of similar convenience between the same entry and exit points shall not be necessary.

5. The width of a sea lane shall not be less than . . . nautical miles or . . . per cent of the distance between the nearest points on islands bordering the sea lane.

6. An archipelagic State which designates sea lanes under this article may also prescribe traffic separation schemes for the safe passage of ships through narrow channels in such sea lanes.

7. An archipelagic State may, when circumstances require, after giving due publicity thereto, substitute other sea lanes or traffic separation schemes for any sea lanes or traffic separation schemes previously designated or prescribed by it.

8. Such sea lanes and traffic separation schemes shall conform to generally accepted international regulations.

9. Before designating or substituting sea lanes or prescribing or substituting traffic separation schemes, an archipelagic State shall refer proposals to the competent international organization with a view to their adoption. The organization may adopt only such sea lanes and traffic separation schemes as may be agreed with the archipelagic State, after which the archipelagic State may designate, prescribe or substitute them.

10. The archipelagic State shall clearly indicate all sea lanes and traffic separation schemes designated or prescribed by it on charts to which due publicity shall be given.

11. Ships in transit shall respect applicable sea lanes and traffic separation schemes established in accordance with this article.

12. If an archipelagic State does not designate sea lanes or air routes, the right of archipelagic sea lanes passage may be exercised through the routes normally used for international navigation.

Article 126

Duties of ships and aircraft during their passage, duties of the archipelagic State and laws and regulations of the archipelagic State relating to archipelagic sea lanes passage

Articles 38, 40 and 42 apply *mutatis mutandis* to archipelagic sea lanes passage.

Article 127

Research and survey activites

During their passage through archipelagic waters, foreign ships, including marine research and hydrographic survey ships, may not carry out any research or survey activities without the prior authorization of the archipelagic State.

Article 128

Régime of islands

1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.

2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of the present Convention applicable to other land territory.

3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.

CAB V. ISLAND AIRLINES, INC.

United States District Court, D. Hawaii, 1964

235 F. Supp. 990

On April 24, 1964 the United States Court of Appeals for the Ninth Circuit, 331 F.2d 207, remanded this case to this court with instructions that this court should rule expressly on the boundary or boundaries of the State of Hawaii, and in order properly to present the problem in the event of subsequent appeal from this decision, this court was further instructed to vacate its final decree, make findings anew, and enter a new decree. The final decree has been vacated.

Inasmuch as this court in its decision of August 8, 1963, comingled its findings of fact with its conclusions of law, in this Decision After Remand the court feels it necessary to and will rewrite (in many portions, copy) its decision of August 8, 1963.

History of the Case

The defendant, Island Airlines, Inc. (Island), on May 20, 1960, filed an application with the Public Utilities Commission of the State of Hawaii (PUC) for authorization to fly a cut-rate, "sky-bus" type of air transportation of passengers between the various major islands comprising the State of Hawaii (State), which proposed routes included flights between Honolulu, on the island of Oahu, and the island of Kauai, and between Honolulu and the islands of Molokai, Maui, and Hawaii. The PUC at that time decided that it did not have jurisdiction over interisland air transportation until the expiration of the transition period between Territorial and State government, viz., August 21, 1961, and dismissed the application.

Another application to the PUC was docketed on August 21, 1961, and after prolonged hearings, with Aloha Airlines, Inc. (Aloha) and Hawaiian Airlines, Inc. (Hawaiian) intervening, and the Civil Aeronautics Board (CAB) appearing as amicus, on August 16, 1962, the PUC made its order fixing rates for Island for intrastate transportation of passengers by air between the above major islands of the State. Thereafter, in the spring of 1963, without ever securing a certificate from the CAB authorizing it to engage in air transportation, and without attempting to comply with Section 401(a) (49 U.S.C. § 1371(a)) of the Federal Aviation Act (Act), Island started carrying passengers on a DC-4 between Honolulu and Kauai, and Honolulu and Maui and Hawaii.

When, after notification by the CAB that it was operating in violation of Section 401(a) (49 U.S.C. § 1371) of the Act, Island persisted in its flights, the CAB on May 24, 1963, filed this complaint against Island for a declaratory judgment and permanent injunction, claiming that Island was an air carrier engaged in air transportation within the meaning of 49 U.S.C. § 1301(3), (10) and (21) (a) of the Act,[2] i. e., in interstate air transportation, without the CAB having issued it a certificate to do so.

The CAB claimed that since each of the islands between which Island was carrying passengers is separated from the others by high seas and open ocean, outside Hawaii's "territorial waters",[3] it was therefore impossible for Island to carry its passengers between the above major islands without passing through air space over a place outside of the State, and therefore such air carriage constituted interstate air transportation within the scope of the Federal Aviation Act. The CAB, therefore, asked that this court declare it to have exclusive jurisdiction to regulate the proposed air transportation of passengers by Island, and further asked that Island be permanently enjoined from the proposed air transportation of passengers between the above major islands of the State without first being issued a certificate of public convenience and necessity by the CAB under the Act.

2. "(3) 'Air carrier' means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation * * *."

"(10) 'Air transportation' means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft."

"(21) 'Interstate air transportation', 'overseas air transportation', and 'foreign air transportation', respectively, mean the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail

At the time the complaint was filed, Island was actively flying passengers between Kauai, Oahu, Maui and Hawaii, and in rapid succession, temporary restraining orders were asked for by CAB, issued, and for various reasons, now immaterial, then dissolved.

Appeals from the order of the PUC of August 16, 1962, had been taken by intervenors in that hearing, viz., Hawaiian and Aloha, and on June 21, 1963, the Supreme Court of the State of Hawaii in the Matter of the Application of Island Airlines, Inc., 47 Haw. 1, 384 P.2d 536, held in essence that, absent the problem of carrying passengers in interstate commerce within the purview of United States v. Capital Transit Co., 325 U.S. 357, 65 S.Ct. 1176, 89 L.Ed. 1663 (1945), air transportation of passengers between the major islands of the State constituted intrastate, rather than interstate air commerce within the scope of the Act, and therefore CAB jurisdiction does not exclude PUC jurisdiction over such intrastate flights.

The Supreme Court of Hawaii did not set forth all of the factors which it considered in arriving at the above conclusions, but promised a supplemental opinion later.

Final hearing and argument on CAB's complaint in this court was held on July 15, 1963. After the matter was submitted, on July 22, 1963, the Supreme Court of Hawaii in the same Matter of the Application of Island Airlines, Inc., 47 Haw. 87, 384 P.2d 536 filed its Supplemental Opinion to its June 21, 1963 opinion. This court, therefore, has had the advantage of the Hawaii Supreme Court's analysis of the scope of the Act in its application to the problem posed by the unique geographical makeup of the State.

Although Island raised several objections to this court assuming jurisdiction over this case, as indicated in this court's ruling of June 7, 1963, on Island's motion to dismiss, this court decided that a federal question was properly presented to this court, inasmuch as no problem is presented other than the determination by this court whether Island is carrying on air transportation in violation of Section 401(a) of the Act.

The problem concerns the rights of a federal regulatory agency charged with the statutory responsibility, by virtue of § 1007 of the Act, for the regulation of interstate air transportation, claiming that an air carrier is transporting passengers in Hawaii in interstate air transportation under the Act, in violation of § 401(a). This court, therefore, has jurisdiction over the subject matter under 28 U.S.C. § 1345.

This court on August 8, 1963 ruled in favor of CAB and issued a permanent injunction against Island operating in the manner above indicated without first being issued a certificate of public convenience and necessity by the CAB.

Island perfected an appeal to the Ninth Circuit Court of Appeals which, after hearing, remanded the case to this court, as above indicated. Following remand, Aloha and Hawaiian were permitted to intervene as parties plaintiff. The State of Hawaii petitioned for leave to intervene as a party defendant, then, before hearing, withdrew its petition and asked for and was granted leave to appear as amicus only.

by aircraft, in commerce between, respectively—

"(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or *between places in the same State of the United States through the airspace over any place outside thereof;* or between places in the same Territory or possession of the United States, or the District of Columbia;" [Emphasis added].

3. Hawaii State Admissions Act (§ 2, 73 Stat. 4) Public Law 86-3, 86th Cong.

4. Island Airlines, Inc. v. Civil Aeronautics Board, 331 F.2d 207 (9th Cir. 1964).

5. Exhibit 2—Distances between the closest points of land in the respective islands.
KAUAI TO OAHU—62.9 nautical miles
OAHU TO MOLOKAI—22 nautical miles
MOLOKAI TO MAUI—7.5 nautical miles

The evidence and argument presented before this court thereafter, was almost entirely confined to "the root of the problem * * * [viz.] where is the boundary or boundaries of the State of Hawaii?" [4]

Findings of Fact and Conclusions of Law

As Exhibit C shows, the major islands making up the State of Hawaii are separated from each other by the waters of the North Pacific Ocean, and the distances between the islands of Kauai and Oahu, Oahu and Molokai, Molokai and Maui, and Maui and Hawaii, over the channels in between, vary from the shortest: Molokai-Maui, 7.5 nautical miles, to the longest: Kauai-Oahu, 62.9 nautical miles.[5] Because of these distances, combined with the complete absence of protective land masses lying anywhere near the islands on the northeast side of the island chain, and, except for the islands of Lanai and Kahoolawe, an equal absence of any land masses on the southwest side of the chain, there is nothing to break up the great swells of the North Pacific waves which, unimpeded, roll upon the shores and sweep through the channels between the islands.

Under the definition of "high seas" set forth in United States v. Rodgers, 150 U.S. 249, 14 S.Ct. 109, 37 L.Ed. 1071 (1893), the term applies to open, unenclosed, large bodies of water extending beyond one's vision (and included the Great Lakes as being bodies of water to which the term "high seas" was applicable). In U. S. v. Grush, 26 Fed.Cas. 48 (C.C.Mass.1829), the term "high seas" in its usual sense expresses "the open, uninclosed ocean, or that portion of the sea, which is without the fauces terrae on the sea coast," (at 51), in contradistinction to that which is surrounded or enclosed between narrow headlands or promontories.[6]

MAUI TO HAWAII—25.4 nautical miles
LANAI TO MOLOKAI—8 nautical miles
LANAI TO MAUI—7.65 nautical miles

6. The Convention On The High Seas, ratified by the President of the United States on March 24, 1961, and entering into force September 30, 1962, in codifying the

The Supreme Court of Hawaii in its July 22, 1963 Supplemental Opinion, supra, determined that the words "over any place" as used in the Act refer to a "place" which itself has boundaries, not international waters which are a "no man's land" outside the boundaries of any place, and demanded that in order for those words of the Act to have any application, the air transportation must pass through air space over another state or a foreign country.

With all deference to that august body, this court cannot agree that air transportation over the high seas outside of the territorial limits of a state is not air transportation over a place outside of that state. "The declaration of what constitutes navigable air space is an exercise of the same source of power, the interstate commerce clause, as that under which Congress has long declared in many acts what constitutes navigable or non-navigable waters. The public right of flight in the navigable air space owes its source to the same constitutional basis which, under decisions of the Supreme Court, has given rise to a public easement of navigation in the navigable waters of the United States, regardless of the ownership of the adjacent or subjacent soil." H.R.Rep.No.572, 69th Cong. 1st Sess., p. 10.

From the inception of the Civil Aeronautics Board, it has interpreted the Civil Aeronautics Act and the Federal Aviation Act as applicable to transportation between places in the same State where said transportation also involved passage through air space over the high seas. Wilmington Catalina Air v. Grandfather Certificate, 1 CAA 431.

A three-judge district court of the Ninth Circuit in United Air Lines, Inc. v. Public Utilities Commission of Cal., 109 F.Supp. 13, reversed on other grounds, 346 U.S. 402, 74 S.Ct. 51, 98 L.Ed. 140 (1953), passed upon the application of the definition of air transportation in the Civil Aeronautics Act of 1938 (the Act of 1958 is identical in this respect), in determining whether or not United flights from Los Angeles to Catalina Island, both of which were places within the State of California, over the Catalina Channel, constituted interstate air transportation under the Act. The court said:

> "The record here shows, by stipulation, that there is a distance of about 30 miles between the shore line of the United States and the Santa Catalina Island. We have no difficulty in finding, and so find that a substantial portion of these 30 miles lies over the high seas and is not within the State of California. Hence it follows that air transportation through the air space thereover is over a *place* outside of the State of California." [Emphasis added.] 109 F.Supp., at 16.[7]

That interisland flights in the State were expected to fall within the scope and control of the Act was clearly stated to the Subcommittee of the Committee on Interior and Insular Affairs of the United States Senate, as is shown by Senate Committee Report No. 80, 86th Congress:

"Aviation matters

"Hawaii presents a unique situation with respect to the impact of statehood on the Federal regulation of air transportation between the main islands. This is because of the geographical structure of the Territory, the land areas being separated by substantial expanses of ocean which are not included in the territorial limits of Hawaii. Hence, most, if not all, of the interisland air transportation passes through airspace not a part of the Territory. Under the provisions of the Federal Aviation Act of 1958 and other applicable Federal legislation, the Civil Aeronautics Board exercises economic regulatory jurisdiction over carriers engaged in interstate air transportation, which is defined to include not only transportation between a place in a State and a place in any other State, but also transportation between places in the same State through the airspace over any place outside thereof. Consequently, with the admission of Hawaii as a State, interisland air transportation will remain subject to the economic controls provided by the Federal Aviation Act including other applicable Federal legislation, because that transportation, or most of it, while between places in the same State, will pass through airspace outside the State. In the other States, air transportation of this kind passing through airspace outside the State is of slight volume in comparison with air transportation merely between places in the same State.

The determination of the meaning of the term "territorial waters" forces this court to turn to the National and international interpretation of the term. The criteria which governed the delimitation of the territorial waters of the United States was clearly set forth in letters from the Department of State to the Department of Justice on the subject of territorial waters: "November 13, 1951. Reference is made to your [Department of Justice] letter dated October 30, 1951, requesting a statement from the Department of State in regard to the position of the United States * * *:

* * * * * *

"(e) With respect to the measurement of territorial waters when * * * islands or groups of islands lie off the coast, the United States took the position at the Conference [Conference for the Codification of International Law held at The Hague in 1930] that * * * each island * * * was to be surrounded by its own belt of territorial waters measured [from the low water mark along the coast, seaward for a distance of one marine league, or three nautical miles] * * *.

"(f) * * * [W]ith respect to a strait, whether it be a strait between the mainland and offshore islands or between two mainlands * * * the United States took the position * * * that if a strait connected two seas having the character of high seas, and both entrances did not exceed six nautical miles in width, all of the waters of the strait should be considered territorial waters of the coastal state. In the case of openings wider than six miles, the belt of territorial waters should be measured in the ordinary way [see (e) supra] * * *. [T]he waters of a strait were not to be regarded as inland waters, even if both belts of territorial waters and both shores belonged to the same state * * *. With respect to a strait which is merely a channel of communication to an inland sea, * * * the rules regarding bays should be applied [i. e., if the bays were no more than ten miles wide, the base line of territorial waters is a straight line drawn across the opening, where the opening exceeds ten miles in width, at the first point therein where the width does not exceed ten miles]." [16]

"February 12, 1952. Reference is made to your [Department of Justice] letter of January 22, 1952, inquiring whether, in the light of the decision of the International Court of Justice in the Fisheries Case (United Kingdom v. Norway) in date of December 18, 1951 * * *.

"The Department noted the holding of the Court that the Norwegian Government in fixing the base lines for the delimitation of Norwegian fisheries by applying the straight base lines method had not violated international law, especially in view of the peculiar geography of the Norwegian coast and of the consolidation of this method by a constant and sufficiently long practice." [17]

The term "territorial waters" is normally used to describe both water areas that comprise the inland waters and the territorial sea. Inland or internal waters include all bodies of water within the land territory and true bays, as well as the area between high-water mark and low-water mark. The common legal feature of all inland waters is the complete sovereignty which a nation exercises over them, i. e., the same as it exercises over its land territory. The sovereignty includes the right of exclusion of foreign vessels

Seaward of the inland waters is the marginal sea, also called the territorial sea and the 3-mile limit. This forms part of the marginal territory of the coastal nation, but foreign merchantmen and perhaps foreign warships in time of peace, have the right of innocent passage through them. The enjoyment of this

16. See Shalowitz, Shore and Sea Boundaries, Vol. I, Append IX, pp. 354–356.

17. Shalowitz, supra note 16 at 357.

18. Shalowitz, supra note 16, pp. 22 et seq. See also testimony of R. T. Yingling, Asst. Legal Adviser in the U. S. Dept. of State, U. S. delegate to the 1958, 1960

right may be subject to special regulations laid down by the coastal state for the protection of navigation and for the execution of laws relating to customs, quarantine, etc. This privilege, nevertheless, leaves the general principle of sovereignty intact, and within the 3-mile limits the jurisdiction of the coastal state is as exclusive as its jurisdiction over the land itself. Seaward of the territorial waters lie the high seas, i. e., the open sea (but in the context of the Submerged Land Cases, infra, "open sea" refers to all the water areas seaward of the *inland* waters).[18]

As indicated above, Kamehameha III's Act of 1846 can only be construed as a claim that the interisland channels were closed, i. e., inland, waters of the Kingdom. The neutrality proclamation of 1854 purported to implement this claim that they were internal waters by declaring all seizures made within the channels an invasion of the jurisdiction of the Kingdom, and unlawful.

The only way in which the extent of such internal waters could be measured would be that which was urged by Island in oral argument, i. e., by virtue of straight base lines running from headlands on each side of the channel. For example, the Kauai channel would be bounded on the east by Kauai's Kahala Point and Oahu's Kahuku Point, and on the west by Kauai's Makahuena Point and Oahu's Barbers Point. The Molokai Channel would presumably be bounded on the east by Oahu's Mokapu Point and Molokai's Ilio Point, and on the west by Oahu's Koko Head and Molokai's Laau Point. The breadth of Alenuihaha Channel would be fantastic: its boundaries on the east being Maui's Kauiki Head and Hawaii's Halaula, and on the west by Kahoolawe's Kaka Point and Hawaii's Keahole Point. (See Ex. C)[19]

The above areas then are the "historic waters" which certainly Island, and impliedly State, claim as the historic waters of Hawaii.

It is instantly apparent that any such delimitation of the boundaries of Hawaii would in effect expropriate to Hawaii large areas of water, normally falling within the international concept of high seas, thus cutting down the sea area over which the doctrine of "freedom of the high seas" could apply.[20] "This country, throughout its existence has stood for freedom of the seas, a principle whose breach has precipitated war among nations. The country's adoption of the three-mile belt is by no means incompatible with its traditional insistence upon freedom of the sea, at least so long as the national Government's power to exercise control consistently with whatever international undertakings or commitments it may see fit to assume in the national interest is unencumbered." [21]

The "historic waters" concept constitutes an exception to the general rules of international law governing the delimitation of the maritime domain of a state.[22] Therefore, the title to "historic waters" is generally considered in the nature of a prescriptive right, i. e., by virtue of "acquisitive prescription".

Geneva Conferences on the Law of the Sea, Tr. pp. 140-146; Report of the International Law Commission to the General Assembly of the United Nations, 1956, Yearbook of the International Law Commission 1956, Vol. II, commentary to the Articles of the Law of the Sea, Part I, Territorial Sea, p. 265.

19. Island argued that straight base lines should run completely around the eastern perimeter of the Hawaiian archipelago from island headland to island headland and on the western perimeter should run straight from Niihau's Kawaihoa Point to Hawaii's Ka Lae, thus including within its boundaries all of the open ocean between "the cord of the bow and the bow itself," but not even Kamehameha III ever made any such grandiose claim, and a similar type of claim put forth by California was rejected in United States v. California, 332 U.S. 19, 67 S.Ct. 1658, 91 L.Ed. 1889 (1947), (as this court has said before).

20. "Definition of the high seas, Article 26.

"1. The term 'high seas' means all parts of the sea that are not included in the territorial sea * * * or in waters of a State.

The position of the United Kingdom in the Norwegian Fisheries case, United Kingdom v. Norway, was that a state can only establish title to areas of sea which do not come within the general rules of territorial or inland waters, on the basis of a prescriptive title.[23] Norway's position in the same case was "the usage on which an historic title is based must be peaceful and continuous, and consequently * * * the reaction of foreign States constitutes an element to be taken into account in an appreciation of such title * * *."[24]

At least three factors must be taken into consideration in determining whether a state has acquired an historic title to a maritime area. These factors are 1, the exercise of authority over the area by the state claiming the historic right; 2, a continuity of this exercise of authority; and 3, the attitude of foreign states. The authority which a state must continuously exercise over a maritime area in order to be able to claim it validly as "historic waters" is sovereignty, i. e., it must be claimed as a part of its national domain. Absent international approval of the claim, the activities carried on by the state in the area in question must be something far more objective than simply and solely internal verbalization, i. e., local legislation or proclamation: 1. The sovereignty claimed must be effectively exercised; the intent of the state must be expressed by deed and not merely by proclamations, e. g., keeping foreign ships or foreign fishermen away from the area, or taking action against them. 2. The *acts* must have notoriety which is normal for acts of the state.[25]

Continuous usage of long standing of the maritime area was demanded even in 1894 (Institute of International Law of 1894). Established usage generally recognized by the nations, was the criteria set up by the International Law Association of 1926. Since an historic title to a maritime area must be based on the active exercise of sovereignty over the area by the state claiming it, the activities from which the required usage must emerge was consequently a repeated or continued activity of that same state. Passage of time is therefore essential; i. e., the state must have kept up its exercise of sovereignty over the area for a considerable time.[26]

In the Fisheries Case, supra, Norway claimed that certain areas off the Norwegian coast (one of them demanding a "baseline" boundary running over the open sea for a distance of 100 miles) were reserved for the exclusive fishing of her nationals. The United Kingdom claimed those areas were "high seas". The historic pattern of exercise of sovereignty showed that prior to the 17th Century there had been disputes between British and Norwegian fishermen in the areas, and as a result of Norway's complaints, the British did not fish in those areas for 300 years. Beginning in 1906, however, British vessels again appeared, with resulting frequent "incidents" and much intergovernmental action, with British trawlers being ar-

"2. Waters within the baseline of the territorial sea are considered 'internal waters'."
(Report of the International Law Commission to the General Assembly of the United Nations, Document A/3159, Yearbook of the International Law Commission 1956, Vol. II, p. 259.)

21. United States v. California, supra note 19, 332 U.S. at p. 35, 67 S.Ct. 1658, at p. 1666, 91 L.Ed. 1889.

22. United Nations Secretariat, Memorandum on "Historic Bays", (A/Conf. 13/1, p. 18–20).

23. International Court of Justice, Pleadings, Oral Arguments, Documents, Fisheries Case, Vol. II, p. 302.

24. Ibid., Vol. III, pp. 461–462.

25. *"Juridicial régime of historic waters, including historic bays"* prepared by the Secretariat, United Nations, Yearbook of the International Law Commission 1962, Vol. II, pp. 13–15.

26. Ibid., p. 15.

27. International Court of Justice Yearbook 1951–52, p. 78.

rested and condemned by Norway. The International Court of Justice found that the same were "historic waters" of Norway.[27]

The burden of proving the open and notorious use of the area in question rests on the state claiming that its "historical waters" possess a character inconsistent with the principle of the freedom of the high seas. Since the historic element is the basis for validating what is an exception to the general rule of freedom of the seas and therefore intrinsically invalid, the burden of proof is thus logically and emphatically placed upon the claimant state.[28]

When the claim of the Kingdom of Hawaii is measured in the light of the above rules of international law, it instantly becomes obvious that the nation of Hawaii ceded and turned over to the United States no valid claim of sovereignty over the interisland channels.

As indicated heretofore, the first and only steps to set up the interisland channels as historic waters were manifested in the years 1846 to 1854, i. e., the Acts, Resolutions and Proclamations, supra. There was, however, never any external manifestation of the verbal claim of sovereignty over the channels. Actually, the Kingdom had no means of enforcing any such claim as set forth in the Neutrality Proclamation of 1854: During its entire history, the Kingdom had only one warship, the SS Kaimiloa, an ex-steamer of 170 tons, refitted into a "man-of-war", which, in 1877, made but one inglorious and disastrous voyage—to Samoa.[29] Further, Kalakaua's 1877 Proclamation of Neutrality negated Kamehameha III's claims of sovereignty over the waters.[30]

28. Supra note 23, Vol. I, p. 566; Vol. II, pp. 645–646.

29. Alexander, History of the Later Years of the Hawaiian Monarchy and Revolution of 1893, (1896) pp. 17–19.

30. Cf. Supreme Court's comments on Texas' claims to the submerged lands for three leagues from shore in United States v. Louisiana, 363 U.S. 1, 60–61, 80 S.Ct. 961, 994, 4 L.Ed.2d 1025 (1960): "More important for the purposes of this case are the circumstances that the three-league provision was made an express part of the Treaty of Guadalupe-Hidalgo, that such boundary was reaffirmed five years later in the Gadsden Treaty of December 30, 1853 and subsequently in a long line of international conventions, and that it has never been repudiated." (Footnotes omitted.)

[5] As indicated above, upon annexation the United States was ceded all rights of the nation of Hawaii. That nation's claim of jurisdiction over the interisland channels had never ripened into a prescriptive historical right to the waters. Thereafter, the United States never made any claim, either locally, nationally, or internationally, that the channel waters were being claimed by the United States as "historical waters", i. e., internal waters of Hawaii.

To the contrary, consistent with its international policy of freedom of the seas and the three-mile limit of territorial waters,[31] in all of the hearings before Congress, the various departments of the government insisted that the channel waters, beyond the three-mile limit, were "high seas". Before the Subcommittee on Territories and Insular Affairs of the 86th Congress, 1st Session, 1959, then considering the Hawaii Statehood bill, S. 50, Mr. Franklin M. Stone, General Counsel of the CAB, stated:

> "To the extent that the channels and waters between the islands comprising the land area of the State of Hawaii are not defined or considered to be a part of the State of Hawaii, the Board would also continue to exercise regulatory jurisdiction over air transportation between the islands by virtue of the definition of interstate air transportation, since the carrier would be traveling between points within the same State,

31. United States v. California, 332 U.S. 19, 33–35, 67 S.Ct. 1658, 1666, 91 L.Ed.

but through the airspace outside thereof."

At the same time and occasion, Mr. Ted Stevens, Assistant to the Secretary of the Interior, in a statement to Senator Henry M. Jackson of Washington, clearly indicated that the term "territorial waters" within the provision of the Statehood Act was to include "all waters seaward to a line 3 geographical miles distant from the coastline," i. e., the line of ordinary low water along the coast, and as stated in the Committee report which accompanied the Statehood bill:

"Hawaii presents a unique situation with respect to the impact of statehood on the Federal regulation of air transportation between the main islands. *This is because of the geographical structure of the Territory, the land areas being separated by substantial expanses of ocean which are not included in the territorial limits of Hawaii.*

S.Rept. 80 (to Accompany S. 50), 86th Cong., 1st Sess., (Emphasis supplied.)"

As our Supreme Court said in United States v. Louisiana, 363 U.S. 1, 35, 80 S.Ct. 961, 981, 4 L.Ed.2d 1025 (1960):

"The power to admit new States resides in Congress. The President, on the other hand, is the constitutional representative of the United States in its dealings with foreign nations. From the former springs the power to establish state boundaries; from the latter comes the power to determine how far this country will claim territorial rights in the marginal sea as against other nations. Any such determination is, of course, binding on the States. * * * [T]here is no question of Congress' power to fix state land and water boundaries as a domestic matter. Such a boundary, fully effective as between Nation and State, undoubtedly circumscribes the extent of navigable *inland* waters and underlying lands owned by the State under the Pollard rule." (Pollard's Lessee v. Hagan, (44 U.S. 212) 3 How. 212, 11 L.Ed. 565.)

A study of the above case and other authorities [32] clearly shows that the term "territorial waters" has a uniformly well understood meaning and application, viz., the term includes 1, the water area comprising both inland waters (rivers, lakes and true bays, etc.) and 2, the waters extending seaward three nautical miles from the coast line, i. e., the line of ordinary low water, (ofttime called the "territorial sea"). Seaward of that three-mile territorial sea lie the high seas. The Submerged Lands Act (1953) confirms titles to the States in the submerged lands off their coasts for a distance of three geographical miles from the coast line. Section 5(i) of the Hawaii Statehood Act reads:

"The Submerged Lands Act of 1953 * * * and the Outer Continental Shelf Lands Act of 1953 * * * shall be applicable to the State of Hawaii, and the said State

1889 (1947): "That the political agencies of this nation both claim and exercise broad dominion and control over our three-mile marginal belt is now a settled fact. * * * And this assertion of national dominion over the three-mile belt is binding upon this Court. * * *

"Not only has acquisition, as it were, of the three-mile belt, been accomplished by the national Government, but protection and control of it has been and is a function of national external sovereignty. * * * This country, throughout its existence has stood for freedom of the seas, * * *." (Supra p. 1004)

32. See also Shalowitz, supra note 16, pp. 22–24.

33. See United States v. California, 332 U.S. 804, 68 S.Ct. 20, 92 L.Ed. 382; Submerged Lands Act (67 Stat. 29) 1953; Department of State Bulletin of June 29, 1959, Publication 6870, Measurement of the United States Territorial Sea.

See also, Shore and Sea Boundaries, supra note 16, p. 228, note 46: "When Hawaii was admitted as a state, its sea boundaries did not include all the water areas between the islands but

shall have the same rights as do existing States thereunder." [33]

Thus, when Congress granted statehood to Hawaii, it said:

"The State of Hawaii shall consist of all the islands together with their appurtenant reefs and territorial waters, included in the Territory of Hawaii on the date of the enactment of this Act * * *." [34]

And thereby the boundaries of Hawaii were fixed at three nautical miles from the line of ordinary low water surrounding each and every one of the islands composing the State of Hawaii. Beyond that "3-mile" boundary line around each island lie the high seas which roll unchecked through the channels between the islands. Neither those intervening seas nor the floors thereof are within the boundaries of Hawaii.

The above finding gives to Hawaii jurisdiction over the surrounding ocean waters no greater nor less than that given to every other state of the Union bordering upon the sea. Neither the Hawaii State Admissions Act [35] nor this decision takes away any internal rights of Hawaii to control its intrastate commerce. The CAB would have no control over purely intrastate flights between Hilo, Kona and Kamuela on the Island of Hawaii, or between Kaanapali, Kahului and Hana on the Island of Maui. Congress recognized that Hawaii was unique in that it was a state composed entirely of islands. If Congress had wanted to leave to the State complete control over interisland passage by sea or air, it could have done so. Nevertheless, that Congress chose *not* to so provide—even in the face of the statements of Mr. Ted Stevens and Senator Jackson on this specific problem (supra p. 1006) —did not thereby demote "unique Hawaii" into a second-class state, nor did it put Hawaii upon a different footing than that of all other states of the Union insofar as its control over interisland, overseas flights was curtailed. Its curtailment is simply a matter of degree, not of substance.[36]

Apart from the above finding, every time a flight is made by Island over the Federal airways between Oahu and Kauai, Island must fly over the high seas many sea leagues from either shore.

The heavy air traffic around the Honolulu airport definitely prevents "direct" flights between the Honolulu Airport and Kauai, and on Kauai-Oahu flights, all planes must fly in the Federal airways on an east-west course—V2, VI2, VI5 (Exhibit 1)—to the places marked "Breakers" or "Orchid", respectively, some 25 and 40 nautical miles west of the nearest place on Oahu, and some 50 nautical miles southwest from Kauai, places which are clearly outside of any rational boundary claims of the State of Hawaii and over the high seas.

Further, when flying between Honolulu, Maui, and Hawaii, as shown on Exhibit 1, upon the often-necessary flights made under instrument flight rules (I.F.R.), as shown on Exhibits A1, A2, A3,

only a 3-mile belt around each island, leaving areas of high seas between most of them. S.Rept. 80, 86th Cong., 1st Sess. 4 (1959)."

See, e. g., G. Etzel Pearcy, Hawaii's Territorial Sea, 11 The Professional Geographer, No. 6, Nov. 1959, in which the author in describing the territorial seas of the State of Hawaii assumes a three-mile belt of territorial waters for each island.

34. Hawaii State Admissions Act, supra note 3.

35. Supra note 3.

36. Cf. Lord v. Steamship Co., supra; Wilmington Catalina Air v. Grandfather Certificate, supra; United Air Lines, Inc. v. Public Utilities Commission of Cal., supra.

37. It has been stipulated that Island, during the month of June 1963 on scheduled flights carrying passengers for hire as a common carrier between the Islands, operating on Federal airways V6, V13, and V12, passed over the Sweet Pea, Halibut, Rainbow, Paradise, Orchid, and Breakers intersections.

38. Island offered testimony to show that the Federal airways shown on Exhibit 1 were subject to change and that Island could apply for and might secure

and A4, Island has[37] and *must* fly on airway V6 to "Sweet Pea", which is over 9 nautical miles north of Maui, and over "Halibut", which is over 20 nautical miles northeast of Maui, and over 45 nautical miles from Hawaii, or on airway V15 to "Rainbow", which is over 25 nautical miles east of Maui and over 35 nautical miles north of Hawaii, all of which places are over the wide open Pacific and admitted by Island to be far beyond any boundaries that could possibly be claimed for the State of Hawaii.[38]

Unquestionably then, whether Island flies over the channels or outside of them, it is compelled to fly its passengers over places outside the State's boundaries in order to fulfill its obligations as an air carrier between the islands. It therefore follows that Island's scheduled interisland flights carrying persons or property are in interstate air commerce between a place in Hawaii to another place in Hawaii, through airspace over places outside thereof, within the scope of the definition of interstate air transportation in the Act (49 U.S.C.A. § 1301(21) (a)), and the CAB has jurisdiction and control over the flights of any such air carrier (and Island is such an air carrier). Such a carrier may not, therefore, carry on such flights between the islands making up the State of Hawaii without having first received a Federal certificate from the CAB under Section 401 of the Act (49 U.S.C.A. § 1371).

Notes

1. Passage. Compare the provisions of the CONVENTION ON THE TERRITORIAL SEA AND THE CONTIGUOUS ZONE, 516 U.N.T.S. 205, 15 U.S.T. 1606, T.I.A.S. No. 5639, with the expanded provisions relating to passage through the territorial sea found in the Informal Single Negotiating Text of the Third Law of the Sea Conference.

GENEVA CONVENTION: SECTION III. RIGHT OF INNOCENT PASSAGE

Sub-section A. Rules Applicable to All Ships

Article 14

1. Subject to the provisions of these articles, ships of all States, whether coastal or not, shall enjoy the right of innocent passage through the territorial sea.

2. Passage means navigation through the territorial sea for the purpose either of traversing that sea without entering internal waters, or of proceeding to internal waters, or of making for the high seas from internal waters.

3. Passage includes stopping and anchoring, but only in so far as the same are incident to ordinary navigation or are rendered necessary by force majeure or by distress.

4. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with these articles and with other rules of international law.

5. Passage of foreign fishing vessels shall not be considered innocent if they do not observe such laws and regulations as the coastal State may make and publish in order to prevent these vessels from fishing in the territorial sea.

6. Submarines are required to navigate on the surface and to show their flag.

Article 15

1. The coastal State must not hamper innocent passage through the territorial sea.

2. The coastal State is required to give appropriate publicity to any dangers to navigation, of which it has knowledge, within its territorial sea.

Article 16

1. The coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent.

2. In the case of ships proceeding to internal waters, the coastal State shall also have the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to those waters is subject.

3. Subject to the provisions of paragraph 4, the coastal State may, without discrimination amongst foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security. Such suspension shall take effect only after having been duly published.

4. There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State.

Article 17

Foreign ships exercising the right of innocent passage shall comply with the laws and regulations enacted by the coastal State in conformity with these articles and other rules of international law and, in particular, with such laws and regulations relating to transport and navigation.

Sub-section B. Rules Applicable to Merchant Ships

Article 18

1. No charge may be levied upon foreign ships by reason only of their passage through the territorial sea.

2. Charges may be levied upon a foreign ship passing through the territorial sea as payment only for specific services rendered to the ship. These charges shall be levied without discrimination.

Sub-section D. Rules Applicable to Warships

Article 23

If any warship does not comply with the regulations of the coastal State concerning passage through the territor-

ial sea and disregards any request for compliance which is made to it, the coastal State may require the warship to leave the territorial sea.

U.N. Doc. A/CONF. 62/ WP. 8/ REV.1/ PART II (Informal Single Negotiating Text):

SUBSECTION A. RULES APPLICABLE TO ALL SHIPS

Article 16

Right of innocent passage

Subject to the present Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea.

Article 17

Meaning of passage

1. Passage means navigation through the territorial sea for the purpose of:

(*a*) Traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or

(*b*) Proceeding to or from internal waters or a call at such a roadstead or port facility.

2. Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.

Article 18

Meaning of innocent passage

1. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with the present Convention and with other rules of international law.

2. Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State, if in the territorial sea it engages in any of the following activities:

(*a*) Any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;

(*b*) Any exercise or practice with weapons of any kind;

(*c*) Any act aimed at collecting information to the prejudice of the defence or security of the coastal State;

(*d*) Any act of propaganda aimed at affecting the defence or security of the coastal State;

(*e*) The launching, landing or taking on board of any aircraft;

(*f*) The launching, landing or taking on board of any military device;

(*g*) The embarking or disembarking of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary regulations of the coastal State;

(*h*) Any act of wilful and serious pollution, contrary to the present Convention;

(*i*) Any fishing activities;

(*j*) The carrying out of research or survey activities;

(*k*) Any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State;

(*l*) Any other activity not having a direct bearing on passage.

Article 19

Submarines and other underwater vehicles

In the territorial sea, submarines and other underwater vehicles are required to navigate on the surface and to show their flag.

Article 20

Laws and regulations of the coastal State relating to innocent passage

1. The coastal State may make laws and regulations, in conformity with the provisions of the present Convention and other rules of international law, relating to innocent passage through the territorial sea, in respect of all or any of the following:

(*a*) The safety of navigation and the regulation of marine traffic;

(*b*) The protection of navigational aids and facilities and other facilities or installations;

(*c*) The protection of cables and pipelines;

(*d*) The conservation of the living resources of the sea;

(*e*) The prevention of infringement of the fisheries regulations of the coastal State;

(*f*) The preservation of the environment of the coastal State and the prevention of pollution thereof;

(*g*) Marine scientific research and hydrographic surveys;

(*h*) The prevention of infringement of the customs, fiscal, immigration, or sanitary regulations of the coastal State.

2. Such laws and regulations shall not apply to or affect the design, construction, manning or equipment of foreign ships or matters regulated by generally accepted international rules unless specifically authorized by such rules.

3. The coastal State shall give due publicity to all such laws and regulations.

4. Foreign ships exercising the right of innocent passage through the territorial sea shall comply with all such laws and regulations and all generally accepted international regulations relating to the prevention of collisions at sea.

Article 21

Sea lanes and traffic separation schemes in the territorial sea

1. The coastal State may, where necessary having regard to the safety of navigation, require foreign ships exercising the right of innocent passage through its territorial sea to use such sea lanes and traffic separation schemes as it may designate or prescribe for the regulation of the passage of ships.

2. In particular, tankers, nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances or materials may be required to confine their passage to such sea lanes.

3. In the designation of sea lanes and the prescription of traffic separation schemes under this article the coastal State shall take into account:

(*a*) The recommendations of competent international organizations;

(*b*) Any channels customarily used for international navigation;

(*c*) The special characteristics of particular ships and channels; and

(*d*) The density of traffic.

4. The coastal State shall clearly indicate such sea lanes and traffic separation schemes in charts to which due publicity shall be given.

Article 22

Foreign nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances

Foreign nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances shall, when exercising the right of innocent passage through the territorial sea, carry documents and observe special precautionary measures established for such ships by international agreements.

Article 23

Duties of the coastal State

1. The coastal State shall not hamper the innocent passage of foreign ships through the territorial sea except in accordance with the present Convention. In particular, in the application of the present Convention or of any laws or regulations made under the present Convention, the coastal State shall not:

(*a*) Impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage; or

(*b*) Discriminate in form or in fact against the ships of any State or against ships carrying cargoes to, from or on behalf of any State.

2. The coastal State shall give appropriate publicity to any dangers to navigation, of which it has knowledge, within its territorial sea.

Article 24

Rights of protection of the coastal State

1. The coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent.

2. In the case of ships proceeding to internal waters or a call at a port facility outside internal waters, the coastal State also has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject.

3. The coastal State may, without discrimination amongst foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security. Such suspension shall take effect only after having been duly published.

Article 25

Charges which may be levied upon foreign ships

1. No charge may be levied upon foreign ships by reason only of their passage through the territorial sea.

2. Charges may be levied upon a foreign ship passing through the territorial sea as payment only for specific services rendered to the ship. These charges shall be levied without discrimination.

SUBSECTION C. RULES APPLICABLE TO WARSHIPS AND OTHER GOVERNMENT SHIPS OPERATED FOR NON-COMMERCIAL PURPOSES

Article 28

Definition of warships

For the purposes of the present Convention, "warship" means a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the Government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline.

Article 29

Non-observance by warships of the laws and regulations of the coastal State

If any warship does not comply with the laws and regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance which is made to it, the coastal State may require it to leave the territorial sea immediately.

Article 30

Responsibility of the flag State for damage caused by a warship or other government ships operated for non-commercial purposes

The flag State shall bear international responsibility for any loss or damage to the coastal State resulting from the non-compliance by a warship or other government ship operated for non-commercial purposes with the laws and regulations of the coastal State concerning passage through the territorial sea or with the provisions of the present Convention or other rules of international law.

Article 31

Immunities of warships and other government ships operated for non-commercial purposes

With such exceptions as are contained in subsection A and in articles 29 and 30, nothing in the present Convention affects the immunities of warships and other government ships operated for non-commercial purposes.

Chapter VI: Right of access of land-locked States to and from the sea and freedom of transit

Article 109

Use of terms

1. For the purposes of the present Convention:

(*a*) "Land-locked State" means a State which has no seacoast;

(*b*) "Transit State" means a State, with or without a seacoast, situated between a land-locked State and the sea through whose territory "traffic in transit" passes;

(*c*) "Traffic in transit" means transit of persons, baggage, goods and means of transport across the territory of one or more transit States, when the passage across such territory, with or without trans-shipment, warehousing, breaking bulk or change in the mode of transport, is only a portion of a complete journey which begins or terminates within the territory of the land-locked State;

(*d*) "Means of transport" means

(i) Railway rolling stock, sea, lake and river craft and road vehicles;

(ii) Where local conditions so require, porters and pack animals.

2. Land-locked States and transit States may, by agreement between them, include as means of transport pipelines and gas lines and means of transport other than those included in paragraph 1.

Article 110

Right of access to and from the sea and freedom of transit

1. Land-locked States shall have the right of access to and from the sea for the purpose of exercising the rights provided for in the present Convention including those relating to the freedom of the high seas and the principle of the common heritage of mankind. To this end, land-locked States shall enjoy freedom of transit through the territories of transit States by all means of transport.

2. The terms and conditions for exercising freedom of transit shall be agreed between the land-locked States and the transit States concerned through bilateral, subregional or regional agreement, in accordance with the present Convention.

3. Transit States, in the exercise of their full sovereignty over their territory, shall have the right to take all measures to ensure that the rights provided for in this Chapter for land-locked States shall in no way infringe their legitimate interests.

Article 111

Exclusion of application of the most-favoured-nation clause

Provisions of the present Convention, as well as special agreements which regulate the exercise of the right of access to and from the sea, establishing rights and facilities on account of the special geographical position of land-locked States, are excluded from the application of the most-favoured-nation clause.

2. Scientific Research. THE CASE OF EDISTO AND EASTWIND, 57 Dep't State Bull. 362 (1967)

On August 16 the United States Coast Guard announced that the 269-foot Coast Guard icebreakers *Edisto* and *Eastwind* planned an 8,000-mile circumnavigation of the Arctic Ocean, conducting scientific research enroute. Their itinerary called for them to travel north of the Soviet islands of Novaya Zemlya, Severnaya Zemlya, and the New Siberian Islands.

The planned course was entirely on the high seas and, therefore, the voyage did not require any previous clearance with Soviet authorities. Nevertheless, the Soviet Government was officially informed of these plans just prior to the public announcement.

However, heavy ice conditions made it impossible for the vessels to proceed north of Severnaya Zemlya. On August 24 our Embassy in Moscow notified the Soviet Ministry of Foreign Affairs of this situation and stated it would be necessary for the two vessels to pass through Vilkitsky Straits south of Severnaya Zemlya in order to complete their journey.

In response the Soviet Ministry of Foreign Affairs made a statement to our Embassy that the straits constituted Soviet territorial waters.

On August 28, as a result of a routine message from the icebreakers to the Soviet Ministry of the Maritime Fleet, the Soviet Ministry of Foreign Affairs reaffirmed its declaration of August 24 and made it clear that the Soviet Government would claim that passage of the ships through the Vilkitsky Straits would be a violation of Soviet frontiers.

Under these circumstances, the United States considered it advisable to cancel the proposed circumnavigation. The *Edisto* has now been ordered to proceed directly to Baffin Bay, and the *Eastwind* was ordered to remain in the area of the Kara and Barents Seas for about a month to conduct further oceanographic research.

On August 30 our Embassy in Moscow sent a note strongly protesting the Soviet position. The note pointed out that Soviet law cannot have the effect of changing the status of international waters and the rights of foreign ships with respect to them. These rights are set forth clearly in the Convention on the Territorial Sea and the Contiguous Zone of April 29, 1958,[2] to which the Soviet Union is a party.

There is right of innocent passage for all ships through straits used for international navigation between two parts of the high seas, whether or not, as in the case of the Vilkitsky Straits, they are described by the Soviet Union as being overlapped by territorial waters, and there is an unlimited right of navigation on the high seas of straits comprising both high seas and territorial waters. Clearly, the Soviet Government, by denying to U.S. vessels their rights under international law, has acted to frustrate a useful scientific endeavor and thus to deprive the international scientific community of research data of considerable significance.

3. Contiguous Zone

(a) CONVENTION ON THE TERRITORIAL SEA AND THE CONTIGUOUS ZONE, 516 U.N.T.S. 205, 15 U.S.T. 1606, T.I.A.S. No. 5639, in force September 10, 1964.

Article 24

1. In a zone of the high seas contiguous to its territorial sea, the coastal State may exercise the control necessary to :

(a) Prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea;

(b) Punish infringement of the above regulations committed within its territory or territorial sea.

2. The contiguous zone may not extend beyond twelve miles from the baseline from which the territorial sea is measured.

3. Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its contiguous zone beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of the two States is measured.

(b) Informal Single Negotiating Text, U.N. Doc. A/ CONF. 62/ WP. 8/ REV. 1/ PART II:

Article 32

2. The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.

UNITED STATES V. LOUISIANA

United States Supreme Court, 1969

394 U.S. 11, 35-47

II.

APPLICATION OF THE CONVENTION ON THE TERRITORIAL SEA AND THE CONTIGUOUS ZONE.

Many issues divide the parties concerning the application of the provisions of the Convention on the Territorial Sea and the Contiguous Zone to the Louisiana coast. Some of these issues, which involve simply interpretation of the Convention, we have been able to decide on the basis of the materials now before us. Others, however, are primarily factual questions involving the construction and application of the Convention's provisions with respect to particularized geographical configurations. Several of these factual disputes cannot be properly resolved without evidentiary hearings, and as to others we think it would be wise at all events in this technical and unfamiliar area to have the benefit, preliminarily, of the judgment of a detached referee. Accordingly, we have decided to refer to a Special Master the task of resolving in the first instance several of the particularized disputes over the precise boundary between the submerged Gulf lands belonging to the United States and those belonging to Louisiana.

1. *Dredged channels.* A recurring question in the application of the Convention to the Louisiana coast is whether dredged channels in the Gulf leading to inland harbors comprise inland waters. In support of its contention that dredged channels, as such, are inland waters, Louisiana relies principally on Article 8 of the Convention:

> "For the purpose of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system shall be regarded as forming part of the coast."

Incontestably, Louisiana argues, the channels "form an integral part of the harbour system"; that they are "harbour works" as well should also be obvious in light of the enormous cost and effort which the United States has expended in dredging and maintaining them.

The United States argues more convincingly, however, that Article 8 applies only to raised structures. The discussions of the Article by the 1958 Geneva Conference and the International Law Commission reveal that the term "harbour works" connoted "structures" and "installations" which were "part of the land" and which in

some sense enclosed and sheltered the waters within.[42] It is not enough that the dredged channels may be an "integral part of the harbour system"; even raised structures which fit that description, such as lighthouses, are not considered "harbour works" unless they are "connected with the coast." Thus, Article 8 provides that "harbour works . . . shall be regarded as forming part of the *coast*" (emphasis supplied), a description which hardly fits underwater channels. As part of the "coast," the breadth of the territorial sea is measured from the harbor works' low-water lines, attributes not possessed by dredged channels.[44] We must therefore conclude that Article 8 does not establish dredged channels as inland waters.

Louisiana also contends that the legislative history of the Submerged Lands Act reveals a clear congressional purpose to include such channels as inland waters. Early versions of the bill contained a definition of the term "inland waters" for the purposes of the Act, and that definition included "channels." The definition was later deleted, but Louisiana contends that the sole purpose of the deletion was to avoid a construction of the definition which would exclude other areas from inland waters.[46] In *United States* v. *California,* 381 U. S. 139, 150–160, we reviewed at length the pertinent legislative history and concluded that the only sure inference which could be drawn from the deletion of the definition was that Congress thought the highly technical question should be left to the courts. We remain of that view. Moreover, it is far from clear that the word "channels" in the deleted definition encompassed dredged channels in the open sea. From the context in which the word appears, it is far more likely that the definition referred only to bodies of water bordered by land.

2. *The territorial sea of low-tide elevations.* Article 11 of the Convention on the Territorial Sea and the Contiguous Zone deals with the subject of low-tide elevations:

> "1. A low-tide elevation is a naturally-formed area of land which is surrounded by and above water at low-tide but submerged at high tide. Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea.
>
> "2. Where a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it has no territorial sea of its own."

The question presented by the application of this provision to the Louisiana coast is whether the territorial sea—or, for purposes of this case, the three-mile grant to Louisiana under the Submerged Lands Act—is to be measured from low-tide elevations which lie within three miles of the baseline across the mouth of a bay but more than three miles from any point on the mainland or an island.

The United States argues that the phrase "at a distance not exceeding the breadth of the territorial sea from the mainland" does not refer to the territorial sea as a *situs*. Rather it uses the width of the territorial sea only as a measurement of *distance*—a circumlocution made necessary by the failure of the 1958 Geneva Conference to agree upon a uniform width. And that distance—three miles in this case—is to be measured from the "mainland," a term which does not comprise baselines across bodies of water but is limited to the low-water mark on dry land. Louisiana, on the other hand, interprets the Article as covering all low-tide elevations situated anywhere within the territorial sea. And the drawing of baselines across the mouths of bays is an integral step in the determination of the area of the territorial sea. Moreover, Louisiana argues, the term "mainland" does include inland waters. The theory of the Convention, it is argued, reflects a long-standing principle of international law—that bays and other inland waters are practically assimilated to the dry land and treated for all legal purposes as if they were a part of it.

The parties agree that Article 11 on its face is not wholly dispositive of the issue, and that the language does not preclude either construction. Each party, therefore, relies on the origins of the Article and the statements of its drafters. When the provision was first proposed to the International Law Commission in 1952, it read as follows:

> "Elevations of the sea bed *situated within the territorial sea,* though only above water at low tide, are taken into consideration for the determination of the base line of the territorial sea." (Emphasis supplied.)

After several amendments to the rapporteur's draft, the Commission in 1954 adopted a version with substantially the same meaning:

> "Drying rocks and shoals *which are wholly or partly within the territorial sea* may be taken as points of departure for delimiting the territorial sea." (Emphasis supplied.)

As the discussion made clear, both drafts of the Article covered *all* low-tide elevations within the territorial sea, however measured. Moreover, the provision was thought to embody long-standing principles of international law.

The draft encountered a serious objection, however, which led to its further amendment by the International Law Commission. If every low-tide elevation "within the territorial sea" was to have a territorial sea of its own, then

> "a country like Holland might extend its territorial sea very considerably by advancing from one shoal to another, claiming that a shoal situated within the territorial sea of another shoal had itself a territorial sea."

To avoid this undue extension of the territorial sea, the final draft of the Commission was revised to read as follows:

> "Drying rock and drying shoals which are wholly or partly within the territorial sea, *as measured from the mainland or an island,* may be taken as points of departure for measuring the extension of the territorial sea." (Emphasis supplied.)

It is clear that under the International Law Commission version of Article 11, the "territorial sea, as measured from the mainland" included those portions which extended from baselines enclosing bays.[58] The sole purpose of the amendment to the initial proposals was to indicate that "drying rocks and drying shoals could only be used once as points of departure for extending the territorial sea and that the process could not be repeated by leapfrogging, as it were, from one rock or shoal to another."

The United States contends that by changing the language of the International Law Commission draft to its present form in the Convention, the Geneva Conference intended also to change its meaning. Precisely the opposite conclusion, however, flows from an inspection of the history of the Convention. The amendment was advanced by the United States; yet its explanation for the proposal contained not the slightest indication that any change in the basic meaning of the Article was intended.[59] Surely there would have been some discussion of the reference to the territorial sea as a measure of distance rather than as a situs had it been the purpose of the United States or the Conference to alter so significantly the meaning of prior drafts and the existing international consensus. Instead, the expert to the Secretariat of the Conference explained "that all the proposals on article 11 corresponded entirely to the intentions of the International Law Commission." We therefore conclude that low-tide elevations situated in the territorial sea as measured from bay-closing lines are part of the coastline from which the three-mile grant of the Submerged Lands Act extends.

SNYDER V. MOTORISTS MUTUAL INS. CO.

Court of Appeals of Ohio, March 17, 1965

2 Ohio App. 2d 19, 206 N.E. 2d 277

DOYLE, Presiding Judge.

In this action commenced in the Court of Common Pleas of Summit County for damages based upon a policy of insurance, a judgment was entered on the verdict of a jury in favor of the boat owner, Harvey J. Snyder (plaintiff-appellee), and against the Motorists Mutual Insurance Company (defendant-appellant), which company had issued its policy of insurance covering damage to the boat and loss to the owner occurring "within the limits of the continental United States of America * * *."

The main issue before this court is whether the trial court erred in charging the jury, as a matter of law, that the loss in damages to the sunken boat occurred within the limits of the continental United States of America.

It appears from the evidence that on March 8, 1960, Snyder was engaged in the sport of fishing from his boat in the Atlantic Ocean off the Florida Keys, when the craft capsized. The geographical point of mishap was located as being approximately four nautical miles from the center of Bahia Honda bridge, and three and six-tenths miles from the nearest shore line, and in a part of the ocean having a water depth of approximately thirty-one feet.

In the appeal from the judgment against it, the Insurance Company urges the following assignments of error, which are declared to be of a prejudicial character and to require a reversal of the judgment:

"(1) The court erred in overruling motions of the defendant for a directed verdict at the close of the plaintiff's evidence and at the close of all of the evidence.

"(2) The court erred in charging the jury as a matter of law that the loss upon which this case was based occurred within the continental United States.

"(3) The court erred in overruling the motion of the defendant for judgment following and notwithstanding the verdict of the jury.

"(4) The court erred in overruling the motion of the defendant for a new trial.

"(5) The judgment of the court is contrary to law."

The Insurance Company claims that a point in the ocean beyond three nautical miles from the coast line is not within the continental limits of the United States, as that language is used in the policy of insurance.

In our research of the questions in this case, we have been unable to find a reported decision of any reviewing court in the country defining the contract limitation provision before us, although the limitation of risk as to place appears in a number of standard contract forms.

From decided cases in this state, and elsewhere, however, the following general rules governing the interpretation of insurance contracts may be deduced:

1. A contract of marine insurance must be given a fair and reasonable interpretation to cover the risks anticipated by the parties;

2. The contract is strictly construed against the insurer and favorable to the insured;

3. Where several interpretations are reasonably possible, that which will favor the insured will be adopted;

4. Ambiguities in the policy will be resolved against the insurance company, so as to give effect to the dominant purpose of the contract; and

5. If an insurance company, in issuing a marine policy, desires to limit or restrict the operation of the general provi-

sions of its contract by limiting its risk as to place, it should do so in clear and unmistakable language.

From early times, it has been recognized that the sovereignty of nations bordering the seas does not stop at the shoreline, but that for some distance it extends over and under the ocean. Grotius declared, in "The Law of War and Peace," Book II, Chapter 3, Sections 13–14, that territorial rights extended over as much of the sea as could be defended from the shore.

A Dutch Judge, Bynkershoek, in his treatise, "De dominio Maris," (1702), wrote: "Wherefore on the whole it seems a better rule that the control of the land (over the sea) extends as far as cannon will carry; for that is as far as we seem to have both command and possession. I am speaking, however, of my own times, in which we have these engines of war; otherwise, I should have to say in general terms that the control of the land ends where the power of men's weapons ends; for it is this, as we have said, that guarantees possession." International Law—Cases and Materials, by William W. Bishop, Jr., 375.

In succeeding generations, scholars and writers frequently tended to equate the distance of a cannon shot with one league or three nautical miles. (Statute or land mile—5280 feet; international nautical mile —6,076.10333 feet.)

On November 8, 1793, Thomas Jefferson, in his capacity as Secretary of State of the United States, wrote the British Minister as follows:

"The President of the United States, thinking that, before it shall be finally decided to what distance from our shore lines the territorial protection of the United States shall be exercised it will be proper to enter into friendly conferences and explanations with the powers chiefly interested in the navigation of the seas on our coasts, and relying that convenient occasions may be taken for these hereafter, finds it necessary in the meantime to fix provisionally on some distance for the present government of these questions. You are sensible that very different opinions and claims have been heretofore advanced on this subject. The greatest distance to which any respectable assent among nations has been at any time given, has been the extent of the human sight, estimated at upwards of twenty miles, and the smallest distance, I believe, claimed by any nation whatever, *is the utmost range of a cannon ball*, usually stated at one league. Some intermediate distances have also been insisted on and that of three sea leagues has some authority in its favor * * *." 1 Moore's Digest of International Law, 702, 703.

In connection with this letter, it may be observed that Thomas Jefferson, when President of the United States, stated to John Quincy Adams, in connection with a claimed act of hostility by a French privateer near Charleston, South Carolina, that "we ought to assume as a principle, that the neutrality of our territory should extend to the gulf stream which was a natural boundary." Ibid.

The several observations made above indicate the confusion which existed in bygone years with respect to sovereignty over territorial ocean waters bordering the line of low tide on the sea coasts. However, the needs of nations to exercise jurisdiction over the waters along their coasts became increasingly important in the interest of self-defense, and the three-mile limit was informally accepted by the United States and Great Britain, while other countries claimed wider belts.

"* * * Thus far no international agreement has been reached on a uniform distance * * *. In the establishment of a rule of international law, two major principles must be respected: (1) the sovereignty of the coastal nation, and (2) the freedom of the high seas. The reconciliation of these two principles has been the

stumbling block thus far. Perhaps the one point of agreement by all nations is that 3 miles is the minimum breadth, or, stating it differently, 3 miles is the one distance on which there is complete unanimity of opinion * * *." Shore and Sea Boundaries, Aaron L. Shalowitz, page 25.

While generally adhering to the doctrine of the freedom of the seas beyond the three-mile limit, the United States has, on numerous occasions, exercised authority beyond the limit, in the fields of law enforcement and national security. Congress has authorized federal officers to board vessels bound for the United States ports when within four leagues, or four nautical miles, of the coast for the purpose of determining the character of the cargo. Similar laws were enacted to enforce national prohibition.

The principle underlying the three-mile limit rule appears to be the attempted establishment of a "freedom of the seas" doctrine, the right of free navigation, and the right of free fishing on the high seas, which are recognized by some nations, including the United States, as rights belonging to all of the peoples of the world.

Furthermore, it has been American policy to establish national dominion over a definite marginal zone (the three-mile limit) to protect our neutrality against foreign nations.

The foregoing statement of governmental policy does not define limits of the continental United States, any more than do the various decisions of the Supreme Court of the United States in ruling upon the rights of states, as against the rights of the federal government, to oil and minerals under the waters of the ocean within and beyond the three-mile limit; or the various laws enacted by the Congress of the United States known as the Submerged Lands Act, and the Outer Continental Shelf Lands Act. (Under the latter Act, the United States claims the right to oil beneath the continental shelf and beyond the three mile limit.)

Every continent rests on a submarine base which extends seaward from the shore. This underwater extension on the part of the continent above sea level is called the "continental shelf." It has been defined as the submerged portion of a continent which slopes gently seaward from the low water line to a point under the sea where a substantial break in grade occurs, at which point the bottom slopes steeply until the great ocean depths are reached. The point or line or break defines the edge of the shelf.

It is common knowledge to the people of the United States that during the years of operation of the Submerged Lands Act, and the Outer Continental Shelf Lands Act, the government of the United States has received millions of dollars from leases of submerged lands beyond this three-mile limit on the continental shelf adjacent to the shore line of the United States.

It thus appears that the place where the boating accident in the instant lawsuit occurred, although a short distance beyond the three-mile limit, was above the continental shelf of the United States, and over lands which the 83rd Congress of the United States (Public Law 212, 67 Stats. at L. 462) declared subject to "[t]he Constitution and laws and civil and political jurisdiction of the United States" for the purpose of "exploring for, developing, removing, and transporting resources therefrom, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State * * *."

It is our view that the language of the policy limiting the risk as to place as one occurring "within the Continental limits of the United States" is fraught with so much ambiguity that it is beyond reasonable definition. In the context in which it is employed, it could mean (1) within the three-mile limit; or it could mean (2) beyond the three-mile limit, and over the "continental shelf" (and perhaps at numerous other places unnecessary to explore here).

Therefore, first: resolving the ambiguous language against the insurance company to give effect to the dominant purpose of the policy, and, second: adopting one reasonable interpretation of the "continental shelf" theory which will give effect to the policy; and, third: strictly construing the policy against the insurer, and in favor of the insured; this court orders a judgment of affirmance.

We find no error committed by the trial court prejudicial to the rights of the appellant, the Motorists Mutual Insurance Company.

Judgment affirmed.

BRENNEMAN and HUNSICKER, JJ., concur.

B. Straits, Bays, and Historic Waters

REPORT OF U.S. SENATE COMM. ON COMMERCE

94th CONG., 1ST SESS.,

THIRD U.N. LAW OF THE SEA CONFERENCE 28-29

(Comm. Print 1975)

TERRITORIAL SEA AND INTERNATIONAL STRAITS

The question of the limits of the territorial sea and transit through international straits is also being examined by Committee II. Agreement on territorial seas and straits is of vital importance for the success of the Conference. While the majority of States represented at the Third Law of the Sea Conference favor adoption of a 12 nautical miles territorial sea, there are some significant complications which have made progress on this matter difficult. Extension of territorial limits to 12 miles would mean that over 100 straits now classified as international waters—including the English Channel, the Straits of Gibraltar, Malacca and Hormutz, to name four of the most important—will come under national control. Under a 3-mile territorial sea, those straits now include high seas.

U. S. position.—The United States has proposed that in the context of an overall satisfactory settlement, it would be willing to accept a 12-mile territorial sea. However, the U.S. has coupled its willingness to agree to a 12-mile territorial sea with recognition of a treaty right of unimpeded transit through and over straits used for international navigation. Without a right of unimpeded transit, it might be possible to assert that only the right of innocent passage would apply. Innocent passage does not permit submerged transit by submarines or overflight by aircraft. Moreover, there is no generally agreed international understanding of what passage is "innocent," and some strait states have interpreted the term innocent passage in such a way as to consider large petroleum tankers or nuclear-powered vessels inherently "not-innocent." Since international straits serve as access and connecting points for large areas of the oceans, free transit is of vital strategic and economic importance. And because of their special prominence, the potential of conflict from an uncertain legal regime is greatly increased in straits. The U.S. recognizes the legitimate concerns of strait states and has proposed international safety and pollution regulations.

Position of strait States.—The position of the strait States was clearly described in the draft articles on navigation through territorial seas and international straits, introduced in 1973 by Cyprus, Greece, Indonesia, Morocco, Spain and Yemen. These states want to maintain the concept of innocent passage and stated in their draft proposal that maritime safety and coastal State security will be served best "by the reasonable and adequate exercise by the coastal State of its right to regulate navigation through its territorial sea, since the purpose of the regulation is not to prevent or hamper passage but to

facilitate it without causing any adverse effects to the coastal State."
The draft articles include a number of general articles applying to all vessels, and specific articles for merchant ships, warships, government ships other than warships and ships with special characteristics, such as nuclear-powered ships, ships carrying nuclear substances "or any other material which may endanger the coastal State or pollute seriously the marine environment" and ships engaged in research of the marine environment. Under the articles, the coastal State would have the right to regulate passage through its territorial sea (which includes straits of 24 nautical miles or narrower) of ships with special characteristics, which in view of the referrence to vessels that could seriously pollute the marine environment, includes tankers. Coastal States could also require prior notification to or authorization by its authorities for nuclear-powered ships or ships carrying nuclear weapons, and submarines would be required to navigate on the surface and to show their flag. The same rules of prior notification to or authorization by the competent authorities of the coastal State would also apply to all warships and government ships other than warships operated for non-commercial purposes.

While the position taken by strait States is unacceptable to most maritime countries, the latter do agree that ships and aircraft in transit should comply with generally accepted international regulations, procedures and practices, and they have encouraged coastal States to propose traffic separation schemes for safety of navigation in crowded straits in order to promote safe passage of ships. The maritime nations also recognize the importance of fully protecting the marine environment, but they want international regulations, procedures and practices for the prevention and control of pollution from ships. They also favor adequate international provisions for compensation should damage result despite the most rigorous prevention requirements.

At the Caracas session there was little public movement toward conciliation on the part of the strait states, but debate was less heated than on previous occasions. Agreement on a 12-mile territorial sea was so widespread that there were virtually no references to any other limit in the public debate. However, major conditions for the acceptance of 12 miles as a maximum limit were agreement on unimpeded transit of straits and acceptance of a 200-mile exclusive economic zone.

UNITED KINGDOM: DRAFT ARTICLES ON STRAITS

U.N. Doc. A/CONF. 62/C.2/L. 3

3 July 1974

CHAPTER III. PASSAGE OF STRAITS USED FOR INTERNATIONAL NAVIGATION

Article 1

1. In straits to which this article applies, all ships and aircraft enjoy the right of transit passage, which shall not be impeded.

2. Transit passage is the exercise in accordance with the provisions of this chapter of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas and another part of the high seas or a State bordering the strait.

3. This article applies to any strait or other stretch of water, whatever its geographical name, which:

(*a*) is used for international navigation;

(*b*) connects two parts of the high seas.

4. Transit passage shall apply in a strait only to the extent that:

(*a*) an equally suitable high seas route does not exist through the strait; or

(*b*) if the strait is formed by an island of the coastal State, an equally suitable high seas passage does not exist seaward of the island.

Article 2

1. Ships and aircraft, while exercising the right of transit passage shall:

(*a*) proceed without delay through the strait and shall not engage in any activities other than those incident to their normal modes of transit;

(*b*) refrain from any threat or use of force in violation of the Charter of the United Nations against the territorial integrity or political independence of an adjacent straits State.

2. Ships in transit shall:

(*a*) comply with generally accepted international regulations, procedures and practices for safety at sea, including the International Regulations for Preventing Collisions at Sea, of 1972;

(*b*) comply with generally accepted international regulations, procedures and practices for the prevention and control of pollution from ships.

3. Aircraft in transit shall:

(*a*) observe rules of the air established by the International Civil Aviation Organization under the Convention on International Civil Aviation signed at Chicago in 1944[2] as they apply to civil aircraft; State aircraft will normally comply with such safety measures and will at all times operate with due regard for the safety of navigation;

(*b*) at all times monitor the radio frequency assigned by the appropriate internationally designated air traffic control authority or the appropriate international distress radio frequency.

Article 3

1. In conformity with this chapter, a straits State may designate sea lanes and prescribe traffic separation schemes for navigation in the strait where necessary to promote the safe passage of ships.

2. A straits State may, when circumstances require and after giving due publicity to its decision, substitute other sea lanes or traffic separation schemes for any previously designated or prescribed by it.

3. Before designating sea lanes or prescribing traffic separation schemes, a straits State shall refer proposals to the competent international organization and shall designate such sea lanes or prescribe such separation schemes only as approved by that organization.

4. The straits State shall clearly indicate all sea lanes and separation schemes designated or prescribed by it on charts to which due publicity shall be given.

5. Ships in transit shall respect applicable sea lanes and separation schemes established in accordance with this article.

Article 4

1. Subject to the provisions of this article, a straits State may make laws and regulations:

(*a*) in conformity with the provisions of article 3 above;

(*b*) giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait.

2. Such laws and regulations shall not discriminate in form or in fact among foreign ships.

3. The straits State shall give due publicity to all such laws and regulations.

4. Foreign ships exercising the right of transit passage shall comply with such laws and regulations of the straits State.

5. If a ship entitled to sovereign immunity does not comply with any such laws or regulations and damage to the straits State results, the flag State shall in accordance with article 7 be responsible for any such damage caused to the straits State.

Article 5

User States and straits States should by agreement cooperate in the establishment and maintenance in a strait of necessary navigation and safety aids or other improvements in aid of international navigation or for the prevention and control of pollution from ships.

Article 6

A straits State shall not hamper transit passage and shall give appropriate publicity to any danger to navigation or overflight within or over the strait of which it has knowledge. There shall be no suspension of transit passage.

Article 7

1. Responsibility for any damage caused to a straits State resulting from acts in contravention of this chapter by any ship or aircraft entitled to sovereign immunity shall be borne by the flag State.

2. If a straits State acts in a manner contrary to the provisions of this chapter and loss or damage to a foreign ship or aircraft results, the straits State shall compensate the owners of the vessel or aircraft for that loss or damage.

Article 8

1. In straits used for international navigation between one part of the high seas and another part of the high seas or between one part of the high seas and the territorial sea of a foreign State, other than those straits in which the régime of transit passage applies in accordance with article 1, the régime of innocent passage in accordance with the provisions of part III of chapter II shall apply, subject to the provisions of this article.

2. There shall be no suspension of the innocent passage of foreign ships through such straits.

3. The provision of article 3 of this chapter shall apply in such straits.

Article 9

Nothing in this chapter shall affect any areas of high seas within a strait.

Article 10

The provisions of this chapter shall not affect obligations under the Charter of the United Nations or under conventions or other international agreements already in force relating to a particular strait.

Article 11

In this chapter "straits State" means any State bordering a strait to which the chapter applies.

Article 12

Any dispute concerning the interpretation or application of this chapter shall be settled in accordance with chapter . . . of this Convention.

John R. Stevenson, "INTERNATIONAL LAW AND THE OCEAN"

65 Dep't State Bull. 261 (1971)

Breadth of Territorial Sea

The first article presented by my Government would establish a maximum breadth of 12 miles for the territorial sea. The prime distinguishing characteristic of the territorial sea is that the coastal state exercises jurisdiction over navigation and overflight, subject to a limited right of innocent passage for vessels. We believe agreement must be reached on a narrow territorial sea. While my Government adheres to the traditional 3-mile limit, it is prepared to take into account the views of others and to agree to a treaty fixing the maximum breadth of the territorial sea at 12 nautical miles, if there is an adequate agreement concerning international straits—to which I shall refer shortly. We use the 12-mile figure because it represents the best, probably the only, possibility for reaching agreement. It is apparent that the overwhelming majority of states are prepared to accept the 12-mile limit. In most cases where broader jurisdictional claims have been made, the reasons for those claims were resource-oriented. We believe that the real concerns of those few states that have claimed broader limits for the territorial sea can be accommodated in the course of the work of this and the other subcommittees.

However, interests in international navigation and overflight are not adequately accommodated with a 12-mile territorial sea alone. By agreeing to extend the territorial sea from 3 to 12 miles, we would place many important straits totally within the territorial sea of riparian states, thus subjecting movements through such straits to the limitations of innocent passage. The doctrine of innocent passage is not adequate when applied to international straits. For example, some states consider "innocence" to be a subjective criterion to be left to the discretion of the coastal state. Some argue that passage of certain types of vessels is inherently non-innocent or that innocence may depend on the flag, cargo, or destination of a vessel. Under the Territorial Sea Convention, neither aircraft nor submerged submarines have a right of innocent passage.

We believe the right to transit straits should be regarded in law for what it is in fact: an inherent and inseparable adjunct of the freedoms of navigation and overflight on the high seas themselves. Without such a right of transit, these high seas freedoms would lose much of their meaning if an expansion of the territorial sea to 12 miles is to be recognized and agreed.

We do not know whether most states that already claim or recognize territorial seas of more than 3 miles thereby intended to relinquish their own rights of transit in important international straits overlapped by territorial seas of more than 3 miles. Neither history nor logic compels any state to concede that an extension of territorial seas has the same effects upon the rights of the international community in straits as it has in other coastal areas. The balance of international and coastal interests is quite different in these two situations.

Free Transit of International Straits

The second article we are presenting recognized this distinction by providing for a right of free transit for vessels and aircraft through and over all international straits overlapped by territorial seas. Coastal states would have the right to designate corridors suitable for transit, but they would not be obliged to do so. For our part, we are prepared to consider whether coastal and international interests could be similarly reconciled in the case of island nations, whose problems were discussed by the distinguished Representative of Fiji in his recent statement.

Mr. Chairman, the United States believes that straits wider than 6 miles currently have high seas within them, where states may exercise the freedoms of the high seas. In short, the present rule of international law in virtually all of the straits of concern is freedom of the seas. To achieve widespread international agreement, we are prepared to give up high seas freedoms in these international straits in exchange for a limited but vital right. Subject only to the right of free transit, territorial waters in international straits would retain their national character in each and every respect. The new right

of free transit would only apply in international straits, using the definition that was adopted at the 1958 Law of the Sea Conference; it would not apply to other territorial or internal waters. Moreover, the right is a narrow one—merely one of transiting the straits, not of conducting any other activities. Should a vessel conduct any other activities that are in violation of coastal state laws and regulations, it would be exceeding the scope of its right and would be subject to appropriate enforcement action by the coastal state.

When we refer to enforcement of coastal state laws and regulations, we intend to include reasonable traffic safety regulations both for vessels and aircraft. We will, of course, want to approach this question cautiously in order to preserve the basic right of free transit and avoid a situation in which the coastal state has a legal basis for using safety regulations as a way of impairing the right of free transit.

There are very few countries whose vital trade and communications links do not pass close to the shores of other countries, particularly in international straits. If coastal states were given a legal basis for impairing transit, virtually every country in the world would find its very economy dependent upon the political good will of some other state by virtue of geography. Moreover, we seriously doubt that any coastal state located on a strait or important navigational route would benefit from gaining such control over international navigation and overflight. It would subject itself to strong and conflicting domestic and international pressures regarding the exercise of such control.

We recognize the concern of many states bordering straits regarding the need to prevent pollution. Pollution control problems, however, are not unique in straits. For example, the same problems pertain in heavily traveled shipping routes. The doctrine of innocent passage is not adequate to protect both coastal and maritime interests in international straits. It applies only in territorial seas, and as I have mentioned, it is subject to varying interpretations by different coastal states. Specific international agreements are required to insure appropriate protection from the hazards of pollution.

I should also point out that agreements specifically relating to particular straits, such as the [1936] Montreux Convention [on the Turkish straits], would not be affected.

Mr. Chairman, the first two articles we are presenting, we believe, would together provide the necessary accommodation of the international and maritime interests in navigation and overflight that I have outlined. They constitute basic elements of the oceans policy announced by our President last year.[1] I trust that the considerations I have discussed explain why my Government would be unable to conceive of a successful law-of-the-sea conference that did not accommodate the objectives of these articles.

We appreciate the fact that many countries attach greater importance to the question of offshore resource management than they do to freedom of navigation. We understand the reasons for this, and it gives us hope that a successful law-of-the-sea conference can be achieved through a process of negotiation with mutual respect for each other's interests.

Our seabeds proposal represents a considered effort to balance coastal and international interests in seabed resources without jeopardizing important navigational interests.

We hope that the fact that United States fisheries, like those of many developed and developing countries, comprise both coastal and distant-water interests will enable us to play a constructive role in helping this subcommittee to work toward achieving a balance of these interests acceptable both to coastal and distant-water fishing states. To achieve this result, we believe the subcommittee should avoid the extremes of absolute freedom of fishing beyond 12 miles, and of absolute and exclusive coastal state control over fisheries in a fixed zone beyond 12 miles. We are particularly concerned about the implications of the latter for navigation and overflight, in view of the historical tendency to assert more and more types of control within fixed zones of special-purpose jurisdiction.

TEXTS OF DRAFT ARTICLES

Article I

1. Each State shall have the right, subject to the provisions of Article II, to establish the breadth of its territorial sea within limits of no more than 12 nautical miles, measured in accordance with the provisions of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone.

2. In instances where the breadth of the territorial sea of a State is less than 12 nautical miles, such State may establish a fisheries zone contiguous to its territorial sea provided, however, that the total breadth of the territorial sea and fisheries zone shall not exceed 12 nautical miles. Such State may exercise within such a zone the same rights in respect to fisheries as it has in its territorial sea.

Article II

1. In straits used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State, all ships and aircraft in transit shall enjoy the same freedom of navigation and overflight, for the purpose of transit through and over such straits, as they have on the high seas. Coastal States may designate corridors suitable for transit by all ships and aircraft through and over such straits. In the case of straits where particular channels of navigation are customarily employed by ships in transit, the corridors, so far as ships are concerned, shall include such channels.

2. The provisions of this Article shall not affect conventions or other international agreements already in force specifically relating to particular straits.

One fact of particular importance is that the North Corfu Channel constitutes a frontier between Albania and Greece, that a part of it is wholly within the territorial waters of these States, and that the Strait is of special importance to Greece by reason of the traffic to and from the port of Corfu.

Having regard to these various considerations, the Court has arrived at the conclusion that the North Corfu Channel should be considered as belonging to the class of international highways through which passage cannot be prohibited by a coastal State in time of peace.

On the other hand, it is a fact that the two coastal States did not maintain normal relations, that Greece had made territorial claims precisely with regard to a part of Albanian territory bordering on the Channel, that Greece had declared that she considered herself technically in a state of war with Albania, and that Albania, invoking the danger of Greek incursions, had considered it necessary to take certain measures of vigilance in this region. The Court is of opinion that Albania, in view of these exceptional circumstances, would have been justified in issuing regulations in respect of the passage of warships through the Strait, but not in prohibiting such passage or in subjecting it to the requirement of special authorization.

For these reasons the Court is unable to accept the Albanian contention that the Government of the United Kingdom has violated Albanian sovereignty by sending the warships through the Strait without having obtained the previous authorization of the Albanian Government.

In these circumstances, it is unnecessary to consider the more general question, much debated by the Parties, whether States under international law have a right to send warships in time of peace through territorial waters not included in a strait.

The Albanian Government has further contended that the sovereignty of Albania was violated because the passage of the British warships on October 22nd, 1946, was not an *innocent passage*. The reasons advanced in support of this contention may be summed up as follows: The passage was not an ordinary passage, but a political mission; the ships were manoeuvring and sailing in diamond combat formation with soldiers on board; the position of the guns was not consistent with innocent passage; the vessels passed with crews at action stations; the number of the ships and their armament surpassed what was necessary in order to attain their object and showed an intention to intimidate and not merely to pass; the ships had received orders to observe and report upon the coastal defences and this order was carried out.

It is shown by the Admiralty telegram of September 21st, cited above, and admitted by the United Kingdom Agent, that the object of sending the warships through the Strait was not only to carry out a passage for purposes of navigation, but also to test Albania's attitude. As mentioned above, the Albanian Government, on May 15th, 1946, tried to impose by means of gunfire its view with regard to the passage. As the exchange of diplomatic notes did not lead to any clarification, the Government of the United Kingdom wanted to ascertain by other means whether the Albanian Government would maintain its illegal attitude and again impose its view by firing at passing ships. The legality of this measure taken by the Government of the United Kingdom cannot be disputed, provided that it was carried out in a manner consistent with the requirements of international law. The "mission" was designed to affirm a right which had been unjustly denied. The Government of the United Kingdom was not bound to abstain from exercising its right of passage, which the Albanian Government had illegally denied.

It remains, therefore, to consider whether the *manner* in which the passage was carried out was consistent with the principle of innocent passage and to examine the various contentions of the Albanian Government in so far as they appear to be relevant.

When the Albanian coastguards at St. George's Monastery reported that the British warships were sailing in combat formation and were manoeuvring, they must have been under a misapprehension. It is shown by the evidence that the ships were not proceeding in combat formation, but in line, one after the other, and that they were not manoeuvring until after the first explosion. Their movements thereafter were due to the explosions and were made necessary in order to save human life and the mined ships. It is shown by the evidence of witnesses that the contention that soldiers were on board must be due to a misunderstanding probably arising from the fact that the two cruisers carried their usual detachment of marines.

It is known from the above-mentioned order issued by the British Admiralty on August 10th, 1946, that ships, when using the North Corfu Strait, must pass with armament in fore and aft position. That this order was carried out during the passage on October 22nd is stated by the Commander-in-Chief, Mediterranean, in a telegram of October 26th to the Admiralty. The guns were, he reported, "trained fore and aft, which is their normal position at sea in peace time, and were not loaded". It is confirmed by the commanders of *Saumarez* and *Volage* that the guns were in this position before the explosions. The navigating officer on board *Mauritius* explained that all guns on that cruiser were in their normal stowage position. The main guns were in the line of the ship, and the anti-aircraft guns were pointing outwards and up into the air, which is the normal position of these guns on a cruiser both in harbour and at sea. In the light of this evidence, the Court cannot accept the Albanian contention that the position of the guns was inconsistent with the rules of innocent passage.

In the above-mentioned telegram of October 26th, the Commander-in-Chief reported that the passage "was made with ships at action stations in order that they might be able to retaliate quickly if fired upon again". In view of the firing from the Albanian battery on May 15th, this measure of precaution cannot, in itself, be regarded as unreasonable. But four warships—two cruisers and two destroyers—passed in this manner, with crews at action stations, ready to retaliate quickly if fired upon. They passed one after another through this narrow channel, close to the Albanian coast, at a time of political tension in this region. The intention must have been, not only to test Albania's attitude, but at the same time to demonstrate such force that she would abstain from firing again on passing ships. Having regard, however, to all the circumstances of the case, as described above, the Court is unable to characterize these measures taken by the United Kingdom authorities as a violation of Albania's sovereignty.

The Admiralty Chart, Annex 21 to the Memorial, shows that coastal defences in the Saranda region had been observed and reported. In a report of the commander of *Volage*, dated October 23rd, 1946—a report relating to the passage on the 22nd—it is stated: "The most was made of the opportunities to study Albanian defences at close range. These included, with reference to XCU...."—and he then gives a description of some coastal defences.

In accordance with Article 49 of the Statute of the Court and Article 54 of its Rules, the Court requested the United Kingdom Agent to produce the documents referred to as XCU for the use of the Court. Those documents were not produced, the Agent pleading naval secrecy; and the United Kingdom witnesses declined to answer questions relating to them. It is not therefore possible to know the real content of these naval orders. The Court cannot, however, draw from this refusal to produce the orders any conclusions differing from those to which the actual events gave rise. The United Kingdom Agent stated that the instructions in these orders related solely to the contingency of shots being fired from the coast—which did not happen. If it is true, as the commander of *Volage* said in evidence, that the orders contained information concerning certain positions from which the British warships might have been fired at, it cannot be deduced therefrom that the vessels had received orders to reconnoitre Albanian coastal defences. Lastly, as the Court has to judge of the innocent nature of the passage, it cannot remain indifferent to the fact that, though two warships struck mines, there was no reaction, either on their part or on that of the cruisers that accompanied them.

With regard to the observations of coastal defences made after the explosions, these were justified by the fact that two ships had just been blown up and that, in this critical situation, their commanders might fear that they would be fired on from the coast, as on May 15th.

Having thus examined the various contentions of the Albanian Government in so far as they appear to be relevant, the Court has arrived at the conclusion that the United Kingdom did not violate the sovereignty of Albania by reason of the acts of the British Navy in Albanian waters on October 22nd, 1946.

* * *

In addition to the passage of the United Kingdom warships on October 22nd, 1946, the second question in the Special Agreement relates to the acts of the Royal Navy in Albanian waters on November 12th and 13th, 1946. This is the minesweeping operation called "Operation Retail" by the Parties during the proceedings. This name will be used in the present Judgment.

After the explosions of October 22nd, the United Kingdom Government sent a note to the Albanian Government, in which it announced its intention to sweep the Corfu Channel shortly. The Albanian reply, which was received in London on October 31st, stated that the Albanian Government would not give its consent to this unless the operation in question took place outside Albanian territorial waters. Meanwhile, at the United Kingdom Government's request, the International Central Mine Clearance Board decided, in a resolution of November 1st, 1946, that there should be a further sweep of the Channel, subject to Albania's consent. The United Kingdom Government having informed the Albanian Government, in a communication of November 10th, that the proposed sweep would take place on November 12th, the Albanian Government replied on the 11th, protesting against this "unilateral decision of His Majesty's Government". It said it did not consider it inconvenient that the British fleet should undertake the sweeping of the channel of navigation, but added that, before sweeping was carried out, it considered it indispensable to decide what area of the sea should be deemed to constitute this channel, and proposed the establishment of a Mixed Commission for the purpose. It ended by saying that any sweeping undertaken without the consent of the Albanian Government outside the channel thus constituted, i.e., inside Albanian territorial waters where foreign warships have no reason to sail, could only be considered as a deliberate violation of Albanian territory and sovereignty.

After this exchange of notes, "Operation Retail" took place on November 12th and 13th. Commander Mestre, of the French Navy, was asked to attend as observer, and was present at the sweep on November 13th. The operation was carried out under the protection of an important covering force composed of an aircraft carrier, cruisers and other war vessels. This covering force remained throughout the operation at a certain distance to the west of the Channel, except for the frigate *St. Bride's Bay*, which was stationed in the Channel south-east of Cape Kiephali. The sweep began in the morning of November 13th, at about 9 o'clock, and ended in the afternoon near nightfall. The area swept was in Albanian territorial waters, and within the limits of the channel previously swept.

The United Kingdom Government does not dispute that "Operation Retail" was carried out against the clearly expressed wish of the Albanian Government. It recognizes that the operation had not the consent of the international mine clearance organizations, that it could not be justified as the exercise of a right of innocent passage, and lastly that, in principle, international law does not allow a State to assemble a large number of warships in the

territorial waters of another State and to carry out minesweeping in those waters. The United Kingdom Government states that the operation was one of extreme urgency, and that it considered itself entitled to carry it out without anybody's consent.

The United Kingdom Government put forward two reasons in justification. First, the Agreement of November 22nd, 1945, signed by the Governments of the United Kingdom, France, the Soviet Union and the United States of America, authorizing regional mine clearance organizations, such as the Mediterranean Zone Board, to divide the sectors in their respective zones amongst the States concerned for sweeping. Relying on the circumstance that the Corfu Channel was in the sector allotted to Greece by the Mediterranean Zone Board on November 5th, i.e., before the signing of the above-mentioned Agreement, the United Kingdom Government put forward a permission given by the Hellenic Government to resweep the navigable channel.

The Court does not consider this argument convincing.

It must be noted that, as the United Kingdom Government admits, the need for resweeping the Channel was not under consideration in November 1945; for previous sweeps in 1944 and 1945 were considered as having effected complete safety. As a consequence, the allocation of the sector in question to Greece, and, therefore, the permission of the Hellenic Government which is relied on, were both of them merely nominal. It is also to be remarked that Albania was not consulted regarding the allocation to Greece of the sector in question, despite the fact that the Channel passed through Albanian territorial waters.

But, in fact, the explosions of October 22nd, 1946, in a channel declared safe for navigation, and one which the United Kingdom Government, more than any other government, had reason to consider safe, raised quite a different problem from that of a routine sweep carried out under the orders of the mineclearance organizations. These explosions were suspicious; they raised a question of responsibility.

Accordingly, this was the ground on which the United Kingdom Government chose to establish its main line of defence. According to that Government, the *corpora delicti* must be secured as quickly as possible, for fear they should be taken away, without leaving traces, by the authors of the minelaying or by the Albanian authorities. This justification took two distinct forms in the United Kingdom Government's arguments. It was presented first as a new and special application of the theory of intervention, by means of which the State intervening would secure possession of evidence in the territory of another State, in order to submit it to an international tribunal and thus facilitate its task.

The Court cannot accept such a line of defence. The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself.

The United Kingdom Agent, in his speech in reply, has further classified "Operation Retail" among methods of self-protection or self-help. The Court cannot accept this defence either. Between independent States, respect for territorial sovereignty is an essential foundation of international relations. The Court recognizes that the Albanian Government's complete failure to carry out its duties after the explosions, and the dilatory nature of its diplomatic notes, are extenuating circumstances for the action of the United Kingdom Government. But to ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy co stituted a violation of Albanian sovereignty.

This declaration is in accordance with the request made by Albania through her Counsel, and is in itself appropriate satisfaction.

The method of carrying out "Operation Retail" has also been criticized by the Albanian Government, the main ground of complaint being that the United Kingdom, on that occasion, made use of an unnecessarily large display of force, out of proportion to the requirements of the sweep. The Court thinks that this criticism is not justified. It does not consider that the action of the British Navy was a demonstration of force for the purpose of exercising political pressure on Albania. The responsible naval commander, who kept his ships at a distance from the coast, cannot be reproached for having employed an important covering force in a region where twice within a few months his ships had been the object of serious outrages.

FOR THESE REASONS,

THE COURT,

on the first question put by the Special Agreement of March 25th, 1948,

by eleven votes to five,

Gives judgment that the People's Republic of Albania is responsible under international law for the explosions which occurred on October 22nd, 1946, in Albanian waters, and for the damage and loss of human life that resulted therefrom; and

by ten votes to six,

Reserves for further consideration the assessment of the amount of compensation and regulates the procedure on this subject by an Order dated this day;

on the second question put by the Special Agreement of March 25th, 1948,

by fourteen votes to two,

Gives judgment that the United Kingdom did not violate the sovereignty of the People's Republic of Albania by reason of the acts of the British Navy in Albanian waters on October 22nd, 1946; and

unanimously,

Gives judgment that by reason of the acts of the British Navy in Albanian waters in the course of the Operation of November 12th and 13th, 1946, the United Kingdom violated the sovereignty of the People's Republic of Albania, and that this declaration by the Court constitutes in itself appropriate satisfaction.

CONVENTION ON THE TERRITORIAL SEA

AND THE CONTIGUOUS ZONE

516 U.N.T.S. 205, 15 U.S.T. 1606, T.I.A.S. No. 5639

In force Sept. 10, 1964

Article 7

1. This article relates only to bays the coasts of which belong to a single State.

2. For the purposes of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.

3. For the purpose of measurement, the area of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water marks of its natural entrance points. Where, because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths. Islands within an indentation shall be included as if they were part of the water areas of the indentation.

4. If the distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.

5. Where the distance between the low-water marks of the natural entrance points of a bay exceeds twenty-four miles, a straight baseline of twenty-four miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length.

6. The foregoing provisions shall not apply to so-called "historic" bays, or in any case where the straight baseline system provided for in article 4 is applied.

UNITED STATES V. CALIFORNIA

United States Supreme Court, 1965

381 U.S. 139, 161-70

III.

The Meaning of "Inland Waters" in the Submerged Lands Act Should Conform to the Convention on the Territorial Sea and the Contiguous Zone.

We turn, then, to determining the judicial definition of "inland waters." It immediately appears that the bulk of cases cited by Congressmen during debates on the Submerged Lands Act for the proposition that inland waters have "been defined time and time again by the courts" deal with interior waters such as lakes and rivers, and provide no assistance in classifying bodies of water which join the open sea. In this latter context no prior case in this Court has ever precisely defined the term. The 1947 *California* opinion clearly indicated that "inland waters" was to have an international content since the outer limits of inland waters would determine the Country's international coastline, but the Court did not particularize the definition. It was that task which subsequently led to the appointment of the Special Master.

The Special Master found that there was no internationally accepted definition for inland waters and decided, in those circumstances, that it was the position which the United States took on the question in the conduct of its foreign affairs which should be controlling. He considered the relevant date on which to determine our foreign policy position to be the date of the *California* decree, October 27, 1947. He therefore rejected the assertion that letters from the State Department written in 1951 and 1952 declaring the then present policy of the United States were conclusive on the question before him. At the same time that decision required the Special Master to consider a great many foreign policy materials dating back to 1793 in an attempt to discern a consistent thread of United States policy on the definition of inland waters. He ultimately decided that as of 1947 the United States had taken the position that a bay was inland water only if a closing line could be drawn across its mouth less than 10 miles long enclosing a sufficient water area to satisfy the Boggs formula.

Since the filing of the Special Master's Report the policy of the United States has changed significantly. Indeed it may now be said that there is a settled international rule defining inland waters. On March 24, 1961, the

United States ratified the Convention on the Territorial Sea and the Contiguous Zone (T. I. A. S. No. 5639) and on September 10, 1964, when the requisite number of nations had ratified it, the Convention went into force. For nations which do not use a straight-base-line method to define inland waters (see *United Kingdom* v. *Norway*, [1951] I. C. J. Rep. 116), the Convention permits a 24-mile maximum closing line for bays and a "semicircle" test for testing the sufficiency of the water area enclosed. The semicircle test requires that a bay must comprise at least as much water area within its closing line as would be contained in a semicircle with a diameter equal to the length of the closing line. Unquestionably the 24-mile closing line together with the semicircle test now represents the position of the United States.

The United States contends that we must ignore the Convention on the Territorial Sea and the Contiguous Zone in performing our duty of giving content to "inland waters" as used in the Submerged Lands Act, and must restrict ourselves to determining what our decision would have been had the question been presented to us for decision on May 22, 1953, the date of enactment. At that time there was no international accord on any definition of inland waters, and the best evidence (although strenuously contested by California) of the position of the United States was the letters of the State Department which the Special Master refused to treat as conclusive.

We do not think that the Submerged Lands Act has so restricted us. Congress, in passing the Act, left the responsibility for defining inland waters to this Court. We think that it did not tie our hands at the same time. Had Congress wished us simply to rubber-stamp the statements of the State Department as to its policy in 1953, it could readily have done so itself. It is our opinion that we best fill our responsibility of giving content to the words which Congress employed by adopting the best and most workable definitions available. The Convention on the Territorial Sea and the Contiguous Zone, approved by the Senate and ratified by the President, provides such definitions. We adopt them for purposes of the Submerged Lands Act. This establishes a single coastline for both the administration of the Submerged Lands Act and the conduct of our future international relations (barring an unexpected change in the rules established by the Convention). Furthermore the comprehensiveness of the Convention provides answers to many of the lesser problems related to coastlines which, absent the Convention, would be most troublesome.

California argues, alternatively to its claim that "inland waters" embraces all ocean areas lying within a State's historic seaward boundaries, that if Congress intended "inland waters" to be judicially defined in accordance with international usage, such definition should possess an ambulatory quality so as to encompass future changes in international law or practice. Thus, if 10 years from now the definitions of the Convention were amended, California would say that the extent of the Submerged Lands Act grant would automatically shift, at least if the effect of such amendment were to enlarge the extent of submerged lands available to the States. We reject this open-ended view of the Act for several reasons. Before today's decision no one could say with assurance where lay the line of inland waters as contemplated by the Act; hence there could have been no tenable reliance on any particular line. After today that situation will have changed. Expectations will be established and reliance placed on the line we define. Allowing future shifts of international understanding respecting inland waters to alter the extent of the Submerged Lands Act grant would substantially undercut the definiteness of expectation which should attend it. Moreover, such a view might unduly inhibit the United States in the conduct of its foreign relations by making its ownership of submerged lands *vis-à-vis* the States continually dependent upon the position it takes with foreign nations. "Freezing" the meaning of "inland waters" in terms of the Convention definition largely avoids this, and also serves to fulfill the requirements of definiteness and stability which should attend any congressional grant of property rights belonging to the United States.

IV.

Subsidiary Issues.

Once it is decided that the definitions of the Convention on the Territorial Sea and the Contiguous Zone apply, many of the subsidiary issues before us fall into place.

1. *Straight Base Lines.*—California argues that because the Convention permits a nation to use the straight-baseline method for determining its seaward boundaries if its "coast line is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity," California is therefore free to use such boundary lines across the openings of its bays and around its islands. We agree with the United States that the Convention rec-

ognizes the validity of straight base lines used by other countries, Norway for instance, and would *permit* the United States to use such base lines if it chose, but that California may not use such base lines to extend our international boundaries beyond their traditional international limits against the expressed opposition of the United States. The national responsibility for conducting our international relations obviously must be accommodated with the legitimate interests of the States in the territory over which they are sovereign. Thus a contraction of a State's recognized territory imposed by the Federal Government in the name of foreign policy would be highly questionable. But an extension of state sovereignty to an international area by claiming it as inland water would necessarily also extend national sovereignty, and unless the Federal Government's responsibility for questions of external sovereignty is hollow, it must have the power to prevent States from so enlarging themselves. We conclude that the choice under the Convention to use the straight-base-line method for determining inland waters claimed against other nations is one that rests with the Federal Government, and not with the individual States.

California relies upon *Manchester* v. *Massachusetts*, 139 U. S. 240, for the proposition that a State may draw its boundaries as it pleases within limits recognized by the law of nations regardless of the position taken by the United States. Although some dicta in the case may be read to support that view, we do not so interpret the opinion. The case involved neither an expansion of our traditional international boundary nor opposition by the United States to the position taken by the State.

2. *Twenty-four-mile Closing Rule.*—The Convention recognizes, and it is the present United States position, that a 24-mile closing rule together with the semicircle test should be used for classifying bays in the United States. Applying these tests to the segments of California's coast here in dispute, it appears that Monterey Bay is inland water and that none of the other coastal segments in dispute fulfill these aspects of the Convention test. We so hold.

UNITED STATES V. LOUISIANA

United States Supreme Court, 1969

394 U.S. 11, 22-26, 74-77

Under generally accepted principles of international law, the navigable sea is divided into three zones, distinguished by the nature of the control which the contiguous nation can exercise over them.[23] Nearest to the nation's shores are its inland, or internal waters. These are subject to the complete sovereignty of the nation, as much as if they were a part of its land territory, and the coastal nation has the privilege even to exclude foreign vessels altogether. Beyond the inland waters, and measured from their seaward edge, is a belt known as the marginal, or territorial, sea.[24] Within it the coastal nation may exercise extensive control but cannot deny the right of innocent passage to foreign nations.[25]

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[22] Article 7 sets forth precise mathematical requirements which bays must satisfy to qualify as inland waters from whose seaward edge the territorial sea extends. See *infra*, at 48; n. 64, at 49; 52, n. 68; 54–55. Paragraph 6 of the Article provides, however, that "[t]he foregoing provisions shall not apply to so-called 'historic' bays . . . ."

[23] On the threefold division of the sea, see generally L. Bouchez, The Regime of Bays In International Law 4–5 (1964); 1 Shalowitz, *supra*, n. 7, at 22–24; M. Strohl, The International Law of Bays 3–4 (1963).

[24] The breadth of the territorial sea varies from country to country, depending on the claims of the coastal state. These claims have long been so diverse that the Geneva Conference was unable to agree upon a uniform distance for purposes of the Convention on the Territorial Sea and the Contiguous Zone. A table illustrating the various territorial sea claims of most nations appears at 1 Shalowitz, *supra*, n. 7, at 389 (App. J.).

[25] Article 14 of the Convention on the Territorial Sea and the Contiguous Zone provides that "ships of all States, whether coastal or not, shall enjoy the right of innocent passage through the territorial sea."

Outside the territorial sea are the high seas, which are international waters not subject to the dominion of any single nation.[26]

Whether particular waters are inland has depended on historical as well as geographical factors. Certain shoreline configurations have been deemed to confine bodies of water, such as bays, which are necessarily inland. But it has also been recognized that other areas of water closely connected to the shore, although they do not meet any precise geographical test, may have achieved the status of inland waters by the manner in which they have been treated by the coastal nation. As we said in *United States* v. *California,* it is generally agreed that historic title can be claimed only when the "coastal nation has traditionally asserted and maintained dominion with the acquiescence of foreign nations." 381 U. S., at 172.[27]

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[26] Article 2 of the Convention on the High Seas provides: "The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty." [1962] 13 U. S. T. (pt. 2) 2313, T. I. A. S. No. 5200. It has, however, generally been thought that the coastal nation can exercise some limited jurisdiction over ships beyond its territorial waters. See, *e. g.,* M. McDougal & W. Burke, The Public Order of the Oceans, c. 6 (1962); P. Jessup, The Law of Territorial Waters and Maritime Jurisdiction 75–112 (1927); 1 Shalowitz, *supra,* n. 7, at 27. The Convention on the Territorial Sea and the Contiguous Zone has recognized that such extensions of jurisdiction are sometimes imperative and has provided that in a contiguous zone not to exceed 12 miles from the coast, the littoral nation "may exercise the control necessary to: (a) Prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea; (b) Punish infringement of the above regulations committed within its territory or territorial sea." Article 24.

[27] A recent United Nations study recommended by the International Law Commission reached the following conclusions:

"There seems to be fairly general agreement that at least three factors have to be taken into consideration in determining whether a State has acquired a historic title to a maritime area. These factors are: (1) the exercise of authority over the area by the

While there is not complete accord on the definition of historic inland waters,[28] it is universally agreed that the reasonable regulation of navigation is not alone a sufficient exercise of dominion to constitute a claim to historic inland waters. On the contrary, control of navigation has long been recognized as an incident of the coastal nation's jurisdiction over the territorial sea. Article 17 of the Convention on the Territorial Sea and the Contiguous Zone embodies this principle in its declaration that "[f]oreign ships exercising the right of innocent passage [in the territorial sea] shall comply with the laws and regulations enacted by the coastal State . . . and, in particular, with such laws and regulations relating to transport and navigation." [29] Because it is an accepted regulation of the territorial sea itself, enforcement of navigation rules by the coastal nation could not constitute a claim to inland waters from whose seaward border the territorial sea is measured.[30]

State claiming the historic right; (2) the continuity of this exercise of authority; (3) the attitude of foreign States. First, the State must exercise authority over the area in question in order to acquire a historic title to it. Secondly, such exercise of authority must have continued for a considerable time; indeed it must have developed into a usage. More controversial is the third factor, the position which the foreign States may have taken towards this exercise of authority. Some writers assert that the acquiescence of other States is required for the emergence of an historic title; others think that absence of opposition by these States is sufficient." Juridical Regime of Historic Waters, Including Historic Bays, [1962] 2 Y. B. Int'l L. Comm'n 1, 13, U. N. Doc. A/CN.4/143 (1962).

See also Bouchez, *supra*, n. 23, at 203, 281.

[28] Historic title can be obtained over territorial as well as inland waters, depending on the kind of jurisdiction exercised over the area. "If the claimant State exercised sovereignty as over internal waters, the area claimed would be internal waters, and if the sovereignty exercised was sovereignty as over the territorial sea, the area would be territorial sea." Juridical Regime of Historic Waters, Including Historic Bays, *supra*, n. 27, at 23.

7. *Historic inland waters.* Louisiana argues that all the waters of the Mississippi River Delta, and East Bay in particular, are "so-called 'historic' bays" within the meaning of Article 7 (6),[98] and that they are therefore inland waters notwithstanding their failure to meet the geographical requirements of Article 7 and the United States' refusal to draw straight baselines.[99] Historic bays are not defined in the Convention, and the term therefore derives its content from general principles of international law.[100] As the absence of a definition indicates, there is no universal accord on the exact meaning of historic waters.[101] There is substantial agreement, however, on the outlines of the doctrine and on the type of showing which a coastal nation must make in order to establish a claim to historic inland waters.[102] But because the concept of historic waters is still relatively imprecise and its application to particular areas raises primarily factual questions, we leave to the Special Master—as we did in *United States* v. *California*—the task of determining in the first instance whether any of the waters off the Louisiana coast are historic bays. We do not think the ultimate resolution of this litigation would be hastened by any further discussion of the subject at this time, beyond the remarks below.

In its effort to establish that the waters of the Delta have been subjected to the continuous authority of the coastal nation, Louisiana has relied heavily on its own activities as well as on those of the Federal Government. The United States contends that those state activities cannot in this lawsuit support the position that the Delta waters are historic bays. The argument is not

[100] The United States argues that the Convention recognizes only historic *bays* and not other kinds of inland water bodies. We do not pass on this contention except to note that, by the terms of the Convention, historic bays need not conform to the normal geographic tests and therefore need not be true bays. How unlike a true bay a body of water can be and still qualify as a historic bay we need not decide, for all of the areas of the Mississippi River Delta which Louisiana claims to be historic inland waters are indentations sufficiently resembling bays that they would clearly qualify under Article 7 (6) if historic title can be proved.

[101] See *supra*, at 24.

[102] See n. 27, *supra*.

that such exercises of authority by Louisiana would not be relevant to a claim of historic title *vis-à-vis* another nation. On the contrary, the United States has "[n]o doubt [that] the national government may, if it chooses, rely on State action to support its own historic claim as against other nations."[103] But, the United States asserts, "a State cannot oblige it to do so or to accept State action as binding in a domestic case such as the present one." In brief, then, the United States' position is that it can prevent judicial recognition of a ripened claim to historic title merely by lodging a disclaimer with the court.

In *United States* v. *California* we noted, but found it unnecessary to pass on, the United States' contention that historic title cannot be founded upon exercises of state authority because a claim to historic inland waters can be maintained only if endorsed by the United States. We there sustained the Master's determination that, even assuming the relevance of California's assertions of sovereignty over the coastal waters, they did not establish historic title. The United States' disclaimer was credited only because the case presented such "questionable evidence of continuous and exclusive assertions of dominion." 381 U. S., at 175. And we noted that we were "reluctant to hold that such a disclaimer would be decisive in all circumstances, for a case might arise in which the historic evidence was clear beyond doubt." *Ibid.* Thus, the Court indicated its unwillingness to give the United States the same complete discretion to block a claim of historic inland waters as it possesses to decline to draw straight baselines.

While we do not now decide that Louisiana's evidence of historic waters is "clear beyond doubt," neither are we in a position to say that it is so "questionable" that the United States' disclaimer is conclusive. We do decide, however, that the Special Master should consider state exercises of dominion as relevant to the existence of historic title. The Convention was, of course, designed with an eye to affairs between nations rather than domestic disputes. But, as we suggested in *United States* v. *California,* it would be inequitable in adapting the principles of international law to the resolution of a domestic controversy, to permit the National Government to distort those principles, in the name of its power over foreign relations and external affairs, by denying any effect to past events.[104] The only fair way to apply the Convention's recognition of historic bays to this case, then, is to treat the claim of historic waters as if it were being made by the national sovereign and opposed by another nation.

UNITED STATES V. ALASKA

United States Court of Appeals, Ninth Circuit, 1974

497 F.2d 1155

OPINION

PER CURIAM:

The United States sued the State of Alaska to quiet title to the lower part of Cook Inlet located on the Alaska coast and to enjoin Alaska from offering oil and gas leases for sale in the area. The district court found in favor of Alaska. United States v. Alaska, 352 F.Supp. 815 (D.Alaska 1972). The United States appealed and we affirm.

In early 1967, Alaska offered to sell, at competitive bidding, an oil and gas lease to a tract of 2,500 acres of submerged lands located in lower Cook Inlet. The United States does not contest Alaska's right to the upper part of Cook Inlet. The tract in question, however, is located more than 3 geographic miles seaward of the low-water line, the closing lines of rivers and small bays within Cook Inlet and the 24-mile fallback line drawn across the narrows at Kalgin Island. The essence of the controversy involves the proper location of the Alaska coastline. The United States would place the coastline at the 24-mile fallback line at Kalgin Island. Alaska would place it at the 47-mile opening of Cook Inlet extending from Cape Douglas through the Barren Islands to Point Gore. The significance of the placement of this line is that under the Submerged Lands Act of 1953 (43 U.S.C. §§ 1301–1343), a state is entitled to the natural resources of the seabed and subsoil in waters up to 3 geographic miles seaward from the state's coast line at low tide or its functional equivalent as drawn by connecting the land openings of water inlets such as rivers and small bays. The waters landward from the line forming the functional equivalent of the coast line are inland waters belonging to the state and the 3-mile distance extends seaward from that line. Whether this line should be drawn at Kalgin Island (as the United States contends) or at Cape Douglas-Point Gore (as Alaska contends) will determine whether the area in question may be leased by Alaska. The pivotal question in this determination is whether this is a seabed over which there are "inland waters" as denominated in, but not defined by, the Submerged Lands Act. If so, Alaska is correct and the district court's judgment must be affirmed.

The Supreme Court has adopted the definition of inland waters as contained in the Convention on the Territorial Sea and the Contiguous Zone (T.I.A.S. No. 5639). United States v. California, 381 U.S. 139, 165, 85 S.Ct. 1401, 14 L.Ed.2d 296 (1965). Article 7 describes inland bays; but Cook Inlet fails to meet the definition which requires a distance of no more than 24 miles between the natural entrance points of the bay. Cook Inlet is 47 miles wide at its natural entrance points. Nevertheless, the Court has recognized that whether or not a body of water is inland may depend upon historical as well as geographical factors. The Court has stated:

> Certain shoreline configurations have been deemed to confine bodies of water, such as bays, which are necessarily inland. But it has also been recognized that other areas of water closely connected to the shore, although they do not meet any precise geographical test, may have achieved the status of inland waters by the manner in which they have been treated by the coastal nation.

United States v. Louisiana (Louisiana Boundary Case), 394 U.S. 11, 23, 89 S.Ct. 773, 781, 22 L.Ed.2d 44 (1969). Historic bays, which Article 7 exempts from the requirement of being no more than 24 miles between the natural entrance points, fall within this classification. As to such waters the Court in the *Louisiana Boundary Case* continued: "[I]t is generally agreed that historic title can be claimed only when the

'coastal nation has traditionally asserted and maintained dominion with the acquiescence of foreign nations.'" 394 U.S. at 23, 89 S.Ct. at 781, *quoting from* United States v. California, 381 U.S. 139, 172, 85 S.Ct. 1401, 14 L.Ed.2d 296 (1965). As further guidance the Court noted with apparent approval:

> A recent United Nations study recommended by the International Law Commission reached the following conclusions:
>
> "There seems to be fairly general agreement that at least three factors have to be taken into consideration in determining whether a State has acquired a historic title to a maritime area. These factors are: (1) the exercise of authority over the area by the State claiming the historic right; (2) the continuity of this exercise of authority; (3) the attitude of foreign States. First, the State must exercise authority over the area in question in order to acquire a historic title to it. Secondly, such exercise of authority must have continued for a considerable time; indeed it must have developed into a usage. More controversial is the third factor, the position which the foreign States may have taken towards this exercise of authority. Some writers assert that the acquiescence of other States is required for the emergence of an historic title; others think that absence of opposition by these States is sufficient." Juridical Regime of Historic Waters, Including Historic Bays, [1962] 2 Y.B.Int'l L. Comm'n 1, 13, U.N.Doc.A/CN. 4/143 (1962).

394 U.S. at 23–24 n.27, 89 S.Ct. at 781. The district court correctly adopted and applied this three-pronged test. Since the district court correctly applied the law, our sole remaining task is to determine whether the facts found by the trial court were clearly erroneous. United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746 (1948).

The United States mounts a heavy attack, reviewing in detail evidence which it contends leads unquestionably to the conclusion that the waters involved are at the most territorial rather than inland. It has succeeded in demonstrating that the evidence was in conflict and that the question of determining the ultimate inferences to be drawn was close. But it failed to show the findings to be clearly erroneous. The trial judge received the testimony of hundreds of witnesses and examined volumes of documents. The clearly erroneous test applies to both. W. S. Shamban and Co. v. Commerce and Industry Ins. Co., 475 F.2d 34 (9th Cir. 1973); United States v. Ironworkers Local 86, 443 F.2d 544, 548–49 (9th Cir.), cert. denied, 404 U.S. 984, 92 S.Ct. 447, 30 L. Ed.2d 367 (1971); Lundgren v. Freeman, 307 F.2d 104, 114–15 (9th Cir. 1962).

As the Court in the *Louisiana Boundary Case* has instructed, boundary disputes involving such complex and detailed evidence as has been presented in this case must be resolved by answering questions that are primarily factual. This task can best be done by the trier of fact who has heard the evidence in the first instance. The Court stated:

> Historic bays are not defined in the Convention, and the term therefore derives its content from general principles of international law. As the absence of a definition indicates, there is no universal accord on the exact meaning of historic waters. There is substantial agreement, however, on the outlines of the doctrine and on the type of showing which a coastal nation must make in order to establish a claim to historic inland waters. But because the concept of historic waters is still relatively imprecise and *its application to particular areas raises primarily factual questions,* we leave to the Special Master—as we did in United States v. California—the task of determining in the first instance whether any of the waters off the Louisiana coast are historic bays.

394 U.S. at 75, 89 S.Ct. at 808 (emphasis added and footnotes omitted).

As the law applied by the district court was correct and its findings were not clearly erroneous, we affirm.

Affirmed.

C. Islands and Archipelagoes

CONVENTION ON THE TERRITORIAL SEA

AND THE CONTIGUOUS ZONE

516 U.N.T.S. 205, 15 U.S.T. 1606, T.I.A.S. No. 5639

In force Sept. 10, 1964

Article 10

1. An island is a naturally-formed area of land, surrounded by water, which is above water at high-tide.

2. The territorial sea of an island is measured in accordance with the provisions of these articles.

Article 11

1. A low-tide elevation is a naturally-formed area of land which is surrounded by and above water at low-tide but submerged at high tide. Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea.

2. Where a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it has no territorial sea of its own.

Evensen, Certain Legal Aspects Concerning the Delimitation of Territorial Waters of an Archipelago

UN Doc. A/Conf. 13/18, I (1957), 289, 301-02

A. *Coastal archipelagos*

Article 5 of the draft articles concerning the law of the sea by the International Law Commission seems reasonably to embody the governing rules and principles laid down by the International Court of Justice in its 1951 Judgement, and also seems to give reasonable weight to the special problems arising out of the delimitation of territorial waters of coastal archipelagos.

However, in view of the special problems involved, the following changes in article 5 may perhaps prove desirable.

According to draft article 5, paragraph 1, first sentence, straight baselines may be used where a coastline is "deeply indented or cut into or because there are islands in its immediate vicinity". If the word "islands" was interpreted strictly, it would prevent the drawing of straight baselines in many cases where such a method seems called for; for example where a string of islets, skerries and rocks (but not islands) is situated in the immediate vicinity of the coast or where a coastal archipelago consisting of islets, skerries and rocks as well as islands is situated along the coast of the mainland. Therefore, the writer ventures to suggest changes in the first sentence of article 5, paragraph 1, so that it will provide as follows:

"Where circumstances necessitate a special régime because the coast is deeply indented or cut into or because there are archipelagos, *islands or islets* in its immediate vicinity, the baseline may be independent of the low water mark." [22]

B. *Outlying archipelagos*

Where outlying (mid-ocean) archipelagos are concerned, the following principles may be set forth — in the writer's opinion — as the governing principles of international law.

No hard-and-fast rules exist whereby a State is compelled to disregard the geographical, historical (and economical) peculiarities of outlying archipelagos. Frequently the only natural and practical solution is to treat such outlying archipelagos as a whole for the delimitation of territorial waters by drawing straight baselines from the outermost points of the archipelago — that is from the outermost points of the constituent islands, islets and rocks — and by drawing the seaward limit of the belt of marginal seas at a distance of X nautical miles outside and parallel to such baselines. Thus the archipelago viewed as a unit has a continuous area of territorial water. Whether or not an outlying archipelago should be treated in such a manner will, to a large extent, depend on the geographical features of the archipelago. The following criteria may be of importance for the delimitation of territorial waters in any particular case:

(*a*) Though a State in delimiting the territorial waters of its outlying archipelagos must be allowed the latitude necessary in order to be able to adapt its delimitation to practical needs and local requirements, it is equally clear that such delimitation has international law aspects and such aspects may be especially delicate where outlying archipelagos are concerned.

(*b*) In any given case, the more or less close dependence of the territorial sea upon the land domain of the archipelago will always be of paramount importance.

(*c*) The drawing of the baselines must not depart to any appreciable extent from the general direction of the coast of the archipelago viewed as a whole.

(*d*) While the distance between the various islands, islets and rocks of an archipelago obviously may play an important role in the question of whether the drawing of straight baselines is appropriate, no fixed maximum exists as to the length of such baselines. On the other hand it is also obvious that exorbitantly long baselines, closing vast areas of sea to free navigation and fishing, are contrary to international law. In such instances there will not be a sufficiently close dependence between the land domain and the water areas concerned.

(*e*) The question as to whether the waters situated between and inside the islands and islets of an archipelago may be considered as internal waters depends upon whether such water areas are so closely linked to the surrounding land domain of the archipelago as to be treated in much the same manner as the surrounding land. Each case must be treated on its individual merits[1] in this respect. The geographical configuration of the archipelago concerned will be of primary importance for such determination, though other factors — such as historical and economical factors — may play a role.

(*f*) Even where the waters between and inside the constituent parts of an archipelago are sufficiently closely linked to the land domain to be considered as internal waters, such waters may form a "strait" and consequently be subject to the rules of international law governing "straits" established for the benefit of free navigation and innocent passage of foreign ships. In view of the foregoing, the writer ventures to propose the following additional article on outlying archipelagos:

"1. In the case of an archipelago which belongs to a single State and which may reasonably be considered as a whole, the extent of the territorial sea shall be measured from the outermost points of the outermost islands and islets of the archipelago. Straight baselines as provided for under article 5 may be applied for such delimitation.

"2. The waters situated between and inside the constituent islands and islets of the archipelago shall be considered as internal waters with the exceptions set forth under paragraph 3 of this article.

"3. Where the waters between and inside the islands and islets of an archipelago form a strait, such waters cannot be closed to the innocent passage of foreign ships."

According to this proposal, straight baselines may be used for delimiting the territorial waters of an archipelago which may be looked upon as a whole. However it is possible to apply other methods: for example, a mixture of straight baselines and arcs of circles.

In the writer's opinion, the waters between and inside the islands and islets of the above-mentioned type of archipelago must be considered as internal waters. But where the waters of such an archipelago form a strait, it is in conformity with the prevailing rules of international law that such a strait cannot be closed to traffic. Whether a water passage is to be considered a strait or not, must be decided in each specific case. Though no definition is universally accepted,[23] a strait is usually defined as a water passage connecting two stretches of open sea with the territorial waters of a State.

6. *Fringes of islands.* At several places the question is raised whether areas between the mainland and fringes or chains of islands along the coast are inland waters. The parties agree that no article of the Convention specifically provides that such areas are inland waters. Louisiana argues that they are inland waters, under any one of several theories: that such island fringes form the perimeter of bays under Article 7, that straight baselines must be drawn along the islands under Article 4, or that the waters should be deemed "inland" under general principles of international law which antedate and supplement the Convention on the Territorial Sea and the Contiguous Zone. The position of the United States is that such island chains can be taken into account as enclosing inland waters only by drawing straight baselines; yet the decision whether to draw such baselines is within the sole discretion of the Federal Government, and the United States has not chosen to do so.

We have concluded that Article 7 does not encompass bays formed in part by islands which cannot realistically be considered part of the mainland. Article 7 defines bays as indentations in the "coast," a term which is used in contrast with "islands" throughout the Convention. Moreover, it is apparent from the face and the history of the Convention that such insular formations were intended to be governed solely by the provision in Article 4 for straight baselines. The language of Article 4 itself is the clearest indication of that intent:

> "1. In localities where the coast line is deeply indented and cut into, *or if there is a fringe of islands along the coast in its immediate vicinity,* the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured." (Emphasis supplied.)

The drafters of the Convention and their predecessors were aware that international law permitted such island fringes in some circumstances to enclose inland waters.[90]

The principle was recognized and applied by the International Court of Justice in the *Fisheries Case* (*United Kingdom* v. *Norway*), [1951] I. C. J. 116, in which Norway was held legitimately to have drawn straight baselines along the "skjaergaard," literally a "rock rampart" composed of hundreds of thousands of insular formations which ringed the mainland. Thereafter, with the *Fisheries Case* as the model, attempts were made to draft concrete rules for the uniform treatment of such island fringes, and both the International Law Commission and the 1958 Geneva Conference discussed the problem at length. There was, however, too little technical information or consensus among nations on that and related subjects to allow the formulation of uniform rules. It was agreed, therefore, that the problem should be handled as it had been by the International Court of Justice in the *Fisheries Case:* each nation was left free to draw straight baselines along suitable insular configurations if it so desired.[93] In the light of this reso-

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[93] The history of the subject is summarized in the Reference Guide to the Articles Concerning the Law of the Sea Adopted by the International Law Commission at its Eighth Session, U. N. Doc. A/C.6/L.378, p. 45, n. 1 (1956), as follows:

"In his first report . . . the special rapporteur proposed an article entitled 'Groups of Islands.' This was article 10, which read as follows:

" 'With regard to a group of islands (archipelago) and islands situated along the coast, the ten-mile line shall be adopted as the base line for measuring the territorial sea in the direction of the high sea. The waters included within the group shall constitute inland waters.'

"He explained, however, that he had inserted this text 'not as expressing the law at present in force, but as a basis of discussion should the Commission wish to study a text envisaging the progressive development of international law on this subject.' He referred to a passage in the Judgment of the International Court of Justice in the Fisheries case where the Court had said . . . :

" 'In this connection, the practice of States does not justify the formulation of any general rule of law. The attempts that have been made to subject groups of islands or coastal archipelagoes to conditions analogous to the limitations concerning bays (distance between the islands not exceeding twice the breadth of the territorial waters, or ten or twelve sea miles), have not got beyond the stage of proposals.'

"In his second report . . . the special rapporteur suggested as article 10 an abbreviated version of his earlier proposal, which now simply read as follows:

" 'With regard to a group of islands (archipelago) and islands situated along the coast, the ten mile line shall be adopted as the base line.'

"After consulting the Committee of Experts the special rapporteur put forward a more elaborate proposal . . . and yet a further proposal in his third report . . . .

"The latter proposal read as follows:

" '1. The term "group of islands," in the juridical sense, shall be deemed to mean three or more islands enclosing a portion of the

lution of the problem, it is clear that the drafters did not intend to leave island fringes beyond the scope of the Convention altogether. The deliberate decision was that such island formations are not to be treated differently from any other islands unless the coastal nation decides to draw straight baselines.

In *United States* v. *California,* 381 U. S. 139, 168, we held that "the choice under the Convention to use the straight-base-line method for determining inland waters claimed against other nations is one that rests with the Federal Government, and not with the individual States." [96] Since the United States asserts that it has not drawn and does not want to draw straight baselines along the Louisiana coast, that disclaimer would, under the *California* decision, be conclusive of the matter. Louisiana argues, however, that because the Louisiana coast is so perfectly suited to the straight baseline method, and because it is clear that the United States would employ it in the conduct of its international affairs were it not for this lawsuit, the Court should reconsider its holding in *California* and itself draw appropriate baselines. While we agree that the straight baseline method was designed for precisely such coasts as the Mississippi River Delta area, we adhere to the position that the selection of this optional method of establishing boundaries should be left to the branches of Government responsible for the formulation and implementation of foreign policy. It would be inappropriate for this Court to review or overturn the considered decision of the United States, albeit partially motivated by a domestic concern, not to extend its borders to the furthest extent consonant with international law.

SECTION 3. SPECIAL JURISDICTIONAL AREAS: ECONOMIC ZONE (CONTINENTAL SHELF)

Presidential Proclamation 2667

3 C.F.R. 67-68 (1943-48 Comp.)

PROCLAMATION 2667

POLICY OF THE UNITED STATES WITH RESPECT TO THE NATURAL RESOURCES OF THE SUBSOIL AND SEA BED OF THE CONTINENTAL SHELF [1]

WHEREAS the Government of the United States of America, aware of the long range world-wide need for new sources of petroleum and other minerals, holds the view that efforts to discover and make available new supplies of these resources should be encouraged; and

WHEREAS its competent experts are of the opinion that such resources underlie many parts of the continental shelf off the coasts of the United States of America, and that with modern technological progress their utilization is already practicable or will become so at an early date; and

WHEREAS recognized jurisdiction over these resources is required in the interest of their conservation and prudent utilization when and as development is undertaken; and

WHEREAS it is the view of the Government of the United States that the exercise of jurisdiction over the natural resources of the subsoil and sea bed of the continental shelf by the contiguous nation is reasonable and just, since the effectiveness of measures to utilize or conserve these resources would be contingent upon cooperation and protection from the shore, since the continental shelf may be regarded as an extension of the land-mass of the coastal nation and thus naturally appurtenant to it, since these resources frequently form a seaward extension of a pool or deposit lying within the territory, and since self-protection compels the coastal nation to keep close watch over activities off its shores which are of the nature necessary for utilization of these resources;

NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, do hereby proclaim the following policy of the United States of America with respect to the natural resources of the subsoil and sea bed of the continental shelf.

Having concern for the urgency of conserving and prudently utilizing its natural resources, the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control. In cases where the continental shelf extends to the shores of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles. The character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States of America to be affixed.

DONE at the City of Washington this 28th day of September, in the year of our Lord nineteen hundred and forty-five, and of the Independence of the United States of America the one hundred and seventieth.

[SEAL]

HARRY S. TRUMAN

By the President:

DEAN ACHESON,
Acting Secretary of State.

GENEVA CONVENTION ON THE CONTINENTAL SHELF

499 U.N.T.S. 311, 15 U.S.T. 471, T.I.A.S. No. 5578

In force June 10, 1964

The States Parties to this Convention

Have agreed as follows:

Article 1

For the purpose of these articles, the term "continental shelf" is used as referring (*a*) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (*b*) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.

Article 2

1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.

2. The rights referred to in paragraph 1 of this article are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities, or make a claim to the continental shelf, without the express consent of the coastal State.

3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.

4. The natural resources referred to in these articles consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, 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 3

The rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters as high seas, or that of the airspace above those waters.

Article 4

Subject to its right to take reasonable measures for the exploration of the continental shelf and the exploitation of its natural resources, the coastal State may not impede the laying or maintenance of submarine cables or pipe lines on the continental shelf.

Article 5

1. The exploration of the continental shelf and the exploitation of its natural resources must not result in any unjustifiable interference with navigation, fishing or the conservation of the living resources of the sea, nor result in any interference with fundamental oceanographic or other scientific research carried out with the intention of open publication.

2. Subject to the provisions of paragraphs 1 and 6 of this article, the coastal State is entitled to construct and maintain or operate on the continental shelf installations and other devices necessary for its exploration and the exploitation of its natural resources, and to establish safety zones around such installations and devices and to take in those zones measures necessary for their protection.

3. The safety zones referred to in paragraph 2 of this article may extend to a distance of 500 metres around the installations and other devices which have been erected, measured from each point of their outer edge. Ships of all nationalities must respect these safety zones.

4. Such installations and devices, though under the jurisdiction of the coastal State, do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea of the coastal State.

5. Due notice must be given of the construction of any such installations, and permanent means for giving warning of their presence must be maintained. Any installations which are abandoned or disused must be entirely removed.

6. Neither the installations or devices, nor the safety zones around them, may be established where interference may be caused to the use of recognized sea lanes essential to international navigation.

7. The coastal State is obliged to undertake, in the safety zones, all appropriate measures for the protection of the living resources of the sea from harmful agents.

8. The consent of the coastal State shall be obtained in respect of any research concerning the continental shelf and undertaken there. Nevertheless the coastal State shall not normally withhold its consent if the request is

submitted by a qualified institution with a view to purely scientific research into the physical or biological characteristics of the continental shelf, subject to the proviso that the coastal State shall have the right, if it so desires, to participate or to be represented in the research, and that in any event the results shall be published.

Article 6

1. Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

2. Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

3. In delimiting the boundaries of the continental shelf, any lines which are drawn in accordance with the principles set out in paragraphs 1 and 2 of this article should be defined with reference to charts and geographical features as they exist at a particular date, and reference should be made to fixed permanent identifiable points on the land.

Article 7

The provisions of these articles shall not prejudice the right of the coastal State to exploit the subsoil by means of tunnelling irrespective of the depth of water above the subsoil.

Article 8

This Convention shall, until 31 October 1958, be open for signature by all States Members of the United Nations or of any of the specialized agencies, and by any other State invited by the General Assembly of the United Nations to become a Party to the Convention.

Article 9

This Convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 10

This Convention shall be open for accession by any States belonging to any of the categories mentioned in article 8. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 11

1. This Convention shall come into force on the thirtieth day following the date of deposit of the twenty-second instrument of ratification or accession with the Secretary-General of the United Nations.

2. For each State ratifying or acceding to the Convention after the deposit of the twenty-second instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.

Article 12

1. At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1 to 3 inclusive.

2. Any Contracting State making a reservation in accordance with the preceding paragraph may at any time withdraw the reservation by a communication to that effect addressed to the Secretary-General of the United Nations.

Article 13

1. After the expiration of a period of five years from the date on which this Convention shall enter into force, a request for the revision of this Convention may be made at any time by any Contracting Party by means of a notification in writing addressed to the Secretary-General of the United Nations.

2. The General Assembly of the United Nations shall decide upon the steps, if any, to be taken in respect of such request.

Article 14

The Secretary-General of the United Nations shall inform all States Members of the United Nations and the other States referred to in article 8:

(*a*) Of signatures to this Convention and of the deposit of instruments of ratification or accession, in accordance with articles 8, 9 and 10;

(*b*) Of the date on which this Convention will come into force, in accordance with article 11;

(*c*) Of requests for revision in accordance with article 13;

(*d*) Of reservations to this Convention, in accordance with article 12.

UNITED STATES V. RAY

United States Court of Appeals, Fifth Circuit, 1970

423 F. 2d 16

Before WISDOM, GEWIN and AINSWORTH, Circuit Judges.

AINSWORTH, Circuit Judge:

Triumph and Long Reefs are two coral reefs which lie in international waters about four and one-half miles off the southeast coast of Florida, near Miami, and are the subject of this interesting and fantastic controversy between two rival private claimants and the United States. To the District Court (Judge Charles B. Fulton), the case was reminiscent of a fairy tale.[1] To the defendants, the reefs were to become an island nation to be known as Grand Capri Republic; to intervenor, a new sovereign country would be established on the reefs, to be named Atlantis, Isle of Gold. Defendants would organize some semblance of a defense but have no intention of attacking the Coast Guard or Navy. Intervenor envisioned the reefs as a property worth one billion dollars, where a post office, building offices, stamp department and foreign office would be built, as well as a government palace and congress.

The fairy tale has an unhappy ending, with the granting by the District Court of the petition of the United States for a permanent injunction against the activities of defendants and intervenor on these reefs, and by the action which we take here in affirming in part and reversing in part the judgment of the trial court. The dreams of the separate groups for a new nation must perish, like the lost continent "Atlantis," beneath the waves and waters of the sea which constantly submerge the reefs.

The United States brought this action for injunctive relief against Louis M. Ray and Acme General Contractors, Inc. alleging interference with the rights of the United States on coral reefs located on its Continental Shelf on two grounds. In the first count the Government alleged that the activities of these defendants in building caissons on the reefs, dredging material from the seabed and depositing that material within the caissons was causing irreparable injury to the reefs which are subject to the control of the United States, and that these activities constituted trespass. The second count alleged that these activities were being unlawfully conducted without the required authorization of the Secretary of the Army. See 33 U.S.C. § 403; 43 U.S.C. § 1333(f). A preliminary injunction was granted against defendants. Thereafter Atlantis Development Corporation, Ltd., which was also contemplating commercial development of the reefs, was allowed by this Court to intervene in the proceedings.[2] Intervenor filed a cross claim, alleging its superior title to the property by virtue of discovery of the reefs by its predecessor. After an extensive nonjury trial, at which numerous witnesses, lay and expert, testified and at which voluminous exhibits were introduced, the District Court adopted all of the facts stipulated by the parties and further found:

"1. Triumph and Long Reefs are a part of the Continental Shelf extending seaward from the East Coast of Florida, and all waters overlying the reefs do not exceed one hundred fathoms in depth.

"2. Triumph and Long Reefs are completely submerged at all times, except when their highest projections are fleetingly visible while awash at mean low water. Accordingly, Triumph and Long Reefs are part of the 'seabed' and 'subsoil' of the Outer Continental Shelf within the Outer Continental Shelf Lands Act of 1953, 43 U.S.C. § 1331, et seq.

"3. These reefs, together with the organisms attached thereto, are 'natural resources' within the Outer Continental Shelf Lands Act, and the Geneva Convention on the Continental Shelf.

"4. The caissons positioned by Ray and the jack platform construction or 'boathouses' built on pilings proposed by Atlantis constitute 'artificial islands and fixed structures * * * erected * * * for the purpose of * * * developing' the reefs, within the Outer Continental Shelf Lands Act."

The District Court denied all claims of defendants and intervenor, granted the claim of the Government under its second count, but denied the Government's claim of trepass under the first count. In so doing, the District Court recognized the sovereign rights of the United States, but concluded that those rights are limited as the claimed interest of the United States is something less than a property right, consisting of neither ownership nor possession, and consequently not supporting a common law action for trespass *quare clausum fregit.*

All parties have appealed. The Government's appeal is limited to the Court's denial of an injunction on count one of the amended complaint. We affirm the District Court's factual findings and its grant of injunctive relief under the Government's second count. However, we reverse the Court's denial of injunctive relief on the first count of the Government's amended complaint.[3]

LACK OF STATUTORY PERMIT ISSUE:

The District Court correctly concluded that the past and proposed activities of defendants and intervenor were unlawful in the absence of a statutory permit from the Secretary of the Army. Section 10 of the Rivers and Harbors Act, 33 U.S.C. § 403, prohibits construction in navigable waters of the United States unless the work has been "recommended by the Chief of Engineers and authorized by the Secretary of the Army." The authority of the Secretary of the Army is extended to the Outer Continental Shelf by Section 1333(f) of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 et seq.:

"The authority of the Secretary of the Army to prevent obstruction to navigation in the navigable waters of the United States is extended to artificial islands and fixed structures located on the outer Continental Shelf."

It is undisputed that defendants and intervenor did not obtain permission or authority for their activities on the reefs. The argument is made that the area is not navigable and therefore not governed by Section 1333(f) of the Outer Continental Shelf Lands Act. Apparently the Court did not, nor do we, deem it necessary to predicate the injunction on navigability of waters covering the reefs, although a specific finding of navigability was made. The quoted section extends the authority of the Secretary to "fixed structures located on the outer Continental Shelf" without regard to the navigability of the particular area involved. If it were necessary to find navigability, however, the evidence amply supports such a finding,[4]

3. The Legal Adviser of the Department of State joined in the brief of the United States "as an expression of the official views of that Department concerning the United States' rights and obligations under the Convention on the Continental Shelf." The United States emphasizes in its brief "that it would be contrary to the interests of the United States to claim, at this time, in a domestic court, more rights for the United States over its continental shelf than are necessary to prevent damage to the interests involved in the particular case." (Reply br. p. 3.)

4. The fact that a portion of a body of water is nonnavigable does not affect the legal character of general navigability of the area. In this respect see United States v. Turner, 5 Cir., 1940, 175 F.2d 644, 647, cert. den., 338 U.S. 851, 70 S.Ct. 92, 94 L.Ed. 521.

and fully establishes that the structures herein involved interfere with the exclusive rights of the United States under the Convention to explore the Continental Shelf and exploit its natural resources. Under the circumstances we do not decide what the result would be if the structures did not interfere with the rights of the United States as recognized by the Convention, our decision being limited to the particular facts of this case.

THE TRESPASS ISSUE:

It is clear that the reefs in question are within the area designated as the Continental Shelf by both national (Outer Continental Shelf Lands Act, supra) and international (Geneva Convention on the Continental Shelf,[5] 15 U.S.T. 473, executed in 1958 and effective in 1964) law.

The Outer Continental Shelf Lands Act, 43 U.S.C. § 1331(a), in pertinent part provides:

> "The term 'outer Continental Shelf' means all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 1301[6] of this title, and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control."

Article 1 of the international Convention on the Continental Shelf similarly reads:

> "For the purpose of these articles, the term 'continental shelf' is used as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; * * *" 15 U.S.T. 473.

[5] The evidence shows that the reefs are completely submerged at mean high water,[7] and as the Court specifically found, "at all times, except when their highest projections are fleetingly visible while awash at mean low water." Thus the reefs are contemplated within the definition of the Outer Continental Shelf Lands Act and the Geneva Convention on the Continental Shelf, if they meet the definition of "seabed" or "subsoil" contained therein. Webster defines "seabed" as "lands underlying the sea."[8] The evidence establishes that the term "seabed" is commonly understood to be any terrain below the high water line. The federal and common law comports with this understanding in defining the "bed" of a body of water as lands below the ordinary high water mark. See United States v. Chicago, M., St. P. & P. R. Co., 312 U.S. 592, 597, 61 S.Ct. 772, 313 U.S. 543, 61 S.Ct. 772, 85 L.Ed. 1064 (1941); Alabama v. Georgia, 64 U.S. (23 Howard) 505, 515, 16 L.Ed. 556 (1859); Borough of Ford City, Pennsylvania v. United States, W.D.Pa., 1963, 213 F.Supp. 248, 251; Yellowstone Pipe Line Company v. Kuczynski, 9 Cir., 1960, 283 F.2d 415, 421. The record shows that on the death of the coral, which has a natural predilection for cementing itself onto preexisting rocky structures, its skeletal remains become

5. The Convention grew out of the 1958 United Nations Conference on the Law of the Sea at Geneva, and was developed by the International Law Commission of the United Nations.

6. The referred-to section is part of the Submerged Lands Act, 43 U.S.C. § 1301:
"When used in this chapter—
(a) the term 'lands beneath navigable waters' means—
* * * * *
(2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide * * *."

7. "Mean high water" has been defined to be the average height of all high waters over a given location during a span of 18.6 years. Borax Consolidated v. City of Los Angeles, 269 U.S. 10, 26, 27, 56 S.Ct. 23, 80 L.Ed. 9 (1935); United States v. California, 382 U.S. 448, 450, 86 S.Ct. 607, 15 L.Ed.2d 517 (1966).

8. Webster's New International Dictionary (3d ed. 1961).

part of the seabed of the Continental Shelf. The District Court's finding that the reefs are part of the "seabed" of the Shelf is fully supported by substantial evidence of record.

The same national and international laws (The Outer Continental Shelf Lands Act and the Geneva Convention on the Continental Shelf) explicitly recognize the sovereign rights of the United States and the exclusiveness of those rights to explore the Shelf and exploit its natural resources.

The Outer Continental Shelf Lands Act (43 U.S.C. § 1332(a)) states:

> "It is declared to be the policy of the United States that the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this subchapter."

To the extent that any of the terms of the Act are inconsistent with the later adopted Geneva Convention on the Continental Shelf, they should be considered superseded. See Cook v. United States, 288 U.S. 102, 118–119, 53 S.Ct. 305, 77 L.Ed. 641 (1933). But there is nothing in the pertinent language of the Geneva Convention on the Continental Shelf which detracts from or is inconsistent with the Outer Continental Shelf Lands Act. To the contrary, the Geneva Convention confirms and crystallizes the exclusiveness of those rights, particularly with reference to the natural resources of the Shelf.

Article 2 of the Geneva Convention on the Continental Shelf provides:

> "1. The coastal State [9] exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.
>
> "2. The rights referred to in paragraph 1 of this article are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities, or make a claim to the continental shelf, without the express consent of the coastal State.
>
> "3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.
>
> "4. The natural resources referred to in these articles consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, 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."

It is unnecessary for us to decide whether the Outer Continental Shelf Lands Act, Section 1332(a), supra (which does not limit the nation's "jurisdiction, control, and power of disposition" to the natural resources of the Shelf), alone confers rights sufficient to authorize the injunctive relief sought. The right of the United States to control those resources is implicit in Article 2, paragraphs 1, 2 and 3, supra, of the Geneva Convention on the Continental Shelf, and explicitly recognized in the Submerged Lands Act, 43 U.S.C. § 1301 et seq. This Act further provides (43 U.S.C. § 1302) the definition of "natural resources" of the Continental Shelf:

> "Nothing in this chapter shall be deemed to affect in any wise the rights of the United States to the natural resources of that portion of the subsoil and seabed of the Continental Shelf lying seaward and outside of the area of lands beneath navigable waters, as defined in Section 1301 of this title, all of which natural resources appertain to the United States, and the jurisdiction and control of which by the United States is confirmed."

Section 1301, referred to within the above-quoted section, defines "natural resources" as including, "*without limiting the generality thereof*, oil, gas, and all other minerals, and *fish*, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, *and other marine animal* and plant *life* * * *." (Emphasis supplied.) 43 U.S.C. § 1301(e).

Article 2, paragraph 4, of the Geneva Convention on the Continental Shelf includes in its definition of "natural resources" both living and non-living [10] resources, for it defines the term as consisting of "* * * mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species. * * *"

Having thus concluded that the United States has the exclusive right for purposes of exploration and exploitation of the reefs, there remains only the question of whether injunctive relief was improperly denied to the Government on its first count which alleged trespass.

Although the complaint is inaccurately framed in terms of trespass in count one, the Government repeatedly stresses that it is not claiming ownership of the reefs. We do not question the District Court's conclusion that the Government's interest, being something less than fee simple, cannot support a common law action for trespass *quare clausum fregit*. But we do not understand that claim to seek such a remedy, despite the language in which the petition is couched. Damages, an inseparable element in the common law action for trespass, are not sought here, and the only relief requested is restraint from interference with rights to an area which appertains to the United States and which under national and international law is subject not only to its jurisdiction but its control as well. It is in this light that we consider the allegations of amended count one.

Neither ownership nor possession is, however, a necessary requisite for the granting of injunctive relief. This principle is implicit in the companion decisions of the Supreme Court, United States v. State of Louisiana, 339 U.S. 699, 70 S.Ct. 914, 94 L.Ed. 1216 (1950); United States v. State of Texas, 339 U.S. 707, 70 S.Ct. 918, 94 L.Ed. 1221 (1950), in which injunctive relief was granted to protect "paramount rights" of the United States beyond the territorial limits of Louisiana and Texas, to distances farther out in international waters than that involved here and at a time when those rights had not yet been statutorily established.[11]

In United States v. Republic Steel Corp., 362 U.S. 482, 80 S.Ct. 884, 4 L. Ed.2d 903 (1960), the Supreme Court did not consider lack of specific statutory authority a bar to injunctive relief for the United States in an action alleging activities which resulted in obstruction to commerce in a navigable inland river. The test for such relief, the Court said, citing United States v. San Jacinto Tin Co., 125 U.S. 273, 8 S.Ct. 850, 31 L.Ed. 747, was "whether the United States had an interest to protect or defend." 362 U.S. at 492, 80 S.Ct. at 890. See also Wyandotte Transportation Co. v. United States, 389 U.S. 191, 88 S.Ct. 379, 19 L. Ed. 407 (1967); United States v. City and County of San Francisco, 310 U.S. 16, 60 S.Ct. 749, 84 L.Ed. 1050 (1940).

The evidence overwhelmingly shows that the Government has a vital interest, from a practical as well as an aesthetic viewpoint, in preserving the reefs for public use and enjoyment.

10. Such a specific declaration renders immaterial the controversy of whether the coral composing the reefs is living or dead. Nevertheless, there is abundant evidence to corroborate the District Court's finding that the living corals attached to the reefs are sedentary.

11. Injunction from interferences with the natural resources over which the United States was claiming "sovereign rights" extended to an area 27 miles from the coast in the case against Louisiana, and to the outer edge of the Outer Continental Shelf in the case against Texas (anywhere from 75 to 150 miles of the coast).

The protective underwater crannies of the reefs serve as a haven and spawning ground for myriad species of tropical and game fish. The unique and spectacular formations of the submerged coral deposits attract scores of water sports enthusiasts, skin divers, nature students, and marine researchers. Certain organisms living on the reefs contain substances useful in pharmacology. The reefs protect the inland waters from the heavy wave action of the open sea, thus making the area conducive to boating and other water sports. Congress, intent on conserving the value and natural beauty of the area, recently enacted the Biscayne National Monument Bill establishing the area, which includes both Triumph and Long Reefs, as a national monument.[12] The reefs are a part of the series of coral reefs which dot the coastal and international waters extending out from southeastern Florida. Slightly to the south and west of the Triumph and Long Reefs, and straddling the three-mile dividing line between federal and state waters, is the huge federal-approved John Pennekamp Coral Reef State Park, also known as Key Largo Coral Reef Preserve. The fact that the area is worthy of preservation is abundantly demonstrated by the evidence. But more importantly, the evidence shows that protective action by the Government to prevent despoliation of these unique natural resources is of tantamount importance. There was convincing evidence that the activities of defendants in dredging and filling the reefs has and would continue to kill the sensitive corals by smothering them; that the construction would constitute a navigational hazard to pleasure craft, and would destroy a very productive marine area and other natural resources. Obviously the United States has an important interest to protect in preventing the establishment of a new sovereign nation within four and one-half miles of the Florida Coast, whether it be Grand Capri Republic or Atlantis, Isle of Gold.

The rights of the United States in and to the reefs and the vital interest which the Government has in preserving the area require full and permanent injunctive relief against any interference with those rights by defendants and intervenor.

We find without merit the additional errors alleged, particularly the challenge to the District Court's jurisdiction. The District Court held, and we agree, that jurisdiction lies under 28 U.S.C. § 1345 (an action by the United States); under 28 U.S.C. § 1331 (a case or controversy arising under the Constitution, laws or treaties of the United States involving more than $10,000); under the Court's general equity and ancillary jurisdiction; and under 43 U.S.C. § 1333(b) (the Outer Continental Shelf Lands Act).

Affirmed in part, reversed in part.

PETROLEUM DEVELOPMENT LTD. V. SHEIKH OF ABU DHABI

1 International & Comparative Law Quarterly 247-48, 253-59

(1951)

AWARD OF LORD ASQUITH OF BISHOPSTONE

1. On January 11, 1939, Sheikh Shakhbut of Abu Dhabi, one of the Trucial States abutting on the Gulf of Persia from the south and west, entered into a written contract in the Arabic language with Petroleum Development (Trucial Coast) Ltd., whereby the Sheikh purported to transfer to that company the exclusive right to drill for and win mineral oil within a certain area in Abu Dhabi. That written agreement contained an arbitration clause, providing for the reference of disputes arising under it to arbitration, for the appointment of two arbitrators, and for the appointment of an umpire in the event of the two arbitrators being unable to agree. Certain disputes (the nature of which is indicated more precisely below, but which relate in substance entirely to the area of the concession) have arisen under this agreement and were in fact referred to arbitration; the said arbitrators did differ; and appointed me as umpire. According to the terms of the arbitration clause, this, my Award, in respect of the dispute is final.

1A. Abu Dhabi has a coast line of about 275 miles on the Gulf. It is bounded on the west by the State of Qatar, and on the east by the State of Dubai, both much smaller States. These frontiers, however, were and are to some extent vague. So is its mainland area, which has been estimated at anything from 10,000 to 26,000 square miles. The main reason for these wide divergences is that the depth of hinterland to be included is indeterminate. Abu Dhabi is a large, primitive, poor, thinly populated country, whose revenue, until oil was discovered, depended mainly on pearling. It is, like the other Trucial Principalities, a British-protected State; that is, its external relations are controlled by His Majesty. Internally, the Sheikh is an absolute, feudal monarch.

2. The nature of the disputes referred to arbitration and the subject-matter of this Award are formulated in a letter from the claimants to the respondent dated July 18, 1949. The letter runs as follows :—

> " The arbitration is to determine what are the rights of the Company with respect to all underwater areas over which the Ruler has or may have sovereignty jurisdiction control or mineral oil rights.
>
> " The Company claims that the area covered by the Agreement of January 11, 1939 (notably Articles 2 and 3 thereof), includes in addition to the mainland and islands :
>
> " (1) All the sea-bed and subsoil under the Ruler's territorial waters (including the territorial waters of his islands), and
>
> " (2) All the sea-bed and subsoil contiguous thereto over which either the Ruler's sovereignty jurisdiction or control extends or may hereafter extend, or which now or hereafter may form part of the area over which he has or may have mineral oil rights."

The issues : The questions referred to arbitration can usefully be paraphrased by expanding them into four, of which the first two

deal with territorial waters and the second two with the submarine area outside territorial waters—

(i) At the time of the agreement of January 11, 1939, did the respondent—the Sheikh—own the right to win mineral oil from the subsoil of the sea-bed subjacent to the territorial waters of Abu Dhabi? (There seems to be no doubt about this.)

(ii) If yes, did he by that agreement transfer such right to the claimant company?

(iii) At the time of the agreement did he own (or as the result of a proclamation of 1949 did he acquire) the right to win mineral oil from the subsoil of any, and, if so, what submarine area lying outside territorial waters?

(iv) If yes, was the effect of the agreement to transfer such original or acquired rights to the claimant company? (The Sheikh in 1949—10 years after this agreement—purported to transfer these last rights to an American company—the "Superior Corporation": which the Petroleum Development Company claim he could not do, since he had already 10 years earlier parted with these same rights to themselves.)

I would add that the parties requested me to express a view both on question (iii) and on question (iv), even if owing to the answer given to one of these questions, the other should become academic; and the view expressed upon it at best an *obiter dictum*.

3. *The terms of the agreement*: The terms of the agreement which are mainly relevant to the determination of these questions are articles 2, 3, 12a, 1 and 17; from which I proceed to quote certain passages.

4. The agreement having originally been in the Arabic tongue, considerable differences have arisen as to what is and what is not an accurate translation. This applies particularly to what is the most crucial article of all, namely article 2. Although, as will later appear, the divergences between those translations are not important, I think I ought for completeness to set out the rival translations. In the translation originally relied upon by the claimant company, the wording of article 2 is as follows:—

"ARTICLE 2 (a) The area included in this Agreement is the whole territory subject to the rule of the Ruler of Abu Dhabi and its dependencies, and all its islands and territorial waters. And if in the future there should be carried out a delimitation of the territory belonging to Abu Dhabi, by arrangement with other governments, then the area (of this Agreement) shall coincide with the boundaries provided in such delimitation.

"(b) If in the future a Neutral Zone should be formed adjacent to the territories of Abu Dhabi and the rights of rule over such Neutral Zone be shared between the Ruler of Abu Dhabi and another Ruler, then the Ruler of Abu Dhabi undertakes that this Agreement shall include all the mineral oil rights which belong to him in such Zone.

"(c) The Company shall not undertake any works in areas used and set apart for places of worship or sacred buildings or burial grounds."

* * * *

In particular I cannot accept the argument put forward for the respondent that sea waters are merely "included" as a means of access to dry land, whether mainland or insular. To read the word "included," in the Concession, as meaning in the case of the mainland and islands "included as petroliferous areas": and to read it in relation to the "sea waters" as something totally different, namely, "included as means of access to the petroliferous areas," seems to me unjustifiable, if not perverse.

I am not impressed by the argument that there was in 1939 no word for "territorial waters" in the language of Abu Dhabi, or that the Sheikh was quite unfamiliar with that conception. Mr. Jourdain had none the less been talking "prose" all his life because the fact was only brought to his notice somewhat late. Every State is owner and sovereign in respect of its territorial waters, their bed and subsoil, whether the Ruler has read the works of Bynkershoek or not. The extent of the Ruler's Dominion cannot depend on his accomplishments as an international jurist.

So far affirmatively. Negatively (still leaving aside what I have called the complicating factors) I should certainly in 1939 have read the expression "the sea waters which belong to that area" not only as including, but as *limited* to, the territorial belt and its subsoil. At that time neither contracting party had ever heard of the doctrine of the Continental Shelf, which as a legal doctrine did not then exist. No thought of it entered their heads. None such entered that of the most sophisticated jurisconsult, let alone the "understanding" perhaps strong, but "simple and unschooled" of Trucial Sheikhs.

Directed, as I apprehend I am, to apply a simple and broad jurisprudence to the construction of this contract, it seems to me that it would be a most artificial refinement to read back into the contract the implications of a doctrine not mooted till seven years later, and, if the view which I am about to express is sound, not even today admitted to the canon of international law. However, the time has now come to consider this doctrine more narrowly.

(d) *The doctrine of the Continental Shelf, its substance and history*: The expression "Continental Shelf" was first used by a geographer in 1898.[1] The legal doctrine which later gathered round this geographical term was possibly foreshadowed when in 1942 England and Venezuela concluded a treaty about the Gulf of Paria providing for spheres of influence in respect of areas covered by the high seas and followed by certain annexations coincident with these spheres. The doctrine was perhaps first explicitly asserted as a legal doctrine (in a very exaggerated form) in a proclamation by the Argentine Republic in 1944, but its classical enunciation in the form in which it has mainly to be considered in this case was the well-known proclamation by President Truman of September 28, 1945.

The substance of the doctrine then proclaimed, as I understand it, was this: A coastal power is not surrounded, even at low water, by a precipice leading vertically to the bottom of the ocean,

[1] It made a fleeting appearance on the legal stage in 1916: but passed over it with "printless feet."

perhaps two miles below. As a rule the sea-bed shelves very gently outwards and downwards for a considerable distance, a distance generally (but not invariably) exceeding the three-mile territorial limit.[2] Again, not always but very often, where the sea reaches a depth of about 100 fathoms or (what is much the same thing) 200 metres, the edge of this shelf is reached and there is a more or less abrupt plunge of the land-mass down to the ocean floor. The doctrine of the "Shelf" as proclaimed in the Truman Declaration of 1945 arrogated to the United States "jurisdiction and control" over "the resources" of the American Continental Shelf which was described as "appertaining" to the United States.

The resources referred to were those of the subsoil of that zone of the sea-bed which lies between the limit of the territorial waters and the point at which its gently shelving character gives place to an abrupt descent.[3]

Several other States followed roughly the same course as the United States. For instance, Great Britain (not quite on the same lines) in respect of Jamaica and of the Bahamas, and Saudi Arabia in respect of parts of the Persian Gulf. Other States weighed in with similar claims. These other States fall into two groups; I. Mexico and the Latin and Central American Republics, and II. The States which are most directly relevant in this Arbitration—States bordering on the Persian Gulf other than Saudi Arabia.

In almost every case the claim was embodied in a decree or proclamation. Most often, though not invariably, the proclamation was in a "declaratory" form, that is in a form asserting or implying that the proclamation was not constitutive of a new right but merely recorded the existence of a pre-existing one.[4]

I. The claims of the Latin and Central American Republics were often far more ambitious than those of this country, the United States and Saudi Arabia; inasmuch as on the one hand the former claims were often claims to actual sovereignty over the Shelf and its subsoil[5] and on the other hand, and this is more important, the claims were often not limited to the Shelf as a geological entity or even to the area ending where the depth of the sea began to exceed 100 fathoms, but sometimes extended to a zone 200 nautical miles

[2] If I speak of the three-mile limit and of the Territorial Maritime Belt interchangeably, this is only for brevity. I am aware that some States claim more than a three-mile belt, but about 80 per cent. of the merchant shipping in the world is registered in "three-mile" countries; and this is the width of territorial waters on the Persian Gulf.

[3] It does not seem to make any difference for the present purpose whether as a matter of geological fact the Shelf was built up by erosion of material from the unsubmerged portion and by its sedimentation, or whether the Shelf was originally there in a denuded state and was subsequently submerged by what is poetically called the "transgression of the seas."

[4] Declaratory: see, for instance, the proclamations of Saudi Arabia, May 28, 1949, of the Trucial States including Abu Dhabi of June 10, 1949; the Truman proclamation of 1945, though its language is not on this point wholly free from ambiguity: and contrast with these proclamations the language of the United Kingdom proclamations in the case of the Bahamas, November 27, 1949; Jamaica, November 26, 1948; and of the Falkland Islands, December 21, 1950, all of which employ somewhat annexatory language such as "the boundaries" of the Colony "are hereby extended": language "constitutive" of rather than merely declaratory of the rights involved.

[5] As in the case of Argentina 1944, Mexico 1945 and Chile 1947.

from the mainland; an area quite unrelated to the width of the physical Shelf.[6] In these exorbitant forms the claims met with protest and resistance; but in the more modest form in which they were advanced by the United States, the United Kingdom and Saudi Arabia, they were acquiesced in by the generality of Powers, or at least not actively gainsaid by them.

II. *The British Persian Gulf Proclamations*: The proclamation of Saudi Arabia was followed in 1949 by proclamations issued by the Sheikhs of the Trucial States (or on their behalf by the Government of the United Kingdom *qua* protecting Power) including the Sheikh of Abu Dhabi. All of these last proclamations conform broadly in their terms to the Truman proclamation. They mostly contain recitals on the following lines: "Whereas it is just that the sea-bed and subsoil extending to a reasonable distance from the coast should appertain to and be controlled by the littoral State to which it is adjacent." The Abu Dhabi proclamation of June 10, 1949, provides in its operative part "We, Shakhbut Bin Sultan Bin Za'id, Ruler of Abu Dhabi, hereby declare that the sea-bed and subsoil lying beneath the high seas in the Persian Gulf contiguous to the territorial waters of Abu Dhabi and extending seaward to boundaries to be determined more precisely as occasion arises on equitable principles by us after consultation with the neighbouring States appertain to the land of Abu Dhabi and are subject to its exclusive jurisdiction and control."

(e) *Is the doctrine in any of its forms part and parcel of international law?*: The preceding section calls attention not only to the recent origin of the doctrine but to the great variety of forms which in its short life it has assumed. Some States claim sovereignty over the Shelf. Others pointedly avoid doing so, claiming only "jurisdiction" or "control," "appurtenance" and the like. Whatever the scope of the rights claimed, some States assert those rights by declaratory proclamations implying their pre-existence; others issue proclamations which are on the face of them a new departure and designed to be constitutive of title. What is the seaward limit of the Shelf? Here again the answers given differ. Some States say, "its geological or geographical limit, its 'edge' or its 'drop.'" Others (whether because their particular Shelf has got no edge and has got no drop, or for other reasons), say, "the point at which the sea become 100 fathoms or 200 metres deep"; while yet others say, "a line drawn parallel to the coast of the contiguous power and 200 nautical miles from it." The 200-mile claim seems to be more or less universally discredited. The other two criteria seem on their face much more reasonable. But what is the position where as in the Persian Gulf itself, both of these more reasonable criteria fail us, because the Shelf not only has no edge, but extends continuously across a sea whose waters never attain a depth of as much as 100 fathoms? Is it to extend outwards to a "reasonable distance" from the coast—the expression used in the recital of the Abu Dhabi proclamation? If so, what is a "reasonable distance"? Where States are grouped, as in this case, round a more or less cylindrical gulf, is the principle "*usque ad medium*

[6] As in the case of Chile, El Salvador, Honduras and Costa Rica.

filum" applicable? How could it possibly be applied in the case of comparably shallow seas of completely irregular configuration, such as the North Sea? Again how are rights of whatever character to the subsoil of the Shelf acquired? Can they indeed be acquired at all? Or would their existence inevitably conflict with the "freedom" of the high seas? Before the doctrine of the Shelf was promulgated I think the general answer might well have been that they cannot be acquired at all—that the Shelf is as inappropriable as the high seas that roll or repose above it: subject to this reservation, that the sea-bed (not the subsoil) of the submarine area, is in certain rare cases, subject to a customary right vested in certain States to conduct "sedentary" fisheries in such sea-bed. For instance, the right to fish for sponges, coral, oysters, pearls and chank.[7] Indeed, the shallow seas of the Persian Gulf are subject to mutual pearling rights by subjects of the various littoral States. If, however, the submarine area is capable not merely of being the subject-matter of these limited occupational rights over the sea-bed, and *pro tanto* a "*res nullius*," is its subsoil as a whole *res nullius*? that is to say, something in which rights can be acquired, but only by effective occupation? Or is the position, as the claimants' main argument maintains, that the rights in the subsoil of the Shelf adhere (and must be taken always to have adhered) *ipso jure*—occupation or no occupation—to the contiguous coastal Power? Or failing that, if occupation be indeed necessary; in cases where it is almost impracticable, may proclamations, or similar acts be treated as a constructive or symbolic or inchoate occupation (the claimants' alternative contention under this head)?

Conclusion as to doctrine of the Continental Shelf

Neither the practice of nations nor the pronouncements of learned jurists give any certain or consistent answer to many—perhaps most—of these questions. I am of opinion that there are in this field so many ragged ends and unfilled blanks, so much that is merely tentative and exploratory, that in no form can the doctrine claim as yet to have assumed hitherto the hard lineaments or the definitive status of an established rule of international law.

Whether there *ought* to exist a rule giving effect to the doctrine in one or other and, if so, which of its forms is another question and one which, if I had to answer it, I should answer in the affirmative. There seems to me much cogency on the arguments of those who advocate the *ipso jure* variant of the doctrine. In particular: (1) it is extremely desirable that someone, in what threatens to become an oil-starved world, should have the right to exploit the subsoil of the submarine area outside the territorial limit; (2) the contiguous coastal Power seems the most appropriate and convenient agency for this purpose. It is in the best position to exercise effective control, and the alternatives teem with disadvantages; (3) there is no reason in principle why the subsoil of the high seas should, like the high seas themselves, be incapable of

[7] An incompletely sedentary crustacean. I gathered from Professor Waldock that a chank moves very slowly: *epur si muove*: on this whole subject Sir Cecil Hurst's Paper read to the Grotius Society in 1948 is the *locus classicus*.

being the subject of exclusive rights in any one. The main reasons why this status is attributed to the high seas is (i) that they are the great highways between nations and navigation of these highways should be unobstructed. (ii) That fishing in the high seas should be unrestricted (a policy approved by this country ever since Magna Carta abolished "several" fisheries). The subsoil, however, of the submarine area is not a highway between nations and the installations necessary to exploit it (even though sunk from the surface into the subsoil rather than tunnelled laterally) need hardly constitute an appreciable obstacle to free navigation; nor does the subsoil contain fish. (4) To treat this subsoil as *res nullius*—"fair game" for the first occupier—entails obvious and grave dangers so far as occupation is possible at all. It invites a perilous scramble. The doctrine that occupation is vital in the case of a *res nullius* has in any case worn thin since the East Greenland Arbitration and more especially since that relating to Clipperton Island. But leaving that aside, it is difficult to imagine any arrangement more calculated to produce international friction than one which entitles nation A, it may be thousands of miles from nation B, to stake out claims in the Continental Shelf contiguous to nation B by "squatting" on B's doorstep—at some point just outside nation B's territorial water limit.

The question just considered, namely not what is but what ought to be the rule, is not so irrelevant as it might at first sight appear, for the following reason: the International Law Commission appointed by the United Nations with M. François as Rapporteur, has been investigating the doctrine and problems of the Continental Shelf. This body has made a number of reports of great interest and importance including a draft code contained in the Report of the Third Session of the International Law Commission (A–CN 4–48) consisting of some six or seven short articles of which I will quote the first three.

> ARTICLE 1: "As here used the term 'Continental Shelf' refers to the sea-bed and subsoil of the submarine areas contiguous to the coast but outside the areas of territorial waters where the depth of the superjacent waters admits of the exploitation of the natural resources of the sea-bed and subsoil."
>
> ARTICLE 2: "The Continental Shelf is subject to the exercise by the coastal state of control and jurisdiction for the purpose of exploring it and exploiting its natural resources."
>
> ARTICLE 3: "The exercise by a coastal state of control and jurisdiction over the Continental Shelf does not affect the legal status of the superjacent waters as high seas."

These draft Articles have been prayed in aid by the claimants with the implication that they are, or are intended to be the expression of principles which are already part of international law, not merely of principles which ought to, or might with advantage, form part of that law in future. If this is indeed the contention of the claimants, I am of opinion that it is ill-founded. It is clear that the Codifying Commission of the International Law Commission is charged with two distinct functions, (1) that of recording existing rules of international law, and (2) that of indicating what

the law should be; promoting as the phrase runs, "the progressive development of international law" by preparing draft conventions on "subjects which have not yet been regulated by international law, or in regard to which the law has not yet been sufficiently developed in the practice of States." It seems to me clear that these Articles were framed in the discharge, not of the first but of the second, of these functions. As the Commission in paragraph 6 of its commentary on Article 2 says: "The Commission has not attempted to base on customary law the right of a State to exercise control and jurisdiction for the limited purposes stated in Article 2, and though numerous proclamations have been issued over the past decade it can hardly be said that such unilateral action has already established a new customary law." [8]

I therefore cannot accept these Articles as recording, or even purporting to record, established rules: and if they do not, if they are mere recommendations as to what such rules might with advantage be, if adopted by International Convention, they clearly cannot affect the construction of the contract of 1939. (f) Pausing here before dealing with the last question, *viz.*, the effect, if any of the *negotiations* on the meaning of the contract; and considering only the possible effect on the construction of the contract of the doctrine of the Shelf; I would summarise as follows the claimant's argument and my conclusions about it: The claimant's primary contention is (1) that the doctrine of the Shelf is settled law, (2) that it always was so, and therefore that it was so in 1939; *ergo*, the meaning which some of the expressions in the contract would or might otherwise have borne is enlarged by the inclusion therein of the Shelf. For instance, in Article 2 either the expression "the whole of the lands which belong to the rule of the Ruler of Abu Dhabi" or the expression "and the sea waters which belong to that area," are so enlarged by the inclusion of an area in this case measuring over

[8] In respect of this interpretation of the suggested Articles—*viz.*, as recommendations rather than records—the following United Nations documents are relevant; besides A-CN. 4-48 of 1951 itself (the suggested Articles and commentary thereon), A-CN. 4-Sr. 66, 67, 68 and 69 (these last constituting the Summary Record of the meetings of the Second Session of the International Law Commission, 1950). Perhaps I may make this footnote the vehicle for an expression of gratitude to those who addressed me, for bringing to my notice some of the voluminous literature, articles, addresses and other publications—by experts on the Continental Shelf. Those from which I have derived the most instruction include:

(1) Prof. H. Lauterpacht's article entitled "Sovereignty over Submarine Areas," which is likely to be published in the *British Year Book of International Law*, Vol. 27, 1950, pp. 376–433, almost simultaneously with this Award.

(2) Professor Waldock's article "The Legal Basis of Claims to the Continental Shelf" (to appear in *Transactions of the Grotius Society*, Vol. 36, 1950), previously printed as a paper submitted to the Copenhagen Conference of the International Law Association, 1950.

(3) Mr. Richard Young's article, "The Legal Status of Submarine Areas beneath the High Seas," published in the *American Journal of International Law*, Vol. 45, 1951, April, pp. 225–249.

(4) The Memorandum of the Secretary-General of the United Nations on the *Regime of the High Seas*—2nd Session (1950) of the International Law Commission (A-CN. 4-32).

(5) The works of Sir Arnold McNair *passim*; my debt to which is too diffused to be particularised by chapter and verse.

10,000 square miles of extraterritorial marine subsoil. The argument falls to the ground if I am right in rejecting the premiss on which it rests, namely, that the doctrine of the Shelf has become and, indeed, was already in 1939, part of the *corpus* of international law.

Again, if I am right in rejecting that premiss, the second way in which they put their case also fails; here they rely on the proviso to Article 2 which says that "If in future the lands which belong to Abu Dhabi are defined by agreement with other States, then the limits of the area" (of the Concession) "shall coincide with the limits specified in this definition." The argument is that the Concession is by these words expressly to extend to any after-acquired area of Abu Dhabi, and that the effect of the proclamations of 1949, if not retrospective, cannot be less than to add the Shelf to the area originally covered as from the date when the proclamations were promulgated. This argument also fails if I am right in thinking that the premiss on which it rests is invalid; but I think it would fail independently of that since there has been no definition of anything "by agreement with other States," and I should have thought in any case that the definition referred to was limited to one affecting dry land, whether epirot or insular.

NORTH SEA CONTINENTAL SHELF CASES

/1969/ I.C.J. Rep. 3, 12-13, 19-23, 29-33, 39-41, 45-46, 48-54

* * * * *

1. By the two Special Agreements respectively concluded between the Kingdom of Denmark and the Federal Republic of Germany, and between the Federal Republic and the Kingdom of the Netherlands, the Parties have submitted to the Court certain differences concerning "the delimitation as between the Parties of the areas of the continental shelf in the North Sea which appertain to each of them"—with the exception of those areas, situated in the immediate vicinity of the coast, which have already been the subject of delimitation by two agreements dated 1 December 1964, and 9 June 1965, concluded in the one case between the Federal Republic and the Kingdom of the Netherlands, and in the other between the Federal Republic and the Kingdom of Denmark.

2. It is in respect of the delimitation of the continental shelf areas lying beyond and to seaward of those affected by the partial boundaries thus established, that the Court is requested by each of the two Special Agreements to decide what are the applicable "principles and rules of international law". The Court is not asked actually to delimit the further boundaries which will be involved, this task being reserved by the Special Agreements to the Parties, which undertake to effect such a delimitation "by agreement in pursuance of the decision requested from the ... Court"—that is to say on the basis of, and in accordance with, the principles and rules of international law found by the Court to be applicable.

11. Although the proceedings have thus been joined, the cases themselves remain separate, at least in the sense that they relate to different areas of the North Sea continental shelf, and that there is no *a priori* reason why the Court must reach identical conclusions in regard to them,—if for instance geographical features present in the one case were not present in the other. At the same time, the legal arguments presented on behalf of Denmark and the Netherlands, both before and since the joinder, have been substantially identical, apart from certain matters of detail, and have been presented either in common or in close co-operation. To this extent therefore, the two cases may be treated as one; and it must be noted that although two separate delimitations are in question, they involve—indeed actually give rise to—a single situation. The fact that the question of either of these delimitations might have arisen and called for settlement separately in point of time, does not alter the character of the problem with which the Court is actually faced, having regard to the manner in which the Parties themselves have brought the matter before it, as described in the two preceding paragraphs.

12. In conclusion as to the facts, it should be noted that the Federal Republic has formally reserved its position, not only in regard to the Danish-Netherlands delimitation of the line E-F (Map 3), as noted in paragraph 9, but also in regard to the delimitations United Kingdom/Denmark and United Kingdom/Netherlands mentioned in paragraph 4. In both the latter cases the Government of the Federal Republic pointed out to all the Governments concerned that the question of the lateral delimitation of the continental shelf in the North Sea between the Federal Republic and the Kingdoms of Denmark and the Netherlands was still outstanding and could not be prejudiced by the agreements concluded between those two countries and the United Kingdom.

* * *

13. Such are the events and geographical facts in the light of which the Court has to determine what principles and rules of international law are applicable to the delimitation of the areas of continental shelf involved. On this question the Parties have taken up fundamentally different positions. On behalf of the Kingdoms of Denmark and the Netherlands it is contended that the whole matter is governed by a mandatory rule of law which, reflecting the language of Article 6 of the Convention on the Continental Shelf concluded at Geneva on 29 April 1958, was designated by them as the "equidistance-special circumstances" rule. According to this contention, "equidistance" is not merely a method of the cartographical construction of a boundary line, but the essential element in a rule of law which may be stated as follows,—namely that in the absence of agreement by the Parties to employ another method or to proceed to a delimitation on an *ad hoc* basis, all continental shelf boundaries must be drawn by means of an equidistance line, unless, or except to the extent to which, "special circumstances" are recognized to exist,—an equidistance line being, it will be recalled, a line every point on which is the same distance away from whatever point is nearest to it on the coast of each of the countries concerned—or rather, strictly, on the baseline of the territorial sea along that coast. As regards what constitutes "special circumstances", all that need be said at this stage is that according to the view put forward on behalf of Denmark and the Netherlands, the configuration of the German North Sea coast, its recessive character, and the fact that it makes nearly a right-angled bend in mid-course, would not of itself constitute, for either of the two boundary lines concerned, a special circumstance calling for or warranting a departure from the equidistance method of delimitation: only the presence of some special feature, minor in itself—such as an islet or small protuberance—but so placed as to produce a disproportionately distorting effect on an otherwise acceptable boundary line would, so it was claimed, possess this character.

14. These various contentions, together with the view that a rule of equidistance-special circumstances is binding on the Federal Republic, are founded by Denmark and the Netherlands partly on the 1958 Geneva Convention on the Continental Shelf already mentioned (preceding paragraph), and partly on general considerations of law relating to the continental shelf, lying outside this Convention. Similar considerations are equally put forward to found the contention that the delimitation on an equidistance basis of the line E-F (Map 3) by the Netherlands-Danish agreement of 31 March 1966 (paragraph 5 above) is valid *erga omnes*, and must be respected by the Federal Republic unless it can demonstrate the existence of juridically relevant "special circumstances".

15. The Federal Republic, for its part, while recognizing the utility of equidistance as a method of delimitation, and that this method can in many cases be employed appropriately and with advantage, denies its obligatory character for States not parties to the Geneva Convention, and contends that the correct rule to be applied, at any rate in such circumstances as those of the North Sea, is one according to which each of the States concerned should have a "just and equitable share" of the available continental shelf, in proportion to the length of its coastline or sea-frontage. It was also contended on behalf of the Federal Republic

that in a sea shaped as is the North Sea, the whole bed of which, except for the Norwegian Trough, consists of continental shelf at a depth of less than 200 metres, and where the situation of the circumjacent States causes a natural convergence of their respective continental shelf areas, towards a central point situated on the median line of the whole seabed —or at any rate in those localities where this is the case—each of the States concerned is entitled to a continental shelf area extending up to this central point (in effect a sector), or at least extending to the median line at some point or other. In this way the "cut-off" effect, of which the Federal Republic complains, caused, as explained in paragraph 8, by the drawing of equidistance lines at the two ends of an inward curving or recessed coast, would be avoided. As a means of giving effect to these ideas, the Federal Republic proposed the method of the "coastal front", or façade, constituted by a straight baseline joining these ends, upon which the necessary geometrical constructions would be erected.

16. Alternatively, the Federal Republic claimed that if, contrary to its main contention, the equidistance method was held to be applicable, then the configuration of the German North Sea coast constituted a "special circumstance" such as to justify a departure from that method of delimitation in this particular case.

17. In putting forward these contentions, it was stressed on behalf of the Federal Republic that the claim for a just and equitable share did not in any way involve asking the Court to give a decision *ex aequo et bono* (which, having regard to the terms of paragraph 2 of Article 38 of the Court's Statute, would not be possible without the consent of the Parties),—for the principle of the just and equitable share was one of the recognized general principles of law which, by virtue of paragraph 1 *(c)* of the same Article, the Court was entitled to apply as a matter of the *justitia distributiva* which entered into all legal systems. It appeared, moreover, that whatever its underlying motivation, the claim of the Federal Republic was, at least ostensibly, to a just and equitable share of the space involved, rather than to a share of the natural resources as such, mineral or other, to be found in it, the location of which could not in any case be fully ascertained at present. On the subject of location the Court has in fact received some, though not complete information, but has not thought it necessary to pursue the matter, since the question of natural resources is less one of delimitation than of eventual exploitation.

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18. It will be convenient to consider first the contentions put forward on behalf of the Federal Republic. The Court does not feel able to accept them—at least in the particular form they have taken. It considers that, having regard both to the language of the Special Agreements and to more general considerations of law relating to the régime of the continental shelf, its task in the present proceedings relates essentially to the delimitation and not the apportionment of the areas concerned, or their division into converging sectors. Delimitation is a process which involves establishing the boundaries of an area already, in principle, appertaining to the coastal State and not the determination *de novo* of such an area. Delimitation in an equitable manner is one thing, but not the same thing as awarding a just and equitable share of a previously undelimited area, even though in a number of cases the results may be comparable, or even identical.

19. More important is the fact that the doctrine of the just and equitable share appears to be wholly at variance with what the Court entertains no doubt is the most fundamental of all the rules of law relating to the continental shelf, enshrined in Article 2 of the 1958 Geneva Convention, though quite independent of it,—namely that the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short, there is here an inherent right. In order to exercise it, no special legal process has to be gone through, nor have any special legal acts to be performed. Its existence can be declared (and many States have done this) but does not need to be constituted. Furthermore, the right does not depend on its being exercised. To echo the language of the Geneva Convention, it is "exclusive" in the sense that if the coastal State does not choose to explore or exploit the areas of shelf appertaining to it, that is its own affair, but no one else may do so without its express consent.

20. It follows that even in such a situation as that of the North Sea, the notion of apportioning an as yet undelimited area, considered as a whole (which underlies the doctrine of the just and equitable share), is quite foreign to, and inconsistent with, the basic concept of continental shelf entitlement, according to which the process of delimitation is essentially one of drawing a boundary line between areas which already appertain to one or other of the States affected. The delimitation itself must indeed be equitably effected, but it cannot have as its object the awarding of an equitable share, or indeed of a share, as such, at all,—for the fundamental concept involved does not admit of there being anything undivided to share out. Evidently any dispute about boundaries must involve that there is a disputed marginal or fringe area, to which both parties are laying claim, so that any delimitation of it which does not leave it wholly to one of the parties will in practice divide it between them in certain shares, or operate as if such a division had been made. But this does not mean that there has been an apportionment of something that previously consisted of an integral, still less an undivided whole.

* * *

21. The Court will now turn to the contentions advanced on behalf of Denmark and the Netherlands. Their general character has already been indicated in paragraphs 13 and 14: the most convenient way of dealing with them will be on the basis of the following question—namely, does the equidistance-special circumstances principle constitute a mandatory rule, either on a conventional or on a customary international law basis, in such a way as to govern any delimitation of the North Sea continental shelf areas between the Federal Republic and the Kingdoms of Denmark and the Netherlands respectively? Another and shorter way of formulating the question would be to ask whether, in any delimitation of these areas, the Federal Republic is under a legal obligation to accept the application of the equidistance-special circumstances principle.

22. Particular attention is directed to the use, in the foregoing formulations, of the terms "mandatory" and "obligation". It has never been doubted that the equidistance method of delimitation is a very convenient one, the use of which is indicated in a considerable number of cases. It constitutes a method capable of being employed in almost all circumstances, however singular the results might sometimes be, and has the virtue that if necessary,—if for instance, the Parties are unable to enter into negotiations,—any cartographer can *de facto* trace such a boundary on the appropriate maps and charts, and those traced by competent cartographers will for all practical purposes agree.

23. In short, it would probably be true to say that no other method of delimitation has the same combination of practical convenience and certainty of application. Yet these factors do not suffice of themselves to convert what is a method into a rule of law, making the acceptance of the results of using that method obligatory in all cases in which the parties do not agree otherwise, or in which "special circumstances" cannot be shown to exist. Juridically, if there is such a rule, it must draw its legal force from other factors than the existence of these advantages, important though they may be. It should also be noticed that the counterpart of this conclusion is no less valid, and that the practical advantages of the equidistance method would continue to exist whether its employment were obligatory or not.

38. The Court will begin by examining this latter aspect, both because it is the more fundamental, and was so presented on behalf of Denmark and the Netherlands—i.e., as something governing the whole case; and because, if it is correct that the equidistance principle is, as the point was put in the course of the argument, to be regarded as inherent in the whole basic concept of continental shelf rights, then equidistance should constitute the rule according to positive law tests also. On the other hand, if equidistance should not possess any *a priori* character of necessity or inherency, this would not be any bar to its having become a rule of positive law through influences such as those of the Geneva Convention and State practice,—and that aspect of the matter would remain for later examination.

39. The *a priori* argument starts from the position described in paragraph 19, according to which the right of the coastal State to its continental shelf areas is based on its sovereignty over the land domain, of which the shelf area is the natural prolongation into and under the sea. From this notion of appurtenance is derived the view which, as has already been indicated, the Court accepts, that the coastal State's rights exist *ipso facto* and *ab initio* without there being any question of having to make good a claim to the areas concerned, or of any apportionment of the continental shelf between different States. This was one reason why the Court felt bound to reject the claim of the Federal Republic (in the particular form which it took) to be awarded a "just and equitable share" of the shelf areas involved in the present proceedings. Denmark and the Netherlands, for their part, claim that the test of appurtenance must be "proximity", or more accurately "closer proximity": all those parts of the shelf being considered as appurtenant to a particular coastal State which are (but only if they are) closer to it than they are to any point on the coast of another State. Hence delimitation must be effected by a method which will leave to each one of the States concerned all those areas that are nearest to its own coast. Only a line drawn on equidistance principles will do this. Therefore, it is contended, only such a line can be valid (unless the Parties, for reasons of their own, agree on another), because only such a line can be thus consistent with basic continental shelf doctrine.

40. This view clearly has much force; for there can be no doubt that as a matter of normal topography, the greater part of a State's continental

shelf areas will in fact, and without the necessity for any delimitation at all, be nearer to its coasts than to any other. It could not well be otherwise; but *post hoc* is not *propter hoc*, and this situation may only serve to obscure the real issue, which is whether it follows that every part of the area concerned must be placed in this way, and that it should be as it were prohibited that any part should not be so placed. The Court does not consider that it does follow, either from the notion of proximity itself, or from the more fundamental concept of the continental shelf as being the natural prolongation of the land domain—a concept repeatedly appealed to by both sides throughout the case, although quite differently interpreted by them.

41. As regards the notion of proximity, the idea of absolute proximity is certainly not implied by the rather vague and general terminology employed in the literature of the subject, and in most State proclamations and international conventions and other instruments—terms such as "near", "close to its shores", "off its coast", "opposite", "in front of the coast", "in the vicinity of", "neighbouring the coast", "adjacent to", "contiguous", etc.,—all of them terms of a somewhat imprecise character which, although they convey a reasonably clear general idea, are capable of a considerable fluidity of meaning. To take what is perhaps the most frequently employed of these terms, namely "adjacent to", it is evident that by no stretch of imagination can a point on the continental shelf situated say a hundred miles, or even much less, from a given coast, be regarded as "adjacent" to it, or to any coast at all, in the normal sense of adjacency, even if the point concerned is nearer to some one coast than to any other. This would be even truer of localities where, physically, the continental shelf begins to merge with the ocean depths. Equally, a point inshore situated near the meeting place of the coasts of two States can often properly be said to be adjacent to both coasts, even though it may be fractionally closer to the one than the other. Indeed, local geographical configuration may sometimes cause it to have a closer physical connection with the coast to which it is not in fact closest.

42. There seems in consequence to be no necessary, and certainly no complete, identity between the notions of adjacency and proximity; and therefore the question of which parts of the continental shelf "adjacent to" a coastline bordering more than one State fall within the appurtenance of which of them, remains to this extent an open one, not to be determined on a basis exclusively of proximity. Even if proximity may afford one of the tests to be applied and an important one in the right conditions, it may not necessarily be the only, nor in all circumstances, the most appropriate one. Hence it would seem that the notion of adjacency, so constantly employed in continental shelf doctrine from the start, only implies proximity in a general sense, and does not imply any fundamental or inherent rule the ultimate effect of which would be to prohibit any State (otherwise than by agreement) from exercising continental shelf rights in respect of areas closer to the coast of another State.

43. More fundamental than the notion of proximity appears to be the principle—constantly relied upon by all the Parties—of the natural prolongation or continuation of the land territory or domain, or land sovereignty of the coastal State, into and under the high seas, via the bed of its territorial sea which is under the full sovereignty of that State. There are various ways of formulating this principle, but the underlying idea, namely of an extension of something already possessed, is the same, and it is this idea of extension which is, in the Court's opinion, determinant. Submarine areas do not really appertain to the coastal State because—or not only because—they are near it. They are near it of course; but this would not suffice to confer title, any more than, according to a well-established principle of law recognized by both sides in the present case, mere proximity confers *per se* title to land territory. What confers the *ipso jure* title which international law attributes to the coastal State in respect of its continental shelf, is the fact that the submarine areas concerned may be deemed to be actually part of the territory over which the coastal State already has dominion,—in the sense that, although covered with water, they are a prolongation or continuation of that territory, an extension of it under the sea. From this it would follow that whenever a given submarine area does not constitute a natural—or the most natural—extension of the land territory of a coastal State, even though that area may be closer to it than it is to the territory of any other State, it cannot be regarded as appertaining to that State;—or at least it cannot be so regarded in the face of a competing claim by a State of whose land territory the submarine area concerned is to be regarded as a natural extension, even if it is less close to it.

44. In the present case, although both sides relied on the prolongation principle and regarded it as fundamental, they interpreted it quite differently. Both interpretations appear to the Court to be incorrect. Denmark and the Netherlands identified natural prolongation with closest proximity and therefrom argued that it called for an equidistance line: the Federal Republic seemed to think it implied the notion of the just and equitable share, although the connection is distinctly remote. (The Federal Republic did however invoke another idea, namely that of the proportionality of a State's continental shelf area to the length of its coastline, which obviously does have an intimate connection with the prolongation principle, and will be considered in its place.) As regards equidistance, it clearly cannot be identified with the notion of natural prolongation or extension, since, as has already been stated (paragraph 8), the use of the equidistance method would frequently cause areas which are the natural prolongation or extension of the territory of one State to be attributed to another, when the configuration of the latter's coast makes the equidistance line swing out laterally across the former's coastal front, cutting it off from areas situated directly before that front.

45. The fluidity of all these notions is well illustrated by the case of the Norwegian Trough (paragraph 4 above). Without attempting to pronounce on the status of that feature, the Court notes that the shelf areas in the North Sea separated from the Norwegian coast by the 80-100 kilometres of the Trough cannot in any physical sense be said to be adjacent to it, nor to be its natural prolongation. They are nevertheless considered by the States parties to the relevant delimitations, as described in paragraph 4, to appertain to Norway up to the median lines shown on Map 1. True these median lines are themselves drawn on equidistance principles; but it was only by first ignoring the existence of the Trough that these median lines fell to be drawn at all.

46. The conclusion drawn by the Court from the foregoing analysis is that the notion of equidistance as being logically necessary, in the sense of being an inescapable *a priori* accompaniment of basic continental shelf doctrine, is incorrect. It is said not to be possible to maintain that there is a rule of law ascribing certain areas to a State as a matter of inherent and original right (see paragraphs 19 and 20), without also admitting the existence of some rule by which those areas can be obligatorily delimited. The Court cannot accept the logic of this view. The problem arises only where there is a dispute and only in respect of the marginal areas involved. The appurtenance of a given area, considered as an entity, in no way governs the precise delimitation of its boundaries, any more than uncertainty as to boundaries can affect territorial rights. There is for instance no rule that the land frontiers of a State must be fully delimited and defined, and often in various places and for long periods they are not, as is shown by the case of the entry of Albania into the League of Nations (*Monastery of Saint Naoum, Advisory Opinion, 1924, P.C.I.J., Series B, No. 9,* at p. 10).

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47. A review of the genesis and development of the equidistance method of delimitation can only serve to confirm the foregoing conclusion. Such a review may appropriately start with the instrument, generally known as the "Truman Proclamation", issued by the Government of the United States on 28 September 1945. Although this instrument was not the first or only one to have appeared, it has in the opinion of the Court a special status. Previously, various theories as to the nature and extent of the rights relative to or exercisable over the continental shelf had been advanced by jurists, publicists and technicians. The Truman Proclamation however, soon came to be regarded as the starting point of the positive law on the subject, and the chief doctrine it enunciated, namely that of the coastal State as having an original, natural, and exclusive (in short a vested) right to the continental shelf off its shores, came to prevail over all others, being now reflected in Article 2 of the 1958 Geneva Convention on the Continental Shelf. With regard to the delimitation of lateral boundaries between the continental shelves of adjacent States, a matter which had given rise to some consideration on the technical, but very little on the juristic level, the Truman Proclamation stated that such boundaries "shall be determined by the United States and the State concerned in accordance with equitable principles". These two concepts, of delimitation by mutual agreement and delimitation in accordance with equitable principles, have underlain all the subsequent history of the subject. They were reflected in various other State proclamations of the period, and after, and in the later work on the subject.

48. It was in the International Law Commission of the United Nations that the question of delimitation as between adjacent States was first taken up seriously as part of a general juridical project; for outside the ranks of the hydrographers and cartographers, questions of delimitation were not much thought about in earlier continental shelf doctrine. Juridical interest and speculation was focussed mainly on such questions as what was the legal basis on which any rights at all in respect of the continental shelf could be claimed, and what was the nature of those rights. As regards boundaries, the main issue was not that of boundaries between States but of the seaward limit of the area in respect of which the coastal State could claim exclusive rights of exploitation. As was pointed out in the course of the written proceedings, States in most cases had not found it necessary to conclude treaties or legislate about their lateral sea boundaries with adjacent States before the question of exploiting the natural resources of the seabed and subsoil arose;—practice was therefore sparse.

49. In the records of the International Law Commission, which had the matter under consideration from 1950 to 1956, there is no indication at all that any of its members supposed that it was incumbent on the Commission to adopt a rule of equidistance because this gave expression to, and translated into linear terms, a principle of proximity inherent in the basic concept of the continental shelf, causing every part of the shelf to appertain to the nearest coastal State and to no other, and because such a rule must therefore be mandatory as a matter of customary international law. Such an idea does not seem ever to have been propounded. Had it been, and had it had the self-evident character contended for by Denmark and the Netherlands, the Commission would have had no alternative but to adopt it, and its long continued hesitations over this matter would be incomprehensible.

64. The normal inference would therefore be that any articles that do not figure among those excluded from the faculty of reservation under Article 12, were not regarded as declaratory of previously existing or emergent rules of law; and this is the inference the Court in fact draws in respect of Article 6 (delimitation), having regard also to the attitude of the International Law Commission to this provision, as already described in general terms. Naturally this would not of itself prevent this provision from eventually passing into the general *corpus* of customary international law by one of the processes considered in paragraphs 70-81 below. But that is not here the issue. What is now under consideration is whether it originally figured in the Convention as such a rule.

65. It has however been suggested that the inference drawn at the beginning of the preceding paragraph is not necessarily warranted, seeing that there are certain other provisions of the Convention, also not excluded from the faculty of reservation, but which do undoubtedly in principle relate to matters that lie within the field of received customary law, such as the obligation not to impede the laying or maintenance of submarine cables or pipelines on the continental shelf seabed (Article 4), and the general obligation not unjustifiably to interfere with freedom of navigation, fishing, and so on (Article 5, paragraphs 1 and 6). These matters however, all relate to or are consequential upon principles or rules of general maritime law, very considerably ante-dating the Convention, and not directly connected with but only incidental to continental shelf rights as such. They were mentioned in the Convention, not in order to declare or confirm their existence, which was not necessary, but simply to ensure that they were not prejudiced by the exercise of continental shelf rights as provided for in the Convention. Another method of drafting might have clarified the point, but this cannot alter the fact that no reservation could release the reserving party from obligations of general maritime law existing outside and independently of the Convention, and especially obligations formalized in Article 2 of the contemporaneous Convention on the High Seas, expressed by its preamble to be declaratory of established principles of international law.

66. Article 6 (delimitation) appears to the Court to be in a different position. It does directly relate to continental shelf rights as such, rather than to matters incidental to these; and since it was not, as were Articles 1 to 3, excluded from the faculty of reservation, it is a legitimate inference that it was considered to have a different and less fundamental status and not, like those Articles, to reflect pre-existing or emergent customary law. It was however contended on behalf of Denmark and the Netherlands that the right of reservation given in respect of Article 6 was not intended to be an unfettered right, and that in particular it does not extend to effecting a total exclusion of the equidistance principle of delimitation,—for, so it was claimed, delimitation on the basis of that principle is implicit in Articles 1 and 2 of the Convention, in respect of which no reservations are permitted. Hence the right of reservation under Article 6 could only be exercised in a manner consistent with the preservation of at least the basic principle of equidistance. In this connection it was pointed out that of the no more than four reservations so far entered in respect of Article 6, one at least of which was somewhat far-reaching, none has purported to effect such a total exclusion or denial.

67. The Court finds this argument unconvincing for a number of reasons. In the first place, Articles 1 and 2 of the Geneva Convention do not appear to have any direct connection with inter-State delimitation as such. Article 1 is concerned only with the outer, seaward, limit of the shelf generally, not with boundaries between the shelf areas of opposite or adjacent States. Article 2 is equally not concerned with such boundaries. The suggestion seems to be that the notion of equidistance is implicit in the reference in paragraph 2 of Article 2 to the rights of the coastal State over its continental shelf being "exclusive". So far as actual language is concerned this interpretation is clearly incorrect. The true sense of the passage is that in whatever areas of the continental shelf a coastal State has rights, those rights are exclusive rights, not exercisable by any other State. But this says nothing as to what in fact are the precise areas in respect of which each coastal State possesses these exclusive rights. This question, which can arise only as regards the fringes of a coastal State's shelf area is, as explained at the end of paragraph 20 above, exactly what falls to be settled through the process of delimitation, and this is the sphere of Article 6, not Article 2.

68. Secondly, it must be observed that no valid conclusions can be drawn from the fact that the faculty of entering reservations to Article 6 has been exercised only sparingly and within certain limits. This is the affair exclusively of those States which have not wished to exercise the faculty, or which have been content to do so only to a limited extent. Their action or inaction cannot affect the right of other States to enter reservations to whatever is the legitimate extent of the right.

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69. In the light of these various considerations, the Court reaches the conclusion that the Geneva Convention did not embody or crystallize any pre-existing or emergent rule of customary law, according to which the delimitation of continental shelf areas between adjacent States must, unless the Parties otherwise agree, be carried out on an equidistance-special circumstances basis. A rule was of course embodied in Article 6 of the Convention, but as a purely conventional rule. Whether it has since acquired a broader basis remains to be seen: *qua* conventional rule however, as has already been concluded, it is not opposable to the Federal Republic.

70. The Court must now proceed to the last stage in the argument put forward on behalf of Denmark and the Netherlands. This is to the effect that even if there was at the date of the Geneva Convention no rule of customary international law in favour of the equidistance principle, and no such rule was crystallized in Article 6 of the Convention, nevertheless such a rule has come into being since the Convention, partly because of its own impact, partly on the basis of subsequent State practice,—and that this rule, being now a rule of customary international law binding on all States, including therefore the Federal Republic, should be declared applicable to the delimitation of the boundaries between the Parties' respective continental shelf areas in the North Sea.

71. In so far as this contention is based on the view that Article 6 of the Convention has had the influence, and has produced the effect, described, it clearly involves treating that Article as a norm-creating provision which has constituted the foundation of, or has generated a rule which, while only conventional or contractual in its origin, has since passed into the general *corpus* of international law, and is now accepted as such by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention. There is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed. At the same time this result is not lightly to be regarded as having been attained.

81. The Court accordingly concludes that if the Geneva Convention was not in its origins or inception declaratory of a mandatory rule of customary international law enjoining the use of the equidistance principle for the delimitation of continental shelf areas between adjacent States, neither has its subsequent effect been constitutive of such a rule; and that State practice up-to-date has equally been insufficient for the purpose.

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82. The immediately foregoing conclusion, coupled with that reached earlier (paragraph 56) to the effect that the equidistance principle could not be regarded as being a rule of law on any *a priori* basis of logical necessity deriving from the fundamental theory of the continental shelf, leads to the final conclusion on this part of the case that the use of the equidistance method is not obligatory for the delimitation of the areas concerned in the present proceedings. In these circumstances, it becomes unnecessary for the Court to determine whether or not the configuration of the German North Sea coast constitutes a "special circumstance" for the purposes either of Article 6 of the Geneva Convention or of any rule of customary international law,—since once the use of the equidistance method of delimitation is determined not to be obligatory in any event, it ceases to be legally necessary to prove the existence of special circumstances in order to justify not using that method.

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88. The Court comes next to the rule of equity. The legal basis of that rule in the particular case of the delimitation of the continental shelf as between adjoining States has already been stated. It must however be noted that the rule rests also on a broader basis. Whatever the legal reasoning of a court of justice, its decisions must by definition be just, and therefore in that sense equitable. Nevertheless, when mention is made of a court dispensing justice or declaring the law, what is meant is that the decision finds its objective justification in considerations lying not outside but within the rules, and in this field it is precisely a rule of law that calls for the application of equitable principles. There is consequently no question in this case of any decision *ex aequo et bono*, such as would only be possible under the conditions prescribed by Article 38, paragraph 2, of the Court's Statute. Nor would this be the first time that the Court has adopted such an attitude, as is shown by the following passage from the Advisory Opinion given in the case of *Judgments of the Administrative Tribunal of the I.L.O. upon Complaints Made against Unesco* (*I.C.J. Reports 1956*, at p. 100):

> "In view of this the Court need not examine the allegation that the validity of the judgments of the Tribunal is vitiated by excess of jurisdiction on the ground that it awarded compensation *ex aequo et bono*. It will confine itself to stating that, in the reasons given by the Tribunal in support of its decision on the merits, the Tribunal said: 'That redress will be ensured *ex aequo et bono* by the granting to the complainant of the sum set forth below.' It does not appear from the context of the judgment that the Tribunal thereby intended to depart from principles of law. The apparent intention was to say that, as the precise determination of the actual amount to be awarded could not be based on any specific rule of law, the Tribunal fixed what the Court, in other circumstances, has described as the true measure of compensation and the reasonable figure of such compensation (*Corfu Channel* case, Judgment of December 15th, 1949, *I.C.J. Reports 1949*, p. 249)."

89. It must next be observed that, in certain geographical circumstances which are quite frequently met with, the equidistance method, despite its known advantages, leads unquestionably to inequity, in the following sense:

(a) The slightest irregularity in a coastline is automatically magnified by the equidistance line as regards the consequences for the delimitation of the continental shelf. Thus it has been seen in the case of concave or convex coastlines that if the equidistance method is employed, then the greater the irregularity and the further from the coastline the area to be delimited, the more unreasonable are the results produced. So great an exaggeration of the consequences of a natural geographical feature must be remedied or compensated for as far as possible, being of itself creative of inequity.

(b) In the case of the North Sea in particular, where there is no outer boundary to the continental shelf, it happens that the claims of several States converge, meet and intercross in localities where, despite their distance from the coast, the bed of the sea still unquestionably consists of continental shelf. A study of these convergences, as revealed by the maps, shows how inequitable would be the apparent simplification brought about by a delimitation which, ignoring such geographical circumstances, was based solely on the equidistance method.

90. If for the above reasons equity excludes the use of the equidistance method in the present instance, as the sole method of delimitation, the question arises whether there is any necessity to employ only one method for the purposes of a given delimitation. There is no logical basis for this, and no objection need be felt to the idea of effecting a delimitation of adjoining continental shelf areas by the concurrent use of various methods. The Court has already stated why it considers that the international law of continental shelf delimitation does not involve any imperative rule and permits resort to various principles or methods, as may be appropriate, or a combination of them, provided that, by the application of equitable principles, a reasonable result is arrived at.

91. Equity does not necessarily imply equality. There can never be any question of completely refashioning nature, and equity does not require that a State without access to the sea should be allotted an area of continental shelf, any more than there could be a question of rendering the situation of a State with an extensive coastline similar to that of a State with a restricted coastline. Equality is to be reckoned within the same plane, and it is not such natural inequalities as these that equity could remedy. But in the present case there are three States whose North Sea coastlines are in fact comparable in length and which, therefore, have been given broadly equal treatment by nature except that the configuration of one of the coastlines would, if the equidistance method is used, deny to one of these States treatment equal or comparable to that given the other two. Here indeed is a case where, in a theoretical situation of equality within the same order, an inequity is created. What is unacceptable in this instance is that a State should enjoy continental shelf rights considerably different from those of its neighbours merely because in the one case the coastline is roughly convex in form and in the other it is markedly concave, although those coastlines are comparable in length. It is therefore not a question of totally refashioning geography whatever the facts of the situation but, given a geographical situation of quasi-equality as between a number of States, of abating the effects of an incidental special feature from which an unjustifiable difference of treatment could result.

92. It has however been maintained that no one method of delimitation can prevent such results and that all can lead to relative injustices. This argument has in effect already been dealt with. It can only strengthen the view that it is necessary to seek not one method of delimitation but one goal. It is in this spirit that the Court must examine the question of how the continental shelf can be delimited when it is in fact the case that the equidistance principle does not provide an equitable solution. As the operation of delimiting is a matter of determining areas appertaining to different jurisdictions, it is a truism to say that the determination must be equitable; rather is the problem above all one of defining the means whereby the delimitation can be carried out in such a way as to be recognized as equitable. Although the Parties have made it known that they intend to reserve for themselves the application of the principles and rules laid down by the Court, it would, even so, be insufficient simply to rely on the rule of equity without giving some degree of indication as to the possible ways in which it might be applied in the present case, it being understood that the Parties will be free to agree upon one method rather than another, or different methods if they so prefer.

93. In fact, there is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures, and more often than not it is the balancing-up of all such considerations that will produce this result rather than reliance on one to the exclusion of all others. The problem of the relative weight to be accorded to different considerations naturally varies with the circumstances of the case.

94. In balancing the factors in question it would appear that various aspects must be taken into account. Some are related to the geological, others to the geographical aspect of the situation, others again to the

idea of the unity of any deposits. These criteria, though not entirely precise, can provide adequate bases for decision adapted to the factual situation.

95. The institution of the continental shelf has arisen out of the recognition of a physical fact; and the link between this fact and the law, without which that institution would never have existed, remains an important element for the application of its legal régime. The continental shelf is, by definition, an area physically extending the territory of most coastal States into a species of platform which has attracted the attention first of geographers and hydrographers and then of jurists. The importance of the geological aspect is emphasized by the care which, at the beginning of its investigation, the International Law Commission took to acquire exact information as to its characteristics, as can be seen in particular from the definitions to be found on page 131 of Volume I of the *Yearbook of the International Law Commission* for 1956. The appurtenance of the shelf to the countries in front of whose coastlines it lies, is therefore a fact, and it can be useful to consider the geology of that shelf in order to find out whether the direction taken by certain configurational features should influence delimitation because, in certain localities, they point-up the whole notion of the appurtenance of the continental shelf to the State whose territory it does in fact prolong.

96. The doctrine of the continental shelf is a recent instance of encroachment on maritime expanses which, during the greater part of history, appertained to no-one. The contiguous zone and the continental shelf are in this respect concepts of the same kind. In both instances the principle is applied that the land dominates the sea; it is consequently necessary to examine closely the geographical configuration of the coastlines of the countries whose continental shelves are to be delimited. This is one of the reasons why the Court does not consider that markedly pronounced configurations can be ignored; for, since the land is the legal source of the power which a State may exercise over territorial extensions to seaward, it must first be clearly established what features do in fact constitute such extensions. Above all is this the case when what is involved is no longer areas of sea, such as the contiguous zone, but stretches of submerged land; for the legal régime of the continental shelf is that of a soil and a subsoil, two words evocative of the land and not of the sea.

97. Another factor to be taken into consideration in the delimitation of areas of continental shelf as between adjacent States is the unity of any deposits. The natural resources of the subsoil of the sea in those parts which consist of continental shelf are the very object of the legal régime established subsequent to the Truman Proclamation. Yet it frequently occurs that the same deposit lies on both sides of the line dividing a continental shelf between two States, and since it is possible to exploit such a deposit from either side, a problem immediately arises on account of the risk of prejudicial or wasteful exploitation by one or other of the States concerned. To look no farther than the North Sea, the practice of States shows how this problem has been dealt with, and all that is needed is to refer to the undertakings entered into by the coastal States of that sea with a view to ensuring the most efficient exploitation or the apportionment of the products extracted—(see in particular the agreement of 10 March 1965 between the United Kingdom and Norway, Article 4; the agreement of 6 October 1965 between the Netherlands and the United Kingdom relating to "the exploitation of single geological structures extending across the dividing line on the continental shelf under the North Sea"; and the agreement of 14 May 1962 between the Federal Republic and the Netherlands concerning a joint plan for exploiting the natural resources underlying the area of the Ems Estuary where the frontier between the two States has not been finally delimited.) The Court does not consider that unity of deposit constitutes anything more than a factual element which it is reasonable to take into consideration in the course of the negotiations for a delimitation. The Parties are fully aware of the existence of the problem as also of the possible ways of solving it.

98. A final factor to be taken account of is the element of a reasonable degree of proportionality which a delimitation effected according to equitable principles ought to bring about between the extent of the continental shelf appertaining to the States concerned and the lengths of their respective coastlines,—these being measured according to their general direction in order to establish the necessary balance between States with straight, and those with markedly concave or convex coasts, or to reduce very irregular coastlines to their truer proportions. The choice and application of the appropriate technical methods would be a matter for the parties. One method discussed in the course of the proceedings, under the name of the principle of the coastal front, consists in drawing a straight baseline between the extreme points at either end of the coast concerned, or in some cases a series of such lines. Where the parties wish to employ in particular the equidistance method of delimitation, the establishment of one or more baselines of this kind can play a useful part in eliminating or diminishing the distortions that might result from the use of that method.

99. In a sea with the particular configuration of the North Sea, and in view of the particular geographical situation of the Parties' coastlines upon that sea, the methods chosen by them for the purpose of fixing the delimitation of their respective areas may happen in certain localities to lead to an overlapping of the areas appertaining to them. The Court considers that such a situation must be accepted as a given fact and resolved either by an agreed, or failing that by an equal division of the overlapping areas, or by agreements for joint exploitation, the latter solution appearing particularly appropriate when it is a question of preserving the unity of a deposit.

100. The Court has examined the problems raised by the present case in its own context, which is strictly that of delimitation. Other questions relating to the general legal régime of the continental shelf, have been examined for that purpose only. This régime furnishes an example of a legal theory derived from a particular source that has secured a general following. As the Court has recalled in the first part of its Judgment, it was the Truman Proclamation of 28 September 1945 which was at the origin of the theory, whose special features reflect that origin. It would therefore not be in harmony with this history to over-systematize a pragmatic construct the developments of which have occurred within a relatively short space of time.

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101. For these reasons,

THE COURT,

by eleven votes to six,

finds that, in each case,

(A) the use of the equidistance method of delimitation not being obligatory as between the Parties; and

(B) there being no other single method of delimitation the use of which is in all circumstances obligatory;

(C) the principles and rules of international law applicable to the delimitation as between the Parties of the areas of the continental shelf in the North Sea which appertain to each of them beyond the partial boundary determined by the agreements of 1 December 1964 and 9 June 1965, respectively, are as follows:

(1) delimitation is to be effected by agreement in accordance with equitable principles, and taking account of all the relevant circumstances, in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other;

(2) if, in the application of the preceding sub-paragraph, the delimitation leaves to the Parties areas that overlap, these are to be divided between them in agreed proportions or, failing agreement, equally, unless they decide on a régime of joint jurisdiction, user, or exploitation for the zones of overlap or any part of them;

(D) in the course of the negotiations, the factors to be taken into account are to include:

(1) the general configuration of the coasts of the Parties, as well as the presence of any special or unusual features;

(2) so far as known or readily ascertainable, the physical and geological structure, and natural resources, of the continental shelf areas involved;

(3) the element of a reasonable degree of proportionality, which a delimitation carried out in accordance with equitable principles ought to bring about between the extent of the continental shelf areas appertaining to the coastal State and the length of its coast measured in the general direction of the coastline, account being taken for this purpose of the effects, actual or prospective, of any other continental shelf delimitations between adjacent States in the same region.

Done in English and in French, the English text being authoritative at the Peace Palace, The Hague, this twentieth day of February, one thousand nine hundred and sixty-nine, in four copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Federal Republic of Germany, to the Government of the Kingdom of Denmark and to the Government of the Kingdom of the Netherlands, respectively.

(Signed) J. L. BUSTAMANTE R.,
President.

(Signed) S. AQUARONE,
Registrar.

THIRD U.N. CONFERENCE ON THE LAW OF THE SEA

SECOND COMMITTEE, SECOND SESSION, 16TH MEETING

26 July 1974

Continental shelf

[*Agenda item 5*]

1. Mr. TUERK (Austria) said that the results of the Committee's work had so far not been as good as might have been expected or desired and he confirmed his delegation's readiness to do everything it could to help the Committee reach generally acceptable solutions.

2. The item before the Committee was of particular concern to his country. His delegation hoped that the new law of the sea would accommodate the legitimate interests of all States. That had not always been the case for certain groups of States, as could be seen from the legal norms established at Geneva in 1958, in the Convention on the Continental Shelf,[1] which totally disregarded the legitimate interests of the land-locked countries. That was understandable considering that the Truman Proclamation of 28 September 1945, on which the Geneva text had been based to some extent, had emanated from a country which did not have to take into account the interests of any land-locked States in its geographical area. In view of the political situation existing at that time, any misgivings which some countries might have had concerning the principle enunciated in the Proclamation had not been voiced. Other coastal States had followed the example set in the Proclamation, and their unilateral declarations had been given legal sanction by the 1958 Geneva Convention. He noted that of the 86 States participating in the First United Nations Conference on the Law of the Sea, in 1958, only 10 were land-locked, while of the 149 States invited to the current Conference 29 were land-locked. His country, like almost two thirds of the States participating in the current Conference, had not become a party to the Geneva Convention on the Continental Shelf.

3. The continental shelf had been defined as the zone around the continent extending from the low-water line to the depth where there was usually a marked increase of declivity to greater depth. Geophysical research had shown that the continental margin was an extension of the same nature as the continent itself. It could therefore be said that the continental margin was a submerged area of the continent and not just of its coastal fringes. The assertion that the continental shelf might be regarded as an extension of the land mass of the coastal nation and thus naturally appurtenant to it seemed correct only in cases where the coastal State was one of continental dimensions with no land-locked countries in its vicinity. The right to explore and exploit the natural resources of the continental shelf should not therefore be reserved for coastal States but should be accorded on an equitable basis to land-locked States in their respective geographical regions. Greater account should also be taken of the legitimate interests of other geographically disadvantaged States.

4. With regard to the delimitation of the continental shelf, he noted that in 1956 the International Law Commission in its draft articles concerning the law of the sea[2] had added the exploitability criterion to the depth criterion and that both criteria had been included in the 1958 Geneva Convention. His country could not accept reconfirmation of the exploitability criterion in the new convention because it implicitly contradicted the Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction[3] by voiding of much of its substance an area whose resources were the common heritage of mankind. His delegation had stated in the general debate at the 38th plenary meeting that it was essential for the Conference to create an economically meaningful international area; the only way to do justice to the concept of the common heritage of mankind would be to set up an international area with enough significant resources left to be shared among all States in the near future. Accordingly, his country preferred a distance criterion not exceeding 200 miles, for the inequity of the depth criterion had been an important reason why a number of States had extended their jurisdiction into the high seas.

5. If the Conference should reach agreement on the establishment of an economic zone, his delegation would see no need to retain the concept of the continental shelf, since the legal content of the term "continental shelf" should be absorbed by the new legal notion of "economic zone". Such a development would clarify the legal framework of matters relating to the sea-bed.

Mr. Pisk (Czechoslovakia), Vice-Chairman, took the Chair.

6. Mr. ZELAYA UBEDA (Nicaragua) said that the question of the continental shelf required frank examination and could be approached from two points of view. First, the 1958 Geneva Convention had created a legal fiction by dividing the submarine part of a territory into two parts, one situated below the territorial sea, the other situated beyond an undefined territorial sea where the coastal State would exercise sovereign rights with regard to the exploration and exploitation of natural resources. That legal fiction had prevented some countries, including his own, from acceding to the Convention. Secondly, when the various proposals concerning the continental shelf submitted to the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction were considered in the context of the notions of territorial sea, patrimonial sea and economic zone, it could be seen

[1] *Official Records of the General Assembly, Eleventh Session, Supplement No. 9*, para. 33.

[3] General Assembly resolution 2749 (XXV).

that the legal fiction had been retained: some ideas had been added which obscured the concept of the continental shelf, while others were open to interpretations which would extend the limits imposed on the coastal State with regard to its submerged territory to such a degree as to be tantamount to acceptance of a further partition of its territory and sovereign powers.

7. His delegation thought that all those ambiguous concepts should be made clear; the new law of the sea should have a rational foundation which would make it intelligible. The existing concept of the continental shelf was similar to an assertion that a person's foot was part of his body if he was barefoot, whereas, when shod, his foot was not part of his body but was identified with the shoe.

8. His country's laws maintained that the continental shelf was a part of its national territory. In view of the recognized special nature of the submerged area of the territory of Central America in the Caribbean, the listing of the characteristics of that area would show that his country's legal tradition of territoriality for the shelf dated from the distant past. Everything that was essential for the territorial integrity and physical, economic and institutional security of a country must be under its jurisdiction and control. That fundamental right was limited only by the equal right of another State. His country could easily demonstrate that its continental shelf in both oceans bordering its coastline—and in the Pacific up to a distance of 200 miles from its coasts—met that criterion fully. History had demonstrated the strategic value of some of the characteristics of his country's continental shelf. Moreover, everyone was aware that its emergent territory did not extend very far and had few resources; thus his country needed the resources of its continental shelf for its development, and the use of those resources was being fully integrated in the life of the country. It needed to complete that integration by establishing a régime which would guarantee rather than weaken it.

9. Some of the proposals concerning the continental shelf, the patrimonial sea and economic zone gave rise to deep concern. Either the economic zone would be limited to the water column situated between the outer limit of the territorial sea of 12 miles and the outer limit of 200 miles, or the concept of the continental shelf established in 1958 would be further weakened. His delegation preferred the former alternative.

10. It was inconceivable that the economic zone or patrimonial sea could be interpreted as including areas of the sea-bed which formed part of a country's continental shelf. That would make the problem more complicated and unless the ambiguity was removed, it would give rise to many reservations. Unless the Committee established that the economic zone or patrimonial sea had a national character, it would be creating yet another legal fiction. Some of the proposals would have serious economic effects and must be limited to certain resources and to a part of the water column of the economic zone. Other proposals, such as that of historic use, divested the concepts of the economic zone and patrimonial sea of the role incumbent upon them as instruments of development. The granting to international bodies of powers of jurisdiction and inspection over the national economic zone was only acceptable in a very limited area and possibly should not go beyond advisory functions. With regard to the question of compensatory measures in favour of the land-locked and other geographically disadvantaged States, his delegation thought that geographical proximity could not be the sole criterion, and it would not be fair to compel States with few resources to share them with others, while the rich countries enjoyed abundance.

11. Failure to reach agreement on certain basic aspects of the issues could impede the general work of the Conference. His delegation thought that some decisions were more basic than others and that it would help the work of all the Committees if they were dealt with separately in a partial and provisional consensus. Accordingly, his delegation had submitted a working document (A/CONF.62/C.2/L.17). It requested that at least the first four paragraphs should be incorporated in the informal working paper on the continental shelf to be prepared by the officers of the Committee, but stressed that all the proposals formed an integral whole.

12. His delegation had tried to set out a series of basic points leading towards a global agreement or the basic political framework for universal solutions. An essential concept was that adjoining the traditional national territory there should be a national zone made up of three separate elements; in it the coastal State would have the right to exercise separate jurisdictional powers to safeguard its own interests and the legitimate interests of the international community; the coastal State would be the guarantor of the international community, which, in its turn, would guarantee to the coastal State the inviolability and integrity of the national zone; finally, the working document dealt with the question of rights and duties in the national zone, including the questions of straits and land-locked and geographically disadvantaged States.

13. Mr. CHOWDHURY (Bangladesh) said that there were three issues before the Committee: the legal basis of the rights of coastal States over the continental shelf; the definition of the continental shelf; the relation of the continental shelf to the economic zone. In 1969, in paragraph 19 of its judgment on the North Sea continental shelf,[4] the International Court of Justice had held that the continental shelf was the natural prolongation of a State's territory and that the rights of the coastal State with regard to that area existed *ipso facto* and *ab initio* by virtue of its sovereignty over the land. Although those rights were embodied in the 1958 Geneva Convention, they existed independently of the Convention by virtue of their foundation in customary law. The International Court had in effect underscored the importance of the geological factor, which must be taken into account in any definition of the continental shelf.

14. The definition of the continental shelf in article 1 of the 1958 Convention lacked precision. The criterion of exploitability was open to various interpretations; by stressing the geological and the geographical factors, the International Court had not supported that criterion. The definition must be made more precise; the legal notion of the continental shelf must be different from the geological notion. In his delegation's view, the definition should be expressed in terms of depth, and the continental shelf should include the continental slope and rise. That view was supported by the judgment of the International Court that the coastal State's jurisdiction over submerged areas extended not only over the continental shelf but also over the slope and rise, on the grounds that they were a natural prolongation of the coastal State's territory.

15. The Conference could not refashion nature. Some coastal States had a better continental margin than others. The need was to agree on a more practical, rational, just and equitable definition of the continental shelf.

16. His delegation thought that the régime for the continental shelf should be considered together with that for the economic zone, for it would depend on the nature and characteristics of the economic zone, including the rights and jurisdictions of coastal States with regard to all the natural resources thereof.

17. Mr. ORION (Israel) said that the doctrine of the continental shelf was firmly established in modern international law and that nothing affected the legal status of the superjacent waters as high seas or of the air space above those waters. The freedom of the seas must be preserved and any interference with freedom of navigation and overflight must be kept to the absolute minimum.

18. Underlying the Truman Proclamation of 1945 was the consideration that the continental shelf was regarded as a

[4] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3.

single morphological unit joined with the continental area of a given State; hence the coastal State enjoyed sovereign rights over it. Technological advances since the 1958 United Nations Conference on the Law of the Sea required a re-examination of the law and new agreements with a view to preventing conflicts. His delegation, which agreed that the rules for the delimitation of the outer limit of the continental shelf should be revised, believed that the criteria of depth and exploitability were now outdated. Israel, a country with a narrow shelf and a short coastline, was unable to support any criterion based on depth as the seaward limit of the continental shelf and it preferred a fixed distance from the shore as an alternative to exploitability.

19. It was advisable to permit each coastal State to define the outer limit of its continental shelf up to an agreed maximum measured from the baselines in order to help the disadvantaged coastal States to exploit the sea-bed within the area designated for the continental shelf. In a semi-closed sea like the Mediterranean, the problem of delimiting the continental shelf for coastal States, whether adjacent or opposite to each other, was that their shelves were likely to overlap. Those States should, therefore, respect each other's sovereignty and conduct necessary consultations in order to arrive at a reasonable agreement on the boundary of the coastal sea-bed area of each State, particularly in accordance with the principle of equity as stated by the International Court of Justice in 1969 with respect to the continental shelf of the North Sea.

20. Since the proposed economic zone of 200 miles would cover the continental shelf, there was some question whether to deal with the issue at all. His delegation believed that the two items should be dealt with separately for the time being, because the economic zone concept was still being formulated and its full development would require time and experience, while the continental shelf was an established institution. With regard to the sea-bed and non-living resources, his delegation was still studying whether exclusive zones would be a practical proposition in Israel's part of the Mediterranean Sea; however, it did not wish to prejudice decisions with respect to the wide oceans where wide allocations were feasible.

21. It was generally recognized that only the developed States currently possessed the financial and technological competence for the exploitation of the submarine resources of the oceans. Accordingly, his delegation would suggest that the United Nations Development Programme should develop programmes to help developing countries to benefit from the resources of the deep sea adjacent to their continental shelf by providing research and technical facilities. His delegation understood that that zone was being limited to the non-living resources of the sea-bed and subsoil underlying a belt of sea up to a reasonable distance seaward of the outer limit of the continental shelf. That would not affect the character, as high seas, of the superjacent sea, nor the status of the air space above it.

22. He wished to recall that his delegation had not taken part in the work of the sea-bed Committee and, since it was speaking on the item for the first time, it reserved the right to speak again, particularly on new proposals introduced at the Conference.

1. Mr. MUKUNA KABONGO (Zaire) said that, over the years, the concept of the continental shelf had lost none of its economic importance. Consequently, it was only right to incorporate it in the new convention. Under the 1958 Geneva Convention on the Continental Shelf,[1] the concept was based on the criteria of morphology and depth. At the current stage, however, it was appropriate to review those criteria within the context of an over-all political solution. A 200-mile economic zone, if established, would, in practice, not differ in substance from the concept of the continental shelf. The rights of a coastal State over the exploration and exploitation of the resources within the relevant economic zone would necessarily cover the mineral resources of the continental shelf, which henceforth should be delimited in accordance with the criterion of distance and not that of exploitability. The continental margin beyond the 200-mile limit would fall within the jurisdiction of the proposed international authority, which would have more extensive powers over that area.

Mr. Pisk (Czechoslovakia), Vice-Chairman, took the Chair.

2. Mr. ROTKIRCH (Finland) said that the question of the future régime of the continental shelf was closely linked to the various new proposals to extend the jurisdiction of coastal States over the natural resources adjacent to their coast, and particularly to the principle of an economic zone. The concept of the continental shelf embodied in the 1958 Geneva Convention on the Continental Shelf was widely accepted and applied by States, including States not parties to the Convention. Accordingly, the function of the Conference was not to abolish the concept, but rather to seek agreement on an exact definition of the outer limit of the continental shelf.

3. The part of the continental shelf situated within the proposed 200-mile economic zone would in practice be absorbed into that zone and would no longer exist as a special régime. The proposals to extend the maximum breadth of the territorial sea to 200 miles would have the same effect. There might be States, however, especially coastal States in enclosed or semi-enclosed sea areas, which did not wish to establish economic zones as such over the whole area of their continental shelf, or States which wished to establish zones of a limited economic nature only, such as fishery zones, of which there were already many examples. In such cases, his delegation understood that the current concept of the continental shelf would remain valid. That view was also reflected in some of the proposals submitted to the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction. If the concept were not to remain valid, difficult situations could arise in many areas of the world where the continental shelves of bordering States had been delimited through bilateral or multilateral agreements.

4. What should be avoided was the creation of a situation in which current agreements would have to be renegotiated just because the concept of the continental shelf had ceased to exist within the area over which an economic zone was established.

REPORT OF U.S. SENATE COMM. ON COMMERCE,

94TH CONG., 1ST SESS.,

THIRD U.N. LAW OF THE SEA CONFERENCE 24-28

(Comm. Print 1975)

THE ECONOMIC ZONE

The concept of exclusive coastal state jurisdiction over the renewable and non-renewable resources which are found in the water, in the seabed, and in the subsoil of an area adjacent to the territorial sea, was first introduced at a meeting of ministers of Caribbean nations on the law of the sea held in Santo Domingo in June 1972. In a declaration issued on June 7, 1972, the Caribbean nations held that coastal states had sovereign rights over such resources in an area (which they called the patrimonial sea) not exceeding a maximum of 200 nautical miles.[12] The Caribbean declaration was followed by draft articles submitted by Kenya, which specifically refer to the rights of coastal states "to establish an Economic Zone beyond the territorial sea for the primary benefit of their peoples and their respective economies in which they shall exercise sovereign rights over the natural resources for the purpose of exploration and exploitation." The rights of the coastal state under the Kenyan draft are more extensive than those under the Santo Domingo Declaration and include the right of the coastal state to regulate scientific research and marine pollution within the Economic Zone. In terms of the limits of the area, the Kenyan draft states that "the Economic Zone shall not in any case exceed 200 nautical miles, measured from the baselines for determining the territorial sea." A year later, the Organization for African Unity at its 21st ordinary session in Addis Ababa, Ethiopia, from 17 to 24 May 1973, adopted the Kenyan draft on the Economic Zone.[13] Gradually, a growing number of developing and some developed nations adopted the 200 nautical mile Economic Zone concept, but the major maritime countries continued their opposition. Finally, at the Caracas session, the Soviet Union and the United States endorsed the concept of a 200 nautical mile economic zone under certain conditions. On July 11, 1974, Ambassador John R. Stevenson stated:

> We are prepared to accept, and indeed we would welcome, general agreement on a 12 mile outer limit for the territorial sea and a 200 mile outer limit for the economic zone, provided it is part of an acceptable comprehensive package including a satisfactory regime within and beyond the economic zone and provision for unimpeded transit of straits used for internatonal navigation.[16]

U.S. position.—The willingness of the United States and other developed coastal states (Japan has not yet endorsed the concept) to accept a 200 mile outer limit for the economic zone depends on the concurrent negotiation and acceptance of correlative coastal state duties. The U.S. draft proposal on the economic zone includes the following provisions:

(1) the outer limit of the economic zone shall not exceed 200 n.m. from applicable baselines for measuring the territorial sea; within the economic zone the coastal state shall have exclusive rights for the purpose of exploring and exploiting all natural resources of the seabed, the subsoil, and the superjacent waters;

(2) coastal states may not interfere with the freedom of navigation and overflight, and other rights recognized by the general principles of international law, except as otherwise specifically provided;

(3) coastal states shall have exclusive rights for the purpose of regulating fishing within the economic zone;

(4) coastal states shall ensure conservation of renewable resources within the economic zone based on scientific research and without discrimination against any fisherman;

(5) the coastal state shall ensure full utilization of renewable resources within the economic zone, and for this purpose shall permit nationals of other states to fish for that portion of the allowable catch not fully utilized by its nationals, and on the basis of priorities. Priorities favor states that have normally fished for the resource, neighboring and land-locked states;

(6) special regulations for anadromous species such as salmon favoring the state of origin;

(7) special regulations for highly migratory species such as tuna, which will be regulated by the coastal state within the economic zone, and by the state of nationality outside the economic zone, in accordance with regulations established by appropriate international and regional fishing organizations;

(8) coastal states will exercise sovereign rights over the continental shelf for the purpose of exploring and exploiting its natural resources. The continental shelf is defined as the seabed and subsoil of the submarine areas adjacent to and beyond the territorial sea to the limit of the economic zone or, beyond that limit, throughout the submerged natural prolongation of the land territory of the coastal state to the outer limit of its continental margin. The seward limit of the continental margins still need to be defined;

(9) other provisions call for guarantees of foreign investment and sharing of revenue of non-renewable resources seward of the territorial sea or the 200 meter isobath, whichever is further; and

(10) rights of the coastal state over the continental shelf do not affect the legal status of the superjacent waters, or that of air space above those waters.[17]

The present U.S. position is both a recognition of the growing consensus on the concept of a 200 n.m. economic zone and a compromise between domestic coastal and distant-water fisheries. The United States has a major interest in both. Its distant-water tuna and shrimp fisheries rank among the most important U.S. fisheries in terms of value landed. At the same time, the United States has recognized the need to protect its coastal fisheries from the rapidly increasing danger of overfishing. Existing international law does not sufficiently protect marine fisheries beyond a narrow zone of twelve miles, and international and regional fisheries treaties and organizations have not proven effective in the fight against overfishing. The proposed economic zone of 200 nautical miles, coupled with special regulations for anadromous and highly migratory species, would bring almost all fisheries of commercial importance under the management of coastal states and international fisheries organizations.

The provision calling for coastal state jurisdiction over the resources of the seabed and subsoil to the outer limit of the continental margin, would also give the coastal state control over almost all potential petroleum provinces in the oceans. The only significant category of exploitable resources outside the economic zone are the manganese nodules, which are primarily located on the deep seabed. The present U.S. position on the continental shelf differs from the original Nixon proposals of 1970. At that time, the United States proposed that all nations adopt as soon as possible a treaty under which they would renounce national claims over seabed resources beyond the 200 meter isobath and would agree to regard those resources as the common heritage of mankind.[18] The Department of the Interior did not favor the Nixon draft, and foreign reaction to the idea of international control was also negative. In response to these negative responses the United States position shifted toward support for the 200-mile economic zone concept.

Developing nations' position.—Most developing coastal states favor a 200 nautical mile economic zone in one form or another. However, they differ significantly in their approach. The African position as

presented in the Declaration of the Organization of African States in 1973, for example, considers the exclusive economic zone as an area over which the coastal state exercises sovereignty over the living and non-living resources of the area. The African nations consider the economic zone as a national area of sovereignty for economic purposes, within which the coastal state not only enjoys sovereignty over all resources, but also exercises exclusive jurisdiction in the area for their protection. Rather than considering the economic zone as an area within which the coastal state has certain rights, the O.A.U. position regards the economic zone as a national zone within which the international community has certain well defined but restricted rights. They reject the obligation to ensure full obligation of living resources and insist on coastal state controls over scientific research and regulation of pollution within the economic zone. Even navigation may be subject to coastal state regulation under the African proposal. The African proposal as it stands does not appear to be acceptable to the maritime nations.

Even within the Group of 77 there are differences of opinion on the rights and obligations of the coastal states within the economic zone. Many land-locked and geographically disadvantaged states fear that unless they have access to the resources of the economic zone and receive guarantees of transit, they have little to gain from the proposed economic zone. This was clearly brought out in the Kampala declaration. Their support for the economic zone will largely depend on the degree of accomodation that coastal states are willing to bring about.

There are further complications. Acceptance of the economic zone will depend on agreement on territorial limits and international straits. Moreover, the Conference also needs to reach agreement on the problem of islands, baselines, archipelagoes, and so on. The list of items before Committee II totals 15 out of the 24 items before the Conference, and because so many controversial matters have to be examined, Committee II made less progress than Committee I at the Caracas session. At the Caracas session, Committee II devoted most of its time to a presentation of individual national positions and proposals at its 46 formal meetings (July 3–August 28) and to an effort in informal sessions to focus future discussions and negotiations on fundamental issues. Much of the available time was used attempting to debate and comment on the more than 80 formal proposals and to reduce as much as possible the number of alternative formulations in the working papers.

Ambassador Andres Aguilar of Venezuela, the Chairman of Committee II, summed up the progress made at Caracas in Committee II in a concluding statement at the end of the session:

> The idea of a territorial sea of 12 miles and of an exclusive economic zone beyond the territorial sea up to a total distance of 200 miles is, at least at this time, the keystone of the compromise solution favored by the majority of States participating in the Conference. The acceptance of this idea is, of course, dependent on a satisfactory solution of other issues especially the issue of passage through straits used for international navigation, the outermost limits of the continental shelf and the actual retention of this concept, and last, but not least, the aspirations of land-locked and other countries which, for one reason or another, consider themselves geographically disadvantaged. There are, in addition, other problems which must be studied and solved in connection with this idea, for example, those relating to archipelagoes and to the regime of islands in general. It is necessary to go further into the matter of the nature and characteristics of the concept of an exclusive economic zone, a subject on which important differences still persist. On all these subjects substantial progress has been made which lays the foundations for negotiation in the intersessional period and at the next session of the conference. Much headway has been made at Caracas along the road which will lead us to the final goal.[21]

U.N. DOC. A/CONF. 62/WP. 8/REV. 1/PART II

3D Official Records 5, 160-65

(Informal Single Negotiating Text)

Chapter III: The exclusive economic zone

Article 44

Rights, jurisdiction and duties of the coastal State in the exclusive economic zone

1. In an area beyond and adjacent to its territorial sea, described as the exclusive economic zone, the coastal State has:

(*a*) Sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the bed and subsoil and the superjacent waters;

(*b*) Exclusive rights and jurisdiction with regard to the establishment and use of artificial islands, installations and structures;

(*c*) Exclusive jurisdiction with regard to:

(i) Other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds; and

(ii) Scientific research;

(*d*) Jurisdiction with regard to the preservation of the marine environment, including pollution control and abatement;

(*e*) Other rights and duties provided for in the present Convention.

2. In exercising its rights and performing its duties under the present Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States.

3. The rights set out in this article with respect to the bed and subsoil shall be exercised in accordance with Chapter IV.

Article 45

Breadth of the exclusive economic zone

The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

Article 46

Rights and duties of other States in the exclusive economic zone

1. In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of the present Convention, the freedoms of navigation and overflight and of the laying of submarine cables and pipelines and other internationally lawful uses of the sea related to navigation and communication.

2. Articles 77 to 103 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Chapter.

3. In exercising their rights and performing their duties under the present Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations enacted by the coastal State in conformity with this Chapter and other rules of international law.

Article 47

Basis for the resolution of conflicts regarding the attribution of rights and jurisdiction in the exclusive economic zone

In cases where the present Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.

Article 48

Artificial islands, installations and structures in the exclusive economic zone

1. In the exclusive economic zone, the coastal State shall have the exclusive right to construct and to authorize and regulate the construction, operation and use of:

(*a*) Artificial islands;

(*b*) Installations and structures for the purposes provided for in article 44 and other economic purposes;

(*c*) Installations and structures which may interfere with the exercise of the rights of the coastal State in the zone.

2. The coastal State shall have exclusive jurisdiction over such artificial islands, installations and structures, including jurisdiction with regard to customs, fiscal, health, safety and immigration regulations.

3. Due notice must be given of the construction of such artificial islands, installations or structures, and permanent means for giving warning of their presence must be maintained. Any installations or structures which are abandoned or disused must be entirely removed.

4. The coastal State may, where necessary, establish reasonable safety zones around such artificial islands, installations and structures in which it may take appropriate measures to ensure the safety both of navigation and of the artificial islands, installations and structures.

5. The breadth of the safety zones shall be determined by the coastal State, taking into account applicable international standards. Such zones shall be designed to ensure that they are reasonably related to the nature and function of the artificial islands, installations or structures, and shall not exceed a distance of 500 metres around them, measured from each point of their outer edge, except as authorized by generally accepted international standards or as recommended by the appropriate international organizations.

6. All ships must respect these safety zones and shall comply with generally accepted international standards regarding navigation in the vicinity of artificial islands, installations, structures and safety zones. Due notice shall be given of the extent of safety zones.

7. Artificial islands, installations and structures and the safety zones around them may not be established where interference may be caused to the use of recognized sea lanes essential to international navigation.

8. Artificial islands, installations and structures have no territorial sea of their own and their presence does not affect the delimitation of the territorial sea or of other zones of coastal State jurisdiction or of the continental shelf.

Article 49

Research

The consent of the coastal State shall be obtained in respect of any research concerning the exclusive economic zone and undertaken there, as provided in Chapter . . . (Marine scientific research)

Article 50

Conservation of the living resources

1. The coastal State shall determine the allowable catch of the living resources in its exclusive economic zone.

2. The coastal State, taking into account the best scientific evidence available to it, shall ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation. As appropriate, the coastal State and relevant subregional, regional and global organizations shall co-operate to this end.

3. Such measures shall also be designed to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the economic needs of coastal fishing communities and the special requirements of developing countries, and taking into account fishing patterns, the interdependence of stocks and any generally recommended subregional, regional or global minimum standards.

4. In establishing such measures the coastal State shall take into consideration the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened.

5. Available scientific information, catch and fishing effort statistics, and other data relevant to the conservation of fish stocks shall be contributed and exchanged on a regular basis through subregional, regional and global organizations where appropriate and with participation by all States concerned, including States whose nationals are allowed to fish in the exclusive economic zone.

Article 51

Utilization of the living resources

1. The coastal State shall promote the objective of optimum utilization of the living resources in the exclusive economic zone without prejudice to article 50.

2. The coastal State shall determine its capacity to harvest the living resources of the exclusive economic zone. Where the coastal State does not have the capacity to harvest the entire allowable catch, it shall, through agreements or other arrangements and pursuant to the terms, conditions and regulations referred to in paragraph 4, give other States access to the surplus of the allowable catch.

3. In giving access to other States to its exclusive economic zone under this article, the coastal State shall take into account all relevant factors, including, *inter alia*, the significance of the living resources of the area to the economy of the coastal State concerned and its other national interests, the provisions of articles 58 and 59, the requirements of developing countries in the subregion or region in harvesting part of the surplus and the need to minimize economi

dislocation in States whose nationals have habitually fished in the zone or which have made substantial efforts in research and identification of stocks.

4. Nationals of other States fishing in the exclusive economic zone shall comply with the conservation measures and with the other terms and conditions established in the regulations of the coastal State. These regulations shall be consistent with the present Convention and may relate, *inter alia*, to the following:

(*a*) Licensing of fishermen, fishing vessels and equipment, including payment of fees and other forms of remuneration, which in the case of developing coastal States, may consist of adequate compensation in the field of financing, equipment and technology relating to the fishing industry;

(*b*) Determining the species which may be caught, and fixing quotas of catch, whether in relation to particular stocks or groups of stocks or catch per vessel over a period of time or to the catch by nationals of any State during a specified period;

(*c*) Regulating seasons and areas of fishing, the types, sizes and amount of gear, and the numbers, sizes and types of fishing vessels that may be used;

(*d*) Fixing the age and size of fish and other species that may be caught;

(*e*) Specifying information required of fishing vessels, including catch and effort statistics and vessel position reports;

(*f*) Requiring, under the authorization and control of the coastal State, the conduct of specified fisheries research programmes and regulating the conduct of such research, including the sampling of catches, disposition of samples and reporting of associated scientific data;

(*g*) The placing of observers or trainees on board such vessels by the coastal State;

(*h*) The landing of all or any part of the catch by such vessels in the ports of the coastal State;

(*i*) Terms and conditions relating to joint ventures or other co-operative arrangements;

(*j*) Requirements for training personnel and transfer of fisheries technology, including enhancement of the coastal State's capability of undertaking fisheries research;

(*k*) Enforcement procedures.

5. Coastal States shall give due notice of conservation and management regulations.

Article 52

Stocks occurring within the exclusive economic zones of two or more coastal States or both within the exclusive economic zone and in an area beyond and adjacent to it

1. Where the same stock or stocks of associated species occur within the exclusive economic zones of two or more coastal States, these States shall seek either directly or through appropriate subregional or regional organizations to agree upon the measures necessary to co-ordinate and ensure the conservation and development of such stocks without prejudice to the other provisions of this Chapter.

2. Where the same stock or stocks of associated species occur both within the exclusive economic zone and in an area beyond and adjacent to the zone, the coastal State and the States fishing for such stocks in the adjacent area shall seek either directly or through appropriate subregional or regional organizations to agree upon the measures necessary for the conservation of these stocks in the adjacent area.

Article 53

Highly migratory species

1. The coastal State and other States whose nationals fish in the region for the highly migratory species listed in the annex shall co-operate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the exclusive economic zone. In regions where no appropriate international organization exists, the coastal State and other States whose nationals harvest these species in the region shall co-operate to establish such an organization and participate in its work.

2. The provisions of paragraph 1 apply in addition to the other provisions of this Chapter.

Article 54

Marine mammals

Nothing in the present Convention restricts the right of a coastal State or international organization, as appropriate, to prohibit, regulate and limit the exploitation of marine mammals. State shall co-operate either directly or through appropriate international organizations with a view to the protection and management of marine mammals.

Article 55

Anadromous stocks

1. States in whose rivers anadromous stocks originate shall have the primary interest in and responsibility for such stocks.

2. The State of origin of anadromous stocks shall ensure their conservation by the establishment of appropriate regulatory measures for fishing in all waters landwards of the outer limits of its exclusive economic zone and for fishing provided for in subparagraph (*b*) of paragraph 3. The State of origin may, after consultation with other States fishing these stocks, establish total allowable catches for stocks originating in its rivers.

3. (*a*) Fisheries for anadromous stocks shall be conducted only in the waters landwards of the outer limits of exclusive economic zones, except in cases where this provision would result in economic dislocation for a State other than the State of origin.

(*b*) The State of origin shall co-operate in minimizing economic dislocation in such other States fishing these stocks, taking into account the normal catch and the mode of operations of such States, and all the areas in which such fishing has occurred.

(*c*) States referred to in subparagraph (*b*), participating by agreement with the State of origin in measures to renew anadromous stocks, particularly by expenditures for that purpose, shall be given special consideration by the State of origin in the harvesting of stocks originating in its rivers.

(*d*) Enforcement of regulations regarding anadromous stocks beyond the exclusive economic zone shall be by agreement between the State of origin and the other States concerned.

4. In cases where anadromous stocks migrate into or through the waters landwards of the outer limits of the exclusive economic zone of a State other than the State of origin, such State shall co-operate with the State of origin with regard to the conservation and management of such stocks.

5. The State of origin of anadromous stocks and other States fishing these stocks shall make arrangements for the implementation of the provisions of this article, where appropriate, through regional organizations.

Article 56

Catadromous species

1. A coastal State in whose waters catadromous species spend the greater part of their life cycle shall have responsibility for the management of these species and shall ensure the ingress and egress of migrating fish.

2. Harvesting of catadromous species shall be conducted only in waters in respect of which the State mentioned in paragraph 1 exercises sovereign rights over the living resources and, when conducted in the exclusive economic zone, shall be subject to the provisions of the present Convention concerning fishing in the zone.

3. In cases where catadromous fish migrate through the waters of another State or States, whether as juvenile or maturing fish, the management, including harvesting, of such fish shall be regulated by agreement between the State mentioned in paragraph 1 and the State or States concerned. Such agreement shall ensure the rational management of the species and take into account the responsibilities of the State mentioned in paragraph 1 for the maintenance of these species.

Article 57

Sedentary species

This Chapter does not apply to sedentary species as defined in paragraph 4 of article 65.

Article 58

Right of land-locked States

1. Land-locked States shall have the right to participate in the exploitation of the living resources of the exclusive economic zones of adjoining coastal States on an equitable basis, taking into account the relevant economic and geographical circumstances of all the States concerned. The terms and conditions of such participation shall be determined by the States concerned through bilateral, subregional or regional agreements. Developed land-locked States shall, however, be entitled to exercise their rights only within the exclusive economic zones of adjoining developed coastal States.

2. This article is subject to the provisions of articles 50 and 51.

3. Paragraph 1 is without prejudice to arrangements agreed upon in regions where the coastal States may grant to land-locked States of the same region equal or preferential rights for the exploitation of the living resources in the exclusive economic zones.

Article 59

Right of certain developing coastal States in a subregion or region

1. Developing coastal States which are situated in a subregion or region whose geographical peculiarities make such States particularly dependent for the satisfaction of the nutritional needs of their populations upon the exploitation of the living resources in the exclusive economic zones of their neighbouring States and developing coastal States which can claim no exclusive economic zones of their own shall have the right to participate, on an equitable basis, in the exploitation of living resources in the exclusive economic zones of other States in a subregion or region.

2. The terms and conditions of such participation shall be determined by the States concerned through bilateral, subregional or regional agreements, taking into account the relevant economic and geographical circumstances of all the States concerned, including the need to avoid effects detrimental to the fishing communities or to the fishing industries of the States in whose zones the right of participation is exercised.

3. This article is subject to the provisions of articles 50 and 51.

Article 60

Restrictions on transfer of rights

1. Rights provided under articles 58 and 59 to exploit living resources cannot without the express consent of the coastal State be transferred to third States or their nationals by lease or license, by establishing joint collaboration ventures or by any other arrangements.

2. Paragraph 1 does not preclude States from obtaining technical or financial assistance from third States or international organizations in order to facilitate the exercise of the rights provided under articles 58 and 59.

Article 61

Enforcement of laws and regulations of the coastal State

1. The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judical proceedings, as may be necessary to ensure compliance with the laws and regulations enacted by it in conformity with the present Convention.

2. Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security.

3. Coastal State penalties for violations of fisheries regulations in the exclusive economic zone may not include imprisonment, in the absence of agreement to the contrary by the States concerned, or any other form of corporal punishment.

4. In cases of arrest or detention of foreign vessels the coastal State shall promptly notify, through appropriate channels, the flag State of the action taken and of any penalties subsequently imposed.

Article 62

Delimitation of the exclusive economic zone between adjacent or opposite States

1. The delimitation of the exclusive economic zone between adjacent or opposite States shall be effected by agreement in accordance with equitable principles, employing, where appropriate, the median or equidistant line, and taking account of all the relevant circumstances.

2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part . . . (Settlement of disputes).

3. Pending agreement or settlement, the States concerned shall make provisional arrangements, taking into account the provisions of paragraph 1.

4. For the purposes of the present Convention, "median or equidistant line" means the line every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

5. Where there is an agreement in force between the States concerned, questions relating to the delimitation of the exclusive economic zone shall be determined in accordance with the provisions of that agreement.

Article 63

Charts and lists of geographical co-ordinates

1. Subject to this Chapter, the outer limit lines of the exclusive economic zone and the lines of delimitation drawn in accordance with article 62 shall be shown on charts of a scale or scales adequate for determining them. Where appropriate, lists of geographical co-ordinates of points, specifying the geodetic datum, may be substituted for such outer limit lines or lines of delimitation.

2. The coastal State shall give due publicity to such charts or lists of geographical co-ordinates and shall deposit a copy of each such chart or list with the Secretary-General of the United Nations.

Chapter IV: Continental shelf

Article 64

Definition of the continental shelf

The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.

Article 65

Rights of the coastal State over the continental shelf

1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.

2. The rights referred to in paragraph 1 are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State.

3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.

4. The natural resources referred to in this Chapter consist of the mineral and other non-living resources of the sea-bed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the sea-bed or are unable to move except in constant physical contact with the sea-bed or the subsoil.

Article 66

Superjacent waters and air space

The rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters or the air space above those waters.

Article 67

Submarine cables and pipelines on the continental shelf

1. All States are entitled to lay submarine cables and pipelines on the continental shelf, in accordance with the provisions of this article.

2. Subject to its right to take reasonable measures for the exploration of the continental shelf, the exploitation of its natural resources and the prevention of pollution from pipelines, the coastal State may not impede the laying or maintenance of such cables or pipelines.

3. The delineation of the course for the laying of such pipelines on the continental shelf is subject to the consent of the coastal State.

4. Nothing in this Chapter affects the right of the coastal State to establish conditions for cables or pipelines entering its territory or territorial sea, or its jurisdiction over cables and pipelines constructed or used in connexion with the exploration of its continental shelf or exploitation of its resources or the operations of artificial islands, installations and structures under its jurisdiction.

5. When laying submarine cables or pipelines, States shall pay due regard to cables or pipelines already in position. In particular, possibilities of repairing existing cables or pipelines shall not be prejudiced.

Article 68

Artificial islands, installations and structures on the continental shelf

Article 48 applies *mutatis mutandis* to artificial islands, installations and structures on the continental shelf.

Article 69

Drilling on the continental shelf

The coastal State shall have the exclusive right to authorize and regulate drilling on the continental shelf for all purposes.

Article 70

Payments and contributions with respect to the exploitation of the continental shelf beyond 200 miles

1. The coastal State shall make payments or contributions in kind in respect of the exploitation of the non-living

resources of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

2. The payments and contributions shall be made annually with respect to all production at a site after the first five years of production at that site. For the sixth year, the rate of payment or contribution shall be . . . per cent of the value or volume of production at the site. The rate shall increase by . . . per cent for each subsequent year until the tenth year and shall remain at . . . per cent thereafter. Production does not include resources used in connexion with exploitation.

3. The International Authority shall determine if and to what extent developing countries shall be obliged to make payments or contributions provided for in paragraphs 1 and 2.

4. The payments or contributions shall be made to the International Authority on terms and procedures to be agreed upon with the Authority in each case. The International Authority shall distribute these payments and contributions on the basis of equitable sharing criteria, taking into account the interests and needs of developing countries, particularly the least developed amongst them.

Article 71

Delimitation of the continental shelf between adjacent or opposite States

1. The delimitation of the continental shelf between adjacent or opposite States shall be effected by agreement in accordance with equitable principles, employing, where appropriate, the median or equidistant line, and taking account of all the relevant circumstances.

2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part . . . (Settlement of disputes).

3. Pending agreement or settlement, the States concerned shall make provisional arrangements, taking into account the provisions of paragraph 1.

4. Where there is an agreement in force between the States concerned, questions relating to the delimitation of the continental shelf shall be determined in accordance with the provisions of that agreement.

Article 72

Charts and lists of geographical co-ordinates

1. Subject to this Chapter the outer limit lines of the continental shelf and the lines of delimitation drawn in accordance with article 71 shall be shown on charts of a scale or scales adequate for determining them. Where appropriate, lists of geographical co-ordinates of points, specifying the geodetic datum may be substituted for such outer limit lines or lines of delimitation.

2. The coastal State shall give due publicity to such charts or lists of geographical co-ordinates and shall deposit a copy of each such chart or list with the Secretary-General of the United Nations.

Article 73

Research

The consent of the coastal State shall be obtained in respect of any research concerning the continental shelf and undertaken there, as provided in Chapter . . . (Marine scientific research).

Article 74

Tunnelling

This Chapter does not prejudice the right of the coastal State to exploit the subsoil by means of tunnelling, irrespective of the depth of water above the subsoil.

George Cadwalader, "Freedom for Science in the Oceans"

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"Americans," wrote de Tocqueville in 1835, "judge that the diffusion of knowledge must necessarily be advantageous and the consequences of ignorance fatal" (*1*). No less true today, this characterization perhaps helps explain the astonishment with which most American oceanographers have reacted to the efforts of developing countries to curtail their freedom to conduct scientific research in the oceans. The response of our marine scientists has been to base their defense of this freedom largely on the intangible but deeply felt conviction that "the quest for knowledge about the oceans is a universal right not to be abridged by national restrictions" (*2*, p. 1). The comparatively few efforts that have been made to reply to the often well-articulated contrary views of the developing countries tend to stress the economic and social benefits that accrue from unrestricted basic research. This argument has proved less than convincing to countries whose mistrust of science is based on the belief that its benefits (which they do not question) are limited to the wealthy few possessing the technology to exploit its findings. For, not surprisingly, the growing tension that exists between the developed and developing countries has become a factor in the debate within the United Nations over freedom for science (*3*).

Since 1945, the area of the ocean known as the "high seas" has been steadily eroded by coastal states' expanding their claims of jurisdiction. More recently, the legal doctrine of freedom of the seas, which historically has applied beyond the limits of national jurisdiction, has come under increasing attack by states calling for the establishment of some form of international authority to regulate on behalf of the international community activities under and on the high seas. These pressures for change, exerted primarily by the developing countries, have led the U.N. General Assembly to call for a new Law of the Sea Conference to begin in 1973. A 90-nation "Committee on the Peaceful Uses of the Seabed and Ocean Floor Beyond the Limits of National Jurisdiction" (known simply as the Seabed Committee) is currently engaged in negotiations preparatory to the conference.

Almost inevitably, the result of the 1973 conference will be that substantially more, if not all, of the ocean space will fall under some form of national or international jurisdiction. The extent of the jurisdiction exercised in the various areas of control that develop will be a matter for negotiation, and freedom for science will certainly be one of the more controversial bargaining points. If science is to continue with a minimum of regulation, the opponents of controls will have to approach these negotiations with more than impassioned pleas for total freedom. Their case will have to be built on a realistic assessment of what can be achieved in view of the prevailing political climate, and they will have to bring something to bargain with in terms of specific proposals aimed at meeting the objections of those who seek to restrict or prevent science in their areas of jurisdiction. Above all, they must be flexible enough to adapt their position to changes in the legal doctrines that justify actions within the ocean.

Freedom versus the Common Heritage

The 17th-century doctrine of freedom of the seas provided the basis for all law of the sea for nearly 300 years. The preeminence of this doctrine was challenged in 1970, when the U.N. General Assembly declared the seabed and its resources beyond the limits of national jurisdiction, to be the "common heritage of all mankind" (*4*). To implement the concept of common heritage will require different legal arrangements than would prevail if the seabeds remained under traditional law. The comparisons in the box on page 17 illustrate these differences.

The Attack on Freedom

The dissatisfaction of developing countries with traditional law of the sea was evident at the 1958 Law of the Sea Conference (*5*). The acceptance of the common heritage concept 12 years later provided a basis for a legal system more compatible with their interests and has led to attacks of increasing frequency on the doctrine of freedom of the seas.

Freedom of the seas evolved into accepted law during a period when the major European nations were beginning to develop sizable merchant fleets. The origin of this concept in 1609, as a counterclaim to the Pope's division of the ocean between Spain and Portugal, has not been lost on the developing countries, who correctly contend that international law is only valid as long as it reflects the interests of the majority of the international community. Freedom of the seas, they argue, met this test as long as the oceans were regarded primarily as avenues for commerce. The principle has become increasingly obsolete as traditional uses of the sea have been expanded and other uses have emerged. Moreover, some have contended that no principle can be held as binding on states that did not even exist during the period in

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which it became accepted international law.

The developing countries thus maintain that there exists today a need for new legal arrangements governing the uses of the sea—arrangements guaranteeing them access to the ocean resources, which are the common heritage, but which de facto are denied to all but the developed countries under the existing concept of freedom of the seas. This point was effectively presented to the U.N. International Law Commission by the Ecuadorian delegate, who argued that "the alleged equality of all states with respect to their rate of access to the high seas and their right to exploit its resources is somewhat illusory, because only the great maritime and shipping powers exercise this right on a really large scale. Thus, the exercise of this right depends on economic power, and equality before the law loses all reality in the face of the economic inequality of states" (*6*, p. 21).

The doctrine of common heritage meets this objection by providing that a state's right to share in seabed resources is not dependent on its economic power. The Seabed Committee has accordingly been charged with designing an International Seabed Authority (ISA) for the purpose of ensuring the equitable distribution of profits from seabed resources among the international community. A major problem in this effort has been the inability to agree on the limits of the geographical area in which the common heritage concept is to apply.

Developing countries have, by and large, argued with equal fervor for both the common heritage and the right to wide areas of national jurisdiction over ocean space. Their critics have been quick to point out that such national claims remove from the area of the common heritage most of the known seabed resources. This criticism has not yet moved the developing countries to reconsider their position, nor is it likely to, since it has yet to be shown that in the short term a coastal state will profit more from the international management of seabed resources than it would from outright ownership of its adjacent continental shelf. Thus, from the perspective of most poor countries, the most advantageous bargaining position is to claim ownership of their shelves and use the vehicle of common heritage to secure a share in whatever resources lie beyond.

This position portends ill for science. If it prevails, it promises: (i) the creation of a strong ISA with broad powers to regulate activities on and under the high seas and (ii) expanded national jurisdiction over ocean space now considered high seas.

The Functions of the ISA

In general, the developing countries have maintained that the ISA should have broad powers to regulate activities (including scientific research) within the area of its jurisdiction (*7*). The developed countries argue that the ISA's functions should be limited to granting leases to mining rights on the sea floor and levying taxes on any resources recovered, with the proceeds being used to support projects of benefit to the international community. The traditional concept of freedom of the seas would remain applicable to all activities not specifically conceded to the ISA.

This apparently procedural dispute reflects the more fundamental disagreement over the legal basis for activities within the ocean. Underlying the position of the developing countries is the assumption that common heritage has replaced freedom as the basis for all law of the sea. The ISA, by virtue of its common heritage mandate, thus acquires at least potential jurisdiction over all activities formerly considered free.

The preference of developed countries for an ISA of strictly limited jurisdiction assumes that the two legal doctrines can coexist. The United States in particular reflects this attitude. The United States was among the first countries to endorse the concept of seabed resources as the common heritage of mankind and to call for the establishment of an international authority to oversee exploitation (*8*). At the same time, the United States has continued in its support of the principle of freedom of the seas, particularly as this freedom relates to navigation, overflight, and (with a much lower priority) science. By so doing, it perpetuates an ambiguity introduced originally in 1945, when President Truman claimed for the United States ownership of all seabed resources on its adjacent continental shelf out to a water depth of 200 meters. Then, as now, the United States held to a territorial sea of 3 (nautical) miles in the interest of maximum freedom for navigation. Thus the effect of the Truman Proclamation was to claim jurisdiction only out to 3 miles on the ocean surface, while at the same time claiming far more extensive jurisdiction on the ocean floor. How to exercise jurisdiction on the ocean floor without exerting some control over the water column above has never been made entirely clear.

This question ceases to be theoretical in the case of the proposed ISA. Any lease the ISA grants on the sea floor will inevitably result in some form of mining activities on the sea surface. Large-scale seabed mining, legal by virtue of the common heritage principle, may impede or prevent other, more traditional uses of the ocean still justified on the basis of freedom. When this does occur, no clear way exists to evaluate the relative merits of the two competing activities, since each claims rights arising from a different legal concept.

Priorities among mutually exclusive uses can only be established if some common standard for comparison applies. When, as is the case with traditional law of the sea, all peaceful uses are presumed free, no such standard is provided. The rather crude criterion of "unreasonable interference" developed because conflicts have occasionally occurred. But the concept of freedom, as its name implies, remains predicated on the assumption that such conflicts will be the exception and that they can be easily resolved in view of the vastness of the ocean and the limited number of activities it supports. However, as activities increase and the apparent size of the ocean decreases, there arises a need for more precise standards than those provided by "unreasonable interference" to establish the optimum balance among activities. The common heritage concept permits uses to be ranked by the degree to which they serve the common heritage, or, alternatively, by the degree to which they do not impede it. The latter is perhaps the better test, since there are many uses which benefit the user and neither help nor harm anyone else.

There obviously can be no universally applicable ranking of activities. Priorities will vary with circumstances, but priorities can always be established if there is a clear objective. Maximizing the common heritage is a vague objective in the abstract, but for any given situation it translates into the realistic and practical goal of balancing activities for the maximum benefit of

the greatest number. This balance is not apt to occur naturally in a "free" environment, since often activities that compete for the same ocean space are not in direct economic competition with one another.

However, even if one agrees to the theoretical advantages of regulating activities for the maximum benefit, it is questionable whether, in practice, the ISA can effectively exercise this function. The difficulty here is not only organizational, it also involves achieving agreement on the limits of the ISA's authority. Even acceptance of the common heritage concept as the legal basis for all activities in the ocean should not empower the ISA with blanket jurisdiction. Its function is properly limited to regulating only those activities that are mutually exclusive, ecologically damaging, or economically and biologically wasteful. All other activities not included in these categories must, by definition, either serve the common heritage or not impede it, and thus the ISA has no legal claim to jurisdiction over them.

Be this as it may, positions at the forthcoming conference will be based on considerations of national and group interest rather than sound law. The developed countries have ignored the logical inconsistencies in their position simply because they cannot go on record as opposing common heritage in principle; at the same time, however, they are not willing to accept the possible curtailment of existing freedoms that its support implies. Their fears in this regard are not groundless, since the developing countries quite obviously support this concept largely as a means of exerting their collective influence in an area from which they are currently excluded by a combination of existing law and lack of technology. In view of the current international climate, it is unlikely that a strong ISA dominated by the developing countries would prove a particularly impartial judge of what activities constituted the common interest.

Regardless of how narrowly the role of the ISA is initially defined, the future will see continuing pressure exerted by the developing countries to broaden the ISA's functions within the area of its jurisdiction. Since science is one of the issues on which positions are divided most clearly along developed-developing lines, efforts to empower the ISA with control over research will continue, even if the attempt fails in 1973.

Limits of National Jurisdiction

The seaward extension of national jurisdiction in the form of a territorial sea was an early exception to freedom of the seas. The right of a state to exercise sovereignty over the strip of ocean adjacent to its coast arose from the need to provide a measure of security against seaborne attack, and the initial seaward limit of jurisdiction of 3 miles was established for the very pragmatic reason that, in the 17th century, this was the maximum conceivable range of shore-based cannon. The original limit thus established a precedent for future adjustments as better cannon were invented or other new conditions arose. However, few states chose to avail themselves of this precedent until after the Truman Proclamation in 1945.

Although the proclamation was intended to claim jurisdiction only over the continental shelf beyond the territorial sea, the U.S. action has been invoked by other states to justify claims for more comprehensive jurisdiction. Iceland recently established an exclusive fisheries zone out to 50 miles from its coast. Chile claims a similar zone 200 miles wide, and Canada maintains the right to prosecute polluters in its Arctic waters. Brazil, Ecuador, and Peru have simply claimed a 200-mile territorial sea, although Ecuador and Peru refer euphemistically to this area as a "maritime zone." So the Truman Proclamation has come back to haunt the United States. The United States, along with the other great maritime powers, considers the major ocean "resource" to be freedom of navigation, and today it finds itself in the embarrassing position of having paved the way for claims that, if honored, will give its naval and research ships access to large parts of the ocean only upon the sufferance of coastal states, over 70 of which are classified as developing nations.

The limits of national jurisdiction have thus become one of the thorniest issues in the Seabed Committee negotiations. The alternatives currently being debated range from 12- to 200-mile limits, with the most likely compromise being a 12-mile territorial sea, with free transit guaranteed by treaty through all straits that would otherwise come under national jurisdiction. Between 12 and 200 miles, in the area becoming known as the "resource zone," states will probably be given

Freedom	Common Heritage
The seabed belongs to everyone (or to no one) and all have equal right of access to it.	The seabed is the common heritage of all mankind and the right of access to it is not necessarily equal for all purposes.
Everyone has an equal right to exploit the seabed for his personal gain and no one may deny this right to another.	Exploitation of the seabed is done on behalf of the international community.
Any usage of the seabed is permissible (unless specifically prohibited by treaty), providing only that it does not interfere "unreasonably" with other uses.	Uses of the seabed are allowed on the basis of their conformity to standards established under the concept of the common heritage.
If two users compete for the same part of the seabed or otherwise propose uses that are mutually exclusive, priority is established by who gets there first.	Priorities among competing uses are established by balancing the interests involved for the greatest net benefit of the world community.
Existing law of the sea requires no specific administering or enforcing agency. Claims of "unreasonable interference" are settled by persuasion or coercion.	Law devised to implement the common heritage concept may require an administering agency to determine priorities, collect revenues, issue licenses, and so forth.

limited jurisdiction for specific purposes (conservation, resource and fisheries management, and so forth).

It is in these resource zones, where the relative jurisdictions of the state and the ISA remain to be defined, that positions on science have become polarized. Developing countries demand that research be one of the activities over which they retain jurisdiction. Developed countries are pushing (with varying degrees of emphasis) for minimum restrictions on science beyond a narrow territorial sea. The stakes involved are evident if one considers that the area between 12 and 200 miles seaward encompasses some 30 percent of the world ocean and is, by and large, the area of most interest scientifically and economically (9).

Common Heritage and Access for Science

Access for scientists to all of the oceans beyond narrowly defined limits of national jurisdiction is one of the "freedoms" the developed countries hope to preserve at the forthcoming conference. Not unexpectedly, the attacks of developing countries on freedom for science have taken much the same form as those on the parent concept. Developing countries contend that science cannot be called a freedom when its exercise is limited only to the handful of nations who have a research capability, nor does it meet the test of being in the best interest of mankind when its results can provide military and economic advantage only to the few possessing the technological ability to exploit its findings.

These arguments are based on a quite different perception of basic research than exists among the developed countries. H. L. F. Von Helmholtz's famous statement that "whoever, in the pursuit of science, seeks after immediate practical utility may rest assured that he seeks in vain" has become such a truism for Western scientists that it appears in *Bartlett's Familar Quotations* (*10*). In contrast is the developing country's view, as expressed by Brazilian diplomat Saraiva Guerreiro, that "in the last analysis, every particle of scientific knowledge can be translated into terms of economic gain or national security, and in the technological society, scientific knowledge means power" (*11*).

The frequent mention oceanographers make of the economic implications of their work contributes to this impression. Warren Wooster, a member of the National Academy of Sciences' Task Force on Freedom for Science, writes in an article demonstrating the "tenuous" connection between scientific research and economic payoff, that scientific geological investigations "will be less detailed and will otherwise differ from that of commercial petroleum or mineral prospectors" (*12*). Not long afterwards, K. O. Emery reported on his investigation of the Eastern Atlantic Continental Margin. He cited the mapping of two features that "may be potential sources of oil" (*13*). A great deal of additional work lies between the preliminary survey described and the actual drilling for oil in these areas. But developing countries have very few petroleum geologists, so they cannot be blamed if they see in the apparent contradiction between Wooster's statement and Emery's findings substantiation of their suspicion that "knowledge means power."

The actual relationship between basic research and power has been much debated. Suffice it to say here that, although this connection appears to be growing increasingly direct, it still remains impossible to predict what basic research will bear fruit in terms of social, military, or economic utility. The only certainly is that the more basic research is encouraged the better the chances for the kind of practical return from the oceans necessary to make the "common heritage" a meaningful concept.

Seen in this perspective, science can no longer be said to be the parochial concern of one group of men or one group of nations. If it can be organized to contribute to the common good, the entire international community will benefit from arrangements that most facilitate the conduct of research.

The question thus becomes one of whether the absence of regulations is the condition that produces the best basic research. Would it not be better to focus the collective attention of the limited number of research oceanographers on particular problems, perhaps by coordinating all research through the proposed ISA? Or, on a more local level, would not individual developing countries do better to stipulate the types of research they felt was needed off their coasts and only permit access to those willing to undertake it?

These might be feasible approaches, if it were possible to predict what basic research will pay off in terms of tangible benefits. Research can be directed toward specific objectives, such as optimizing the return of food or minerals or minimizing the danger of hurricanes and pollution, but the potential of the ocean is so vast that further basic research will almost certainly lead to the discovery of other uses, and implications of existing uses, still undreamed of. Without knowing what these uses are, there is no way to mobilize scientific talent directly toward their achievement. The only alternative, as one laboratory director put it (*14*), is to "get good men and turn them loose," knowing from experience that even the most apparently esoteric investigation may lead to valuable results in solving the global problems of hunger, poverty, and pollution.

Another factor to consider in evaluating the implications of controlling basic research is the personality of the investigator himself. Very few scientists in basic research are much motivated by the possibility of their work leading to any practical results. More commonly, they are men driven mainly by a sense of curiosity developed sometimes to the point of eccentricity. While it is easy to make too much of the fact that scientists are somehow a breed apart, it is a fair generalization to say that, as a group, they are notoriously impatient with the petty intrusions of everyday life. Therefore, the environment in which they operate best is a fragile one, easily disrupted by the necessity to conform to bureaucratic regulations requiring lengthy advance notice of their investigations, detailed research plans, specific handling of data, and all the other requirements that follow with increased controls.

Both the proven but unpredictable return from basic research and the peculiar nature of the few men competent to conduct it suggest that restrictive regulations on science do in fact run counter to the common heritage concept. For if the ocean and its resources are the common heritage of mankind, it follows that states accepting this principle are obligated to subordinate, to some degree, their own interest in the area to the common interest of the international community. Scientific freedom can be justified on the grounds that, since research does yield knowledge of potential social utility, no state accepting the common

heritage principle can properly erect barriers that restrict mankind from learning what he must know about the ocean in order to optimize its use for the benefit of all. The same logic condemns states that pay lip service to the common heritage concept, while at the same time claiming expansive areas of national jurisdiction. The concept is meaningless if the greater part of ocean resources is in the hands of individual states.

To maintain (as many will) that arguments such as these have little weight in the United Nations is to underestimate the amount of idealism underlying the concept of a common heritage. Although the developing countries have exploited this concept for the political leverage it affords, they and much of the rest of the world community are not blind to the hope that common heritage will provide the basis for a new world order based on cooperation rather than competition. Positions against regulation of science that are based on the idea of a common heritage will be difficult for any country to oppose, both politically and in principle.

Open Research versus Limited Exploration

If science is governed by the common heritage concept, the test of scientific "legitimacy" (that is, whether or not a particular type of investigation is subject to regulation) becomes a question of whether the investigation is structured so that its results contribute to the common good or whether they contribute only to the advantage of the sponsor. The difficulty, of course, lies in making this distinction. "A proposed U.S. position on freedom for science in the oceans" (*2*), drafted by the National Academy of Sciences, attempts to do this by differentiating between open research, which is "intended for the benefit of all mankind and characterized by the prompt availability and full publication of results" and limited exploration, "intended for the economic benefit of a limited group" (*2*, p. 2). The proposal suggests that these definitions are "easily understood and subject to operational tests" and calls for no restrictions on open research in areas beyond the territorial sea.

The academy does not consider the issue of burden of proof. Does it suffice for the scientist to apply these "operational tests" to his own work, or must he convince someone else that his is really open research? Publication, after all, occurs after the fact. How can developing countries, with little scientific capability of their own, be assured that they are receiving all data collected, and of what use is it to them if they do receive it? Even if universally known, data are only useful to those with the technology to exploit them.

It would seem that even if the developing countries accept the academy's definition and agree that research should not be regulated in the resource zones and the deep sea, it is likely that they will insist on some form of neutral international machinery to verify the nature of research proposed in areas of concern. Granting this, it would certainly be good politics, as well as an indisputable gesture of good faith, if the developed countries themselves proposed specific machinery for verification and agreed to abide by its decisions as an arbitrator. In 1968, an informal proposal that the Intergovernmental Oceanographic Commission (IOC) act in this capacity, met with vehement opposition, particularly from some U.S. oceanographers who claimed that the IOC had neither the staff nor the scientific expertise to make judgments of this kind. The fear was also expressed that such a "clearinghouse" would cause interminable delays and frustrations to the reseacher (*15*).

Arbitration procedures established by treaty for use on an ad hoc basis may prove less ponderous than an established agency. The procedures common to international arbitration, whereby the disputing parties select referees from a list of neutral experts, could certainly be employed in cases where the nature of a proposed investigation was in question. Regardless of the method, however, some delay and frustration are inevitable. The risk of the certifying procedures becoming a bureaucratic nightmare must be weighed against their advantages.

To date, the opponents of regulation have been on the defensive, fighting to retain as much of the status quo as possible in light of a changing international environment. A case for science, based on the common heritage concept, takes the initiative away from the advocates of control. The only part of their argument left intact, and the one they will certainly fall back on, is the contention that science is not in the common interest as long as it is used by the developed to exploit the developing. For the reasons given earlier, it is unlikely that the National Academy of Sciences' effort to differentiate between types of research will dissuade developing countries from this suspicion unless a mechanism that they can trust is created to assist in differentiating between open research and limited exploration. By proposing such a mechanism themselves, the advocates of scientific freedom eliminate the major remaining objection of their opponents with an alternative that, again, is difficult to oppose politically or in principle.

As matters now stand, the 1973 conference will very probably give states the right to regulate science within their resource zones. An effectively presented argument against regulations as being incompatible with the common heritage concept, combined with an offer to submit proposed investigations to the scrutiny of an impartial body, may not convince the developing countries to withdraw their demand that investigators request permission to work within their resource zones. A mechanism for third-party settlement could, however, provide an alternative to individual states' having the final authority over what science is done in the area between 12 and 200 miles off their coasts.

In areas where a 200-mile jurisdiction is now claimed, access for the purpose of doing research has been obtained by bilateral negotiations between the parties involved. This would certainly become the pattern if the 200-mile limit applied universally. Recourse to arbitration would be necessary only when bilateral negotiations broke down (a major objection to the IOC proposal was that the commission would act as an intermediary in *all* requests). The third party could be a neutral body to which a developing country without an oceanographic capability of its own could turn if it were uncertain of the implications of the research proposed. The third party could serve equally well as a court of appeals for those whose requests for access were summarily rejected, particularly if states agreed by treaty to abide by its decisions. The procedures established would also work in cases of disagreement between an investigator and the ISA over the nature of research, in the event that the ISA is given control over research in its area of jurisdiction.

The establishment by treaty of procedures for binding third-party settlement in cases where the ISA or the state withholds permission for research within their respective areas of control is the position most favorable to basic research, and one that none of the competing interest groups at the 1973 conference can effectively oppose. Having claimed that a legitimate distinction exists between basic research and limited exploration, the developed countries cannot object to entrusting this determination, when contested, to a neutral body of experts. Nor can developing countries justify in the name of the common heritage claims to the right to bar from their resource zones research certified by an unbiased third party to be in the common interest.

Freedom for science is no longer a universal right. But access to the oceans for research "intended for the benefit of all mankind" is equally justified under the common heritage doctrine. It would be ironic if the new law of the sea that is being created to make this doctrine a reality were to contain provisions which would impede the understanding of the marine environment on which all nations, rich and poor alike, are going to depend increasingly in the years ahead.

References and Notes

1. A. de Tocqueville, *Democracy in America*, P. Bradley, Ed. (Knopf, New York, 1963), vol. 1, p. 393.
2. Ocean Affairs Board of the National Academy of Sciences, "A proposed U.S. position on freedom for science in the oceans" (unpublished, revised June 1972).
3. I make an obvious oversimplification in treating both the developed and the developing countries as unified blocs. The variety and complexity of the issues confronting the 1973 Law of the Sea Conference, sponsored by the United Nations, assures that voting will not always be strictly along these lines. Science, however, is one of the issues in which the difference between developed and developing countries is most apparent.
4. U.N. General Assembly Resolution 2750 (17 December 1970), p. 2.
5. R. Friedheim, *World Polit.* **18**, 25 (1965).
6. As quoted by W. Marz, *Bull. At. Sci.* **24** (No. 9), 19 (1968).
7. Representative of the developing country's position in the debate over the ISA's jurisdiction is a statement by the Peruvian delegate to the July 1971 meeting of the Seabed Committee, who called for an authority empowered to carry out a wide range of activities, including the coordination of scientific research (see U.S. Department of State telegram from U.S. mission, Geneva, 241846Z, July 1971).
8. Statement by the President on U.S. Ocean Policy, Office of the White House Press Secretary, 23 May 1970.
9. P. M. Fye, "Ocean policy and scientific freedom," lecture given before the Marine Technology Society, Washington, D.C., 11 September 1972.
10. J. Bartlett, *Bartlett's Familiar Quotations*, E. Beck, Ed. (Little, Brown, Boston, 1968), p. 709.
11. U.N. General Assembly Document A/Ac 138/SR 54 (22 March 1971), p. 109; quoted by H. Franssen, in *Freedom of Oceanic Research*, W. S. Wooster, Ed. (Crane, Russak, New York, 1973), p. 158.
12. W. S. Wooster, "Costs and consequences of restrictions on research: Another view," discussion paper presented at Scripps Institution of Oceanography Center for Marine Affairs Workshop on Conditions for Freedom of Oceanic Research, 24–26 April 1972.
13. K. Emery, *Science* **178**, 298 (1972).
14. P. M. Fye, personal communication.
15. This proposal was made informally, and, although it generated considerable comment, it was apparently never mentioned in official records. I learned of it from A. E. Maxwell, provost of the Woods Hole Oceanographic Institution and a frequent delegate to the IOC.

16. This article would not have been possible without the help of Robertson P. Dinsmore, Richard L. Haedrich, Herman Franssen, Maureen Franssen, Paul M. Fye, Kaleroy L. Hatzikon, and, above all, P. Sreenivasa Rao, who spent many hours introducing me to the mysteries of international law. This article is Woods Hole Oceanographic Institution Contribution No. 3089.

Notes

1. Pollution Zone.

(a) Compare the positions of the United States and of the developing countries, as summarized in the REPORT OF THE U.S. SENATE COMM. ON COMMERCE, 94TH CONG., 1ST SESS., THIRD U.N. LAW OF THE SEA CONFERENCE 29-32 (Comm. Print 1975) (footnotes omitted):

MARINE POLLUTION AND SCIENTIFIC RESEARCH

Protection of the marine environment was largely overlooked at the 1958 and 1960 conferences on the law of the sea. Particularly since the Stockholm Conference on the Human Environment, the need for multilateral action to combat marine pollution has become apparent.

Committee III of the Conference was given a functional rather than a territorial mandate: it was to deal with the problems of pollution and scientific research everywhere in the oceans. The Third Conference addresses itself to two basic sources of pollution, (1) pollution produced in the process of exploiting the non-living resources of the seabed and subsoil and (2) pollution introduced to the marine environment from deliberate and accidental discharges. The Conference does not address itself to another major source of marine pollution; water-borne pollution emptied into the oceans by the world's river systems. The most critical pollution question at the Conference appears to lie in the area of coastal state jurisdiction over pollution regulation and control within the proposed economic zone.

While marine pollution related to offshore petroleum production contributes only a fraction of the total amount of oil spilled in the oceans, its local impact can be large.

U.S. position.—The U.S. has proposed that pollution resulting from the exploration and exploitation of seabed resources be treated differently from vessel-source pollution. The former should fall under the jurisdiction of the coastal state; the latter should be subject to international standards and regulation. The U.S. fears that coastal state jurisdiction over vessel-source pollution could lead to different sets of standards for coastal states, which in turn would impair freedom of navigation. However, the United States maintains that even within the economic zone, there should be minimum international standards with respect to the production of liquid hydrocarbons. A coastal state can have the right to impose stricter standards in addition to the minimum international standards.[29]

The United States favors international regulations for the control of vessel-source pollution, and envisions a combination flag state—port state coastal state regulatory system, which provides that:

> The flag State would continue to have enforcement responsibilities over its vessels, although such authority would not be exclusive, and would assume a specific obligation to enforce international standards in the case of vessels flying its flag, subject to the right of other States to have recourse to compulsory dispute settlement procedures to ensure that the obligation was fully discharged. The port state would be able to enforce pollution control standards in the case of vessels using its port, regardless of where violations took place.
>
> The coastal state would have rights and remedies that would fully protect its environmental interests; provision was made for dealing with the four major maritime pollution problems facing the coastal state: serious maritime casualties off its coast, violations of international standards imminent danger of major harmful consequences, persistent and unreasonable failure of a State to enforce the international standards with respect to vessels flying its flag, and general violations of the standards.[30]

The United States has indicated that extensive coastal state controls over marine pollution within the 200-mile economic zone would hurt developing coastal states as much as it would the U.S. and other maritime powers. Most developing countries are "zone locked," which means that vessels bound from their port to areas beyond any 200-nautical mile economic zone would of necessity pass through the economic zone of at least one other nation. If pollution control zones were used to inhibit maritime transport, the majority of the world's coastal States could be hurt.

Developing countries positions.—Developing countries maintain that not only pollution resulting from seabed resources development should be controlled by the coastal state, but that vessel-source pollution should also be regulated and controlled by the coastal State within the proposed economic zone. It may prove very difficult to reconcile this view with that of the developed nations.

Another major problem arises from the degree of urgency of pollution control as perceived by coastal States. The developing countries are generally not as enthusiastic about the concept of pollution prevention as are the developed countries. They maintain that the developed countries achieved their advanced economic status at no small cost to their environments, and only now, in their years of affluence, are in a position to afford consideration of such factors as environmental quality. They argue that suggestions concerning restrictions of industrial development for the purpose of protecting the environment will reduce growth rates in the developing countries. They are only willing to accept restrictions on growth if the developed nations pay for it.

Developing countries are also quick to point out that of the six international conventions for the Prevention of Pollution, only one—the 1954 agreement—is in force.[31] Moreover, they have charged, rightly or wrongly, that the Inter-Governmental Maritime Consultative Organization (IMCO)—which has been engaged in attempts to reduce vessel-source pollution—has by and large been the tool of the major maritime powers, and its efforts at pollution prevention have been token at best. Hence, most developing coastal states want to regulate and control marine pollution within the proposed economic zone.

At the Caracas session, draft articles were completed on general obligations to prevent pollution, particular obligations, global and regional cooperation, technical assistance, rights of states to exploit their resources, and the relevance of economic factors to developing countries' obligations. These texts were not fully agreed upon and the U.S., among others, opposed the last two in their entirety. Work was begun on rights to set standards and to enforce them, and on monitoring. The Committee did not begin consideration of state responsibility and liability, sovereign immunity or settlements of disputes.

At the Geneva session, the Committee will begin with the article on monitoring and then take up standard-setting and enforcement rights. The basic problem of vessel-source pollution remains to be addressed, although a trend against coastal state standard setting is already evident, particularly with respect to construction standards. Negotiations have moved to the point of beginning on the major controversial issues of standards and enforcement, particularly regarding vessel-source pollution. Private negotiations and consultations indicated considerable detailed consideration of specific problems and a willingness to discuss realistic solutions.

(b) The Informal Single Negociating Text, U.N. Doc. A/ CONF. 62/ WP. 8/ REV. 1/ PART III, provides as follows:

Chapter I: Protection and preservation of the marine environment

SECTION I. GENERAL PROVISIONS

Article 1

"Pollution of the marine environment" means the introduction by man, directly or indirectly, of substances or energy into the marine environment (including estuaries) which results or is likely to result in such deleterious effects as harm to living resources, hazards to human health, hindrance to marine activities including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.*

Article 2

States have the obligation to protect and preserve the marine environment.

Article 3

States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment.

Article 4

1. States shall take all necessary measures consistent with this Convention to prevent, reduce and control pollution of the marine environment from any source using for this purpose the best practicable means at their disposal and in accordance with their capabilities, individually or jointly, as appropriate, and they shall endeavour to harmonize their policies in this connexion.

2. States shall take all necessary measures to ensure that activities under their jurisdiction or control are so conducted that they do not cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.

3. The measures taken pursuant to this Chapter of the Convention shall deal with all sources whatsoever of pollution of the marine environment. These measures shall include, *inter alia*, those designed to minimize to the fullest possible extent:

(*a*) Release of toxic, harmful and noxious substances, especially those which are persistent:

(i) From land-based sources;
(ii) From or through the atmosphere;
(iii) By dumping.

(*b*) Pollution from vessels, in particular for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, preventing intentional and unintentional discharges, and regulating the design, construction, equipment, operation and manning of vessels;

(*c*) Pollution from installations and devices used in the exploration or exploitation of the natural resources of the sea-bed and subsoil, in particular for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, and regulating the design, construction, equipment, operation and manning of such installations or devices;

(*d*) Pollution from all other installations and devices operating in the marine environment, in particular for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, and regulating the design, construction, equipment, operation and manning of such installations or devices.

4. In taking measures to prevent, reduce or control pollution of the marine environment States shall refrain from unjustifiable interference with activities in pursuance of the rights and duties of other States exercised in conformity with this Convention.

Article 5

In taking measures to prevent, reduce or control pollution of the marine environment, States shall so act as not to transfer, directly or indirectly, damage or hazards from one area to another or transform one type of pollution into another.

Article 6

1. States shall take all necessary measures to prevent, reduce and control the use of technologies under their jurisdiction or control, or the intentional or accidental introduction of species, alien or new to a particular part of the marine environment, which may cause significant and harmful changes thereto.

2. This Article shall not affect the application of the provisions of the present Convention regarding the prevention, reduction and control of pollution of the marine environment.

SECTION 2. GLOBAL AND REGIONAL CO-OPERATION

Article 7

States shall co-operate on a global basis and as appropriate on a regional basis, directly or through competent international organizations, global or regional, to formulate and elaborate international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features.

Article 8

A State, which becomes aware of cases in which the marine environment is in imminent danger of being damaged or has been damaged by pollution shall immediately notify other States it deems likely to be affected by such damage, as well as the competent international organizations.

Article 9

In the cases referred to in Article 8 of this Part of the Convention, States in the area affected, in accordance with their capabilities, and the competent international organizations, shall co-operate, to the extent possible, in eliminating the effects of pollution and preventing or minimizing the damage. Towards that end, States shall jointly promote and develop contingency plans for responding to pollution incidents in the marine environment.

Article 10

States shall co-operate directly or through competent international organizations for the purpose of promoting studies, undertaking programmes of scientific research and encouraging the exchange of information and data acquired about pollution of the marine environment. They shall endeavour to participate actively in regional and international programmes to acquire knowledge for the assessment of the nature and extent of pollution and the pathways and risks of, exposures to and the remedies for pollution.

Article 11

In the light of the information and data acquired pursuant to Article 10 of this Part of the Convention, States shall co-operate directly or through competent international organizations in establishing appropriate scientific criteria for the formulation and elaboration of rules, standards and recommended practices and procedures for the prevention of pollution of the marine environment.

SECTION 3. TECHNICAL ASSISTANCE

Article 12

States shall directly or through competent international or regional organizations:

(*a*) Promote programmes of scientific, educational, technical and other assistance to developing countries for the preservation of the marine environment and the prevention of marine pollution. Such assistance shall include, *inter alia:*

(i) Training of scientific and technical personnel;

(ii) Facilitation of their participation in relevant international programmes;

(iii) Supply of necessary equipment and facilities;

(iv) Enhancing the capacity of developing countries to manufacture such equipment;

(v) Development of facilities for and advice on research, monitoring, educational and other programmes;

(*b*) Provide appropriate assistance, in particular to developing countries, for the minimization of the effects of major incidents which may cause serious pollution in the marine environment;

(*c*) Provide appropriate assistance, in particular to developing countries, concerning the preparation of environmental assessments.

Article 13

Developing States shall, for purposes of the prevention of pollution of the marine environment or the minimization of its effects, be granted preference in:

(*a*) The allocation of appropriate funds and technical assistance facilities of international organizations, and

(*b*) The utilization of their specialized services.

SECTION 4. MONITORING

Article 14

1. States shall, consistent with the rights of other States, endeavour, as far as practicable, individually or collectively through the competent international organizations to observe, measure, evaluate and analyse, by recognized methods, the risks or effects of pollution of the marine environment.

2. In particular, States shall keep under surveillance the effect of any activities which they permit or in which they engage to determine whether these activities are likely to pollute the marine environment.

Article 15

States shall publish reports of the results obtained relating to risks or effects of pollution of the marine environment, or provide at appropriate intervals such reports to the competent international or regional organizations, which should make them available to all States.

SECTION 5. ENVIRONMENTAL ASSESSMENT

Article 16

When States have reasonable grounds for expecting that planned activities under their jurisdiction or control may cause substantial pollution of, or significant and harmful changes to, the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments in the manner provided in Article 15 of this Part of the Convention.

2. Fisheries Zone. The following points up the problem of an extended national fisheries zone.

"Stormy Seas," THE WALL STREET JOURNAL, Thursday, November 11, 1976. (Reprinted with permission of THE WALL STREET JOURNAL. Copyright Dow Jones & Company, Inc.,(1976). All Rights Reserved.

By MIKE THARP
Staff Reporter of THE WALL STREET JOURNAL

OTARU, Japan—The rain has turned to hail, and the wind rocks the Sanyo Maru, moored in the harbor of this town on the island of Hokkaido in northern Japan. Inside the boat's warm cabin, Kanematsu Hiramatsu watches men in black slickers and yellow safety hats unload pollack from the hold.

"Our sea is getting smaller," says the 45-year-old fisherman. "In the past it was our sea, but now it is becoming the sea of others. When we take a long trip, we run into many outsiders now. It isn't our sea anymore."

Mr. Hiramatsu refers to the probable effects on his livelihood and his town when, in March, the U.S. implements the law extending its jurisdiction over fisheries to 200 miles off its coast from the present 12 miles. The law will have ripples far beyond its impact on Mr. Hiramatsu and other Japanese fishermen who head their boats into the choppy waters of the North Pacific.

Indeed, the 200-mile economic zone is the most serious bilateral disagreement currently confronting the U.S. and Japan, and the dispute could strain relations between the two allies on other fronts. One U.S. official says, "We're worried. The Japanese might have a sense of betrayal that casts a substantial cloud over the relationship." And Yoshihide Uchimura, director general of the Japanese Fisheries Agency, says, "If our fishing can't be continued in U.S. waters, it will have grave consequences for the Japanese people."

Compromise Unlikely

American and Japanese negotiators began another round of talks on the fishing issue in Tokyo this week. During the first session, the Japanese restated their refusal to recognize the 200-mile economic zone. Despite optimism voiced by U.S. negotiators before the talks began, prospects for any compromise are slim. The law goes into effect on March 1, 1977, and participants from the U.S. side are limited in what they can offer the Japanese. An earlier meeting, scheduled for August, was postponed when agreement couldn't be reached on either procedural or substantive matters.

The Japanese have recently met with the Canadians on the same issue, and the U.S. conducted exchanges with both these countries last week. Later this year and next, the U.S. and Japan will sit down at the bargaining table with the Soviet Union. The Americans and Japanese have also been trying to hammer out some agreement with South Korea over its fishing rights and restrictions.

Whatever the outcome of the negotiations between the U.S. and Japan, the international trend is clearly toward the 200-mile economic zone. More than 50 countries have already extended their territorial waters to that distance from their coasts, and the U.S. measure, according to experts on ocean law, isn't as radical as those of some other nations. What is new compared with previous bilateral agreements between the U.S. and other countries is that specific quotas for catches will be enforced by members of eight regional councils responsible for U.S. waters.

This provision particularly worries the Japanese, according to one U.S. official. He says they fear that the regional councils will place local interests above international considerations, such as trying to limit overfishing.

The Japanese are also concerned about acquiring permits to fish in waters affected by the 200-mile limit, and about paying license fees to be able to fish. "We don't think we should pay to advanced countries," says Takeshi Nakamura, executive director of the Japan Fisheries Association, a private group. "Also, the amount is so huge that we can't pay it."

U.S. Arguments

The U.S. maintains that the law is necessary for several reasons. For years, American fishermen have claimed that they have been shoved out of the richest fishing waters of the North Pacific by highly mechanized Japanese and Soviet fishing fleets. Additionally, supporters of the economic zone charge that overfishing by foreign ships has depleted the stock of several species, and that the new law's restrictions will allow those fish to replenish themselves. Finally, some U.S. congressional leaders lost patience with the International Law of the Sea Conferences that for years have been trying unsuccessfully to produce a workable global pact on ocean rights. Another such session is scheduled for May 1977, and the Japanese would like the U.S. to refrain from implementing its law until after that meeting. So far, the U.S. has refused, though there have been indications that it might be willing to change its law to coincide with any law promulgated by the conference.

The threatened reduction in Japan's catch is viewed with trepidation here, for about half the daily protein intake of the average Japanese comes from fish-related products. Fish is to the Japanese what the T-bone and hamburger are to the average American. In 1974, for example, Japan's per-capita annual consumption of fish was 77 pounds, compared to only 5.5 pounds of beef. (By contrast, per-capita consumption of fish in the U.S. that year was 12 pounds, compared to 116.3 pounds of beef.) There are nearly 40,000 shops in Japan that specialize in sushi, the raw fish delicacy so popular here, and almost 57,000 Japanese make their living as fishmongers.

The Japanese estimate that about 1.6 million tons of the nation's 10 million-ton annual catch comes from waters within the 200-mile limit of the U.S. and Canada. "We have no alternative to the North Pacific," says Mr. Nakamura of the Japan Fisheries Association. "The sea is rich in fishing resources there, and there's no replacing what we get there." More than 700 boats with 15,000 crew members operate in waters off the U.S. coast, according to the association.

Quotas on Pollack

One of the knottiest problems facing negotiators is the question of quotas, particularly for the Alaskan pollack. Largely regarded as a "trash" fish by U.S. fishermen, the pollack is used in several ways in Japanese diets, most commonly for kamaboko, or boiled fish paste. Japan annually catches about 1.1 million tons of pollack in waters off Alaska within the 200-mile limit of the new law. Officials close to the negotiations say that the U.S. will seek to reduce the amount of that catch to 850,000 tons or less a year. "The cost of kamaboko paste will go up," concedes one American official, "but it's not a preferred component of the Japanese diet."

U.S. officials maintain that because fish is an international commodity, the Japanese can still import it from abroad if their catch runs short of demand. "In the long run, there's no reason for any nation to suffer economic dislocation," one American expert says.

Apart from the current negotiations, the Japanese are taking several steps to try to soften the expected blow. For one, they're trying to win support for their cause abroad by organizing public demonstrations in Tokyo protesting the U.S. position. For another, they have been placing increasing emphasis on the development of aquaculture, or fish farming. The Japanese are also considering stepping up imports of beef and pork and increasing domestic production of other protein sources.

"What Can We Do?"

Whatever emerges from the negotiations or other fronts, the most substantial impact of the U.S. law will be felt in towns like Otaru. In this city of 180,000, officials estimate that some 5,000 residents work as crew members on fishing boats. Otaru also has 500 enterprises related to the fishing business, such as processing plants and supply shops. City officials estimate the annual volume of the fish-processing industry to be about $50 million and the annual value of the catch to be about $36.7 million. Though they decline to project specific figures, Otaru officials say that implementation of the new law would cause the town's unemployment rate, currently at about 4.5%, to go even higher. "If fishing went down, other industries would suffer a serious blow," says one administrator.

Nishidate Masanobu, who has been supplying tools, rope and other gear to local fishermen for nearly 50 of his 65 years, agrees. "It is a life-or-death problem for us," he says. Miyokichi Abe, whose father ran the same beer and sake shop that he now operates, says his sales will fall by 15% once the new law goes into effect. He says that one recent ship heading for Alaskan waters bought more than $2,500 worth of provisions from his store. "What can we do?" he asks. "I have been here 53 years. I can't move from this place."

Fishermen, of course, will be even more directly affected. Makota Honma, who fishes from the decks of the Shosei Maru, estimates that his catch for the entire year will be reduced by 30% once the law goes into effect. "We are too old to change jobs," he says, showing a gold tooth as he smiles. "I may have to become a beggar." And Magoshichi Watanabe stands in the cabin of the Zenpo Maru and explains that long-distance fishermen like himself will now have to compete with those who fish in nearby coastal waters. "We would both lose money," he says.

Many fishermen here admit that they haven't prepared for the impact of the new law. Mr. Honma, who comes from several generations of fishermen in Otaru, says he won't advise his sons to follow in his footsteps. "A new period has come," he says, "and the weather has changed."

3. Semi-enclosed Seas. The Informal Single Negotiating Text, U.N. Doc. A/ CONF. 62/ WP. 8/ REV. 1/ PART II.

Article 129

Definition

For the purposes of this Chapter, "enclosed or semi-enclosed sea" means a gulf, basin, or sea surrounded by two or more States and connected to the open sea by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States.

Article 130

Co-operation of States bordering enclosed or semi-enclosed seas

States bordering enclosed or semi-enclosed seas should co-operate with each other in the exercise of their rights and duties under the present Convention. To this end they shall endeavour, directly or through an appropriate regional organization:

(a) To co-ordinate the management, conservation, exploration and exploitation of the living resources of the sea;

(b) To co-ordinate the implementation of their rights and duties with respect to the preservation of the marine environment;

(c) To co-ordinate their scientific research policies and undertake where appropriate joint programmes of scientific research in the area;

(d) To invite, as appropriate, other interested States or international organizations to co-operate with them in furtherance of the provisions of this article.

4. Scientific Research

(a) REPORT OF U.S. SENATE COMM. ON COMMERCE, 94TH CONG., 1ST SESS., THIRD U.N. LAW OF THE SEA CONFERENCE 32-33 (Comm. Print 1975) (footnotes omitted):

U.S. position on scientific research.--Maritime nations like the United States have maintained that oceanic research has benefitted all mankind by provideing the scientific community with information that can lead to better management of ocean resources, better weather forecasting, understanding and regulation of pollution, and the like. As most of the interesting scientific research at sea is conducted within the proposed economic zone of 200 nautical miles, marine scientists maintain that much vital research will be impaired by coastal state restrictions if the latter were to have the right to regulate scientific research within the area.

In order to safeguard the interests of the coastal states, the U.S. has proposed that all scientific research remain free from restraints, but that researchers comply with the following rules if they wish to conduct research in the economic zone:

(1) advance notification of the proposed research, including a detailed description of the research project;

(2) a right of the coastal state to participate directly or through an international organization of their choice;

(3) sharing of all data and samples with the coastal states;

(4) assistance to the coastal states in interpreting the results of the research project in a manner that is relevant to the coastal state;

(5) publication as soon as possible of the significant research findings in an open, readily available scientific publication;

(6) compliance with all appicable international environmental standards; and

(7) flag-state certification that the research will be conducted in accordance with the treaty by a qualified institution with a view to purely scientific research.

Developing coastal states, on the other hand, want to have control over all scientific research within the proposed economic zone. Developing coastal states have expressed the following reasons for their need to control oceanic research:

(1) the desire to control all oceanic activities, including scientific research within the proposed economic zone would make the coastal state the final judge of the kind of research they believe would be of benefit to their state;

(2) the fear that unregulated research within the proposed economic zone will widen the technological gap between the developed and the developing nations(this fear is based on the perception that only advanced countries can translate scientific research into economic benefits or military power);

(3) fear for espionage activities by research vessels (Pueblo affair syndrome); and

(4) freedom to conduct scientific research within the economic zone would not provide the developing coastal state with a quid pro quo which they expect in return for allowing foreign researchers to conduct oceanic research within their coastal waters.

At the Caracas session, the views of the maritime nations and the developing coastal states on the question of freedom of scientific research did not come any closer to one another. Agreement was reached on general principles for the conduct of research as well as obligations for international and regional cooperation. The general principles include a requirement that scientific research be conducted exclusively for peaceful purposes, a clause dealing with non-interference with other uses, a requirement that research comply with applicable environmental regulations,and agreement that research activities shall not form the legal basis for any claim to any part of the marine environment or its resources. The most important issues, and those on which there was the greatest divergence of views, centered upon research in the economic zone and the international seabed. The number of proposals were finally reduced to four principle alternative texts.

(b) Informal Single Negotiating Text, U.N. Doc. A/CONF. 62/ WP.8/ REV.1/ PART III:

Chapter II. Marine scientific research

SECTION 1. GENERAL PROVISIONS

Article 48

For the purpose of this Convention, "marine scientific research" means any study or related experimental work designed to increase mankind's knowledge of the marine environment.

Article 49

States, irrespective of their geographical location, and competent international organizations have the right to conduct marine scientific research subject to the rights and duties of other States as provided for in this Convention.

Article 50

States and competent international organizations shall promote and facilitate the development and conduct of marine scientific research in accordance with the provisions of this Convention.

Article 51

In the conduct of marine scientific research the following principles shall apply:

(*a*) Marine scientific research activities shall be conducted exclusively for peaceful purposes;

(*b*) Such activities shall be conducted with appropriate scientific methods and means compatible with the provisions of this Convention;

(*c*) Such activities shall not unjustifiably interfere with other legitimate uses of the sea compatible with the provisions of this Convention and shall be duly respected in the course of such uses;

(*d*) Such activities shall comply with all relevant regulations established in conformity with the provisions of this Convention including those for the preservation of the marine environment.

Article 52

Marine scientific research activities shall not form the legal basis for any claim whatsoever to any part of the marine environment or its resources.

SECTION 2. INTERNATIONAL AND REGIONAL CO-OPERATION

Article 53

States and competent international organizations shall, in accordance with the principle of respect for sovereignty and on the basis of mutual benefit, promote international co-operation in marine scientific research for peaceful purposes.

Article 54

States and competent international organizations shall co-operate with one another, through the conclusion of bilateral, regional and multilateral agreements, to create favourable conditions for the conduct of scientific research in the marine environment and to integrate the efforts by scientists in studying the essence of and the interrelations between phenomena and processes occurring in the marine environment.

Article 55

States shall, both individually, and in co-operation with other States and with competent international organizations, actively promote the flow of scientific data and information and the transfer of knowledge resulting from marine scientific research in particular to developing countries, as well as the strengthening of the autonomous marine research capabilities of developing countries through, *inter alia*, programmes to provide adequate education and training of their technical and scientific personnel

Article 56

States and competent international organizations shall, in accordance with the provisions of this Convention, make available information on proposed major programmes and their objectives as well as knowledge resulting from marine scientific research by publication and dissemination through appropriate channels.

SECTION 3. CONDUCT AND PROMOTION OF MARINE SCIENTIFIC RESEARCH

Article 57

Coastal States have the sovereign right to conduct and regulate marine scientific research in their territorial sea established in accordance with this Convention. Scientific research activities therein shall be conducted only under the conditions set forth by the coastal State.

Article 58

States and competent international organizations which intend to undertake scientific research in the economic zone or on the continental shelf of a coastal State shall, not less than four months in advance of the expected starting date of the research project, provide that State with a full description of:

(*a*) The nature and objectives of the research project;

(*b*) The method and means to be used, including name, tonnage, type and class of vessels and a description of scientific equipment;

(*c*) The precise geographical areas in which the activities are to be conducted;

(*d*) The expected date of first appearance and final departure of the research vessels, or deployment of the equipment and its removal, as appropriate;

(*e*) The name of the sponsoring institution, its director, and the person in charge of the research project;

(*f*) The extent to which it is considered that the coastal State should be able to participate or to be represented in the research project.

Article 59

States and competent international organizations when undertaking scientific research in the economic zone or on the continental shelf of a coastal State shall comply with the following conditions:

(*a*) Ensure the rights of the coastal State, if it so desires, to participate or be represented in the research project, especially on board research vessels and other craft or installations, when practicable, without payment of any remuneration to the scientists of the coastal State and without obligation to contribute towards the cost of the research project;

(*b*) Provide the coastal State, at its request, with preliminary reports, as soon as practicable, and with the final results and conclusions after the completion of the research;

(*c*) Undertake to provide access for the coastal State, at its request, to all data and samples derived from the research project and likewise to furnish it with data which may be copied and samples which may be divided without detriment to their scientific value;

(*d*) If requested, assist the coastal State in assessing such data and samples and the results thereof;

(*e*) Ensure that the research studies are made internationally available through appropriate national or international channels, as soon as feasible;

(*f*) Inform the coastal State immediately of any major change in the research programme;

(*g*) Unless otherwise agreed remove the scientific installations or equipment once the research is completed.

Article 60

1. Marine scientific research activities in the economic zone or on the continental shelf shall be conducted with the consent of the coastal State in accordance with the provisions of this Convention.

2. The coastal State shall not withhold its consent to the conduct of a marine scientific research project unless that project:

(*a*) Bears substantially upon the exploration and exploitation of the living or non-living resources;

(*b*) Involves drilling or the use of explosives;

(*c*) Unduly interferes with economic activities performed by the coastal State in accordance with its jurisdiction as provided for in this Convention;

(*d*) Involves the construction, operation or use of such artificial islands, installations and structures as are referred to in Articles . . . of Part II of this Convention.

Article 61

The results of a research project bearing substantially upon the exploration and exploitation of the living or non-living resources of the economic zone and on the continental shelf of a coastal State shall not be published or made internationally available against the express wish of that State.

Article 62

States shall seek to promote through competent international organizations the establishment of general criteria and guidelines to assist States in ascertaining the nature and implications of marine scientific research.

Article 63

Communications concerning the research project shall be made through appropriate official channels unless otherwise agreed.

Article 64

States or competent international organizations may proceed with a research project upon the expiry of four months from the date upon which the information required pursuant to Article 52 of this Part of the Convention was provided to the coastal State unless within two months of the receipt of the communication containing such information the coastal State has communicated to the State or organization conducting the research:

(*a*) The withholding of its consent pursuant to Article 60, subparagraph 2 (*a*) of this Part of the Convention;

(*b*) A statement that the information provided regarding the nature or objectives of the research project is inaccurate and does not conform to the manifestly evident facts;

(*c*) A request for supplementary information relevant to determining more precisely the nature and objectives of the research project.

Article 65

1. The coastal State shall have the right to require the cessation of any research activities in progress within its economic zone or on its continental shelf if:

(*a*) The State or competent international organization conducting marine scientific research fails to comply substan-

tially with the provisions of Article 58 of this Part of the Convention and compliance is not secured within a reasonable time;

(*b*) Information communicated to the coastal State under Article 58 of this Part of the Convention regarding the nature and objectives of the research project is shown to be inaccurate.

2. The coastal State may likewise require the fulfilment of any outstanding obligations as referred to in Article 59 of this Part of the Convention before the commencement of any subsequent research project by the defaulting party within the economic zone or on the continental shelf of the coastal State.

Article 66

1. States and competent international organizations conducting marine scientific research in the economic zone or on the continental shelf of a coastal State shall take into account the interests and rights of neighbouring land-locked and other geographically disadvantaged States, as provided for in this Convention and shall notify these States of the proposed research project as well as provide, at their request, relevant information and assistance as specified in Article 58 and Article 59, subparagraphs (*d*) and (*f*) of this Part of the Convention.

2. Such neighbouring land-locked and other geographically disadvantaged States shall, at their request, be given the opportunity to participate, whenever feasible, in the proposed research project through qualified experts appointed by them.

Article 67

Coastal States shall, on the basis of bilateral or regional and other multilateral agreements and in a spirit of international co-operation with a view to promoting marine scientific research activities conducted in accordance with this Convention, adopt measures to facilitate access to their harbours and to provide assistance for marine scientific research vessels carrying on such activities.

Article 68

States, irrespective of their geographical location, as well as competent international organizations, shall have the right, in conformity with the provisions of Part I of this Convention, to conduct marine scientific research in the international sea-bed area.

Article 69

States, irrespective of their geographical location, as well as competent international organizations, shall have the right, in conformity with the provisions of this Convention, to conduct marine scientific research in the water column beyond the limits of the economic zone.

SECTION 4: LEGAL STATUS OF SCIENTIFIC RESEARCH INSTALLATIONS AND EQUIPMENT IN THE MARINE ENVIRONMENT

Article 70

The deployment and use of any type of scientific research installations or equipment in any area of the marine environment shall be subject to the same conditions as those for the conduct of marine scientific research in such area, as provided for in this Convention.

Article 71

The installations or equipment referred to in this Section shall not have the status of islands or possess their own territorial waters, and their presence shall not affect the delimitation of the territorial sea, continental shelf or economic zone of the coastal State.

Article 72

Safety zones of a reasonable width not exceeding a distance of 500 metres may be created around scientific research installations in accordance with the relevant provisions of this Convention. All States shall ensure that such safety zones are respected by their vessels.

Article 73

The deployment and use of any type of scientific research installations or equipment must not constitute an obstacle to the established international shipping routes.

Article 74

Installations or equipment referred to in this Section shall bear identification markings indicating the State or international organization where they are registered and shall have adequate internationally agreed warning signals to ensure the safety of sea and air navigation, taking into account the principles established by competent international organizations.

SECTION 5. RESPONSIBILITY AND LIABILITY

Article 75

1. States and competent international organizations shall be responsible for ensuring that marine scientific research, whether undertaken by them or on their behalf, is conducted in accordance with the provisions of this Convention.

2. States and competent international organizations shall be responsible and liable for the measures they undertake in contravention of this Convention in respect of marine scientific research activities conducted by other States, their natural or juridical persons or by competent international organizations, and shall provide compensation for damage resulting from such measures.

3. States and competent international organizations shall be responsible and liable pursuant to the principles set forth in Article 44 of this Part of the Convention for damage arising out of marine scientific research undertaken by them or on their behalf.

SECTION 6. SETTLEMENT OF DISPUTES

Article 76

1. Any dispute relating to marine scientific research shall be settled by negotiation, conciliation or other procedures for settlement agreed upon by the parties to the dispute, notwithstanding anything to the contrary contained in this Convention.

2. If a dispute regarding the nature or objectives of a research project is not settled by negotiation or a procedure under paragraph 1, agreed to between the parties concerned, it shall, at the request of any of the parties to the dispute, be submitted for settlement in accordance with the conciliation procedure set out below:

(*a*) Each party to the dispute, unless otherwise agreed, shall nominate one expert from a list of experts established by the appropriate United Nations organ in the field of marine scientific research;

(*b*) The experts shall assist the parties to reach an agreement. If, after a period of two months from the date the dispute is first submitted for conciliation, the disagreement continues, a third expert shall be nominated by the appropriate United Nations organ at the request of any of the interested parties in order to assist in the conciliation of the differences. The maximum period for the procedure outlined in this paragraph shall not exceed four months from the date the dispute is first submitted for conciliation. If no agreement is reached by this process, the dispute shall be resolved by the procedures for settlement of disputes set forth in the relevant articles of this Convention.

3. Any other dispute which is not resolved by procedures set forth in this Article shall be settled pursuant to Part IV of this Convention.

Article 77

Pending conciliation or settlement of a dispute in accordance with Article 76 of this Part of the Convention, the State or competent international organization shall not allow research activities to commence or continue without the express approval of the coastal State.

Notes

5. Dispute Settlement

(a) REPORT OF U.S. SENATE COMM. ON COMMERCE, 94TH CONG., 1ST SESS., THIRD U.N. LAW OF THE SEA CONFERENCE 33-34 (Comm. Print 1975) (footnotes omitted).

> The nations negociating at the law of the sea conferences are attempting to produce an internationally agreed upon system, aimed at limiting friction and conflict over the uses of the sea. The voting procedures agreed upon at the Caracas session are a step in the direction of achieving this goal. However, there are likely to be differences over the interpretation and application of the provisions of the treaty. In order to define the rights and duties of states and to provide assurances that those rights under the treaty will be protected, a dispute settlement mechanism is necessary.
>
> U.S. position.--The U.S. government believes that any law of the sea treaty is almost as easily susceptible of unreasonable unilateral interpretation as are the principles of customary international law. This is particularly true considering that the essential balance of critical portions of the treaty, such as the economic zone, must rest upon impartial interpretation of treaty provisions.
>
> In a working paper, introduced jointly with Australia, Belgium, Bolivia, Colombia, El Salvador, Luxembourg, the Netherlands and Singapore, the United States has set out its views on dispute settlement. In addition, most U.S. draft proposals contain compulsory dispute settlement provisions. The United States favors the creation of a new oceans tribunal with broad jurisdiction to deal with disputes arising under the treaty. Whenever parties who abide by the law of the sea treaty cannot agree on a method of dispute settlement, they may refer the dispute to the tribunal. However, prior to referring disputes to the tribunal, states should be free to agree on other methods of dispute settlement they consider suitable, such as mediation, conciliation, arbitration, and other procedures. The only disputes that would not be submitted to the tribunal are fishing disputes, which would instead be submitted to a special commission, consisting of five members, named by agreement between the states in dispute or by the U.N. Secretary-General. The United States government maintains that a system of compulsory and peaceful third-party settlement of disputes is in the end perhaps the most significant justification for the accommodations which nations have been asked to make.

Developing countries positions.--They generally do not favor compulsory dispute settlement for the following reasons: (1) They believe that the decision-makers in this approach will tend to be from developed nations; (2) costs associated with compulsory dispute settlement are likely to be high, and are consequently difficult to sustain for poor countries; and (3) the number of disputes requiring tribunal action may become overwhelming.

At the Caracas session the three Committees did not become deeply involved in dispute settlement problems. Aside from Committee I, there was not much public debate in the Conference on dispute settlement. In the latter part of the session about 30 states from all regions interested in dispute settlement met informally on a regular basis to discuss dispute settlement problems, and at the end of the session nine countries, including the United States, issued a working paper which is likely to stimulate further study and discussion before the Geneva session.

(b) The Informal Single Negotiating Text, U.N. Doc. A/ CONF. 62/ WP. 9/ REV. 1/ PART IV, provides:

SECTION 1

Article 1

Obligation to settle disputes by peaceful means

The Contracting Parties shall settle any dispute between them relating to the interpretation or aplication of the present Convention through the peaceful means indicated in Article 33 of the Charter of the United Nations.

Article 2

Settlement of disputes by means chosen by the parties

Nothing in this Chapter shall impair the right of the Contracting Parties to agree at any time to settle a dispute between them which relates to the interpretation or application of the present Convention by any peaceful means of their own choice.

Article 3

Obligations under general, regional or special agreements

If the Contracting Parties which are parties to a dispute relating to the interpretation or application of the present Convention have accepted, through a general, regional

or special agreement, or some other instrument or instruments an obligation to settle such dispute by resort to arbitration or judicial settlement, any party to the dispute may refer it to arbitration or judicial settlement in accordance with such agreement or instruments in place of the procedure specified in this Chapter, unless the parties agree otherwise.

Article 4

Obligation to exchange views

1. If a dispute arises between two or more Contracting Parties with respect to the interpretation or application of the present Convention, those parties shall proceed expeditiously to exchange views regarding settlement of the dispute.

2. Similarly, such an exchange of views shall be held whenever a procedure under the present Convention, or another procedure chosen by the parties, has been terminated without a settlement of the dispute.

Article 5

If the Contracting Parties which are parties to a dispute have agreed to settle a dispute by peaceful means of their own choice and have agreed on a time-limit for such proceedings, the procedure specified in this Chapter shall apply only after the expiration of that time-limit, provided that no settlement has been reached and the agreement between the parties does not preclude any further procedure.

6. High Seas: Definition and Freedoms Enjoyed

The Geneva Convention on the High Seas, 450 U.N.T.S. 82, 13 U.S.T. 2312, T.I.A.S. No. 5200, provides:

Article 1

The term "high seas" means all parts of the sea that are not included in the territorial sea or in the internal waters of a State.

Article 2

The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by the other rules of international law. It comprises, inter alia, both for coastal and non-coastal States:

(1) Freedom of navigation;
(2) Freedom of fishing;
(3) Freedom to lay submarine cables and pipelines;
(4) Freedom to fly over the high seas.

These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in the exercise of the freedom of the high seas.

Compare the provisions of the Informal Single Negociating Text, U.N. Doc. A/ CONF. 62/ WP. 8/ REV.1/ PART II:

Article 75

The term "high seas" as used in the present Convention means all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State.

Article 76

1. The high seas are open to all States, whether coastal or land-locked. Accordingly, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by the present Convention and by other rules of international law. It comprises, inter alia, both for coastal and land-locked States:

(a) Freedom of navigation;
(b) Freedom of overflight;
(c) Freedom to lay submarine cables and pipelines, subject to Chapter IV;
(d) Freedom to construct artificial islands and other installations permitted under international law, subject to Chapter IV;

(e) Freedom of fishing, subject to the conditions laid down in section 2;

(f) Freedom of scientific research, subject to Chapters IV and . . . (Marine scientific research).

2. These freedoms shall be exercised by all States, with due consideration for the interests of other States in their exercise of the freedom of the high seas, and also with due consideration for the rights under the present Convention with respect to activities in the International Area.

Chapter Two

LIVING RESOURCES OF THE OCEANS

"Every new enclosure of the commons involves the infringement of somebody's personal liberty. Infringements made in the distant past are accepted because no contemporary complains of a loss. It is the newly proposed infringements that we vigorously oppose: cries of 'rights' and 'freedom' fill the air. But what does freedom mean? When man mutually agreed to pass laws against robbing, mankind became more free, not less so. Individuals locked into the logic of the commons are free only to bring on universal ruin; once they see the necessity of mutual coercion, they become free to pursue other goals. I believe it was Hegel who said, 'Freedom is the recognition of necessity.'"

Hardin, The Tragedy of the Commons, 162 Science 1243 (1968).

"Eight years ago, I stood on the Route One bridge in south Miami and squinted into the blaze of sunlight sparkling on the waters below. I had come to see the famous manatees of the Miami River, those whalelike creatures so thrilling to behold and so few in number. But when I leaned over the rail to find them in their customary hideout under the bridge, they were not there. Scanning the river in vain for the familiar upboilings that mark their whereabouts, I approached an elderly fisherman on the bridge. 'Where are the manatees?' When he did not answer, I went on to describe them: about 12 feet long and hung like dirigibles in the water, with legless hindquarters and bristly prehensile lips that plucked the greens out of the river. 'You mean the sea cows?' the fisherman replied. 'They're dead. Propellers on the big power boats slashed them up.'"

George, This Fragile Menagerie Hangs by a Thread, 12 Nat. Wildlife 6 (Apr.-May, 1974).

SECTION 1. INTRODUCTION

From his place at the summit of the food chain, man often overlooks the importance -- or even the existence -- of his travelling companions aboard this sphere with its delicately interdependent and complex biomass. Especially forgotten are the animals least frequently seen -- those living in or near the oceans and coastal waters.

A reminder of sea life appears now and then, perhaps. Maybe a sketch of a smiling halibut adorning a frozen package in the supermarket or a glimpse of an exotic tropical fish in an aquarium might maintain a vague awareness for most people that an aquatic world exists. But how many really appreciate its importance?

Whether it's the continental shelf fisheries which support the large fishing industry, or the Florida manatee, a tropical marine mammal known to aid navigation by clearing waterways clogged by luxuriant hyacinth growths, the water animals are a necessary portion of the system. But like many wild species, their survival is threatened by man.

Already gone are the sea cow, the sea mink and the Atlantic gray whale. The sturgeon, reported by Captain John Smith as more plentiful than could be "devoured by dog or man," has now vanished from the Chesapeake Bay.

The blue, bowhead, finback, gray, humpback, right, sei and sperm whales are listed as officially endangered, as are the Florida manatee, the Dugong and the Hawaiian monk seal. 41 Fed. Reg. 47181.

Considered threatened by the National Wildlife Federation are the Southern sea otter, and the Guadalupe fur, Carribean monk and ribbon seals. Virtually all of the major commercial fish species face serious depletion, and marine scientists are currently debating whether porpoise and dolphin populations are in a general decline.

This chapter will deal with the legal protections accorded marine life: the Fisheries Conservation and Management Act of 1976 and the Marine Mammal Protection Act of 1972. Also considered are the developments in the international law of the sea, state regulations of fisheries and aquaculture, and the application of the Endangered Species Act to coastal animals.

The Economics of Fisheries Management-a note

The extension of United States jurisdiction to 200 nautical miles embodied within the Fisheries Conservation and Management Act of 1976 (FCMA) is predicated on a task never before attempted by the federal government -- the management of the fisheries of the continental shelf.

From an economic standpoint, a fishery with free access to all fishermen (which was the case prior to March 1, 1977, the effective date of the FCMA) will inevitably become exploited to the point of eventual depletion. There is simply insufficient incentive for the individual fisherman to conserve the common resource, absent some assurance that all of his competitors will also conserve. And since no fisherman can restrain any other fisherman operating within a commons, there is actually a real disincentive for fishermen to conserve.

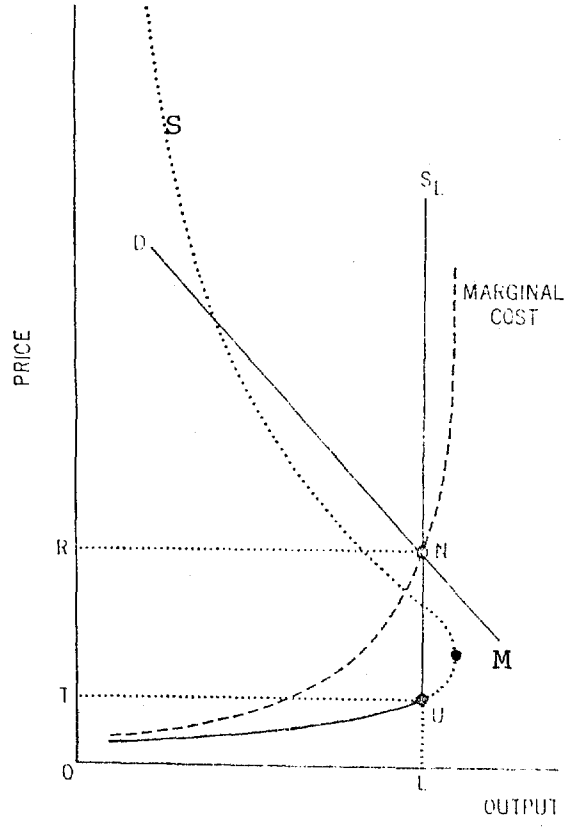
A conservationist fisherman would find that his restraint lessened the competition for his colleagues, and at the same time reduced their future costs as his conservation efforts slowed the depletion of the fisheries stocks, or even aided their replinishment. So in an unlimited entry system, the fishermen find that although their maximum fishing efforts will result in the depletion of their resource, they nevertheless must optimize their present catch, as they have no control over their colleagues or the result of their collective operations.

Not only does such fishing bring on depletion of the common resource, it also produces great economic waste as more labor and capital are invested than are required to acheive the maximum catch. In hopes of solving the problems of economic waste and depletion brought on by the commons, the FCMA seeks to manage the fisheries through a set of plans to acheive the optimum sustainable yield (OSY) of the fishery.

OSY is an interesting concept. The starting point in its formulation is the maximum sustainable yield (MSY), or the point in fishing where the stocks can maintain themselves from season to season. If fishing exceeds the MSY, the stock's reproduction cannot keep pace with the extraction, thus depletion begins.

MSY, then, is primarily a biological term, while OSY represents a broader concept. The Act defines OSY as the MSY of the fishery, as modified by "any relevant economic, social, and ecological factors." FCMA, 16 U.S.C.A. §1802(18). In its report, the Senate Committee on Commerce cautioned that the OSY concept could not be used to justify a catch exceeding the MSY on a continued basis. Rather, the report said, the OSY should ordinarily be "equal to or below the MSY." Sen. Rep. No. 416. 94th Cong., 1st Sess. 21 (1975).

It should be noted that the OSY of the fishery is not necessarily synonymous with the maximum economic yield (MEY). The MEY model is geared toward the maximization of economic rent (or the value of the right to fish), and the elimination of economic waste. As illustrated in the graph below, the supply of fish (s) increases with corresponding fishing efforts to a point, MSY, at which increased fishing produces a decline in fish populations. MEY represents a point on the curve at which the increase in fishing cost per unit matches the increase in revenues, and fishing beyond this point results in a decline in revenues at such an increasing rate as to constitute economic waste. See Clingan, A Second Look at United States Fisheries Management, 9 San Diego L. Rev. 432 (1972); Comment, Legal Dimensions of Entry Fisheries Management, 17 Wm & Mary L. Rev. 757 (1976).



In the graph at the left, the point M represents the point at which increased fishing efforts begin to deplete the stocks. The point U is the limit imposed by the selection of MEY, or the intersection of demand and marginal cost. See Copes, The Backward-Bending Supply Curve of the Fishing Industry 17 Scot. J. Polit. Econ. 69 (1970).

While an MEY-based management scheme might prove the most economically efficient course, it would likely have the undesirable effect of rapidly diminishing the size of the domestic fishing fleet, with a corresponding decline in the number of jobs available in the fishing industry. On the other hand, a plan based on the OSY (with social and ecological factors considered) should not have that effect. The adoption by Congress of the OSY concept signifies a healthy regard for the numerous variables at work in the fisheries systems, and it indicates that although open access has led to serious overfishing and threats to the existence of some stocks, the institution of fisheries management should proceed with caution.

Procedurally, the management will be conducted on the basis of regional management plans conceived by regional commissions with membership weighted toward private citizens over governmental officials. The management plans will be submitted to the Secretary of Commerce for approval, and then published in the Federal Register along with regulations implementing the plans. Enforcement of the regulations is assigned to the Coast Guard, and violators can face criminal and civil penalties and civil forfeitures.

The FCMA charges the commissions with the responsibility of determining the OSY, but leaves the regulatory means of acheiving it to the discretion of the commission and the Secretary. Generally, there are three major types of restricting fishing: closed seasons, restrictions on fishing gear, and limitations on the number of vessels permitted to operate.

Arguments can be made against the closing of seasons on the basis of efficiency. Professor Clingan suggests that although a closed season allows time for repair of gear and maintenance of vessels, the ultimate effect is the creation of a highly intensified effort during the open season. Additionally, Clingan states, "shorter seasons result in the need for high capacity processing plants (to) remain idle for long periods," thereby denying the consumer the availability of fresh fish and imposing the inflated costs resulting from the longer periods of storage.

Limitations on the types of fishing gear, such as those currently in force in some states are similarly criticized by Professor Clingan as a "deliberate choice for inefficiency." Such a limitation can result in technological stagnation in the area, with some fish stocks going underutilized. Also, economic waste will ensue as more labor and capital are invested than are required to obtain the optimum return.

The most attractive option -- one which would achieve the goals of closed seasons and gear limitations, and at the same time attain maximum efficiency -- is that of limited access, Clingan argues. Authorized by the FCMA, 16 U.S.C.A. §1853(6), a limited access plan would involve the required determination by the regional management council of the OSY, followed by a finding of the number of vessels necessary to take the specified catch. Only that number of vessels would be licensed to operate within the fishery.

The concept is simple, but the application has obvious problems. A sudden imposition of a vessel limit would diminish the number of vessels in the fishing industry, with a certain corresponding loss of employment opportunities within the fishing industry and the subsequent displacement of persons now active in the fishing work force. Of course, regard for such social factors would indicate that limitations resulting in large employment losses should be adopted gradually to minimize the adverse impact.

So the regional management councils have a difficult mandate. On the one hand they must insure that the fishery stocks survive and prosper; and on the other, they must ameliorate the harsh impacts of limited entry by considering relevant social factors.

* * *

For an analysis of possible constitutional attacks on limited access regulations, see Comment, Legal Dimensions of Entry Fisheries Management, 17 Wm & Mary L. Rev. 757 (1976).

THE FISHERIES JURISDICTION CASE: UNITED KINGDOM v. ICELAND

The International Court of Justice
Merits Judgment of July 25, 1974 [1974] I.C.J.Rep. 3

THE COURT,

delivers the following Judgment:

1. By a letter of 14 April 1972, received in the Registry of the Court the same day, the Chargé d'Affaires of the British Embassy in the Netherlands transmitted to the Registrar an Application instituting proceedings against the Republic of Iceland in respect of a dispute concerning the then proposed extension by the Government of Iceland of its fisheries jurisdiction.

2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was at once communicated to the Government of Iceland. In accordance with paragraph 3 of that Article, all other States entitled to appear before the Court were notified of the Application.

3. By a letter dated 29 May 1972 from the Minister for Foreign Affairs of Iceland, received in the Registry on 31 May 1972, the Court was informed *(inter alia)* that the Government of Iceland was not willing to confer jurisdiction on the Court and would not appoint an Agent.

4. On 19 July 1972, the Agent of the United Kingdom filed in the Registry of the Court a request for the indication of interim measures of protection under Article 41 of the Statute and Article 61 of the Rules of Court adopted on 6 May 1946. By an Order dated 17 August 1972, the Court indicated certain interim measures of protection in the case; and by a further Order dated 12 July 1973, the Court confirmed that those measures should, subject as therein mentioned, remain operative until the Court has given final judgment in the case. By a letter of 21 November 1973, the Agent of the United Kingdom informed the Court, with reference to the Orders of 17 August 1972 and 12 July 1973, of the conclusion on 13 November 1973 of an Exchange of Notes constituting an interim agreement "relating to fisheries in the disputed area, pending a settlement of the substantive dispute and without prejudice to the legal position or rights of either government in relation thereto". Copies of the Exchange of Notes were enclosed with the letter. A further copy was communicated to the Court by the Minister for Foreign Affairs of Iceland under cover of a letter dated 11 January 1974. The Exchange of Notes was registered with the United Nations Secretariat under Article 102 of the Charter of the United Nations.

5. By an Order dated 18 August 1972, the Court, considering that it was necessary to resolve first of all the question of its jurisdiction in the case, decided that the first pleadings should be addressed to the question of the jurisdiction of the Court to entertain the dispute, and fixed time-limits for the filing of a Memorial by the Government of the United Kingdom and a Counter-Memorial by the Government of Iceland. The Memorial of the Government of the United Kingdom was filed within the time-limit prescribed, and was communicated to the Government of Iceland; no Counter-Memorial was filed by the Government of Iceland. On 5 January 1973, after due notice to the Parties, a public hearing was held in the course of which the Court heard the oral argument of counsel for the United Kingdom on the question of the Court's jurisdiction; the Government of Iceland was not represented at the hearing.

6. By a Judgment dated 2 February 1973, the Court found that it had jurisdiction to entertain the Application filed by the United Kingdom and to deal with the merits of the dispute.

7. By an Order dated 15 February 1973 the Court fixed time-limits for the written proceedings on the merits, namely 1 August 1973 for the Memorial of the Government of the United Kingdom and 15 January 1974 for the Counter-Memorial of the Government of Iceland. The Memorial of the Government of the United Kingdom was filed within the time-limit prescribed, and was communicated to the Government of Iceland; no Counter-Memorial was filed by the Government of Iceland.

8. By a letter from the Registrar dated 17 August 1973 the Agent of the United Kingdom was invited to submit to the Court any observations which the Government of the United Kingdom might wish to present on the question of the possible joinder of this case with the case instituted on 5 June 1972 by the Federal Republic of Germany against the Republic of Iceland (General List No. 56), and the Agent was informed that the Court had fixed 30 September 1973 as the time-limit within which any such observations should be filed. By a letter dated 26 September 1973, the Agent of the United Kingdom submitted the observations of his Government on the question of the possible joinder of the two *Fisheries Jurisdiction* cases. The Government of Iceland was informed that the observations of the United Kingdom on possible joinder had been invited, but did not make any comments to the Court. On 17 January 1974 the Court decided by nine votes to five not to join the present proceedings to those instituted by the Federal Republic of Germany against the Republic of Iceland. In reaching this decision the Court took into account the fact that while the basic legal issues in each case appeared to be identical, there were differences between the positions of the two Applicants, and between their respective submissions, and that joinder would be contrary to the wishes of the two Applicants. The Court decided to hold the public hearings in the two cases immediately following each other.

9. On 25 and 29 March 1974, after due notice to the Parties, public hearings were held in the course of which the Court heard the oral argument of counsel for the United Kingdom on the merits of the case; the Government of Iceland was not represented at the hearings. Various Members of the Court addressed questions to the Agent of the United Kingdom both during the course of the hearings and subsequently, and replies were given either orally at the hearings or in writing. Copies of the verbatim record of the hearings and of the written questions and replies were transmitted to the Government of Iceland.

10. The Governments of Argentina, Australia, Ecuador, the Federal Republic of Germany, India, New Zealand and Senegal requested that the pleadings and annexed documents in this case should be made available to them in accordance with Article 44, paragraph 2, of the Rules of Court. The Parties having indicated that they had no objection, it was decided to accede to these requests. Pursuant to Article 44, paragraph 3, of the Rules of Court, the pleadings and annexed documents were, with the consent of the Parties, made accessible to the public as from the date of the opening of the oral proceedings.

11. In the course of the written proceedings, the following submissions were presented on behalf of the Government of the United Kingdom:

in the Application:

"The United Kingdom asks the Court to adjudge and declare:

(a) That there is no foundation in international law for the claim by Iceland to be entitled to extend its fisheries jurisdiction by establishing a zone of exclusive fisheries jurisdiction extending to 50 nautical miles from the baselines hereinbefore referred to; and that its claim is therefore invalid; and

(b) that questions concerning the conservation of fish stocks in the waters around Iceland are not susceptible in international law to regulation by the unilateral extension by Iceland of its exclusive fisheries jurisdiction to 50 nautical miles from the aforesaid baselines but are matters that may be regulated, as between Iceland and the United Kingdom, by arrangements agreed between those two countries, whether or not together with other interested countries and whether in the form of arrangements reached in accordance with the North-East Atlantic Fisheries Convention of 24 January 1959, or in the form of arrangements for collaboration in accordance with the Resolution on Special Situations relating to Coastal Fisheries of 26 April 1958, or otherwise in the form of arrangements agreed between them that give effect to the continuing rights and interests of both of them in the fisheries of the waters in question."

in the Memorial on the merits:

"... the Government of the United Kingdom submit to the Court that the Court should adjudge and declare:

(a) that the claim by Iceland to be entitled to a zone of exclusive fisheries jurisdiction extending 50 nautical miles from baselines around the coast of Iceland is without foundation in international law and is invalid;

(b) that, as against the United Kingdom, Iceland is not entitled unilaterally to assert an exclusive fisheries jurisdiction beyond the limits agreed to in the Exchange of Notes of 1961;

(c) that Iceland is not entitled unilaterally to exclude British fishing vessels from the area of the high seas beyond the limits agreed to in the Exchange of Notes of 1961 or unilaterally to impose restrictions on the activities of such vessels in that area;

(d) that activities by the Government of Iceland such as are referred to in Part V of this Memorial, that is to say, interference by force or the threat of force with British fishing vessels operating in the said area of the high seas, are unlawful and that Iceland is under an obligation to make compensation therefor to the United Kingdom (the form and amount of such compensation to be assessed, failing agreement between the Parties, in such manner as the Court may indicate); and

(e) that, to the extent that a need is asserted on conservation grounds, supported by properly attested scientific evidence, for the introduction of restrictions on fishing activities in the said area of the high seas, Iceland and the United Kingdom are under a duty to examine together in good faith (either bilaterally or together with other interested States and either by new arrangements or through already existing machinery for international collaboration in these matters such as the North-East Atlantic Fisheries Commission) the existence and extent of that need and similarly to negotiate for the establishment of such a régime for the fisheries of the area as, having due regard to the interests of other States, will ensure for Iceland, in respect of any such restrictions that are shown to be needed as aforesaid, a preferential position consistent with its position as a State specially dependent on those fisheries and as will also ensure for the United Kingdom a position consistent with its traditional interest and acquired rights in and current dependency on those fisheries."

13. No pleadings were filed by the Government of Iceland, which was also not represented at the oral proceedings, and no submissions were therefore presented on its behalf. The attitude of that Government was however defined in the above-mentioned letter of 29 May 1972 from the Minister for Foreign Affairs of Iceland, namely that there was on 14 April 1972 (the date on which the Application was filed) no basis under the Statute for the Court to exercise jurisdiction in the case, and that the Government of Iceland was not willing to confer jurisdiction on the Court. After the Court had decided, by its Judgment of 2 February 1973, that it had jurisdiction to deal with the merits of the dispute, the Minister for Foreign Affairs of Iceland, by letter dated 11 January 1974, informed the Court that:

"With reference to the time-limit fixed by the Court for the submission of Counter-Memorials by the Government of Iceland, I have the honour to inform you that the position of the Government of Iceland with regard to the proceedings in question remains unchanged and, consequently, no Counter-Memorials will be submitted. At the same time, the Government of Iceland does not accept or acquiesce in any of the statements of facts or allegations or contentions of law contained in the Memorials filed by the Parties concerned."

14. Iceland has not taken part in any phase of the present proceedings. By the above-mentioned letter of 29 May 1972, the Government of Iceland informed the Court that it regarded the Exchange of Notes between the Government of Iceland and the Government of the United Kingdom dated 11 March 1961 as terminated; that in its view there was no basis under the Statute for the Court to exercise jurisdiction in the case; that, as it considered the vital interests of the people of Iceland to be involved, it was not willing to confer jurisdiction on the Court in any case involving the extent of the fishery limits of Iceland; and that an agent would not be appointed to represent the Government of Iceland. Thereafter, the Government of Iceland did not appear before the Court at the public hearing held on 1 August 1972 concerning the United Kingdom's request for the indication of interim measures of protection; nor did it file any pleadings or appear before the Court in the subsequent proceedings concerning the Court's jurisdiction to entertain the dispute. Notwithstanding the Court's Judgment of 2 February 1973, in which the Court decided that it has jurisdiction to entertain the United Kingdom's Application and to deal with the merits of the dispute, the Government of Iceland maintained the same position with regard to the subsequent proceedings. By its letter of 11 January 1974, it informed the Court that no Counter-Memorial would be submitted. Nor did it in fact file any pleading or appear before the Court at the public hearings on the merits of the dispute. At these hearings, counsel for the United Kingdom, having drawn attention to the non-appearance in Court of any representative of the Respondent, referred to Article 53 of the Statute, and concluded by presenting the final submissions of the United Kingdom on the merits of the dispute for adjudication by the Court.

15. The Court is thus confronted with the situation contemplated by Article 53, paragraph 1, of the Statute, that "Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favour of its claim". Paragraph 2 of that Article, however, also provides: "The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law."

16. The present case turns essentially on questions of international law, and the facts requiring the Court's consideration in adjudicating upon the Applicant's claim either are not in dispute or are attested by documentary evidence. Such evidence emanates in part from the Government of Iceland, and has not been specifically contested, and there does not appear to be any reason to doubt its accuracy. The Government of Iceland, it is true, declared in its above-mentioned letter of 11 January 1974 that "it did not accept or acquiesce in any of the *statements of fact* or allegations or contentions of law contained in the Memorials of the Parties concerned" (emphasis added). But such a general declaration of non-acceptance and non-acquiescence cannot suffice to bring into question facts which appear to be established by documentary evidence, nor can it change the position of the applicant Party, or of the Court, which remains bound to apply the provisions of Article 53 of the Statute.

17. It is to be regretted that the Government of Iceland has failed to appear in order to plead its objections or to make its observations against the Applicant's arguments and contentions in law. The Court however, as an international judicial organ, is deemed to take judicial notice of international law, and is therefore required in a case falling under Article 53 of the Statute, as in any other case, to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute. It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court. In ascertaining the law applicable in the present case the Court has had cognizance not only of the legal arguments submitted to it by the Applicant but also of those contained in various communications addressed to it by the Government of Iceland, and in documents presented to the Court. The Court has thus taken account of the legal position of each Party. Moreover, the Court has been assisted by the answers given by the Applicant, both orally and in writing, to questions asked by Members of the Court during the oral proceedings or immediately thereafter. It should be stressed that in applying Article 53 of the Statute in this case, the Court has acted with particular circumspection and has taken special care, being faced with the absence of the respondent State.

18. Accordingly, for the purposes of Article 53 of the Statute, the Court considers that it has before it the elements necessary to enable it to determine whether the Applicant's claim is, or is not, well founded in fact and law, and it is now called upon to do so. However, before proceeding further the Court considers it necessary to recapitulate briefly the history of the present dispute.

*
* *

19. In 1948 the Althing (the Parliament of Iceland) passed a law entitled "Law concerning the Scientific Conservation of the Continental Shelf Fisheries" containing, *inter alia*, the following provisions:

"*Article 1*

The Ministry of Fisheries shall issue regulations establishing explicitly bounded conservation zones within the limits of the continental shelf of Iceland; wherein all fisheries shall be subject to Icelandic rules and control; Provided that the conservation measures now in effect shall in no way be reduced. The Ministry shall further issue the necessary regulations for the protection of the fishing grounds within the said zones . . .

Article 2

The regulations promulgated under Article 1 of the present law shall be enforced only to the extent compatible with agreements with other countries to which Iceland is or may become a party."

20. The 1948 Law was explained by the Icelandic Government in its *exposé des motifs* submitting the Law to the Althing, in which, *inter alia*, it stated:

"It is well known that the economy of Iceland depends almost entirely on fishing in the vicinity of its coasts. For this reason, the population of Iceland has followed the progressive impoverishment of fishing grounds with anxiety. Formerly, when fishing equipment was far less efficient than it is today, the question appeared in a different light, and the right of providing for exclusive rights of fishing by Iceland itself in the vicinity of her coasts extended much further than is admitted by the practice generally adopted since 1900. It seems obvious, however, that measures to protect fisheries ought to be extended in proportion to the growing efficiency of fishing equipment.

. . . . . .

In so far as the jurisdiction of States over fishing grounds is concerned, two methods have been adopted. Certain States have proceeded to a determination of their territorial waters, especially for fishing purposes. Others, on the other hand, have left the question of the territorial waters in abeyance and have contented themselves with asserting their exclusive right over fisheries, independently of territorial waters. Of these two methods, the second seems to be the more natural, having regard to the fact that certain considerations arising from the concept of 'territorial waters' have no bearing upon the question of an exclusive right to fishing, and that there are therefore serious drawbacks in considering the two questions together."

21. Commenting upon Article 2 of the 1948 Law, the *exposé des motifs* referred to the Anglo-Danish Convention of 1901, which applied to the fisheries in the waters around Iceland and established a 3-mile limit for the exclusive right of fishery. This Convention, which was subject to termination by either party on giving two years' notice, was mentioned as one of the international agreements with which any regulations issued under the Law would have to be compatible so long as the Convention remained in force. In the following year, on 3 October 1949, the Government of Iceland gave notice of the denunciation of the Convention, with the result that it ceased to be in force after the expiry of the prescribed two-year period of notice on 3 October 1951. Furthermore, during that interval this Court had handed down its Judgment in the *Fisheries* case (*I.C.J. Reports 1951*, p. 116) between the United Kingdom and Norway, in which it had endorsed the validity of the system of straight baselines applied by Norway off the Norwegian coast. Early in 1952, Iceland informed the United Kingdom of its intention to issue new fishery regulations in accordance with the 1948 Law. Then, on 19 March of that year, Iceland issued Regulations providing for a fishery zone whose outer limit was to be a line drawn 4 miles to seaward of straight baselines traced along the outermost points of the coasts, islands and rocks and across the opening of bays, and prohibiting all foreign fishing activities within that zone.

22. The 1952 Fisheries Regulations met with protests from the United Kingdom, regarding Iceland's claim to a 4-mile limit and certain features of its straight-baseline system, which the United Kingdom considered to go beyond the principles endorsed by the Court in the *Fisheries* case. After various attempts to resolve the dispute, a *modus vivendi* was reached in 1956 under which there was to be no further extension of Iceland's fishery limits pending discussion by the United Nations General Assembly in that year of the Report of the International Law Commission on the Law of the Sea. This discussion resulted in the convening at Geneva in 1958 of the first United Nations Conference on the Law of the Sea.

23. The 1958 Conference, having failed to reach agreement either on the limit of the territorial sea or on the zone of exclusive fisheries, adopted a resolution requesting the General Assembly to study the advisability of convening a second Law of the Sea Conference specifically to deal with these questions. After the conclusion of the 1958 Conference, Iceland made on 1 June 1958 a preliminary announcement of its intention to reserve the right of fishing within an area of 12 miles from the baselines exclusively to Icelandic fishermen, and to extend the fishing zone also by modification of the baselines, and then on 30 June 1958 issued new "Regulations concerning the Fisheries Limits off Iceland". Article 1 of these proclaimed a new 12-mile fishery limit around Iceland drawn from new baselines defined in that Article, and Article 2 prohibited all fishing activities by foreign vessels within the new fishery limit. Article 7 of the Regulations expressly stated that they were promulgated in accordance with the Law of 1948 concerning Scientific Conservation of the Continental Shelf Fisheries.

24. The United Kingdom did not accept the validity of the new Regulations, and its fishing vessels continued to fish inside the 12-mile limit, with the result that a number of incidents occurred on the fishing grounds. Various attempts were made to settle the dispute by negotiation but the dispute remained unresolved. On 5 May 1959 the Althing passed a resolution on the matter in which, *inter alia*, it said:

> "... the Althing declares that it considers that Iceland has an indisputable right to fishery limits of 12 miles, that *recognition should be obtained of Iceland's right to the entire continental shelf area in conformity with the policy adopted by the Law of 1948, concerning the Scientific Conservation of the Continental Shelf Fisheries* and that fishery limits of less than 12 miles from base-lines around the country are out of the question" (emphasis added).

The Resolution thus stressed that the 12-mile limit asserted in the 1958 Regulations was merely a further step in Iceland's progress towards its objective of a fishery zone extending over the whole of the continental shelf area.

25. After the Second United Nations Conference on the Law of the Sea, in 1960, the United Kingdom and Iceland embarked on a series of negotiations with a view to resolving their differences regarding the 12-mile fishery limits and baselines claimed by Iceland in its 1958 Regulations. According to the records of the negotiations which were drawn up by and have been brought to the Court's attention by the Applicant, the Icelandic representatives in their opening statement called attention to the proposals submitted to the 1960 Conference on the Law of the Sea concerning preferential rights and to the widespread support these proposals had received, and asserted that Iceland, as a country in a special situation, "should receive preferential treatment even beyond 12 miles". Fishery conservation measures outside the 12-mile limit, including the reservation of areas for Icelandic fishing, were discussed, but while the United Kingdom representatives recognized that "Iceland is a 'special situation' country", no agreement was reached regarding fisheries outside the 12-mile limit. In these discussions, the United Kingdom insisted upon receiving an assurance concerning the future extension of Iceland's fishery jurisdiction and a compromissory clause was then included in the Exchange of Notes which was agreed upon by the Parties on 11 March 1961.

26. The substantive provisions of the settlement, which were set out in the principal Note addressed by the Government of Iceland to the Government of the United Kingdom, were as follows:

(1) The United Kingdom would no longer object to a 12-mile fishery zone around Iceland measured from the baselines accepted solely for the purpose of the delimitation of that zone.

(2) The United Kingdom accepted for that purpose the baselines set out in the 1958 Regulations subject to the modification of four specified points.

(3) For a period of three years from the date of the Exchange of Notes, Iceland would not object to United Kingdom vessels fishing within certain specified areas and during certain stated months of the year.

(4) During that three-year period, however, United Kingdom vessels would not fish within the outer 6 miles of the 12-mile zone in seven specified areas.

(5) Iceland "will continue to work for the implementation of the Althing Resolution of May 5, 1959, regarding the extension of fisheries jurisdiction around Iceland, but shall give to the United Kingdom Government six months' notice of such extension and, in case of a dispute in relation to such extension, the matter shall, at the request of either party, be referred to the International Court of Justice".

In its Note in reply the United Kingdom emphasized that:

> ". . . in view of the exceptional dependence of the Icelandic nation upon coastal fisheries for their livelihood and economic development, and without prejudice to the rights of the United Kingdom under international law towards a third party, the contents of Your Excellency's Note are acceptable to the United Kingdom and the settlement of the dispute has been accomplished on the terms stated therein".

27. On 14 July 1971 the Government of Iceland issued a policy statement in which, *inter alia*, it was said:

> "That the agreements on fisheries jurisdiction with the British and the West Germans be terminated and that a decision be taken on the extension of fisheries jurisdiction to 50 nautical miles from base lines, and that this extension become effective not later than September 1st, 1972."

28. The United Kingdom replied on 27 September 1971 and placed formally on record its view that "such an extension of the fishery zone around Iceland would have no basis in international law". It then controverted Iceland's proposition that the object and purpose of the provision for recourse to judicial settlement of disputes relating to an extension of fisheries jurisdiction had been fully achieved, and again reserved all its rights under that provision. At the same time, however, the United Kingdom expressed its willingness, without prejudice to its legal position, to enter into further exploratory discussions. In November 1971 the United Kingdom and Iceland held discussions. At these talks, the British delegation stated their view that Iceland's objectives could be achieved by a catch-limitation agreement. In further talks which took place in January

1972 the United Kingdom expressed its readiness to negotiate any arrangements for the limitation of catches that scientific evidence might show to be necessary, and in which any preferential requirements of the coastal State resulting from its dependence on fisheries would be recognized. It further proposed, as an interim measure pending the elaboration of a multilateral arrangement, to limit its annual catch of demersal fish in Icelandic waters to 185,000 tons. The Icelandic Government was not, however, prepared to negotiate further on this basis.

29. On 15 February 1972 the Althing adopted a Resolution reiterating the fundamental policy of the Icelandic people that the continental shelf of Iceland and the superjacent waters were within the jurisdiction of Iceland. While repeating that the provisions of the Exchange of Notes of 1961 no longer constituted an obligation for Iceland, it resolved, *inter alia*:

"1. That the fishery limits will be extended to 50 miles from base-lines around the country, to become effective not later than 1 September 1972.

. . . . . .

3. That efforts to reach a solution of the problems connected with the extension be continued through discussions with the Governments of the United Kingdom and the Federal Republic of Germany.
4. That effective supervision of the fish stocks in the Iceland area be continued in consultation with marine biologists and that the necessary measures be taken for the protection of the fish stocks and specified areas in order to prevent over-fishing . . ."

In an aide-mémoire of 24 February 1972 Iceland's Minister for Foreign Affairs formally notified the United Kingdom Ambassador in Reykjavik of his Government's intention to proceed in accordance with this Resolution.

30. On 14 March 1972, the United Kingdom in an aide-mémoire took note of the decision of Iceland to issue new Regulations, reiterated its view that "such an extension of the fishery zone around Iceland would have no basis in international law", and rejected Iceland's contention that the Exchange of Notes was no longer in force. Moreover, formal notice was also given by the United Kingdom that an application would shortly be made to the Court in accordance with the Exchange of Notes; the British Government was however willing to continue discussions with Iceland "in order to agree satisfactory practical arrangements for the period while the case is before the International Court of Justice". On 14 April 1972, the United Kingdom filed in the Registry its Application bringing the present case before the Court.

31. A series of negotiations between representatives of the two countries soon followed and continued throughout May, June and July 1972, in the course of which various proposals for catch-limitation, fishing-effort limitation, area or seasonal restrictions for United Kingdom vessels were discussed, in the hope of arriving at practical arrangements for an interim régime pending the settlement of the dispute. By 12 July there was still no agreement on such an interim régime, and the Icelandic delegation announced that new Regulations would be issued on 14 July 1972 which would exclude all foreign vessels from fishing within the 50-mile limit after 1 September 1972. The United Kingdom delegation replied that, while ready to continue the discussions for an interim régime, they reserved the United Kingdom's rights in areas outside the 12-mile

limit and would seek an Order for interim measures of protection from the Court. The new Regulations, issued on 14 July 1972, extended Iceland's fishery limits to 50 miles as from 1 September 1972 and, by Article 2, prohibited all fishing activities by foreign vessels inside those limits. Consequently, on 19 July 1972, the United Kingdom filed its request for the indication of interim measures of protection.

33. On 17 August 1972 the Court made an Order for provisional measures in which, *inter alia*, it indicated that, pending the Court's final decision in the proceedings, Iceland should refrain from taking any measures to enforce the Regulations of 14 July 1972 against United Kingdom vessels engaged in fishing outside the 12-mile fishery zone; and that the United Kingdom should limit the annual catch of its vessels in the "Sea Area of Iceland" to 170,000 tons. That the United Kingdom has complied with the terms of the catch-limitation measure indicated in the Court's Order has not been questioned or disputed. Iceland, on the other hand, notwithstanding the measures indicated by the Court, began to enforce the new Regulations against United Kingdom vessels soon after they came into effect on 1 September 1972. Moreover, when in August 1972 the United Kingdom made it clear to Iceland that in its view any settlement between the parties of an interim régime should be compatible with the Court's Order, Iceland replied on 30 August that it would not consider the Order to be binding upon it "since the Court has no jurisdiction in the matter".

34. By its Judgment of 2 February 1973, the Court found that it had jurisdiction to entertain the Application and to deal with the merits of the dispute. However, even after the handing down of that Judgment, Iceland persisted in its efforts to enforce the 50-mile limit against United Kingdom vessels and, as appears from the letter of 11 January 1974 addressed to the Court by the Minister for Foreign Affairs of Iceland, mentioned above, it has continued to deny the Court's competence to entertain the dispute.

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* *

35. Negotiations for an interim arrangement were, however, resumed between the two countries, and were carried on intermittently during 1972 and 1973. In the meantime incidents on the fishing grounds involving British and Icelandic vessels were becoming increasingly frequent, and eventually discussions between the Prime Ministers of Iceland and the United Kingdom in 1973 led to the conclusion of an "Interim Agreement in the Fisheries Dispute" constituted by an Exchange of Notes dated 13 November 1973.

36. The terms of the Agreement were set out in the Icelandic Note, which began by referring to the discussions which had taken place and continued:

> "In these discussions the following arrangements have been worked out for an interim agreement relating to fisheries in the disputed area, pending a settlement of the substantive dispute and without prejudice to the legal position or rights of either Government in relation thereto, which are based on an estimated annual catch of about 130,000 metric tons by British vessels."

The arrangements for the fishing activities of United Kingdom vessels in the disputed area were then set out, followed by paragraph 7 which stipulated:

> "The agreement will run for two years from the present date. Its termination will not affect the legal position of either Government with respect to the substantive dispute."

38. The interim agreement of 1973, unlike the 1961 Exchange of Notes, does not describe itself as a "settlement" of the dispute, and, apart from being of limited duration, clearly possesses the character of a provisional arrangement adopted without prejudice to the rights of the Parties, nor does it provide for the waiver of claims by either Party in respect of the matters in dispute. The Applicant has not sought to withdraw or discontinue its proceedings. The primary duty of the Court is to discharge its judicial function and it ought not therefore to refuse to adjudicate merely because the Parties, while maintaining their legal positions, have entered into an agreement one of the objects of which was to prevent the continuation of incidents.

40. The Court is of the view that there is no incompatibility with its judicial function in making a pronouncement on the rights and duties of the Parties under existing international law which would clearly be capable of having a forward reach; this does not mean that the Court should declare the law between the Parties as it might be at the date of expiration of the interim agreement, a task beyond the powers of any tribunal. The possibility of the law changing is ever present: but that cannot relieve the Court from its obligation to render a judgment on the basis of the law as it exists at the time of its decision. In any event it cannot be said that the issues now before the Court have become without object; for there is no doubt that the case is one in which "there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the Parties" (*Northern Cameroons, Judgment, I.C.J. Reports 1963*, pp. 33-34).

41. Moreover, if the Court were to come to the conclusion that the interim agreement prevented it from rendering judgment, or compelled it to dismiss the Applicant's claim as one without object, the inevitable result would be to discourage the making of interim arrangements in future disputes with the object of reducing friction and avoiding risk to peace and security. This would run contrary to the purpose enshrined in the provisions of the United Nations Charter relating to the pacific settlement of disputes. It is because of the importance of these considerations that the Court has felt it necessary to state at some length its views on the inferences discussed above. The Court concludes that the existence of the interim agreement ought not to lead it to refrain from pronouncing judgment in the case.

49. The Applicant has challenged the Regulations promulgated by the Government of Iceland on 14 July 1972, and since the Court has to pronounce on this challenge, the ascertainment of the law applicable becomes necessary. As the Court stated in the *Fisheries* case:

> "The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law." (*I.C.J. Reports 1951*, p. 132.)

The Court will therefore proceed to the determination of the existing rules of international law relevant to the settlement of the present dispute.

50. The Geneva Convention on the High Seas of 1958, which was adopted "as generally declaratory of established principles of international law", defines in Article 1 the term "high seas" as "all parts of the sea that are not included in the territorial sea or in the internal waters of a State". Article 2 then declares that "The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty" and goes on to provide that the freedom of the high seas comprises, *inter alia*, both for coastal and non-coastal States, freedom of navigation and freedom of fishing. The freedoms of the high seas are however made subject to the consideration that they "shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas".

51. The breadth of the territorial sea was not defined by the 1958 Convention on the Territorial Sea and the Contiguous Zone. It is true that Article 24 of this Convention limits the contiguous zone to 12 miles "from the baseline from which the breadth of the territorial sea is measured". At the 1958 Conference, the main differences on the breadth of the territorial sea were limited at the time to disagreements as to what limit, not exceeding 12 miles, was the appropriate one. The question of the breadth of the territorial sea and that of the extent of the coastal State's fishery jurisdiction were left unsettled at the 1958 Conference. These questions were referred to the Second Conference on the Law of the Sea, held in 1960. Furthermore, the question of the extent of the fisheries jurisdiction of the coastal State, which had constituted a serious obstacle to the reaching of an agreement at the 1958 Conference, became gradually separated from the notion of the territorial sea. This was a development which reflected the increasing importance of fishery resources for all States.

52. The 1960 Conference failed by one vote to adopt a text governing the two questions of the breadth of the territorial sea and the extent of fishery rights. However, after that Conference the law evolved through the practice of States on the basis of the debates and near-agreements at the Conference. Two concepts have crystallized as customary law in recent years arising out of the general consensus revealed at that Conference. The first is the concept of the fishery zone, the area in which a State may claim exclusive fishery jurisdiction independently of its territorial sea; the extension of that fishery zone up to a 12-mile limit from the baselines appears now to be generally accepted. The second is the concept of preferential rights of fishing in adjacent waters in favour of the coastal State in a situation of special dependence on its coastal fisheries, this preference operating in regard to other States concerned in the exploitation of the same fisheries, and to be implemented in the way indicated in paragraph 57 below.

53. In recent years the question of extending the coastal State's fisheries jurisdiction has come increasingly to the forefront. The Court is aware that a number of States has asserted an extension of fishery limits. The Court is also aware of present endeavours, pursued under the auspices of the United Nations, to achieve in a third Conference on the Law of the Sea the further codification and progressive development of this branch of the law, as it is of various proposals and preparatory documents produced in this framework, which must be regarded as manifestations of the views and opinions of individual States and as vehicles of their aspirations, rather than as expressing principles of existing law. The very fact of convening the third Conference on the Law of the Sea evidences a manifest desire on the part of all States to proceed to the codification of that law on a universal basis, including the question of fisheries and conservation of the living resources of the sea. Such a general desire is understandable since the rules of international maritime law have been the product of mutual accommodation, reasonableness and co-operation. So it was in the past, and so it necessarily is today. In the circumstances, the Court, as a court of law, cannot render judgment *sub*

specie legis ferendae, or anticipate the law before the legislator has laid it down.

54. The concept of a 12-mile fishery zone, referred to in paragraph 52 above, as a *tertium genus* between the territorial sea and the high seas, has been accepted with regard to Iceland in the substantive provisions of the 1961 Exchange of Notes, and the United Kingdom has also applied the same fishery limit to its own coastal waters since 1964; therefore this matter is no longer in dispute between the Parties. At the same time, the concept of preferential rights, a notion that necessarily implies the existence of other legal rights in respect of which that preference operates, has been admitted by the Applicant to be relevant to the solution of the present dispute. Moreover, the Applicant has expressly recognized Iceland's preferential rights in the disputed waters and at the same time has invoked its own historic fishing rights in these same waters, on the ground that reasonable regard must be had to such traditional rights by the coastal State, in accordance with the generally recognized principles embodied in Article 2 of the High Seas Convention. If, as the Court pointed out in its dictum in the *Fisheries* case, cited in paragraph 49 above, any national delimitation of sea areas, to be opposable to other States, requires evaluation in terms of the existing rules of international law, then it becomes necessary for the Court, in its examination of the Icelandic fisheries Regulations, to take those elements into consideration as well. Equally it has necessarily to take into account the provisions of the Exchange of Notes of 1961 which govern the relations between the Parties with respect to Iceland's fishery limits. The said Exchange of Notes, which was concluded within the framework of the existing provisions of the law of the sea, was held by the Court, in its Judgment of 2 February 1973, to be a treaty which is valid and in force.

*
* *

55. The concept of preferential rights for the coastal State in a situation of special dependence on coastal fisheries originated in proposals submitted by Iceland at the Geneva Conference of 1958. Its delegation drew attention to the problem which would arise when, in spite of adequate fisheries conservation measures, the yield ceased to be sufficient to satisfy the requirements of all those who were interested in fishing in a given area. Iceland contended that in such a case, when a catch-limitation becomes necessary, special consideration should be given to the coastal State whose population is overwhelmingly dependent on the fishing resources in its adjacent waters.

56. An Icelandic proposal embodying these ideas failed to obtain the majority required, but a resolution was adopted at the 1958 Conference concerning the situation of countries or territories whose people are overwhelmingly dependent upon coastal fisheries for their livelihood or economic development. This resolution, after "recognizing that such situations call for exceptional measures befitting particular needs" recommended that:

> ". . . where, for the purpose of conservation, it becomes necessary to limit the total catch of a stock or stocks of fish in an area of the high seas adjacent to the territorial sea of a coastal State, any other States fishing in that area should collaborate with the coastal State to secure just treatment of such situation, by establishing agreed measures which shall recognize any preferential requirements of the coastal State resulting from its dependence upon the fishery concerned while having regard to the interests of the other States".

57. At the Plenary Meetings of the 1960 Conference the concept of preferential rights was embodied in a joint amendment presented by Brazil, Cuba and Uruguay which was subsequently incorporated by a substantial vote into a joint United States-Canadian proposal concerning a 6-mile territorial sea and an additional 6-mile fishing zone, thus totalling a 12-mile exclusive fishing zone, subject to a phasing-out period. This amendment provided, independently of the exclusive fishing zone, that the coastal State had:

> ". . . the faculty of claiming preferential fishing rights in any area of the high seas adjacent to its exclusive fishing zone when it is scientifically established that a special situation or condition makes the exploitation of the living resources of the high seas in that area of fundamental importance to the economic development of the coastal State or the feeding of its population".

It also provided that:

> "A special situation or condition may be deemed to exist when:
>
> *(a)* The fisheries and the economic development of the coastal State or the feeding of its population are so manifestly interrelated that, in consequence, that State is greatly dependent on the living resources of the high seas in the area in respect of which preferential fishing is being claimed;
>
> *(b)* It becomes necessary to limit the total catch of a stock or stocks of fish in such areas . . ."

The contemporary practice of States leads to the conclusion that the preferential rights of the coastal State in a special situation are to be implemented by agreement between the States concerned, either bilateral or multilateral, and, in case of disagreement, through the means for the peaceful settlement of disputes provided for in Article 33 of the Charter of the United Nations. It was in fact an express condition of the amendment referred to above that any other State concerned would have the right to request that a claim made by a coastal State should be tested and determined by a special commission on the basis of scientific criteria and of evidence presented by the coastal State and other States concerned. The commission was to be empowered to determine, for the period of time and under the limitations that it found necessary, the preferential rights of the coastal State, "while having regard to the interests of any other State or States in the exploitation of such stock or stocks of fish".

59. There can be no doubt of the exceptional dependence of Iceland on its fisheries. That exceptional dependence was explicitly recognized by the Applicant in the Exchange of Notes of 11 March 1961, and the Court has also taken judicial notice of such recognition, by declaring that it is "necessary to bear in mind the exceptional dependence of the Icelandic nation upon coastal fisheries for its livelihood and economic development" (*I.C.J. Reports 1972*, p. 16, para. 23).

60. The preferential rights of the coastal State come into play only at the moment when an intensification in the exploitation of fishery resources makes it imperative to introduce some system of catch-limitation and sharing of those resources, to preserve the fish stocks in the interests of their rational and economic exploitation. This situation appears to have been reached in the present case. In regard to the two main demersal species concerned—cod and haddock—the Applicant has shown itself aware of the need for a catch-limitation which has become indispensable in view of the establishment of catch-limitations in other regions of the North Atlantic. If a system of catch-limitation were not established in the Icelandic area, the fishing effort displaced from those other regions might well be directed towards the unprotected grounds in that area.

61. The Icelandic regulations challenged before the Court have been issued and applied by the Icelandic authorities as a claim to exclusive rights thus going beyond the concept of preferential rights. Article 2 of the Icelandic Regulations of 14 July 1972 states:

> "Within the fishery limits all fishing activities by foreign vessels shall be prohibited in accordance with the provisions of Law No. 33 of 19 June 1922, concerning Fishing inside the Fishery Limits."

Article 1 of the 1922 Law provides: "Only Icelandic citizens may engage in fishing in the territorial waters of Iceland, and only Icelandic boats or ships may be used for such fishing." The language of the relevant government regulations indicates that their object is to establish an exclusive fishery zone, in which all fishing by vessels registered in other States, including the United Kingdom, would be prohibited. The mode of implementation of the regulations, carried out by Icelandic governmental authorities vis-à-vis United Kingdom fishing vessels, before the 1973 interim agreement, and despite the Court's interim measures, confirms this interpretation.

62. The concept of preferential rights is not compatible with the exclusion of all fishing activities of other States. A coastal State entitled to preferential rights is not free, unilaterally and according to its own uncontrolled discretion, to determine the extent of those rights. The characterization of the coastal State's rights as preferential implies a certain priority, but cannot imply the extinction of the concurrent rights of other States, and particularly of a State which, like the Applicant, has for many years been engaged in fishing in the waters in question, such fishing activity being important to the economy of the country concerned. The coastal State has to take into account and pay regard to the position of such other States, particularly when they have established an economic dependence on the same fishing grounds. Accordingly, the fact that Iceland is entitled to claim preferential rights does not suffice to justify its claim unilaterally to exclude the Applicant's fishing vessels from all fishing activity in the waters beyond the limits agreed to in the 1961 Exchange of Notes.

63. In this case, the Applicant has pointed out that its vessels have been fishing in Icelandic waters for centuries and that they have done so in a manner comparable with their present activities for upwards of 50 years. Published statistics indicate that from 1920 onwards, fishing of demersal species by United Kingdom vessels in the disputed area has taken place on a continuous basis from year to year, and that, except for the period of the Second World War, the total catch of those vessels has been remarkably steady. Similar statistics indicate that the waters in question constitute the most important of the Applicant's distant-water fishing grounds for demersal species.

64. The Applicant further states that in view of the present situation of fisheries in the North Atlantic, which has demanded the establishment of agreed catch-limitations of cod and haddock in various areas, it would not be possible for the fishing effort of United Kingdom vessels displaced from the Icelandic area to be diverted at economic levels to other fishing grounds in the North Atlantic. Given the lack of alternative fishing opportunity, it is further contended, the exclusion of British fishing vessels from the Icelandic area would have very serious adverse consequences, with immediate results for the affected vessels and with damage extending over a wide range of supporting and related industries. It is pointed out in particular that wide-spread unemployment would be caused among all sections of the British fishing industry and in ancillary industries and that certain ports—Hull, Grimsby and Fleetwood—specially reliant on fishing in the Icelandic area, would be seriously affected.

65. Iceland has for its part admitted the existence of the Applicant's historic and special interests in the fishing in the disputed waters. The Exchange of Notes as a whole and in particular its final provision requiring Iceland to give advance notice to the United Kingdom of any extension of its fishery limits impliedly acknowledged the existence of United Kingdom fishery interests in the waters adjacent to the 12-mile limit. The discussions which have taken place between the two countries also imply an acknowledgement by Iceland of the existence of such

67. The provisions of the Icelandic Regulations of 14 July 1972 and the manner of their implementation disregard the fishing rights of the Applicant. Iceland's unilateral action thus constitutes an infringement of the principle enshrined in Article 2 of the 1958 Geneva Convention on the High Seas which requires that all States, including coastal States, in exercising their freedom of fishing, pay reasonable regard to the interests of other States. It also disregards the rights of the Applicant as they result from the Exchange of Notes of 1961. The Applicant is therefore justified in asking the Court to give all necessary protection to its own rights, while at the same time agreeing to recognize Iceland's preferential position. Accordingly, the Court is bound to conclude that the Icelandic Regulations of 14 July 1972 establishing a zone of exclusive fisheries jurisdiction extending to 50 nautical miles from baselines around the coast of Iceland, are not opposable to the United Kingdom, and the latter is under no obligation to accept the unilateral termination by Iceland of United Kingdom fishery rights in the area.

68. The findings stated by the Court in the preceding paragraphs suffice to provide a basis for the decision of the present case, namely: that Iceland's extension of its exclusive fishery jurisdiction beyond 12 miles is not opposable to the United Kingdom; that Iceland may on the other hand claim preferential rights in the distribution of fishery resources in the adjacent waters; that the United Kingdom also has established rights with respect to the fishery resources in question; and that the principle of reasonable regard for the interests of other States enshrined in Article 2 of the Geneva Convention on the High Seas of 1958 requires Iceland and the United Kingdom to have due regard to each other's interests, and to the interests of other States, in those resources.

69. It follows from the reasoning of the Court in this case that in order to reach an equitable solution of the present dispute it is necessary that the preferential fishing rights of Iceland, as a State specially dependent on coastal fisheries, be reconciled with the traditional fishing rights of the Applicant. Such a reconciliation cannot be based, however, on a phasing-out of the Applicant's fishing, as was the case in the 1961 Exchange of Notes in respect of the 12-mile fishery zone. In that zone, Iceland was to exercise exclusive fishery rights while not objecting to continued fishing by the Applicant's vessels during a phasing-out period. In adjacent waters outside that zone, however, a similar extinction of rights of other fishing States, particularly when such rights result from a situation of economic dependence and long-term reliance on certain fishing grounds, would not be compatible with the notion of preferential rights as it was recognized at the Geneva Conferences of 1958 and 1960, nor would it be equitable. At the 1960 Conference, the concept of preferential rights of coastal States in a special situation was recognized in the joint amendment referred to in paragraph 57 above, under such limitations and to such extent as is found "necessary by reason of the dependence of the coastal State on the stock or stocks of fish, while having regard to the interests of any other State or States in the exploitation of such stock or stocks of fish". The reference to the interests of other States in the exploitation of the same stocks clearly indicates that the preferential rights of the coastal State and the established rights of other States were considered as, in principle, continuing to co-exist.

70. This is not to say that the preferential rights of a coastal State in a special situation are a static concept, in the sense that the degree of the coastal State's preference is to be considered as fixed for ever at some given moment. On the contrary, the preferential rights are a function of the exceptional dependence of such a coastal State on the fisheries in adjacent waters and may, therefore, vary as the extent of that dependence changes. Furthermore, as was expressly recognized in the 1961 Exchange of Notes, a coastal State's exceptional dependence on fisheries may relate not only to the livelihood of its people but to its economic development. In each case, it is essentially a matter of appraising the dependence of the coastal State on the fisheries in question in relation to that of the other State concerned and of reconciling them in as equitable a manner as is possible.

71. In view of the Court's finding (paragraph 67 above) that the Icelandic Regulations of 14 July 1972 are not opposable to the United Kingdom for the reasons which have been stated, it follows that the Government of Iceland is not in law entitled unilaterally to exclude United Kingdom fishing vessels from sea areas to seaward of the limits agreed to in the 1961 Exchange of Notes or unilaterally to impose restrictions on their activities in such areas. But the matter does not end there; as the Court has indicated, Iceland is, in view of its special situation, entitled to preferential rights in respect of the fish stocks of the waters adjacent to its coasts. Due recognition must be given to the rights of both Parties, namely the rights of the United Kingdom to fish in the waters in dispute, and the preferential rights of Iceland. Neither right is an absolute one: the preferential rights of a coastal State are limited according to the extent of its special dependence on the fisheries and by its obligation to take account of the rights of other States and the needs of conservation; the established rights of other fishing States are in turn limited by reason of the coastal State's special dependence on the fisheries and its own obligation to take account of the rights of other States, including the coastal State, and of the needs of conservation.

72. It follows that even if the Court holds that Iceland's extension of its fishery limits is not opposable to the Applicant, this does not mean that the Applicant is under no obligation to Iceland with respect to fishing in the disputed waters in the 12-mile to 50-mile zone. On the contrary, both States have an obligation to take full account of each other's rights and of any fishery conservation measures the necessity of which is shown to exist in those waters. It is one of the advances in maritime international law, resulting from the intensification of fishing, that the former *laissez-faire* treatment of the living resources of the sea in the high seas has been replaced by a recognition of a duty to have due regard to the rights of other States and the needs of conservation for the benefit of all. Consequently, both Parties have the obligation to keep under review the fishery resources in the disputed waters and to examine together, in the light of scientific and other available information, the measures required for the conservation and development, and equitable exploitation, of those resources, taking into account any international agreement in force between them, such as the North-East Atlantic Fisheries Convention of 24 January 1959, as well as such other agreements as may be reached in the matter in the course of further negotiation.

73. The most appropriate method for the solution of the dispute is clearly that of negotiation. Its objective should be the delimitation of the rights and interests of the Parties, the preferential rights of the coastal State on the one hand and the rights of the Applicant on the other, to balance and regulate equitably questions such as those of catch-limitation, share allocations and "related restrictions concerning areas closed to fishing, number and type of vessels allowed and forms of control of the agreed provisions"

75. The obligation to negotiate thus flows from the very nature of the respective rights of the Parties; to direct them to negotiate is therefore a proper exercise of the judicial function in this case. This also corresponds to the Principles and provisions of the Charter of the United Nations concerning peaceful settlement of disputes. As the Court stated in the *North Sea Continental Shelf* cases:

> "... this obligation merely constitutes a special application of a principle which underlies all international relations, and which is moreover recognized in Article 33 of the Charter of the United Nations as one of the methods for the peaceful settlement of international disputes" (*I.C.J. Reports 1969*, p. 47, para. 86).

78. In the fresh negotiations which are to take place on the basis of the present Judgment, the Parties will have the benefit of the above appraisal of their respective rights, and of certain guidelines defining their scope. The task before them will be to conduct their negotiations on the basis that each must in good faith pay reasonable regard to the legal rights of the other in the waters around Iceland outside the 12-mile limit, thus bringing about an equitable apportionment of the fishing resources based on the facts of the particular situation, and having regard to the interests of other States which have established fishing rights in the area. It is not a matter of finding simply an equitable solution, but an equitable solution derived from the applicable law. As the Court stated in the *North Sea Continental Shelf* cases:

> "... it is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles" (*I.C.J. Reports 1969*, p. 47, para. 85).

79. For these reasons,

THE COURT,

by ten votes to four,

(1) finds that the Regulations concerning the Fishery Limits off Iceland *(Reglugerð um fiskveiðilandhelgi Íslands)* promulgated by the Government of Iceland on 14 July 1972 and constituting a unilateral extension of the exclusive fishing rights of Iceland to 50 nautical miles from the baselines specified therein are not opposable to the Government of the United Kingdom;

(2) finds that, in consequence, the Government of Iceland is not entitled unilaterally to exclude United Kingdom fishing vessels from areas between the fishery limits agreed to in the Exchange of Notes of 11 March 1961 and the limits specified in the Icelandic Regulations of 14 July 1972, or unilaterally to impose restrictions on the activities of those vessels in such areas;

by ten votes to four,

(3) holds that the Government of Iceland and the Government of the United Kingdom are under mutual obligations to undertake negotiations in good faith for the equitable solution of their differences concerning their respective fishery rights in the areas specified in subparagraph 2;

(4) holds that in these negotiations the Parties are to take into account, *inter alia*:

(a) that in the distribution of the fishing resources in the areas specified in subparagraph 2 Iceland is entitled to a preferential share to the extent of the special dependence of its people upon the fisheries in the seas around its coasts for their livelihood and economic development;

(b) that by reason of its fishing activities in the areas specified in subparagraph 2, the United Kingdom also has established rights in the fishery resources of the said areas on which elements of its people depend for their livelihood and economic well-being;

(c) the obligation to pay due regard to the interests of other States in the conservation and equitable exploitation of these resources;

(d) that the above-mentioned rights of Iceland and of the United Kingdom should each be given effect to the extent compatible with the conservation and development of the fishery resources in the areas specified in subparagraph 2 and with the interests of other States in their conservation and equitable exploitation;

(e) their obligation to keep under review those resources and to examine together, in the light of scientific and other available information, such measures as may be required for the conservation and development, and equitable exploitation, of those resources, making use of the machinery established by the North-East Atlantic Fisheries Convention or such other means as may be agreed upon as a result of international negotiations.

Done in English, and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-fifth day of July, one thousand nine hundred and seventy-four, in three copies, of which one will be placed in the archives of the Court and the others transmitted to the Government of the United Kingdom of Great Britain and Northern Ireland and to the Government of the Republic of Iceland respectively.

The four dissenting judges stressed in their separate opinions that a more definite answer was necessary concerning whether Iceland's claim to a 50-mile exclusive zone was contrary to international law, and emphasized that the issue of whether Iceland could regulate conservation of the stocks in the waters around Iceland was beyond the competency of the court.

The Law of the Sea and the Fisheries Management Conservation Act

To an extent, the decision in the Fisheries Jurisdiction Case reflects the atmosphere of change and uncertainty surrounding the jurisdiction of coastal nations. In considering the Fisheries Conservation and Management Act of 1976, the international law of coastal state jurisdiction was examined, and the Senate Commerce Committee concluded that "the world community is ready to accept a 200-mile limit" with respect to fishery regulation zones.

THE FISHERIES CONSERVATION AND MANAGEMENT ACT

SENATE COMMERCE COMMITTEE REPORT
94th Cong., 1st Sess.

The United States first touched off the most recent series of unilaterial declarations of fisheries jurisdiction beyond the territorial sea. President Harry S. Truman, in his "Presidential Proclamation With Respect to Coastal Fisheries in Certain Areas of the High Seas," delivered September 28, 1945, set the stage, as follows:

> In view of the pressing need for conservation and protection of fisheries resources, the Government of the United States of America regards it as proper to establish conservation zones in those areas of the high seas contiguous to the coast of the United States wherein fishing activities have been or in the future may be developed and maintained on a substantial scale * * * and all fishing activities in such zones shall be subject to regulation and control. * * * The right of any State to establish conservation zones off its shores * * * is conceded. * * * The character as high seas of areas where such conservation zones are established and the right to their free and unimpeded navigation are in no way thus affected. * * *

The motivating purpose behind President Truman's proclamation was conservation. The proclamation represented a response to the incursion of Japanese fishermen into the Alaska Bristol Bay red salmon fishery. Chile responded quickly to the Truman Fisheries Proclamation by declaring its own jurisdiction over the seas adjacent to its coast to a distance of 200 miles.

The Truman Fisheries Proclamation was never, however, implemented into law. According to the "Digest of International Law," the proclamation *per se* asserts no claim to exclusive fisheries jurisdiction over high seas fishing areas off the coast of the United States. Instead, it is stated, the purpose of the fisheries proclamation was to establish, as U.S. policy, that where fishing activities were developed or maintained jointly by the United States and other nations, conservation zones would be established—but only pursuant to agreement between the United States and such other nations. The domestic implementation of this proclamation has been mainly through State Department attempts to negotiate international agreements to protect certain species of fish, which were threatened by the Japanese, most notably the salmon. Since that time, except for a treaty with Canada on sockeye salmon concluded in 1930, the United States has negotiated

all of the 22 fishery treaties presently in existence (see app. I.). Also, since that time, approximately 36 nations have declared exclusive fisheries zones beyond 12 nautical miles. (See app. II.)

International Treaties

In 1958 the international community negotiated 4 separate treaties regarding the law of the sea. These treaties represented an attempt to codify uncertain international rules. The principal objective of the 1960 meeting was to resolve the issue of the limits of territorial sea or fisheries jurisdiction. The question of fisheries proved to be the point on which nations could not agree, and no specific limits were agreed upon. At that time, the practice of most nations supported a 3-mile territorial limit with a 12-mile fisheries zone. (Now, however, the practice of numerous nations reflects support for a 12 mile territorial with a 200-mile fisheries zone.)

Following the 1958 and 1960 sessions of the first Conference on Law of the Sea, there has been a trend away from a completely lassez-faire policy for fishing on the high seas, particularly in coastal waters outside the territorial sea. This trend was recognized in the Convention on Fishing and Conservation of the Living Resources of the High Seas which was signed by the delegates attending the Conference. Article I of the convention state that the right of all nations to fish on the high seas is a fundamental freedom. But the convention also recognizes the special right of coastal nation to unilaterally adopt conservation measures off its shores, even in areas of the high seas, under certain, yet rather strict, conditions. The extent of coastal nation fishery management authority was the most troublesome issue discussed at the 1958 and 1960 meetings. Broad fishery jurisdiction was not approved, the Convention on Fishing representing the only compromise achievable at the time. Nonetheless, the beginnings of a trend were evident.

Following the Conference, there were new and renewed international disputes over fishing rights: A "lobster war" broke out between France and Brazil over lobster resources on the Brazilian Continental Shelf. The "tuna war" between the United States and several Latin American countries continued over the tuna, which occasionally roam into and through the 200-mile zones claimed by these Central and South American countries. The "cod war" between Iceland and Great Britain heated up, causing great strain within the North Atlantic Treaty Organization. More nations claimed exclusive fishery zones beyond the 12-mile limit. In 1967, the United Nations decided to convene a new Law of the Sea Conference.

The recent International Court of Justice decision (1973), in a controversy growing out of the "cod war" is particularly instructive in evaluating the developing customary international law on fishery jurisdictions. While the Court said that Iceland could not unilaterally exclude British vessels from its claimed 50-mile fishery conservation zone, it did state:

> State practice on the subject of fisheries reveals an increasing and widespread acceptance for the concept of preferential rights for coastal States, particularly in favour of countries or territories in a situation of special dependence on coastal fisheries. * * *

The International Court went on to say that the content and scope of this preferential right must be worked out in negotiation with other countries fishing in coastal areas. The Court also emphasized that:

> [T]he preferential rights of the coastal State come into play only at the moment when an intensification in the exploitation of fishery resources makes it imperative to introduce some system of catch-limitation and sharing of those resources, to preserve the fish stocks in the interests of their rational and economic exploitation. * * *

International law with regard to the geographical extent of coastal nation fishery jurisdiction is in a state of flux. Some legal experts still claim that the international law limit on coastal nation fishery jurisdiction is 12 nautical miles, but only because they do not feel that enough nations, have adopted the 200-mile limit. Few legal experts dispute, however, the fact that the trend is in that direction, and almost all scientists agree on the precarious biological status of many of the world's fish stocks. The Third Law of the Sea Conference, now underway, will, in all likelihood, agree to a coastal fishery jurisdiction limit of 200 nautical miles.

The Third Law of the Sea Conference, and the Position of the United States

In 1968, the United Nations resolved to make yet another attempt at developing a consensus on the law of the sea. On June 20, 1974, after several years of preparatory meetings, the United Nations convented the Third Law of the Sea Conference in Caracas, Venezuela. A second session convened in 1975 in Geneva, Switzerland. A third session will convene in New York City on March 29, 1976. One of the most contentious issues before the Conference is the extent of jurisdiction coastal nations can exercise over fisheries off their shores.

As a matter of policy, for the last several years the United has adamantly opposed any extension of fishery jurisdiction beyond 12 miles. The executive branch has generally supported the principle of freedom of the seas as being in the best interest of the Nation. This attitude is attributable to strong naval interests, the need to import large amounts of energy and raw materials by water, and long distance fishing interests, notably tuna and shrimp. Strictly coastal fishing interests have taken a back seat to global interests. Consequently, the U.S. position was, until quite recently, the so-called "species" approach, designed to assert no geographical fisheries jurisdiction. Under this proposal, coastal nations would be given regulatory jurisdiction over coastal and anadromous species of fish, together with preferential rights to as much fish as they can catch. The actual limit of coastal jurisdiction over these species would be determined by the species' location, not by any arbitrary geographical line. In those instances where a coastal nation is not harvesting all of the fish that can be taken, based on maximum sustainable yield, all nations would be permitted to fish for the surplus, after payment of an administrative fee. Migratory species would be placed under management by an international body.

The U.S. "species approach" position generated little support among the international community. Accordingly, in 1974, the United States

enunciated a new position. On July 11, 1974, Ambassador John R. Stevenson, Special Representative of the President and U.S. Representative to the Law of the Sea Conference stated the new position as follow, on July 11, 1974:

> In the course of listening to and reading the statements made during the last 2 weeks, I have been struck by the very large measure of agreement on the general outlines of an overall settlement. Most delegations that have spoken have endorsed or indicated a willingness to accept, under certain conditions and as part of a package settlement, a maximum limit of 12 miles for the territorial sea and of 200 miles for an economic zone, and an international regime for the deep sea bed in the area beyond national jurisdiction.
>
> The United States has for a number of years indicated its flexibility on the limits of coastal state resource jurisdiction. We have stressed that the content of the legal regime within such coastal state jurisdiction is more important than the limits of such jurisdiction. Accordingly, we are prepared to accept, and indeed we would welcome general agreement on a 12 mile outer limit for the territorial sea and a 200-mile outer limit for the economic zone provided that it is part of an acceptable comprehensive package including a satisfactory regime within and beyond the economic zone and provision for unimpeded transit of straits used in international navigation.

Ambassador Stevenson went on to state further that:

> For fisheries, to the extent that the coastal nation does not fully utilize a fishery resource, we contemplate coastal nation duty to permit foreign fishing under reasonable coastal state regulations. These regulations would include conservation measures and provisions for harvesting by coastal state vessels up to their capacity and would include the payment of a reasonable license fee by foreign fishermen. We also contemplated duty for the coastal state and all other fishing states to cooperate with each other in formulating equitable international and regional conservation and allocation regulations for highly migratory species, taking into account the unique migratory pattern of these species within and without the zones.

The thrust of this new position is that the United States is ready to accept, as part of an acceptable overall treaty package, the concept of 200 miles for fishery management jurisdiction. However, acceptance would be conditioned upon satisfactory resolution of a number of issues of high importance to the U.S. delegation. In effect, the United States has conceded that the 200-mile limit will be accepted by the law of the Sea Conference and has turned its attention to defining the relationships between the coastal notions and the international community within that 200-mile limit.

16 U.S.C.A.

§ 1801. Findings, purposes and policy

(a) Findings.—The Congress finds and declares the following:

(1) The fish off the coasts of the United States, the highly migratory species of the high seas, the species which dwell on or in the Continental Shelf appertaining to the United States, and the anadromous species which spawn in United States rivers or estuaries, constitute valuable and renewable natural resources. These fishery resources contribute to the food supply, economy, and health of the Nation and provide recreational opportunities.

(2) As a consequence of increased fishing pressure and because of the inadequacy of fishery conservation and management practices and controls (A) certain stocks of such fish have been overfished to the point where their survival is threatened, and (B) other such stocks have been so substantially reduced in number that they could become similarly threatened.

(3) Commercial and recreational fishing constitutes a major source of employment and contributes significantly to the economy of the Nation. Many coastal areas are dependent upon fishing and related activities, and their economies have been badly damaged by the overfishing of fishery resources at an ever-increasing rate over the past decade. The activities of massive foreign fishing fleets in waters adjacent to such coastal areas have contributed to such damage, interfered with domestic fishing efforts, and caused destruction of the fishing gear of United States fishermen.

(4) International fishery agreements have not been effective in preventing or terminating the overfishing of these valuable fishery resources. There is danger that irreversible effects from overfishing will take place before an effective international agreement on fishery management jurisdiction can be negotiated, signed, ratified, and implemented.

(5) Fishery resources are finite but renewable. If placed under sound management before overfishing has caused irreversible effects, the fisheries can be conserved and maintained so as to provide optimum yields on a continuing basis.

(6) A national program for the conservation and management of the fishery resources of the United States is necessary to prevent overfishing, to rebuild overfished stocks, to insure conservation, and to realize the full potential of the Nation's fishery resources.

(7) A national program for the development of fisheries which are underutilized or not utilized by United States fishermen, including bottom fish off Alaska, is necessary to assure that our citizens benefit from the employment, food supply, and revenue which could be generated thereby.

(b) Purposes.—It is therefore declared to be the purposes of the Congress in this chapter—

(1) to take immediate action to conserve and manage the fishery resources found off the coasts of the United States, and the anadromous species and Continental Shelf fishery resources of the United States, by establishing (A) a fishery conservation zone within which the United States will assume exclusive fishery management authority over all fish, except highly migratory species, and (B) exclusive fishery management authority beyond such zone over such anadromous species and Continental Shelf fishery resources;

(2) to support and encourage the implementation and enforcement of international fishery agreements for the conservation and management of highly migratory species, and to encourage the negotiation and implementation of additional such agreements as necessary;

(3) to promote domestic commercial and recreational fishing under sound conservation and management principles;

(4) to provide for the preparation and implementation, in accordance with national standards, of fishery management plans which will achieve and maintain, on a continuing basis, the optimum yield from each fishery;

(5) to establish Regional Fishery Management Councils to prepare, monitor, and revise such plans under circumstances (A) which will enable the States, the fishing industry, consumer and environmental organizations, and other interested persons to participate in, and advise on, the establishment and administration of such plans, and (B) which take into account the social and economic needs of the States; and

(6) to encourage the development of fisheries which are currently underutilized or not utilized by United States fishermen, including bottom fish off Alaska.

(c) **Policy.**—It is further declared to be the policy of the Congress in this chapter—

(1) to maintain without change the existing territorial or other ocean jurisdiction of the United States for all purposes other than the conservation and management of fishery resources, as provided for in this chapter;

(2) to authorize no impediment to, or interference with, recognized legitimate uses of the high seas, except as necessary for the conservation and management of fishery resources, as provided for in this chapter;

(3) to assure that the national fishery conservation and management program utilizes, and is based upon, the best scientific information available; involves, and is responsive to the needs of, interested and affected States and citizens; promotes efficiency; draws upon Federal, State, and academic capabilities in carrying out research, administration, management, and enforcement; and is workable and effective;

(4) to permit foreign fishing consistent with the provisions of this chapter; and

(5) to support and encourage continued active United States efforts to obtain an internationally acceptable treaty, at the Third United Nations Conference on the Law of the Sea, which provides for effective conservation and management of fishery resources.

§ 1802. Definitions

As used in this chapter, unless the context otherwise requires—

(1) The term "anadromous species" means species of fish which spawn in fresh or estuarine waters of the United States and which migrate to ocean waters.

(2) The term "conservation and management" refers to all of the rules, regulations, conditions, methods, and other measures (A) which are required to rebuild, restore, or maintain, and which are useful in rebuilding, restoring, or maintaining, any fishery resource and the marine environment; and (B) which are designed to assure that—

(i) a supply of food and other products may be taken, and that recreational benefits may be obtained, on a continuing basis;

(ii) irreversible or long-term adverse effects on fishery resources and the marine environment are avoided; and

(iii) there will be a multiplicity of options available with respect to future uses of these resources.

(3) The term "Continental Shelf" means the seabed and subsoil of the submarine areas adjacent to the coast, but outside the area of the territorial sea, of the United States, to a depth of 200 meters or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of such areas.

(4) The term "Continental Shelf fishery resources" means the following:

COLENTERATA

Bamboo Coral—Acanella spp.;
Black Coral—Antipathes spp.;
Gold Coral—Callogorgia spp.;
Precious Red Coral—Corallium spp.;
Bamboo Coral—Keratoisis spp.; and
Gold Coral—Parazoanthus spp.

CRUSTACEA

Tanner Crab—Chionoecetes tanneri;
Tanner Crab—Chionoecetes opilio;
Tanner Crab—Chionoecetes angulatus;
Tanner Crab—Chionoecetes bairdi;
King Crab—Paralithodes camtschatica;
King Crab—Paralithodes platypus;
King Crab—Paralithodes brevipes;
Lobster—Homarus americanus;
Dungeness Crab—Cancer magister;
California King Crab—Paralithodes californiensis;
California King Crab—Paralithodes rathbuni;
Golden King Crab—Lithodes aequispinus;
Northern Stone Crab—Lithodes maja;
Stone Crab—Menippe mercenaria; and
Deep-sea Red Crab—Geryon quinquedens.

MOLLUSKS

Red Abalone—Haliotis rufescens;
Pink Abalone—Haliotis corrugata;
Japanese Abalone—Haliotis kamtschatkana;
Queen Conch—Strombus gigas;
Surf Clam—Spisula solidissima; and
Ocean Quahog—Artica islandica.

SPONGES

Glove Sponge—Hippiospongia canaliculata;
Sheepswool Sponge—Hippiospongia lachne;
Grass Sponge—Spongia graminea; and
Yellow Sponge—Spongia barbera.

If the Secretary determines, after consultation with the Secretary of State, that living organisms of any other sedentary species are, at the harvestable stage, either—

(A) immobile on or under the seabed, or

(B) unable to move except in constant physical contact with the seabed or subsoil,

of the Continental Shelf which appertains to the United States, and publishes notice of such determination in the Federal Register, such sedentary species shall be considered to be added to the foregoing list and included in such term for purposes of this chapter.

(5) The term "Council" means any Regional Fishery Management Council established under section 1852 of this title.

(6) The term "fish" means finfish, mollusks, crustaceans, and all other forms of marine animal and plant life other than marine mammals, birds, and highly migratory species.

(7) The term "fishery" means—

(A) one or more stocks of fish which can be treated as a unit for purposes of conservation and management and which are identified on the basis of geographical, scientific, technical, recreational, and economic characteristics; and

(B) any fishing for such stocks.

(8) The term "fishery conservation zone" means the fishery conservation zone established by section 1811 of this title.

(9) The term "fishery resource" means any fishery, any stock of fish, any species of fish, and any habitat of fish.

(10) The term "fishing" means—

(A) the catching, taking, or harvesting of fish;

(B) the attempted catching, taking, or harvesting of fish;

(C) any other activity which can reasonably be expected to result in the catching, taking, or harvesting of fish; or

(D) any operations at sea in support of, or in preparation for, any activity described in subparagraphs (A) through (C).

Such term does not include any scientific research activity which is conducted by a scientific research vessel.

(11) The term "fishing vessel" means any vessel, boat, ship, or other craft which is used for, equipped to be used for, or of a type which is normally used for—

(A) fishing; or

(B) aiding or assisting one or more vessels at sea in the performance of any activity relating to fishing, including, but not limited to, preparation, supply, storage, refrigeration, transportation, or processing.

(12) The term "foreign fishing" means fishing by a vessel other than a vessel of the United States.

(13) The term "high seas" means all waters beyond the territorial sea of the United States and beyond any foreign nation's territorial sea, to the extent that such sea is recognized by the United States.

(14) The term "highly migratory species" means species of tuna which, in the course of their life cycle, spawn and migrate over great distances in waters of the ocean.

(15) The term "international fishery agreement" means any bilateral or multilateral treaty, convention, or agreement which relates to fishing and to which the United States is a party.

(16) The term "Marine Fisheries Commission" means the Atlantic States Marine Fisheries Commission, the Gulf States Marine Fisheries Commission, or the Pacific Marine Fisheries Commission.

(17) The term "national standards" means the national standards for fishery conservation and management set forth in section 1851 of this title.

(18) The term "optimum", with respect to the yield from a fishery, means the amount of fish—

(A) which will provide the greatest overall benefit to the Nation, with particular reference to food production and recreational opportunities; and

(B) which is prescribed as such on the basis of the maximum sustainable yield from such fishery, as modified by any relevant economic, social, or ecological factor.

(19) The term "person" means any individual (whether or not a citizen or national of the United States), any corporation, partnership, association, or other entity (whether or not organized or existing under the laws of any State), and any Federal, State, local, or foreign government or any entity of any such government.

(20) The term "Secretary" means the Secretary of Commerce or his designee.

(21) The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, Guam, and any other Commonwealth, territory, or possession of the United States.

(22) The term "stock of fish" means a species, subspecies, geographical grouping, or other category of fish capable of management as a unit.

(23) The term "treaty" means any international fishery agreement which is a treaty within the meaning of section 2 of article II of the Constitution.

(24) The term "United States", when used in a geographical context, means all the States thereof.

(25) The term "vessel of the United States" means any vessel documented under the laws of the United States or registered under the laws of any State.

SUBCHAPTER I—FISHERY MANAGEMENT AUTHORITY OF THE UNITED STATES

§ 1811. Fishery conservation zone

There is established a zone contiguous to the territorial sea of the United States to be known as the fishery conservation zone. The inner boundary of the fishery conservation zone is a line coterminous with the seaward boundary of each of the coastal States, and the outer boundary of such zone is a line drawn in such a manner that each point on it is 200 nautical miles from the baseline from which the territorial sea is measured.

§ 1812. Exclusive fishery management authority

The United States shall exercise exclusive fishery management authority, in the manner provided for in this chapter, over the following:

(1) All fish within the fishery conservation zone.

(2) All anadromous species throughout the migratory range of each such species beyond the fishery conservation zone; except that such management authority shall not extend to such species during the time they are found within any foreign nation's territorial sea or fishery conservation zone (or the equivalent), to the extent that such sea or zone is recognized by the United States.

(3) All Continental Shelf fishery resources beyond the fishery conservation zone.

§ 1813. Highly migratory species

The exclusive fishery management authority of the United States shall not include, nor shall it be construed to extend to, highly migratory species of fish.

SUBCHAPTER II—FOREIGN FISHING AND INTERNATIONAL FISHERY AGREEMENTS

§ 1821. Foreign fishing

(a) In general.—After February 28, 1977, no foreign fishing is authorized within the fishery conservation zone, or for anadromous species or Continental Shelf fishery resources beyond the fishery conservation zone, unless such foreign fishing—

(1) is authorized under subsection (b) or (c) of this section;

(2) is not prohibited by subsection (f) of this section; and

(3) is conducted under, and in accordance with, a valid and applicable permit issued pursuant to section 1824 of this title.

(b) Existing international fishery agreements.—Foreign fishing described in subsection (a) of this section may be conducted pursuant to an international fishery agreement (subject to the provisions of section 1822 (b) or (c) of this title), if such agreement—

(1) was in effect on April 13, 1976; and

(2) has not expired, been renegotiated, or otherwise ceased to be of force and effect with respect to the United States.

(c) Governing international fishery agreements.—Foreign fishing described in subsection (a) of this section may be conducted pursuant to an international fishery agreement (other than a treaty) which meets the requirements of this subsection if such agreement becomes effective after application of section 1823 of this title. Any such international fishery agreement shall hereafter in this chapter be referred to as a "governing international fishery agreement". Each governing international fishery agreement shall acknowledge the exclusive fishery management authority of the United States, as set forth in this chapter. It is the sense of the Congress that each such agreement shall include a binding commitment, on the part of such foreign nation and its fishing vessels, to comply with the following terms and conditions:

(1) The foreign nation, and the owner or operator of any fishing vessel fishing pursuant to such agreement, will abide by all regulations promulgated by the Secretary pursuant to this chapter, including any regulations promulgated to implement any applicable fishery management plan or any preliminary fishery management plan.

(2) The foreign nation, and the owner or operator of any fishing vessel fishing pursuant to such agreement, will abide by the requirement that—

(A) any officer authorized to enforce the provisions of this chapter (as provided for in section 1861 of this title) be permitted—

(i) to board, and search or inspect, any such vessel at any time,

(ii) to make arrests and seizures provided for in section 1861(b) of this title whenever such officer has reasonable cause to believe, as a result of such a search or inspection, that any such vessel or any person has committed an act prohibited by section 1857 of this title, and

(iii) to examine and make notations on the permit issued pursuant to section 1824 of this title for such vessel;

(B) the permit issued for any such vessel pursuant to section 1824 of this title be prominently displayed in the wheelhouse of such vessel;

(C) transponders, or such other appropriate position-fixing and identification equipment as the Secretary of the department in which the Coast Guard is operating determines to be appropriate, be installed and maintained in working order on each such vessel;

(D) duly authorized United States observers be permitted on board any such vessel and that the United States be reimbursed for the cost of such observers;

(E) any fees required under section 1824(b)(10) of this title be paid in advance;

(F) agents be appointed and maintained within the United States who are authorized to receive and respond to any legal process issued in the United States with respect to such owner or operator; and

(G) responsibility be assumed, in accordance with any requirements prescribed by the Secretary, for the reimbursement of United States citizens for any loss of, or damage to, their fishing vessels, fishing gear, or catch which is caused by any fishing vessel of that nation;

and will abide by any other monitoring, compliance, or enforcement requirement related to fishery conservation and management which is included in such agreement.

(3) The foreign nation and the owners or operators of all of the fishing vessels of such nation shall not, in any year, exceed such nation's allocation of the total allowable level of foreign fishing, as determined under subsection (e) of this section.

(4) The foreign nation will—

(A) apply, pursuant to section 1824 of this title, for any required permits;

(B) deliver promptly to the owner or operator of the appropriate fishing vessel any permit which is issued under that section for such vessel; and

(C) abide by, and take appropriate steps under its own laws to assure that all such owners and operators comply with, section 1824(a) of this title and the applicable conditions and restrictions established under section 1824(b)(7) of this title.

(d) Total allowable level of foreign fishing.—The total allowable level of foreign fishing, if any, with respect to any fishery subject to the exclusive fishery management authority of the United States, shall be that portion of the optimum yield of such fishery which will not be harvested by vessels of the United States, as determined in accordance with the provisions of this chapter.

(e) Allocation of allowable level.—The Secretary of State, in cooperation with the Secretary, shall determine the allocation among foreign nations of the total allowable level of foreign fishing which is permitted with respect to any fishery subject to the exclusive fishery management authority of the United States. In making any such determination, the Secretary of State and the Secretary shall consider—

(1) whether, and to what extent, the fishing vessels of such nations have traditionally engaged in fishing in such fishery;

(2) whether such nations have cooperated with the United States in, and made substantial contributions to, fishery research and the identification of fishery resources;

(3) whether such nations have cooperated with the United States in enforcement and with respect to the conservation and management of fishery resources; and

(4) such other matters as the Secretary of State, in cooperation with the Secretary, deems appropriate.

(f) **Reciprocity.**—Foreign fishing shall not be authorized for the fishing vessels of any foreign nation unless such nation satisfies the Secretary and the Secretary of State that such nation extends substantially the same fishing privileges to fishing vessels of the United States, if any, as the United States extends to foreign fishing vessels.

(g) **Preliminary fishery management plans.**—The Secretary, when notified by the Secretary of State that any foreign nation has submitted an application under section 1824(b) of this title, shall prepare a preliminary fishery management plan for any fishery covered by such application if the Secretary determines that no fishery management plan for that fishery will be prepared and implemented, pursuant to subchapter III of this chapter, before March 1, 1977. To the extent practicable, each such plan—

(1) shall contain a preliminary description of the fishery and a preliminary determination as to the optimum yield from such fishery and the total allowable level of foreign fishing with respect to such fishery;

(2) shall require each foreign fishing vessel engaged or wishing to engage in such fishery to obtain a permit from the Secretary;

(3) shall require the submission of pertinent data to the Secretary, with respect to such fishery, as described in section 1853(a)(5) of this title; and

(4) may, to the extent necessary to prevent irreversible effects from overfishing, with respect to such fishery, contain conservation and management measures applicable to foreign fishing which—

(A) are determined to be necessary and appropriate for the conservation and management of such fishery,

(B) are consistent with the national standards, the other provisions of this chapter, and other applicable law, and

(C) are described in section 1853(b)(2), (3), (4), (5), and (7) of this title.

Each preliminary fishery management plan shall be in effect with respect to foreign fishing for which permits have been issued until a fishery management plan is prepared and implemented, pursuant to subchapter III of this chapter, with respect to such fishery. The Secretary may, in accordance with section 553 of Title 5, also prepare and promulgate interim regulations with respect to any such preliminary plan. Such regulations shall be in effect until regulations implementing the applicable fishery management plan are promulgated pursuant to section 1855 of this title.

§ 1822. International fishery agreements

(a) **Negotiations.**—The Secretary of State—

(1) shall renegotiate treaties as provided for in subsection (b) of this section;

(2) shall negotiate governing international fishery agreements described in section 1821(c) of this title;

(3) may negotiate boundary agreements as provided for in subsection (d) of this section;

(4) shall, upon the request of and in cooperation with the Secretary, initiate and conduct negotiations for the purpose of entering into international fishery agreements—

(A) which allow fishing vessels of the United States equitable access to fish over which foreign nations assert exclusive fishery management authority, and

(B) which provide for the conservation and management of anadromous species and highly migratory species; and

(5) may enter into such other negotiations, not prohibited by subsection (c) of this section, as may be necessary and appropriate to further the purposes, policy, and provisions of this chapter.

(b) **Treaty renegotiation.**—The Secretary of State, in cooperation with the Secretary, shall initiate, promptly after April 13, 1976, the renegotiation of any treaty which pertains to fishing within the fishery conservation zone (or within the area that will constitute such zone after February 28, 1977), or for anadromous species or Continental Shelf fishery resources beyond such zone or area, and which is in any manner inconsistent with the purposes, policy, or provisions of this chapter, in order to conform such treaty to such purposes, policy, and provisions. It is the sense of Congress that the United States shall withdraw from any such treaty, in accordance with its provisions, if such treaty is not so renegotiated within a reasonable period of time after April 13, 1976.

(c) **International fishery agreements.**—No international fishery agreement (other than a treaty) which pertains to foreign fishing within the fishery conservation zone (or within the area that will constitute such zone after February 28, 1977), or for anadromous species or Continental Shelf fishery resources beyond such zone or area—

(1) which is in effect on June 1, 1976, may thereafter be renewed, extended, or amended; or

(2) may be entered into after May 31, 1976;

by the United States unless it is in accordance with the provisions of section 1821(c) of this title.

(d) **Boundary negotiations.**—The Secretary of State, in cooperation with the Secretary, may initiate and conduct negotiations with any adjacent or opposite foreign nation to establish the boundaries of the fishery conservation zone of the United States in relation to any such nation.

(e) **Nonrecognition.**—It is the sense of the Congress that the United States Government shall not recognize the claim of any foreign nation to a fishery conservation zone (or the equivalent) beyond such nation's territorial sea, to the extent that such sea is recognized by the United States, if such nation—

(1) fails to consider and take into account traditional fishing activity of fishing vessels of the United States;

(2) fails to recognize and accept that highly migratory species are to be managed by applicable international fishery agreements, whether or not such nation is a party to any such agreement; or

(3) imposes on fishing vessels of the United States any conditions or restrictions which are unrelated to fishery conservation and management.

§ 1823. Congressional oversight of governing international fishery agreements

(a) **In general.**—No governing international fishery agreement shall become effective with respect to the United States before the close of the first 60 calendar days of continuous session of the Congress after the date on which the President transmits to the House of Representatives and to the Senate a document setting forth the text of such governing international fishery agreement. A copy of the document shall be delivered to each House of Congress on the same day and shall be delivered to the Clerk of the House of Representatives, if the House is not in session, and to the Secretary of the Senate, if the Senate is not in session.

(b) **Referral to committees.**—Any document described in subsection (a) of this section shall be immediately referred in the House of Representatives to the Committee on Merchant Marine and Fisheries, and in the Senate to the Committees on Commerce and Foreign Relations.

(c) **Computation of 60-day period.**—For purposes of subsection (a)—

(1) continuity of session is broken only by an adjournment of Congress sine die; and

(2) the days on which either House is not in session because of an adjournment of more than 3 days to a day certain are excluded in the computation of the 60-day period.

(d) **Congressional procedures.**—

(1) **Rules of the House of Representatives and Senate.**—The provisions of this section are enacted by the Congress—

(A) as an exercise of the rulemaking power of the House of Representatives and the Senate, respectively, and they are deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of fishery agreement resolutions described in paragraph (2), and they supersede other rules only to the extent that they are inconsistent therewith; and

(B) with full recognition of the constitutional right of either House to change the rules (so far as they relate to the procedure of that House) at any time, and in the same manner and to the same extent as in the case of any other rule of that House.

(2) **Definition.**—For purposes of this subsection, the term "fishery agreement resolution" refers to a joint resolution of either House of Congress—

(A) the effect of which is to prohibit the entering into force and effect of any governing international fishery agreement the text of which is transmitted to the Congress pursuant to subsection (a) of this section; and

(B) which is reported from the Committee on Merchant Marine and Fisheries of the House of Representatives or the Committee on Commerce or the Committee on Foreign Relations of the Senate, not later than 45 days after the date on which the document described in subsection (a) of this section relating to that agreement is transmitted to the Congress.

(3) **Placement on calendar.**—Any fishery agreement resolution upon being reported shall immediately be placed on the appropriate calendar.

(4) **Floor consideration in the House.**—

(A) A motion in the House of Representatives to proceed to the consideration of any fishery agreement resolution shall be highly privileged and not debatable. An amendment to the motion shall not be in order, nor shall it be in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

(B) Debate in the House of Representatives on any fishery agreement resolution shall be limited to not more than 10 hours, which shall be divided equally between those favoring and those opposing the resolution. A motion further to limit debate shall not be debatable. It shall not be in order to move to recommit any fishery agreement resolution or to move to reconsider the vote by which any fishery agreement resolution is agreed to or disagreed to.

(C) Motions to postpone, made in the House of Representatives with respect to the consideration of any fishery agreement resolution, and motions to proceed to the consideration of other business, shall be decided without debate.

(D) All appeals from the decisions of the Chair relating to the application of the Rules of the House of Representatives to the procedure relating to any fishery agreement resolution shall be decided without debate.

(E) Except to the extent specifically provided in the preceding provisions of this subsection, consideration of any fishery agreement resolution shall be governed by the Rules of the House of Representatives applicable to other bills and resolutions in similar circumstances.

(5) **Floor consideration in the Senate.**—

(A) A motion in the Senate to proceed to the consideration of any fishery agreement resolution shall be privileged and not debatable. An amendment to the motion shall not be in order, nor shall it be in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

(B) Debate in the Senate on any fishery agreement resolution and on all debatable motions and appeals in connection therewith shall be limited to not more than 10 hours. The time shall be equally divided between, and controlled by, the majority leader and the minority leader or their designees.

(C) Debate in the Senate on any debatable motion or appeal in connection with any fishery agreement resolution shall be limited to not more than 1 hour, to be equally divided between, and controlled by, the mover of the motion or appeal and the manager of the resolution, except that if the manager of the resolution is in favor of any such motion or appeal, the time in opposition thereto shall be controlled by the minority leader or his designee. The majority leader and the minority leader, or either of them, may allot additional time to any Senator during the consideration of any debatable motion or appeal, from time under their control with respect to the applicable fishery agreement resolution.

(D) A motion in the Senate to further limit debate is not debatable. A motion to recommit any fishery agreement resolution is not in order.

§ 1824. Permits for foreign fishing

(a) In general.—After February 28, 1977, no foreign fishing vessel shall engage in fishing within the fishery conservation zone, or for anadromous species or Continental Shelf fishery resources beyond such zone, unless such vessel has on board a valid permit issued under this section for such vessel.

(b) Applications and permits under governing international fishery agreements.—

(1) Eligibility.—Each foreign nation with which the United States has entered into a governing international fishery agreement shall submit an application to the Secretary of State each year for a permit for each of its fishing vessels that wishes to engage in fishing described in subsection (a) of this section.

(2) Forms.—The Secretary, in consultation with the Secretary of State and the Secretary of the department in which the Coast Guard is operating, shall prescribe the forms for permit applications submitted under this subsection and for permits issued pursuant to any such application.

(3) Contents.—Any application made under this subsection shall specify—

(A) the name and official number or other identification of each fishing vessel for which a permit is sought, together with the name and address of the owner thereof;

(B) the tonnage, capacity, speed, processing equipment, type and quantity of fishing gear, and such other pertinent information with respect to characteristics of each such vessel as the Secretary may require;

(C) each fishery in which each such vessel wishes to fish;

(D) the amount of fish or tonnage of catch contemplated for each such vessel during the time such permit is in force; and

(E) the ocean area in which, and the season or period during which, such fishing will be conducted;

and shall include any other pertinent information and material which the Secretary may require.

(4) Transmittal for action.—Upon receipt of any application which complies with the requirements of paragraph (3), the Secretary of State shall publish such application in the Federal Register and shall promptly transmit—

(A) such application, together with his comments and recommendations thereon, to the Secretary;

(B) a copy of the application to each appropriate Council and to the Secretary of the department in which the Coast Guard is operating; and

(C) a copy of such material to the Committee on Merchant Marine and Fisheries of the House of Representatives and to the Committees on Commerce and Foreign Relations of the Senate.

(5) Action by council.—After receipt of an application transmitted under paragraph (4)(B), each appropriate Council shall prepare and submit to the Secretary such written comments on the application as it deems appropriate. Such comments shall be submitted within 45 days after the date on which the application is received by the Council and may include recommendations with respect to approval of the application and, if approval is recommended, with respect to appropriate conditions and restrictions thereon. Any interested person may submit comments to such Council with respect to any such application. The Council shall consider any such comments in formulating its submission to the Secretary.

(6) Approval.—After receipt of any application transmitted under paragraph (4)(A), the Secretary shall consult with the Secretary of State and, with respect to enforcement, with the Secretary of the department in which the Coast Guard is operating. The Secretary, after taking into consideration the views and recommendations of such Secretaries, and any comments submitted by any Council under paragraph (5), may approve the application, if he determines that the fishing described in the application will meet the requirements of this chapter.

(7) Establishment of conditions and restrictions.—The Secretary shall establish conditions and restrictions which shall be included in each permit issued pursuant to any application approved under paragraph (6) and which must be complied with by the owner or operator of the fishing vessel for which the permit is issued. Such conditions and restrictions shall include the following:

(A) All of the requirements of any applicable fishery management plan, or preliminary fishery management plan, and the regulations promulgated to implement any such plan.

(B) The requirement that no permit may be used by any vessel other than the fishing vessel for which it is issued.

(C) The requirements described in section 1821(c)(1), (2), and (3) of this title.

(D) Any other condition and restriction related to fishery conservation and management which the Secretary prescribes as necessary and appropriate.

(8) Notice of approval.—The Secretary shall promptly transmit a copy of each application approved under paragraph (6) and the conditions and restrictions established under paragraph (7) to—

(A) the Secretary of State for transmittal to the foreign nation involved;

(B) the Secretary of the department in which the Coast Guard is operating;

(C) any Council which has authority over any fishery specified in such application; and

(D) the Committee on Merchant Marine and Fisheries of the House of Representatives and the Committees on Commerce and Foreign Relations of the Senate.

(9) Disapproval of applications.—If the Secretary does not approve any application submitted by a foreign nation under this subsection, he shall promptly inform the Secretary of State of the disapproval and his reasons therefore. The Secretary of State shall notify such foreign nation of the disapproval and the reasons therefor. Such foreign nation, after taking into consideration the reasons for disapproval, may submit a revised application under this subsection.

(10) Fees.—Reasonable fees shall be paid to the Secretary by the owner or operator of any foreign fishing vessel for which a permit is issued pursuant to this subsection. The Secretary, in consultation with the Secretary of State, shall establish and publish a schedule of such fees, which shall apply nondiscriminatorily to each foreign nation. In determining the level of such fees, the Secretary may take into account the cost of carrying out the provisions of this chapter with respect to foreign fishing, including, but not limited to, the cost of fishery conservation and management, fisheries research, administration, and enforcement.

(11) Issuance of permits.—If a foreign nation notifies the Secretary of State of its acceptance of the conditions and restrictions established by the Secretary under paragraph (7), the Secretary of State shall promptly transmit such notification to the Secretary. Upon payment of the applicable fees established pursuant to paragraph (10), the Secretary shall thereupon issue to such foreign nation, through the Secretary of State, permits for the appropriate fishing vessels of that nation. Each permit shall contain a statement of all conditions and restrictions established under paragraph (7) which apply to the fishing vessel for which the permit is issued.

(12) Sanctions.—If any foreign fishing vessel for which a permit has been issued pursuant to this subsection has been used in the commission of any act prohibited by section 1857 of this title the Secretary may, or if any civil penalty imposed under section 1858 of this title or any criminal fine imposed under section 1859 of this title has not been paid and is overdue the Secretary shall—

(A) revoke such permit, with or without prejudice to the right of the foreign nation involved to obtain a permit for such vessel in any subsequent year;

(B) suspend such permit for the period of time deemed appropriate; or

(C) impose additional conditions and restrictions on the approved application of the foreign nation involved and on any permit issued under such application.

Any permit which is suspended under this paragraph for nonpayment of a civil penalty shall be reinstated by the Secretary upon the payment of such civil penalty together with interest thereon at the prevailing rate.

(c) Registration permits.—The Secretary of State, in cooperation with the Secretary, shall issue annually a registration permit for each fishing vessel of a foreign nation which is a party to an international fishery agreement under which foreign fishing is authorized by section 1821 (b) of this title and which wishes to engage in fishing described in subsection (a) of this section. Each such permit shall set forth the terms and conditions contained in the agreement that apply with respect to such fishing, and shall include the additional requirement that the owner or operator of the fishing vessel for which the permit is issued shall prominently display such permit in the wheelhouse of such vessel and show it, upon request, to any officer authorized to enforce the provisions of this chapter (as provided for in section 1861 of this title). The Secretary of State, after consultation with the Secretary and the Secretary of the department in which the Coast Guard is operating, shall prescribe the form and manner in which applications for registration permits may be made, and the forms of such permits. The Secretary of State may establish, require the payment of, and collect fees for registration permits; except that the level of such fees shall not exceed the administrative costs incurred by him in issuing such permits.

§ 1825. Import prohibitions

(a) Determinations by Secretary of State.—If the Secretary of State determines that—

(1) he has been unable, within a reasonable period of time, to conclude with any foreign nation an international fishery agreement allowing fishing vessels of the United States equitable access to fisheries over which that nation asserts exclusive fishery management authority, as recognized by the United States, in accordance with traditional fishing activities of such vessels, if any, and under terms not more restrictive than those established under sections 1821(c) and (d) and 1824(b)(7) and (10) of this title, because such nation has (A) refused to commence negotiations, or (B) failed to negotiate in good faith;

(2) any foreign nation is not allowing fishing vessels of the United States to engage in fishing for highly migratory species in accordance with an applicable international fishery agreement, whether or not such nation is a party thereto;

(3) any foreign nation is not complying with its obligations under any existing international fishery agreement concerning fishing by fishing vessels of the United States in any fishery over which that nation asserts exclusive fishery management authority; or

(4) any fishing vessel of the United States, while fishing in waters beyond any foreign nation's territorial sea, to the extent that such sea is recognized by the United States, is seized by any foreign nation—

(A) in violation of an applicable international fishery agreement;

(B) without authorization under an agreement between the United States and such nation; or

(C) as a consequence of a claim of jurisdiction which is not recognized by the United States;

he shall certify such determination to the Secretary of the Treasury.

(b) Prohibitions.—Upon receipt of any certification from the Secretary of State under subsection (a) of this section, the Secretary of the Treasury shall immediately take such action as may be necessary and appropriate to prohibit the importation into the United States—

(1) of all fish and fish products from the fishery involved, if any; and

(2) upon recommendation of the Secretary of State, such other fish or fish products, from any fishery of the foreign nation concerned, which the Secretary of State finds to be appropriate to carry out the purposes of this section.

(c) Removal of prohibition.—If the Secretary of State finds that the reasons for the imposition of any import prohibition under this section no longer prevail, the Secretary of State shall notify the Secretary of the Treasury, who shall promptly remove such import prohibition.

(d) Definitions.—As used in this section—

(1) The term "fish" includes any highly migratory species.

(2) The term "fish products" means any article which is produced from or composed of (in whole or in part) any fish.

SUBCHAPTER III—NATIONAL FISHERY MANAGEMENT PROGRAM

§ 1851. National standards for fishery conservation and management

(a) In general.—Any fishery management plan prepared, and any regulation promulgated to implement any such plan, pursuant to this subchapter shall be consistent with the following national standards for fishery conservation and management:

(1) Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery.

(2) Conservation and management measures shall be based upon the best scientific information available.

(3) To the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination.

(4) Conservation and management measures shall not discriminate between residents of different States. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.

(5) Conservation and management measures shall, where practicable, promote efficiency in the utilization of fishery resources; except that no such measure shall have economic allocation as its sole purpose.

(6) Conservation and management measures shall take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches.

(7) Conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication.

(b) Guidelines.—The Secretary shall establish guidelines, based on the national standards, to assist in the development of fishery management plans.

§ 1852. Regional fishery management councils

(a) Establishment.—There shall be established, within 120 days after April 13, 1976, eight Regional Fishery Management Councils, as follows:

(1) New England Council.—The New England Fishery Management Council shall consist of the States of Maine, New Hampshire, Massachusetts, Rhode Island, and Connecticut and shall have authority over the fisheries in the Atlantic Ocean seaward of such States. The New England Council shall have 17 voting members, including 11 appointed by the Secretary pursuant to subsection (b)(1)(C) of this section (at least one of whom shall be appointed from each such State).

(2) Mid-Atlantic Council.—The Mid-Atlantic Fishery Management Council shall consist of the States of New York, New Jersey, Delaware, Pennsylvania, Maryland, and Virginia and shall have authority over the fisheries in the Atlantic Ocean seaward of such States. The Mid-Atlantic Council shall have 19 voting members, including 12 appointed by the Secretary pursuant to subsection (b)(1)(C) of this section (at least one of whom shall be appointed from each such State).

(3) South Atlantic Council.—The South Atlantic Fishery Management Council shall consist of the States of North Carolina, South Carolina, Georgia, and Florida and shall have authority over the fisheries in the Atlantic Ocean seaward of such States. The South Atlantic Council shall have 13 voting members, including 8 appointed by the Secretary pursuant to subsection (b)(1)(C) of this section (at least one of whom shall be appointed from each such State).

(4) Caribbean Council.—The Caribbean Fishery Management Council shall consist of the Virgin Islands and the Commonwealth of Puerto Rico and shall have authority over the fisheries in the Caribbean Sea and Atlantic Ocean seaward of such States. The Carribbean Council shall have 7 voting members, including 4 appointed by the Secretary pursuant to subsection (b)(1)(C) of this section (at least one of whom shall be appointed from each such State).

(C) The executive director of the Marine Fisheries Commission for the geographical area concerned, if any, or his designee.

(D) One representative of the Department of State designated for such purpose by the Secretary of State, or his designee.

(2) The Pacific Council shall have one additional nonvoting member who shall be appointed by, and serve at the pleasure of, the Governor of Alaska.

(d) Compensation and expenses.—The voting members of each Council, who are not employed by the Federal Government or any State or local government, shall receive compensation at the daily rate for GS–18 of the General Schedule when engaged in the actual performance of duties for such Council. The voting members of each Council, any nonvoting member described in subsection (c)(1)(C) of this section, and the nonvoting member appointed pursuant to subsection (c)(2) of this section shall be reimbursed for actual expenses incurred in the performance of such duties.

(e) Transaction of business.—

(1) A majority of the voting members of any Council shall constitute a quorum, but one or more such members designated by the Council may hold hearings. All decisions of any Council shall be by majority vote of the voting members present and voting.

(2) The voting members of each Council shall select a Chairman for such Council from among the voting members.

(3) Each Council shall meet in the geographical area concerned at the call of the Chairman or upon the request of a majority of its voting members.

(4) If any voting member of a Council disagrees with respect to any matter which is transmitted to the Secretary by such Council, such member may submit a statement to the Secretary setting forth the reasons for such disagreement.

(f) Staff and administration.—

(1) Each Council may appoint, and assign duties to, an executive director and such other full- and part-time administrative employees as the Secretary determines are necessary to the performance of its functions.

(2) Upon the request of any Council, and after consultation with the Secretary, the head of any Federal agency is authorized to detail to such Council, on a reimbursable basis, any of the personnel of such agency, to assist such Council in the performance of its functions under this chapter.

(3) The Secretary shall provide to each Council such administrative and technical support services as are necessary for the effective functioning of such Council.

(4) The Administrator of General Services shall furnish each Council with such offices, equipment, supplies, and services as he is authorized to furnish to any other agency or instrumentality of the United States.

(5) The Secretary and the Secretary of State shall furnish each Council with relevant information concerning foreign fishing and international fishery agreements.

(6) Each Council shall determine its organization, and prescribe its practices and procedures for carrying out its functions under this chapter, in accordance with such uniform standards as are prescribed by the Secretary. Each Council shall publish and make available to the public a statement of its organization, practices, and procedures.

(7) The Secretary shall pay—

(A) the compensation and expenses provided for in subsection (d) of this section;

(B) appropriate compensation to employees appointed under paragraph (1);

(C) the amounts required for reimbursement of other Federal agencies under paragraphs (2) and (4);

(D) the actual expenses of the members of the committees and panels established under subsection (g) of this section; and

(E) such other costs as the Secretary determines are necessary to the performance of the functions of the Councils.

(g) Committees and panels.—

(1) Each Council shall establish and maintain, and appoint the members of, a scientific and statistical committee to assist it in the development, collection, and evaluation of such statistical, biological, economic, social, and other scientific information as is relevant to such Council's development and amendment of any fishery management plan.

(5) **Gulf Council.**—The Gulf of Mexico Fishery Management Council shall consist of the States of Texas, Louisiana, Mississippi, Alabama, and Florida and shall have authority over the fisheries in the Gulf of Mexico seaward of such States. The Gulf Council shall have 17 voting members, including 11 appointed by the Secretary pursuant to subsection (b)(1)(C) of this section (at least one of whom shall be appointed from each such State).

(6) **Pacific Council.**—The Pacific Fishery Management Council shall consist of the States of California, Oregon, Washington, and Idaho and shall have authority over the fisheries in the Pacific Ocean seaward of such States. The Pacific Council shall have 13 voting members, including 8 appointed by the Secretary pursuant to subsection (b)(1)(C) of this section (at least one of whom shall be appointed from each such State).

(7) **North Pacific Council.**—The North Pacific Fishery Management Council shall consist of the States of Alaska, Washington, and Oregon and shall have authority over the fisheries in the Arctic Ocean, Bering Sea, and Pacific Ocean seaward of Alaska. The North Pacific Council shall have 11 voting members, including 7 appointed by the Secretary pursuant to subsection (b)(1)(C) of this section (5 of whom shall be appointed from the State of Alaska and 2 of whom shall be appointed from the State of Washington).

(8) **Western Pacific Council.**—The Western Pacific Fishery Management Council shall consist of the State of Hawaii, American Samoa, and Guam and shall have authority over the fisheries in the Pacific Ocean seaward of such States. The Western Pacific Council shall have 11 voting members, including 7 appointed by the Secretary pursuant to subsection (b)(1)(C) of this section (at least one of whom shall be appointed from each such State).

Each Council shall reflect the expertise and interest of the several constituent States in the ocean area over which such Council is granted authority.

(b) **Voting members.**—(1) The voting members of each Council shall be:

(A) The principal State official with marine fishery management responsibility and expertise in each constituent State, who is designated as such by the Governor of the State, so long as the official continues to hold such position, or the designee of such official.

(B) The regional director of the National Marine Fisheries Service for the geographic area concerned, or his designee, except that if two such directors are within such geographical area, the Secretary shall designate which of such directors shall be the voting member.

(C) The members required to be appointed by the Secretary shall be appointed by the Secretary from a list of qualified individuals submitted by the Governor of each applicable constituent State. With respect to the initial such appointments, such Governors shall submit such lists to the Secretary as soon as practicable, not later than 45 days after April 13, 1976. As used in this subparagraph, (i) the term "list of qualified individuals" shall include the names (including pertinent biographical data) of not less than three such individuals for each applicable vacancy, and (ii) the term "qualified individual" means an individual who is knowledgeable or experienced with regard to the management, conservation, or recreational or commercial harvest, of the fishery resources of the geographical area concerned.

(2) Each voting member appointed to a Council pursuant to paragraph (1)(C) shall serve for a term of 3 years; except that, with respect to the members initially so appointed, the Secretary shall designate up to one-third thereof to serve for a term of 1 year, up to one-third thereof to serve for a term of 2 years, and the remaining such members to serve for a term of 3 years.

(3) Successors to the voting members of any Council shall be appointed in the same manner as the original voting members. Any individual appointed to fill a vacancy occurring prior to the expiration of any term of office shall be appointed for the remainder of that term.

(c) **Nonvoting members.**—(1) The nonvoting members of each Council shall be:

(A) The regional or area director of the United States Fish and Wildlife Service for the geographical area concerned, or his designee.

(B) The commander of the Coast Guard district for the geographical area concerned, or his designee; except that, if two Coast Guard districts are within such geographical area, the commander designated for such purpose by the commandant of the Coast Guard.

(2) Each Council shall establish such other advisory panels as are necessary or appropriate to assist it in carrying out its functions under this chapter.

(h) Functions.—Each Council shall, in accordance with the provisions of this chapter—

(1) prepare and submit to the Secretary, a fishery management plan with respect to each fishery within its geographical area of authority and, from time to time, such amendments to each such plan as are necessary;

(2) prepare comments on any application for foreign fishing transmitted to it under section 1824(b)(4)(B) of this title, and any fishery management plan or amendment transmitted to it under section 1854(c)(2) of this title;

(3) conduct public hearings, at appropriate times and in appropriate locations in the geographical area concerned, so as to allow all interested persons an opportunity to be heard in the development of fishery management plans and amendments to such plans, and with respect to the administration and implementation of the provisions of this chapter;

(4) submit to the Secretary—

(A) a report, before February 1 of each year, on the Council's activities during the immediately preceding calendar year,

(B) such periodic reports as the Council deems appropriate, and

(C) any other relevant report which may be requested by the Secretary;

(5) review on a continuing basis, and revise as appropriate, the assessments and specifications made pursuant to section 1853(a)(3) and (4) of this title with respect to the optimum yield from, and the total allowable level of foreign fishing in, each fishery within its geographical area of authority; and

(6) conduct any other activities which are required by, or provided for in, this chapter or which are necessary and appropriate to the foregoing functions.

§ 1853. Contents of fishery management plans

(a) Required provisions.—Any fishery management plan which is prepared by any Council, or by the Secretary, with respect to any fishery, shall—

(1) contain the conservation and management measures, applicable to foreign fishing and fishing by vessels of the United States, which are—

(A) necessary and appropriate for the conservation and management of the fishery;

(B) described in this subsection or subsection (b) of this section, or both; and

(C) consistent with the national standards, the other provisions of this chapter, and any other applicable law;

(2) contain a description of the fishery, including, but not limited to, the number of vessels involved, the type and quantity of fishing gear used, the species of fish involved and their location, the cost likely to be incurred in management, actual and potential revenues from the fishery, any recreational interests in the fishery, and the nature and extent of foreign fishing and Indian treaty fishing rights, if any;

(3) assess and specify the present and probable future condition of, and the maximum sustainable yield and optimum yield from, the fishery, and include a summary of the information utilized in making such specification;

(4) assess and specify—

(A) the capacity and the extent to which fishing vessels of the United States, on an annual basis, will harvest the optimum yield specified under paragraph (3), and

(B) the portion of such optimum yield which, on an annual basis, will not be harvested by fishing vessels of the United States and can be made available for foreign fishing; and

(5) specify the pertinent data which shall be submitted to the Secretary with respect to the fishery, including, but not limited to, information regarding the type and quantity of fishing gear used, catch by species in numbers of fish or weight thereof, areas in which fishing was engaged in, time of fishing, and number of hauls.

(b) Discretionary provisions.—Any fishery management plan which is prepared by any Council, or by the Secretary, with respect to any fishery, may—

(1) require a permit to be obtained from, and fees to be paid to, the Secretary with respect to any fishing vessel of the United States fishing, or wishing to fish, in the fishery conservation zone, or for anadromous species or Continental Shelf fishery resources beyond such zone;

(2) designate zones where, and periods when, fishing shall be limited, or shall not be permitted, or shall be permitted only by specified types of fishing vessels or with specified types and quantities of fishing gear;

(3) establish specified limitations on the catch of fish (based on area, species, size, number, weight, sex, incidental catch, total biomass, or other factors), which are necessary and appropriate for the conservation and management of the fishery;

(4) prohibit, limit, condition, or require the use of specified types and quantities of fishing gear, fishing vessels, or equipment for such vessels, including devices which may be required to facilitate enforcement of the provisions of this chapter;

(5) incorporate (consistent with the national standards, the other provisions of this chapter, and any other applicable law) the relevant fishery conservation and management measures of the coastal States nearest to the fishery;

(6) establish a system for limiting access to the fishery in order to achieve optimum yield if, in developing such system, the Council and the Secretary take into account—

(A) present participation in the fishery,

(B) historical fishing practices in, and dependence on, the fishery,

(C) the economics of the fishery,

(D) the capability of fishing vessels used in the fishery to engage in other fisheries,

(E) the cultural and social framework relevant to the fishery, and

(F) any other relevant considerations; and

(7) prescribe such other measures, requirements, or conditions and restrictions as are determined to be necessary and appropriate for the conservation and management of the fishery.

(c) Proposed regulations.—Any Council may prepare any proposed regulations which it deems necessary and appropriate to carry out any fishery management plan, or any amendment to any fishery management plan, which is prepared by it. Such proposed regulations shall be submitted to the Secretary, together with such plan or amendment, for action by the Secretary pursuant to sections 1854 and 1855 of this title.

(d) Confidentiality of statistics.—Any statistics submitted to the Secretary by any person in compliance with any requirement under subsection (a)(5) of this section shall be confidential and shall not be disclosed except when required under court order. The Secretary shall, by regulation, prescribe such procedures as may be necessary to preserve such confidentiality, except that the Secretary may release or make public any such statistics in any aggregate or summary form which does not directly or indirectly disclose the identity or business of any person who submits such statistics.

§ 1854. Action by the Secretary

(a) Action by the Secretary after receipt of plan.—Within 60 days after the Secretary receives any fishery management plan, or any amendment to any such plan, which is prepared by any Council, the Secretary shall—

(1) review such plan or amendment pursuant to subsection (b) of this section; and

(2) notify such Council in writing of his approval, disapproval, or partial disapproval of such plan or amendment.

In the case of disapproval or partial disapproval, the Secretary shall include in such notification a statement and explanation of the Secretary's objections and the reasons therefor, suggestions for improvement, a request to such Council to change such plan or amendment to satisfy the objections, and a request to resubmit the plan or amendment, as so modified, to the Secretary within 45 days after the date on which the Council receives such notification.

(b) Review by the Secretary.—The Secretary shall review any fishery management plan, and any amendment to any such plan, prepared by any Council and submitted to him to determine whether it is consistent with the national standards, the other provisions of this chapter, and any other applicable law. In carrying out such review, the Secretary shall consult with—

(1) the Secretary of State with respect to foreign fishing; and

(2) the Secretary of the department in which the Coast Guard is operating with respect to enforcement at sea.

(c) Preparation by the Secretary.—(1) The Secretary may prepare a fishery management plan, with respect to any fishery, or any amendment to any such plan, in accordance with the national standards, the other provisions of this chapter, and any other applicable law, if—

(A) the appropriate Council fails to develop and submit to the Secretary, after a reasonable period of time, a fishery management plan for such fishery, or any necessary amendment to such a plan, if such fishery requires conservation and management; or

(B) the Secretary disapproves or partially disapproves any such plan or amendment, and the Council involved fails to change such plan or amendment in accordance with the notification made under subsection (a)(2) of this section.

In preparing any such plan or amendment, the Secretary shall consult with the Secretary of State with respect to foreign fishing and with the Secretary of the department in which the Coast Guard is operating with respect to enforcement at sea.

(2) Whenever, pursuant to paragraph (1), the Secretary prepares a fishery management plan or amendment, the Secretary shall promptly transmit such plan or amendment to the appropriate Council for consideration and comment. Within 45 days after the date of receipt of such plan or amendment, the appropriate Council may recommend, to the Secretary, changes in such plan or amendment, consistent with the national standards, the other provisions of this chapter, and any other applicable law. After the expiration of such 45-day period, the Secretary may implement such plan or amendment pursuant to section 1855 of this title.

(3) Notwithstanding paragraph (1), the Secretary may not include in any fishery management plan, or any amendment to any such plan, prepared by him, a provision establishing a limited access system described in section 1853(b)(6) of this title, unless such system is first approved by a majority of the voting members, present and voting, of each appropriate Council.

(d) Establishment of fees.—The Secretary shall by regulation establish the level of any fees which are authorized to be charged pursuant to section 1853(b)(1) of this title. Such level shall not exceed the administrative costs incurred by the Secretary in issuing such permits.

(e) Fisheries Research.—The Secretary shall initiate and maintain a comprehensive program of fishery research to carry out and further the purposes, policy, and provisions of this chapter. Such program shall be designed to acquire knowledge and information, including statistics, on fishery conservation and management, including, but not limited to, biological research concerning the interdependence of fisheries or stocks of fish, the impact of pollution on fish, the impact of wetland and estuarine degradation, and other matters bearing upon the abundance and availability of fish.

(f) Miscellaneous duties.—(1) If any fishery extends beyond the geographical area of authority of any one Council, the Secretary may—

(A) designate which Council shall prepare the fishery management plan for such fishery and any amendment to such plan; or

(B) may require that the plan and amendment be prepared jointly by the Councils concerned.

No jointly prepared plan or amendment may be submitted to the Secretary unless it is approved by a majority of the voting members, present and voting, of each Council concerned.

(2) The Secretary shall establish the boundaries between the geographical areas of authority of adjacent Councils.

§ 1855. **Implementation of fishery management plans**

(a) **In general.**—As soon as practicable after the Secretary—

(1) approves, pursuant to section 1854(a) and (b) of this title, any fishery management plan or amendment; or

(2) prepares, pursuant to section 1854(c) of this title, any fishery management plan or amendment;

the Secretary shall publish in the Federal Register (A) such plan or amendment, and (B) any regulations which he proposes to promulgate to implement such plan or amendment. Interested persons shall be afforded a period of not less than 45 days after such publication within which to submit in writing data, views, or comments on the plan or amendment, and on the proposed regulations.

(b) **Hearing.**—The Secretary may schedule a hearing, in accordance with section 553 of Title 5, on any fishery management plan, any amendment to any such plan, and any regulations to implement any such plan or amendment. If any such hearing is scheduled, the Secretary may, pending its outcome—

(A) postpone the effective date of the regulations proposed to implement such plan or amendment; or

(B) take such other action as he deems appropriate to preserve the rights or status of any person.

(c) **Implementation.**—The Secretary shall promulgate regulations to implement any fishery management plan or any amendment to any such plan—

(1) after consideration of all relevant matters—

(A) presented to him during the 45-day period referred to in subsection (a) of this section, and

(B) produced in any hearing held under subsection (b) of this section; and

(2) if he finds that the plan or amendment is consistent with the national standards, the other provisions of this chapter, and any other applicable law.

To the extent practicable, such regulation shall be put into effect in a manner which does not disrupt the regular fishing season for any fishery.

(d) **Judicial review.**—Regulations promulgated by the Secretary under this chapter shall be subject to judicial review to the extent authorized by, and in accordance with, chapter 7 of Title 5, if a petition for such review is filed within 30 days after the date on which the regulations are promulgated; except that (1) section 705 of such title is not applicable, and (2) the appropriate court shall only set aside any such regulation on a ground specified in section 706(2)(A), (B), (C), or (D) of such title.

(e) **Emergency actions.**—If the Secretary finds that an emergency involving any fishery resources exists, he may—

(1) promulgate emergency regulations, without regard to subsections (a) and (c) of this section, to implement any fishery management plan, if such emergency so requires; or

(2) promulgate emergency regulations to amend any regulation which implements any existing fishery management plan, to the extent required by such emergency.

Any emergency regulation which changes any existing fishery management plan shall be treated as an amendment to such plan for the period in which such regulation is in effect. Any emergency regulation promulgated under this subsection (A) shall be published in the Federal Register together with the reasons therefor; (B) shall remain in effect for not more than 45 days after the date of such publication, except that any such regulation may be repromulgated for one additional period of not more than 45 days; and (C) may be terminated by the Secretary at any earlier date by publication in the Federal Register of a notice of termination.

(f) **Annual report.**—The Secretary shall report to the Congress and the President, not later than March 1 of each year, on all activities of the Councils and the Secretary with respect to fishery management plans, regulations to implement such plans, and all other activities relating to the conservation and management of fishery resources that were undertaken under this chapter during the preceding calendar year.

(g) **Responsibility of the Secretary.**—The Secretary shall have general responsibility to carry out any fishery management plan or amendment approved or prepared by him, in accordance with the provisions of this chapter. The Secretary may promulgate such regulations, in accordance with section 553 of Title 5, as may be necessary to discharge such responsibility or to carry out any other provision of this chapter.

§ 1856. State jurisdiction

(a) In general.—Except as provided in subsection (b) of this section, nothing in this chapter shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries. No State may directly or indirectly regulate any fishing which is engaged in by any fishing vessel outside its boundaries, unless such vessel is registered under the laws of such State.

(b) Exception.—(1) If the Secretary finds, after notice and an opportunity for a hearing in accordance with section 554 of Title 5, that—

(A) the fishing in a fishery, which is covered by a fishery management plan implemented under this chapter, is engaged in predominately within the fishery conservation zone and beyond such zone; and

(B) any State has taken any action, or omitted to take any action, the results of which will substantially and adversely affect the carrying out of such fishery management plan;

the Secretary shall promptly notify such State and the appropriate Council of such finding and of his intention to regulate the applicable fishery within the boundaries of such State (other than its internal waters), pursuant to such fishery management plan and the regulations promulgated to implement such plan.

(2) If the Secretary, pursuant to this subsection, assumes responsibility for the regulation of any fishery, the State involved may at any time thereafter apply to the Secretary for reinstatement of its authority over such fishery. If the Secretary finds that the reasons for which he assumed such regulation no longer prevail, he shall promptly terminate such regulation.

§ 1857. Prohibited acts

It is unlawful—

(1) for any person—

(A) to violate any provision of this chapter or any regulation or permit issued pursuant to this chapter;

(B) to use any fishing vessel to engage in fishing after the revocation, or during the period of suspension, of an applicable permit issued pursuant to this chapter;

(C) to violate any provision of, or regulation under, an applicable governing international fishery agreement entered into pursuant to section 1821(c) of this title;

(D) to refuse to permit any officer authorized to enforce the provisions of this chapter (as provided for in section 1861 of this title) to board a fishing vessel subject to such person's control for purposes of conducting any search or inspection in connection with the enforcement of this chapter or any regulation, permit, or agreement referred to in subparagraph (A) or (C);

(E) to forcibly assault, resist, oppose, impede, intimidate, or interfere with any such authorized officer in the conduct of any search or inspection described in subparagraph (D);

(F) to resist a lawful arrest for any act prohibited by this section;

(G) to ship, transport, offer for sale, sell, purchase, import, export, or have custody, control, or possession of, any fish taken or retained in violation of this chapter or any regulation, permit, or agreement referred to in subparagraph (A) or (C); or

(H) to interfere with, delay, or prevent, by any means, the apprehension or arrest of another person, knowing that such other person has committed any act prohibited by this section; and

(2) for any vessel other than a vessel of the United States, and for the owner or operator of any vessel other than a vessel of the United States, to engage in fishing—

(A) within the boundaries of any State; or

(B) within the fishery conservation zone, or for any anadromous species or Continental Shelf fishery resources beyond such zone, unless such fishing is authorized by, and conducted in accordance with, a valid and applicable permit issued pursuant to section 1824(b) or (c) of this title.

§ 1858. Civil penalties

(a) **Assessment of penalty.**—Any person who is found by the Secretary, after notice and an opportunity for a hearing in accordance with section 554 of Title 5, to have committed an act prohibited by section 1857 of this title shall be liable to the United States for a civil penalty. The amount of the civil penalty shall not exceed $25,000 for each violation. Each day of a continuing violation shall constitute a separate offense. The amount of such civil penalty shall be assessed by the Secretary, or his designee, by written notice. In determining the amount of such penalty, the Secretary shall take into account the nature, circumstances, extent, and gravity of the prohibited acts committed and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.

(b) **Review of civil penalty.**—Any person against whom a civil penalty is assessed under subsection (a) of this section may obtain review thereof in the appropriate court of the United States by filing a notice of appeal in such court within 30 days from the date of such order and by simultaneously sending a copy of such notice by certified mail to the Secretary. The Secretary shall promptly file in such court a certified copy of the record upon which such violation was found or such penalty imposed, as provided in section 2112 of Title 28. The findings and order of the Secretary shall be set aside by such court if they are not found to be supported by substantial evidence, as provided in section 706(2) of Title 5.

(c) **Action upon failure to pay assessment.**—If any person fails to pay an assessment of a civil penalty after it has become a final and unappealable order, or after the appropriate court has entered final judgment in favor of the Secretary, the Secretary shall refer the matter to the Attorney General of the United States, who shall recover the amount assessed in any appropriate district court of the United States. In such action, the validity and appropriateness of the final order imposing the civil penalty shall not be subject to review.

(d) **Compromise or other action by Secretary.**—The Secretary may compromise, modify, or remit, with or without conditions, any civil penalty which is subject to imposition or which has been imposed under this section.

§ 1859. Criminal offenses

(a) **Offenses.**—A person is guilty of an offense if he commits any act prohibited by—

(1) section 1857(1)(D), (E), (F), or (H) of this title; or

(2) section 1857(2) of this title.

(b) **Punishment.**—Any offense described in subsection (a)(1) of this section is punishable by a fine of not more than $50,000, or imprisonment for not more than 6 months, or both; except that if in the commission of any such offense the person uses a dangerous weapon, engages in conduct that causes bodily injury to any officer authorized to enforce the provisions of this chapter (as provided for in section 1861 of this title), or places any such officer in fear of imminent bodily injury, the offense is punishable by a fine of not more than $100,000, or imprisonment for not more than 10 years, or both. Any offense described in subsection (a)(2) of this section is punishable by a fine of not more than $100,000, or imprisonment for not more than 1 year, or both.

(c) **Jurisdiction.**—There is Federal jurisdiction over any offense described in this section.

§ 1860. Civil forfeitures

(a) **In general.**—Any fishing vessel (including its fishing gear, furniture, appurtenances, stores, and cargo) used, and any fish taken or retained, in any manner, in connection with or as a result of the commission of any act prohibited by section 1857 of this title (other than any act for which the issuance of a citation under section 1861(c) of this title is sufficient sanction) shall be subject to forfeiture to the United States. All or part of such vessel may, and all such fish shall, be forfeited to the United States pursuant to a civil proceeding under this section.

(b) **Jurisdiction of courts.**—Any district court of the United States which has jurisdiction under section 1861(d) of this title shall have jurisdiction, upon application by the Attorney General on behalf of the United States, to order any forfeiture authorized under subsection (a) of this section and any action provided for under subsection (d) of this section.

(c) **Judgment.**—If a judgment is entered for the United States in a civil forfeiture proceeding under this section, the Attorney General may seize any property or other interest declared forfeited to the United States, which has not previously been seized pursuant to this chapter or for which security has not previously been obtained under subsection (d) of this section. The provisions of the customs laws relating to—

(1) the disposition of forfeited property,

(2) the proceeds from the sale of forfeited property,

(3) the remission or mitigation of forfeitures, and

(4) the compromise of claims,

shall apply to any forfeiture ordered, and to any case in which forfeiture is alleged to be authorized, under this section, unless such provisions are inconsistent with the purposes, policy, and provisions of this chapter. The duties and powers imposed upon the Commissioner of Customs or other persons under such provisions shall, with respect to this chapter, be performed by officers or other persons designated for such purpose by the Secretary.

(d) **Procedure.**—(1) Any officer authorized to serve any process in rem which is issued by a court having jurisdiction under section 1861(d) of this title shall—

(A) stay the execution of such process; or

(B) discharge any fish seized pursuant to such process;

upon the receipt of a satisfactory bond or other security from any person claiming such property. Such bond or other security shall be conditioned upon such person (i) delivering such property to the appropriate court upon order thereof, without any impairment of its value, or (ii) paying the monetary value of such property pursuant to an order of such court. Judgment shall be recoverable on such bond or other security against both the principal and any sureties in the event that any condition thereof is breached, as determined by such court.

(2) Any fish seized pursuant to this chapter may be sold, subject to the approval and direction of the appropriate court, for not less than the fair market value thereof. The proceeds of any such sale shall be deposited with such court pending the disposition of the matter involved.

(e) **Rebuttable presumption.**—For purposes of this section, it shall be a rebuttable presumption that all fish found on board a fishing vessel which is seized in connection with an act prohibited by section 1857 of this title were taken or retained in violation of this chapter.

§ 1861. Enforcement

(a) **Responsibility.**—The provisions of this chapter shall be enforced by the Secretary and the Secretary of the department in which the Coast Guard is operating. Such Secretaries may, by agreement, on a reimbursable basis or otherwise, utilize the personnel, services, equipment (including aircraft and vessels), and facilities of any other Federal agency, including all elements of the Department of Defense, and of any State agency, in the performance of such duties. Such Secretaries shall report semiannually, to each committee of the Congress listed in section 1823(b) of this title and to the Councils, on the degree and extent of known and estimated compliance with the provisions of this chapter.

(b) **Powers of authorized officers.**—Any officer who is authorized (by the Secretary, the Secretary of the department in which the Coast Guard is operating, or the head of any Federal or State agency which has entered into an agreement with such Secretaries under subsection (a) of this section to enforce the provisions of this chapter may—

(1) with or without a warrant or other process—

(A) arrest any person, if he has reasonable cause to believe that such person has committed an act prohibited by section 1857 of this title;

(B) board, and search or inspect, any fishing vessel which is subject to the provisions of this chapter;

(C) seize any fishing vessel (together with its fishing gear, furniture, appurtenances, stores, and cargo) used or employed in, or with respect to which it reasonably appears that such vessel was used or employed in, the violation of any provision of this chapter;

(D) seize any fish (wherever found) taken or retained in violation of any provision of this chapter; and

(E) seize any other evidence related to any violation of any provision of this chapter;

(2) execute any warrant or other process issued by any court of competent jurisdiction; and

(3) exercise any other lawful authority.

(c) **Issuance of citations.**—If any officer authorized to enforce the provisions of this chapter (as provided for in this section) finds that a fishing vessel is operating or has been operated in violation of any provision of this chapter, such officer may, in accordance with regulations issued jointly by the Secretary and the Secretary of the department in which the Coast Guard is operating, issue a citation to the owner or operator of such vessel in lieu of proceeding under subsection (b) of this section. If a permit has been issued pursuant to this chapter for such vessel, such officer shall note the issuance of any citation under this subsection, including the date thereof and the reason therefor, on the permit. The Secretary shall maintain a record of all citations issued pursuant to this subsection.

(d) **Jurisdiction of courts.**—The district courts of the United States shall have exclusive jurisdiction over any case or controversy arising under the provisions of this chapter. In the case of Guam, and any Commonwealth, territory, or possession of the United States in the Pacific Ocean, the appropriate court is the United States District Court for the District of Guam, except that in the case of American Samoa, the appropriate court is the United States District Court for the District of Hawaii. Any such court may, at any time—

(1) enter restraining orders or prohibitions;

(2) issue warrants, process in rem, or other process;

(3) prescribe and accept satisfactory bonds or other security; and

(4) take such other actions as are in the interest of justice.

(e) **Definition.**—For purposes of this section—

(1) The term "provisions of this chapter" includes (A) any regulation or permit issued pursuant to this chapter, and (B) any provision of, or regulation issued pursuant to, any international fishery agreement under which foreign fishing is authorized by section 1821 (b) or (c) of this title, with respect to fishing subject to the exclusive fishery management authority of the United States.

(2) The term "violation of any provision of this chapter" includes (A) the commission of any act prohibited by section 1857 of this title, and (B) the violation of any regulation, permit, or agreement referred to in paragraph (1).

Notes

1. Prior United States authority over fishing arose from the Fishing Zone Extra-Territorial Sea Act of 1966, which extended jurisdiction to 12 nautical miles. The Bartlett Act, passed in 1964, made it unlawful for vessels to take sedentary species (such as crab) from the continental shelf. Both acts were repealed by the FCMA. Consider also that 200 nautical miles is the equivalent of 230 statute miles, or roughly the distance between New York City and Washington, D.C. It is also interesting to note that with the adoption of the FCMA the United States acquired the largest fishing zone in world, more than 2.2 million square nautical miles. See Alexander and Hodgson, The Impact of the 200-Mile Economic Zone on the Law of the Sea, 12 San Diego L. Rev. 569 (1975).

2. How will anadromous species, such as salmon, which range beyond the 200-nautical mile limit but return to inland streams to spawn be managed? See section 1812(2). What is the justification for the extension of authority under section 1812(2)? Notice the only limitation on authority under section 1812(2) is that of other nations' regulatory zones. Also, it has been speculated that the type of authority exercised under 1812(2) would be unacceptable to the majority of the representatives to the United Nations Law of the Sea Conference.

3. Which is the more persuasive: (1) With the declaration of the 200-nautical mile fishing zone, the Japanese salmon fishermen will abrogate the North Pacific Fisheries Treaty (which sets a western boundary for their fishing operations) and fish within the abstention line, thus severely restricting the United States catch; or (2) Other fish taken by the Japanese within the 200-mile zone are more important to them and can be used as a negotiating tool by the United States in the attempt to enforce salmon regulation under the anadromous species section. Obviously, Congress believed the latter. See H. Rep. No. 445, 94th Cong., 1st Sess. 48 (1975).

4. Fishing for highly migratory species is exempt from regulation under the FCMA. Section 1813. The United States tuna industry feared that the inclusion of highly migratory species, such as tuna, within the scope of regulation would destroy their operation, which depends upon the freedom of wide ranging travel to take the speeding tuna. See Comment, The 200-Mile Exclusive Economic Zone: Death Knell for the American Tuna Industry, 13 San Diego L. Rev. 707 (1976).

NORTH CAROLINA GENERAL STATUTES

Chapter 113

SUBCHAPTER IV. CONSERVATION OF FISHERIES RESOURCES.

ARTICLE 12.

General Definitions.

§ 113-127. Application of Article. — Unless the context clearly requires otherwise, the definitions in this Article apply throughout this Subchapter.

§ 113-128. Definitions relating to agencies and their powers. — The following definitions apply to powers and administration of agencies charged with the conservation of marine and estuarine and wildlife resources:

(1) Commercial and Sports Fisheries Inspector. — An employee of the Department of Natural and Economic Resources sworn in as an officer and assigned the duties which include exercise of law-enforcement power. All references in statutes, regulations, contracts, and other legal and official documents to commercial fisheries inspectors apply to commercial and sports fisheries inspectors.
(2) Committee. — Commercial and Sports Fisheries Committee.
(3) Department. — Department of Natural and Economic Resources.
(4) Executive Director. — Executive Director, North Carolina Wildlife Resources Commission.
(5) Inspector. — Commercial and sports fisheries inspector.
(6) Notice; Notify. — Where it is required that notice be given an agency of a situation within a given number of days, this places the burden on the person giving notice to make sure that the information is received in writing by a responsible member of the agency within the time limit.
(7) Protector. — Wildlife protector.
(8) Secretary. — Secretary of Natural and Economic Resources.
(9) Wildlife Protector. — An employee of the North Carolina Wildlife Resources Commission sworn in as an officer and assigned to duties which include exercise of law-enforcement powers.
(10) Wildlife Resources Commission. — North Carolina Wildlife Commission as established by Article 24 of Chapter 143 of the General Statutes of North Carolina and as modified by any amendments which became effective prior to 1974.

§ 113-129. Definitions relating to resources. — The following definitions apply in the description of the various marine and estuarine and wildlife resources:

(1) Bushel. — A dry measure containing 2,150.42 cubic inches.
(2) Coastal Fisheries. — Any and every aspect of cultivating, taking, possessing, transporting, processing, selling, utilizing, and disposing of fish taken in coastal fishing waters, whatever the manner or purpose of taking, except for the regulation of inland game fish in coastal fishing waters which is vested in the Wildlife Resources Commission; and all such dealings with fish, wherever taken or found, by a person primarily concerned with fish taken in coastal fishing waters so as to be placed under the administrative supervision of the Department. Provided, that the Department is given no authority over the taking of fish in inland fishing waters. Except as provisions in this Subchapter or in regulations of the Marine Fisheries Commission authorized under this Subchapter may make such reference inapplicable, all references in statutes, regulations, contracts, and other legal or official documents to commercial fisheries apply to coastal fisheries.

(3) Coastal Fishing. — All fishing in coastal fishing waters. Except as provisions in this Subchapter or in regulations of the Department of Natural and Economic Resources authorized under this Subchapter may make such references inapplicable, all references in statutes, regulations, contracts, and other legal or official documents to commercial fishing apply to coastal fishing.

(4) Coastal Fishing Waters. — The Atlantic Ocean; the various coastal sounds; and estuarine waters up to the dividing line between coastal fishing waters and inland fishing waters agreed upon by the Department and the Wildlife Resources Commission. Except as provisions in this Subchapter or changes in the agreement between the Department and the Wildlife Resources Commission may make such reference inapplicable, all references in statutes, regulations, contracts, and other legal or official documents to commercial fishing waters apply to coastal fishing waters.

(5) Crustaceans. — Crustacea, specifically including shrimp and hard- and soft-shelled crabs.

(6) Fisheries Resources. — Marine and estuarine resources and such wildlife resources as relate to fish.

(7) Fish; Fishes. — All marine mammals; all shellfish; all crustaceans; and all other fishes.

(8) Game Fish. — Inland game fish and such other game fish in coastal fishing waters as may be regulated by the Department.

(9) Inland Fishing Waters. — All inland waters except private ponds; and all waters connecting with or tributary to coastal sounds or the ocean extending inland from the dividing line between coastal fishing waters and inland fishing waters agreed upon by the Department and the Wildlife Resources Commission.

(10) Inland Game Fish. — Those species of freshwater fish, wherever found, and migratory saltwater fish, when found in inland fishing waters, as to which there is an important element of sport in taking and which are denominated as game fish in the regulations of the Wildlife Resources Commission. No species of fish of commercial importance not classified as a game fish in commercial fishing waters as of January 1, 1965, may be classified as an inland game fish in coastal fishing waters without the concurrence of the Department.

(11) Marine and Estuarine Resources. — All fish, except inland game fish, found in the Atlantic Ocean and in coastal fishing waters; all fisheries based upon such fish; all uncultivated or undomesticated plant and animal life, other than wildlife resources, inhabiting or dependent upon coastal fishing waters; and the entire ecology supporting such fish, fisheries, and plant and animal life.

(12) Nongame Fish. — All fish found in inland fishing waters other than inland game fish.

(13) Private Pond. — A body of water arising within and lying wholly upon the lands of a single owner or a single group of joint owners or tenants in common, and from which fish cannot escape, and into which fish of legal size cannot enter from public waters at any time.

(14) Shellfish. — Mollusca, specifically including oysters, clams, mussels, and scallops.

(15) Wild Animals. — Game animals; fur-bearing animals; and such other wild mobile creatures included in the definition of wildlife resources which in the discretion of the Wildlife Resources Commission need protection or regulation in the interests of conservation of wildlife resources.

(16) Wildlife. — Wild animals; wild birds; all fish found in inland fishing waters; and inland game fish. Unless the context clearly requires otherwise, the definitions of wildlife, wildlife resources, wild animals, wild birds, fish, and the like are deemed to include species normally wild, or indistinguishable from wild species, which are raised or kept in captivity.

(17) Wildlife Resources. — All wild birds; all wild mammals other than marine mammals found in coastal fishing waters; all fish found in inland fishing waters, including migratory saltwater fish; all inland game fish; all uncultivated or undomesticated plant and animal life inhabiting or depending upon inland fishing waters; waterfowl food plants wherever found, except that to the extent such plants in coastal fishing waters affect the conservation of marine and estuarine resources the Department is given concurrent jurisdiction as to such plants; all undomesticated terrestrial creatures; and the entire ecology supporting such birds, mammals, fish, plant and animal life, and creatures.

§ 113-130. Definitions relating to activities of public. — The following definitions apply to activities of the public in regard to marine and estuarine and wildlife resources:

(1) Individual. — A human being.

(2) Owner; Ownership.—As for personal property, refers to persons having beneficial ownership and not to those holding legal title for security; as for real property, refers to persons having the present right of control, possession, and enjoyment, whether as life tenant, fee holder, beneficiary of a trust, or otherwise. Provided, that this definition does not include lessees of property except where the lease arrangement is a security device to facilitate what is in substance a sale of the property to the lessee.

(3) Person. — Any individual; or any partnership, firm, association, corporation, or other group of individuals capable of suing or being sued as an entity.

(4) Resident. — In the case of individuals, one who, at the time in question, has resided in North Carolina for the preceding six months or has been domiciled in North Carolina for the preceding 60 days, provided that when resort must be had to the circumstances of domicile rather than the mere fact of residence, such individual shall sign a certificate on a form supplied by the Wildlife Resources Commission stating the necessary facts and intent to constitute legal domicile within the State for the preceding 60 days. In the case of corporations, a corporation which is chartered under the laws of North Carolina and has its principal office within the State.

(5) To Fish. — To take fish.

(6) To Sell; Sale. — Includes a sale or exchange of property, or an offer or attempt to sell or exchange — for money or any other valuable consideration.

(7) To Take. — All operations during, preparatory, and subsequent to an attempt — whether successful or not — to capture, kill, pursue, or otherwise harm or reduce to possession any fisheries resources.

(8) Vessel. — Every description of watercraft, other than a seaplane on the water, used or capable of being used as a means of transportation on water.

ARTICLE 13.

Jurisdiction of Fisheries Agencies.

§ 113-131. Resources belong to public; stewardship of conservation agencies. — The marine and estuarine and wildlife resources of the State belong to the people of the State as a whole. The Department and the Wildlife Resources Commission are charged with stewardship of these resources.

§ 113-132. Jurisdiction of fisheries agencies. — (a) The Department has jurisdiction over the conservation of marine and estuarine resources. Except as may be otherwise provided by law, it has jurisdiction over all activities connected with the conservation and regulation of marine and estuarine resources.

(b) The Wildlife Resources Commission has jurisdiction over the conservation of wildlife resources. Except as may be otherwise provided by law, it has jurisdiction over all activities connected with the conservation and regulation of wildlife resources.

(c) Notwithstanding the provisions of this Article, the Department and the Wildlife Resources Commission do not have jurisdiction over matters with respect to which jurisdiction may now or hereafter be vested in the Environmental Management Commission, the Department of Natural and Economic Resources, or the Commission for Health Services.

(d) To the extent that the grant of jurisdiction to the Department and the Wildlife Resources Commission may overlap, the Department and the Wildlife Resources Commission are granted concurrent jurisdiction. In cases of conflict between actions taken or regulations promulgated by either agency, as respects the activities of the other, pursuant to the dominant purpose of such jurisdiction, the Department and the Wildlife Resources Commission are empowered to make agreements concerning the harmonious settlement of such conflict in the best interests of the conservation of the marine and estuarine and wildlife resources of the State. In the event the Department and the Wildlife Resources Commission cannot agree, the Governor is empowered to resolve the differences.

(e) Those coastal fishing waters in which are found a significant number of freshwater fish, as agreed upon by the Department and the Wildlife Resources Commission, may be denominated joint fishing waters. Such waters are deemed coastal fishing waters from the standpoint of laws and regulations administered by the Department and are deemed inland fishing waters from the standpoint of laws and regulations administered by the Wildlife Resources Commission. The Marine Fisheries Commission and the Wildlife Resources Commission may make joint regulations governing the responsibilities of each agency and modifying the applicability of licensing and other regulatory provisions as may be necessary for rational and compatible management of the marine and estuarine and wildlife resources in such joint fishing waters.

(f) The granting of jurisdiction in this section pertains to the power of agencies to enact regulations and ordinances. Nothing in this section or in G.S. 113-138 is designed to prohibit law-enforcement officers who would otherwise have jurisdiction from making arrests or in any manner enforcing the provisions of this Subchapter.

§ 113-133. Abolition of local coastal fishing laws. — The enjoyment of the marine and estuarine resources of the State belongs to the people of the State as a whole and is not properly the subject of local regulation. As the Department is charged with administering the governing statutes and promulgating regulations in a manner to reconcile as equitably as may be the various competing interests of the people as regards these resources, considering the interests of those whose livelihood depends upon full and wise use of renewable and nonrenewable resources and also the interests of the many whose approach is recreational, all special, local, and private acts and ordinances regulating the conservation of marine and estuarine resources are repealed. Nothing in this section is intended to invalidate local legislation or local ordinances which exercise valid powers over subjects other than the conservation of marine and estuarine resources, even though an incidental effect may consist of an overlapping or conflict of jurisdiction as to some particular provision not essential to the conservation objectives set out in this Subchapter.

§ 113-134. Regulations. — The Marine Fisheries Commission or the Wildlife Resources Commission, as appropriate, are empowered to promulgate regulations implementing the provisions of this Chapter, within the limits of the jurisdiction granted in this Article.

§ 113-134.1. **Jurisdiction over marine resources in Atlantic Ocean.** — The State of North Carolina shall exercise all such jurisdiction it possesses under the State Constitution necessary for the maintenance, preservation and protection of all marine fisheries resources from their inland reaches to a line drawn parallel to the entire coastline at a distance of 200 miles or where the water depth reaches 100 fathoms, whichever is greater. The Department of Natural and Economic Resources is hereby given the authority to promulgate the rules and regulations necessary to carry out the intent of this section; provided, however, that no such rule or regulation shall become effective until it has been approved by the General Assembly. Such rules and regulations shall be designed to prevent substantial depletion or damaging of the various marine fisheries resources. Any violation of the rules and regulations promulgated under the authority of this section shall constitute a misdemeanor, punishable by imprisonment not to exceed two years, or by a fine not to exceed one thousand dollars ($1,000) or by both such fine and imprisonment. The rules and regulations adopted by the Department of Natural and Economic Resources pursuant to this section shall be enforced by the fisheries inspectors, in the same manner and with the same authority vested in them by Chapter 113 of the General Statutes. (1973, c. 1315.)

§ 113-135. **General penalty for violating Subchapter or regulations.** — Any person who violates any provision of this Subchapter or any regulation adopted by the Marine Fisheries Commission or the Wildlife Resources Commission, as appropriate, pursuant to the authority of this Subchapter is guilty of a misdemeanor. Unless a different level of punishment is elsewhere set out, anyone convicted of such a misdemeanor may be fined not exceeding fifty dollars ($50.00). Noncriminal sanctions, such as license revocation or suspension, and exercise of powers auxiliary to criminal prosecution, such as seizure of property involved in the commission of an offense, do not constitute alternative levels of punishment so as to oust criminal liability.

§ 113-136. **Enforcement authority of inspectors and protectors; refusal to obey or allow inspection by inspectors and protectors.** — (a) Inspectors and protectors are granted the powers of peace officers anywhere in this State in enforcing all matters within their respective subject-matter jurisdiction as set out in this section.

(b) The jurisdiction of inspectors extends to all matters within the jurisdiction of the Department of Natural and Economic Resources as set out in this Subchapter and to all other matters within the jurisdiction of the Department of Natural and Economic Resources.

(c) The jurisdiction of protectors extends to all matters within the jurisdiction of the Wildlife Resources Commission, whether set out in this Chapter, Chapter 75A, Chapter 143, or elsewhere.

(d) Inspectors and protectors are additionally authorized to arrest without warrant under the terms of G.S. 15A-401(b) for felonies, for breaches of the peace, for assaults upon them or in their presence, and for other offenses evincing a flouting of their authority as enforcement officers or constituting a threat to public peace and order which would tend to subvert the authority of the State if ignored. In particular, they are authorized, subject to the direction of their administrative superiors, to arrest for violations of G.S. 14-223, 14-225, 14-269, and 14-277.

(e) Inspectors and protectors may serve warrants, subpoenas, and other process connected with any cases within their subject-matter jurisdiction. In the exercise of their law-enforcement powers, inspectors and protectors are subject to provisions relating to police officers in general set out in Chapter 15 and elsewhere.

(f) Inspectors and protectors are authorized to stop temporarily any persons they reasonably believe to be engaging in activity regulated by their respective agencies to determine whether such activity is being conducted within the requirements of the law, including license requirements. If the person stopped is in a motor vehicle being driven at the time and the inspector or protector in question is also in a motor vehicle, the inspector or protector is required to sound a siren or activate a special light, bell, horn, or exhaust whistle approved for law-enforcement vehicles under the provisions of G.S. 20-125(b) or 20-125(c).

(g) Protectors may not temporarily stop or inspect vehicles proceeding along primary highways of the State without clear evidence that someone within the vehicle is or has recently been engaged in an activity regulated by the Wildlife Resources Commission. Inspectors may temporarily stop vehicles, boats, airplanes, and other conveyances upon reasonable grounds to believe that they are transporting taxable seafood products; they are authorized to inspect any seafood products being transported to determine whether they were taken in accordance with law and to require exhibition of any applicable license, tax receipts, permits, bills of lading, or other identification required to accompany such seafood products.

(h) The refusal of any person to stop in obedience to the implicit or explicit directions of an inspector or protector acting under the authority of this section is unlawful. It is unlawful to refuse to exhibit upon request any license, permit, tax receipt, certificate, or identification required to be carried by any law or regulation as to which inspectors and protectors have enforcement jurisdiction. It is unlawful to refuse to allow inspectors and protectors to inspect weapons, equipment, fish, or wildlife regulated by any law or regulation as to which inspectors and protectors have enforcement jurisdiction.

(i) Nothing in this section authorizes searches within the curtilage of a dwelling or of the living quarters of a vessel in contravention of constitutional prohibitions against unreasonable searches and seizures.

(j) The refusal of any person to stop in obedience to explicit directions of an inspector or protector acting under the authority of this section is unlawful. A violation of this subsection (j) is punishable by a fine of not less than fifty dollars ($50.00) nor more than two hundred dollars ($200.00) or imprisonment of up to 30 days or both.

(k) It is unlawful to refuse to exhibit upon request any license, permit, tax receipt, certificate, or identification required to be carried by any law or regulation as to which inspectors and protectors have enforcement jurisdiction. It is unlawful to refuse to allow inspectors and protectors to inspect weapons, equipment, fish, or wildlife regulated by any law or regulation as to which inspectors and protectors have enforcement jurisdiction.

(l) Nothing in this section authorizes searches within the curtilage of a dwelling or of the living quarters of a vessel in contravention of constitutional prohibitions against unreasonable searches and seizures.

§ 113-137. Search on arrest; seizure and confiscation of property; disposition of confiscated property. — (a) Every inspector or protector who arrests a person for an offense as to which he has enforcement jurisdiction is authorized to search the person arrested and the surrounding area for weapons and for fruits, instrumentalities, and evidence of any crime for which the person arrested is or might have been arrested.

(b) Every inspector or protector who issues a citation instead of arresting a person, in cases in which the inspector or protector is authorized to arrest, may seize all lawfully discovered evidence, fruits, and instrumentalities of any crime as to which he has arrest jurisdiction and probable cause.

(c) Every inspector or protector who in the lawful pursuit of his duties has probable cause for believing he has discovered a violation of the law over which he has jurisdiction may seize in connection therewith any fish, wildlife, weapons, equipment, vessels, or other evidence, fruits, or instrumentalities of the crime, notwithstanding the absence of any person in the immediate area subject to arrest or the failure or inability of the inspector or protector to capture or otherwise take custody of the person guilty of the violation in question. Where the owner of such property satisfies the Secretary or the Executive Director, as the case may be, of his ownership and that he had no knowledge or culpability in regard to the offense involving the use of his property, such property must be returned to the owner. If after due diligence on the part of employees of the

Department or the Wildlife Resources Commission, as the case may be, the identity or whereabouts of the violator or of the owner of the property seized cannot be determined, such property may be sold by the Department or the Wildlife Resources Commission in accordance with the provisions of this section.

(d) The Department and the Wildlife Resources Commission may provide by regulation for summary disposition of live or perishable fish seized by an inspector or protector pursuant to subsection (b) or (c) or pursuant to a search authorized under subsection (a). If the property seized consists of live fish which may again be placed to the benefit of the public on public grounds or in public waters, the inspector or protector may require the person in possession of the seized live property to transport it such distance as may be necessary to effect placement on appropriate grounds or waters. In the event of refusal by the person in question to transport the property, the inspector or protector must take appropriate steps to effect such transportation. The steps may include seizure of any conveyance or vessel of the person refusing to transport the property. Where a conveyance or vessel is seized, it is to be safeguarded by the inspector or protector seizing it pending trial and it becomes subject to the orders of the court. Such transportation costs as may be borne by the Department or by the Wildlife Resources Commission, as the case may be, may be collected by the agency from the proceeds of the sale of any other property of the defendant seized and sold in accordance with the provisions of this section.

Except as provided in subsection (g), where the seizure consists of edible fish which is not alive, may not live, or may not otherwise benefit conservation objectives if again placed on public grounds or in public waters, the inspector or protector must dispose of the property by turning it over to one or more appropriate public or charitable or nonprofit agencies or institutions, in accordance with the directions of his administrative superiors.

(e) Except as otherwise specifically provided in this section, all property seized must be safeguarded pending trial by the inspector or protector initiating the prosecution. Upon a conviction the property seized in connection with the offense in question is subject to the disposition ordered by the court. Upon an acquittal, property seized must be returned to the defendant or established owner, except:

(1) Where the property was summarily disposed of in accordance with subsection (d);
(2) Where possession of the property by the person to whom it otherwise would be returned would constitute a crime; and
(3) Where the property seized has been sold in accordance with subsection (g). In this event the net proceeds of the sale must be returned to the defendant or established owner, as the case may be.

Where property seized summarily under subsection (d) is not available for return, an acquitted defendant or established owner is entitled to no compensation where there was probable cause for the action taken.

In safeguarding property seized pending trial, an inspector or protector is authorized in his discretion, subject to orders of his administrative superiors, to make his own provisions for storage or safekeeping or to deposit the property with the sheriff of the county in which the trial is to be held for custody pending trial. In the event the mode of safekeeping reasonably selected by the inspector or protector entails a storage or handling charge, such charge is to be paid as follows:

(1) By the defendant if he is convicted but the court nevertheless orders the return of the property to the defendant;
(2) From the proceeds of the sale of the property if the property is sold under court order or in accordance with the provisions of this section; or
(3) By the Department or by the Wildlife Resources Commission, as the case may be, if no other provision for payment exists.

(f) Subject to orders of his administrative superiors, an inspector or protector in his discretion may leave property which he is authorized to seize in the possession of the defendant with the understanding that such property will be subject to the orders of the court upon disposition of the case. Willful failure or inexcusable neglect of the defendant to keep such property subject to the orders of the court is a misdemeanor punishable in the discretion of the court. In exercising his discretion, the inspector or protector should not permit property to be retained by the defendant if there is any substantial risk of its being used by the defendant in further unlawful activity.

(g) Where a prosecution involving seized saleable fish is pending and such fish are perishable or seasonal, the inspector or protector may apply to the court in which the trial is pending for an order permitting sale prior to trial. As used in this subsection, seasonal fish are those which command a higher price at one season than at another so that economic loss may occur if there is a delay in the time of sale. When ordered by the court, such sale prior to trial must be conducted in accordance with the order of the court or in accordance with the provisions of this section. The net proceeds of such sale are to be deposited with the court and are subject to the same disposition as would have been applicable to other types of property seized. Where sale is not lawful or otherwise not practicable or where prosecution is not pending, disposal of the fish is in accordance with subsection (d).

(h) Pending trial, the defendant or the established owner of any nonperishable and nonconsumable property seized may apply to the court designated to try the offense for return of the property. The property must be returned pending trial if:

(1) The court is satisfied that return of the property will not facilitate further violations of the law; and

(2) The claimant posts a bond for return of the property at trial in an amount double the value of the property as assessed by the court.

(i) Upon conviction of any defendant for a violation of the laws or regulations administered by the Department or the Wildlife Resources Commission under the authority of this Subchapter, the court in its discretion may order seizure and sale of all weapons, equipment, vessels, conveyances, fish, and other evidence, fruits, and instrumentalities of the offense in question — whether or not seized or made subject to the orders of the court pending trial. The defendant may appeal the reasonableness of any order of seizure and sale. Unless otherwise specified in the order of the court, such sales are to be held by the Department or by the Wildlife Resources Commission, as the case may be.

The Marine Fisheries Commission and the Wildlife Resources Commission may by regulation provide for an orderly public sale procedure of property which it may sell under the provisions of this section. Such procedure may include turning the property to be sold over to some other agency for sale, provided that the provisions of subsection (j) are complied with and there is proper accounting for the net proceeds of the sale. In the case of property unlikely to sell for a sufficient amount to offset the costs of sale, the Marine Fisheries Commission and Wildlife Resources Commission may provide for destruction of the property.

(j) Except as provided in subsection (d), or in the case of property seized under the provisions of subsection (c) or in any case where it appears that a person not a defendant has an interest in any property to be sold, destroyed, or otherwise disposed of, the Marine Fisheries Commission and the Wildlife Resources Commission must provide for public notice of the description of the property and the circumstances of its seizure for a sufficient period prior to the time set for sale or other disposition to allow innocent owners or lienholders to assert their claims. The validity of such claims are to be determined by the trial court in the event there is or has been a prosecution in connection with the seizure of the property. Where there has been no prosecution, the validity of such claims must be determined by the Secretary or by the Executive Director, as the case may be. Where there has been a sale under subsection (g), the provisions of this subsection apply to the net proceeds of the sale.

(k) Except as provided in subdivision (e)(3) and subsection (j), the net proceeds of all sales made pursuant to this section must be deposited in the school fund of the county in which the property was seized.

§ **113-139. Search warrants.** — (a) Inspectors and protectors are authorized to obtain and execute search warrants within the limitations of this section from any official authorized to issue search warrants in accordance with the procedure in Article 11 of Chapter 15A of the General Statutes.

(b) Search warrants which inspectors may execute must be for evidence, fruits, or instrumentalities of some criminal offense as to which the Department is granted exclusive or primary jurisdiction in this Subchapter.

(c) Search warrants which protectors may execute must be for evidence, fruits, or instrumentalities of some criminal offense as to which the Wildlife Resources Commission is granted exclusive or primary jurisdiction in this Chapter or elsewhere, including Chapters 75A and 143.

§ **113-138. Enforcement jurisdiction of special officers.** — The Marine Fisheries Commission and the Wildlife Resources Commission by regulation may confer law-enforcement powers over matters within their jurisdiction upon the employees of any local, State, or federal public agency who possess special law-enforcement jurisdiction that would not otherwise extend to the subject matter of this Subchapter. The Department of Natural and Economic Resources and Wildlife Resources Commission may confer such powers or not to any particular officers or class of officers as may be convenient or desirable in the interests of conservation of marine and estuarine and wildlife resources. Such conferring of powers does not constitute the appointment of any such special enforcement officer to an additional office and no oath need be taken.

ARTICLE 14.

Commercial and Sports Fisheries Licenses and Taxes.

§ **113-151. Regulations of Marine Fisheries Commission.** — The [Marine Fisheries Commission] is authorized to make reasonable rules and regulations governing the administration and enforcement of all license requirements and taxes prescribed in this Article.

§ **113-151.1. License agents.** — The Secretary shall commission such persons as in his discretion he deems necessary to be license agents for the Department of Natural and Economic Resources; provided, that at least one such license agent shall be appointed in each county which contains or borders on coastal fishing waters. Such agents together with the Department of Natural and Economic Resources shall have the authority and duty to sell all licenses provided for by this Article. Agents shall be compensated not in excess of five percent (5%) of the license fees collected by them.

§ **113-152. Licensing of vessels; fees.** — (a) The following vessels are subject to the licensing requirements of this section:

(1) All vessels engaged in commercial fishing operations in coastal fishing waters and

(2) All North Carolina vessels engaged in commercial fishing operations without the State which result in landing and selling fish in North Carolina. North Carolina vessels are those which have their primary situs in North Carolina. Motorboats with North Carolina numbers under the provisions of Chapter 75A of the General Statutes are deemed to have their primary situs in North Carolina; documented vessels which list a North Carolina port as home port are deemed to have their primary situs in North Carolina.

"Commercial fishing operations" are all operations preparatory to, during, and subsequent to the taking of fish:

(1) With the use of commercial fishing equipment or

(2) By any means, if a primary purpose of the taking is to sell the fish.

It is unlawful for the owner of a vessel subject to licensing requirements to permit it to engage in commercial fishing operations without having first procured the appropriate license. It is unlawful for anyone to command such a vessel engaged in commercial fishing operations without complying with the

provisions of this section and of regulations made under the authority of this Article. It is unlawful for anyone to command such a vessel engaged in commercial fishing operations that does not meet the license requirements of this Article or of regulations made under the authority of the Article, or without making reasonably certain that all persons on board are in compliance with the provisions of this Article and regulations made under the authority of this Article. It is unlawful to participate in any commercial fishing operation in connection with which there is a vessel subject to licensing requirements not meeting the licensing requirements under the provisions of this Article or of regulations made under the authority of this Article.

Nothing contained in this section shall require the licensing of any vessel used solely for clamming or oystering by a person not required to have a clam and oyster license under the provisions of G.S. 113-154. Spears or gigs shall not be deemed commercial fishing equipment unless used in an operation the purpose of which is the taking of fish for commercial purposes.

(b) Any license that may be required by this section is to be issued in the name of the owner of the vessel. It is unlawful for the owner to permit anyone who is not eligible to have the license issued to him in his own right to command such licensed vessel for the purpose of engaging in commercial fishing operations. It is unlawful for such an ineligible person to command a licensed vessel for such purposes. The license application for a menhaden vessel must state the name of the person in command of the vessel. Upon change in command of a menhaden vessel, the owner must notify the Secretary within 15 days. Upon change in ownership of any licensed vessel, the new owner must notify the Secretary within 15 days. The Marine Fisheries Commission may provide by regulation for replacement of lost license plates upon tender of the original license receipt or upon such other evidence as the Marine Fisheries Commission may deem sufficient. A fee not to exceed fifty cents (50¢) may be charged for replacement of a plate.

(c) Licenses are issued annually upon a calendar-year basis for vessels of various lengths (length measured straight through the cabin and along the deck, from end to end, excluding the sheer) and types as follows for the fees indicated:

(1) Vessels without motors, one dollar ($1.00).
(2) Vessels with motors not over 18 feet in length, three dollars ($3.00).
(3) Vessels with motors over 18 feet but not over 26 feet in length, fifty cents (50¢) per foot.
(4) Vessels with motors over 26 feet in length, seventy-five cents (75¢) per foot.
(5) Vessels engaged in menhaden fishing shall be taxed, based on tonnage, as prescribed in subsection (d).

Length is measured from end to end over the deck excluding sheer.

(d) Vessels engaging in menhaden fishing are subject to the following license and fee requirements:

(1) For the mother ship, one dollar and sixty cents ($1.60) per ton, gross tonnage, customhouse measurements.
(2) For each purse boat carrying a purse seine used in connection with a licensed mother ship, no license required.

(e) Unless otherwise indicated, all licenses in this Article expire on December 31 of each year and are subject to the full license fee regardless of when issued.

(f) No persons exempt from the oyster and clam licenses under the provisions of this section may take more than one bushel of oysters and clams in the aggregate on any one day.

§ 113-153. Vessels fishing beyond territorial waters. — Persons aboard vessels not having their primary situs in North Carolina which are carrying a cargo of fish taken outside the waters of North Carolina may land and sell their catch in North Carolina either by complying with the licensing provisions of G.S. 113-152 with respect to the vessel in question or by complying, if eligible, with the provisions of G.S. 113-155. The Marine Fisheries Commission may by regulation modify the licensing procedure set out in G.S. 113-152 in order to devise an efficient and convenient procedure for licensing out-of-state vessels after landing in order to permit sale of cargo. Provided, that persons aboard vessels having a primary situs in a jurisdiction that would allow North Carolina vessels without restriction to land and sell their catch, taken outside such jurisdiction, may land and sell their catch in North Carolina without complying with this section.

§ 113-154. Oyster and clam licenses. — (a) In addition to all other license requirements, every individual engaged in taking oysters or clams from the public or private grounds of North Carolina for commercial use by any means whatever must have first procured an individual oyster and clam license.

(b) It is unlawful for any individual to take oysters or clams for commercial use from the public or private grounds of North Carolina without having ready at hand for inspection a current and valid oyster and clam license issued to him personally and bearing his correct name and address. It is unlawful for any such individual taking or possessing freshly taken oysters or clams to refuse to exhibit his license upon the request of an officer authorized to enforce the fishing laws.

(c) Oyster and clam licenses are issued annually on a calendar-year basis upon payment of a fee of one dollar ($1.00) upon proof that the license applicant is a resident of North Carolina.

(d) In the event an individual possessing an oyster and clam license changes his name or address or receives one erroneous in this respect, he must within 15 days surrender the license for one bearing the correct name and address. An individual prosecuted for failure to possess a valid license is exonerated if he can show that the invalidity consisted solely of an incorrect name or address appearing in a license to which he was lawfully entitled and that the erroneous condition had not existed for longer than 15 days.

(e) It is unlawful for an individual issued an oyster and clam license to transfer or offer to transfer his license, either temporarily or permanently, to another. It is unlawful for an individual to secure or attempt to secure an oyster or clam license from a source not authorized by the Department.

§ 113-155. Licenses to land and sell fish. — (a) Except as otherwise provided in this Article, it is unlawful for any person to sell fish, no matter where or how taken, to a fish dealer required to be licensed under this Article unless the fish were taken lawfully and unless:

(1) He has a current and valid license to land and sell fish issued to him personally and has received less than two hundred dollars ($200.00) on account of the sale of fish within the last 12 months; or

(2) The fish were taken in a commercial fishing operation meeting all licensing requirements, and he was a party to the operation; or

(3) The fish were taken by him, whether by sport or commercial methods, through the use of a vessel currently and validly licensed under G.S. 113-152; or

(4) The fish were taken by him in inland fishing waters in conformity with laws and regulations administered by the [Wildlife Resources] Commission and are of a type permitted to be sold by the [Wildlife Resources] Commission; or

(5) He is a licensed fish dealer.

(b) In the case of oysters or clams a license to land and sell is not required, but the person selling must satisfy the dealer that he took them or participated in the taking, that he then had a current and valid oyster and clam license issued to him personally, and that the oysters or clams were taken lawfully. In the event the person selling is a dealer, he must satisfy the purchasing dealer that the oysters or clams were acquired in conformity with law.

(c) Dealers purchasing fish must record such information relating to purchases as required by the Department of Natural and Economic Resources to implement the provisions of this section.

(d) Annual licenses to land and sell are issued on a calendar-year basis to individual residents and nonresidents upon payment of a fee of two dollars ($2.00).

(e) Any individual who receives in excess of two hundred dollars ($200.00) in cash or equivalent value within any 12-month period on account of the sale of fish is not entitled to a license to land and sell. If not covered by any exemption from license requirements, he must comply with licensing provisions applicable to vessels (or secure compliance by the owner of any vessel that may be involved) or comply with licensing provisions applicable to dealers, as may be appropriate. The Marine Fisheries Commission may implement this subsection by regulations clarifying which license is required in particular situations. In the event the

taking of fish is done without the use of a vessel but the vessel license rather than the dealer license is the appropriate one, the Marine Fisheries Commission may by regulation determine which vessel license may be applicable on the basis of amount or value of fish taken and the average size of vessels ordinarily used to take such quantity or value of fish.

(f) It is unlawful for an individual issued a license to land and sell to transfer or offer to transfer his license, either temporarily or permanently, to another. It is unlawful for an individual to secure or attempt to secure an oyster and clam license from a source not authorized by the Department.

§ 113-155.1. Commercial fishermen; identification. — Upon request by a licensed commercial fisherman, the Department of Natural and Economic Resources shall issue to him a suitable card which shall identify him as a commercial fisherman. Each identification card issued shall bear an expiration date, which date shall be the date on which the license issued to such fisherman expires, and such card may be renewed annually for so long as a valid commercial fishing license is in effect. The Secretary of Natural and Economic Resources shall prescribe the form and contents of such identification cards and shall promulgate the necessary rules and regulations relative to their issuance.

§ 113-156. Licenses for fish dealers. — (a) Except as otherwise provided in this Article, every person who sells fish or has any connection whatever with fish that results in his enrichment is a fish dealer, provided that individual employees of fish dealers are not fish dealers merely by virtue of transacting the business of their employers.

(b) The Marine Fisheries Commission may make reasonable regulations to implement this section by clarifying the status of particular classes of persons as regards fish dealerships. Persons all of whose dealings with a category of fish fall under one or more of the following headings are not fish dealers as respects that category:

(1) Persons whose dealings in fish are primarily educational, scientific, or official. Scientific, educational, or official agencies may sell fish harvested or processed in connection with research or demonstration projects without being deemed dealers, but such sales are subject to such reasonable regulations as the Marine Fisheries Commission may make governing such sales.

(2) Individuals selling legally acquired fish other than oysters and clams to individuals other than dealers on a casual, noncommercial basis, provided that such sales do not net in excess of five hundred dollars ($500.00) in cash or equivalent value in any 12-month period. Any public offer to sell, or peddling of fish, is deemed commercial.

(3) Fishermen who sell their catch exclusively to licensed dealers in accordance with G.S. 113-155.

(c) Every fish dealer is subject to the licensing requirements of this section unless all fish handled within any particular licensing category meet one or more of the following requirements:

(1) The fish are shipped to him by a dealer from without the State.

(2) The fish are nongame fish taken in inland fishing waters.

(3) The fish are of a kind the sale of which is regulated exclusively by the [Wildlife Resources] Commission.

(4) The fish are purchased from a licensed dealer.

In the event the seller is a licensed fish dealer, he must satisfy any purchasing fish dealer, whether licensed or unlicensed, that the fish were acquired in conformity with law. It is unlawful for a fish dealer to purchase or sell or in any manner deal in fish except in conformity with the provisions of this section.

(d) Every fish dealer subject to the licensing provisions of this section must secure a separate license or set of licenses for each established location. Where a dealer does not have an established location for transacting the fisheries business within the State, the license application must be denied unless the applicant satisfies the Secretary that his residence, or some other office or address, within the State, is a suitable substitute for an established location and that records kept in connection with licensing, sale, and tax requirements will be available for inspection when necessary. Fish dealers' licenses are issued on a calendar-year basis upon payment of a fee as set forth herein upon proof, satisfactory to the Secretary, that the license applicant is a resident of North Carolina.

(e) Every fish dealer subject to licensing requirements must secure an annual license at each established location for each of the following activities transacted there, upon payment of the fee set out:

(1) Dealing in shellfish:
   a. Shucker-packer (including sale of shell stock), twenty-five dollars ($25.00).
   b. Shell stock shipper, ten dollars ($10.00).
(2) Dealing in hard and soft crabs:
   a. Crab processor (including dealing in unprocessed crabs), ten dollars ($10.00).
   b. Unprocessed crab dealer, five dollars ($5.00).
(3) Dealing in shrimp, ten dollars ($10.00).
(4) Dealing in finfish, ten dollars ($10.00).
(5) Operating menhaden processing plant, one hundred dollars ($100.00).
(6) Operating any other fish-dehydrating or oil-extracting plant, fifty dollars ($50.00).

Any person subject to fish-dealer licensing requirements who deals in fish not included in the above categories must secure a finfish dealer license. The Department of Natural and Economic Resources may make reasonable regulations implementing and clarifying the dealer categories of this subsection.

§ 113-157. Taxes on seafood. — (a) Taxes are due and payable to the Department from fish dealers required to be licensed upon delivery to them of any seafood listed in this section taken within the State, whether from public or private grounds, unless accompanied by evidence that the tax levied by this section has already been assessed. The Marine Fisheries Commission may make reasonable regulations governing the assessment of the seafood tax and the Department may make reasonable regulations governing the administration and collection of said tax.

(b) In the event the fish dealer required to be licensed is also the fisherman taking the taxable seafood, the Marine Fisheries Commission may make reasonable regulations fixing the point at which the seafood tax becomes due and payable.

(c) In the event that the Department of Natural and Economic Resources authorizes a self-assessment method of collecting all or any part of the seafood tax, upon forms furnished to dealers by the Department, all taxes assessed are payable at all times on demand of any inspector or other authorized agent of the Department. If the Secretary becomes satisfied that any dealer granted the privilege of self-assessment has substantially obstructed the efficient and equitable administration of the provisions of this Article, either willfully or through inexcusable neglect, the Secretary may order the dealer's self-assessment privilege terminated. Termination may not exceed 10 days upon the first occasion. Upon the second occasion, the period of termination may not exceed 30 days. Upon the third or any subsequent occasion, the Secretary may terminate the self-assessment privilege indefinitely subject to reinstatement in his discretion. If the Secretary determines that termination of the privilege is

likely to aggravate rather than reduce obstruction, he should employ other methods designed to secure compliance with laws, regulations, and reasonable requests of agents of the Department designed to produce equitable and efficient administration and enforcement of the provisions of this Article.

(d) The following taxes are applicable to the seafood named below:

(1) Oysters, eight cents (8¢) per bushel.
(2) Clams, six cents (6¢) per bushel.
(3) Scallops, five cents (5¢) per gallon.
(4) Soft crabs, two cents (2¢) per dozen.
(5) Hard crabs, ten cents (10¢) per one hundred pounds.
(6) Shrimp, green, heads off, fifteen cents (15¢) per one hundred pounds.
(7) Shrimp, green, heads on, ten cents (10¢) per one hundred pounds.

(e) In the event the Department of Natural and Economic Resources authorizes a self-assessment method of collecting all or any part of the seafood tax, all records and accounts required to be kept by the Department must be kept in a safe place and reasonable efforts must be made to preserve them from loss or destruction. If it becomes impossible to determine the amount of tax assessed for any period owing to loss or destruction of records or accounts, failure to make proper entries, or other fault of the dealer, an agent of the Department must reconstruct the approximate tax payable based upon previous sales in similar periods, the general condition of the market for the time in question, and other relevant information. The tax to be assessed for such period includes a one hundred percent (100%) penalty and is double the reconstructed figure. It is unlawful for any fish dealer to fail to remit upon demand of an authorized agent of the Department all taxes and penalties due. If any dispute arises as to the accuracy of the reconstructed figure, the dealer must bear the burden of showing it to be inaccurate. The dealer may appeal the reconstructed amount to the Secretary and, if dissatisfied, to the Marine Fisheries Commission. The decision of the Marine Fisheries Commission is final. In the event of appeal, the dealer must pay the reconstructed tax plus penalty under protest.

ARTICLE 15.

Regulation of Coastal Fisheries.

§ 113-181. Duties and powers of Department. — (a) It is the duty of the Department to administer and enforce the provisions of this Subchapter pertaining to the conservation of marine and estuarine resources. In execution of this duty, the Department may collect such statistics, market information, and research data as is necessary or useful to the promotion of sports and commercial fisheries in North Carolina and the conservation of marine and estuarine resources generally; conduct or contract for research programs or research and development programs applicable to resources generally and to methods of cultivating, harvesting, marketing, or processing fish as may be beneficial in achieving the objectives of this Subchapter; enter into reciprocal agreements with other jurisdictions with regard to the conservation of marine and estuarine resources; and regulate placement of nets and other sports or commercial fishing apparatus in coastal fishing waters with regard to navigational and recreational safety as well as from a conservation standpoint.

(b) The Department is directed to make every reasonable effort to carry out the duties imposed in this Subchapter. The Marine Fisheries Commission may make regulations as necessary to implement the work of the Department in carrying out such duties.

erty, will execute its powers in such a way as to bring about injustices to states, their subdivisions, or persons acting pursuant to their permission." *Id.*, at 40.

The Submerged Lands Act did indeed grant to the States dominion over the offshore seabed within the limits defined in the Act and released the States from any liability to account for any prior income received from state leases that had been granted with respect to the marginal sea. But in further exercise of paramount national authority, the Act expressly declared that nothing in the Act

> "shall be deemed to affect in any wise the rights of the United States to the natural resources of that portion of the subsoil and seabed of the Continental Shelf lying seaward and outside of [the marginal sea], all of which natural resources appertain to the United States, and the jurisdiction and control of which by the United States is confirmed." 43 U. S. C. § 1302.

This declaration by Congress is squarely at odds with the assertions of the States in the present case. So, too, is the provision of the Act by which the grant to the States is expressly limited to the seabed within three miles (or three marine leagues in some cases) of the coastline, whether or not the States' historic boundaries might extend farther into the ocean. § 1301 (b). Moreover, in the course of litigation dealing with the reach and impact of the Act, the Court has said as plainly as may be that "the Act concededly did not impair the validity of the *California, Louisiana,* and *Texas* cases, which are admittedly applicable to all coastal States . . . ." *United States* v. *Louisiana,* 363 U. S. 1, 7 (1960); see also *id.*, at 83 n. 140. We agree with the Special Master when he said: "It is quite obvious that Congress could reserve to the federal government all the rights to the seabed of the continental shelf beyond the three-mile territorial belt of sea (or three leagues in the case of certain Gulf states) only upon the basis that it already had the paramount right to that seabed under the rule laid down in the *California* case." Report 19.

Congress emphatically implemented its view that the United States has paramount rights to the seabed beyond the three-mile limit when a few months later it enacted the Outer Continental Shelf Lands Act of 1953, 67 Stat. 462, 43 U. S. C. § 1331 *et seq.* Section 3 of the Act

"declared [it] to be the policy of the United States that the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this subchapter." 43 U. S. C. § 1332 (a).

The Act then proceeds to set out detailed provisions for the exercise of exclusive jurisdiction in the area and for the leasing and development of the resources of the seabed.

Of course, the defendant States were not parties to *United States* v. *California* or to the relevant decisions, and they are not precluded by res judicata from litigating the issues decided by those cases. But the doctrine of *stare decisis* is still a powerful force in our jurisprudence; and although on occasion the Court has declared—and acted accordingly—that constitutional decisions are open to re-examination, we are convinced that the doctrine has peculiar force and relevance in the present context. It is apparent that in the almost 30 years since *California,* a great deal of public and private business has been transacted in accordance with those decisions and in accordance with major legislation enacted by Congress, a principal purpose of which was to resolve the "interminable litigation" arising over the controversy of the ownership of the lands underlying the marginal sea. See H. R. Rep. No. 215, 83d Cong., 1st Sess., 2 (1953). Both the Submerged Lands Act and the Outer Continental Shelf Lands Act which soon followed proceeded from the premises established by prior Court decisions and provided for the orderly development of offshore resources. Since 1953, when this legislation was enacted, 33 lease sales have been held, in which 1,940 leases, embracing over eight million acres, have been issued. The Outer Continental Shelf, since 1953, has yielded over three billion barrels of oil, 19 trillion m.c.f. of natural gas, 13 million long tons of sulfur, and over four million long tons of salt. In 1973 alone, 1,081,000 barrels of oil and 8.9 billion cubic feet of natural gas were extracted daily from the Outer Continental Shelf.[7] Exploitation of our resources offshore implicates a broad range of federal legislation, ranging from the Longshoremen's and Harbor Workers' Compensation Act, incorporated into the Outer Continental Shelf Lands Act, to the more recent Coastal Zone Management Act.[8] We are quite sure that it would be inappropriate to disturb our prior cases, major legislation, and many years of commercial activity[9] by calling

into question, at this date, the constitutional premise of prior decisions. We add only that the Atlantic States, by virtue of the *California, Louisiana,* and *Texas* cases, as well as by reason of the Submerged Lands Act, have been on notice of the substantial body of authoritative law, both constitutional and statutory, which is squarely at odds with their claims to the seabed beyond the three-mile marginal sea. Neither the States nor their putative lessees have been in the slightest misled. Judgment shall be entered for the United States.

NOTES

In United States v. Florida, 420 U.S. 531(1975), the Court upheld the Special Master's finding that the seaward boundary of Florida in the Atlantic Ocean extended only to the limits specified in §1301(b) of the Submerged Lands Act(three geographical miles) rather than the boundaries defined in the State's 1868 Constitution.

B. Regulation of OCS Drilling

OUTER CONTINENTAL SHELF LANDS ACT

43 U.S.C. §1331 et. seq. (enacted 1953)

§ 1331. Definitions

When used in this subchapter—

(a) The term "outer Continental Shelf" means all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 1301 of this title, and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control;

(b) The term "Secretary" means the Secretary of the Interior;

(c) The term "mineral lease" means any form of authorization for the exploration for, or development or removal of deposits of, oil, gas, or other minerals; and

(d) The term "person" includes, in addition to a natural person, an association, a State, a political subdivision of a State, or a private, public, or municipal corporation.

§ 1332. Congressional declaration of policy; jurisdiction; construction

(a) It is declared to be the policy of the United States that the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this subchapter.

(b) This subchapter shall be construed in such manner that the character as high seas of the waters above the outer Continental Shelf and the right to navigation and fishing therein shall not be affected.

§ 1333. Laws and regulations governing lands—Constitution and United States laws; laws of adjacent States; publication of projected States lines; restriction on State taxation and jurisdiction

(a)(1) The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands and fixed structures which may be erected thereon for the purpose of exploring for, developing, removing, and transporting resources therefrom, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State: *Provided, however,* That mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter.

(2) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf.

(3) The provisions of this section for adoption of State law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom.

* * *

Coast Guard regulations; marking of islands and structures; offenses and penalties

(e) (1) The head of the Department in which the Coast Guard is operating shall have authority to promulgate and enforce such reasonable regulations with respect to lights and other warning devices, safety equipment, and other matters relating to the promotion of safety of life and property on the islands and structures referred to in subsection (a) of this section or on the waters adjacent thereto, as he may deem necessary.

Prevention of obstruction to navigation by Secretary of the Army

(f) The authority of the Secretary of the Army to prevent obstruction to navigation in the navigable waters of the United States is extended to artificial islands and fixed structures located on the outer Continental Shelf.

§ 1334. Administration of leasing—Rules and regulations; amendment; cooperation with State agencies; violations and penalties; compliance with regulations as condition of lease

(a) (1) The Secretary shall administer the provisions of this subchapter relating to the leasing of the outer Continental Shelf, and shall prescribe such rules and regulations as may be necessary to carry out such provisions. The Secretary may at any time prescribe and amend such rules and regulations as he determines to be

necessary and proper in order to provide for the prevention of waste and conservation of the natural resources of the outer Continental Shelf, and the protection of correlative rights therein, and, notwithstanding any other provisions herein, such rules and regulations shall apply to all operations conducted under a lease issued or maintained under the provisions of this subchapter. In the enforcement of conservation laws, rules, and regulations the Secretary is authorized to cooperate with the conservation agencies of the adjacent States. Without limiting the generality of the foregoing provisions of this section, the rules and regulations prescribed by the Secretary thereunder may provide for the assignment or relinquishment of leases, for the sale of royalty oil and gas accruing or reserved to the United States at not less than market value, and, in the interest of conservation, for unitization, pooling, drilling agreements, suspension of operations or production, reduction of rentals or royalties, compensatory royalty agreements, subsurface storage of oil or gas in any of said submerged lands, and drilling or other easements necessary for operations or production.

(2) Any person who knowingly and willfully violates any rule or regulation prescribed by the Secretary for the prevention of waste, the conservation of the natural resources, or the protection of correlative rights shall be deemed guilty of a misdemeanor and punishable by a fine of not more than $2,000 or by imprisonment for not more than six months, or by both such fine and imprisonment, and each day of violation shall be deemed to be a separate offense. The issuance and continuance in effect of any lease, or of any extension, renewal, or replacement of any lease under the provisions of this subchapter shall be conditioned upon compliance with the regulations issued under this subchapter and in force and effect on the date of the issuance of the lease if the lease is issued under the provisions of section 1337 of this title, or with the regulations issued under the provisions of section 1335(b) (2) of this title if the lease is maintained under the provisions of section 1335 of this title.

Cancellation of lease; judicial review

(b) (1) Whenever the owner of a nonproducing lease fails to comply with any of the provisions of this subchapter, or of the lease, or of the regulations issued under this subchapter and in force and effect on the date of the issuance of the lease if the lease is issued under the provisions of section 1337 of this title, or of the regulations issued under the provisions of section 1335(b) (2) of this title, if the lease is maintained under the provisions of section 1335 of this title, such lease may be canceled by the Secretary, subject to the right of judicial review as provided in section 1337(j) of this title, if such default continues for the period of thirty days after mailing of notice by registered letter to the lease owner at his record post office address.

(2) Whenever the owner of any producing lease fails to comply with any of the provisions of this subchapter, or of the lease, or of the regulations issued under this subchapter and in force and effect on the date of the issuance of the lease if the lease is issued under the provisions of section 1337 of this title, or of the regulations issued under the provisions of section 1335(b) (2) of this title, if the lease is maintained under the provisions of section 1335 of this title, such lease may be forfeited and canceled by an appropriate proceeding in any United States district court having jurisdiction under the provisions of section 1333(b) of this title.

said submerged lands in the vicinity of the pipeline in such proportionate amounts as the Federal Power Commission, in the case of gas, and the Interstate Commerce Commission, in the case of oil, may, after a full hearing with due notice thereof to the interested parties, determine to be reasonable, taking into account, among other things, conservation and the prevention of waste. Failure to comply with the provisions of this section or the regulations and conditions prescribed thereunder shall be ground for forfeiture of the grant in an appropriate judicial proceeding instituted by the United States in any United States district court having jurisdiction under the provisions of section 1333(b) of this title.

Pipeline rights-of-way; forfeiture of grant

(c) Rights-of-way through the submerged lands of the outer Continental Shelf, whether or not such lands are included in a lease maintained or issued pursuant to this subchapter, may be granted by the Secretary for pipeline purposes for the transportation of oil, natural gas, sulphur, or other mineral under such regulations and upon such conditions as to the application therefor and the survey, location and width thereof as may be prescribed by the Secretary, and upon the express condition that such oil or gas pipelines shall transport or purchase without discrimination, oil or natural gas produced from

* * *

§ 1337. Grant of leases by Secretary—Oil and gas leases; award to highest bidder; method of bidding

* * *

Terms and provisions of oil and gas leases

(b) An oil and gas lease issued by the Secretary pursuant to this section shall (1) cover a compact area not exceeding five thousand seven hundred and sixty acres, as the Secretary may determine, (2) be for a period of five years and as long thereafter as oil or gas may be produced from the area in paying quantities, or drilling or well reworking operations as approved by the Secretary are conducted thereon, (3) require the payment of a royalty of not less than 12½ per centum, in the amount or value of the production saved, removed, or sold from the lease, and (4) contain such rental provisions and such other terms and provisions as the Secretary may prescribe at the time of offering the area for lease.

* * *

Publication of notices of sale and terms of bidding

(f) Notice of sale of leases, and the terms of bidding, authorized by this section shall be published at least thirty days before the date of sale in accordance with rules and regulations promulgated by the Secretary.

* * *

§ 1340. Geological and geophysical explorations

Any agency of the United States and any person authorized by the Secretary may conduct geological and geophysical explorations in the outer Continental Shelf, which do not interfere with or endanger actual operations under any lease maintained or granted pursuant to this subchapter, and which are not unduly harmful to aquatic life in such area. Aug. 7, 1953, c. 345, § 11, 67 Stat. 469.

§ 1341. Reservation of lands and rights—Withdrawal of unleased lands by President

(a) The President of the United States may, from time to time, withdraw from disposition any of the unleased lands of the outer Continental Shelf.

First refusal of mineral purchases

(b) In time of war, or when the President shall so prescribe, the United States shall have the right of first refusal to purchase at the market price all or any portion of any mineral produced from the outer Continental Shelf.

National security clause

(c) All leases issued under this subchapter, and leases, the maintenance and operation of which are authorized under this subchapter, shall contain or be construed to contain a provision whereby authority is vested in the Secretary, upon a recommendation of the Secretary of Defense, during a state of war or national emergency declared by the Congress or the President of the United States after August 7, 1953, to suspend operations under any lease; and all such leases shall contain or be construed to contain provisions for the payment of just compensation to the lessee whose operations are thus suspended.

National defense areas; suspension of operations; extension of leases

(d) The United States reserves and retains the right to designate by and through the Secretary of Defense, with the approval of the President, as areas restricted from exploration and operation that part of the outer Continental Shelf needed for national defense; and so long as such designation remains in effect no exploration or operations may be conducted on any part of the surface of such area except with the concurrence of the Secretary of Defense; and if operations or production under any lease theretofore issued on lands within any such restricted area shall be suspended, any payment of rentals, minimum royalty, and royalty prescribed by such lease likewise shall be suspended during such period of suspension of operation and production, and the term of such lease shall be extended by adding thereto any such suspension period, and the United States shall be liable to the lessee for such compensation as is required to be paid under the Constitution of the United States.

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43 C.F.R. 3300 et. seq.

Subpart 3300—Outer Continental Shelf Mineral Deposits; General

SOURCE: The provisions of this Subpart 3300 appear at 35 F.R. 9604, June 13, 1970, unless otherwise noted.

§ 3300.0–3 Purpose and authority.

The Outer Continental Shelf Lands Act of August 7, 1953 (67 Stat. 462; 43 U.S.C. § 1331 et seq.), referred to in this part as "the act", among other things, authorizes the Secretary of the Interior to issue on a competitive basis leases for oil and gas, sulphur, and other minerals in submerged lands of the Outer Continental Shelf, as defined in section 2 of the act. Subject to the supervisory authority of the Secretary, the regulations in this part shall be administered by the Director, Bureau of Land Management, hereinafter referred to in this part as the Director.

§ 3300.0–4 Applicability of public land laws.

The laws and regulations pertaining to the public lands of the United States are not applicable to the submerged lands of the Outer Continental Shelf.

Mineral deposits in the submerged lands of the Outer Continental Shelf are subject to disposition only in accordance with the provisions of the act and the regulations promulgated by the Secretary thereunder.

* * *

§ 3301.1 Leasing maps.

(a) Any area of the Outer Continental Shelf which has been appropriately platted as provided in paragraph (b) of this section is subject to lease for any mineral not included in a subsisting lease issued under the act or meeting the requirements of subsection (a) of section 6 of the act, unless before any lease is offered or issued the unit is (1) withdrawn from disposition pursuant to section 12(a) of the act, or (2) designated as an area or part of an area restricted from operation under section 12(d) of the act.

(b) As the need arises, the Bureau of Land Management will prepare official leasing maps of areas of the Outer Continental Shelf, which will be made to conform so far as practicable to the method of tract designation established by the adjoining State. The area included in each mineral lease shall be described in accordance with the official leasing map.

§ 3301.2 Resources evaluation.

From time to time the Director may announce tentative schedules of lease sales of Outer Continental Shelf areas. At such time as an area is initially considered for mineral leasing, or as the need arises, the Director shall request the Director, Geological Survey, to prepare a summary report describing the general geology and potential mineral resources of the area and shall request other interested Federal agencies to prepare reports describing to the extent known any other valuable resources contained within the general area and the potential effect of mineral operations upon the resources or upon the total environment.

§ 3301.3 Nominations of tracts.

In selecting tracts for oil and gas, sulphur, or other mineral leasing, the Director will receive and consider nominations of tracts or requests describing areas and expressing an interest in leasing of minerals, or, from time to time, upon his own motion, upon approval of the Secretary, may issue calls for nominations of tracts for the leasing of minerals in specified areas. Nominations of tracts should be addressed to the Director, with copies to the appropriate Bureau of Land Management field office and the appropriate oil and gas supervisor of the Geological Survey. The Director, Geological Survey, shall submit recommendations to the Director on tract selections and lease terms and conditions.

§ 3301.4 Selection of tracts.

The Director, prior to the final selection of tracts for leasing, either selected on his own motion or nominated pursuant to § 3301.3 of this subpart, shall evaluate fully the potential effect of the leasing program on the total environment, aquatic resources, aesthetics, recreation, and other resources in the entire area during exploration, development and operational phases. To aid him in his evaluation and determinations he shall request and consider the views and recommendations of appropriate Federal agencies, may hold public hearings after appropriate notice, and may consult with State agencies, organizations, industries, and individuals. The Director shall develop special leasing stipulations and conditions when necessary to protect the environment and all other resources, and such special stipulations and conditions shall be contained in the proposed notice of lease offer. The proposed notice of lease offer, together with all views and recommendations received and the Director's findings or actions thereon, shall be submitted to the Secretary for final approval.

§ 3301.5 Notice of lease offer.

Upon approval of the Secretary, the Director shall publish the notice of lease offer at the expense of the United States in the FEDERAL REGISTER, as the official publication, and in other publications as may be desirable. The publication in the FEDERAL REGISTER shall be at least 30 days prior to the date of the sale. The notice shall state the place and time at which bids will be filed, and the place, date, and hour at which bids will be opened. The notice shall contain any special stipulations or conditions which will become a part of any lease issued pursuant to such notice, including stipulations or conditions for the protection of the environment, aquatic life and other resources.

* * *

§ 3306.2 Cancellation of leases.

Any nonproducing lease issued under the act may be canceled by the authorized officer whenever the lessee fails to comply with any provision of the act or lease or applicable regulations in force and effect on the date of the issuance of the lease, if such failure to comply continues for 30 days after mailing of notice by registered letter to the lease owner at his record post office address. Any such cancellation is subject to judicial review as provided in section 8(j) of the act upon the complaint of any person. Producing leases issued under the act

may be canceled for such failure only by judicial proceedings in the manner prescribed in section 5(b)(2) of the act. Any lease issued under the act, whether producing or not, will be canceled by the authorized officer upon proof that it was obtained by fraud or misrepresentation, and after notice and opportunity to be heard has been afforded to the lessee.

* * *

§ 3307.4 Exploration and operations.

§ 3307.4–1 Purchase of production.

In time of war, or when the President of the United States shall so prescribe, the United States shall have the right of first refusal to purchase at the market price all or any portion of the oil or gas produced from the leased area, as provided in section 12(b) of the act.

§ 3307.4–2 Suspension of operations during war or national emergency.

Upon recommendation of the Secretary of Defense, during a state of war or national emergency declared by the Congress or the President of the United States after August 7, 1953, the Secretary is authorized to suspend any or all operations under a lease, as provided in section 12(c) of the act: *Provided*, That just compensation shall be paid by the United States to the lessee whose operations are thus suspended.

§ 3307.4–3 Restriction of exploration and operations.

The United States shall have the right, as provided in section 12(d) of the act, to restrict from exploration and operations the leased area or any part thereof which may be designated by and through the Secretary of Defense, with the approval of the President of the United States, as, or as part of, an area of the Outer Continental Shelf needed for national defense. So long as such designation remains in effect no exploration or operations may be conducted on the surface of the leased area or the part thereof included within the designation except with the concurrence of the Secretary of Defense. If operations or production under any lease within any such restricted area shall be suspended, any payments of rentals, minimum royalty, and royalty prescribed by such lease likewise shall be suspended during such period of suspension of operations and production, and the term of such lease shall be extended by adding thereto any such suspension period, and the United States shall be liable to the lessee for such compensation as is required to be paid under the Constitution of the United States.

§ 3307.4–4 Geological and geophysical exploration; rights-of-way.

The United States reserves the right to authorize the conduct of geological and geophysical exploration in the leased area which does not interfere with or endanger actual operations under the lease and the right to grant such easements or rights-of-way, upon, through, or in the leased area as may be necessary or appropriate to the working of other lands containing the deposits described in the act, and to the treatment and shipment of products thereof by or under authority of the Government, its lessees or permittees, and for other public purposes, subject to the provisions of section 5(c) of the act where they are applicable and to all lawful and reasonable regulations and conditions prescribed by the Secretary thereunder.

30 C.F.R. 250 et. seq.

§ 250.1 Purpose and authority.

The Outer Continental Shelf Lands Act enacted on August 7, 1953 (67 Stat 462), referred to in this part as "the act," authorizes the Secretary of the Interior at any time to prescribe and amend such rules and regulations, to be applicable to all operations conducted under a lease issued or maintained under the provisions of the act, as he determines to be necessary and proper to provide for the prevention of waste and conservation of the natural resources of the Outer Continental Shelf, and the protection of correlative rights therein. Subject to the supervisory authority of the Secretary of the Interior, the regulations in this part shall be administered by the Director of the Geological Survey through the Chief, Conservation Division.

* * *

§ 250.12 Regulation of operations.

(a) *Duties of supervisor.* The supervisor in accordance with the regulations in this part shall inspect and regulate all operations and is authorized to issue OCS Orders and other orders and rules necessary for him to effectively supervise operations and to prevent damage to, or waste or, any natural resource, or injury to life or property. The supervisor shall receive, and shall, when in his judgment it is necessary, consult with or solicit advice from lessees, field officials of inter-

ested Departments and agencies, including the Fish and Wildlife Service, Federal Water Pollution Control Administration, Bureau of Land Management, Coast Guard, Department of Defense, Corps of Engineers, and representatives of State and local governments.

* * *

(c) *Emergency suspensions.* The supervisor is authorized, either in writing or orally with written confirmation, to suspend any operation, including production, which in his judgment threatens immediate, serious, or irreparable harm or damage to life, including aquatic life, to property, to the leased deposits, to other valuable mineral deposits or to the environment. Such emergency suspension shall continue until in his judgment the threat or danger has terminated.

* * *

§ 250.14 Samples, tests, and surveys.

(a) When deemed necessary or advisable, the supervisor is authorized to require that adequate tests or surveys be made in an acceptable manner without cost to the lessor to determine the reservoir energy; the presence, quantity, and quality of oil, gas, sulphur, other mineral deposits, or water; the amount and direction of deviation of any well from the vertical; or the formation, casing, tubing, or other pressures.

(b) The supervisor may, at the time of approval of any notice to drill or redrill any well, stipulate reasonable requirements for the taking of formation samples or cores to determine the identity and character of any formation.

§ 250.30 Lease terms, regulations, waste, damage and safety.

The lessee shall comply with the terms of applicable laws and regulations, the lease terms, OCS Orders and other written orders and rules of the supervisor, and with oral orders of the supervisor. All such oral orders shall be effective when issued, and are to be confirmed in writing as provided in § 250.11. The lessee shall take all necessary precautions to prevent damage to or waste of any natural resource or injury to life, or property, or the aquatic life of the seas.

* * *

§ 250.38 Well records.

* * *

(c) Upon request by the supervisor, the lessee shall submit paleontological reports identifying microscopic fossils by depth (not the resulting interpretations based upon such identifications) unless washed well samples normally maintained by the lessee for paleontological determinations are made available to the supervisor for inspection.

* * *

(g) The lessee shall submit any other reports and records of operations when required and in the manner and form prescribed by the supervisor.

* * *

§ 250.41 Control of wells.

(a) *Drilling wells.* The lessee shall take all necessary precautions to keep all wells under control at all times, shall utilize only personnel trained and competent to drill and operate such wells, and shall utilize and maintain materials and high-pressure fittings and equipment necessary to insure the safety of operating conditions and procedures.

* * *

§ 250.43 Pollution and waste disposal.

(a) The lessee shall not pollute land or water or damage the aquatic life of the sea or allow extraneous matter to enter and damage any mineral- or water-bearing formation. The lessee shall dispose of all liquid and nonliquid waste materials as prescribed by the supervisor. All spills or leakage of oil or waste materials shall be recorded by the lessee and, upon request of the supervisor, shall be reported to him. All spills or leakage of a substantial size or quantity, as defined by the supervisor, and those of any size or quantity which cannot be immediately controlled also shall be reported by the lessee without delay to the supervisor and to the Coast Guard and the Regional Director of the Federal Water Pollution Control Administration. All spills or leakage of oil or waste materials of a size or quantity specified by the designee under the pollution contingency plan shall also be reported by the lessee without delay to such designee.

(b) If the waters of the sea are polluted by the drilling or production operations conducted by or on behalf of the lessee, and such pollution damages or threatens to damage aquatic life, wildlife, or public or private property, the control and total removal of the pollutant, wheresoever found, proximately resulting therefrom shall be at the expense of the lessee. Upon failure of the lessee to control and remove the pollutant the supervisor, in cooperation with other appropriate agencies of the Federal, State and local governments, or in cooperation with the lessee, or both, shall have the right to accomplish the control and removal of the pollutant in accordance with any established contingency plan for combating oil spills or by other means at the cost of the lessee. Such action shall not relieve the lessee of any responsibility as provided herein.

(c) The lessee's liability to third parties, other than for cleaning up the pollutant in accordance with paragraph (b) of this section shall be governed by applicable law.

* * *

§ 251.5 **Requirement of notices and permits.**

(a) *Geological or geophysical exploration for mineral resources.* A person may not conduct geological or geophysical exploration for mineral resources without a permit. Separate permits will be issued for geological exploration for mineral resources and for geophysical exploration for mineral resources.

* * *

§ 251.12 **Submission of data and information by permittees.**

(a) *Submission of geological data and analyzed geological information.* (1) Each holder of a permit for geological exploration shall notify the Supervisor immediately, in writing, of the acquisition or analysis of any geological data collected under the permit. At any time within one year of receiving a notice of acquisition or analysis from a permittee, or within a longer period if specified in the permit, the Supervisor may select all or part of the geological data and analyzed geological information. The permittee shall keep the geological data and analyzed geological information available for inspection and selection by the Supervisor during such period, and the permittee shall submit geological data and analyzed geological information to the Supervisor within 30 days after receiving a request for submission of them.

* * *

THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969
42 U.S.C. §§4321 et seq.

§ 4321. Congressional declaration of purpose

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality. Pub.L. 91-190, § 2, Jan. 1, 1970, 83 Stat. 852.

SUBCHAPTER I. -- POLICIES AND GOALS

§ 4331. Congressional declaration of national environmental policy

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to

improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may --

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, whereever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall --

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment:

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on --

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) and irreversible and irretrievable commitments of resources which would be involved in the proposed action should be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

* * *

§ 4333. Conformity of administrative procedures to national environmental policy

All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this chapter and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this chapter.

§ 4334. Other statutory obligations of agencies

Nothing in section 4332 or 4333 of this title shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

§4335. Efforts supplemental to existing authorizations

The policies and goals set forth in this chapter are supplementary to those set forth in existing authorizations of Federal agencies.

NOTES

An OCS lease sale involves the following basic procedures:

a.)the Secretary of the Interior determines a general leasing schedule;

b.)The Secretary receives nominations by industry of tracts they are interested in bidding on and so called "negative nominations"--requests by States or persons that the Secretary not lease certain tracts due to possible adverse environmental consequences;

c.)the Secretary tentatively designates tracts for leasing;

d.)a draft environmental impact statement(EIS) is prepared discussing the impact of and alternatives to developing the specific tracts;

e.)a public hearing is held with the EIS providing the focus for public comment on the proposed action; written comments are also received;

f.)a final EIS is prepared;

g.)a decision is made to offer specific tracts for lease;
h.)bids are received and if an acceptable bid is offered the lease is sold;
i.)exploratory drilling is carried out to determine the feasibility of commercial production;and
j.)permission for commercial production is granted by the Secretary after a review of compliance with safety, environmental and other regulations.

GULF OIL CORPORATION V. MORTON
493 F.2d 141(9th Cir. 1973)

OPINION

DUNIWAY, Circuit Judge:

This is an appeal by the Secretary of the Interior and subordinate federal officials from a judgment (1) setting aside the Secretary's orders suspending drilling operations on eleven oil and gas leases in the Santa Barbara Channel, (2) directing the Secretary to forthwith grant all pending applications for drilling permits, and (3) extending the initial term of these leases for 32 months to enable the lessees to exercise their rights under these leases.

We reverse.

1. *The Facts*

The relevant facts have been stipulated to by the parties. Plaintiffs are the holders of eleven oil and gas leases covering areas of the outer continental shelf in the Santa Barbara Channel, granted in 1968 pursuant to the terms of the Outer Continental Shelf Lands Act, 67 Stat. 462 (Aug. 7, 1953), 43 U.S.C. §§ 1331–1343 (OCS Act). They have paid some $153,000,000 for these leases. In January, 1969, a well being drilled by Union Oil Company under another lease, not one here involved, blew out, causing the massive Santa Barabara oil spill. Shortly thereafter, the Secretary suspended all operations on certain leases in the Channel. This order was complied with, although the companies took an unsuccessful administrative appeal, and the leases were extended for the period of the suspension. In April, 1971, before plaintiffs had begun drilling under the leases here in question, they were again ordered to suspend operations. They were informed that this suspension was to continue until January, 1973, that the lease terms would be extended for an appropriate period of time, and that no royalties would be due from them during the suspension. On appeal, the Secretary sustained the suspension, stating that it was for the purpose of permitting Congress to consider proposed legislation to terminate the leases, and that the action was taken "in the interest of conservation." His decision incorporated a statement by the Acting Director of the United States Geological Survey which identified three environmental risks which would be involved in continuing operations under the leases: the possibility of another blowout; the possibility that wells would be improperly plugged should the legislation pass and abandonment become necessary; the possibility that geologic structures such as the one which contributed to the 1969 spill would be encountered and fractured, thus causing large quantities of oil and gas to escape. The statement emphasized that none of these risks was acute and that, if the development and extraction of oil were contemplated under these leases, the risks would be acceptable. However, it also concluded that the risks were unacceptable in light of the fact that the leases might be terminated in the near future.

The plaintiffs then filed this action, requesting that the suspensions be declared invalid and revoked, that the Secretary be ordered to issue drilling permits for the leases, and that the leases be extended to compensate for the loss of drilling time. The district court entered judgment in their favor, stating:

> "This Court considers that the only suspension orders which can be issued by the Secretary are those provided for by Section 12 of the Act [dealing with suspension during time of war and for defense purposes] or those

providing for the suspension of actual operations when requested by the lessee or when necessary to prevent waste or damage to person or property." 345 F.Supp. at 685, 688–689.

* * *

Section 5(a)(1) of the Act, 43 U.S.C. § 1334(a)(1), provides:

> "The Secretary shall administer the provisions of this Act relating to the leasing of the outer Continental Shelf, and shall prescribe such rules and regulations as may be necessary to carry out such provisions. The Secretary may at any time prescribe and amend such rules and regulations as he determines to be necessary and proper in order to provide for the prevention of waste and *conservation of the natural resources of the outer Continental Shelf,* and the protection of correlative rights therein, and, notwithstanding any other provisions herein, such rules and regulations shall apply to all operations conducted under a lease issued or maintained under the provisions of this subchapter. In the enforcement of conservation laws, rules, and regulations the Secretary is authorized to cooperate with the conservation agencies of the adjacent States. Without limiting the generality of the foregoing provisions of this section, the rules and regulations prescribed by the Secretary thereunder may provide for the assignment or relinquishment of leases, for the sale of royalty oil and gas accruing or reserved to the United States at not less than market value, and, *in the interest of conservation,* for unitization, pooling, drilling agreements, *suspension of operations or production,* reduction of rentals or royalties, compensatory royalty agreements, subsurface storage of oil or gas in any of said submerged lands, and drilling or other easements necessary for operational production." (Emphasis added.)

It is true, as plaintiffs argue, that the basic delegation of authority is to administer the leasing provisions of the Act and that these deal with exploration for and extraction of oil and gas and sulphur. But it is also true that, in authorizing the Secretary to issue regulations, the Act speaks of "conservation of the natural resources of the outer Continental Shelf," not just of conservation of oil, gas, sulphur and other mineral resources. We cannot conclude that the later language, permitting suspension of leases "in the interest of conservation" is confined to conservation of oil and gas as plaintiffs urge, even though the sentence also refers to "unitization, pooling, drilling agreements . . . reduction of rentals or royalties, compensatory royalty agreements, subsurface storage of oil or gas . . ." all of which do relate primarily to conservation of oil and gas. We think that the phrase "in the interest of conservation" refers back to the earlier phrase which we have quoted.

The phrase "conservation of the natural resources of the outer Continental Shelf" is, on its face, broader than the meaning that plaintiffs would give it. Its natural meaning would encompass all such resources, not just oil and gas, sulphur and other minerals.

The OCS Act was originally introduced in Congress as Title III of the Submerged Lands Act, 67 Stat. 29, May 22, 1953. See 1953 U.S.Code Cong. & Admin.News 2177 ff, quoting S.Rep. 411, H.Rep. 413, Conf.Rep. 1031, 83rd Cong., 1st Sess. (1953). It was stricken from that Act, but reintroduced in the same form and ultimately adopted on August 7, 1953. In the legislative history, it is still referred to as Title III of the Submerged Lands Act, although it was finally adopted as an amendment to the Submerged Lands Act. It is clear, however, that the two Acts are in pari materia.

Section 2(e) of the Submerged Lands Act (43 U.S.C. § 1301(e)) provides

> "The term 'natural resources' includes, without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life but does not include water power, or the use of water for the production of power."

We think it entirely reasonable for the Secretary to conclude that the OCS Act,

in § 5(a)(1), uses the phrase "natural resources" in the sense in which it is defined in Section 2(e) of the Submerged Lands Act.

If there were still any doubt in our minds that the Secretary's range of choices includes suspension to conserve the natural resources of the outer continental shelf as thus broadly construed, those doubts would be removed by the National Environmental Policy Act of 1969, 83 Stat. 852, 42 U.S.C. §§ 4321–4347 (NEPA). That Act provides in § 102, 42 U.S.C. § 4332:

> "The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, ..."

In Calvert Cliffs' Coord. Com. v. United States A. E. Comm., 1971, 146 U.S. App.D.C. 33, 449 F.2d 1109, 1112–1113, the court said:

> "NEPA, first of all, makes environmental protection a part of the mandate of every federal agency and department. . . . This compulsion is most plainly stated in Section 102. . . . Congress also 'authorizes and directs' that '(2) all agencies of the Federal Government shall' follow certain rigorous procedures in considering environmental values. Senator Jackson, NEPA's principal sponsor, stated that '[n]o agency will [now] be able to maintain that it has no mandate or no requirement to consider the environmental consequences of its actions.' He characterized the requirements of Section 102 as 'action-forcing' and stated that that '[o]therwise, these lofty declarations [in Section 101] are nothing more than that.'" (Footnotes omitted.)

The Secretary's Order is Within the Range of Choices Available to Him

There remains, however, a second question: could the Secretary suspend operations under the plaintiffs' leases for the reasons that he has invoked in this case, i. e., was this particular action within the range of choices available to him? Plaintiffs urge that it was not. They point out that the leases were made in full conformity with the OCS Act, that one purpose of the Act was to develop the resources of the outer Continental Shelf, particularly oil and gas, that the leases themselves contemplate, and indeed require, the plaintiffs to drill. They add to this the fact that the statement of the Geological Survey, on which the Secretary relied, shows that, if drilling is to be done, the ecological risks are acceptable. Finally, they point out that the Secretary himself recognizes that, under these circumstances, only Congress can permanently prevent drilling by cancelling the leases and paying the plaintiffs for their value. In essence, their argument is that the Secretary cannot suspend the leases to give himself a chance to persuade Congress to do what he now thinks ought to be done.

The argument is a powerful one, but we are unable to accept it. As we construe the OCS Act and NEPA, the Secretary has a continuing duty to guard all the resources of the outer Continental Shelf. After the leases in question were made, events occurred in the Santa Barbara Channel that were both unexpected and very dangerous to the environment. These caused the Secretary to reconsider the dangers to the natural resources of the area if drilling were to proceed under the leases.

On April 20, 1971, the Secretary sent to the Speaker of the House a letter, a proposed bill, and an environmental impact statement. In his letter, the Secretary recites the actions taken by him after the January 1969 blow out in the Santa Barbara Channel, and continues:

> "At the same time, a second major action was taken. An order was signed which converted the existing two-mile buffer opposite the Santa Barbara State Oil Sanctuary into a permanent ecological preserve. Until this order was signed, the area which covers 21,000 acres, had no special legal status.
>
> The enclosed bill proposed a more permanent solution to the problem. It would terminate 35 of the Federal leases and place the area covered by them, as well as certain other adjacent

areas, into a National Energy Reserve. The reserve shall be available for lease only as determined by the President.

. . . We believe that the proposed bill offers an equitable solution to the problem created by the 'blowout' in the Santa Barbara Channel area of the Outer Continental Shelf.

* * *

The Bill, however, did not come to a vote. A second suspension order was issued in April of 1973. The parties have stipulated that its validity will be controlled by our disposition of this case. Under date of April 18, 1973, the Secretary re-submitted the bill.

* * *

The bill was introduced in the Senate on June 6, 1973. So far as we are advised, it is still pending.

When the suspension order in question was made, drilling had not yet begun on the leases in question. In such circumstances, the fact that the leases might be terminated is highly relevant to an evaluation of the risks involved. For example, even if the threat to the marine environment were grave, the Secretary might be justified in refusing to order a suspension of operations if it were certain that drilling would eventually take place and there were no reason to believe that the risks would decrease with the passing of time. On the other hand, if there were a good possibility that drilling would have to be abandoned, it would certainly be rational for the Secretary to decide not to run the risk of substantial environmental damage, even if that risk were not acute. This is particularly true when, as the Geological Survey statement observes, the plugging of wells itself poses a risk of ecological damage. It would make little sense to require the Secretary to ignore reality by always assuming that a leased field will eventually be developed.

The fact that the bill in question was recommended by the Secretary does not affect this analysis. It cannot be seriously contended that he has no power to recommend legislation. Indeed, NEPA seems to require that he do so when he believes that legislation is necessary to enable him to carry out his duties under that Act. See § 103 and § 102(2)(C), 42 U.S.C. § 4333 and § 4332(2)(C). It would be a strange rule of law to insist that the Secretary's right hand ignore what his left hand is doing. There is nothing to support the plaintiffs' fears that the Secretary will use this procedure as a bootstrap method of discontinuing the off-shore exploration and drilling program entirely. Should such abuses occur, they can be dealt with in an appropriate case. We think that, given the fact that drilling had not yet begun and that it might have to be abandoned, the Secretary's evaluation of the environmental risks cannot be called arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

We do not hold that the Secretary can continue to issue comparable orders one after another and justify them by repeatedly having his proposed legislation introduced in the Congress. It is arguable that at some point, if Congress does not act, there must be an end to the matter. The parties' stipulation precludes our considering whether that point had been reached when the first suspension order expired in January of this year. We express no opinion as to whether such a point would be reached if and when the order presently in effect expires without congressional action. If that happens, and if the Secretary then should issue another suspension, that would be a new and different case.

The judgment is reversed.

SIERRA CLUB V. MORTON
510 F.2d 813(5th Cir. 1975)

CLARK, Circuit Judge:

This case involves yet another clash between a federal agency and environmentalists over a proposed development of the nation's resources. The judicial focus, blurred as usual by the lack of technical and scientific expertise, is upon whether the impact statement compiled during consideration of the federal action satisfies the National Environmental Policy Act (NEPA), 42 U.S.C.A. § 4321 et seq.

* * *

Under existing jurisprudence, plaintiffs were required to establish by a preponderance of the evidence, rather than by a prima facie showing of deficiencies, that the EIS for MAFLA was inadequate. The additional attack on the Secretary of Interior's decision to proceed with the leasing must be founded on proof that it was arbitrary and capricious. Since the basic legal premises on which the district judge based his determination that the federal agency actions passed muster were correct, plaintiffs must shoulder a more imposing burden in this Court. Having failed to convince the trial court that the EIS was inadequate, the plaintiffs must now demonstrate that the lower court's findings accepting the EIS as adequate and the decision to proceed as permissible were clearly erroneous.

Section 102(2) contains the procedural requirements designed to compel all federal agencies contemplating actions having a significant impact on the environment to consider NEPA's substantive policies and goals as enunciated in Section 101. The effectiveness of Section 102(2) depends upon compliance with procedural duties "to the fullest extent possible," *i.e.*, a compliance, the completeness of which is only limited by the agency's statutory obligations. While no agency may properly adopt a less demanding standard for their effort, judicial review is based on a pragmatic standard. In determining whether an agency has complied with Section 102(2), we are governed by the *rule of reason*, *i.e.*, we must recognize "on the one hand that the Act mandates that no agency limit its environmental activity by the use of an artificial framework and on the other that the act does not intend to impose an impossible standard on the agency." The court's task is to determine whether the EIS was compiled with objective good faith and whether the resulting statement would permit a decisionmaker to fully consider and balance the environmental factors.

TESTING THE EIS

Plaintifffs submit that the EIS fails to comply with Section 102(2)(C) of the Act since it: does not adequately describe and analyze the present environment of the area; fails to adequately describe and analyze the most significant impacts that will result from the MAFLA sale; fails to analyze the cumulative effect of oil development in the Gulf of Mexico; and fails to adequately analyze reasonable alternatives to the MAFLA sale.

The purposes of an environmental impact statement are to detail the environmental and economic effects of proposed federal action "to enable those who did not have a part in its compilation to understand and consider meaningfully the factors involved," and to compel the decisionmaker to give serious weight to environmental factors in making discretionary choices. "The sweep of NEPA is extraordinarily broad, compelling consideration of any and all types of environmental impact of federal action." To carry out this statutory mandate, every relevant environmental effect of the project must be given appropriate consideration. Section 102(2)(C) seeks these goals by specifically requiring a *detailed* statement.

The purposes served by this "detailed statement" requirement have been succinctly enumerated by the First Circuit in Silva v. Lynn, 482 F.2d 1282, 1284-85 (1st Cir. 1973). The *Silva* court stated:

> The "detailed statement" required by § 4332(2)(C) serves at least three purposes. First, it permits the court to ascertain whether the agency has made a good faith effort to take into

account the values NEPA seeks to safeguard. To that end it must "explicate fully its course of inquiry, its analysis and its reasoning." . . . Second, it serves as an environmental full disclosure law, providing information which Congress thought the public should have concerning the particular environmental costs involved in a project. To that end, it "must be written in language that is understandable to nontechnical minds and yet contain enough scientific reasoning to alert specialists to particular problems within the field of their expertise." . . . It cannot be composed of statements "too vague, too general and too conclusory." . . . Finally and perhaps most substantively, the requirement of a detailed statement helps insure the integrity of the process of decision by precluding stubborn problems or serious criticism from being swept under the rug.

Id. (Citations omitted.) Again, the courts have approached their review of claims that congressionally specified detail of environmental effects was lacking in an EIS with a view that Congress did not intend to mandate perfection, or intend "for an impact statement to document every particle of knowledge that an agency might compile in considering the proposed action."

Present Environment

Plaintiffs contend that a most serious shortfall of the EIS is its lack of necessary baseline environmental studies upon which any reasoned decision on the environmental effect of the proposed sale must be based. Four specific omissions are asserted.

First, the statement does not include sufficient analysis of present air and water quality in the area. For the most part, plaintiffs are correct in this censure. While the statement does include an analysis of the impact of lease operations on water quality it does not describe the present quality of these environmental factors although it does contain a brief discussion of water quality degradation which previously occurred in the Mississippi Sound, Mobile Bay and along the Florida Gulf and of climatological and oceanographic conditions.

Second, the statement fails to assess each ecosystem as to its unique character, productivity, and the manner in which it operates. This attack is hypercritical. The statement discusses significant portions of the biological environment. Descriptions of the communities of Phytoplankton, Zooplankton, Benthic invertebrates and the active swimmers (Nekton) of the Gulf, embracing an analysis of factors affecting the distribution and abundance of Benthos and the location of significant Benthic communities, are included.[14]

Third, the statement does not describe the operation of the Eastern Gulf ecosystem as a whole or the importance of the lease area to this ecosystem as a unit. While the EIS does contain general information about life in the Gulf there is a dearth of information explaining the interrelationship of localized biotic communities. No information is given as to the predicted effect on the whole if some part of the system were to be harmed.

Fourth, detailed geological data is absent from the statement. The statement does include a review of the geological history and present structural composition of the entire Gulf, with special attention to structures within the MAFLA sale area and a recognition of geologic hazards of MAFLA exploration and production. Additionally the EIS observes that tests necessary to determine shallow hazards, unstable bottom and mud waves are scheduled to be run after the sale, and that prior to approval of a drilling permit, the Geological Survey requires submittal of an operation plan that includes suitable safety procedures necessary to control anticipated hazards.

Environmental Impact

Section 102(2)(C)(i) and (ii) require that the EIS contain a detailed statement of the environmental impact of the proposed action and any adverse effects which cannot be avoided if such proposed action is taken. Plaintiffs do not argue that defendants have failed to include references to environmental effects. Indeed, the summary of the EIS states:

> All tracts offered pose some degree of pollution risk to the environment and adjacent shoreline. The risk potential is related to adverse effects on the environment and other resource uses

which may result principally from accidental or chronic oil spillage.

Rather, plaintiffs urge that the material included is inadequate to permit the proper evaluation of its probability or importance.

In a panoply of particularized criticism plaintiffs attack omissions and deficiencies in Interior's preliminary studies. While it is true that the pre-EIS research was either inadequate or nonexistent in some specific areas, the significant environmental effects were recognized and presented in the final statement in a way which afforded the decisionmaker an opportunity to properly weigh them. NEPA's procedural requirements do not exist to dictate form but to insure that judgments are no longer based on old values. This EIS clearly brings the significant long-term environmental hazards and detriments to peer status with the present need and economic costs considerations which formerly would have controlled decision-making. This being so, under the rule of reason it meets the minimum requirements of Section 102(2)(C)(i) and (ii).

* * *

Although recognizing that the EIS includes a general discussion of the environmental problems that would result from pipeline construction, plaintiffs complain of the absence of analysis of the effects of pipeline location and construction and the impact of pipeline leakage on particular areas. While the EIS does not include an analysis of these matters, it does include a look at long-term effects of pipeline construction generally, mitigating measures that may be employed to prevent harm from such construction, and a special lease stipulation that reserves the right to require pipelines to be placed in designated areas or corridors. On leases in areas at depths above 200 feet, the pipelines of common carriers must be buried and only 18 of the 147 tracts lie partially or wholly beyond the 200 foot contour. This procedure is expected to minimize the adverse effects from these lines.

The EIS also reviews the effects in previous Gulf operations of gas leaks, oil spills and other pipeline accidents. It further suggests that if it is determined that official establishment of pipeline corridors will constitute a major federal action requiring preparation of an impact statement, then such will be prepared. Plaintiffs read this suggestion as an attempt to fragment the project, and, by gaining acceptance of some parts, compel acceptance of the whole. We do not agree that this is the thrust of Interior's proposal. This project is an easily divisible one. In this continuously controllable project, the fact that a tract may prove productive would not mandate that an unsound method of delivering that production be utilized. We are not unmindful of the rule that the sufficiency of an EIS must be determined without reference to *possible* future action. Today's statement, however, includes sufficient pre-statement analysis of possible environmental hazards from pipeline location, construction or leakage.

The MAFLA sale is said to violate NEPA because it places the entire responsibility on the states to prevent environmental injury from construction of pipelines and onshore facilities. We are in accord with the district court's finding that "an examination of the [EIS] and the supplemental documents reveals that while the states have a role to play in the planning of pipelines and onshore facilities, the federal agency has considered, and will continue to consider, these features." The fact that the MAFLA leases contain a stipulation that pipelines be placed in corridors selected by the federal government gives the government a great deal of control over placement of pipelines and, consequently, over onshore facilities. Thus, Interior retains the opportunity to select less environmentally hazardous areas whenever some harm becomes possible. Their lease controls give them even greater supervisory powers. Additionally, the states of Mississippi, Alabama and Florida have been consulted on several occasions and encouraged to begin planning environmental safeguards for the construction and operation of onshore pipelines and facilities. These states have been forewarned by the EIS of the possible harm that may result from unrestricted construction and operation. Such efforts do not indicate any abdication of responsibility in violation of Inte-

rior's NEPA obligations, rather they evince the agency's fulfillment of NEPA requirements that the impact statement be subjected to "the comments and views of the appropriate . . . State, and local agencies . . ., and that the Federal Government "make available to States . . . advice and information useful in restoring, maintaining, and enhancing the quality of the environment."

* * *

Sierra Club contends that the statement should have totalled the amount of oil spills which have already occurred from all oil drilling in the Gulf and determined from these figures how much more was probable. It further asserts that similar calculations should have been made for other pollutants, and that the statement should have included a mathematical analysis of the probability of collision and loss of land from pipelines being placed in marsh areas. These contentions boil down to questioning the degree of detail rather than the lack of it. While agreeing that these additional facts may have been useful to the Secretary in reaching a decision, we still conclude that the detail presented was sufficient to uphold the EIS.

* * *

Baseline Studies

Plaintiffs next allege that the defendants' actions violated subsections A, B, and D of Section 102. Subsection A requires an agency to carry out systematic, interdisciplinary studies of the environmental impact which would result from exploration and development. More specifically, plaintiffs contend that defendants failed to satisfy Interior's regulation 43 C.F.R. § 3301.4, which requires evaluation of the potential effect of the leasing program on the total environment, aquatic life, aesthetics, recreation and other resources in the area. However, the EIS does deal specifically with each of these items.

Plaintiffs contend that Interior's plans to gain more detailed information concerning the hazardous geologic conditions of the ocean floor after the sale do not satisfy the requirement that the statement "must stand the test alone—*i. e.*, in and of itself it must either meet the requirements of NEPA or fail." However, in a project such as this where developers sign leases and conduct separable operations over a period of months and years, and where restrictions in those leases give the agency the ability to constantly control and adjust future action, this continuing control must be considered in determining the reasonableness of the impact statement.[43] The MAFLA sale is a unique form of federal action. It does not involve a single undertaking or a project which becomes a *fait accompli* the day the decision to proceed is made. Because it contemplates numerous, successive lessor-lessee relationships involving activities over many areas and over many years, the agency's continuing opportunity for making informed adjustments has a major effect upon our evaluation of the sufficiency of the materials contained in the EIS itself.

The future ability to control development for ecological reasons is not given judicial recognition in a NEPA evaluation for the first time here. In Gulf Oil Corp. v. Morton, 493 F.2d 141, 144 (9th Cir. 1973), the Ninth Circuit held that the Outer Continental Shelf Lands Act and NEPA authorize "the Secretary [of Interior] to suspend operations under existing leases whenever he determines that the risk to the marine environment outweighs the immediate national interest in exploring and drilling for oil and gas." More specifically, the court held that the Secretary could properly suspend offshore oil and gas leases for a period sufficient to permit Congress to consider termination of those leases for environmental reasons. This Circuit, in Canal Authority of State of Florida v. Callaway, 489 F.2d 567, 577 (5th Cir. 1974), has cited Gulf Oil Corp. v. Morton for the proposition that "temporary administrative action to meet previously unconsidered environmental dangers may be appropriate if it furthers the public policy expressed by Congress in the National Environmental Policy Act (NEPA), 42 U.S.C.A. § 4321 et seq., even if it involves a temporary cessation of a project previously approved by Congress." Here, the right to exercise future control is directly contractual and even broader than the right which was

judicially declared there.

* * *

DECISION TO PROCEED

Supplementary to their assertions of sta' ment inadequacy plaintiffs attack the Secretary of Interior's decision to proceed with the sale. In view of our determination that the procedural requirements of Section 102 were satisfied, we look to see whether the secretary's decision, based upon the information contained in the EIS, was arbitrary, capricious or an abuse of discretion. However, our review does not include consideration of the merits of the actual decision to go forward with the sale. "[I]t is the court's function to insure that the mandate of the statute has been carried out and that all relevant environmental effects of the project [are] given appropriate consideration by the [secretary]." NEPA intended that courts and federal agencies collaborate to insure attainment of the Act's goals, not that a court substitute its discretion for that of the executive as the decision-maker.

This court may reject the secretary's substantive decision only if it was reached procedurally without a full, good faith, individualized consideration and balancing of environmental factors; or if, according to the standards set forth in Sections 101(b) and 102(1) of NEPA, it is "[shown that] 'the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental value.'" The decision to proceed in this instance was not shown to be in clear disregard of the evidence contained in the EIS, nor does it appear arbitrary, capricious or an abuse of discretion.

The judgment appealed from is Affirmed.

NEW YORK V. KLEPPE
7 Environmental Law Reporter 20230(1977)

Weinstein, J.:

After extensive hearings held in July and August of 1976, this court determined that the National Environmental Policy Act (NEPA), 42 U.S.C. §4321*et seq.*, required issuance of a preliminary injunction preventing the Secretary of the Interior from proceeding with Lease Sale Number 40 of outer continental shelf lands in the mid-Atlantic region for exploration and production of oil and gas.

* * *

The issue before this court is not the wisdom or desirability of this country's total "energy program," or of any of its specific aspects. It is not this court's function to pass on the substantive merits of the Sale 40 lease project, either in its present or potentially modified form. It is, rather, concerned with whether the Secretary of the Interior, in reaching his decision to lease these lands, complied with the statutory requirements governing his responsibilities as trustee and administrator of the public resources of the outer continental shelf; specifically, the question posed is whether his decision was fully and accurately informed and made after adequate consideration of viable alternative programs and potential adverse environmental impacts.

Our preliminary finding, as outlined in this court's opinion of August 13, 1976, was that the Secretary had not met his NEPA responsibilities. In deciding to proceed with Sale 40 in its present configuration he virtually ignored the power of states and their political subdivisions to regulate the siting, construction, and use of nearshore and onshore facilities through measures such as special land-use laws, air and water pollution laws, pipeline regulations, and zoning and building codes.

Accordingly, a preliminary injunction preventing Lease Sale 40 was granted pending further hearings and decision on applications for a permanent injunction. On August 16, 1976, the Court of Appeals for the Second Circuit stayed the order of this court; on October 14, 1976, it held that plaintiffs had not demonstrated that they would suffer irreparable harm between the date of the preliminary hearing and the trial, and that there was some question whether plaintiffs would succeed on the merits at the trial.

* * *

The Secretary of the Interior proceeded to lease a total of 93 tracts in the Sale 40 area. He accepted bids totalling over 1.1 billion dollars. The successful bidders have begun to take preliminary steps required for full exploitation of their leaseholds.

* * *

I. Summary of Findings

We find that the Secretary (1) ignored the practical effects of local governmental licensing, permitting, and review powers in the NEPA documents; (2) failed to consider the environmental impact of specific probable pipeline routes from the outer continental shelf, in spite of the fact that projection of such routes is routinely made by industry and could have been made by the Secretary or his agents; (3) greatly overstated peak oil and gas production for Sale 40 and significantly understated the cost of such production, including pipeline construction; this resulted in a serious lack of consideration of the likelihood and attendant dangers of increased tanker traffic and an overestimate of the net value of the entire project; (4) failed to consider the possible impact of particular tract-selection choices on the feasibility and sites of pipelines; there was no consideration of the alternatives of either excluding industry-preferred tracts, or including less highly

desired tracts in the final sale offer because of related onshore impacts and developments; and (5) failed to consider the alternative of separating exploration from production leasing. Adequate consideration of these factors might have led to modifications in the Sale 40 leasing program, resulting in greater environmental protection without impairing reasonable exploitation of offshore hydrocarbon resources.

* * *

NEPA Violations

A. Failure to Consider Impact of State and Local Exercise of Regulatory Powers

* * *

1. Effect of Coastal Zone Management Plans

Defendants have relied heavily on the contention that these various states and localities have been, and will be, able to protect their coastal areas and environment from the effects of an incomplete impact statement by developing coastal zone management plans in accordance with the Federal Coastal Zone Management Act (CZMA), 16 U.S.C. §1451 *et seq.*, using funds supplied by the federal government. The argument that this activity is a substitute for the government's responsibilities under NEPA is unpersuasive. First, NEPA requires an independent assessment of a variety of facts to determine possible environmental damage. That responsibility cannot be fobbed off to the states under a different program. Second, the extensive work being done on the various state plans will not be completed until 1978 at the earliest. Third, the critical amendments to the CZMA relied upon by defendants were adopted *after* the Final Environmental Statement on Sale 40 was published and the Secretary of the Interior made his decision to lease; these amendments could have had no impact on his decisions under NEPA.

* * *

Evidence, which could have been brought to the Secretary's attention by the NEPA documents, demonstrates that these local governmental powers can and will be utilized to prevent landing of outer continental shelf oil over wide portions of the coast line, whether that landing is by tanker or pipeline. Failure to include an evaluation of such local opposition to pipelines or tanker-related onshore facilities necessarily resulted in a failure to gain a full and meaningful perspective on the intrinsic environmental problems related to offshore oil and gas exploration.

2. Recognition of State and Local Powers in NEPA Documents

In attempting to demonstrate that the Secretary gave adequate consideration to state and local powers to affect outer continental shelf activities, defendants, in their extensive post-trial memoranda, marshal numerous references in the final environmental statement to such powers. In order to understand the true significance of the references, the most significant passages are reproduced below. In context, they demonstrate a listing in abstract form, without any attempt to evaluate their practical effect on specific oil and gas production and delivery systems from specific areas offshore to specific affected areas onshore:

* * *

These and other references succeed in establishing beyond question that the Secretary should have known of the existence of some vague state and local zoning and permitting powers. But there was never any doubt in the court's mind that the Secretary had such unspecific knowledge; any suggestion to the contrary would have had to assume a total ignorance on his part of our federal system.

Nor was there any doubt that the NEPA documents made reference generally to the formal state and local powers and procedural requirements in this area, although it hardly requires an environmental impact statement to disclose the existence of some sort of regulatory powers; it is surely elementary knowledge to anyone involved in major federal or industry projects.

But passing references to, and abstract listings of, state and local authority is only the beginning and not the end of the NEPA-required inquiry. The next, and by far more crucial step is a projection of the site-specific, pragmatic, empirical effects of the likely exercise of such power. It is the *impact* of local authority, not its mere *existence*, that must be studied and evaluated.

NEPA certainly contemplated that the federal agency responsible for safely regulating ocean exploration would consider specific, pragmatic land-based obstacles to transporting ocean-bottom energy resources. This has not been done. The NEPA documents, in their critial transportation aspects, are highly abstract. Despite the enormous volume of discussion they contain, the likely oil and gas delivery routes are nowhere described; one might almost suppose that levitation were the anticipated mode of transport. The NEPA documents read like a theoretical college thesis, written without the hard empirical data needed by any practical person making a decision. The impact statement studiously avoids the factors required for rational, practical decisionmaking.

* * *

The Council on Environmental Quality Guidelines on Preparation of Environmental Impact Statements, 40 C.F.R. Part 1500, requires analysis of specific impacts on specific areas. It requires consideration of:

> The relationship of the proposed action to land use plans, policies, and controls for the affected area. This requires a discussion of *how the proposed action may conform or conflict with* the objectives and *specific terms* of approved or proposed Federal, State, and local *land use plans, policies, and controls*. . . . Where a conflict or inconsistency exists, the statement should describe the extent to which the agency has reconciled its proposed action with the plan, policy or control, and the reasons why the agency has decided to proceed notwithstanding the absence of full reconciliation.

* * *

3. Effect of State and Local Powers on Pipeline Routing—Absence of Any Projection of Likely Pipeline Locations

Absence of any projections of likely pipeline locations illustrates the abstract nature of the relevant documents. The Department's assumptions were that oil and gas collected by gathering lines from separate platforms would be transported to onshore facilities along one to four corridors, in two 24" to 36" pipelines per corridor.

* * *

Although as many as eight separate 36" pipelines were anticipated, there was no attempt to determine specific likely landfall sites or the ocean or overland routes that would be followed. The decision documents merely contain brief, vague and abstract conjecture concerning the extremely broad geographical areas that might be involved:

* * *

All consideration of likely routes is clearly and explicitly deferred to the period after discovery of commercial quantities of oil:

* * *

This deferral of an attempt to grapple with specifics borders on irresponsibility in view of NEPA's explicit mandate that all potential environmental considerations be weighed prior to the decision to proceed with major federal programs. NEPA required the Secretary to explore the site-specific impacts of pipelines along definite routes, at least to the extent that such routes were ascertainable based on information available at the time.

It is as if the federal government decided to proceed with the construction of a major highway connecting New York and Washington—approximately the distance to be covered by Sale 40

pipelines—but refused to reveal the contemplated route, whether bridges or tunnels would be utilized, whether mountains would be skirted or dynamited, or the impact on the area bordering the road. Such a course of action would surely be impermissible. *Cf. Monroe County Conservation Council, Inc. v. Volpe,* 472 F.2d 693, 697 [3 ELR 20006] (2d Cir. 1972); *Citizens Committee for Hudson Valley v. Volpe,* 425 F.2d 97 [1 ELR 20006] (2d Cir. 1970). Yet the analogy to the instant case is a strong one.

It is perfectly clear from highly credible expert testimony at trial from defendants' own witness that pipeline routes not only could have been predicted with a high degree of specificity and accuracy, but that such predictions were in fact made by the oil companies who put up hard cash—"megabucks," as one industry representative described them—in bids. Oil company experts projected relative costs of transportation problems that might arise from local and state zoning, and also predicted specific environmental factors attendant upon detailed alternative pipeline routes.

For example, the witness Franklin Brunjes, Manager of Land Transportation for Shell Oil Co., testified that he had computed economic feasibility vis-a-vis tanker transport of various pipeline routes from OCS lease sites to refining facilities in the Philadelphia area.

* * *

Had the Secretary been at least as conscientious as Shell Oil in exploring specific pipeline locations from an environmental perspective, he certainly would have considered the route into the Delaware Bay and up the Delaware River to Philadelphia, which was studied by Mr. Brunjes and considered a feasible and likely corridor.

* * *

The evidence clearly established that the Secretary did not engage in inquiries adequate to inform federal, state, and local decisionmakers and the public of the alternative modes and routes of transport of Sale 40 oil and gas, and to enable government decisionmakers to understand and plan to cope with the impacts of reasonably defined tanker-pipeline options in their zoning, land use, and coastal zone management planning processes.

* * *

Mr. Brunjes' testimony clearly established the feasibility of "costing-out" different transportation forms and routes, and the high degree of precision with which economic conclusions can be reached in this sphere:

* * *

This evidence establishes that it was quite possible for the Secretary to engage in an economic assessment of the effects of local opposition to pipelines. It was also reasonably necessary in order for the Secretary to know the realistic costs of the proposed action as compared to the benefits, and in order to assess fairly the economic feasibility of pipelines as against tankers. Without this information the Secretary could not make a reasoned decision as to the potential costs to be incurred by the proposed program.

Where, as here, information was available to the government and meaningful analysis was reasonably possible on issues of such environmental significance, the Interior Department was under a NEPA-imposed obligation to disclose the information and undertake the analysis. The conclusion is inescapable that if, in their own economic interest oil companies can project, examine and analyze fairly detailed pipeline corridors, the Secretary of the Interior, in the critical public interest of environmental protection, must do so as well.

B. Defective Cost-Benefit Analysis of Lease Sale 40

In balancing the projected benefits of Lease Sale 40 against its potential adverse environmental impact and against alternative energy producing programs, and in order to arrive at a reasoned decision on whether to proceed, it was essential for the Secretary to make a realistic estimate of the investment costs necessary to produce a given quantity of energy. Critical components of that factor are the estimated quantities of oil and gas reserves, expected peak production levels, and the cost of pipeline construction. This last item has exceptional significance, in light of the Secretary's firm assumption that pipelines, rather than tankers, would be the actual mode of transport. The accuracy of the Secretary's assessment of each of these components was called into serious question by highly credible evidence.

1. Underestimate of Finding Costs.

Based on data sources readily available prior to the preparation of the final environmental impact statement, an expert witness concluded that the finding cost estimates used in the decision documents were unrealistically low, relative to recent industry experience. The Secretary estimated that, assuming large gas and oil reserves, finding costs were 14.5 cents per million British Thermal Units (BTUs), and, on the hypothesis of low reserves, 12.26 cents per million BTUs. The expert testimony, on the other hand, established that realistically determined finding costs for new oil would in fact be 168 percent greater in the first instance, and 127 percent greater in the second.

* * *

2. Underestimate of Pipeline Construction Costs

Additional testimony by Mr. Donkin, based on information readily available to the Secretary, indicated that the critical element of pipeline construction costs was greatly underestimated in the NEPA documents. While the Secretary used a figure of $1 million per mile for a large diameter off-shore pipeline, the realistic cost is on the order of $1.75 million per mile.

In the low resource case the cost of a pipeline was, as a consequence of this disparity, underestimated by $73 million. In the high resource case the error was $330 million:

* * *

3. Underestimate of Total Investment Required

As a result of the underestimates with respect to finding and pipeline costs the realistic investment cost for the Sale 40 area in the low reserve case is in fact between 88.8 percent and 131.9 percent greater than Interior Department estimates. With respect to finding new natural gas, in absolute terms this results in additional costs of $756,790,000. In the high reserve case the realistic costs are between 70.7 percent and 100.9 percent higher than Department of Interior estimates, or in absolute terms between $2,359,773,000 and $3,668,733,000 greater.

* * *

4. Overestimate of Peak Levels of Production.

Finally, Mr. Donkin concluded that the peak levels of oil and natural gas production assumed by the Interior Department could never be obtained given the Department's own reserve estimates. Based on those estimates, peak oil production in 1988 would in fact be 15,000 barrels per day less than assumed by the Secretary in the low reserve case and 60,000 barrels per day less in the high reserve case.

In the low case, reserves necessary to support the level of peak production assumed by the Secretary would have to be 52.5 percent greater than government estimates. In the high gas reserve case, resources would have to be 51 percent greater to support the predicted peaks.

* * *

5. NEPA Consequences of Gross Misestimates of Costs and Benefits

The Secretary's cost-benefit analysis is vitally linked to critical NEPA issues. Its relevance to the tanker-pipeline issue has previously been alluded to, and its connection to other environmental impact issues is also clear. If the Secretary has grossly understated the investment costs and overstated the daily produc-

tion rates and reserves, then the timing, locations, size, and number of pipelines, drilling wells, and duration of construction may differ from the Secretary's projections, with resultant environmental and socio-economic impacts (offshore and onshore) qualitatively and quantitatively different from those estimated in the NEPA documents.

The Secretary's duty under NEPA to compare Sale 40 to its alternatives, and to weigh the latter and their environmental effects, depends upon an accurate cost-benefit analysis of the Sale 40 project, without which the Secretary and other decisionmakers cannot adequately determine priorities and the course of action tending most strongly to further the public interest. While we find it unnecessary to consider plaintiff's submission that NEPA requires substantive review of the administrative decision, and no such review has been undertaken in this case, there is no disagreement that, at a minimum, the Secretary's decision may not be arbitrary and capricious. *See* Kurwin, *Substantive Review Under the National Environmental Policy Act*, 3 Ecology L. Q. 173 (1973).

Where, as here, the economic costs and benefits of the planned action were seriously and grossly misrepresented or omitted, there could be no adequate balancing of economic benefits against environmental costs. It should be emphasized that the discrepancies are so substantial that they cannot be attributed to mere differences in judgment. They were so inadequate as to constitute, for NEPA purposes, a failure to make a meaningful inquiry. As a result, the Secretary's decision on Sale 40 was in this respect arbitrary and capricious and in violation of NEPA.

C. Failure to Evaluate Separation of Exploration and Production Leasing

The Department of Interior failed to adequately consider alternatives to the Sale 40 leasing procedure. The leases utilized grant exploration, development, and production rights to a successful bidder in one document. The government never considered exploration to determine the extent of oil and gas reserves and their location before granting exclusive rights of production.

In uncontradicted trial testimony, the government's witness, Judith Gresham, flatly stated that no alternative had ever been considered by the New York City office of the Bureau of Land Management in preparing for Sale No. 40. Tr. 768-69. It was this office that coordinated preparation for Sale 40 leasing and that prepared the relevant NEPA documents. Ms. Gresham testified that the existing lease forms for the outer continental shelf had always combined exploration, development and production rights and that no thought had ever been given to proceeding differently in Sale 40.

This failure to consider exploration before leasing for production was particularly anomalous in view of the limited government knowledge of the nature, extent, and exact location of probable oil and gas in the area. Private oil companies had been making costly preliminary studies for some ten years but the government had not. Apparently only on-the-spot exploratory drilling can determine what, if any, hydrocarbons will be available.

The final commitment to grant exclusive rights to exploit specific tracts of governmental land—without even considering prior exploration—occurred in the face of no less than thirteen public comments on the Draft Environmental Statement for Sale No. 40, including among them remarks by the States of New York, New Jersey, Delaware, and Maryland, urging that the exploration and development phases be separated. FES Sale 40, Vol. 3, p. 67. The thrust of these comments was that separation of exploration and development would allow government at all levels to exercise timely and essential controls over environmental, social, and economic impacts, especially those associated with onshore development.

Notwithstanding this impressive body of public comment, the possibility of separating exploration from development was effectively ignored in the Sale 40 final environmental statement. Section VIII of the impact statement, which discusses "Alternatives to the Proposed Action," is wholly silent on this option. In the Sale 40 documents the only reference to this alternative is contained in a few lines of response to comments on the draft environmental impact statement, which summarily dismiss the proposed separation as impossible under the provisions of the OCS Lands Act of 1953. FES Sale 40, Vol. 3, p. 67.

The environmental impact statement does briefly mention the alternative of government exploration, Vol. 2, pp. 582-83, but the discussion is, considering the thousands of pages devoted to relatively insignificant matter in the NEPA documents, woefully inadequate.

* * *

When an alternative course of action exists, whether or not it is within the Secretary's existing authority, that could satisfy environmental and economic concerns relating to a program, that alternative must be treated in a meaningful, non-conclusory fashion. As the court in *Committee for Nuclear Responsibility v. Seaborg*, 463 F.2d 783, 787 (D.C. Cir. 1971), noted:

> [T]he statement has significance in focusing environmental factors for informed appraisal by the President, who has broad concern even when not directly involved in the decisional process, and in any event by Congress and the public.

The point was reiterated in *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 833 (D.C. Cir. 1972), where the question of considering alternatives outside the jurisdictional power of the agency was raised:

> Congress contemplared that the Impact Statement would constitute the environmental source material for the information of the Congress as well as the Executive, in connection with the making of relevant decisions, and would be available to enhance enlightenment of—and by—the public.

In the *Morton* case, Interior argued that it need not consider alternatives which were beyond its power to affect. The court of appeals rejected this argument and required that such alternatives be considered:

> While the Department of the Interior does not have the authority to eliminate or reduce oil import quotas, such action is within the purview of both Congress and the President, to whom the impact statement goes. The impact statement is not only for the exposition of the thinking of the agency, but also for the guidance of these ultimate decisionmakers, and must provide them with the environmental effects of both the proposal and the alternatives, for their consideration along with the various other elements of the public interest.

458 F.2d at 835.

* * *

D. Failure to Consider Impact of Leasing Alternative Tracts

Those responsible for the tract selection process neglected to examine the potential environmental effect of offering, and accepting bids on, tracts other than those actually proposed and leased.

As we noted earlier, the Secretary has now leased 93 tracts in the Sale 40 area. These leases represent the culmination of a multistep tract selection process.

Initially, based on the United States Geological Survey and industry information concerning the potential of a specific region of offshore energy reserves, an area of approximately 6.5 million acres was designated open to "nomination and comment." Tracts

covering approximately half this area were "nominated" by industry, *i.e.*, industry expressed at least some interest in leasing these acres. Of the industry-nominated tracts 154 were selected for further study in the Environmental Impact Statement. All of the tracts selected for study were ultimately put up for sale. One hundred one of these were bid on, and 93 were ultimately leased, with 8 bids rejected. See Appendix "D," *infra* [Appendices omitted. Ed.].

It is clear from the record that nowhere in the lengthy process of considering which tracts were ultimately to be leased did the Secretary or Bureau of Land Management personnel charged with preparing NEPA documents consider the onshore impact of choosing particular tracts, rather than others. They simply assumed that landing of outer continental shelf oil and gas could be had at any point along the coast. Even if the states do not prohibit pipelines, they may restrict their point of entry, requiring a landfall, for example, at the industrialized northern section of the New Jersey Coast or at the refinery areas in the tri-state New Jersey-Delaware-Pennsylvania region. The existence of such a probability imposed on the Secretary the duty to consider the alternative of leasing tracts other than those proposed in Sale 40. It might, for example, improve the revenue from lease sale, decrease pipeline lengths, and reduce environmental impacts if tracts contiguous to potentially acceptable pipeline landfalls were utilized.

Testimony by Judith Gresham, Chief of Operations of the Bureau of Land Management, who played a significant role in the process by which tracts were selected for Sale 40, established that the only environmental considerations that affected the scope of Sale 40 was concern over the impact on commercial fishing grounds. No consideration whatsoever was given to the relationship of the selected tracts to specific pipeline routes, onshore impacts, or local zoning and related powers.

* * *

E. The Issue of Secretary's Lack of Good Faith

At trial plaintiffs renewed their contention that the NEPA review process was used as *post hoc* justification for decisions previously made by the Secretary to accelerate outer continental shelf leasing and to hold Sale 40. A strong argument has been made, supported by considerable circumstantial evidence, that the NEPA documents and public hearings were but a charade; that the decision to lease was a foregone conclusion once Presidents and those in their administrations, including successive Secretaries of the Interior, decided some years ago that production of Atlantic hydrocarbons should proceed speedily.

Defendant's own witness, Mr. Robert Bybee, an Exxon executive, admitted that as early as 1965 his company began gathering geological data in the Atlantic area north of Cape Hatteras, based on information, obtained from the Interior Department, that a lease sale was planned in the Atlantic:

* * *

This statement, as well as numerous other written internal memoranda and public statements of responsible government officials tend strongly to demonstrate that firm decisions to accelerate outer continental shelf leasing and to hold Sale 40 were made long before the ostensible decision dates, and before fulfillment of NEPA's requirements, and that the Bureau of Land Management simply went through the NEPA motions in order to validate the decisions previously made.

Although defendant claimed that these decisions were made as a response to the Arab oil embargo, on April 18, 1973, nearly six months prior to the embargo, the President announced his decision to accelerate outer continental shelf leasing and to hold lease sales. At that time, the President directed the Secretary "to take steps which would triple the annual acreage leased on the Outer Continental Shelf by 1979." Pl. Ex. 86, p. 393. The Secretary had, in fact, recommended to the President that this acceleration of leasing occur. Pl. Ex. 103, p. 2. Three months later, on July 11, 1973, the Bureau of Land Management issued a revised proposed schedule implementing the President's directive. The Department of the Interior had decided at that time that leasing would be accelerated; it left open only the final decision about

* * *

specific sale sites. Pl. Ex. 87, p. 7. On September 12, 1973, the Department of the Interior Under Secretary of Energy announced that this accelerated program was required in order to meet future energy needs. Pl Ex. 87, p. 6.

* * *

That the Department of the Interior had little interest in properly fulfilling its obligations under NEPA is evidenced by a memorandum from Assistant Secretary Hughes. The Assistant Secretary allowed the United States Geological Survey one week to furnish him with information for the final environmental statement on Proposed Increase in Oil and Gas Leasing on the Outer Continental Shelf relating to estimated outer continental shelf oil and gas reserves, likely drilling sites, and whether tankers or pipelines were to be used. Mr. Hughes acknowledged that the "regrettably short response time will likely not allow highly accurate answers." Pl. Ex. 97.

In spite of this strong circumstantial evidence that the decision to proceed with Sale 40 was made without considering the NEPA documents, we decline to base our decision that NEPA has been violated on these contentions. To do so would constitute review of the "mental processes" of the Secretary. Under general principles of review of agency action, such an inquiry should be avoided by courts, if it is at all possible to decide a case on other grounds:

* * *

As already demonstrated, there are ample other grounds for holding that NEPA has been violated by the Sale 40 leases. Accordingly, the court need not decide the good faith issue.

III. Remedy

* * *

In considering the proper scope of any injunction we have examined and rejected alternatives such as allowing exploration to continue, but enjoining production pending preparation of an adequate environmental impact statement. Such a course is undesirable for two reasons. First, to allow the project to proceed will involve the commitment of resources which will either be lost if the project is abandoned or reformed in the light of compliance with NEPA as a result of proper environmental impact evaluation, or which will impermissibly tilt the scales in favor of proceeding.

Second, NEPA requires an evaluation of environmental impact early in the planning phase of a project, so that the decisonmaker has the most options available to reformulate the project to minimize adverse consequences. Once action has been taken, or allowed to proceed, it may be too late to alter the plans, because certain otherwise available alternatives have been foreclosed.

IV. Conclusion

Judged against "a rule of reason," *N.Y. Natural Res. Defence Council v. Kleppe*, ___ U.S. ___, ___, 97 S.C. 4, 6 (1976), the Secretary of the Interior violated NEPA. The parties are enjoined from further proceedings with the exercise of any powers purportedly granted by Sale 40 leases executed by the defendant. The leases are declared null and void. This order is stayed pending the completion of appeals, if any.

SO ORDERED.

NOTES

1. Secretary of the Interior Andrus and the intervenor defendant, Ocean Industries Association, have both announced they will appeal the N.Y. v. Kleppe decision. A lawyer for the Interior Department said he believed Sierra Club v. Morton provides persuasive precedent for overturning the N.Y. decision. Are the two cases reconcilable?

2. Most circuits have held that there exists a right of substantive review under NEPA. The Eight Circuit Court of Appeals delineated the scope of this review:

> The review is a limited one for the purpose of determining whether the agency reached its decision after a full good faith consideration of environmental factors made under the standards set forth in §101 and 102 of NEPA; and whether the actual balance of costs and benefits struck by the agency according to these standards was clearly arbitrary or clearly gave insufficient weight to environmental factors. Environmental Defense Fund, Inc. v. Froehlke, 473 F. 2d 346, 353(8th Cir. 1972)

Although numerous cases have presented the issue of substantive review under NEPA, no circuit has ever totally overturned an agency decision on that ground. How would one apply the standards of §101 and 102 to an OCS decision?

It has been suggested that some judges exercise substantive review by applying an exacting standard of procedural NEPA review. See Kays, Substantive Rights under the National Environmental Policy Act, 13 Am. Bus. L.J. 289 (1976).

3. State participation in OCS decisions-

a. To date States have participated in OCS decision-making primarily through advisory groups and litigation. The Secretary of the Interior chartered an OCS Advisory Board for policy matters and and OCS Environmental Studies Advisory Committee (OCSESAC) for technical questions. These groups have representatives from each coastal state as well as representatives from federal agencies and the private sector. Regional committees are also provided. Both of the group's charters state that their functions are "solely advisory." A typical complaint of the groups was voiced by the OCSESAC regional Committee for the North Atlantic States:

> There is concern with both the timeliness of the data and the use to which it is put in making management decisions. It is felt that existing data may not be adequate, and new data not analyzed in time to make rational, tract-by-tract decisions for the lease sale.
>
> Additionally, it is not clear how new information will enter

the leasing process stream, although we are aware of the definitions of OCS orders, regulations and special stipu= lations.

Finally, there is no mechanism providing for specific responses to state reccommendations or for translating these recommendations into program modifications. 1976 OCS Environmental Studies Advisory Committee Annual Report, 85,(1977).

b. Another method of control is the exercise of the police powers of a state. Although the actual drilling occurs on Federal lands essential support facilities including pipelines, ports and refineries will be on state lands and all these facilities will have major impacts on the state coastal zone. California has created statewide and regional coastal zone commissions and prohibits the construction of oil treatment or shipment facilities within 1000 yards of the coast without a permit from the regional commission. Califormia Coastal Zone Conservation Act, Cal. Pub. Rev. Code §2700 et. seq. (West. Supp. 1976). Are such acts preempted by the OCSLA; are they invlaid restraints on commerce? See Askew v. American Waterways Operators, 411 U.S. 325(1973) (upholding state liability and bonding requirements on tankers to protect state water and property from oil discharge within state jurisdiction) and Union Oil v. Miner, 437 F.2d 408 (9th Cir. 1970) (enjoining a local district attorney form using a state nuisance statute to interfere with Federal OCS drilling but specifically reserving the question of the power of a state to punish those who, on Federal lands, do acts which have effects on shore).

c. The Coastal Zone Management Act (CZMA),16 U.S.C. 1451-64, provides for grants to assist states in managing the coastal zone. As defined in the Act, the "coastal zone" does not include Federal OCS lands. However, the Act is still relevant to OCS activities. Section 307(c)(3) of the Act provides:

> After final approval by the Secretary of a state's managment program, any applicant for a required Federal license or permit to conduct an activity affecting land or water uses in the coastal zone of that state shall provide in the application to the licensing or permitting agency a certification that the proposed activity complies with the state's approved program and that such activity will be conducted in a manner consistent with the program.... No license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant's certification or until, by the state's failure to act, the concurrence is conclusively presumed, unless the Secretary, on his own initiative or upon appeal by the applicant, finds, after providing a reasonable opportunity for detailed comments from the Federal agency involved and from the state, that the activity is consistent with

the objectives of this chapter or is otherwise necessary in the interest of national security.

One of the criteria for approval of a state plan by the Secretary is a finding that "the management program provides for adequate consideration of the national interest involved in the citing of facilities necessary to meet the requirements which are other than local in nature." For further materials on coastal state planning see Chapter Seven.

4. The OCSLA has not been significantly changed since its enactment in 1953. Over the last several years there has been a strong move in Congress to make substantial changes in the Act. In the 94th Congress bills passed both houses but the bill was returned to conference by the House. Identical bills (H. 1614, S.9) which copy the 94 th Congress House Conference Report have been introduced in the 95th Congress. The proposed amendments cover almost all aspects of OCS operations, codifying many of the existing regulations and also making several significant changes.

SENATE BILL 9
95th Congress 1st Session

SEC. 101. The Congress finds and declares that—

(1) the demand for energy in the United States is increasing and will continue to increase for the foreseeable future;

* * *

SEC. 102. The purposes of this Act are to—

(1) establish policies and procedures for managing the oil and natural gas resources of the Outer Continental Shelf in order to achieve national economic and energy policy goals, assure national security, reduce dependence on foreign sources, and maintain a favorable balance of payments in world trade;

(2) preserve, protect, and develop oil and natural gas resources in the Outer Continental Shelf in a manner which is consistent with the need (A) to make such resources available to meet the Nation's energy needs as rapidly as possible, (B) to balance orderly energy resource development with protection of the human, marine, and coastal environments, (C) to insure the public a fair and equitable return on the resources of the Outer Continental Shelf, and (D) to preserve and maintain free enterprise competition;

(3) encourage development of new and improved technology for energy resource production which will eliminate or minimize risk of damage to the human, marine, and coastal environments;

(4) provide States which are impacted by Outer Continental Shelf oil and gas exploration, development, and production with comprehensive assistance in order to anticipate and plan for such impact, and thereby to assure adequate protection of the human environment;

(5) assure that States have timely access to information regarding activities on the Outer Continental Shelf, and opportunity to review and comment on decisions relating to such activities, in order to anticipate, ameliorate, and plan for the impacts of such activities;

(6) assure that States which are directly affected by exploration, development, and production of oil and natural gas are provided an opportunity to participate in policy and planning decisions relating to management of the resources of the Outer Continental Shelf;

(7) minimize or eliminate conflicts between the exploration, development, and production of oil and natural gas, and the recovery of other resources such as fish and shellfish;

(8) establish an oil spill liability fund to pay for the prompt removal of any oil spilled or discharged as a result of activities on the Outer Continental Shelf and for any damages to public or private interests caused by such spills or discharges; and

(9) insure that the extent of oil and natural gas resources of the Outer Continental Shelf is asessed at the earliest practicable time.

SEC. 201.

* * *

(f) The term 'affected State' means, with respect to any program, plan, lease sale, or other activity, proposed, conducted, or approved pursuant to the provisions of this Act, any State—

"(1) the laws of which are declared, pursuant to section 4(a) (2) of this Act, to be the law of the United States for the portion of the outer Continental Shelf on which such activity is, or is proposed to be, conducted;

"(2) which is or is proposed to be directly connected by transportation facilities to any artificial island or structure referred to in section 4(a) (1) of this Act;

"(3) which is receiving, or in accordance with the proposed activity, will receive, oil for processing, refining, or transshipment which was extracted from the outer Continental Shelf and transported by means of vessels or by a combination of means including vessels;

"(4) which is designated by the Secretary as a State in which there is a substantial probability of significant impact on or damage to the coastal, marine, or human environment, or a State in which there will be significant changes in the social, governmental, or economic infrastructure, resulting from the exploration, development, and production of oil and gas anywhere on the outer Continental Shelf; or

"(5) in which the Secretary finds that because of such activity there is, or will be, a significant risk of serious damage, due to factors such as prevailing winds and currents, to the marine or coastal environment in the event of any oilspill, blowout, or release of oil or gas from vessels, pipelines, or other transshipment facilities;

* * *

SEC. 204.

SEC. 5. ADMINISTRATION OF LEASING OF THE OUTER CONTINENTAL SHELF.— * * * *The regulations prescribed by the Secretary under this subsection shall include, but not be limited to, provisions—*

(1) for the suspension or temporary prohibition of any operation or activity, including production, pursuant to any lease or permit (A) at the request of a lessee, in the interest of conservation, to facilitate proper development of a lease, or to allow for the unavailability of transportation facilities, or (B) if there is a threat of serious, irreparable, or immediate harm or damage to life (including aquatic life), to property, to any mineral deposits (in areas leased or not yet leased), or to the marine, coastal, or human environment, and for the extension of any permit or lease affected by such suspension or prohibition by a period equivalent

to the period of such suspension or prohibition, except that no permit or lease shall be so extended when such suspension or prohibition is the result of gross negligence or willful violation of such lease or permit, or of regulations issued concerning such lease or permit;

"(2) for the cancellation of any lease or permit, at any time, when it is determined, after hearing, that continued activity pursuant to such lease or permit would cause serious harm or damage, which would not decrease over a reasonable period of time, to life (including aquatic life), to property, to any mineral deposits (in areas leased or not yet leased), to the national security or defense, or to the marine, coastal, or human environment . . .

* * *

SEC. 203.

SEC. 18. OUTER CONTINENTAL SHELF LEASING PROGRAM.—*(a) The Secretary, pursuant to procedures set forth in subsections (c) and (d), shall prepare and periodically revise, and maintain an oil and gas leasing program to implement the policies of this Act. The leasing program shall indicate as precisely as possible the size, timing, and location of leasing activity which he determines will best meet national energy needs for the five-year period following its approval or reapproval. Such leasing program shall be prepared and maintained in a manner consistent with the following principles:*

* * *

(3) Within nine months after the date of enactment of this section, the Secretary shall submit a proposed leasing program to the Congress, the Attorney General, the Governors of affected States, and the Regional Outer Continental Shelf Advisory Boards, and shall publish such proposed program in the Federal Register.

* * *

(c) The Secretary shall review the leasing program approved under this section at least once each year, and he may revise and reapprove such program, at any time, in the same manner as originally developed.

* * *

SEC. 19 REGIONAL OUTER CONTINENTAL SHELF ADVISORY BOARDS.—*(a) The Governors of affected States may establish Regional Outer Continental Shelf Advisory Boards for their regions with such membership as they may determine, after consultation with the Secretary and the Secretary of Commerce.*

* * *

(c) Each Board established pursuant to subsection (a) shall advise the Secretary on all matters relating to outer Continental Shelf oil and gas development, including development of the leasing program required by section 18 of this Act, approval of development and production plans required pursuant to section 25 of this Act, implementation of baseline and monitoring studies, and the preparation of environmental impact statements prepared in the course of the implementation of the provisions of this Act.

"(d) If any Regional Advisory Board or the Governor of any affected State—

"(1) makes specific recommendations to the Secretary regarding the size, timing, or location of a proposed lease sale or with respect to a proposed development and production plan; and

"(2) submits such recommendations to the Secretary within sixty days after receipt of notice of such proposed lease sale or of such development and production plan,

the Secretary shall accept such recommendations, unless he determines they are not consistent with national security or the overriding national interest. For purposes of this subsection, a determination of overriding national interest shall be based on the desirability of obtaining oil and

gas supplies in a balanced manner, consistent with the policies of this Act. If the recommendations from State Governors or Regional Advisory Boards conflict with each other, the Secretary shall accept any of those recommendations which he finds to be the most consistent with the national interest. If the Secretary finds that he cannot accept recommendations made pursuant to this subsection, he shall communicate, in writing, to such Governor or such Board the reasons for rejection of such recommendations. The Secretary's determination that recommendations are not consistent with the national security or the overriding national interest shall be final and shall not, alone, be a basis for invalidation of a proposed lease sale or a proposed development and production plan in any suit or judicial review pursuant to section 23 of this Act, unless found to be arbitrary or capricious.

"SEC. 20. BASELINE AND MONITORING STUDIES.—"(a)(1) The Secretary of Commerce, in cooperation with the Secretary, shall conduct a study of any area or region included in any lease sale in order to establish baseline information concerning the status of the human, marine, and coastal environments of the outer Continental Shelf and the coastal areas which may be affected by oil and gas development in such area or region.

"(3) The Secretary of Commerce shall, after being notified of the submission of any development and production plan in an area or region under study, complete such study and submit it to the Secretary prior to the date for final approval of any development and production plan required by section 25 of this Act for any lease area. Failure of the Secretary of Commerce to complete any such study in a lease area shall not be a basis for precluding the approval of a development and production plan by the Secretary, unless the Secretary, in his discretion, finds such failure to be an appropriate basis for such preclusion.

SEC. 21. SAFETY REGULATIONS.—(a)

(2) In promulgating regulations under this section, the Secretary shall require, on all new drilling and production operations and, wherever practicable, on existing operations, the use of the best available and safest technology, wherever failure of equipment would have a significant effect on occupational or public health, safety, or the environment.

SEC. 23. CITIZEN SUITS, COURT JURISDICTION, AND JUDICIAL REVIEW.(a)(1) Except as provided in this section, any person having an interest which is or can be adversely affected may commence a civil action on his own behalf—

"(A) against any person, including the United States, and any other government instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution) for any alleged violation of any provision of this Act or any regulation promulgated under this Act, or of the terms of any permit or lease issued by the Secretary under this Act; and

"(B) against any Federal official referred to in section 21(a)(1) of this Act where there is alleged a failure of such official to perform any act or duty under this Act which is not discretionary.

(c)(1) Any action of the Secretary to approve a leasing program pursuant to section 18 of this Act shall be subject to judicial review only in the United States Court of Appeals for the District of Columbia.

"(2) Any action of the Secretary to approve, require modification

of, or disapprove any exploration plan or any development and production plan under this Act shall be subject to judicial review only in a United States court of appeals for a circuit in which an affected State is located.

"(3) The judicial review specified in paragraphs (1) and (2) of this subsection shall be available only to a person who (A) participated in the administrative proceedings related to the actions specified in such paragraphs, (B) is adversely affected or aggrieved by such action, (C) files a petition for review of the Secretary's action within sixty days after the date of such action, and (D) promptly transmits copies of the petition to the Secretary and to the Attorney General of the United States.

* * *

(6) The court of appeals conducting a proceeding pursuant to this subsection shall consider the matter under review solely on the record made before the Secretary. The findings of the Secretary, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The court may affirm, vacate, or modify any order or decision or may remand the proceedings to the Secretary for such further action as it may direct.

* * *

(d) Except as to causes of action which the court considers of greater importance, any action under this section shall take precedence on the docket over all other causes of action and shall be set for hearing at the earliest practical date and expedited in every way.

"(e) Notwithstanding any other provision of this section, this section shall not apply to any action which is commenced to require compliance with any provision of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

* * *

SEC. 25. OIL AND GAS DEVELOPMENT AND PRODUCTION.—(a) (1) Prior to development and production pursuant to an oil and gas lease or maintained under this Act in any region of the outer Continental Shelf, other than the Gulf of Mexico or the Santa Barbara Channel, the lessee shall submit a development and production plan (hereinafter in this section referred to as a 'plan') to the Secretary, for approval pursuant to this section.

* * *

(d) (1) After review of a plan submitted pursuant to this section in accordance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), the Secretary shall declare his findings as to whether development and production pursuant to the lease or set of leases (which set includes such lease and other leases which cover adjacent or nearby areas to the area covered by such lease) is a major Federal action.

"(2) The Secretary shall at least once, prior to major development in any area or region of the outer Continental Shelf, other than the Gulf of Mexico or the Santa Barbara Channel, declare development and production pursuant to a lease or set of leases to be a major Federal action.

* * *

(f) If developmet and production pursuant to a plan is not found to be a major Federal action, the Governor of any affected State, any appropriate Regional Outer Continental Shelf Advisory Board, and the executive of any affected local government area shall have ninety days from receipt of the plan from the Secretary to submit comments and recommendations. Such comments and recommendations shall be made available to the public upon request. In addition, any interested person may submit comments and recommendations.

* * * * * * *The Secretary shall require modification of a plan if he determines that the lessee has failed to make adequate provision in such plan for safe oper-*

ations on the lease area or for protection of the human, marine, or coastal environment, except that any modification requested by the Secretary shall be, to the maximum extent practicalbe, consistent with the coastal zone management programs of affected States approved pursuant to section 306 of the Coastal Zone Management Act of 1972 (16 U.S.C. 1455). The Secretary shall disapprove a plan only (A) if the lessee fails to demonstrate that he can comply with the requirements of this Act and other applicable Federal law, (B) if the plan is not and cannot be made, to the maximum extent practicable, consistent with the coastal zone management programs of affected States approved pursuant to section 306 of the Coastal Zone Management Act of 1972 (16 U.S.C. 1455), or (C) if because of exceptional geological conditions in the lease area, exceptional resource values in the marine or coastal environment, or other exceptional circumstances, the proposed plan cannot be modified to insure a safe operation.

* * *

OFFSHORE OIL SPILL POLLUTION FUND

* * *

SEC. 302. (a) There is established within the Department of Transportation an Offshore Oil Pollution Compensation Fund. The Fund may sue or be sued in its own name.

* * *

SEC. 303. The discharge of oil from any offshore facility or vessel, in quantities which the President under section 311(b) of the Federal Water Pollution Control Act (33 U.S.C. 1321(b)) determines to be harmful, is prohibited.

* * *

SEC. 305. (a) Whenever any oil is discharged from any offshore facility or vessel in violation of section 303 of this title, the President shall act to remove or arrange for the removal of such oil, unless he determines such removal will be done properly and expeditiously by the owner or operator of such offshore facility or vessel.

* * *

RECOVERABLE DAMAGES

SEC. 307. Damages may be recovered under this title for—

(1) the value of any loss or injury, at the time such loss or injury is incurred, with respect to any real or personal property which is damaged or destroyed as a result of a discharge of oil;

(2) (A) the cost to the owner of restoring, repairing, or replacing any real or personal property which is damaged or destroyed by a discharge of oil, (B) any income necessarily lost by such owner during the time such property is being restored, repaired, or replaced, and (C) any reduction in the value of such property caused by such discharge;

(3) any loss of income or impairment of earning capacity for a period of not to exceed five years due to damages to real or personal property, or to natural resources, without regard to ownership of such property or resources, which are damaged or destroyed by a discharge of oil, if the claimant derives at least 25 per centum of his earnings from activities which utilize such property or natural resources;

(4) any costs and expenses incurred by the Federal Government or any State government in the restoration, repair, or replace of natural resources which are damaged or destroyed by a discharge of oil; and

CLEANUP COSTS AND DAMAGES

SEC. 308. (a) All cleanup costs incurred by the President, the Secretary, or any other Federal, State, or local official or agency, in connection with a discharge of oil shall be borne by the owners and operator of the offshore facility or vessel from which the discharge occurred.

(b) Notwithstanding any other provision of law and except as provided in subsection (d) of this section, the owner and operator of an offshore facility shall be held jointly and severally liable, without regard to fault, for damages which result from a discharge of oil from such offshore facility. Such liability shall not exceed $35,000,000, except that if it can be shown that (1) such damages were the result of gross negligence or willful misconduct within the privity and knowledge of such owner or operator, or of the person in charge of such offshore facility, or (2) such discharge was the result of a violation of applicable safety, construction, or operating standards or regulations, such owner and operator shall be jointly and severally liable for the full amount of such damages.

(c) Notwithstanding any other provision of law and except as provided in subsection (d) of this section, the owner and operator of a vessel shall be jointly and severally liable, without regard to fault, for damages which result from a discharge of oil from such vessel. Such liability shall not exceed $150 per gross registered ton, except that if it can be shown that (1) such damages were the result of gross negligence or willful misconduct within the privity and knowledge of such owner or operator, or of the person in charge of such vessel, or (2) such discharge was the result of a violation of applicable safety, construction, or operating standards or regulations, such owner and operator shall be jointly and severally liable for the full amount of such damages.

(d) No liability shall be imposed under subsection (b)(c) of this section to the extent the owner or operator establishes that the discharge of oil or that any damages resulting from such discharge were caused by (1) an act of war, or (2) the negligent or intentional act of the damaged party or of any third party (including any government entity). . . .

. . .

FEE COLLECTION; DEPOSITS IN REVOLVING ACCOUNT

SEC. 310. (a)(1) The Secretary shall levy and the Secretary of the Treasury shall collect a fee of not to exceed 3 cents per barrel on oil obtained from the Outer Continental Shelf, which shall be imposed on the owner of the oil when such oil is produced.

(2) The collection of the fee imposed pursuant to paragraph (1) of this subsection shall continue until the amount in the revolving account totals at least $100,000,000, whereupon imposition of such fee may be suspended by the Secretary. Thereafter, the Secretary shall, from time to time and in accordance with the limitation set forth in the first sentence of paragraph (1) of this subsection, modify by regulation the amount of the fee, if any, to be collected under this subsection in order to maintain the revolving account at a level of not less than $100,000,000 and not more than $200,000,000.

. . .

TRUSTEE OF NATURAL RESOURCES

SEC. 312. (a) The President, or the authorized representative of any State, shall act on behalf of the public as trustee of the natural resources to recover for damages to such resources. Sums recovered shall be used to restore, rehabilitate, or acquire the equivalent of such natural resources by the appropriate agencies of the Federal Government, or the State government.

5. The Carter Administration generally supports the proposed OCSLA legislation but feels that Senate Bill 9 goes too far in compelling Interior to accept governors' recommendations. Also the Administration prefers a comprehensive oil spill program in lieu of the amendments to OCSLA. An Administration bill reflecting these and other concerns was promised by Andrus. The legislation submitted by the Administration for the creation of a new Energy Department provides for that new department to set long-term OCS production goals but leaves overall control of the leasing program with the Interior Department.

6. The law in the OCS field will likely continue to change rapidly as national energy policy evolves. The impact of OCS oil on that policy is difficult to ascertain at this time due to the large degree of uncertainty as to the amount of recoverable OCS oil. The United States Geological Survey estimates that possible offshore yields at 95% chance of recovery and 5% chance of recovery respectively are 4-70 billion barrels of oil and 20-256 trillion cubic feet of natural gas. Most of these reserves are located in Federal lands. In 1976 the United States consumed over six billion barrels of oil and 25 trillion cubic feet of natural gas.

SECTION 3. DEEPWATER PORTS

To compensate for the disparity between domestic production and demand the United States imports over six million barrels of oil per day. The amount of imported oil has risen sharply in the last few years and with domestic production declining and energy demand still growing it is projected that imports will continue to increase. Supertankers, several times larger than any tanker existing only a few years ago, are rapidly becoming the standard vehicle for transporting oil over long distances. Although the United States has few ports deep enough to accomodate these tankers, supertankers are still used for oil delivery to the United States. However, before these tankers enter the port part of the oil is pumped into several smaller ships. This decreases the draft of the tanker and allows it to proceed into the port. Transportation costs of imported oil would be greatly reduced if facilities that would enable supertankers to directly transfer their cargo to onshore facilities were available.

The development of deepwater ports presents a number of domestic and international legal questions. Congress resolved many of these issues in the Deepwater Port Act of 1974, 33 U.S.C. §§1501-24. That act is reproduced in Chapter Six and is accompanied there by a discussion of the regulatory scheme for

deepwater ports. Here the question of the use of the ocean beyond territorial waters will be considered.

Approval for the construction of two deepwater ports on the continental shelf of the United States has been granted. One will be located 26 miles off the Texas coast and the other will be 19 miles off the Louisiana coast.

CONVENTION ON THE HIGH SEAS
450 U.N.T.S. 82, 13 U.S.T. 2312, T.I.A.S. No. 5200
(In force Sept. 30, 1962)

Article 2

The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by the other rules of international law. It comprises, inter alia, both for coastal and non-coastal States:

(1) Freedom of navigation;
(2) Freedom of fishing;
(3) Freedom to lay submarine cables and pipelines;
(4) Freedom to fly over the high seas.

These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.

CONVENTION ON THE CONTINENTAL SHELF
499 U.N.T.S. 311, 15 U.S.T. 471, T.I.A.S. No. 5578
(In force June 10, 1964)

Article 5

1. The exploration of the continental shelf and the exploitation of its natural resources must not result in any unjustifiable interference with navigation, fishing or the conservation of the living resources of the sea, nor result in any interference with fundamental oceanographic or other scientific research carried out with the intention of open publication.

2. Subject to the provisions of paragraphs 1 and 6 of this article, the coastal State is entitled to construct and maintain or operate on the continental shelf installations and other devices necessary for its exploration and the exploitation of its natural resources, and to establish safety zones around such installations and devices and to take in those zones measures necessary for their protection.

3. Neither the installations or devices, nor the safety zones around them, may be established where interference may be caused to the use of recognized sea lanes essential to international navigation.

CONVENTION ON THE TERRITORIAL SEA AND THE CONTIGUOUS ZONE
516 U.N.T.S. 205, 15 U.S.T. 1606, T.I.A.S. No. 5639
(In force Sept. 10, 1964)

Article 9

Roadsteads which are normally used for the loading, unloading and anchoring of ships, and which would otherwise be situated wholly or partly outside the outer limit of the territorial sea, are included in the territorial sea. The coastal State must clearly demarcate such roadsteads and indicate them on charts together with their boundaries, to which due publicity must be given.

DEEPWATER PORT ACT OF 1974. JOINT REPORT TOGETHER WITH ADDITIONAL VIEWS OF COMMITTEE ON COMMERCE, INTERIOR AND INSULAR AFFAIRS AND PUBLIC WORKS TO ACCOMPANY S. 4706 (Oct. 2, 1974) pp. 7-8.

INTERNATIONAL LEGAL BASIS

As far as can be determined, a U.S. deepwater port constructed in international waters would be the first such facility located outside a nation's territorial limits anywhere in the world. A nation exercises nearly absolute sovereignty over its territorial waters by virtue of the International Convention on the Territorial Sea and Contiguous Zone. In addition, the Convention on the Continental Shelf authorizes a coastal nation to erect structures on its continental shelf for the purpose of exploring and exploiting the mineral and non-living resources, and provides coastal nations with jurisdiction over sedentary living species on or under the seabed. No existing international law, treaty, or agreement specifically recognizes the construction and operation of deepwater ports as a permissible use of international waters. However, the freedom of all nations to make reasonable use of waters beyond territorial boundaries is recognized by the International Convention on the High Seas.

Testimony presented to the special joint subcommittee indicated that constructing and operating deepwater ports beyond a nation's territorial limits would constitute a "reasonable use" as contemplated by Article 2 of the Convention on the High Seas. . . .

Under the authority of this Convention, a nation might properly execute jurisdiction on the High Seas in order to license and regulate such facilities. According to the U.S. Department of State and several academic experts, the phrase *inter alia* implies that the authors of the Convention on the High Seas foresaw a need to permit a broader range of uses than the four specified in Article 2.

However, although they consider development of deepwater port facilities to be a reasonable use of the high seas under international law, the State Department also believes that it is necessary to seek multilateral agreement as encouraged in section 11 of the bill. The United States is presently seeking clarification of the legal status of deepwater ports in the United Nations Law of the Sea Conference now underway. In addition, section 22 of the bill authorizes the pursuit of international agreements with Canada and Mexico, especially with respect to environmental concerns, since the resources of those two nations will be most immediately affected by development of deepwater ports off the coast of the United States.

DEEPWATER PORT ACT OF 1974
33 U.S.C. §§ 1501 et. seq.

§ 1501. Congressional declaration of policy

* * *

(b) The Congress declares that nothing in this chapter shall be construed to affect the legal status of the high seas, the superjacent airspace, or the seabed and subsoil, including the Continental Shelf.
Pub.L. 93-627, § 2, Jan. 3, 1975, 88 Stat. 2126.

* * *

§ 1503. License for ownership, construction, and operation of deepwater port—Requirement; restrictions on utilization of deepwater port

* * *

Conditions for issuance

(c) The Secretary may issue a license in accordance with the provisions of this chapter if—

* * *

(4) he determines that the deepwater port will not unreasonably interfere with international navigation or other reasonable uses of the high seas, as defined by treaty, convention, or customary international law;

* * *

§ 1504. Procedure—Regulations; issuance, amendment, or rescission; scope

* * *

Additional regulations; criteria for site evaluation and preconstruction testing

(b) The Secretary, in consultation with the Secretary of the Interior and the Administrator of the National Oceanic and Atmospheric Administration, shall, as soon as practicable after January 3, 1975, prescribe regulations relating to those activities involved in site evaluation and preconstruction testing at potential deepwater port locations that may (1) adversely affect the environment; (2) interfere with authorized uses of the Outer Continental Shelf; or (3) pose a threat to human health and welfare. Such activity may thenceforth not be undertaken except in accordance with regulations prescribed pursuant to this subsection. Such regulations shall be consistent with the purposes of this chapter.

* * *

§ 1509. Marine environmental protection and navigational safety—Regulations and procedures

(a) Subject to recognized principles of international law, the Secretary shall prescribe by regulation and enforce procedures with respect to any deepwater port, including, but not limited to, rules governing vessel movement, loading and unloading procedures, designation and marking of anchorage areas, maintenance, law enforcement, and the equipment, training, and maintenance required (A) to prevent pollution of the marine environment, (B) to clean up any pollutants which may be discharged, and (C) to otherwise prevent or minimize any adverse impact from the construction and operation of such deepwater port.

* * *

Safety zones; designation; construction period; permitted activities

(d)(1) Subject to recognized principles of international law and after consultation with the Secretary of the Interior, the Secretary of Commerce, the Secretary of State, and the Secretary of Defense, the Secretary shall designate a zone of appropriate size around and including any deepwater port for the purpose of navigational safety. In such zone, no installations, structures, or uses will be permitted that are incompatible with the operation of the deepwater port. The Secretary shall by regulation define permitted activities within such zone. The Secretary shall, not later than 30 days after publication of notice pursuant to section 1504(c) of this title, designate such safety zone with respect to any proposed deepwater port.

§ 1510. International agreements

The Secretary of State, in consultation with the Secretary, shall seek effective international action and cooperation in support of the policy and purposes of this chapter and may formulate, present, or support specific proposals in the United Nations and other competent international organizations for the development of appropriate international rules and regulations relative to the construction, ownership, and operation of deepwater ports, with particular regard for measures that assure protection of such facilities as well as the promotion of navigational safety in the vicinity thereof.

§ 1521. Negotiations with Canada and Mexico; report to Congress

The President of the United States is authorized and requested to enter into negotiations with the Governments of Canada and Mexico to determine:

(1) the need for intergovernmental understandings, agreements, or treaties to protect the interests of the people of Canada, Mexico, and the United States and of any party or parties involved with the construction or operation of deepwater ports; and

(2) the desirability of undertaking joint studies and investigations designed to insure protection of the environment and to eliminate any legal and regulatory uncertainty, to assure that the interests of the people of Canada, Mexico, and the United Staes are adequately met.

The President shall report to the Congress the actions taken, the progress achieved, the areas of disagreement, and the matters about which more information is needed, together with his recommendations for further action.

UNITED STATES OF AMERICA: DRAFT ARTICLES FOR A CHAPTER ON THE ECONOMIC ZONE AND THE CONTINENTAL SHELF U.N. Doc. A/CONF. 62/C.2/L/47 (August 8, 1974)

Article 28. Installations

1. The coastal State shall have the exclusive right to authorize and regulate on the continental shelf the construction, operation and use of artificial islands and installations for the purpose of exploration or exploitation of natural resources or for other economic purposes, and of any installation which may interfere with the exercise of the rights of the coastal State.

2. The coastal State may, where necessary, establish reasonable safety zones around such off-shore installations in which it may take appropriate measures to ensure the safety both of the installations and of navigation. Such safety zones shall be designed to ensure that they are reasonably related to the nature and function of the installation. Ships of all nationalities must respect these safety zones.

3. The breadth of the safety zones shall be determined by the coastal State and shall conform to applicable international standards in existence or to be established by the Inter-Governmental Maritime Consultative Organization re-

garding the establishment and breadth of safety zones. In the absence of such additional standards, safety zones around installations for the exploration and exploitation of non-renewable resources of the sea-bed and subsoil may extend to a distance of 500 metres around the installations, measured from each point of their outer edge.

4. Due notice must be given of the construction of any such installations and the extent of safety zones, and permanent means for giving warning of the presence of such installations must be maintained. Any such installations which are abandoned or disused must be entirely removed.

5. States shall ensure compliance by vessels of their flag with applicable international standards regarding navigation outside the safety zones but in the vicinity of such off-shore installations.

6. Installations and safety zones around them may not be established where interference may be caused to the use of recognized sea lanes essential to international navigation.

7. For the purpose of this section, the term "installations" refers to artificial off-shore islands, facilities, or similar devices, other than those which are mobile in their normal mode of operation at sea. Installations shall not afford a basis for a claim to a territorial sea or economic zone, and their presence does not affect the delimitation of the territorial sea or economic zone of the coastal State.

THIRD UNITED NATIONS LAW OF
THE SEA CONFERENCE
REVISED SINGLE NEGOTIATING TEXT, Part 2
A/CONF. 62/WP.8 Rev. 1/ Part II 6 May 1976

Article 44

1. In an area beyond and adjacent to its territorial sea, described as the exclusive economic zone, the coastal State has:

...

(b) Exclusive rights and jurisdiction with regard to establishment and use of all artificial islands, installations, and structures;

(c) Exclusive jurisdiction with regard to (i) other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents, and winds;

...

NOTES

Compare the Deepwater Port Act with the present and proposed OCS regulatory structure. Section 1508(b)(1) of the Deepwater Port Act gives governors of adjacent states veto power over deepwater port development beyond the state submerged lands. Are there policy justifications for the different treatment of states in OCS and deepwater port decision-making?

SECTION 4. FLOATING NUCLEAR POWER PLANTS

The ocean offers two scarce resources for nuclear power plants--space and water. Nuclear plants require a vast amount of water for cooling. Even if the coolant is recycled large quantities are lost through evaporation. In fact a nuclear plant can consume as much water as a good size city. To meet this need for water and to supply energy to the large populations of the coastal zone, many existing and planned facilities are located near the coast and use brackish or saline water for cooling.

Under present regulations a land based nuclear power plant requires a site of 400-500 acres. Such land is often scarce in the coastal area and public opposition to the construction nearby of a nuclear plant further reduces the number of available sites. This opposition in part reflects the acute sensitivity of the coastal environment to the impact of construction of such a facility and the subsequent thermal pollution from cooling operations.

Many contend that the construction of floating nuclear power plants (FNNP) offers a solution to these problems and that it offers cost savings and fewer adverse environmental impacts than land based plants. The oceans would satisfy the demands of cooling water and a plant site. Costs are hoped to be lowered due to the potential for centralization of production and standardization of plants. By placing the plant some distance from the coastal urban areas and sensitive wetland areas adverse environmental impacts may be reduced.

COASTAL EFFECTS OF OFFSHORE ENERGY SYSTEMS,
UNITED STATES CONGRESS OFFICE OF TECHNOLOGY ASSESSMENT
November 1976, pp. 197-203, 230-237.

Nothing on the scale of the offshore complex of floating plants and protective breakwater has ever been built in ocean waters anywhere in the world. More cubic yards of rock and concrete will go into the breakwater that will create a lagoon of calm water for the plants and shield them from the pounding of ocean waves than went into many major dams in the United States. The gantry crane in the Florida shipyard where the plants will be built could straddle the dome of the U.S. Capitol.

The powerplants will be assembled by Offshore Power Systems, a subsidiary of Westinghouse Electric Corp., at a shipyard on a manmade island near Jacksonville, Fla., 8 miles up the St. John's River from the east coast.

The platform for each plant will be a steel barge measuring nearly 400 feet square and 44 feet deep, reinforced with bulkheads to form a honeycomb of watertight compartments. A pressurized water reactor (PWR) similar to

Westinghouse reactors now operating in land-based powerplants will be mounted on each barge inside a 17-story domed containment structure with steam turbines, generators, and office buildings clustered around it.

The domed containment structure will rise nearly 18 stories above the ocean surface and from the shore will look much like the distant skyline of a small city.

While the floating plants are being built, construction workers will build the largest structure ever placed in ocean waters—a massive, curving breakwater of 5.6 million tons of stone and cast concrete that will span 49 acres of ocean floor and rise 64 feet above the water surface.

Powerplants will be towed at intervals of 2 years from Florida, moored, sealed in the breakwater with a wall of concrete caissons, and connected to 4 miles of underwater cable leading to shore and the power distribution grid. Public Service plans are to have the first plant operational in 1985 and the second in 1987.

* * *

The plants have a design life of 40 years, after which they may be shut down and decommissioned.

* * *

In this study, OTA has analyzed available information on costs, benefits, environmental impact, safety, waste disposal systems, transportation, and decommissioning activities associated with the floating plants. The study does not attempt to evaluate general controversies about the safety and performance of nuclear plants; these are beyond the scope of the coastal effects analysis. It concentrates, instead, on exploring differences between the designs of floating and land-based plants and comparing the advantages and disadvantages of each.

As a result of this comparative analysis, the study finds that:

- Although the costs of the first two floating nuclear plants, AGS 1 and 2, are about the same as the costs of a similar land-based plant, volume production and standardization eventually could slow down the rapid escalation of capital costs of nuclear powerplants.

Offshore siting of nuclear plants would reduce thermal pollution and eliminate disruption of marshlands and estuaries that would be associated with land-based or shoreline nuclear installations.

Routine operations would produce less air pollution than would routine operations of a coal-fired plant equipped with flue gas desulfurization and other advanced pollution control equipment.

The NRC has not evaluated and does not plan to evaluate risks from accidents in floating nuclear plants comprehensively enough to permit either a general comparison of the relative risks from land-based and floating plants or an assessment of the specific risks associated with deploying Atlantic Generating Station Units 1 and 2.

Several technical problems of design and operation remain to be resolved, including procedures for transporting nuclear fuel to a floating plant and carrying radioactive wastes to shore, the process of decommissioning a floating plant, and the techniques of towing plants from Florida to the Mid-Atlantic coast.

There do not seem to be any significant differences between land-based and floating powerplants as to releases of radioactive material and other pollutants during routine operations.

Although the nuclear reactor steam supply and turbine generator systems and the floating barge are, separately, proven technologies, the combination is not. In addition, there are unique features including the barge-to-cable connection, the breakwater, and the mooring system that have not been tested by experience.

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Accident Risks

The most serious accident possible in an operating nuclear powerplant is overheating that causes the fuel core to melt. If the upper containment of a powerplant were to rupture as a result of a core-melt, the radioactive materials released into the atmosphere could have severe health and economic impacts. No core-melt accident has occurred in any commercial light water reactor and the 1975 *Reactor Safety Study (WASH-1400)*, commonly known as the Rasmussen Report, estimated the probability of such an accident in a land-based reactor as 1 in 20,000 years of reactor operation. *WASH-1400* also concluded that only about one in six pressurized water reactor core-melt accidents would lead to the release of significant amounts of radioactive materials to the open air.

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Taking all the differences that might alter the probability of a core-meltdown into account, OTA's preliminary analysis indicates that the probability of a core-meltdown accident in a floating nuclear powerplant is comparable to the value of 1 in 20,000 per year of reactor operation that was calculated for land-based plants in *WASH–1400*, although substantial additional effort would be required to validate that conclusion. The effects of a towing and continued operation in a marine environment were not analyzed in detail because that would require an examination of individual component failure rates that is beyond the scope of this study.

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Consequences of a Core-Melt

The OTA analysis indicates that the consequences of a core-melt on a floating nuclear plant may be significantly different from those for a land-based plant. One reason is that in the case of a core-melt on a floating plant the core eventually would melt through the bottom of the barge hull and release large quantities of radioactive material directly into the ocean, where it could contaminate beaches and be taken up into the food chain. While a core-melt in a land-based plant could also lead to waterborne contamination, e.g., if the core entered an aquifer after melting through the bottom of the containment, such effects were not considered in detail in *WASH-1400*. Concern about this type of release prompted the Advisory Committee on Reactor Safeguards to request a special study of the effects of accidental releases of radioactive materials into water as part of its review of floating nuclear powerplants. The NRC subsequently decided to conduct a Liquid Pathways Generic Study to analyze the effects of such releases from both land-based and floating nuclear plants.

A second reason to expect different consequences for a floating plant is that it appears that in case of a core-melt a release of radioactive materials to the atmosphere is about seven times more likely with the reactor system used in the floating plant than with the *WASH-1400* land-based PWR plant. On the other hand, this may be offset to some extent by design features of floating plants which could reduce the amount of radioactive material released in case of an accident.

• • • First, in the case of a core-melt in a floating plant the core would eventually melt through the bottom of the platform and contact the water on which the plant was floating. This probably would produce large quantities of steam because boiling conditions could be expected to exist at the

surface of the core for a day or more after melt through. This steam could in turn transport into the atmosphere significant quantities of radioactive material, including fine particles produced in the interaction of the molten core with water. While the possible interaction of a molten core with groundwater is a potential mechanism for similar secondary atmospheric releases in some land-based plants, there are some factors that may lead to differences in the effects of such releases on the generic risks of floating plants as compared to land-based plants. For one thing, the potential for such releases exists for all plants located on water, and only for some land-based plants, depending on the site. In addition, the release would occur later in time after initiation of a core-melt sequence in a land-based plant because of the thicker containment base mat that the core would have to melt through before encountering groundwater; this could reduce the population at risk by allowing additional time for evacuation. However, since *WASH-1400* did not consider this type of release, further analysis would be needed to determine whether the potential for such secondary releases leads to a difference in the generic risks of land-based and floating plants.

A second possible generic difference between land-based and floating plants is the fact that floating plants can be located away from shore, which guarantees a permanent zone of zero resident population for several miles around the plant. This could reduce the expected consequences of an atmospheric release compared to some onshore sites. However, this difference applies only to offshore sites, and would not affect nearshore sites as compared to land-based plants located near the coast.

In summary, OTA's preliminary analysis indicates that the conclusions of *WASH-1400* about the expected consequences of atmospheric releases cannot be directly applied to the floating nuclear powerplant. Furthermore, substantial additional analysis would be required to enable a generic comparison of the types and effects of atmospheric releases resulting from core-melt accidents in land-based and floating nuclear plants.

NOTES

1. Construction of a complex to manufacture FNPPs is presently underway as are procedures for the licensing of two FNPPs off the New Jersy coast. The single assembly complex could produce over 50 FNNPs over the next 20 years.

2. Although there are possible sites for FNPPs beyond territorial waters present proposals all involve sites within territorial waters. There is some doubt as to whether the Nuclear Regulatory Commission could license a plant beyond territorial waters under the present law. Section 2131 of the Atomic Energy Act, 42 U.S.C. 2131 et. seq. provides:

> It shall be unlawful except as provided in section 91 of this Act for any person within the United States to transfer or receive in interstate commerce, manufacture, produce, transfer, acquire, possess, use import, or export any utilization or production facility except in accordance with a license issued by the Commission pursuant to section 103 or 104 of this Act.

Section 103 states, inter alia, (d) No license under this section may be given to any person for activites which are not under or within the jurisdiction of the United States....

There is a similar question whether the Price-Anderson Act, which limits liability in the event of a nuclear accident, would apply to a FNNP outside of territorial waters.

3. There are several methods for states to oppose construction of a FNNP. Nuclear plants are subject to a number of laws. The two most important in the licensing procedure are the Atomic Energy Act and NEPA. The numerous hearings, licenses and permits required under these and other laws provide many opportunities for state intervention. Other powers of the state include the certification of consistency under the CZMA and the state's police power. These powers could be significantly reduced if the current question of Federal preemption of nuclear power plant regulation is resolved against the states.

SECTION 5. DEEP SEABED MINING

A. Ownership of the Resources

UNITED NATIONS RESOLUTION

2574 (XXIV). Question of the reservation exclusively for peaceful purposes of the sea-bed and the ocean floor, and the subsoil thereof, underlying the high seas beyond the limits of present national jurisdiction, and the use of their resources in the interests of mankind

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The General Assembly,

Recalling its resolution 2467 A (XXIII) of 21 December 1968 to the effect that the exploitation of the resources of the sea-bed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction should be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States, taking into account the special interests and needs of the developing countries,

Convinced that it is essential, for the achievement of this purpose, that such activities be carried out under an international régime including appropriate international machinery,

Noting that this matter is under consideration by the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction,

Recalling its resolution 2340 (XXII) of 18 December 1967 on the importance of preserving the sea-bed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction from actions and uses which might be detrimental to the common interests of mankind,

Declares that, pending the establishment of the aforementioned international régime:

(*a*) States and persons, physical or juridical, are bound to refrain from all activities of exploitation of the resources of the area of the sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction;

(*b*) No claim to any part of that area or its resources shall be recognized.

1833rd plenary meeting,
15 December 1969.

2749 (XXV). Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction

The General Assembly,

Recalling its resolutions 2340 (XXII) of 18 December 1967, 2467 (XXIII) of 21 December 1968 and 2574 (XXIV) of 15 December 1969, concerning the area to which the title of the item refers,

Affirming that there is an area of the sea-bed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction, the precise limits of which are yet to be determined,

Recognizing that the existing legal régime of the high seas does not provide substantive rules for regulating the exploration of the aforesaid area and the exploitation of its resources,

Convinced that the area shall be reserved exclusively for peaceful purposes and that the exploration of the area and the exploitation of its resources shall be carried out for the benefit of mankind as a whole,

Believing it essential that an international régime applying to the area and its resources and including appropriate international machinery should be established as soon as possible,

Bearing in mind that the development and use of the area and its resources shall be undertaken in such a manner as to foster the healthy development of the world economy and balanced growth of international trade, and to minimize any adverse economic effects caused by the fluctuation of prices of raw materials resulting from such activities,

Solemnly declares that:

1. The sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction (hereinafter referred to as the area), as well as the resources of the area, are the common heritage of mankind.

2. The area shall not be subject to appropriation by any means by States or persons, natural or juridical, and no State shall claim or exercise sovereignty or sovereign rights over any part thereof.

3. No State or person, natural or juridical, shall claim, exercise or acquire rights with respect to the area or its resources incompatible with the international régime to be established and the principles of this Declaration.

4. All activities regarding the exploration and exploitation of the resources of the area and other related activities shall be governed by the international régime to be established.

5. The area shall be open to use exclusively for peaceful purposes by all States, whether coastal or land-locked, without discrimination, in accordance with the international régime to be established.

6. States shall act in the area in accordance with the applicable principles and rules of international law, including the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted by the General Assembly on 24 October 1970, in the interests of maintaining international peace and security and promoting international co-operation and mutual understanding.

7. The exploration of the area and the exploitation of its resources shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States, whether land-locked or coastal, and taking into particular consideration the interests and needs of the developing countries.

8. The area shall be reserved exclusively for peaceful purposes, without prejudice to any measures which have been or may be agreed upon in the context of international negotiations undertaken in the field of disarmament and which may be applicable to a broader area. One or more international agreements shall be concluded as soon as possible in order to implement effectively this principle and to constitute a step towards the exclusion of the sea-bed, the ocean floor and the subsoil thereof from the arms race.

9. On the basis of the principles of this Declaration, an international régime applying to the area and its resources and including appropriate international machinery to give effect to its provisions shall be established by an international treaty of a universal character, generally agreed upon. The régime shall, *inter alia,* provide for the orderly and safe development and rational management of the area and its resources and for expanding opportunities in the use thereof, and ensure the equitable sharing by States in the benefits derived therefrom, taking into particular consideration the interests and needs of the developing countries, whether land-locked or coastal.

10. States shall promote international co-operation in scientific research exclusively for peaceful purposes:

(*a*) By participation in international programmes and by encouraging co-operation in scientific research by personnel of different countries;

(*b*) Through effective publication of research programmes and dissemination of the results of research through international channels;

(*c*) By co-operation in measures to strengthen research capabilities of developing countries, including the participation of their nationals in research programmes.

No such activity shall form the legal basis for any claims with respect to any part of the area or its resources.

11. With respect to activities in the area and acting in conformity with the international régime to be established, States shall take appropriate measures for and shall co-operate in the adoption and implementation of international rules, standards and procedures for, *inter alia*:

(*a*) The prevention of pollution and contamination, and other hazards to the marine environment, including the coastline, and of interference with the ecological balance of the marine environment;

(*b*) The protection and conservation of the natural resources of the area and the prevention of damage to the flora and fauna of the marine environment.

12. In their activities in the area, including those relating to its resources, States shall pay due regard to the rights and legitimate interests of coastal States in the region of such activities, as well as of all other States, which may be affected by such activities. Consultations shall be maintained with the coastal States concerned with respect to activities relating to the exploration of the area and the exploitation of its resources with a view to avoiding infringement of such rights and interests.

13. Nothing herein shall affect:

(*a*) The legal status of the waters superjacent to the area or that of the air space above those waters;

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

14. Every State shall have the responsibility to ensure that activities in the area, including those relating to its resources, whether undertaken by governmental agencies, or non-governmental entities or persons under its jurisdiction, or acting on its behalf, shall be carried out in conformity with the international régime to be established. The same responsibility applies to international organizations and their members for activities undertaken by such organizations or on their behalf. Damage caused by such activities shall entail liability.

15. The parties to any dispute relating to activities in the area and its resources shall resolve such dispute by the measures mentioned in Article 33 of the Charter of the United Nations and such procedures for settling disputes as may be agreed upon in the international régime to be established.

1933rd plenary meeting,
17 December 1970.

REPORT ON THE DEEP SEABED HARD MINERALS ACT,
COMMITTEE ON INTERIOR AND INSULAR AFFAIRS, No. 754
94th Congress (1976) pp. 5-14

BACKGROUND OF MANGANESE NODULE MINING

The area lying seaward of the continental margin, generally referred to as the deep seabed, is known to be rich in mineral resources. For the moment very little is known about the *subsurface* potential of the deep seabed. With respect to the surface of the seabed, however, we know that extensive deposits of manganese nodules containing over 20 metallic elements are abundant. Potentially minable nodules will contain at least 25 percent manganese, 1.25 percent nickel, 1 percent copper and 0.22 percent cobalt.

There are three types of mining systems presently being considered for manganese nodule mining:

(*a*) Continuous path dredging involves a suspended conduit that connects a dredge head and the ship, which transverses the mine site, collecting ore over a certain sweep width.

(*b*) Fixed area dredging is conducted by a collecting device whose central portion remains stationary on the ocean bottom until ore lying within the radius of the sweeping device has been collected. During the process, the surface ship or platform remains stationary above.

(*c*) Continuous line bucket dredging involves a long continuous rope to which are attached dredge buckets. As the ship moves sideways, the loop of dredge buckets is dragged across the ocean bottom, scooping up ore.

Pilot tests of the continuous path dredging system and the continuous line bucket system have been conducted, but few of the results have been publicly released. The technological sophistication of all these mining devices will make them both expensive and design-sensitive to particular types of nodule deposits and surrounding topography.

Several metallurgical processes have been experimentally tried in the winning of metals from manganese nodules, however, only hydrometallurgical techniques are presently being considered for commercial processing. The metallurgical process is specifically sensitive to such factors as the physical characteristics of the nodules, their iron content, trace metal content, assay or grade and detrital materials. This is a critical aspect of nodule mining—the degree to which both equipment development and type of metallurgical process are dependent upon definite knowledge of the mine site to be developed.

NEED FOR SEABED MINERALS

The seabed minerals are important. The major products will be copper, nickel, manganese, cobalt, and molybdenum. It is well known that all of these metals are essential to a modern industrial economy. Manganese is vital in the production of all steel and imparts properties of toughness to certain steels. Nickel is the essential ingredient in stainless steels and in high temperature—high performance alloys. Cobalt is of great utility in making magnets and is essential in the making of "space age" alloys. Molybdenum is an essential ingredient in special steels. The uses of copper for electrical apparatus of all kinds and in piping and hardware are well known.

What is not well known about these materials is that we are either not self sufficient or entirely lack domestic supplies. We have only one small nickel mine and must import over 70 percent of our total consumption of nickel. We have no domestic cobalt or manganese production and are 100 percent dependent on new primary supply from imports. Although we are the largest copper producer in the world, we are not self sufficient, and our copper imports have been predicted to increase. Today we import 15 percent of our copper.

The effect of these imports on our balance of payments is substantial. In 1975, imports amounted to almost $1,000,000,000. In future years this is expected to rise rapidly. Recovery of seabed minerals could almost eliminate this outflow of dollars by 1990.

The technology of seabed resource development is at hand and production is certain to occur between now and 1980 if secure legal arrangements are achieved by the passage of this legislation. Several companies have dredged nodules from the deep ocean in substantial quantity. At least two successful processes for extracting metals from the deep seabed ores (manganese nodules) have been tested in pilot plants. The pace of technology is further illustrated by the recent formation of three separate international consortia to undertake engineering development of means of nodule recovery.

These considerations alone may not demonstrate a need for urgency with respect to the development of the deep seabeds; however, other factors do create a degree of urgency. These involve our lead in prospecting, technology, and marketing, as well as the need to maintain industry initiative and momentum and the need to encourage pioneering industrial activity which may give rise eventually to even greater mineral resources benefits in the oceans.

NEED FOR INVESTMENT GUARANTEE

* * *

The technology which is currently being developed for nodule mining is extremely sophisticated and expensive. The oceanographic ship and its equipment used in the prospecting phase alone can cost $1,500-

$4,000 per day, while the costs jump to $2,500-$5,000 per day when more intensive exploration work begins. Shipboard equipment must include highly complex devices for acoustical, optical and magnetic observation, together with grab samplers, prospecting dredges, and box and piston corers for sampling.

From what we know, our technology, both in the systems which must be used to mine in approximately 15,000 feet of water where these nodules are found and in the metallurgical processes which must be used to win the metals, is advanced beyond the other countries, Japan, Germany, France, Great Britain, and the Soviet Union who have also shown an immediate interest in deep sea mining. Nevertheless, our technological lead is fragile. If others develop manganese nodules before we do and obtain an important marketing advantage, the resource will be developed but, at least for some time to come, we will still be importing it. Moreover, we may see our companies flee the United States to engage in joint ventures under the flags of other countries. This would decrease the possibility that manganese nodule mining would become a new United States industry.

It is, therefore, incumbent upon the Congress to assure that corporate initiative and technological achievement are not stifled by the United States' own actions. Indeed, it is important that corporate initiative be encouraged. If it is, we may begin to see production from ocean nodules as early as 1978 and substantial commercial production underway not later than 1982.

For this reason, the Committee believes that the investment guarantee provisions of S. 713 are needed and are in the national interest.

The technology is available. Under existing law the freedom of the seas rule permits American companies to mine nodules today. It is to a large extent the uncertain future of the legal situation which is inhibiting exploitation. Large sums of money are required to carry out final engineering work and to erect complex mining equipment and metallurgical plants. Industry must have the assurance of being able to mine a particular ore from a patricular site long enough to achieve a return on its investment. Industry needs the assurance that any future Law of the Sea treaty will not in effect expropriate their investment and put them out of economic operation. This legislation provides the assurances that are necessary for industry to move ahead and at the same time provides the regulation—non-existent now—which will ensure that development of the deep seabed will be carried out in conformance with an express public policy and sound environmental practices.

It should be noted that in the past the United States has indicated that any Law of the Sea treaty must guarantee access to seabed minerals under reasonable conditions. If, in fact, this is the kind of treaty ratified by the United States there would be little, if any, payment to industry under this bill. S. 713 does not provide insurance against the normal risks of a pioneer business. It is solely directed toward changes in existing international law agreed to by the United States.

RELATIONSHIP TO EXISTING INTERNATIONAL LAW

S. 713 is entirely consistent with existing international law, and does not in any way deprive other states of any of their existing rights. In fact S. 713 is grounded on three international law doctrines: (1) the freedom of the seas, (2) the extraterritorial authority of a sovereign state to regulate the conduct of its nationals, and (3) comity.

Article 2 of the 1958 Geneva Convention on the High Seas specifically recognizes and adopts the freedom of the seas doctrine. It states that the high seas freedoms "shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas." S. 713 epitomizes this concept. It provides a statutory means for U.S. nationals to exercise the freedom of the seas they enjoy by virtue of their status as being subject to the jurisdiction of the United States, while deliberately mandating that such exercize "will not unreasonably interfere with other reasonable uses of the high seas, as defined by any treaty or convention to which the United States is signatory, or by customary international law."

Second, S. 713 expressly limits its scope to the extraterritorial high seas regulation of U.S. nationals. It does not purport in any manner to impose regulation by the United States of any kind upon the activities of foreign nationals on the High Seas.

Finally, the bill incorporates the international law doctrine of comity by providing for recognition of the rights of reciprocating states which establish an interim policy and practice comparable to that established by this legislation. In the event that an international agreement binding upon the United States enters into force establishing a regime for the development of mineral resources of the deep seabed no licenses shall be issued under this Act inconsistent with the regime.

Thus, far from constituting a unilateral act, this legislation incorporates careful and complete recognition of existing international law while anticipating a new international agreement and specifically providing that such agreement will supersede this act.

RELATIONSHIP TO LAW OF THE SEA NEGOTIATIONS

The Administration has continually taken the position that enactment of S. 713 would "adversely affect progress on the deep seabeds as well as other aspects of the Law of the Sea negotiation."

The Committee completely supports the concept of a Law of the Sea treaty. We have repeatedly indicated our support of the United States' position in the current negotiations.

The Committee recognizes that the Government must protect a variety of important interests in the development of ocean law including our mineral resource interests. We agree that only through a successful Law of the Sea Conference will the world achieve harmony and stability in the many new and varied uses of ocean space, including deep sea mining, which are developing right now. Haphazard development of international law in this area may not adequately protect our own or any other country's interests in navigation, pollution control, freedom of scientific research and the rational development of both living and mineral resources of the ocean and seabeds.

* * *

The basic issue is whether we continue to wait for a treaty and risk a loss of American industrial initiatives. The Adminstration spokesmen have stated that a timely and satisfactory Law of the Sea treaty is obtainable. The facts do not bear this out. The United Nations Seabed Committee spent many sessions in preparatory work but failed to make significant progress toward agreement. The Law of the Sea Conference, now in session in New York, consists of some 150 nations of widely disparate views. The issues are not confined to the question of the deep seabed but include navigation rights of several kinds, fisheries, Continental Shelf resources, and a multiplicity of subissues. As one might expect, there is no sign of imminent agreement.

The Administration has indicated that the portions of the single negotiating text developed at the 1975 Geneva Session dealing with seabed mining are totally unacceptable to the United States. The Committee completely agrees.

Two of the Congressional delegates to the New York session, Representatives McCloskey and Gilman, have filed a very comprehensive report on the first 4 weeks of the session. Their report points out the chances of final agreement by May 7, are very slim and the chances of serious deadlock are very great. (The report is printed in full in Appendix I of this report.)

The Committee has concluded that we can no longer delay in our own national efforts to create conditions conducive to the recovery of the resources of the deep seabed. We cannot accept the same old story from the treaty negotiators that progress is greater than it appears and that success is just around the corner. The Committee firmly believes that S. 1134 *is consistent* with our national interest in developing new sources of minerals and *is not inconsistent* with our long-term national goal of a broad international agreement on a new system of Law of the Sea.

SENATE BILL 713
94th Congress 2nd Session

Section 2. (a) FINDINGS.--The Congress finds--

(1) that the Nation's hard mineral resource requirements will continue to expand in order to supply national industrial needs and that the demand for certain hard minerals will increasingly exceed available domestic sources of supply;

(2) that, in the case of some minerals, the Nation is totally dependent upon foreign sources of supply and that the acquisition of mineral resources from foreign sources is a substantial factor in the national balance-of-payments position;

(3) that the national security interests of the United States require the availability of mineral resources which are independent of the export policies of foreign nations;

(4) that there is an alternate source of supply of certain minerals which are significant in relation to national needs contained in the manganese nodules which exist in great abundance on the ocean floor;

(5) that to the extent that such nodules are located outside the territorial limits and beyond the Continental Shelf of any nation, the nodules are available for utilization by any nation with the ability to develop them;

(6) that United States mining companies have developed the technology necessary for the development and processing of deep seabed nodules and, given the necessary security of tenure, are prepared to make the necessary capital investment for such development and processing; and

(7) that the increasing complexity of the world's problems has required the nations of the world to become more interdependent, especially in such matters as the resources of the land and the sea, transportation and communication, food, population, human rights, arms control, world order under law and cultural relations;

(8) that solutions to the problems of and interdependent world requires a reciprocal recognition by all nations of the legitimate interests of one another; and

(9) that it is in the national interest of the United States to utilize existing technology and cpabilities by providing for interim legislation which will authorize investment guarantees and insurance in order to encourage further efforts to insure national access to available deep seabed hard minerals and to provide the means whereby the national program may be merged into an international program which evolves from negotiations on the Law of the Sea resulting in a treaty which is subsequently ratified by and becomes binding upon the United States.

(b) PURPOSES--The Congress declares that the purposes of this Act are--

(1) to establish a national program to promote the orderly development of certain hard mineral resources of the deep seabed, pending the establishment of an international regime for that purpose; and

(2) to insure the establishment of all practicable requirements

necessary to protect the quality of the marine environment to the extent that that environment may be affected by deep seabed hard mineral mining development.

DEFINITIONS
Section 3. For the purposes of this Act--

(a)"Secretary" means the Secretary of the Interior;

(b)"deep seabed" means the seabed, and the subsoil thereof, lying seaward and outside the Continental Shelf of any nation;

(c)"Continental Shelf" refers to the seabed and the subsoil of the submarine areas adjacent to the coast of any nations (including the coasts of islands), but outside the area of the territorial sea, to a depth of two hundred meters or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas;

...

(e)"hard mineral" or "hard mineral resources" refers to nodules or accretions containg, but not limited to, iron, manganese, nickel, cobalt, and copper;

...

(m)"reciprocating State" means any foreign State, designated by the President as a State with requirements and procedures comparable to those of the United States under this Act, and which has undertaken to recognize licenses issued under this Act; and

...

ACTIVITIES PROHIBITED
Section 4. (a) Except (1) as authorized pursuant to the provisions of this Act, including subseation (b) hereof, (2) as authorized under alicense issued by a reciprocating State, or (3) as may be authorized under a treaty, convention, or other international agreement, which is ratified by and binding upon the United States, no person subject to the jurisdiction of the United States shall engage directly or indirectly in the development of hard mineral resources of the deep seabed. The prohibition of this subsection does not apply to equipment engineering development, prospecting, or scientific research, nor to the rendering of contractual engineering construction, or other service, not amounting to actual exploration or commercial recovery, nor to the furnishing of machinery, products, supplies, or materials to any organization or person lawfully engaged in such development. Provided, That the development does not infringe upon a license recognized as exclusive under the provisions of section 5(b) hereof.

...

LICENSE TO DEVELOP
Section 5 (a) GENERAL--Pursuant to the provisions of this Act, the Secretary shall accept applications from, and issue licenses to, eligible applicants for the development of hard meineral resources of the deep seabed....Before he may issue a license

the Secretary must first determine, in the consideration of each license application--

(1) that the applicat is financially responsible and has demonstrated the ability to comply with applicable laws, regulations, and license conditions;

(2) that the operations under the license will not unreasonably interfere with other reasonable uses of the high seas, as defined by any treaty or convention to which the United States is signatory, or by customary international law;

(3) that the issuance of a license does not conflict with any obligations of the United States, established by treaty or other international agreement: and

(4) that operations under the license will not pose an unreasonable threat to the integrity of the marine environment and that all reasonable precautions will be taken to minimize any adverse impact on that environment.

(b) NATURE AND DURATION OF LICENSE--(1) Subject to the provisions of section 12 hereof, any license issued pursuant to this Act shall be exclusive as against all persons sublect to the jurisdiction of the United States or of any reciprocating State, and shall authorize development of the hard mineral resources of the deep seabed within specified blocks thereof: Provided, That in no event shall any license issued under this Act authorize the commercial recovery of such resources prior to January 1, 1977: And provided further, That, except to the extent that such licenses are authorized pursuant to the provisions of a future international agreement ratified by and binding upon the United States establishing a regime for the development of the international seabed area beyond the limits of coastal State territorial or resource jurisdiction, no licenses shall be issued under this Act subsequent to the date on which such international agreement shall be ratified by and become binding upon the United States.

...

INTERNATIONAL REGIME

SECTION 12. At such time as a future international agreement, providing for the establishment of an international regime for the development of the hard mineral resources of the deep seabed, shall be ratified and become binding upon the United States, no additional licenses shall be issued pursuant to this Act, To the extent that they are consistent with the provisions of the international regime, licenses previously issued shall continue in effect, and, to the extent possible under the international agreement, the United States shall exercise its rights and responsibilities under the agreement to insure their continuation under the international regime.

INVESTMENT GUARNATY

SECTION 13. To the extent that a future international agreement, ratified by and binding upon the United States, shall differ from the requirements of this Act, the United States shall provide the licensee with compensation in an effectively relizable form representing the reduction in value of the investment resulting form imposition of differing requirements or loss of rights granted under this Act: Provided, That the liability for compensation shall, until after an authorization for commercial recoery has been granted, be limited to compensation in relation to equipment and facilities utilized for exploration purposes: Provided further, That the Secretary of Commerce shall determine in the first instance the amount owing on the claims for compensation under this section: Provided further, That after an authorization for commercial recovery has been granted, the value of the investment shall be determined by subtracting from the value of the original investment any gross profits realized from development and processing operations: And provided further, That the liability under this section shall terminate ten years after commercial recovery has begun.

INVESTMENT INSURANCE

SECTION 14. (a) On annual payment by any licensee of a premium to be determined by the Skcretary of Commerce, utilizing standard insurance practices and based upon the relative risks involved, the United States shall insure the licensee, in an amount not exceeding the value of the investment, for any damages suffered through the impairment of the insured investment, or through the removal of hard minerals from the licensed block, by any other person against whom a legal remedy either does not exist or is unavailable in any legal forum to which the licensee has accesss. The Secretary of Commerce shall determine the amount owing on any claim for reimbursement under this section.

(b) Insurance under this section shall be available solely upon the request of the licensee and after the Secretary of Commerce has determined that the insurance coverage requested is not readily available at a reasonable price elsewhere.

...

RECIPROCATING STATES

SECTION 19. (a) The Secretary shall, in promulgating regulations under this Act, attempt to harmonize his regulations with the laws, regulations, or other officail acts of any other State which has enacted legislation or regulations or taken, pursuant ti its own laws and procedured, equivalent official acts for purposes similar to those of this Act. When the Secretary finds, in consultation with the Secretary of State, that the laws and regulations of the United States and similar actions by any other State are in essential harmony one with the other, such other State shall be deemed to be a reciprocating State for the purposes of this Act.

(b) Any license or similar legal entitlement issued by a reciprocating State shall be accorded equivalent legal status as though it were issued by the Secretary: Provided, That the reciprocating State accords the same legal status to licenses issued by the Secretary: Provided further, That sections 13 and 14 of this Act shall not apply to persons subject to the jurisdiction of the United States in respect to mining licenses or similar legal entitlements issued to them by a reciprocating State.

NOTES

Bills similar to Senate Bill 713 have been introduced in the last several sessions of Congress. In the 94th Congress Senate Bill 713 and a comparable House bill were both reported out of committee but never came to a vote. Deep seabed legislation was again introduce in the 95th Congress.

ADDRESS BY SECRETARY OF STATE HENRY KISSINGER
TO THE 1976 ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION
printed in, REPORT ON THE DEEP SEABED MINERALS ACT, COMMITTEE ON INTERIOR AND INSULAR AFFAIRS, No. 754, 94th Congress (1976) pp. 35-41.

The issues before the Law of the Sea Conference cover virtually every area and aspect of man's uses of the seas, from the coastline to the farthest deep seabed. Like the oceans themselves, these various issues are interrelated parts of a single entity. Without agreement on all the issues, agreement on any will be empty, for nations will not accept a partial solution—all the less so as some of the concessions that have been made were based on the expectation of progress on the issues which are not yet solved.

* * *

The deep seabeds

The third, and the most complex and vital issue remaining before the Conference is the problem of the deep seabeds.

For decades we have known that the deep seabeds contain great potential resources of nickel, manganese, cobalt and copper—resources whose accessibility would contribute significantly to global economic growth in the future. It is only recently that the technology has been developed which can enable us to reach those deposits and extract them.

The Conference has not yet approached agreement on the issue of the deep seabeds because it has confronted serious philosophical disagreements. Some have argued that commercial exploitation unrestrained by international treaty would be in the best interests of the United States. In fact this country is many years ahead of any other in the technology of deep sea mining, and we are in all respects prepared to protect our interests. If the deep seabeads are not subject to international agreement the United States can and will proceed to explore and mine on its own.

First, to ensure an equitable decisionmaking system, the United States continues to believe that the Treaty should authorize the formation of an International Seabed Resource Authority to supervise exploration and development of the deep seabeds. The Authority would be comprised of four principal organs: An Assembly of all member states, to give general policy guidance; a Council, to serve as the executive, policy-level and main decisionmaking forum, setting operational and environmental rules for mining, and supervising the contracts for deep seabed mining; a Tribunal, to resolve disputes through legal processes; and a Secretariat, to carry out the day-to-day administrative activities of the Authority.

The United States proposes:

That the power of the Authority be carefully detailed by the Treaty in order to preserve all those rights regarding the uses of the seas which fall outside the competence of the Authority, and to avoid any jurisdictional overlap with other international organizations;

That the composition and structure of the Council reflect the producer and consumer interests of those states most concerned with seabed mining. All nations whose vital national economic concerns are affected by decisions of the Authority must have a voice and influence in the Council commensurate with their interests; and

That the proposed permanent seabed Tribunal adjudicate questions of interpretation of the Treaty and of the powers of the International Authority raised by parties to the Treaty or by private companies engaged in seabed mining. Without a Tribunal, unresolved contention is a certainty. Such a body will be necessary if any seabed proposal is to win wide acceptance.

Second, to insure that all nations, developed and developing, have adequate access to seabed mining sites:

The United States proposes that the Treaty should guarantee nondiscriminatory access for states and their nationals to deep seabed resources under specified and reasonable conditions. The requirement of guaranteed access will not be met if the Treaty contains arbitrary or restrictive limitations on the number of mine sites which any nation might exploit. And such restrictions are unnecessary because deep seabed mining cannot be monopolized: there are many more productive seabed mining sites than conceivably can be mined for centuries to come.

The United States accepts that an "Enterprise" should be established as part of the International Seabed Resource Authority and given the right to exploit the deep seabeds under the same conditions as apply to all mining.

The United States could accept as part of an overall settlement, a system in which prime mining sites are reserved for exclusive exploitation by the Enterprise or by the developing countries directly—if this approach meets with broad support. Under this system, each individual contractor would propose two mine sites for exploitation. The Authority would then select one of these sites which would be mined by the Authority directly or made available to developing countries at its discretion. The other site would be mined by the contractor on his own.

The United States proposes that the international Authority should supervise a system of revenue sharing from mining activities for the use of the international community, primarily for the needs of the poorest countries. These revenues will not only advance the growth of developing countries; they will provide tangible evidence that a fair share in global economic activity can be achieved by a policy of cooperation. Revenue sharing could be based either on royalties or on a system of profit sharing from contract mining. Such a system would give reality to the designation of the deep seabeds as the common heritage of all mankind.

Finally, the United States is prepared to make a major effort to enhance the skills and access of developing countries to advanced deep seabed mining technology in order to assist their capabilities in this field. For example, incentives should be established for private companies to participate in agreements to share technology and train personnel from developing countries.

But while such a course might bring us a short-term advantage, it poses long-term dangers. Eventually any one country's technical skills are bound to be duplicated by others. A race would then begin, to carve out deep sea domains for exploitation. This cannot but escalate into economic warfare, endanger the freedom of navigation, and ultimately lead to tests of strength and military confrontations. America would not be true to itself, or to its moral heritage, if it accepted a world in which might makes right—where power alone decided the clash of interests. And, from a practical standpoint, no one recognizes more clearly than American industry investment, access, and profit can best be protected in an establishing and predictable environment.

On the other hand, there are those who would place all the deep seabed's resources under an international authority. Such a proposal would not provide adequate incentives and guarantees for those nations whose technological achievement and entrepreneurial boldness are required if the deep seabeds are to benefit all mankind. It would give control to those who do not have the resources to undertake deep seabed mining.

Let me briefly review the specific issues before us and then set forth the proposals which we believe can form the basis for a new consensus on the deep seabeds.

First, the decision-making machinery for managing the deep seabeds. There has been considerable debate over the form and the powers of the decision-making machinery established under the Treaty.

The United States is prepared to accept international machinery; but such machinery must be balanced, equitable, and ensure that the relative economic interests of the countries with important activities in the deep seabeds be protected, even though those countries may be a numerical minority.

Second, access to the deep seabeds. The Conference has been struggling with the issues of which nations, which firms, and which international authorities will have direct access to, and share in the benefits from the developing of deep seabed resources. The United States understands the concern that the riches of the seas not be the exclusive preserve of only the most powerful and technologically advanced nations. We recognize that the world community should share in the benefits of deep seabed exploitation.

What the United States cannot accept is that the right of access to seabed minerals be given exclusively to an international authority, or be so severely restricted as effectively to deny access to the firms of any individual nation including our own. We are gratified to note an increasing awareness of the need to avoid such extreme positions and to move now to a genuine accommodation that would permit reasonable assurances to all states and their nationals that their access to these resources will not be denied.

Third, the effect of seabed mining on land-based producers. Land-based producers of seabed minerals are concerned that seabed production may adversely affect their national economies. This is an especially serious problem since many of these producers are poor, developing countries.

We take these concerns seriously. But at the same time it must be recognized that commercial seabed production of these metals is at least five years away. For many years thereafter, seabed production will amount to only a fraction of total global production. Moreover, global metal markets are expanding and should easily be able to accommodate additional production from the seabeds without adversely affecting revenues of land-based producer countries.

U.S. proposals for the deep seabeds

The United States is prepared to make a major effort to resolve these issues equitably and to bring the Law of the Sea Conference to a swift and successful conclusion. In this spirit, the United States offers the following proposals.

Third, in response to the legitimate concerns of land-based producers of minerals found in the deep seabeds, we offer the following steps as an additional major contribution to the negotiations:

The United States is prepared to accept a temporary limitation, for a period fixed in the Treaty on production of the seabed minerals tied to the projected growth in the world nickel market, currently estimated to be about 6 percent a year. This would in effect limit production of other minerals contained in deep seabed nodules, including copper. After this period, the seabed production should be governed by overall market conditions.

The United States proposes that the International Seabed Authority have the right to participate in any international agreements on seabed-produced commodities in accordance with the amount of production for which it is directly responsible. The United States is prepared to examine with flexibility the details of arrangements concerning the relationships between the Authority and any eventual commodity agreements.

The United States proposes that some of the revenues of the International Seabed Resource Authority be used for adjustment assistance and that the World Bank, regional development banks, and other international institutions assist countries to improve their competitiveness or diversify into other kinds of production if they are seriously injured by production from the deep seabeds. An urbent task of the International Authority, when it is established, will be to devise an adjustment assistance program in collaboration with other international institutions for countries which suffer economic dislocations as a result of deep seabed mining.

* * *

The United States believes that the world community has before it a grave responsibility. Our country cannot delay in its efforts to develop an assured supply of critical resources through our deep seabed mining projects. We strongly prefer an international agreement to provide a stable legal environment before such development begins, one that ensures that all resources are managed for the good of the global community and that all can participate. But if an agreement is not reached this year it will be increasingly difficult to resist pressure to proceed unilaterally. An agreement on the deep seabed can turn the world's interdependence from a slogan into a reality. A sense of community which nations have striven to achieve on land for centuries could be realized in a regime for the oceans.

NOTES

1. The developing countries, earlier named the "Group of 77" but now consisting of over 115 members,are primarily interested obtaining a share of deepsea mining proceeds. They also desire to protect their members who are land based producers of the minerals found in the nodules.

2. The most difficult issue in the Law of the Sea Conference deep seabed negotiations has been the question whether an international group would have authority to conduct mining operations and whether that authority would be exclusive. The developing countries are afraid that given the high capital requirements of deep seabed mining and the large technological advantage of the United States and a few other countries, mining will be monopolized by a few countries if individual States or private

companies are allowed to mine.

3. There are a total of almost 160 nations participating in the Law of the Sea negotiations. Each nation has one vote. Thus the developing countries could easily dominate any issues left to the Authorities discretion since the Authority will have the same voting arrangement. The industralized countries want many aspects of mining to be covered by provisions not subject to such voting. They also want a subgroup of the assembly, with voting power reflecting respective economic interests to be given primary decison making authority.

4. A deep seabed mining operation requires an investment of $350-650 million and annual operating costs of $100-160 million. Annual net revenues of $40-60 million per operation are expected. If individual States or private companies conduct operations a percentage of their revenues would go to the Authority. No specific royalty has yet been proposed.

5. Although the quality of mining sites varies, there are considered to many more productive sites than can be mined in many centuries. Mining companies presently plan to recover nickel, copper, cobalt and some manganese from the nodules. The lion's share of the economic return comes from the nickel recovery. The impact of these new supplies on the world market would be significant. Each full scale mining operation could produce almost 10% of the present world consumption of nickel. One of the important issues is the duration, and level of any production quota to lessen the impact on the developing countries that are dependent on exporting these minerals.

6. A two thirds vote of those nations present and voting is necessary for the adoption of any Law of the Sea agreement. Therefore approval on the part of a majority of the developing countries is required since they account for over two thirds of the total votes.

7. After the two negotiating sessions held in 1976 the countries were still at an impasse. Subequent to those sessions a workshop was set up for futher efforts toward agreement. The following are summaries of the proposals that were submitted:

Group of 77 Proposals

Under the paper submitted by the Group of 77, activities covered by the contract and the extent of the participation of developing countries therein, as well as the proper financial arrangements.

Provisions were also made to cover cases where more than one application is received, whereby selection would be on a competitive basis, and any preference and priority would be accorded at a subsequent stage to an applicant who had previously entered into a contract for a separate stage or stages of operations. The Authority could reinitiate the procedure for selection of applicants if, after a specified period and after negotiations had been entered into, a contract had not been concluded.

The Authority was empowered to determine that, in certain parts of the contract area, activities should only be conducted by it either through the Enterprise or in association with developing countries, the Enterprise having the first right of refusal. When considering applications for such area the Authority was required to ensure that the developing country or countries would obtain substantial benefits. Reference to the issue of a quota or anti-monopoly provision was maintained in the text of Workshop Paper No. 1.

Proposals by USSR

Under the paper submitted by the USSR, the activities in the area should be conducted both by States parties and directly by the Authority. The Authority would determine the part or parts of the area in which it would conduct its activities. The Authority's area would not exceed that in which activities would be carried out by States parties.

The activities of State parties would be conducted on the basis of contracts with the Authority and they would come under its effective financial and administrative supervision. States parties might carry out activities through State enterprises or juridical persons registered in and sponsored by States. States parties sponsoring such entities would be responsible for taking all necessary measures to ensure that such entities complied with the Convention, its rules, regulations and procedure adopted by the Authority. All States parties would have equal rights to participate in activities in the area irrespective of their geographical location, social system and level of industrial development, and particular consideration would be given to the needs of developing countries, particularly the land-locked or geographically disadvantaged.

It was emphasized that the right of States to conduct exploration and exploitation activities in the area followed naturally from the concept of "common heritage of mankind" since States are juridical representatives of mankind under international law, and that those rights should therefore be guaranteed in the Convention itself and not left to the discretion of the Authority.

Furthermore, the system of exploitation would need to take account of the legitimate rights and interests of the socialist system, being one of the main systems in the world; no sea-bed régime and machinery would be viable without taking that into account. Although the paper did not contain any quota clause, it was emphasized that such a clause should none the less be an integral part of the system of exploitation as presented in the paper.

Proposals by United States

Under the paper submitted by the United States, there would be a parallel or dual access system. It was pointed out that a parallel system could be a method of accommodating the interests of all States and the international community in general, so as to best reflect the principle of the common heritage of mankind. States parties or other entities and the Enterprise would carry out activities in the area directly by entering into contracts with the Authority. All such activities would be in accordance with Annex I and the rules, regulations and procedures adopted by the Authority. The Authority would have effective fiscal and administrative supervision over all activities in the area to secure effective compliance with Part I of the Convention, Annex I and the rules and regulations of the Authority.

States parties who sponsor other entities would assist the Authority by taking all appropriate measures to ensure such compliance. The Authority should promote and encourage activities in the area and should avoid discrimination in granting access and in implementing its powers and functions.

The Authority would be forbidden to impair any rights granted under Part I of the Convention and must fully safeguard such rights. Pursuant to specific articles in Part I of the Convention dealing with scientific research, technology transfer and the distribution of revenues, the Authority would be empowered to give special consideration to the interests and needs of developing countries, particularly the land-locked and geographically disadvantaged. Such special consideration would not be deemed to be discriminatory.

Title to the resources would be vested in the Contractor at the moment the resources were recovered from the area pursuant to a contract. A contract would be entered into by the Authority if the applicant was qualified by virtue of his financial standing and technological capability. The Enterprise and States parties would be presumed to be so qualified. An applicant would also be required to submit a work programme to the Authority which would fully take into account the Authority's rules and regulations. All contractors would be required to accept the supervision of the Authority.

Subject only to those requirements, the Authority would award a contract; but if it had received simultaneously an application for a contract in the same area, the contract would be awarded on a competitive basis. If no such competing application were received, a properly qualified applicant would be granted a contract within 90 days and the Authority would not have the right to refuse to enter into such a contract if the financial arrangements criteria set forth in paragraph 9 (d) had been satisfied and the contract was in all other respects in strict conformity with the Convention and the Authority's rules and regulations.

It would be the obligation of the Contractor to provide the funds, materials, equipment, skills and know-how as necessary for the conduct of operations under the contract. The paper made clear that the procedural and substantive provisions of Annex I relating to contracts would apply *mutatis mutandis* to the Enterprise. It was emphasized that the parallel system could only serve as the basis for a compromise if the Enterprise were on an equal footing with other applicants for contracts.

In the area should be conducted exclusively by the Authority (1) directly through the Enterprise in accordance with a formal written plan of work, or (2) as determined by the Authority, through a form of association between the Enterprise and the specified entities pursuant to a contract. For the purpose of securing compliance at all times with the relevant provisions and instruments, the Authority should exercise full and effective control over the activities in the area.

States parties should assist the Authority by taking all measures necessary to secure such compliance. The paper further provided that the Authority should avoid discrimination in the exercise of its powers and functions and that all rights granted should be fully safeguarded. Special consideration for developing countries, including the conduct of activities by the Authority in certain parts of the area solely in association with them, should not be deemed discriminatory.

Flexibility was maintained in the provision as to when title to minerals and processed substances could be passed

from the Authority. The Authority would be required to adopt appropriate administrative procedures, rules and regulations for making an application and for the qualifications of an applicant. Such qualifications included financial standing, technological capability and satisfactory performance under previous contracts with the Authority, if any. In assessing the qualifications of a State party its character as a State should be taken into account.

Every applicant should be treated on an equal footing and would be required to fulfil four specific requirements: the undertaking to comply with and to accept as enforceable all the obligations; acceptance of control by the Authority; satisfactory assurance of fulfilment of obligations in good faith; the undertaking to promote the interests of developing countries by association or other means. In view of the two main methods of operation embodied in article 22, one new paragraph was added to provide that the procedures for the Enterprise should be governed by such provisions as the Authority might establish in its rules and regulations and by the Statute of the Enterprise. Its activities should be conducted in accordance with the resource policy and the relevant decisions of the Authority in implementation thereof.

The Authority should determine as to when to conduct activities in the area in association with entities. With respect to selection of applicants, the Authority would be empowered, on its own initiative, or upon receiving an application, to initiate selection procedures for applicants and to publish and make known a time-limit for receiving other applications.

Subject to the foregoing, the Authority should enter into negotiations with the applicant on the terms of a contract, provided that the applicant possessed the requisite qualifications and complied with the procedures established for applications; that the application did not relate to those parts of the area retained solely for the conduct of activities by the Enterprise or by it in association with the developing countries; and that the contract complied with the resource policy and the relevant decisions of the Authority. The terms of a contract to be negotiated were clearly set out in the text. They included the respective contributions of the Authority and the Contractor in association, including the contribution of funds, materials, equipment, skills and know-how as necessary for the conduct of operations

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B. Environmental Impact and Regulation of Deep Seabed Mining

FRANK, ENVIRONMENTAL ASPECTS OF DEEPSEA MINING*
15 Virginia Journal of International Law, 815 (1975), pp. 815-20.

The red clay sediment discharged during deepsea manganese nodule exploitation forms a dark "plume" over a large area of the ocean's surface. It has been estimated that the sediment may take five years to settle 100 yards downward. If, as is forecast, many companies ultimately mine, the blue of the ocean will be turned reddish-brown over tens of thousands of square miles. More importantly, the top layer of a substantial portion of the ocean, the so-called "euphotic zone" where photosynthesis gives birth to the primary organisms in the food chain, may be fundamentally changed.[1] Bottom layers might likewise be altered in some heretofore unknown manner.[2] No one knows the ultimate implication of these alterations of nature.[3]

Because of the plume and various other effects, deepsea mining will inevitably have a profound impact on the ocean environment. The basic problem today is that neither government, industry, nor the environmental community has adequate information to make a sound judgment of the consequences to the marine ecology of this new activity: *e.g.*, whether the consequences are so adverse as to suggest mining should not occur, or should be severely limited.

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1. Amos, Garside, Haines, & Roels, *Effects of Surface-Discharged Deep-sea Mining Effluent*, in FERROMANGANESE DEPOSITS ON THE OCEAN FLOOR 271 (D. Horn ed. 1972); U.S. DEP'T INTERIOR, DRAFT ENVIRONMENTAL STATEMENT PROPOSED FOR UNITED STATES INVOLVEMENT IN LAW OF THE SEA NEGOTIATIONS GOVERNING THE MINING OF DEEP SEABED HARD MINERAL RESOURCES SEAWARD OF THE LIMITS OF NATIONAL JURISDICTION 2.113 (1974) [hereinafter cited as ENVIRONMENTAL IMPACT STATEMENT].

2. Statement of O. Roels, *Hearings on Amend. No. 946 to S.1134 Before the Subcomm. on Minerals, Materials and Fuels of the Senate Comm. on Interior and Insular Affairs*, 93d Cong., 2d Sess., pt. 2, at 1092 (1974) [hereinafter cited as *Senate Hearings*].

3. Knauss, *Ocean Pollution: Status and Prognostication*, in LAW OF THE SEA INSTITUTE, EIGHTH ANNUAL CONFERENCE, PROCEEDINGS 313, 326-27 (1973).

*used with permission of the Virginia Journal of International Law Association

Unfortunately, no one now understands the environmental implications of mining the ocean's floor. According to the draft environmental impact statement on deepsea mining prepared by the Department of the Interior, there are gaps in techniques of observation of ecological baselines and of forecasting any natural or artificial change in the ocean environment.[12] Deepsea fauna are relatively unknown, with a large fraction of species not ever having been described.[13] Further, the state of the art of benthic sampling is inadequate to support intelligent decision-making.[14] The Department of the Interior therefore concludes that "sufficient data is not available to assess accurately the effects of many of the actions involved in deep seabed mining at this time."[15]

Part of the problem is the inherent difficulty of forecasting environmental consequences of a novel activity for which the equipment has not even been fully developed. But another aspect is that the executive branch of the United States Government has not requested adequate funds to undertake the necessary baseline studies and experimentation. Although the environmental impact statement strongly recommends study and experimental work,[16] and the National Oceanographic and Atmospheric Administration of the Department of Commerce pressed for at least two years to seek $9 million of appropriations for a Deep Ocean Mining Environmental Study, other parts of the executive branch delayed the project. A modest $3 million appropriation for a more limited study has been requested this year.[17] In sum, while the government is promoting the development of deepsea mining, *inter alia* through the negotiation of a Law of the Sea treaty mentioned below, it has not yet taken those steps necessary to learn of the ecological consequences of the activity it is promoting.

These ecological consequences may not simply be dismissed because they are unknown. For although the adversity of its impact and the magnitude of that adversity is uncertain, it is clear that deepsea nodule mining will have an impact on the marine environment in various predictable ways. For example, regardless of the technique used in mining, sediment

12. ENVIRONMENTAL IMPACT STATEMENT, *supra* note 1, at 1.65.
13. *Id.* at 2.141.
14. *Id.* at 3.33.
15. *Id.* at 5.1.
16. *E.g.*, *id.* at 3.7.
17. The struggle between NOAA and other parts of the Executive branch is well known to the industry and the environmental communities. However, public documentation of this is unavailable.

from the ocean floor will be lifted with the nodules.[18] Some sediment may separate during the ascent to the surface, but most will probably be washed free on board the mining vessel and either discharged over the side or possibly returned to the sea at intermediate depths through a discharge pipe.[19] The discharge of sediment creates the dark plume referred to earlier, and could well fundamentally change the character of the euphotic zone in the area.[20] One study concludes that mixing deep-ocean water and sediment with surface water may cause a stimulation of photoplankton and blooms of organisms which do not normally occur in the pelagic zone of areas overlying manganese nodule concentrations (perhaps because of sediment-associated vitamins).[21] Some speculate that such a redistribution of photoplankton species may be beneficial, or may be irrelevant since the areas of the ocean in which presently-projected mining will occur appear to be the least biologically active.[22] On the other hand, no one is aware of the full implications of tinkering with such basic elements in the life chain. Furthermore, the esthetics of changing ocean color aside, surface-discharged deepsea sediments may well alter light penetration in lower layers and reduce photosynthesis there, leaving effects which are also heretofore unknown.[23]

A second impact is likely to result from the disturbance to biologic activity and sediment on the ocean bottom caused by operation of either the suction or bucket system.[24] One could argue that such consequences will have an insignificant impact since bottom currents naturally transfer sediment, since most of it will settle, and since ocean bottom areas where mining is likely to occur have little biologic activity.[25] But again, the role of these fauna in the ocean environment is unclear;[26] the ocean bottom in some areas contains long-lived, late pubescent fauna — one benthic clam requires 200 years to reach sexual maturity[27] — and if large areas of the ocean floor are exploited, then the Department of the Interior concludes that a "serious concern may be found in the preservability of deep-ocean fauna"[28] and that some types of mining "could diminish the probability of some species reproducing themselves thus leading to a more rapid extinc-

18. ENVIRONMENTAL IMPACT STATEMENT, *supra* note 1, at 3.16 *et seq.*
19. *Id.* at 3.21, 3.22.
20. AMOS, *supra* note 1; ENVIRONMENTAL IMPACT STATEMENT, *supra* note 1, at 2.113.
21. *Environmental Impact Statement, supra* note 1, at 3.28-9 and 3.332.
22. Statement of O. Roels, *Senate Hearings, supra* note 2, at 1092.
23. ENVIRONMENTAL IMPACT STATEMENT, *supra* note 1, at 3.28.
24. *Id.* at 3.16 *et seq.*
25. Statement of O. Roels, *Senate Hearings, supra* note 2, at 1092.
26. *See* ENVIRONMENTAL IMPACT STATEMENT, *supra* note 1, at 2.124-27.
27. *Id.* at 3.10.
28. *Id.* at 3.54.

tion rate of this unique fauna."[29] The Department of the Interior concludes regulation will be required to prevent the "potential damage" of too "aggressive" floor mining.[30]

All U.S. mining companies, except one, will apparently extract only copper, nickel, and cobalt from nodules.[31] After the extraction process, a great deal of waste, including manganese tracings, will be disposed. The huge quantities of manganese tracings and other waste may be dumped on land or in the ocean, but neither the economic feasibility nor the environmental impact of either disposal method has been evaluated. An interesting analogy may be made to the problem created by the dumping in Lake Superior of low-grade iron ore waste by the Reserve Mining Company.[32] Neither the Government nor, apparently, the company was aware that the waste contained asbestos elements which, it is now claimed, are carcinogenic.[33]

A fourth possible consequence could result from the processing of the nodules at sea. Most U.S. companies maintain that they will not process at sea during the early years of mining.[34] But no existing regulation or law would prevent such processing, and at least one foreign company has stated it may engage in primary refinement or "beneficiation" of ore at sea because that reduces transport costs.[35] Highly pollutive chemicals with heavy alkaline and acid bases are used in such processing, and they will undoubtedly be dumped at the mining site or in nearby areas.

Assuming that processing will not be accomplished at sea, the fifth probable consequence might arise in a shift in the location of processing facilities from the "hinterland" to coastal areas. According to the Department of the Interior, the development of extractive plants near the shoreline will "increase the probability of adverse impact in these areas."[36] But the nature or magnitude of the adverse environmental impact on the coastal zone has never been analyzed.

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29. *Id.* at 3.10.

30. *Id.* at 3.40.

31. *Senate Hearings, supra* note 2, at 797.

32. *See* Washington Post, Feb. 23, 1975, at B2, col. 1; United States v. Reserve Mining Co., 380 F.Supp. 11 (D. Minn.), *remanded*, 498 F.2d 1073 (8th Cir.), *continuation of stay of injunction denied*, 380 F.Supp. 11 (D. Minn. 1974).

33. THIRD MEETING OF THE SECOND SESSION OF THE CONFERENCE IN THE MATTER OF POLLUTION OF LAKE SUPERIOR AND ITS TRIBUTARY BASIN IN THE STATES OF MINNESOTA, WISCONSIN AND MICHIGAN, PROCEEDINGS (1972); N.Y. Times, Oct. 2, 1974, at 29, col. 1.

34. Statement of M. Dubs on behalf of the American Mining Congress and Kennecott Copper Corp., *Senate Hearings, supra* note 2, at 1016, 1021; ENVIRONMENTAL IMPACT STATEMENT, *supra* note 1, at 1.81.

35. Statement of O. Roels, *Senate Hearings, supra* note 2, at 1094. *See also* Mero, *Potential Economic Value of Ocean Floor Manganese Nodule Deposits*, in FERROMANGANESE DEPOSITS ON THE OCEAN FLOOR 191 (D. Horn ed. 1972).

36. ENVIRONMENTAL IMPACT STATEMENT, *supra* note 1, at 5.2.

Mining systems require substantial amounts of power. The Department of the Interior opines that future systems with large energy requirements may need to utilize nuclear reactors at sea.[37] The potential environmental hazard from reactors is well known; the risks of using reactors at sea for mining have never been explored.

The seventh consequence herein exposed is also unknown, for the origin of deepsea nodules is unknown. However, it is most likely that the nodules will play a role in the interface process between ocean water and the ocean bottom.[38] Therefore the removal of the metal nodules may itself have an effect on the basic ocean biologic system.

A final environmental concern involves an andromeda strain type problem. The ocean bottom is essentially a self-contained unit; its life does not mingle with the rest of the earth. Deepsea mining will bring up from that unknown world large amounts of ancient sediment containing ancient spores and organisms which may have created strange, alien antibodies which continue to survive. Scientists simply are unaware of what will happen when any such antibodies are set free in the new environment. It is possible that they will infect plant life or humans and that we will not have cures.

II. The Law of the Sea Regime

In 1970, the General Assembly of the United Nations adopted a resolution calling for the convocation of a Law of the Sea Conference which would, *inter alia*, establish a regime covering the mining of mineral nodules in areas beyond national jurisdiction.[39] After a series of preparatory meetings, the Conference held its first formal session in Caracas, Venezuela, in the summer of 1974 and has held a second eight-week session from March 17 to May 9, 1975, in Geneva.

A stated United States objective at the Conference is to promote the establishment of a regime under which deepsea mining could commence.[40] The Conference has reached a consensus that there should be an international Seabed Authority which would regulate deepsea nodule mining.[41] But the negotiators have not yet decided upon such basic attributes of the

37. *Id.* at 1.47.

38. Bonatti, Kraemer, & Rydell, *Classification and Genesis of Submarine Iron-Manganese Deposits*, in Ferromanganese Deposits on the Ocean Floor 149 (D. Horn ed 1972).

39. G.A. Res. 2749, 25 U.N. GAOR Supp. 28, at 24, U.N.Doc. A/8028 (1970).

NOTES

Debate on both the national and international levels has centered on the economics of exploitation of deep seabed minerals and the division of the proceeds. The burden of environmental protection falls to the following provisions:

Senate Bill 713

Section 5....Before he may issue a license, the Secretary must first determine...(4) that operations under the license will not pose an unreasonable threat ot the integrity of the marine

environment and that all reasonable precautions will be taken to minimize any adverse impact on that environment.

Section 7. The Secretary shall consult with appropriate Federal agencies and departments regarding environmental criteria and shall establish environmental standards based to the maximum extent practicable on available technical date and scientific data, applied in a consistent manner under the rules and regulations of section 18, to which operations under a license issued under this Act shall adhere. The Secretary may from time to time, propose revisions of the rules and regulations regarding environmental standards as available data may warrant.

THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA
Revised Single Negotiating Text
A/Conf.62/WP.8/Rev.1/Part I

PROTECTION OF THE MARINE ENVIRONMENT

Article 12

With respect to activities in the Area, necessary measures shall be taken in order to ensure effective protection for the marine environment from harmful effects which may arise from such activities. To that end the Authority shall adopt appropriate rules, regulations and procedures for inter alia:

(a) The prevention of pollution and contamination, and other hazards to the marine environment, including the coastline, and of interference with the ecological balance of the marine environment, particular attention being paid to the need for protection from the consequences of such activities as drilling, dredging, excavation, disposal of waste, construction and operation or maintenance of installations, pipelines and other devices related to such activities;

(b) The protection and conservation of the natural resources of the Area and the prevention of damage to the flora and fauna of the marine environment.

SECTION 5. OTHER PROPOSED USES OF THE NONLIVING AND ENERGY RESOURCES OF THE OCEAN

A. Energy from the Ocean

The recent realization that fossil fuels are neither cheap nor unlimited and the recognition of the high economic and environmental costs of nuclear power have prompted a search for new energy sources. Many of the proposed new sources involve the use of the oceans.

i.)ocean thermal energy conversion(OTEC)- OTEC facilities

would produce electricity by using the difference in temperatures between cold deep waters and the warm surface waters to drive a turbine connected to a generator. Ammonia in a closed system would be heated by the warm waters. This would cause the ammonia to boil. It would expand and pass through a turbine. After passing through the generator cold deep seawater would be used to cool and condense the ammonia. The ammonia would continuously cycle through the system. This is basically the same way that conventional generators work. They employ much more intense heat and convert water to steam to drive the turbine. Ammonia is used in lieu of steam in the OTEC facility since the difference between the warm and cold seawater as the temperature difference created in a nuclear or fossil fuel plant.

OTEC facilities are presently designed to be movable but they will be anchored to the sea bed at the operating site and will be almost totally submerged. A pipe 25-50 meters in diameter and 500-1000 meters long will be necessary to transport the cold water up to the surface.

Much of the present research is directed to the locating of potential sites. The areas off the Southeastern states have been identified as potential sites. The best sites appear to be in the tropics several hundred miles form shore.

Two primary environmental effects are anticipated from OTEC facilities. The first is a slight reduction in the temperature of the surface waters around the plant. This change may have some secondary effects. For example, it has been suggested that down wind rain may be reduced due to the lower amount of evaporation from the cooled waters. The second impact results from the introduction of nutrients in the deep waters into the warmth and light of the suface. Observations of natural upwellings and experimentation suggests that this impact may provide an excellent setting for mariculture.

(ii) wind-A strong and constant wind is needed for power production. A constant wind is important since it is expensive to provide back-up power for times when winds are calm. Wind velocity is important because the power content of wind is proportional to the cube of wind velocity. Thus when wind speed doubles, power output increases eight times.

Good winds are found in several offshore areas and there have been several proposal for the construction of floating windmills. Particularily good winds are found at the edge of the Continental Shelf offshore from North Carolina to the Canadian border. It has been proposed that the country could meet a

large part of its energy demands by constructing about 3000 of these windmills along the Atlantic coast. It is claimed that the cost of the power would be one half that of nuclear plants.

(iii) Other proposals include the construction of devices to capture the energy of waves both along the shore and in deeper waters; the production of power by using salintiy differences; and plans to make use of the energy in tides and currents.

B. Water Column Mining

There are many minerals dissolved in seawater and the total amount of these minerals is almost unlimited. A common problem in the recovery of any of these minerals is that they are generally present in such minute concentrations compared to land based ores that extraction costs are prohibitive. In the past some bromine, salt and magnesium were produced from seawater. Today only magnesium and a small part of salt production are derived from seawater. It would take a major breakthrough in technology to make seawater mining of other elements economically feasible.

C. Other Proposals

Other proposals for use of the ocean include floating airports, artifical islands, and cities at sea.

CHAPTER FOUR

MARINE POLLUTION CONTROL

SECTION 1. INTERNATIONAL LAW

The international law of marine pollution is derived from several sources. The custom and practice of civilized nations is one such source. Where no convention or treaty controls, authorities look to custom and usage to determine international law. Principles of customary international law which pertain to marine pollution are found in two opinions. In the Trail Smelter Arbitration, 3 U.N. Rep. Intl. Arb. Awards 1905 (1949), 35 Am. J. Int'l. L. 684 (1941), the tribunal held that states had an obligation not to use their territory in such a way as might damage their neighbors. The International Court of Justice has likewise held that States have an obligation not to knowingly allow their territory to be used for acts which will be harmful to the rights of other states. Corfu Channel Case, (1949) 1 C. J. Rep. 4, 22. These principles would seem to prevent a nation polluting its waters to the extent that the polluting activity causes serious harm to the rights or territories of other nations.

As the following materials indicate, the law of marine pollution control is now primarily governed by public international agreements.

UNITED NATIONS CONFERENCE ON THE HUMAN ENVIRONMENT, REPORT, U.N. Doc. A/CONF. 48/14 (1972)

"Principles"

. . . .

7. States shall take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea.

1958 GENEVA CONVENTION ON THE HIGH SEAS, April 29, 1958, 450 U.N.T.S. 82 (effective for United States Sept. 30, 1962).

. . . .

Article 24

Every State shall draw up regulations to prevent pollution of the seas by the discharge of oil from ships or pipelines or resulting from the exploitation and exploration of the seabed and its subsoil, taking account of existing treaty provisions on the subject.

Article 25

1. Every State shall take measures to prevent pollution of the seas from the dumping of radio-active waste, taking into account any standards and regulations which may be formulated by the competent international organizations.

2. All States shall co-operate with the competent international organizations in taking measures for the prevention of pollution of the seas or air space above, resulting from any activities with radio-active materials or other harmful agents.

Allegrone, MARINE OIL POLLUTION:
THE EMERGING REGIME FOR THE ENFORCEMENT OF
VESSEL SOURCES OF POLLUTION
(unpublished seminar paper 1976)

. . . The 1958 Convention on the High Seas, established at the First Law of the Sea Conference in Geneva, set out the basic rights of states to enforce oil pollution laws.[4] The 1954 International Convention for the Prevention of Oil Pollution was amended twice, once in 1962 and again in 1969; these conventions established zones in which oil could not be discharged and set down standards for showing a violation.[5] Also in 1969, two United Nations conventions were passed, the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties,[6] (the so-called Intervention Convention), which gave coastal states the right to intervene if such action was necessary to eliminate harm to its coastline; and the International Convention on Civil Liability for Oil Pollution Damage,[7] (the Civil Liability Convention), which was the first attempt by governments to adopt uniform international rules and procedures for determining questions of liability and providing compensation to persons affected by oil from ships.

Growing demand for sufficient liability coverage for oil pollution damage lead to three significant agreements in the early 1970's. In 1971 the United Nations agreed upon the International Oil Pollution Compensation Fund, (the Fund Convention) which would serve to supplement the Civil Liability Convention.[8] In the same year, the private sector entered the field with two agreements which would serve to provide liability coverage while the Civil Liability and Fund Conventions were being ratified; they were the Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution (TOVALOP)[9] and the Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution (CRISTAL),[10] where

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[4]Article 24 states: "Every State shall draw up regulations to prevent pollution of the seas by the discharge of oil from ships . . . taking account of existing treaty provisions on the subject." 13 U.S.T. 2312, T.I.A.S. 5200.

[5]Council on Environmental Quality, Fourth Annual Report 332.

[6]9 Int'l Legal Mat'ls 25 (1969). Entered into law 6 May 1975.

[7]9 Int'l Legal Mat'ls 45 (1969). Entered into law 19 June 1975.

[8]11 Int'l Legal Mat'ls 284 (1971). The Fund Convention has a two-fold purpose: 1)to provide compensation to the victims of oil pollution who have suffered damage to the extent that they fail to be protected by the Civil Liability Convention, and 2) indemnifying shipowners and their insurers for the additional burdens which the Civil Liability Convention imposes on them. The Civil Liability Convention's maximum damage recovery is $14,112,000. The Fund Convention will extend compensation up to a maximum of $32,400,000 (or up to $64,800,000 if 2/3 of the IMCO Assembly so votes). For more detail see, L.F.E. Goldie, "Liability for Oil Pollution Disasters: International Law and the Delimitation of Competenses in a Federal Policy", 6 J. of Maritime L. and Comm. 303 (1975).

[9] 8 Int'l Legal Mat'ls 497 (1969).

10 G. Houston Lay, New Directions in the Law of the Sea, Vol. II, Documents, (1973) at 646.

the cargo owners agreed to supplement the tanker owner's funds.[11]

Finally, and most importantly, the Inter-governmental Maritime Consultative Organization Convention for the Prevention of Oil Pollution by Ships was passed in 1973.[12] This convention set new oil pollution standards and explicitly chose neither to permit nor forbid individual nations from passing stricter measures than the Convention.[13] Upon entry into force it will replace the 1954 Convention as amended.

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[11] It is anticipated that both TOVALOP and CRISTAL will probably end when the Civil Liability Convention and the Fund Convention become law. The Civil Liability Convention entered into force on 19 June 1975 and the Fund Convention should receive a sufficient number of ratifications soon.

[12] 12 Int'l Legal Mat'ls 1319 (1974).

[13] Dennis Livingstone, "Oil on the Seas", 16 Environment 38, (Sept. 1974) at 41.

INTERNATIONAL CONFERENCE ON MARINE POLLUTION: INTERNATIONAL CONVENTION FOR THE PREVENTION OF POLLUTION FROM SHIPS*

[Done at London, November 2, 1973]

INTERNATIONAL CONVENTION FOR THE PREVENTION OF POLLUTION FROM SHIPS, 1973

Text of the Articles of the Convention as adopted by the Conference

THE PARTIES TO THE CONVENTION,

BEING CONSCIOUS of the need to preserve the human environment in general and the marine environment in particular,

RECOGNIZING that deliberate, negligent or accidental release of oil and other harmful substances from ships constitutes a serious source of pollution,

RECOGNIZING ALSO the importance of the International Convention for the Prevention of Pollution of the Sea by Oil, 1954, as being the first multilateral instrument to be concluded with the prime objective of protecting the environment, and appreciating the significant contribution which that Convention has made in preserving the seas and coastal environment from pollution,

DESIRING to achieve the complete elimination of intentional pollution of the marine environment by oil and other harmful substances and the minimization of accidental discharge of such substances,

CONSIDERING that this object may best be achieved by establishing rules not limited to oil pollution having a universal purport,

HAVE AGREED as follows:

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*[Reproduced from I.M.C.O. Document MP/CONF/WP.35 of November 2, 1973. [The Convention will be opened for signature from January 15, 1974 through December 31, 1974. The Convention includes five annexes and two protocols. Annexes III, IV, and V are so-called "optional annexes", and a state may declare that it does not accept any one or all of these. Annex I (p. 1335) concerns the regulations for oil pollution prevention; Annex II (p. 1386) deals with the control of pollution by noxious liquid substances; Annex III (p. 1421) contains the regulations for the prevention of pollution by harmful substances carried in packaged forms; Annex IV (p. 1424), the regulations for the prevention of pollution by sewage from ships; Annex V (p. 1434), the regulations for the prevention of pollution by garbage from ships. Protocol I contains the provisions for reports on incidents involving harmful substances, and Protocol II concerns arbitration.

ARTICLE 3

Application

(1) The present Convention shall apply to:

(a) ships entitled to fly the flag of a Party to the Convention; and

(b) ships not entitled to fly the flag of a Party but which operate under the authority of a Party.

(2) Nothing in the present Article shall be construed as derogating from or extending the sovereign rights of the Parties under international law over the sea-bed and subsoil thereof adjacent to their coasts for the purposes of exploration and exploitation of their natural resources.

(3) The present Convention shall not apply to any warship, naval auxiliary or other ship owned or operated by a State and used, for the time being, only on government non-commercial service. However, each Party shall ensure by the adoption of appropriate measures not impairing the operations or operational capabilities of such ships owned or operated by it, that such ships act in a manner consistent, so far as is reasonable and practicable, with the present Convention.

ARTICLE 4

Violation

(1) Any violation of the requirements of the present Convention shall be prohibited and sanctions shall be established therefor under the law of the Administration of the ship concerned wherever the violation occurs. If the Administration is informed of such a violation and is satisfied that sufficient evidence is available to enable proceedings to be brought in respect of the alleged violation, it shall cause such proceedings to be taken as soon as possible, in accordance with its law.

(2) Any violation of the requirements of the present Convention within the jurisdiction of any Party to the Convention shall be prohibited and sanctions shall be established therefor under the law of that Party. Whenever such a violation occurs, that Party shall either:

(a) cause proceedings to be taken in accordance with its law; or

(b) furnish to the Administration of the ship such information and evidence as may be in its possession that a violation has occurred.

(3) Where information or evidence with respect to any violation of the present Convention by a ship is furnished to the Administration of that ship, the Administration shall promptly inform the Party which has furnished the information or evidence, and the Organization, of the action taken.

(4) The penalties specified under the law of a Party pursuant to the present Article shall be adequate in severity to discourage violations of the present Convention and shall be equally severe irrespective of where the violations occur.

Regulation 9

Control of Discharge of Oil

(1) Subject to the provisions of Regulations 10 and 11 of this Annex and paragraph (2) of this Regulation, any discharge into the sea of oil or oily mixtures from ships to which this Annex applies shall be prohibited except when all the following conditions are satisfied:

(a) for an oil tanker, except as provided for in sub-paragraph (b) of this paragraph:

(i) the tanker is not within a special area;

(ii) the tanker is more than 50 nautical miles from the nearest land;

(iii) the tanker is proceeding en route;

(iv) the instantaneous rate of discharge of oil content does not exceed 60 litres per nautical mile;

(v) the total quantity of oil discharged into the sea does not exceed for existing tankers 1/15,000 of the total quantity of the particular cargo of which the residue formed a part, and for new tankers 1/30,000 of the total quantity of the particular cargo of which the residue formed a part; and

(vi) the tanker has in operation, except as provided for in Regulation 15(3) of this Annex, an oil discharge monitoring and control system and a slop tank arrangement as required by Regulation 15 of this Annex;

(b) from a ship of 400 tons gross tonnage and above other than an oil tanker and from machinery space bilges excluding cargo pump room bilges of an oil tanker unless mixed with oil cargo residue:

(i) the ship is not within a special area;

(ii) the ship is more than 12 nautical miles from the nearest land;

(iii) the ship is proceeding en route;

(iv) the oil content of the effluent is less than 100 parts per million; and

(v) the ship has in operation an oil discharge monitoring and control system, oily water separating equipment, oil filtering system or other installation as required by Regulation 16 of this Annex.

(2) In the case of a ship of less than 400 tons gross tonnage other than an oil tanker whilst outside the special area, the Administration shall ensure that it is equipped as far as practicable and reasonable with installations to ensure the storage of oil residues on board and their discharge to reception facilities or into the sea in compliance with the requirements of paragraph (1)(b) of this Regulation.

(3) Whenever visible traces of oil are observed on or below the surface of the water in the immediate vicinity of a ship or its wake, Governments of Parties to the Convention should, to the extent they are reasonably able to do so, promptly investigate the facts bearing on the issue of whether there has been a violation of the provisions of this Regulation or Regulation 10 of this Annex. The investigation should include, in particular, the wind and sea conditions, the track and speed

of the ship, other possible sources of the visible traces in the vicinity, and any relevant oil discharge records.

(4) The provisions of paragraph (1) of this Regulation shall not apply to the discharge of clean or segregated ballast. The provisions of sub-paragraph (1)(b) of this Regulation shall not apply to the discharge of oily mixture which without dilution has an oil content not exceeding 15 parts per million.

(5) No discharge into the sea shall contain chemicals or other substances in quantities or concentrations which are hazardous to the marine environment or chemicals or other substances introduced for the purpose of circumventing the conditions of discharge specified in this Regulation.

(6) The oil residues which cannot be discharged into the sea in compliance with paragraphs (1), (2) and (4) of this Regulation shall be retained on board or discharged to reception facilities.

Regulation 10

Methods for the Prevention of Oil Pollution from Ships While Operating in Special Areas

(1) For the purpose of this Annex the special areas are the Mediterranean Sea area, the Baltic Sea area, the Black Sea area, the Red Sea area and the "Gulfs area" which are defined as follows:

(a) The Mediterranean Sea area means the Mediterranean Sea proper including the gulfs and seas therein with the boundary between the Mediterranean and the Black Sea constituted by the 41°N parallel and bounded to the west by the Straits of Gibraltar at the meridian of 5°36'W.

(b) The Baltic Sea area means the Baltic Sea proper with the Gulf of Bothnia, the Gulf of Finland and the entrance to the Baltic Sea bounded by the parallel of the Skaw in the Skagerrak at 57°44.8'N.

(c) The Black Sea area means the Black Sea proper with the boundary between the Mediterranean and the Black Sea constituted by the parallel 41°N.

(d) The Red Sea area means the Red Sea proper including the Gulfs of Suez and Aqaba bounded at the south by the rhumb line between Ras si Ane (12°8.5'N, 43°19.6'E) and Husn Murad (12°40.4'N, 43°30.2'E).

(e) The "Gulfs area" means the sea area located north west of the rhumb line between Ras al Hadd (22°30'N, 59°48'E) and Ras Al Fastch (25°04'N, 61°25'E).

(2) (a) Subject to the provisions of Regulation 11 of this Annex, any discharge into the sea of oil or oily mixture from any oil tanker and any ship of 400 tons gross tonnage and above other than an oil tanker shall be prohibited, while in a special area.

(b) Such ships while in a special area shall retain on board all oil drainage and sludge, dirty ballast and tank washing waters and discharge them only to reception facilities.

(3) (a) Subject to the provisions of Regulation 11 of this Annex, any discharge into the sea of oil or oily mixture from a ship of less than 400 tons gross tonnage, other than an oil tanker, shall be prohibited while in a special area, except when the oil content of the effluent without dilution does not exceed 15 parts per million or alternatively when all of the following conditions are satisfied:

(i) the ship is proceeding en route;

(ii) the oil content of the effluent is less than 100 parts per million; and

(iii) the discharge is made as far as practicable from the land, but in no case less than 12 nautical miles from the nearest land.

(b) No discharge into the sea shall contain chemicals or other substances in quantities or concentrations which are hazardous to the marine environment or chemicals or other substances introduced for the purpose of circumventing the conditions of discharge specified in this Regulation.

(c) The oil residues which cannot be discharged into the sea in compliance with sub-paragraph (a) of this paragraph shall be retained on board or discharged to reception facilities.

(4) The provisions of this Regulation shall not apply to the discharge of clean or segregated ballast.

(5) Nothing in this Regulation shall prohibit a ship on a voyage only part of which is in a special area from discharging outside the special area in accordance with Regulation 9 of this Annex.

(6) Whenever visible traces of oil are observed on or below the surface of the water in the immediate vicinity of a ship or its wake, the Governments of Parties to the Convention should, to the extent they are reasonably able to do so,

promptly investigate the facts bearing on the issue of whether there has been a violation of the provisions of this Regulation or Regulation 9 of this Annex. The investigation should include, in particular, the wind and sea conditions, the track and speed of the ship, other possible sources of the visible traces in the vicinity, and any relevant oil discharge records.

(7) Reception facilities within special areas:

(a) Mediterranean Sea, Black Sea and Baltic Sea areas.

(i) The Government of each Party to the Convention, the coastline of which borders on any given special area undertakes to ensure that not later than 1 January 1977 all oil loading terminals and repair ports within the special area are provided with facilities adequate for the reception and treatment of all the dirty ballast and tank washing water from oil tankers. In addition all ports within the special area shall be provided with adequate reception facilities for other residues and oily mixtures from all ships. Such facilities shall have adequate capacity to meet the needs of the ships using them without causing undue delay.

(ii) The Government of each Party having under its jurisdiction entrances to seawater courses with low depth contour which might require a reduction of draught by the discharge of ballast undertakes to ensure the provision of the facilities referred to in sub-paragraph (a)(i) of this paragraph but with the proviso that ships required to discharge slops or dirty ballast could be subject to some delay.

(iii) During the period between the entry into force of the present Convention (if earlier than 1 January 1977) and 1 January 1977 ships while navigating in the special areas shall comply with the requirements of Regulation 9 of this Annex. However the Governments of Parties the coastlines of which border any of the special areas under this sub-paragraph may establish a date earlier than 1 January 1977 but after the date of entry into force of the present Convention, from which the requirements of this Regulation in respect of the special areas in question shall take effect:

(1) if all the reception facilities required have been provided by the date so established; and

(2) provided that the Parties concerned notify the Organization of the date so established at least six months in advance, for circulation to other parties.

(iv) After 1 January 1977, or the date established in accordance with sub-paragraph (a)(iii) of this paragraph if earlier, each Party shall notify the Organization for transmission to the Contracting Governments concerned of all cases where the facilities are alleged to be inadequate.

(b) Red Sea area and "Gulf area"

(i) The Government of each Party the coastline of which borders on the special areas undertakes to ensure that as soon as possible all oil loading terminals and repair ports within those special areas are provided with facilities adequate for the reception and treatment of all the dirty ballast and tank washing water from tankers. In addition all ports within the special area shall be provided with adequate reception facilities for other residues and oily mixtures from all ships. Such facilities shall have adequate capacity to meet the needs of the ships using them without causing undue delay.

(ii) The Government of each Party having under its jurisdiction entrances to seawater courses with low depth contour which might require a reduction of draught by the discharge of ballast shall undertake to ensure the provision of the facilities referred to in sub-paragraph (b)(i) of this paragraph but with the proviso that ships required to discharge slops or dirty ballast could be subject to some delay.

(iii) Each Party concerned shall notify the Organization of the measures taken pursuant to provisions of sub-paragraph (b)(i) and (ii) of this paragraph. Upon receipt of sufficient notifications the Organization shall establish a date from which the requirements of this Regulation in respect of the area in question shall take effect. The Organization shall notify all Parties of the date so established no less than twelve months in advance of that date.

(iv) During the period between the entry into force of the present Convention and the date so established, ships while navigating in the special area shall comply with the requirements of Regulation 9 of this Annex.

(v) After such date oil tankers loading in ports in these special areas where such facilities are not yet available shall also fully comply with the requirements of this Regulation. However, oil tankers entering these special areas for the purpose of loading shall make every effort to enter the area with only clean ballast on board.

(vi) After the date on which the requirements for the special area in question take effect, each Party shall notify the Organization for transmission to the Parties concerned of all cases where the facilities are alleged to be inadequate.

(vii) At least the reception facilities as prescribed in Regulation 12 of this Annex shall be provided by 1 January 1977 or one year after the date of entry into force of the present Convention, whichever occurs later.

Regulation 11

Exception

Regulations 9 and 10 of this Annex shall not apply to:

(a) the discharge into the sea of oil or oily mixture necessary for the purpose of securing the safety of a ship or saving life at sea; or

(b) the discharge into the sea of oil or oily mixture resulting from damage to a ship or its equipment;

(i) provided that all reasonable precautions have been taken after the occurrence of the damage or discovery of the discharge for the purpose of preventing or minimizing the discharge; and

(ii) except if the owner or the Master acted either with intent to cause damage, or recklessly and with knowledge that damage would probably result; or

(c) the discharge into the sea of substances containing oil, approved by the Administration, when being used for the purpose of combating specific pollution incidents in order to minimize the damage from

erty, will execute its powers in such a way as to bring about injustices to states, their subdivisions, or persons acting pursuant to their permission." *Id.*, at 40.

The Submerged Lands Act did indeed grant to the States dominion over the offshore seabed within the limits defined in the Act and released the States from any liability to account for any prior income received from state leases that had been granted with respect to the marginal sea. But in further exercise of paramount national authority, the Act expressly declared that nothing in the Act

> "shall be deemed to affect in any wise the rights of the United States to the natural resources of that portion of the subsoil and seabed of the Continental Shelf lying seaward and outside of [the marginal sea], all of which natural resources appertain to the United States, and the jurisdiction and control of which by the United States is confirmed." 43 U. S. C. § 1302.

This declaration by Congress is squarely at odds with the assertions of the States in the present case. So, too, is the provision of the Act by which the grant to the States is expressly limited to the seabed within three miles (or three marine leagues in some cases) of the coastline, whether or not the States' historic boundaries might extend farther into the ocean. § 1301 (b). Moreover, in the course of litigation dealing with the reach and impact of the Act, the Court has said as plainly as may be that "the Act concededly did not impair the validity of the *California, Louisiana,* and *Texas* cases, which are admittedly applicable to all coastal States . . . ." *United States* v. *Louisiana,* 363 U. S. 1, 7 (1960); see also *id.,* at 83 n. 140. We agree with the Special Master when he said: "It is quite obvious that Congress could reserve to the federal government all the rights to the seabed of the continental shelf beyond the three-mile territorial belt of sea (or three leagues in the case of certain Gulf states) only upon the basis that it already had the paramount right to that seabed under the rule laid down in the *California* case." Report 19.

Congress emphatically implemented its view that the United States has paramount rights to the seabed beyond the three-mile limit when a few months later it enacted the Outer Continental Shelf Lands Act of 1953, 67 Stat. 462, 43 U. S. C. § 1331 *et seq.* Section 3 of the Act

"declared [it] to be the policy of the United States that the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this subchapter." 43 U. S. C. § 1332 (a).

The Act then proceeds to set out detailed provisions for the exercise of exclusive jurisdiction in the area and for the leasing and development of the resources of the seabed.

Of course, the defendant States were not parties to *United States* v. *California* or to the relevant decisions, and they are not precluded by res judicata from litigating the issues decided by those cases. But the doctrine of *stare decisis* is still a powerful force in our jurisprudence; and although on occasion the Court has declared—and acted accordingly—that constitutional decisions are open to re-examination, we are convinced that the doctrine has peculiar force and relevance in the present context. It is apparent that in the almost 30 years since *California,* a great deal of public and private business has been transacted in accordance with those decisions and in accordance with major legislation enacted by Congress, a principal purpose of which was to resolve the "interminable litigation" arising over the controversy of the ownership of the lands underlying the marginal sea. See H. R. Rep. No. 215, 83d Cong., 1st Sess., 2 (1953). Both the Submerged Lands Act and the Outer Continental Shelf Lands Act which soon followed proceeded from the premises established by prior Court decisions and provided for the orderly development of offshore resources. Since 1953, when this legislation was enacted, 33 lease sales have been held, in which 1,940 leases, embracing over eight million acres, have been issued. The Outer Continental Shelf, since 1953, has yielded over three billion barrels of oil, 19 trillion m.c.f. of natural gas, 13 million long tons of sulfur, and over four million long tons of salt. In 1973 alone, 1,081,000 barrels of oil and 8.9 billion cubic feet of natural gas were extracted daily from the Outer Continental Shelf.[7] Exploitation of our resources offshore implicates a broad range of federal legislation, ranging from the Longshoremen's and Harbor Workers' Compensation Act, incorporated into the Outer Continental Shelf Lands Act, to the more recent Coastal Zone Management Act.[8] We are quite sure that it would be inappropriate to disturb our prior cases, major legislation, and many years of commercial activity[9] by calling

into question, at this date, the constitutional premise of prior decisions. We add only that the Atlantic States, by virtue of the *California, Louisiana,* and *Texas* cases, as well as by reason of the Submerged Lands Act, have been on notice of the substantial body of authoritative law, both constitutional and statutory, which is squarely at odds with their claims to the seabed beyond the three-mile marginal sea. Neither the States nor their putative lessees have been in the slightest misled. Judgment shall be entered for the United States.

NOTES

In United States v. Florida, 420 U.S. 531(1975), the Court upheld the Special Master's finding that the seaward boundary of Florida in the Atlantic Ocean extended only to the limits specified in §1301(b) of the Submerged Lands Act(three geographical miles) rather than the boundaries defined in the State's 1868 Constitution.

B. Regulation of OCS Drilling

OUTER CONTINENTAL SHELF LANDS ACT

43 U.S.C. §1331 et. seq. (enacted 1953)

§ 1331. Definitions

When used in this subchapter—

(a) The term "outer Continental Shelf" means all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 1301 of this title, and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control;

(b) The term "Secretary" means the Secretary of the Interior;

(c) The term "mineral lease" means any form of authorization for the exploration for, or development or removal of deposits of, oil, gas, or other minerals; and

(d) The term "person" includes, in addition to a natural person, an association, a State, a political subdivision of a State, or a private, public, or municipal corporation.

§ 1332. Congressional declaration of policy; jurisdiction; construction

(a) It is declared to be the policy of the United States that the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this subchapter.

(b) This subchapter shall be construed in such manner that the character as high seas of the waters above the outer Continental Shelf and the right to navigation and fishing therein shall not be affected.

§ 1333. Laws and regulations governing lands—Constitution and United States laws; laws of adjacent States; publication of projected States lines; restriction on State taxation and jurisdiction

(a) (1) The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands and fixed structures which may be erected thereon for the purpose of exploring for, developing, removing, and transporting resources therefrom, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State: *Provided, however,* That mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter.

(2) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf.

(3) The provisions of this section for adoption of State law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom.

* * *

Coast Guard regulations; marking of islands and structures; offenses and penalties

(e) (1) The head of the Department in which the Coast Guard is operating shall have authority to promulgate and enforce such reasonable regulations with respect to lights and other warning devices, safety equipment, and other matters relating to the promotion of safety of life and property on the islands and structures referred to in subsection (a) of this section or on the waters adjacent thereto, as he may deem necessary.

Prevention of obstruction to navigation by Secretary of the Army

(f) The authority of the Secretary of the Army to prevent obstruction to navigation in the navigable waters of the United States is extended to artificial islands and fixed structures located on the outer Continental Shelf.

§ 1334. Administration of leasing—Rules and regulations; amendment; cooperation with State agencies; violations and penalties; compliance with regulations as condition of lease

(a) (1) The Secretary shall administer the provisions of this subchapter relating to the leasing of the outer Continental Shelf, and shall prescribe such rules and regulations as may be necessary to carry out such provisions. The Secretary may at any time prescribe and amend such rules and regulations as he determines to be

necessary and proper in order to provide for the prevention of waste and conservation of the natural resources of the outer Continental Shelf, and the protection of correlative rights therein, and, notwithstanding any other provisions herein, such rules and regulations shall apply to all operations conducted under a lease issued or maintained under the provisions of this subchapter. In the enforcement of conservation laws, rules, and regulations the Secretary is authorized to cooperate with the conservation agencies of the adjacent States. Without limiting the generality of the foregoing provisions of this section, the rules and regulations prescribed by the Secretary thereunder may provide for the assignment or relinquishment of leases, for the sale of royalty oil and gas accruing or reserved to the United States at not less than market value, and, in the interest of conservation, for unitization, pooling, drilling agreements, suspension of operations or production, reduction of rentals or royalties, compensatory royalty agreements, subsurface storage of oil or gas in any of said submerged lands, and drilling or other easements necessary for operations or production.

(2) Any person who knowingly and willfully violates any rule or regulation prescribed by the Secretary for the prevention of waste, the conservation of the natural resources, or the protection of correlative rights shall be deemed guilty of a misdemeanor and punishable by a fine of not more than $2,000 or by imprisonment for not more than six months, or by both such fine and imprisonment, and each day of violation shall be deemed to be a separate offense. The issuance and continuance in effect of any lease, or of any extension, renewal, or replacement of any lease under the provisions of this subchapter shall be conditioned upon compliance with the regulations issued under this subchapter and in force and effect on the date of the issuance of the lease if the lease is issued under the provisions of section 1337 of this title, or with the regulations issued under the provisions of section 1335(b) (2) of this title if the lease is maintained under the provisions of section 1335 of this title.

Cancellation of lease; judicial review

(b) (1) Whenever the owner of a nonproducing lease fails to comply with any of the provisions of this subchapter, or of the lease, or of the regulations issued under this subchapter and in force and effect on the date of the issuance of the lease if the lease is issued under the provisions of section 1337 of this title, or of the regulations issued under the provisions of section 1335(b) (2) of this title, if the lease is maintained under the provisions of section 1335 of this title, such lease may be canceled by the Secretary, subject to the right of judicial review as provided in section 1337(j) of this title, if such default continues for the period of thirty days after mailing of notice by registered letter to the lease owner at his record post office address.

(2) Whenever the owner of any producing lease fails to comply with any of the provisions of this subchapter, or of the lease, or of the regulations issued under this subchapter and in force and effect on the date of the issuance of the lease if the lease is issued under the provisions of section 1337 of this title, or of the regulations issued under the provisions of section 1335(b) (2) of this title, if the lease is maintained under the provisions of section 1335 of this title, such lease may be forfeited and canceled by an appropriate proceeding in any United States district court having jurisdiction under the provisions of section 1333(b) of this title.

said submerged lands in the vicinity of the pipeline in such proportionate amounts as the Federal Power Commission, in the case of gas, and the Interstate Commerce Commission, in the case of oil, may, after a full hearing with due notice thereof to the interested parties, determine to be reasonable, taking into account, among other things, conservation and the prevention of waste. Failure to comply with the provisions of this section or the regulations and conditions prescribed thereunder shall be ground for forfeiture of the grant in an appropriate judicial proceeding instituted by the United States in any United States district court having jurisdiction under the provisions of section 1333(b) of this title.

Pipeline rights-of-way; forfeiture of grant

(c) Rights-of-way through the submerged lands of the outer Continental Shelf, whether or not such lands are included in a lease maintained or issued pursuant to this subchapter, may be granted by the Secretary for pipeline purposes for the transportation of oil, natural gas, sulphur, or other mineral under such regulations and upon such conditions as to the application therefor and the survey, location and width thereof as may be prescribed by the Secretary, and upon the express condition that such oil or gas pipelines shall transport or purchase without discrimination, oil or natural gas produced from

* * *

§ 1337. Grant of leases by Secretary—Oil and gas leases; award to highest bidder; method of bidding

* * *

Terms and provisions of oil and gas leases

(b) An oil and gas lease issued by the Secretary pursuant to this section shall (1) cover a compact area not exceeding five thousand seven hundred and sixty acres, as the Secretary may determine, (2) be for a period of five years and as long thereafter as oil or gas may be produced from the area in paying quantities, or drilling or well reworking operations as approved by the Secretary are conducted thereon, (3) require the payment of a royalty of not less than 12½ per centum, in the amount or value of the production saved, removed, or sold from the lease, and (4) contain such rental provisions and such other terms and provisions as the Secretary may prescribe at the time of offering the area for lease.

* * *

Publication of notices of sale and terms of bidding

(f) Notice of sale of leases, and the terms of bidding, authorized by this section shall be published at least thirty days before the date of sale in accordance with rules and regulations promulgated by the Secretary.

* * *

§ 1340. Geological and geophysical explorations

Any agency of the United States and any person authorized by the Secretary may conduct geological and geophysical explorations in the outer Continental Shelf, which do not interfere with or endanger actual operations under any lease maintained or granted pursuant to this subchapter, and which are not unduly harmful to aquatic life in such area. Aug. 7, 1953, c. 345, § 11, 67 Stat. 469.

§ 1341. Reservation of lands and rights—Withdrawal of unleased lands by President

(a) The President of the United States may, from time to time, withdraw from disposition any of the unleased lands of the outer Continental Shelf.

First refusal of mineral purchases

(b) In time of war, or when the President shall so prescribe, the United States shall have the right of first refusal to purchase at the market price all or any portion of any mineral produced from the outer Continental Shelf.

National security clause

(c) All leases issued under this subchapter, and leases, the maintenance and operation of which are authorized under this subchapter, shall contain or be construed to contain a provision whereby authority is vested in the Secretary, upon a recommendation of the Secretary of Defense, during a state of war or national emergency declared by the Congress or the President of the United States after August 7, 1953, to suspend operations under any lease; and all such leases shall contain or be construed to contain provisions for the payment of just compensation to the lessee whose operations are thus suspended.

National defense areas; suspension of operations; extension of leases

(d) The United States reserves and retains the right to designate by and through the Secretary of Defense, with the approval of the President, as areas restricted from exploration and operation that part of the outer Continental Shelf needed for national defense; and so long as such designation remains in effect no exploration or operations may be conducted on any part of the surface of such area except with the concurrence of the Secretary of Defense; and if operations or production under any lease theretofore issued on lands within any such restricted area shall be suspended, any payment of rentals, minimum royalty, and royalty prescribed by such lease likewise shall be suspended during such period of suspension of operation and production, and the term of such lease shall be extended by adding thereto any such suspension period, and the United States shall be liable to the lessee for such compensation as is required to be paid under the Constitution of the United States.

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43 C.F.R. 3300 et. seq.

Subpart 3300—Outer Continental Shelf Mineral Deposits; General

SOURCE: The provisions of this Subpart 3300 appear at 35 F.R. 9694, June 13, 1970, unless otherwise noted.

§ 3300.0–3 Purpose and authority.

The Outer Continental Shelf Lands Act of August 7, 1953 (67 Stat. 462; 43 U.S.C. § 1331 et seq.), referred to in this part as "the act", among other things, authorizes the Secretary of the Interior to issue on a competitive basis leases for oil and gas, sulphur, and other minerals in submerged lands of the Outer Continental Shelf, as defined in section 2 of the act. Subject to the supervisory authority of the Secretary, the regulations in this part shall be administered by the Director, Bureau of Land Management, hereinafter referred to in this part as the Director.

§ 3300.0–4 Applicability of public land laws.

The laws and regulations pertaining to the public lands of the United States are not applicable to the submerged lands of the Outer Continental Shelf.

Mineral deposits in the submerged lands of the Outer Continental Shelf are subject to disposition only in accordance with the provisions of the act and the regulations promulgated by the Secretary thereunder.

* * *

§ 3301.1 Leasing maps.

(a) Any area of the Outer Continental Shelf which has been appropriately platted as provided in paragraph (b) of this section is subject to lease for any mineral not included in a subsisting lease issued under the act or meeting the requirements of subsection (a) of section 6 of the act, unless before any lease is offered or issued the unit is (1) withdrawn from disposition pursuant to section 12(a) of the act, or (2) designated as an area or part of an area restricted from operation under section 12(d) of the act.

(b) As the need arises, the Bureau of Land Management will prepare official leasing maps of areas of the Outer Continental Shelf, which will be made to conform so far as practicable to the method of tract designation established by the adjoining State. The area included in each mineral lease shall be described in accordance with the official leasing map.

§ 3301.2 Resources evaluation.

From time to time the Director may announce tentative schedules of lease sales of Outer Continental Shelf areas. At such time as an area is initially considered for mineral leasing, or as the need arises, the Director shall request the Director, Geological Survey, to prepare a summary report describing the general geology and potential mineral resources of the area and shall request other interested Federal agencies to prepare reports describing to the extent known any other valuable resources contained within the general area and the potential effect of mineral operations upon the resources or upon the total environment.

§ 3301.3 Nominations of tracts.

In selecting tracts for oil and gas, sulphur, or other mineral leasing, the Director will receive and consider nominations of tracts or requests describing areas and expressing an interest in leasing of minerals, or, from time to time, upon his own motion, upon approval of the Secretary, may issue calls for nominations of tracts for the leasing of minerals in specified areas. Nominations of tracts should be addressed to the Director, with copies to the appropriate Bureau of Land Management field office and the appropriate oil and gas supervisor of the Geological Survey. The Director, Geological Survey, shall submit recommendations to the Director on tract selections and lease terms and conditions.

§ 3301.4 Selection of tracts.

The Director, prior to the final selection of tracts for leasing, either selected on his own motion or nominated pursuant to § 3301.3 of this subpart, shall evaluate fully the potential effect of the leasing program on the total environment, aquatic resources, aesthetics, recreation, and other resources in the entire area during exploration, development and operational phases. To aid him in his evaluation and determinations he shall request and consider the views and recommendations of appropriate Federal agencies, may hold public hearings after appropriate notice, and may consult with State agencies, organizations, industries, and individuals. The Director shall develop special leasing stipulations and conditions when necessary to protect the environment and all other resources, and such special stipulations and conditions shall be contained in the proposed notice of lease offer. The proposed notice of lease offer, together with all views and recommendations received and the Director's findings or actions thereon, shall be submitted to the Secretary for final approval.

§ 3301.5 Notice of lease offer.

Upon approval of the Secretary, the Director shall publish the notice of lease offer at the expense of the United States in the FEDERAL REGISTER, as the official publication, and in other publications as may be desirable. The publication in the FEDERAL REGISTER shall be at least 30 days prior to the date of the sale. The notice shall state the place and time at which bids will be filed, and the place, date, and hour at which bids will be opened. The notice shall contain any special stipulations or conditions which will become a part of any lease issued pursuant to such notice, including stipulations or conditions for the protection of the environment, aquatic life and other resources.

* * *

§ 3306.2 Cancellation of leases.

Any nonproducing lease issued under the act may be canceled by the authorized officer whenever the lessee fails to comply with any provision of the act or lease or applicable regulations in force and effect on the date of the issuance of the lease, if such failure to comply continues for 30 days after mailing of notice by registered letter to the lease owner at his record post office address. Any such cancellation is subject to judicial review as provided in section 8(j) of the act upon the complaint of any person. Producing leases issued under the act

may be canceled for such failure only by judicial proceedings in the manner prescribed in section 5(b)(2) of the act. Any lease issued under the act, whether producing or not, will be canceled by the authorized officer upon proof that it was obtained by fraud or misrepresentation, and after notice and opportunity to be heard has been afforded to the lessee.

* * *

§ 3307.4 Exploration and operations.

§ 3307.4–1 Purchase of production.

In time of war, or when the President of the United States shall so prescribe, the United States shall have the right of first refusal to purchase at the market price all or any portion of the oil or gas produced from the leased area, as provided in section 12(b) of the act.

§ 3307.4–2 Suspension of operations during war or national emergency.

Upon recommendation of the Secretary of Defense, during a state of war or national emergency declared by the Congress or the President of the United States after August 7, 1953, the Secretary is authorized to suspend any or all operations under a lease, as provided in section 12(c) of the act: *Provided*, That just compensation shall be paid by the United States to the lessee whose operations are thus suspended.

§ 3307.4–3 Restriction of exploration and operations.

The United States shall have the right, as provided in section 12(d) of the act, to restrict from exploration and operations the leased area or any part thereof which may be designated by and through the Secretary of Defense, with the approval of the President of the United States, as, or as part of, an area of the Outer Continental Shelf needed for national defense. So long as such designation remains in effect no exploration or operations may be conducted on the surface of the leased area or the part thereof included within the designation except with the concurrence of the Secretary of Defense. If operations or production under any lease within any such restricted area shall be suspended, any payments of rentals, minimum royalty, and royalty prescribed by such lease likewise shall be suspended during such period of suspension of operations and production, and the term of such lease shall be extended by adding thereto any such suspension period, and the United States shall be liable to the lessee for such compensation as is required to be paid under the Constitution of the United States.

§ 3307.4–4 Geological and geophysical exploration; rights-of-way.

The United States reserves the right to authorize the conduct of geological and geophysical exploration in the leased area which does not interfere with or endanger actual operations under the lease and the right to grant such easements or rights-of-way, upon, through, or in the leased area as may be necessary or appropriate to the working of other lands containing the deposits described in the act, and to the treatment and shipment of products thereof by or under authority of the Government, its lessees or permittees, and for other public purposes, subject to the provisions of section 5(c) of the act where they are applicable and to all lawful and reasonable regulations and conditions prescribed by the Secretary thereunder.

30 C.F.R. 250 et. seq.

§ 250.1 Purpose and authority.

The Outer Continental Shelf Lands Act enacted on August 7, 1953 (67 Stat 462), referred to in this part as "the act," authorizes the Secretary of the Interior at any time to prescribe and amend such rules and regulations, to be applicable to all operations conducted under a lease issued or maintained under the provisions of the act, as he determines to be necessary and proper to provide for the prevention of waste and conservation of the natural resources of the Outer Continental Shelf, and the protection of correlative rights therein. Subject to the supervisory authority of the Secretary of the Interior, the regulations in this part shall be administered by the Director of the Geological Survey through the Chief, Conservation Division.

* * *

§ 250.12 Regulation of operations.

(a) *Duties of supervisor.* The supervisor in accordance with the regulations in this part shall inspect and regulate all operations and is authorized to issue OCS Orders and other orders and rules necessary for him to effectively supervise operations and to prevent damage to, or waste or, any natural resource, or injury to life or property. The supervisor shall receive, and shall, when in his judgment it is necessary, consult with or solicit advice from lessees, field officials of inter-

ested Departments and agencies, including the Fish and Wildlife Service, Federal Water Pollution Control Administration, Bureau of Land Management, Coast Guard, Department of Defense, Corps of Engineers, and representatives of State and local governments.

* * *

(c) *Emergency suspensions.* The supervisor is authorized, either in writing or orally with written confirmation, to suspend any operation, including production, which in his judgment threatens immediate, serious, or irreparable harm or damage to life, including aquatic life, to property, to the leased deposits, to other valuable mineral deposits or to the environment. Such emergency suspension shall continue until in his judgment the threat or danger has terminated.

* * *

§ 250.14 Samples, tests, and surveys.

(a) When deemed necessary or advisable, the supervisor is authorized to require that adequate tests or surveys be made in an acceptable manner without cost to the lessor to determine the reservoir energy; the presence, quantity, and quality of oil, gas, sulphur, other mineral deposits, or water; the amount and direction of deviation of any well from the vertical; or the formation, casing, tubing, or other pressures.

(b) The supervisor may, at the time of approval of any notice to drill or redrill any well, stipulate reasonable requirements for the taking of formation samples or cores to determine the identity and character of any formation.

§ 250.30 Lease terms, regulations, waste, damage and safety.

The lessee shall comply with the terms of applicable laws and regulations, the lease terms, OCS Orders and other written orders and rules of the supervisor, and with oral orders of the supervisor. All such oral orders shall be effective when issued, and are to be confirmed in writing as provided in § 250.11. The lessee shall take all necessary precautions to prevent damage to or waste of any natural resource or injury to life, or property, or the aquatic life of the seas.

* * *

§ 250.38 Well records.

* * *

(c) Upon request by the supervisor, the lessee shall submit paleontological reports identifying microscopic fossils by depth (not the resulting interpretations based upon such identifications) unless washed well samples normally maintained by the lessee for paleontological determinations are made available to the supervisor for inspection.

* * *

(g) The lessee shall submit any other reports and records of operations when required and in the manner and form prescribed by the supervisor.

* * *

§ 250.41 Control of wells.

(a) *Drilling wells.* The lessee shall take all necessary precautions to keep all wells under control at all times, shall utilize only personnel trained and competent to drill and operate such wells, and shall utilize and maintain materials and high-pressure fittings and equipment necessary to insure the safety of operating conditions and procedures.

* * *

§ 250.43 Pollution and waste disposal.

(a) The lessee shall not pollute land or water or damage the aquatic life of the sea or allow extraneous matter to enter and damage any mineral- or water-bearing formation. The lessee shall dispose of all liquid and nonliquid waste materials as prescribed by the supervisor. All spills or leakage of oil or waste materials shall be recorded by the lessee and, upon request of the supervisor, shall be reported to him. All spills or leakage of a substantial size or quantity, as defined by the supervisor, and those of any size or quantity which cannot be immediately controlled also shall be reported by the lessee without delay to the supervisor and to the Coast Guard and the Regional Director of the Federal Water Pollution Control Administration. All spills or leakage of oil or waste materials of a size or quantity specified by the designee under the pollution contingency plan shall also be reported by the lessee without delay to such designee.

(b) If the waters of the sea are polluted by the drilling or production operations conducted by or on behalf of the lessee, and such pollution damages or threatens to damage aquatic life, wildlife, or public or private property, the control and total removal of the pollutant, wheresoever found, proximately resulting therefrom shall be at the expense of the lessee. Upon failure of the lessee to control and remove the pollutant the supervisor, in cooperation with other appropriate agencies of the Federal, State and local governments, or in cooperation with the lessee, or both, shall have the right to accomplish the control and removal of the pollutant in accordance with any established contingency plan for combating oil spills or by other means at the cost of the lessee. Such action shall not relieve the lessee of any responsibility as provided herein.

(c) The lessee's liability to third parties, other than for cleaning up the pollutant in accordance with paragraph (b) of this section shall be governed by applicable law.

* * *

§ 251.5 **Requirement of notices and permits.**

(a) *Geological or geophysical exploration for mineral resources.* A person may not conduct geological or geophysical exploration for mineral resources without a permit. Separate permits will be issued for geological exploration for mineral resources and for geophysical exploration for mineral resources.

* * *

§ 251.12 **Submission of data and information by permittees.**

(a) *Submission of geological data and analyzed geological information.* (1) Each holder of a permit for geological exploration shall notify the Supervisor immediately, in writing, of the acquisition or analysis of any geological data collected under the permit. At any time within one year of receiving a notice of acquisition or analysis from a permittee, or within a longer period if specified in the permit, the Supervisor may select all or part of the geological data and analyzed geological information. The permittee shall keep the geological data and analyzed geological information available for inspection and selection by the Supervisor during such period, and the permittee shall submit geological data and analyzed geological information to the Supervisor within 30 days after receiving a request for submission of them.

* * *

THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969
42 U.S.C. §§4321 et seq.

§ 4321. Congressional declaration of purpose

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality. Pub.L. 91-190, § 2, Jan. 1, 1970, 83 Stat. 852.

SUBCHAPTER I. -- POLICIES AND GOALS

§ 4331. Congressional declaration of national environmental policy

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to

improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may --

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, whereever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall --

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment:

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on --

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) and irreversible and irretrievable commitments of resources which would be involved in the proposed action should be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

* * *

§ 4333. Conformity of administrative procedures to national environmental policy

All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this chapter and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this chapter.

§ 4334. Other statutory obligations of agencies

Nothing in section 4332 or 4333 of this title shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

§4335. Efforts supplemental to existing authorizations

The policies and goals set forth in this chapter are supplementary to those set forth in existing authorizations of Federal agencies.

NOTES

An OCS lease sale involves the following basic procedures:

a.)the Secretary of the Interior determines a general leasing schedule;

b.)The Secretary receives nominations by industry of tracts they are interested in bidding on and so called "negative nominations"--requests by States or persons that the Secretary not lease certain tracts due to possible adverse environmental consequences;

c.)the Secretary tentatively designates tracts for leasing;

d.)a draft environmental impact statement(EIS) is prepared discussing the impact of and alternatives to developing the specific tracts;

e.)a public hearing is held with the EIS providing the focus for public comment on the proposed action; written comments are also received;

f.)a final EIS is prepared;

g.)a decision is made to offer specific tracts for lease;
h.)bids are received and if an acceptable bid is offered the lease is sold;
i.)exploratory drilling is carried out to determine the feasibility of commercial production;and
j.)permission for commercial production is granted by the Secretary after a review of compliance with safety, environmental and other regulations.

GULF OIL CORPORATION V. MORTON
493 F.2d 141(9th Cir. 1973)

OPINION

DUNIWAY, Circuit Judge:

This is an appeal by the Secretary of the Interior and subordinate federal officials from a judgment (1) setting aside the Secretary's orders suspending drilling operations on eleven oil and gas leases in the Santa Barbara Channel, (2) directing the Secretary to forthwith grant all pending applications for drilling permits, and (3) extending the initial term of these leases for 32 months to enable the lessees to exercise their rights under these leases.

We reverse.

1. *The Facts*

The relevant facts have been stipulated to by the parties. Plaintiffs are the holders of eleven oil and gas leases covering areas of the outer continental shelf in the Santa Barbara Channel, granted in 1968 pursuant to the terms of the Outer Continental Shelf Lands Act, 67 Stat. 462 (Aug. 7, 1953), 43 U.S.C. §§ 1331–1343 (OCS Act). They have paid some $153,000,000 for these leases. In January, 1969, a well being drilled by Union Oil Company under another lease, not one here involved, blew out, causing the massive Santa Barabara oil spill. Shortly thereafter, the Secretary suspended all operations on certain leases in the Channel. This order was complied with, although the companies took an unsuccessful administrative appeal, and the leases were extended for the period of the suspension. In April, 1971, before plaintiffs had begun drilling under the leases here in question, they were again ordered to suspend operations. They were informed that this suspension was to continue until January, 1973, that the lease terms would be extended for an appropriate period of time, and that no royalties would be due from them during the suspension. On appeal, the Secretary sustained the suspension, stating that it was for the purpose of permitting Congress to consider proposed legislation to terminate the leases, and that the action was taken "in the interest of conservation." His decision incorporated a statement by the Acting Director of the United States Geological Survey which identified three environmental risks which would be involved in continuing operations under the leases: the possibility of another blowout; the possibility that wells would be improperly plugged should the legislation pass and abandonment become necessary; the possibility that geologic structures such as the one which contributed to the 1969 spill would be encountered and fractured, thus causing large quantities of oil and gas to escape. The statement emphasized that none of these risks was acute and that, if the development and extraction of oil were contemplated under these leases, the risks would be acceptable. However, it also concluded that the risks were unacceptable in light of the fact that the leases might be terminated in the near future.

The plaintiffs then filed this action, requesting that the suspensions be declared invalid and revoked, that the Secretary be ordered to issue drilling permits for the leases, and that the leases be extended to compensate for the loss of drilling time. The district court entered judgment in their favor, stating:

> "This Court considers that the only suspension orders which can be issued by the Secretary are those provided for by Section 12 of the Act [dealing with suspension during time of war and for defense purposes] or those

providing for the suspension of actual operations when requested by the lessee or when necessary to prevent waste or damage to person or property." 345 F.Supp. at 685, 688–689.

* * *

Section 5(a)(1) of the Act, 43 U.S.C. § 1334(a)(1), provides:

> "The Secretary shall administer the provisions of this Act relating to the leasing of the outer Continental Shelf, and shall prescribe such rules and regulations as may be necessary to carry out such provisions. The Secretary may at any time prescribe and amend such rules and regulations as he determines to be necessary and proper in order to provide for the prevention of waste and *conservation of the natural resources of the outer Continental Shelf,* and the protection of correlative rights therein, and, notwithstanding any other provisions herein, such rules and regulations shall apply to all operations conducted under a lease issued or maintained under the provisions of this subchapter. In the enforcement of conservation laws, rules, and regulations the Secretary is authorized to cooperate with the conservation agencies of the adjacent States. Without limiting the generality of the foregoing provisions of this section, the rules and regulations prescribed by the Secretary thereunder may provide for the assignment or relinquishment of leases, for the sale of royalty oil and gas accruing or reserved to the United States at not less than market value, and, *in the interest of conservation,* for unitization, pooling, drilling agreements, *suspension of operations or production,* reduction of rentals or royalties, compensatory royalty agreements, subsurface storage of oil or gas in any of said submerged lands, and drilling or other easements necessary for operational production." (Emphasis added.)

It is true, as plaintiffs argue, that the basic delegation of authority is to administer the leasing provisions of the Act and that these deal with exploration for and extraction of oil and gas and sulphur. But it is also true that, in authorizing the Secretary to issue regulations, the Act speaks of "conservation of the natural resources of the outer Continental Shelf," not just of conservation of oil, gas, sulphur and other mineral resources. We cannot conclude that the later language, permitting suspension of leases "in the interest of conservation" is confined to conservation of oil and gas as plaintiffs urge, even though the sentence also refers to "unitization, pooling, drilling agreements . . . reduction of rentals or royalties, compensatory royalty agreements, subsurface storage of oil or gas . . ." all of which do relate primarily to conservation of oil and gas. We think that the phrase "in the interest of conservation" refers back to the earlier phrase which we have quoted.

The phrase "conservation of the natural resources of the outer Continental Shelf" is, on its face, broader than the meaning that plaintiffs would give it. Its natural meaning would encompass all such resources, not just oil and gas, sulphur and other minerals.

The OCS Act was originally introduced in Congress as Title III of the Submerged Lands Act, 67 Stat. 29, May 22, 1953. See 1953 U.S.Code Cong. & Admin.News 2177 ff, quoting S.Rep. 411, H.Rep. 413, Conf.Rep. 1031, 83rd Cong., 1st Sess. (1953). It was stricken from that Act, but reintroduced in the same form and ultimately adopted on August 7, 1953. In the legislative history, it is still referred to as Title III of the Submerged Lands Act, although it was finally adopted as an amendment to the Submerged Lands Act. It is clear, however, that the two Acts are in pari materia.

Section 2(e) of the Submerged Lands Act (43 U.S.C. § 1301(e)) provides

> "The term 'natural resources' includes, without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life but does not include water power, or the use of water for the production of power."

We think it entirely reasonable for the Secretary to conclude that the OCS Act,

in § 5(a)(1), uses the phrase "natural resources" in the sense in which it is defined in Section 2(e) of the Submerged Lands Act.

If there were still any doubt in our minds that the Secretary's range of choices includes suspension to conserve the natural resources of the outer continental shelf as thus broadly construed, those doubts would be removed by the National Environmental Policy Act of 1969, 83 Stat. 852, 42 U.S.C. §§ 4321–4347 (NEPA). That Act provides in § 102, 42 U.S.C. § 4332:

> "The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, ..."

In Calvert Cliffs' Coord. Com. v. United States A. E. Comm., 1971, 146 U.S. App.D.C. 33, 449 F.2d 1109, 1112–1113, the court said:

> "NEPA, first of all, makes environmental protection a part of the mandate of every federal agency and department. . . . This compulsion is most plainly stated in Section 102. . . . Congress also 'authorizes and directs' that '(2) all agencies of the Federal Government shall' follow certain rigorous procedures in considering environmental values. Senator Jackson, NEPA's principal sponsor, stated that '[n]o agency will [now] be able to maintain that it has no mandate or no requirement to consider the environmental consequences of its actions.' He characterized the requirements of Section 102 as 'action-forcing' and stated that that '[o]therwise, these lofty declarations [in Section 101] are nothing more than that.'" (Footnotes omitted.)

The Secretary's Order is Within the Range of Choices Available to Him

There remains, however, a second question: could the Secretary suspend operations under the plaintiffs' leases for the reasons that he has invoked in this case, i. e., was this particular action within the range of choices available to him? Plaintiffs urge that it was not. They point out that the leases were made in full conformity with the OCS Act, that one purpose of the Act was to develop the resources of the outer Continental Shelf, particularly oil and gas, that the leases themselves contemplate, and indeed require, the plaintiffs to drill. They add to this the fact that the statement of the Geological Survey, on which the Secretary relied, shows that, if drilling is to be done, the ecological risks are acceptable. Finally, they point out that the Secretary himself recognizes that, under these circumstances, only Congress can permanently prevent drilling by cancelling the leases and paying the plaintiffs for their value. In essence, their argument is that the Secretary cannot suspend the leases to give himself a chance to persuade Congress to do what he now thinks ought to be done.

The argument is a powerful one, but we are unable to accept it. As we construe the OCS Act and NEPA, the Secretary has a continuing duty to guard all the resources of the outer Continental Shelf. After the leases in question were made, events occurred in the Santa Barbara Channel that were both unexpected and very dangerous to the environment. These caused the Secretary to reconsider the dangers to the natural resources of the area if drilling were to proceed under the leases.

On April 20, 1971, the Secretary sent to the Speaker of the House a letter, a proposed bill, and an environmental impact statement. In his letter, the Secretary recites the actions taken by him after the January 1969 blow out in the Santa Barbara Channel, and continues:

> "At the same time, a second major action was taken. An order was signed which converted the existing two-mile buffer opposite the Santa Barbara State Oil Sanctuary into a permanent ecological preserve. Until this order was signed, the area which covers 21,000 acres, had no special legal status.
>
> The enclosed bill proposed a more permanent solution to the problem. It would terminate 35 of the Federal leases and place the area covered by them, as well as certain other adjacent

areas, into a National Energy Reserve. The reserve shall be available for lease only as determined by the President.

. . . We believe that the proposed bill offers an equitable solution to the problem created by the 'blowout' in the Santa Barbara Channel area of the Outer Continental Shelf.

* * *

The Bill, however, did not come to a vote. A second suspension order was issued in April of 1973. The parties have stipulated that its validity will be controlled by our disposition of this case. Under date of April 18, 1973, the Secretary re-submitted the bill.

* * *

The bill was introduced in the Senate on June 6, 1973. So far as we are advised, it is still pending.

When the suspension order in question was made, drilling had not yet begun on the leases in question. In such circumstances, the fact that the leases might be terminated is highly relevant to an evaluation of the risks involved. For example, even if the threat to the marine environment were grave, the Secretary might be justified in refusing to order a suspension of operations if it were certain that drilling would eventually take place and there were no reason to believe that the risks would decrease with the passing of time. On the other hand, if there were a good possibility that drilling would have to be abandoned, it would certainly be rational for the Secretary to decide not to run the risk of substantial environmental damage, even if that risk were not acute. This is particularly true when, as the Geological Survey statement observes, the plugging of wells itself poses a risk of ecological damage. It would make little sense to require the Secretary to ignore reality by always assuming that a leased field will eventually be developed.

The fact that the bill in question was recommended by the Secretary does not affect this analysis. It cannot be seriously contended that he has no power to recommend legislation. Indeed, NEPA seems to require that he do so when he believes that legislation is necessary to enable him to carry out his duties under that Act. See § 103 and § 102(2)(C), 42 U.S.C. § 4333 and § 4332(2)(C). It would be a strange rule of law to insist that the Secretary's right hand ignore what his left hand is doing. There is nothing to support the plaintiffs' fears that the Secretary will use this procedure as a bootstrap method of discontinuing the off-shore exploration and drilling program entirely. Should such abuses occur, they can be dealt with in an appropriate case. We think that, given the fact that drilling had not yet begun and that it might have to be abandoned, the Secretary's evaluation of the environmental risks cannot be called arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

We do not hold that the Secretary can continue to issue comparable orders one after another and justify them by repeatedly having his proposed legislation introduced in the Congress. It is arguable that at some point, if Congress does not act, there must be an end to the matter. The parties' stipulation precludes our considering whether that point had been reached when the first suspension order expired in January of this year. We express no opinion as to whether such a point would be reached if and when the order presently in effect expires without congressional action. If that happens, and if the Secretary then should issue another suspension, that would be a new and different case.

The judgment is reversed.

SIERRA CLUB V. MORTON
510 F.2d 813(5th Cir. 1975)

CLARK, Circuit Judge:

This case involves yet another clash between a federal agency and environmentalists over a proposed development of the nation's resources. The judicial focus, blurred as usual by the lack of technical and scientific expertise, is upon whether the impact statement compiled during consideration of the federal action satisfies the National Environmental Policy Act (NEPA), 42 U.S.C.A. § 4321 et seq.

* * *

Under existing jurisprudence, plaintiffs were required to establish by a preponderance of the evidence, rather than by a prima facie showing of deficiencies, that the EIS for MAFLA was inadequate. The additional attack on the Secretary of Interior's decision to proceed with the leasing must be founded on proof that it was arbitrary and capricious. Since the basic legal premises on which the district judge based his determination that the federal agency actions passed muster were correct, plaintiffs must shoulder a more imposing burden in this Court. Having failed to convince the trial court that the EIS was inadequate, the plaintiffs must now demonstrate that the lower court's findings accepting the EIS as adequate and the decision to proceed as permissible were clearly erroneous.

Section 102(2) contains the procedural requirements designed to compel all federal agencies contemplating actions having a significant impact on the environment to consider NEPA's substantive policies and goals as enunciated in Section 101. The effectiveness of Section 102(2) depends upon compliance with procedural duties "to the fullest extent possible," *i.e.*, a compliance, the completeness of which is only limited by the agency's statutory obligations. While no agency may properly adopt a less demanding standard for their effort, judicial review is based on a pragmatic standard. In determining whether an agency has complied with Section 102(2), we are governed by the *rule of reason*, *i.e.*, we must recognize "on the one hand that the Act mandates that no agency limit its environmental activity by the use of an artificial framework and on the other that the act does not intend to impose an impossible standard on the agency." The court's task is to determine whether the EIS was compiled with objective good faith and whether the resulting statement would permit a decisionmaker to fully consider and balance the environmental factors.

TESTING THE EIS

Plaintifffs submit that the EIS fails to comply with Section 102(2)(C) of the Act since it: does not adequately describe and analyze the present environment of the area; fails to adequately describe and analyze the most significant impacts that will result from the MAFLA sale; fails to analyze the cumulative effect of oil development in the Gulf of Mexico; and fails to adequately analyze reasonable alternatives to the MAFLA sale.

The purposes of an environmental impact statement are to detail the environmental and economic effects of proposed federal action "to enable those who did not have a part in its compilation to understand and consider meaningfully the factors involved," and to compel the decisionmaker to give serious weight to environmental factors in making discretionary choices. "The sweep of NEPA is extraordinarily broad, compelling consideration of any and all types of environmental impact of federal action." To carry out this statutory mandate, every relevant environmental effect of the project must be given appropriate consideration. Section 102(2)(C) seeks these goals by specifically requiring a *detailed* statement.

The purposes served by this "detailed statement" requirement have been succinctly enumerated by the First Circuit in Silva v. Lynn, 482 F.2d 1282, 1284–85 (1st Cir. 1973). The *Silva* court stated:

> The "detailed statement" required by § 4332(2)(C) serves at least three purposes. First, it permits the court to ascertain whether the agency has made a good faith effort to take into

account the values NEPA seeks to safeguard. To that end it must "explicate fully its course of inquiry, its analysis and its reasoning." . . . Second, it serves as an environmental full disclosure law, providing information which Congress thought the public should have concerning the particular environmental costs involved in a project. To that end, it "must be written in language that is understandable to nontechnical minds and yet contain enough scientific reasoning to alert specialists to particular problems within the field of their expertise." . . . It cannot be composed of statements "too vague, too general and too conclusory." . . . Finally and perhaps most substantively, the requirement of a detailed statement helps insure the integrity of the process of decision by precluding stubborn problems or serious criticism from being swept under the rug.

Id. (Citations omitted.) Again, the courts have approached their review of claims that congressionally specified detail of environmental effects was lacking in an EIS with a view that Congress did not intend to mandate perfection, or intend "for an impact statement to document every particle of knowledge that an agency might compile in considering the proposed action."

Present Environment

Plaintiffs contend that a most serious shortfall of the EIS is its lack of necessary baseline environmental studies upon which any reasoned decision on the environmental effect of the proposed sale must be based. Four specific omissions are asserted.

First, the statement does not include sufficient analysis of present air and water quality in the area. For the most part, plaintiffs are correct in this censure. While the statement does include an analysis of the impact of lease operations on water quality it does not describe the present quality of these environmental factors although it does contain a brief discussion of water quality degradation which previously occurred in the Mississippi Sound, Mobile Bay and along the Florida Gulf and of climatological and oceanographic conditions.

Second, the statement fails to assess each ecosystem as to its unique character, productivity, and the manner in which it operates. This attack is hypercritical. The statement discusses significant portions of the biological environment. Descriptions of the communities of Phytoplankton, Zooplankton, Benthic invertebrates and the active swimmers (Nekton) of the Gulf, embracing an analysis of factors affecting the distribution and abundance of Benthos and the location of significant Benthic communities, are included.[14]

Third, the statement does not describe the operation of the Eastern Gulf ecosystem as a whole or the importance of the lease area to this ecosystem as a unit. While the EIS does contain general information about life in the Gulf there is a dearth of information explaining the interrelationship of localized biotic communities. No information is given as to the predicted effect on the whole if some part of the system were to be harmed.

Fourth, detailed geological data is absent from the statement. The statement does include a review of the geological history and present structural composition of the entire Gulf, with special attention to structures within the MAFLA sale area and a recognition of geologic hazards of MAFLA exploration and production. Additionally the EIS observes that tests necessary to determine shallow hazards, unstable bottom and mud waves are scheduled to be run after the sale, and that prior to approval of a drilling permit, the Geological Survey requires submittal of an operation plan that includes suitable safety procedures necessary to control anticipated hazards.

Environmental Impact

Section 102(2)(C)(i) and (ii) require that the EIS contain a detailed statement of the environmental impact of the proposed action and any adverse effects which cannot be avoided if such proposed action is taken. Plaintiffs do not argue that defendants have failed to include references to environmental effects. Indeed, the summary of the EIS states:

> All tracts offered pose some degree of pollution risk to the environment and adjacent shoreline. The risk potential is related to adverse effects on the environment and other resource uses

which may result principally from accidental or chronic oil spillage.

Rather, plaintiffs urge that the material included is inadequate to permit the proper evaluation of its probability or importance.

In a panoply of particularized criticism plaintiffs attack omissions and deficiencies in Interior's preliminary studies. While it is true that the pre-EIS research was either inadequate or nonexistent in some specific areas, the significant environmental effects were recognized and presented in the final statement in a way which afforded the decisionmaker an opportunity to properly weigh them. NEPA's procedural requirements do not exist to dictate form but to insure that judgments are no longer based on old values. This EIS clearly brings the significant long-term environmental hazards and detriments to peer status with the present need and economic costs considerations which formerly would have controlled decision-making. This being so, under the rule of reason it meets the minimum requirements of Section 102(2)(C)(i) and (ii).

* * *

Although recognizing that the EIS includes a general discussion of the environmental problems that would result from pipeline construction, plaintiffs complain of the absence of analysis of the effects of pipeline location and construction and the impact of pipeline leakage on particular areas. While the EIS does not include an analysis of these matters, it does include a look at long-term effects of pipeline construction generally, mitigating measures that may be employed to prevent harm from such construction, and a special lease stipulation that reserves the right to require pipelines to be placed in designated areas or corridors. On leases in areas at depths above 200 feet, the pipelines of common carriers must be buried and only 18 of the 147 tracts lie partially or wholly beyond the 200 foot contour. This procedure is expected to minimize the adverse effects from these lines.

The EIS also reviews the effects in previous Gulf operations of gas leaks, oil spills and other pipeline accidents. It further suggests that if it is determined that official establishment of pipeline corridors will constitute a major federal action requiring preparation of an impact statement, then such will be prepared. Plaintiffs read this suggestion as an attempt to fragment the project, and, by gaining acceptance of some parts, compel acceptance of the whole. We do not agree that this is the thrust of Interior's proposal. This project is an easily divisible one. In this continuously controllable project, the fact that a tract may prove productive would not mandate that an unsound method of delivering that production be utilized. We are not unmindful of the rule that the sufficiency of an EIS must be determined without reference to *possible* future action. Today's statement, however, includes sufficient pre-statement analysis of possible environmental hazards from pipeline location, construction or leakage.

The MAFLA sale is said to violate NEPA because it places the entire responsibility on the states to prevent environmental injury from construction of pipelines and onshore facilities. We are in accord with the district court's finding that "an examination of the [EIS] and the supplemental documents reveals that while the states have a role to play in the planning of pipelines and onshore facilities, the federal agency has considered, and will continue to consider, these features." The fact that the MAFLA leases contain a stipulation that pipelines be placed in corridors selected by the federal government gives the government a great deal of control over placement of pipelines and, consequently, over onshore facilities. Thus, Interior retains the opportunity to select less environmentally hazardous areas whenever some harm becomes possible. Their lease controls give them even greater supervisory powers. Additionally, the states of Mississippi, Alabama and Florida have been consulted on several occasions and encouraged to begin planning environmental safeguards for the construction and operation of onshore pipelines and facilities. These states have been forewarned by the EIS of the possible harm that may result from unrestricted construction and operation. Such efforts do not indicate any abdication of responsibility in violation of Inte-

rior's NEPA obligations, rather they evince the agency's fulfillment of NEPA requirements that the impact statement be subjected to "the comments and views of the appropriate . . . State, and local agencies . . ., and that the Federal Government "make available to States . . . advice and information useful in restoring, maintaining, and enhancing the quality of the environment."

* * *

Sierra Club contends that the statement should have totalled the amount of oil spills which have already occurred from all oil drilling in the Gulf and determined from these figures how much more was probable. It further asserts that similar calculations should have been made for other pollutants, and that the statement should have included a mathematical analysis of the probability of collision and loss of land from pipelines being placed in marsh areas. These contentions boil down to questioning the degree of detail rather than the lack of it. While agreeing that these additional facts may have been useful to the Secretary in reaching a decision, we still conclude that the detail presented was sufficient to uphold the EIS.

* * *

Baseline Studies

Plaintiffs next allege that the defendants' actions violated subsections A, B, and D of Section 102. Subsection A requires an agency to carry out systematic, interdisciplinary studies of the environmental impact which would result from exploration and development. More specifically, plaintiffs contend that defendants failed to satisfy Interior's regulation 43 C.F.R. § 3301.4, which requires evaluation of the potential effect of the leasing program on the total environment, aquatic life, aesthetics, recreation and other resources in the area. However, the EIS does deal specifically with each of these items.

Plaintiffs contend that Interior's plans to gain more detailed information concerning the hazardous geologic conditions of the ocean floor after the sale do not satisfy the requirement that the statement "must stand the test alone—*i. e.*, in and of itself it must either meet the requirements of NEPA or fail." However, in a project such as this where developers sign leases and conduct separable operations over a period of months and years, and where restrictions in those leases give the agency the ability to constantly control and adjust future action, this continuing control must be considered in determining the reasonableness of the impact statement.[43] The MAFLA sale is a unique form of federal action. It does not involve a single undertaking or a project which becomes a *fait accompli* the day the decision to proceed is made. Because it contemplates numerous, successive lessor-lessee relationships involving activities over many areas and over many years, the agency's continuing opportunity for making informed adjustments has a major effect upon our evaluation of the sufficiency of the materials contained in the EIS itself.

The future ability to control development for ecological reasons is not given judicial recognition in a NEPA evaluation for the first time here. In Gulf Oil Corp. v. Morton, 493 F.2d 141, 144 (9th Cir. 1973), the Ninth Circuit held that the Outer Continental Shelf Lands Act and NEPA authorize "the Secretary [of Interior] to suspend operations under existing leases whenever he determines that the risk to the marine environment outweighs the immediate national interest in exploring and drilling for oil and gas." More specifically, the court held that the Secretary could properly suspend offshore oil and gas leases for a period sufficient to permit Congress to consider termination of those leases for environmental reasons. This Circuit, in Canal Authority of State of Florida v. Callaway, 489 F.2d 567, 577 (5th Cir. 1974), has cited Gulf Oil Corp. v. Morton for the proposition that "temporary administrative action to meet previously unconsidered environmental dangers may be appropriate if it furthers the public policy expressed by Congress in the National Environmental Policy Act (NEPA), 42 U.S.C.A. § 4321 et seq., even if it involves a temporary cessation of a project previously approved by Congress." Here, the right to exercise future control is directly contractual and even broader than the right which was

judicially declared there.

* * *

DECISION TO PROCEED

Supplementary to their assertions of sta' ment inadequacy plaintiffs attack the Secretary of Interior's decision to proceed with the sale. In view of our determination that the procedural requirements of Section 102 were satisfied, we look to see whether the secretary's decision, based upon the information contained in the EIS, was arbitrary, capricious or an abuse of discretion. However, our review does not include consideration of the merits of the actual decision to go forward with the sale. "[I]t is the court's function to insure that the mandate of the statute has been carried out and that all relevant environmental effects of the project [are] given appropriate consideration by the [secretary]." NEPA intended that courts and federal agencies collaborate to insure attainment of the Act's goals, not that a court substitute its discretion for that of the executive as the decision-maker.

This court may reject the secretary's substantive decision only if it was reached procedurally without a full, good faith, individualized consideration and balancing of environmental factors; or if, according to the standards set forth in Sections 101(b) and 102(1) of NEPA, it is "[shown that] 'the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental value.'" The decision to proceed in this instance was not shown to be in clear disregard of the evidence contained in the EIS, nor does it appear arbitrary, capricious or an abuse of discretion.

The judgment appealed from is Affirmed.

NEW YORK V. KLEPPE
7 Environmental Law Reporter 20230(1977)

Weinstein, J.:

After extensive hearings held in July and August of 1976, this court determined that the National Environmental Policy Act (NEPA), 42 U.S.C. §4321*et seq.*, required issuance of a preliminary injunction preventing the Secretary of the Interior from proceeding with Lease Sale Number 40 of outer continental shelf lands in the mid-Atlantic region for exploration and production of oil and gas.

* * *

The issue before this court is not the wisdom or desirability of this country's total "energy program," or of any of its specific aspects. It is not this court's function to pass on the substantive merits of the Sale 40 lease project, either in its present or potentially modified form. It is, rather, concerned with whether the Secretary of the Interior, in reaching his decision to lease these lands, complied with the statutory requirements governing his responsibilities as trustee and administrator of the public resources of the outer continental shelf; specifically, the question posed is whether his decision was fully and accurately informed and made after adequate consideration of viable alternative programs and potential adverse environmental impacts.

Our preliminary finding, as outlined in this court's opinion of August 13, 1976, was that the Secretary had not met his NEPA responsibilities. In deciding to proceed with Sale 40 in its present configuration he virtually ignored the power of states and their political subdivisions to regulate the siting, construction, and use of nearshore and onshore facilities through measures such as special land-use laws, air and water pollution laws, pipeline regulations, and zoning and building codes.

Accordingly, a preliminary injunction preventing Lease Sale 40 was granted pending further hearings and decision on applications for a permanent injunction. On August 16, 1976, the Court of Appeals for the Second Circuit stayed the order of this court; on October 14, 1976, it held that plaintiffs had not demonstrated that they would suffer irreparable harm between the date of the preliminary hearing and the trial, and that there was some question whether plaintiffs would succeed on the merits at the trial.

* * *

The Secretary of the Interior proceeded to lease a total of 93 tracts in the Sale 40 area. He accepted bids totalling over 1.1 billion dollars. The successful bidders have begun to take preliminary steps required for full exploitation of their leaseholds.

* * *

I. Summary of Findings

We find that the Secretary (1) ignored the practical effects of local governmental licensing, permitting, and review powers in the NEPA documents; (2) failed to consider the environmental impact of specific probable pipeline routes from the outer continental shelf, in spite of the fact that projection of such routes is routinely made by industry and could have been made by the Secretary or his agents; (3) greatly overstated peak oil and gas production for Sale 40 and significantly understated the cost of such production, including pipeline construction; this resulted in a serious lack of consideration of the likelihood and attendant dangers of increased tanker traffic and an overestimate of the net value of the entire project; (4) failed to consider the possible impact of particular tract-selection choices on the feasibility and sites of pipelines; there was no consideration of the alternatives of either excluding industry-preferred tracts, or including less highly

desired tracts in the final sale offer because of related onshore impacts and developments; and (5) failed to consider the alternative of separating exploration from production leasing. Adequate consideration of these factors might have led to modifications in the Sale 40 leasing program, resulting in greater environmental protection without impairing reasonable exploitation of offshore hydrocarbon resources.

* * *

NEPA Violations

A. *Failure to Consider Impact of State and Local Exercise of Regulatory Powers*

* * *

1. *Effect of Coastal Zone Management Plans*

Defendants have relied heavily on the contention that these various states and localities have been, and will be, able to protect their coastal areas and environment from the effects of an incomplete impact statement by developing coastal zone management plans in accordance with the Federal Coastal Zone Management Act (CZMA), 16 U.S.C. §1451 *et seq.*, using funds supplied by the federal government. The argument that this activity is a substitute for the government's responsibilities under NEPA is unpersuasive. First, NEPA requires an independent assessment of a variety of facts to determine possible environmental damage. That responsibility cannot be fobbed off to the states under a different program. Second, the extensive work being done on the various state plans will not be completed until 1978 at the earliest. Third, the critical amendments to the CZMA relied upon by defendants were adopted *after* the Final Environmental Statement on Sale 40 was published and the Secretary of the Interior made his decision to lease; these amendments could have had no impact on his decisions under NEPA.

* * *

Evidence, which could have been brought to the Secretary's attention by the NEPA documents, demonstrates that these local governmental powers can and will be utilized to prevent landing of outer continental shelf oil over wide portions of the coast line, whether that landing is by tanker or pipeline. Failure to include an evaluation of such local opposition to pipelines or tanker-related onshore facilities necessarily resulted in a failure to gain a full and meaningful perspective on the intrinsic environmental problems related to offshore oil and gas exploration.

2. *Recognition of State and Local Powers in NEPA Documents*

In attempting to demonstrate that the Secretary gave adequate consideration to state and local powers to affect outer continental shelf activities, defendants, in their extensive post-trial memoranda, marshal numerous references in the final environmental statement to such powers. In order to understand the true significance of the references, the most significant passages are reproduced below. In context, they demonstrate a listing in abstract form, without any attempt to evaluate their practical effect on specific oil and gas production and delivery systems from specific areas offshore to specific affected areas onshore:

* * *

These and other references succeed in establishing beyond question that the Secretary should have known of the existence of some vague state and local zoning and permitting powers. But there was never any doubt in the court's mind that the Secretary had such unspecific knowledge; any suggestion to the contrary would have had to assume a total ignorance on his part of our federal system.

Nor was there any doubt that the NEPA documents made reference generally to the formal state and local powers and procedural requirements in this area, although it hardly requires an environmental impact statement to disclose the existence of some sort of regulatory powers; it is surely elementary knowledge to anyone involved in major federal or industry projects.

But passing references to, and abstract listings of, state and local authority is only the beginning and not the end of the NEPA-required inquiry. The next, and by far more crucial step is a projection of the site-specific, pragmatic, empirical effects of the likely exercise of such power. It is the *impact* of local authority, not its mere *existence*, that must be studied and evaluated.

NEPA certainly contemplated that the federal agency responsible for safely regulating ocean exploration would consider specific, pragmatic land-based obstacles to transporting ocean-bottom energy resources. This has not been done. The NEPA documents, in their critial transportation aspects, are highly abstract. Despite the enormous volume of discussion they contain, the likely oil and gas delivery routes are nowhere described; one might almost suppose that levitation were the anticipated mode of transport. The NEPA documents read like a theoretical college thesis, written without the hard empirical data needed by any practical person making a decision. The impact statement studiously avoids the factors required for rational, practical decisionmaking.

* * *

The Council on Environmental Quality Guidelines on Preparation of Environmental Impact Statements, 40 C.F.R. Part 1500, requires analysis of specific impacts on specific areas. It requires consideration of:

> The relationship of the proposed action to land use plans, policies, and controls for the affected area. This requires a discussion of *how the proposed action may conform or conflict with* the objectives and *specific terms* of approved or proposed Federal, State, and local *land use plans, policies, and controls*. . . . Where a conflict or inconsistency exists, the statement should describe the extent to which the agency has reconciled its proposed action with the plan, policy or control, and the reasons why the agency has decided to proceed notwithstanding the absence of full reconciliation.

* * *

3. *Effect of State and Local Powers on Pipeline Routing—Absence of Any Projection of Likely Pipeline Locations*

Absence of any projections of likely pipeline locations illustrates the abstract nature of the relevant documents. The Department's assumptions were that oil and gas collected by gathering lines from separate platforms would be transported to onshore facilities along one to four corridors, in two 24" to 36" pipelines per corridor.

* * *

Although as many as eight separate 36" pipelines were anticipated, there was no attempt to determine specific likely landfall sites or the ocean or overland routes that would be followed. The decision documents merely contain brief, vague and abstract conjecture concerning the extremely broad geographical areas that might be involved:

* * *

All consideration of likely routes is clearly and explicitly deferred to the period after discovery of commercial quantities of oil:

* * *

This deferral of an attempt to grapple with specifics borders on irresponsibility in view of NEPA's explicit mandate that all potential environmental considerations be weighed prior to the decision to proceed with major federal programs. NEPA required the Secretary to explore the site-specific impacts of pipelines along definite routes, at least to the extent that such routes were ascertainable based on information available at the time.

It is as if the federal government decided to proceed with the construction of a major highway connecting New York and Washington—approximately the distance to be covered by Sale 40

pipelines—but refused to reveal the contemplated route, whether bridges or tunnels would be utilized, whether mountains would be skirted or dynamited, or the impact on the area bordering the road. Such a course of action would surely be impermissible. *Cf. Monroe County Conservation Council, Inc. v. Volpe,* 472 F.2d 693, 697 [3 ELR 20006] (2d Cir. 1972); *Citizens Committee for Hudson Valley v. Volpe,* 425 F.2d 97 [1 ELR 20006] (2d Cir. 1970). Yet the analogy to the instant case is a strong one.

It is perfectly clear from highly credible expert testimony at trial from defendants' own witness that pipeline routes not only could have been predicted with a high degree of specificity and accuracy, but that such predictions were in fact made by the oil companies who put up hard cash—"megabucks," as one industry representative described them—in bids. Oil company experts projected relative costs of transportation problems that might arise from local and state zoning, and also predicted specific environmental factors attendant upon detailed alternative pipeline routes.

For example, the witness Franklin Brunjes, Manager of Land Transportation for Shell Oil Co., testified that he had computed economic feasibility vis-a-vis tanker transport of various pipeline routes from OCS lease sites to refining facilities in the Philadelphia area.

* * *

Had the Secretary been at least as conscientious as Shell Oil in exploring specific pipeline locations from an environmental perspective, he certainly would have considered the route into the Delaware Bay and up the Delaware River to Philadelphia, which was studied by Mr. Brunjes and considered a feasible and likely corridor.

* * *

The evidence clearly established that the Secretary did not engage in inquiries adequate to inform federal, state, and local decisionmakers and the public of the alternative modes and routes of transport of Sale 40 oil and gas, and to enable government decisionmakers to understand and plan to cope with the impacts of reasonably defined tanker-pipeline options in their zoning, land use, and coastal zone management planning processes.

* * *

Mr. Brunjes' testimony clearly established the feasibility of "costing-out" different transportation forms and routes, and the high degree of precision with which economic conclusions can be reached in this sphere:

* * *

This evidence establishes that it was quite possible for the Secretary to engage in an economic assessment of the effects of local opposition to pipelines. It was also reasonably necessary in order for the Secretary to know the realistic costs of the proposed action as compared to the benefits, and in order to assess fairly the economic feasibility of pipelines as against tankers. Without this information the Secretary could not make a reasoned decision as to the potential costs to be incurred by the proposed program.

Where, as here, information was available to the government and meaningful analysis was reasonably possible on issues of such environmental significance, the Interior Department was under a NEPA-imposed obligation to disclose the information and undertake the analysis. The conclusion is inescapable that if, in their own economic interest oil companies can project, examine and analyze fairly detailed pipeline corridors, the Secretary of the Interior, in the critical public interest of environmental protection, must do so as well.

B. Defective Cost-Benefit Analysis of Lease Sale 40

In balancing the projected benefits of Lease Sale 40 against its potential adverse environmental impact and against alternative energy producing programs, and in order to arrive at a reasoned decision on whether to proceed, it was essential for the Secretary to make a realistic estimate of the investment costs necessary to produce a given quantity of energy. Critical components of that factor are the estimated quantities of oil and gas reserves, expected peak production levels, and the cost of pipeline construction. This last item has exceptional significance, in light of the Secretary's firm assumption that pipelines, rather than tankers, would be the actual mode of transport. The accuracy of the Secretary's assessment of each of these components was called into serious question by highly credible evidence.

1. Underestimate of Finding Costs.

Based on data sources readily available prior to the preparation of the final environmental impact statement, an expert witness concluded that the finding cost estimates used in the decision documents were unrealistically low, relative to recent industry experience. The Secretary estimated that, assuming large gas and oil reserves, finding costs were 14.5 cents per million British Thermal Units (BTUs), and, on the hypothesis of low reserves, 12.26 cents per million BTUs. The expert testimony, on the other hand, established that realistically determined finding costs for new oil would in fact be 168 percent greater in the first instance, and 127 percent greater in the second.

* * *

2. Underestimate of Pipeline Construction Costs

Additional testimony by Mr. Donkin, based on information readily available to the Secretary, indicated that the critical element of pipeline construction costs was greatly underestimated in the NEPA documents. While the Secretary used a figure of $1 million per mile for a large diameter off-shore pipeline, the realistic cost is on the order of $1.75 million per mile.

In the low resource case the cost of a pipeline was, as a consequence of this disparity, underestimated by $73 million. In the high resource case the error was $330 million:

* * *

3. Underestimate of Total Investment Required

As a result of the underestimates with respect to finding and pipeline costs the realistic investment cost for the Sale 40 area in the low reserve case is in fact between 88.8 percent and 131.9 percent greater than Interior Department estimates. With respect to finding new natural gas, in absolute terms this results in additional costs of $756,790,000. In the high reserve case the realistic costs are between 70.7 percent and 100.9 percent higher than Department of Interior estimates, or in absolute terms between $2,359,773,000 and $3,668,733,000 greater.

* * *

4. Overestimate of Peak Levels of Production.

Finally, Mr. Donkin concluded that the peak levels of oil and natural gas production assumed by the Interior Department could never be obtained given the Department's own reserve estimates. Based on those estimates, peak oil production in 1988 would in fact be 15,000 barrels per day less than assumed by the Secretary in the low reserve case and 60,000 barrels per day less in the high reserve case.

In the low case, reserves necessary to support the level of peak production assumed by the Secretary would have to be 52.5 percent greater than government estimates. In the high gas reserve case, resources would have to be 51 percent greater to support the predicted peaks.

* * *

5. NEPA Consequences of Gross Misestimates of Costs and Benefits

The Secretary's cost-benefit analysis is vitally linked to critical NEPA issues. Its relevance to the tanker-pipeline issue has previously been alluded to, and its connection to other environmental impact issues is also clear. If the Secretary has grossly understated the investment costs and overstated the daily produc-

tion rates and reserves, then the timing, locations, size, and number of pipelines, drilling wells, and duration of construction may differ from the Secretary's projections, with resultant environmental and socio-economic impacts (offshore and onshore) qualitatively and quantitatively different from those estimated in the NEPA documents.

The Secretary's duty under NEPA to compare Sale 40 to its alternatives, and to weigh the latter and their environmental effects, depends upon an accurate cost-benefit analysis of the Sale 40 project, without which the Secretary and other decisionmakers cannot adequately determine priorities and the course of action tending most strongly to further the public interest. While we find it unnecessary to consider plaintiff's submission that NEPA requires substantive review of the administrative decision, and no such review has been undertaken in this case, there is no disagreement that, at a minimum, the Secretary's decision may not be arbitrary and capricious. *See* Kurwin, *Substantive Review Under the National Environmental Policy Act*, 3 Ecology L. Q. 173 (1973).

Where, as here, the economic costs and benefits of the planned action were seriously and grossly misrepresented or omitted, there could be no adequate balancing of economic benefits against environmental costs. It should be emphasized that the discrepancies are so substantial that they cannot be attributed to mere differences in judgment. They were so inadequate as to constitute, for NEPA purposes, a failure to make a meaningful inquiry. As a result, the Secretary's decision on Sale 40 was in this respect arbitrary and capricious and in violation of NEPA.

C. Failure to Evaluate Separation of Exploration and Production Leasing

The Department of Interior failed to adequately consider alternatives to the Sale 40 leasing procedure. The leases utilized grant exploration, development, and production rights to a successful bidder in one document. The government never considered exploration to determine the extent of oil and gas reserves and their location before granting exclusive rights of production.

In uncontradicted trial testimony, the government's witness, Judith Gresham, flatly stated that no alternative had ever been considered by the New York City office of the Bureau of Land Management in preparing for Sale No. 40. Tr. 768-69. It was this office that coordinated preparation for Sale 40 leasing and that prepared the relevant NEPA documents. Ms. Gresham testified that the existing lease forms for the outer continental shelf had always combined exploration, development and production rights and that no thought had ever been given to proceeding differently in Sale 40.

This failure to consider exploration before leasing for production was particularly anomalous in view of the limited government knowledge of the nature, extent, and exact location of probable oil and gas in the area. Private oil companies had been making costly preliminary studies for some ten years but the government had not. Apparently only on-the-spot exploratory drilling can determine what, if any, hydrocarbons will be available.

The final commitment to grant exclusive rights to exploit specific tracts of governmental land—without even considering prior exploration—occurred in the face of no less than thirteen public comments on the Draft Environmental Statement for Sale No. 40, including among them remarks by the States of New York, New Jersey, Delaware, and Maryland, urging that the exploration and development phases be separated. FES Sale 40, Vol. 3, p. 67. The thrust of these comments was that separation of exploration and development would allow government at all levels to exercise timely and essential controls over environmental, social, and economic impacts, especially those associated with onshore development.

Notwithstanding this impressive body of public comment, the possibility of separating exploration from development was effectively ignored in the Sale 40 final environmental statement. Section VIII of the impact statement, which discusses "Alternatives to the Proposed Action," is wholly silent on this option. In the Sale 40 documents the only reference to this alternative is contained in a few lines of response to comments on the draft environmental impact statement, which summarily dismiss the proposed separation as impossible under the provisions of the OCS Lands Act of 1953. FES Sale 40, Vol. 3, p. 67.

The environmental impact statement does briefly mention the alternative of government exploration, Vol. 2, pp. 582-83, but the discussion is, considering the thousands of pages devoted to relatively insignificant matter in the NEPA documents, woefully inadequate.

* * *

When an alternative course of action exists, whether or not it is within the Secretary's existing authority, that could satisfy environmental and economic concerns relating to a program, that alternative must be treated in a meaningful, non-conclusory fashion. As the court in *Committee for Nuclear Responsibility v. Seaborg*, 463 F.2d 783, 787 (D.C. Cir. 1971), noted:

> [T]he statement has significance in focusing environmental factors for informed appraisal by the President, who has broad concern even when not directly involved in the decisional process, and in any event by Congress and the public.

The point was reiterated in *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 833 (D.C. Cir. 1972), where the question of considering alternatives outside the jurisdictional power of the agency was raised:

> Congress contemplared that the Impact Statement would constitute the environmental source material for the information of the Congress as well as the Executive, in connection with the making of relevant decisions, and would be available to enhance enlightenment of—and by—the public.

In the *Morton* case, Interior argued that it need not consider alternatives which were beyond its power to affect. The court of appeals rejected this argument and required that such alternatives be considered:

> While the Department of the Interior does not have the authority to eliminate or reduce oil import quotas, such action is within the purview of both Congress and the President, to whom the impact statement goes. The impact statement is not only for the exposition of the thinking of the agency, but also for the guidance of these ultimate decisionmakers, and must provide them with the environmental effects of both the proposal and the alternatives, for their consideration along with the various other elements of the public interest.

458 F.2d at 835.

* * *

D. Failure to Consider Impact of Leasing Alternative Tracts

Those responsible for the tract selection process neglected to examine the potential environmental effect of offering, and accepting bids on, tracts other than those actually proposed and leased.

As we noted earlier, the Secretary has now leased 93 tracts in the Sale 40 area. These leases represent the culmination of a multistep tract selection process.

Initially, based on the United States Geological Survey and industry information concerning the potential of a specific region of offshore energy reserves, an area of approximately 6.5 million acres was designated open to "nomination and comment." Tracts

covering approximately half this area were "nominated" by industry, *i.e.*, industry expressed at least some interest in leasing these acres. Of the industry-nominated tracts 154 were selected for further study in the Environmental Impact Statement. All of the tracts selected for study were ultimately put up for sale. One hundred one of these were bid on, and 93 were ultimately leased, with 8 bids rejected. See Appendix "D," *infra* [Appendices omitted. Ed.].

It is clear from the record that nowhere in the lengthy process of considering which tracts were ultimately to be leased did the Secretary or Bureau of Land Management personnel charged with preparing NEPA documents consider the onshore impact of choosing particular tracts, rather than others. They simply assumed that landing of outer continental shelf oil and gas could be had at any point along the coast. Even if the states do not prohibit pipelines, they may restrict their point of entry, requiring a landfall, for example, at the industrialized northern section of the New Jersey Coast or at the refinery areas in the tri-state New Jersey-Delaware-Pennsylvania region. The existence of such a probability imposed on the Secretary the duty to consider the alternative of leasing tracts other than those proposed in Sale 40. It might, for example, improve the revenue from lease sale, decrease pipeline lengths, and reduce environmental impacts if tracts contiguous to potentially acceptable pipeline landfalls were utilized.

Testimony by Judith Gresham, Chief of Operations of the Bureau of Land Management, who played a significant role in the process by which tracts were selected for Sale 40, established that the only environmental considerations that affected the scope of Sale 40 was concern over the impact on commercial fishing grounds. No consideration whatsoever was given to the relationship of the selected tracts to specific pipeline routes, onshore impacts, or local zoning and related powers.

* * *

E. The Issue of Secretary's Lack of Good Faith

At trial plaintiffs renewed their contention that the NEPA review process was used as *post hoc* justification for decisions previously made by the Secretary to accelerate outer continental shelf leasing and to hold Sale 40. A strong argument has been made, supported by considerable circumstantial evidence, that the NEPA documents and public hearings were but a charade; that the decision to lease was a foregone conclusion once Presidents and those in their administrations, including successive Secretaries of the Interior, decided some years ago that production of Atlantic hydrocarbons should proceed speedily.

Defendant's own witness, Mr. Robert Bybee, an Exxon executive, admitted that as early as 1965 his company began gathering geological data in the Atlantic area north of Cape Hatteras, based on information, obtained from the Interior Department, that a lease sale was planned in the Atlantic:

* * *

This statement, as well as numerous other written internal memoranda and public statements of responsible government officials tend strongly to demonstrate that firm decisions to accelerate outer continental shelf leasing and to hold Sale 40 were made long before the ostensible decision dates, and before fulfillment of NEPA's requirements, and that the Bureau of Land Management simply went through the NEPA motions in order to validate the decisions previously made.

Although defendant claimed that these decisions were made as a response to the Arab oil embargo, on April 18, 1973, nearly six months prior to the embargo, the President announced his decision to accelerate outer continental shelf leasing and to hold lease sales. At that time, the President directed the Secretary "to take steps which would triple the annual acreage leased on the Outer Continental Shelf by 1979." Pl. Ex. 86, p. 393. The Secretary had, in fact, recommended to the President that this acceleration of leasing occur. Pl. Ex. 103, p. 2. Three months later, on July 11, 1973, the Bureau of Land Management issued a revised proposed schedule implementing the President's directive. The Department of the Interior had decided at that time that leasing would be accelerated; it left open only the final decision about

* * *

specific sale sites. Pl. Ex. 87, p. 7. On September 12, 1973, the Department of the Interior Under Secretary of Energy announced that this accelerated program was required in order to meet future energy needs. Pl Ex. 87, p. 6.

* * *

That the Department of the Interior had little interest in properly fulfilling its obligations under NEPA is evidenced by a memorandum from Assistant Secretary Hughes. The Assistant Secretary allowed the United States Geological Survey one week to furnish him with information for the final environmental statement on Proposed Increase in Oil and Gas Leasing on the Outer Continental Shelf relating to estimated outer continental shelf oil and gas reserves, likely drilling sites, and whether tankers or pipelines were to be used. Mr. Hughes acknowledged that the "regrettably short response time will likely not allow highly accurate answers." Pl. Ex. 97.

In spite of this strong circumstantial evidence that the decision to proceed with Sale 40 was made without considering the NEPA documents, we decline to base our decision that NEPA has been violated on these contentions. To do so would constitute review of the "mental processes" of the Secretary. Under general principles of review of agency action, such an inquiry should be avoided by courts, if it is at all possible to decide a case on other grounds:

* * *

As already demonstrated, there are ample other grounds for holding that NEPA has been violated by the Sale 40 leases. Accordingly, the court need not decide the good faith issue.

III. Remedy

* * *

In considering the proper scope of any injunction we have examined and rejected alternatives such as allowing exploration to continue, but enjoining production pending preparation of an adequate environmental impact statement. Such a course is undesirable for two reasons. First, to allow the project to proceed will involve the commitment of resources which will either be lost if the project is abandoned or reformed in the light of compliance with NEPA as a result of proper environmental impact evaluation, or which will impermissibly tilt the scales in favor of proceeding.

Second, NEPA requires an evaluation of environmental impact early in the planning phase of a project, so that the decisonmaker has the most options available to reformulate the project to minimize adverse consequences. Once action has been taken, or allowed to proceed, it may be too late to alter the plans, because certain otherwise available alternatives have been foreclosed.

IV. Conclusion

Judged against "a rule of reason," *N.Y. Natural Res. Defence Council v. Kleppe*, ___ U.S. ___, ___, 97 S.C. 4, 6 (1976), the Secretary of the Interior violated NEPA. The parties are enjoined from further proceedings with the exercise of any powers purportedly granted by Sale 40 leases executed by the defendant. The leases are declared null and void. This order is stayed pending the completion of appeals, if any.

SO ORDERED.

NOTES

1. Secretary of the Interior Andrus and the intervenor defendant, Ocean Industries Association, have both announced they will appeal the N.Y. v. Kleppe decision. A lawyer for the Interior Department said he believed Sierra Club v. Morton provides persuasive precedent for overturning the N.Y. decision. Are the two cases reconcilable?

2. Most circuits have held that there exists a right of substantive review under NEPA. The Eight Circuit Court of Appeals delineated the scope of this review:

> The review is a limited one for the purpose of determining whether the agency reached its decision after a full good faith consideration of environmental factors made under the standards set forth in §101 and 102 of NEPA; and whether the actual balance of costs and benefits struck by the agency according to these standards was clearly arbitrary or clearly gave insufficient weight to environmental factors. Environmental Defense Fund, Inc. v. Froehlke, 473 F. 2d 346, 353(8th Cir. 1972)

Although numerous cases have presented the issue of substantive review under NEPA, no circuit has ever totally overturned an agency decision on that ground. How would one apply the standards of §101 and 102 to an OCS decision?

It has been suggested that some judges exercise substantive review by applying an exacting standard of procedural NEPA review. See Kays, Substantive Rights under the National Environmental Policy Act, 13 Am. Bus. L.J. 289 (1976).

3. State participation in OCS decisions-

a. To date States have participated in OCS decision-making primarily through advisory groups and litigation. The Secretary of the Interior chartered an OCS Advisory Board for policy matters and and OCS Environmental Studies Advisory Committee (OCSESAC) for technical questions. These groups have representatives from each coastal state as well as representatives from federal agencies and the private sector. Regional committees are also provided. Both of the group's charters state that their functions are "solely advisory." A typical complaint of the groups was voiced by the OCSESAC regional Committee for the North Atlantic States:

> There is concern with both the timeliness of the data and the use to which it is put in making management decisions. It is felt that existing data may not be adequate, and new data not analyzed in time to make rational, tract-by-tract decisions for the lease sale.
>
> Additionally, it is not clear how new information will enter

the leasing process stream, although we are aware of the definitions of OCS orders, regulations and special stipu= lations.

Finally, there is no mechanism providing for specific responses to state reccommendations or for translating these recommendations into program modifications. 1976 OCS Environmental Studies Advisory Committee Annual Report, 85,(1977).

b. Another method of control is the exercise of the police powers of a state. Although the actual drilling occurs on Federal lands essential support facilities including pipelines, ports and refineries will be on state lands and all these facilities will have major impacts on the state coastal zone. California has created statewide and regional coastal zone commissions and prohibits the construction of oil treatment or shipment facilities within 1000 yards of the coast without a permit from the regional commission. Califormia Coastal Zone Conservation Act, Cal. Pub. Rev. Code §2700 et. seq. (West. Supp. 1976). Are such acts preempted by the OCSLA; are they invlaid restraints on commerce? See Askew v. American Waterways Operators, 411 U.S. 325(1973) (upholding state liability and bonding requirements on tankers to protect state water and property from oil discharge within state jurisdiction) and Union Oil v. Miner, 437 F.2d 408 (9th Cir. 1970) (enjoining a local district attorney form using a state nuisance statute to interfere with Federal OCS drilling but specifically reserving the question of the power of a state to punish those who, on Federal lands, do acts which have effects on shore).

c. The Coastal Zone Management Act (CZMA),16 U.S.C. 1451-64, provides for grants to assist states in managing the coastal zone. As defined in the Act, the "coastal zone" does not include Federal OCS lands. However, the Act is still relevant to OCS activities. Section 307(c)(3) of the Act provides:

> After final approval by the Secretary of a state's managment program, any applicant for a required Federal license or permit to conduct an activity affecting land or water uses in the coastal zone of that state shall provide in the application to the licensing or permitting agency a certification that the proposed activity complies with the state's approved program and that such activity will be conducted in a manner consistent with the program.... No license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant's certification or until, by the state's failure to act, the concurrence is conclusively presumed, unless the Secretary, on his own initiative or upon appeal by the applicant, finds, after providing a reasonable opportunity for detailed comments from the Federal agency involved and from the state, that the activity is consistent with

the objectives of this chapter or is otherwise necessary in the interest of national security.

One of the criteria for approval of a state plan by the Secretary is a finding that "the management program provides for adequate consideration of the national interest involved in the citing of facilities necessary to meet the requirements which are other than local in nature." For further materials on coastal state planning see Chapter Seven.

4. The OCSLA has not been significantly changed since its enactment in 1953. Over the last several years there has been a strong move in Congress to make substantial changes in the Act. In the 94th Congress bills passed both houses but the bill was returned to conference by the House. Identical bills (H. 1614, S.9) which copy the 94 th Congress House Conference Report have been introduced in the 95th Congress. The proposed amendments cover almost all aspects of OCS operations, codifying many of the existing regulations and also making several significant changes.

SENATE BILL 9
95th Congress 1st Session

SEC. 101. The Congress finds and declares that—

(1) the demand for energy in the United States is increasing and will continue to increase for the foreseeable future;

* * *

SEC. 102. The purposes of this Act are to—

(1) establish policies and procedures for managing the oil and natural gas resources of the Outer Continental Shelf in order to achieve national economic and energy policy goals, assure national security, reduce dependence on foreign sources, and maintain a favorable balance of payments in world trade;

(2) preserve, protect, and develop oil and natural gas resources in the Outer Continental Shelf in a manner which is consistent with the need (A) to make such resources available to meet the Nation's energy needs as rapidly as possible, (B) to balance orderly energy resource development with protection of the human, marine, and coastal environments, (C) to insure the public a fair and equitable return on the resources of the Outer Continental Shelf, and (D) to preserve and maintain free enterprise competition;

(3) encourage development of new and improved technology for energy resource production which will eliminate or minimize risk of damage to the human, marine, and coastal environments;

(4) provide States which are impacted by Outer Continental Shelf oil and gas exploration, development, and production with comprehensive assistance in order to anticipate and plan for such impact, and thereby to assure adequate protection of the human environment;

(5) assure that States have timely access to information regarding activities on the Outer Continental Shelf, and opportunity to review and comment on decisions relating to such activities, in order to anticipate, ameliorate, and plan for the impacts of such activities;

(6) assure that States which are directly affected by exploration, development, and production of oil and natural gas are provided an opportunity to participate in policy and planning decisions relating to management of the resources of the Outer Continental Shelf;

(7) minimize or eliminate conflicts between the exploration, development, and production of oil and natural gas, and the recovery of other resources such as fish and shellfish;

(8) establish an oil spill liability fund to pay for the prompt removal of any oil spilled or discharged as a result of activities on the Outer Continental Shelf and for any damages to public or private interests caused by such spills or discharges; and

(9) insure that the extent of oil and natural gas resources of the Outer Continental Shelf is asessed at the earliest practicable time.

Sec. 201.

* * *

(f) The term 'affected State' means, with respect to any program, plan, lease sale, or other activity, proposed, conducted, or approved pursuant to the provisions of this Act, any State—

"(1) the laws of which are declared, pursuant to section 4(a)(2) of this Act, to be the law of the United States for the portion of the outer Continental Shelf on which such activity is, or is proposed to be, conducted;

"(2) which is or is proposed to be directly connected by transportation facilities to any artificial island or structure referred to in section 4(a)(1) of this Act;

"(3) which is receiving, or in accordance with the proposed activity, will receive, oil for processing, refining, or transshipment which was extracted from the outer Continental Shelf and transported by means of vessels or by a combination of means including vessels;

"(4) which is designated by the Secretary as a State in which there is a substantial probability of significant impact on or damage to the coastal, marine, or human environment, or a State in which there will be significant changes in the social, governmental, or economic infrastructure, resulting from the exploration, development, and production of oil and gas anywhere on the outer Continental Shelf; or

"(5) in which the Secretary finds that because of such activity there is, or will be, a significant risk of serious damage, due to factors such as prevailing winds and currents, to the marine or coastal environment in the event of any oilspill, blowout, or release of oil or gas from vessels, pipelines, or other transshipment facilities;

* * *

Sec. 204.

Sec. 5. Administration of Leasing of the Outer Continental Shelf.— * * * *The regulations prescribed by the Secretary under this subsection shall include, but not be limited to, provisions—*

(1) for the suspension or temporary prohibition of any operation or activity, including production, pursuant to any lease or permit (A) at the request of a lessee, in the interest of conservation, to facilitate proper development of a lease, or to allow for the unavailability of transportation facilities, or (B) if there is a threat of serious, irreparable, or immediate harm or damage to life (including aquatic life), to property, to any mineral deposits (in areas leased or not yet leased), or to the marine, coastal, or human environment, and for the extension of any permit or lease affected by such suspension or prohibition by a period equivalent

to the period of such suspension or prohibition, except that no permit or lease shall be so extended when such suspension or prohibition is the result of gross negligence or willful violation of such lease or permit, or of regulations issued concerning such lease or permit;

"(2) for the cancellation of any lease or permit, at any time, when it is determined, after hearing, that continued activity pursuant to such lease or permit would cause serious harm or damage, which would not decrease over a reasonable period of time, to life (including aquatic life), to property, to any mineral deposits (in areas leased or not yet leased), to the national security or defense, or to the marine, coastal, or human environment . . .

* * *

SEC. 208.

SEC. 18. OUTER CONTINENTAL SHELF LEASING PROGRAM.—*(a) The Secretary, pursuant to procedures set forth in subsections (c) and (d), shall prepare and periodically revise, and maintain an oil and gas leasing program to implement the policies of this Act. The leasing program shall indicate as precisely as possible the size, timing, and location of leasing activity which he determines will best meet national energy needs for the five-year period following its approval or reapproval. Such leasing program shall be prepared and maintained in a manner consistent with the following principles:*

* * *

(3) Within nine months after the date of enactment of this section, the Secretary shall submit a proposed leasing program to the Congress, the Attorney General, the Governors of affected States, and the Regional Outer Continental Shelf Advisory Boards, and shall publish such proposed program in the Federal Register.

* * *

(c) The Secretary shall review the leasing program approved under this section at least once each year, and he may revise and reapprove such program, at any time, in the same manner as originally developed.

* * *

SEC. 19 REGIONAL OUTER CONTINENTAL SHELF ADVISORY BOARDS.—*(a) The Governors of affected States may establish Regional Outer Continental Shelf Advisory Boards for their regions with such membership as they may determine, after consultation with the Secretary and the Secretary of Commerce.*

* * *

(c) Each Board established pursuant to subsection (a) shall advise the Secretary on all matters relating to outer Continental Shelf oil and gas development, including development of the leasing program required by section 18 of this Act, approval of development and production plans required pursuant to section 25 of this Act, implementation of baseline and monitoring studies, and the preparation of environmental impact statements prepared in the course of the implementation of the provisions of this Act.

"(d) If any Regional Advisory Board or the Governor of any affected State—

"(1) makes specific recommendations to the Secretary regarding the size, timing, or location of a proposed lease sale or with respect to a proposed development and production plan; and

"(2) submits such recommendations to the Secretary within sixty days after receipt of notice of such proposed lease sale or of such development and production plan,

the Secretary shall accept such recommendations, unless he determines they are not consistent with national security or the overriding national interest. For purposes of this subsection, a determination of overriding national interest shall be based on the desirability of obtaining oil and

gas supplies in a balanced manner, consistent with the policies of this Act. If the recommendations from State Governors or Regional Advisory Boards conflict with each other, the Secretary shall accept any of those recommendations which he finds to be the most consistent with the national interest. If the Secretary finds that he cannot accept recommendations made pursuant to this subsection, he shall communicate, in writing, to such Governor or such Board the reasons for rejection of such recommendations. The Secretary's determination that recommendations are not consistent with the national security or the overriding national interest shall be final and shall not, alone, be a basis for invalidation of a proposed lease sale or a proposed development and production plan in any suit or judicial review pursuant to section 23 of this Act, unless found to be arbitrary or capricious.

"SEC. 20. BASELINE AND MONITORING STUDIES.—"(a)(1) The Secretary of Commerce, in cooperation with the Secretary, shall conduct a study of any area or region included in any lease sale in order to establish baseline information concerning the status of the human, marine, and coastal environments of the outer Continental Shelf and the coastal areas which may be affected by oil and gas development in such area or region.

"(3) The Secretary of Commerce shall, after being notified of the submission of any development and production plan in an area or region under study, complete such study and submit it to the Secretary prior to the date for final approval of any development and production plan required by section 25 of this Act for any lease area. Failure of the Secretary of Commerce to complete any such study in a lease area shall not be a basis for precluding the approval of a development and production plan by the Secretary, unless the Secretary, in his discretion, finds such failure to be an appropriate basis for such preclusion.

SEC. 21. SAFETY REGULATIONS.—(a)

(2) In promulgating regulations under this section, the Secretary shall require, on all new drilling and production operations and, wherever practicable, on existing operations, the use of the best available and safest technology, wherever failure of equipment would have a significant effect on occupational or public health, safety, or the environment.

SEC. 23. CITIZEN SUITS, COURT JURISDICTION, AND JUDICIAL REVIEW.(a)(1) Except as provided in this section, any person having an interest which is or can be adversely affected may commence a civil action on his own behalf—

"(A) against any person, including the United States, and any other government instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution) for any alleged violation of any provision of this Act or any regulation promulgated under this Act, or of the terms of any permit or lease issued by the Secretary under this Act; and

"(B) against any Federal official referred to in section 21(a)(1) of this Act where there is alleged a failure of such official to perform any act or duty under this Act which is not discretionary.

(c)(1) Any action of the Secretary to approve a leasing program pursuant to section 18 of this Act shall be subject to judicial review only in the United States Court of Appeals for the District of Columbia.

"(2) Any action of the Secretary to approve, require modification

of, or disapprove any exploration plan or any development and production plan under this Act shall be subject to judicial review only in a United States court of appeals for a circuit in which an affected State is located.

"(3) The judicial review specified in paragraphs (1) and (2) of this subsection shall be available only to a person who (A) participated in the administrative proceedings related to the actions specified in such paragraphs, (B) is adversely affected or aggrieved by such action, (C) files a petition for review of the Secretary's action within sixty days after the date of such action, and (D) promptly transmits copies of the petition to the Secretary and to the Attorney General of the United States.

* * *

"(6) The court of appeals conducting a proceeding pursuant to this subsection shall consider the matter under review solely on the record made before the Secretary. The findings of the Secretary, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The court may affirm, vacate, or modify any order or decision or may remand the proceedings to the Secretary for such further action as it may direct.

* * *

"(d) Except as to causes of action which the court considers of greater importance, any action under this section shall take precedence on the docket over all other causes of action and shall be set for hearing at the earliest practical date and expedited in every way.

"(e) Notwithstanding any other provision of this section, this section shall not apply to any action which is commenced to require compliance with any provision of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

* * *

SEC. 25. OIL AND GAS DEVELOPMENT AND PRODUCTION.—(a) (1) Prior to development and production pursuant to an oil and gas lease or maintained under this Act in any region of the outer Continental Shelf, other than the Gulf of Mexico or the Santa Barbara Channel, the lessee shall submit a development and production plan (hereinafter in this section referred to as a 'plan') to the Secretary, for approval pursuant to this section.

* * *

"(d) (1) After review of a plan submitted pursuant to this section in accordance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), the Secretary shall declare his findings as to whether development and production pursuant to the lease or set of leases (which set includes such lease and other leases which cover adjacent or nearby areas to the area covered by such lease) is a major Federal action.

"(2) The Secretary shall at least once, prior to major development in any area or region of the outer Continental Shelf, other than the Gulf of Mexico or the Santa Barbara Channel, declare development and production pursuant to a lease or set of leases to be a major Federal action.

* * *

"(f) If developmet and production pursuant to a plan is not found to be a major Federal action, the Governor of any affected State, any appropriate Regional Outer Continental Shelf Advisory Board, and the executive of any affected local government area shall have ninety days from receipt of the plan from the Secretary to submit comments and recommendations. Such comments and recommendations shall be made available to the public upon request. In addition, any interested person may submit comments and recommendations.

* * * * * * *The Secretary shall require modification of a plan if he determines that the lessee has failed to make adequate provision in such plan for safe oper-*

ations on the lease area or for protection of the human, marine, or coastal environment, except that any modification requested by the Secretary shall be, to the maximum extent practicalbe, consistent with the coastal zone management programs of affected States approved pursuant to section 306 of the Coastal Zone Management Act of 1972 (16 U.S.C. 1455). The Secretary shall disapprove a plan only (A) if the lessee fails to demonstrate that he can comply with the requirements of this Act and other applicable Federal law, (B) if the plan is not and cannot be made, to the maximum extent practicable, consistent with the coastal zone management programs of affected States approved pursuant to section 306 of the Coastal Zone Management Act of 1972 (16 U.S.C. 1455), or (C) if because of exceptional geological conditions in the lease area, exceptional resource values in the marine or coastal environment, or other exceptional circumstances, the proposed plan cannot be modified to insure a safe operation.

* * *

OFFSHORE OIL SPILL POLLUTION FUND

* * *

SEC. 302. (a) There is established within the Department of Transportation an Offshore Oil Pollution Compensation Fund. The Fund may sue or be sued in its own name.

* * *

SEC. 303. The discharge of oil from any offshore facility or vessel, in quantities which the President under section 311(b) of the Federal Water Pollution Control Act (33 U.S.C. 1321(b)) determines to be harmful, is prohibited.

* * *

SEC. 305. (a) Whenever any oil is discharged from any offshore facility or vessel in violation of section 303 of this title, the President shall act to remove or arrange for the removal of such oil, unless he determines such removal will be done properly and expeditiously by the owner or operator of such offshore facility or vessel.

* * *

RECOVERABLE DAMAGES

SEC. 307. Damages may be recovered under this title for—

(1) the value of any loss or injury, at the time such loss or injury is incurred, with respect to any real or personal property which is damaged or destroyed as a result of a discharge of oil;

(2)(A) the cost to the owner of restoring, repairing, or replacing any real or personal property which is damaged or destroyed by a discharge of oil, (B) any income necessarily lost by such owner during the time such property is being restored, repaired, or replaced, and (C) any reduction in the value of such property caused by such discharge;

(3) any loss of income or impairment of earning capacity for a period of not to exceed five years due to damages to real or personal property, or to natural resources, without regard to ownership of such property or resources, which are damaged or destroyed by a discharge of oil, if the claimant derives at least 25 per centum of his earnings from activities which utilize such property or natural resources;

(4) any costs and expenses incurred by the Federal Government or any State government in the restoration, repair, or replace of natural resources which are damaged or destroyed by a discharge of oil; and

CLEANUP COSTS AND DAMAGES

SEC. 308. (a) All cleanup costs incurred by the President, the Secretary, or any other Federal, State, or local official or agency, in connection with a discharge of oil shall be borne by the owners and operator of the offshore facility or vessel from which the discharge occurred.

(b) Notwithstanding any other provision of law and except as provided in subsection (d) of this section, the owner and operator of an offshore facility shall be held jointly and severally liable, without regard to fault, for damages which result from a discharge of oil from such offshore facility. Such liability shall not exceed $35,000,000, except that if it can be shown that (1) such damages were the result of gross negligence or willful misconduct within the privity and knowledge of such owner or operator, or of the person in charge of such offshore facility, or (2) such discharge was the result of a violation of applicable safety, construction, or operating standards or regulations, such owner and operator shall be jointly and severally liable for the full amount of such damages.

(c) Notwithstanding any other provision of law and except as provided in subsection (d) of this section, the owner and operator of a vessel shall be jointly and severally liable, without regard to fault, for damages which result from a discharge of oil from such vessel. Such liability shall not exceed $150 per gross registered ton, except that if it can be shown that (1) such damages were the result of gross negligence or willful misconduct within the privity and knowledge of such owner or operator, or of the person in charge of such vessel, or (2) such discharge was the result of a violation of applicable safety, construction, or operating standards or regulations, such owner and operator shall be jointly and severally liable for the full amount of such damages.

*(d) No liability shall be imposed under subsection (b) (c) of this section to the extent the owner or operator establishes that the discharge of oil or that any damages resulting from such discharge were caused by (1) an act of war, or (2) the negligent or intentional act of the damaged party or of any third party (including any government entity). * * **

** * **

FEE COLLECTION; DEPOSITS IN REVOLVING ACCOUNT

SEC. 310. (a) (1) The Secretary shall levy and the Secretary of the Treasury shall collect a fee of not to exceed 3 cents per barrel on oil obtained from the Outer Continental Shelf, which shall be imposed on the owner of the oil when such oil is produced.

(2) The collection of the fee imposed pursuant to paragraph (1) of this subsection shall continue until the amount in the revolving account totals at least $100,000,000, whereupon imposition of such fee may be suspended by the Secretary. Thereafter, the Secretary shall, from time to time and in accordance with the limitation set forth in the first sentence of paragraph (1) of this subsection, modify by regulation the amount of the fee, if any, to be collected under this subsection in order to maintain the revolving account at a level of not less than $100,000,000 and not more than $200,000,000.

** * **

TRUSTEE OF NATURAL RESOURCES

SEC. 312. (a) The President, or the authorized representative of any State, shall act on behalf of the public as trustee of the natural resources to recover for damages to such resources. Sums recovered shall be used to restore, rehabilitate, or acquire the equivalent of such natural resources by the appropriate agencies of the Federal Government, or the State government.

5. The Carter Administration generally supports the proposed OCSLA legislation but feels that Senate Bill 9 goes too far in compelling Interior to accept governors' recommendations. Also the Administration prefers a comprehensive oil spill program in lieu of the amendments to OCSLA. An Administration bill reflecting these and other concerns was promised by Andrus. The legislation submitted by the Administration for the creation of a new Energy Department provides for that new department to set long-term OCS production goals but leaves overall control of the leasing program with the Interior Department.

6. The law in the OCS field will likely continue to change rapidly as national energy policy evolves. The impact of OCS oil on that policy is difficult to ascertain at this time due to the large degree of uncertainty as to the amount of recoverable OCS oil. The United States Geological Survey estimates that possible offshore yields at 95% chance of recovery and 5% chance of recovery respectively are 4-70 billion barrels of oil and 20-256 trillion cubic feet of natural gas. Most of these reserves are located in Federal lands. In 1976 the United States consumed over six billion barrels of oil and 25 trillion cubic feet of natural gas.

SECTION 3. DEEPWATER PORTS

To compensate for the disparity between domestic production and demand the United States imports over six million barrels of oil per day. The amount of imported oil has risen sharply in the last few years and with domestic production declining and energy demand still growing it is projected that imports will continue to increase. Supertankers, several times larger than any tanker existing only a few years ago, are rapidly becoming the standard vehicle for transporting oil over long distances. Although the United States has few ports deep enough to accomodate these tankers, supertankers are still used for oil delivery to the United States. However, before these tankers enter the port part of the oil is pumped into several smaller ships. This decreases the draft of the tanker and allows it to proceed into the port. Transportation costs of imported oil would be greatly reduced if facilities that would enable supertankers to directly transfer their cargo to onshore facilities were available.

The development of deepwater ports presents a number of domestic and international legal questions. Congress resolved many of these issues in the Deepwater Port Act of 1974, 33 U.S.C. §§1501-24. That act is reproduced in Chapter Six and is accompanied there by a discussion of the regulatory scheme for

deepwater ports. Here the question of the use of the ocean beyond territorial waters will be considered.

Approval for the construction of two deepwater ports on the continental shelf of the United States has been granted. One will be located 26 miles off the Texas coast and the other will be 19 miles off the Louisiana coast.

CONVENTION ON THE HIGH SEAS
450 U.N.T.S. 82, 13 U.S.T. 2312, T.I.A.S. No. 5200
(In force Sept. 30, 1962)

Article 2

The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by the other rules of international law. It comprises, inter alia, both for coastal and non-coastal States:

(1) Freedom of navigation;
(2) Freedom of fishing;
(3) Freedom to lay submarine cables and pipelines;
(4) Freedom to fly over the high seas.

These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.

CONVENTION ON THE CONTINENTAL SHELF
499 U.N.T.S. 311, 15 U.S.T. 471, T.I.A.S. No. 5578
(In force June 10, 1964)

Article 5

1. The exploration of the continental shelf and the exploitation of its natural resources must not result in any unjustifiable interference with navigation, fishing or the conservation of the living resources of the sea, nor result in any interference with fundamental oceanographic or other scientific research carried out with the intention of open publication.

2. Subject to the provisions of paragraphs 1 and 6 of this article, the coastal State is entitled to construct and maintain or operate on the continental shelf installations and other devices necessary for its exploration and the exploitation of its natural resources, and to establish safety zones around such installations and devices and to take in those zones measures necessary for their protection.

3. Neither the installations or devices, nor the safety zones around them, may be established where interference may be caused to the use of recognized sea lanes essential to international navigation.

CONVENTION ON THE TERRITORIAL SEA AND THE CONTIGUOUS ZONE
516 U.N.T.S. 205, 15 U.S.T. 1606, T.I.A.S. No. 5639
(In force Sept. 10, 1964)

Article 9

Roadsteads which are normally used for the loading, unloading and anchoring of ships, and which would otherwise be situated wholly or partly outside the outer limit of the territorial sea, are included in the territorial sea. The coastal State must clearly demarcate such roadsteads and indicate them on charts together with their boundaries, to which due publicity must be given.

DEEPWATER PORT ACT OF 1974. JOINT REPORT TOGETHER WITH ADDITIONAL VIEWS OF COMMITTEE ON COMMERCE, INTERIOR AND INSULAR AFFAIRS AND PUBLIC WORKS TO ACCOMPANY S. 4706 (Oct. 2, 1974) pp. 7-8.

INTERNATIONAL LEGAL BASIS

As far as can be determined, a U.S. deepwater port constructed in international waters would be the first such facility located outside a nation's territorial limits anywhere in the world. A nation exercises nearly absolute sovereignty over its territorial waters by virtue of the International Convention on the Territorial Sea and Contiguous Zone. In addition, the Convention on the Continental Shelf authorizes a coastal nation to erect structures on its continental shelf for the purpose of exploring and exploiting the mineral and non-living resources, and provides coastal nations with jurisdiction over sedentary living species on or under the seabed. No existing international law, treaty, or agreement specifically recognizes the construction and operation of deepwater ports as a permissible use of international waters. However, the freedom of all nations to make reasonable use of waters beyond territorial boundaries is recognized by the International Convention on the High Seas.

Testimony presented to the special joint subcommittee indicated that constructing and operating deepwater ports beyond a nation's territorial limits would constitute a "reasonable use" as contemplated by Article 2 of the Convention on the High Seas. . . .

Under the authority of this Convention, a nation might properly execute jurisdiction on the High Seas in order to license and regulate such facilities. According to the U.S. Department of State and several academic experts, the phrase *inter alia* implies that the authors of the Convention on the High Seas foresaw a need to permit a broader range of uses than the four specified in Article 2.

However, although they consider development of deepwater port facilities to be a reasonable use of the high seas under international law, the State Department also believes that it is necessary to seek multilateral agreement as encouraged in section 11 of the bill. The United States is presently seeking clarification of the legal status of deepwater ports in the United Nations Law of the Sea Conference now underway. In addition, section 22 of the bill authorizes the pursuit of international agreements with Canada and Mexico, especially with respect to environmental concerns, since the resources of those two nations will be most immediately affected by development of deepwater ports off the coast of the United States.

DEEPWATER PORT ACT OF 1974
33 U.S.C. §§ 1501 et. seq.

§ 1501. Congressional declaration of policy

* * *

(b) The Congress declares that nothing in this chapter shall be construed to affect the legal status of the high seas, the superjacent airspace, or the seabed and subsoil, including the Continental Shelf.
Pub.L. 93-627, § 2, Jan. 3, 1975, 88 Stat. 2126.

* * *

§ 1503. License for ownership, construction, and operation of deepwater port—Requirement; restrictions on utilization of deepwater port

* * *

Conditions for issuance

(c) The Secretary may issue a license in accordance with the provisions of this chapter if—

* * *

(4) he determines that the deepwater port will not unreasonably interfere with international navigation or other reasonable uses of the high seas, as defined by treaty, convention, or customary international law;

* * *

§ 1504. Procedure—Regulations; issuance, amendment, or rescission; scope

* * *

Additional regulations; criteria for site evaluation and preconstruction testing

(b) The Secretary, in consultation with the Secretary of the Interior and the Administrator of the National Oceanic and Atmospheric Administration, shall, as soon as practicable after January 3, 1975, prescribe regulations relating to those activities involved in site evaluation and preconstruction testing at potential deepwater port locations that may (1) adversely affect the environment; (2) interfere with authorized uses of the Outer Continental Shelf; or (3) pose a threat to human health and welfare. Such activity may thenceforth not be undertaken except in accordance with regulations prescribed pursuant to this subsection. Such regulations shall be consistent with the purposes of this chapter.

* * *

§ 1509. Marine environmental protection and navigational safety—Regulations and procedures

(a) Subject to recognized principles of international law, the Secretary shall prescribe by regulation and enforce procedures with respect to any deepwater port, including, but not limited to, rules governing vessel movement, loading and unloading procedures, designation and marking of anchorage areas, maintenance, law enforcement, and the equipment, training, and maintenance required (A) to prevent pollution of the marine environment, (B) to clean up any pollutants which may be discharged, and (C) to otherwise prevent or minimize any adverse impact from the construction and operation of such deepwater port.

* * *

Safety zones; designation; construction period; permitted activities

(d)(1) Subject to recognized principles of international law and after consultation with the Secretary of the Interior, the Secretary of Commerce, the Secretary of State, and the Secretary of Defense, the Secretary shall designate a zone of appropriate size around and including any deepwater port for the purpose of navigational safety. In such zone, no installations, structures, or uses will be permitted that are incompatible with the operation of the deepwater port. The Secretary shall by regulation define permitted activities within such zone. The Secretary shall, not later than 30 days after publication of notice pursuant to section 1504(c) of this title, designate such safety zone with respect to any proposed deepwater port.

§ 1510. International agreements

The Secretary of State, in consultation with the Secretary, shall seek effective international action and cooperation in support of the policy and purposes of this chapter and may formulate, present, or support specific proposals in the United Nations and other competent international organizations for the development of appropriate international rules and regulations relative to the construction, ownership, and operation of deepwater ports, with particular regard for measures that assure protection of such facilities as well as the promotion of navigational safety in the vicinity thereof.

§ 1521. Negotiations with Canada and Mexico; report to Congress

The President of the United States is authorized and requested to enter into negotiations with the Governments of Canada and Mexico to determine:

(1) the need for intergovernmental understandings, agreements, or treaties to protect the interests of the people of Canada, Mexico, and the United States and of any party or parties involved with the construction or operation of deepwater ports; and

(2) the desirability of undertaking joint studies and investigations designed to insure protection of the environment and to eliminate any legal and regulatory uncertainty, to assure that the interests of the people of Canada, Mexico, and the United Staes are adequately met.

The President shall report to the Congress the actions taken, the progress achieved, the areas of disagreement, and the matters about which more information is needed, together with his recommendations for further action.

UNITED STATES OF AMERICA: DRAFT ARTICLES FOR A CHAPTER ON THE ECONOMIC ZONE AND THE CONTINENTAL SHELF U.N. Doc. A/CONF. 62/C.2/L/47 (August 8, 1974)

Article 28. Installations

1. The coastal State shall have the exclusive right to authorize and regulate on the continental shelf the construction, operation and use of artificial islands and installations for the purpose of exploration or exploitation of natural resources or for other economic purposes, and of any installation which may interfere with the exercise of the rights of the coastal State.

2. The coastal State may, where necessary, establish reasonable safety zones around such off-shore installations in which it may take appropriate measures to ensure the safety both of the installations and of navigation. Such safety zones shall be designed to ensure that they are reasonably related to the nature and function of the installation. Ships of all nationalities must respect these safety zones.

3. The breadth of the safety zones shall be determined by the coastal State and shall conform to applicable international standards in existence or to be established by the Inter-Governmental Maritime Consultative Organization re-

garding the establishment and breadth of safety zones. In the absence of such additional standards, safety zones around installations for the exploration and exploitation of non-renewable resources of the sea-bed and subsoil may extend to a distance of 500 metres around the installations, measured from each point of their outer edge.

4. Due notice must be given of the construction of any such installations and the extent of safety zones, and permanent means for giving warning of the presence of such installations must be maintained. Any such installations which are abandoned or disused must be entirely removed.

5. States shall ensure compliance by vessels of their flag with applicable international standards regarding navigation outside the safety zones but in the vicinity of such off-shore installations.

6. Installations and safety zones around them may not be established where interference may be caused to the use of recognized sea lanes essential to international navigation.

7. For the purpose of this section, the term "installations" refers to artificial off-shore islands, facilities, or similar devices, other than those which are mobile in their normal mode of operation at sea. Installations shall not afford a basis for a claim to a territorial sea or economic zone, and their presence does not affect the delimitation of the territorial sea or economic zone of the coastal State.

THIRD UNITED NATIONS LAW OF
THE SEA CONFERENCE
REVISED SINGLE NEGOTIATING TEXT, Part 2
A/CONF. 62/WP.8 Rev. 1/ Part II 6 May 1976

Article 44

1. In an area beyond and adjacent to its territorial sea, described as the exclusive economic zone, the coastal State has:

...

(b) Exclusive rights and jurisdiction with regard to establishment and use of all artificial islands, installations, and structures;

(c) Exclusive jurisdiction with regard to (i) other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents, and winds;

...

NOTES

Compare the Deepwater Port Act with the present and proposed OCS regulatory structure. Section 1508(b)(1) of the Deepwater Port Act gives governors of adjacent states veto power over deepwater port development beyond the state submerged lands. Are there policy justifications for the different treatment of states in OCS and deepwater port decision-making?

SECTION 4. FLOATING NUCLEAR POWER PLANTS

The ocean offers two scarce resources for nuclear power plants--space and water. Nuclear plants require a vast amount of water for cooling. Even if the coolant is recycled large quantities are lost through evaporation. In fact a nuclear plant can consume as much water as a good size city. To meet this need for water and to supply energy to the large populations of the coastal zone, many existing and planned facilities are located near the coast and use brackish or saline water for cooling.

Under present regulations a land based nuclear power plant requires a site of 400-500 acres. Such land is often scarce in the coastal area and public opposition to the construction nearby of a nuclear plant further reduces the number of available sites. This opposition in part reflects the acute sensitivity of the coastal environment to the impact of construction of such a facility and the subsequent thermal pollution from cooling operations.

Many contend that the construction of floating nuclear power plants (FNNP) offers a solution to these problems and that it offers cost savings and fewer adverse environmental impacts than land based plants. The oceans would satisfy the demands of cooling water and a plant site. Costs are hoped to be lowered due to the potential for centralization of production and standardization of plants. By placing the plant some distance from the coastal urban areas and sensitive wetland areas adverse environmental impacts may be reduced.

COASTAL EFFECTS OF OFFSHORE ENERGY SYSTEMS,
UNITED STATES CONGRESS OFFICE OF TECHNOLOGY ASSESSMENT
November 1976, pp. 197-203, 230-237.

Nothing on the scale of the offshore complex of floating plants and protective breakwater has ever been built in ocean waters anywhere in the world. More cubic yards of rock and concrete will go into the breakwater that will create a lagoon of calm water for the plants and shield them from the pounding of ocean waves than went into many major dams in the United States. The gantry crane in the Florida shipyard where the plants will be built could straddle the dome of the U.S. Capitol.

The powerplants will be assembled by Offshore Power Systems, a subsidiary of Westinghouse Electric Corp., at a shipyard on a manmade island near Jacksonville, Fla., 8 miles up the St. John's River from the east coast.

The platform for each plant will be a steel barge measuring nearly 400 feet square and 44 feet deep, reinforced with bulkheads to form a honeycomb of watertight compartments. A pressurized water reactor (PWR) similar to

Westinghouse reactors now operating in land-based powerplants will be mounted on each barge inside a 17-story domed containment structure with steam turbines, generators, and office buildings clustered around it.

The domed containment structure will rise nearly 18 stories above the ocean surface and from the shore will look much like the distant skyline of a small city.

While the floating plants are being built, construction workers will build the largest structure ever placed in ocean waters—a massive, curving breakwater of 5.6 million tons of stone and cast concrete that will span 49 acres of ocean floor and rise 64 feet above the water surface.

Powerplants will be towed at intervals of 2 years from Florida, moored, sealed in the breakwater with a wall of concrete caissons, and connected to 4 miles of underwater cable leading to shore and the power distribution grid. Public Service plans are to have the first plant operational in 1985 and the second in 1987.

* * *

The plants have a design life of 40 years, after which they may be shut down and decommissioned.

* * *

In this study, OTA has analyzed available information on costs, benefits, environmental impact, safety, waste disposal systems, transportation, and decommissioning activities associated with the floating plants. The study does not attempt to evaluate general controversies about the safety and performance of nuclear plants; these are beyond the scope of the coastal effects analysis. It concentrates, instead, on exploring differences between the designs of floating and land-based plants and comparing the advantages and disadvantages of each.

As a result of this comparative analysis, the study finds that:

- Although the costs of the first two floating nuclear plants, AGS 1 and 2, are about the same as the costs of a similar land-based plant, volume production and standardization eventually could slow down the rapid escalation of capital costs of nuclear powerplants.

Offshore siting of nuclear plants would reduce thermal pollution and eliminate disruption of marshlands and estuaries that would be associated with land-based or shoreline nuclear installations.

Routine operations would produce less air pollution than would routine operations of a coal-fired plant equipped with flue gas desulfurization and other advanced pollution control equipment.

The NRC has not evaluated and does not plan to evaluate risks from accidents in floating nuclear plants comprehensively enough to permit either a general comparison of the relative risks from land-based and floating plants or an assessment of the specific risks associated with deploying Atlantic Generating Station Units 1 and 2.

Several technical problems of design and operation remain to be resolved, including procedures for transporting nuclear fuel to a floating plant and carrying radioactive wastes to shore, the process of decommissioning a floating plant, and the techniques of towing plants from Florida to the Mid-Atlantic coast.

There do not seem to be any significant differences between land-based and floating powerplants as to releases of radioactive material and other pollutants during routine operations.

Although the nuclear reactor steam supply and turbine generator systems and the floating barge are, separately, proven technologies, the combination is not. In addition, there are unique features including the barge-to-cable connection, the breakwater, and the mooring system that have not been tested by experience.

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Accident Risks

The most serious accident possible in an operating nuclear powerplant is overheating that causes the fuel core to melt. If the upper containment of a powerplant were to rupture as a result of a core-melt, the radioactive materials released into the atmosphere could have severe health and economic impacts. No core-melt accident has occurred in any commercial light water reactor and the 1975 *Reactor Safety Study (WASH-1400)*, commonly known as the Rasmussen Report, estimated the probability of such an accident in a land-based reactor as 1 in 20,000 years of reactor operation. *WASH-1400* also concluded that only about one in six pressurized water reactor core-melt accidents would lead to the release of significant amounts of radioactive materials to the open air.

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Taking all the differences that might alter the probability of a core-meltdown into account, OTA's preliminary analysis indicates that the probability of a core-meltdown accident in a floating nuclear powerplant is comparable to the value of 1 in 20,000 per year of reactor operation that was calculated for land-based plants in *WASH–1400*, although substantial additional effort would be required to validate that conclusion. The effects of a towing and continued operation in a marine environment were not analyzed in detail because that would require an examination of individual component failure rates that is beyond the scope of this study.

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Consequences of a Core-Melt

The OTA analysis indicates that the consequences of a core-melt on a floating nuclear plant may be significantly different from those for a land-based plant. One reason is that in the case of a core-melt on a floating plant the core eventually would melt through the bottom of the barge hull and release large quantities of radioactive material directly into the ocean, where it could contaminate beaches and be taken up into the food chain. While a core-melt in a land-based plant could also lead to waterborne contamination, e.g., if the core entered an aquifer after melting through the bottom of the containment, such effects were not considered in detail in *WASH-1400*. Concern about this type of release prompted the Advisory Committee on Reactor Safeguards to request a special study of the effects of accidental releases of radioactive materials into water as part of its review of floating nuclear powerplants. The NRC subsequently decided to conduct a Liquid Pathways Generic Study to analyze the effects of such releases from both land-based and floating nuclear plants.

A second reason to expect different consequences for a floating plant is that it appears that in case of a core-melt a release of radioactive materials to the atmosphere is about seven times more likely with the reactor system used in the floating plant than with the *WASH-1400* land-based PWR plant. On the other hand, this may be offset to some extent by design features of floating plants which could reduce the amount of radioactive material released in case of an accident.

• • • First, in the case of a core-melt in a floating plant the core would eventually melt through the bottom of the platform and contact the water on which the plant was floating. This probably would produce large quantities of steam because boiling conditions could be expected to exist at the

surface of the core for a day or more after melt through. This steam could in turn transport into the atmosphere significant quantities of radioactive material, including fine particles produced in the interaction of the molten core with water. While the possible interaction of a molten core with groundwater is a potential mechanism for similar secondary atmospheric releases in some land-based plants, there are some factors that may lead to differences in the effects of such releases on the generic risks of floating plants as compared to land-based plants. For one thing, the potential for such releases exists for all plants located on water, and only for some land-based plants, depending on the site. In addition, the release would occur later in time after initiation of a core-melt sequence in a land-based plant because of the thicker containment base mat that the core would have to melt through before encountering groundwater; this could reduce the population at risk by allowing additional time for evacuation. However, since *WASH-1400* did not consider this type of release, further analysis would be needed to determine whether the potential for such secondary releases leads to a difference in the generic risks of land-based and floating plants.

A second possible generic difference between land-based and floating plants is the fact that floating plants can be located away from shore, which guarantees a permanent zone of zero resident population for several miles around the plant. This could reduce the expected consequences of an atmospheric release compared to some onshore sites. However, this difference applies only to offshore sites, and would not affect nearshore sites as compared to land-based plants located near the coast.

In summary, OTA's preliminary analysis indicates that the conclusions of *WASH-1400* about the expected consequences of atmospheric releases cannot be directly applied to the floating nuclear powerplant. Furthermore, substantial additional analysis would be required to enable a generic comparison of the types and effects of atmospheric releases resulting from core-melt accidents in land-based and floating nuclear plants.

NOTES

1. Construction of a complex to manufacture FNPPs is presently underway as are procedures for the licensing of two FNPPs off the New Jersy coast. The single assembly complex could produce over 50 FNNPs over the next 20 years.

2. Although there are possible sites for FNPPs beyond territorial waters present proposals all involve sites within territorial waters. There is some doubt as to whether the Nuclear Regulatory Commission could license a plant beyond territorial waters under the present law. Section 2131 of the Atomic Energy Act, 42 U.S.C. 2131 et. seq. provides:

> It shall be unlawful except as provided in section 91 of this Act for any person within the United States to transfer or receive in interstate commerce, manufacture, produce, transfer, acquire, possess, use import, or export any utilization or production facility except in accordance with a license issued by the Commission pursuant to section 103 or 104 of this Act.

Section 103 states, inter alia, (d) No license under this section may be given to any person for activites which are not under or within the jurisdiction of the United States....

There is a similar question whether the Price-Anderson Act, which limits liability in the event of a nuclear accident, would apply to a FNNP outside of territorial waters.

3. There are several methods for states to oppose construction of a FNNP. Nuclear plants are subject to a number of laws. The two most important in the licensing procedure are the Atomic Energy Act and NEPA. The numerous hearings, licenses and permits required under these and other laws provide many opportunities for state intervention. Other powers of the state include the certification of consistency under the CZMA and the state's police power. These powers could be significantly reduced if the current question of Federal preemption of nuclear power plant regulation is resolved against the states.

SECTION 5. DEEP SEABED MINING

A. Ownership of the Resources

UNITED NATIONS RESOLUTION

2574 (XXIV). Question of the reservation exclusively for peaceful purposes of the sea-bed and the ocean floor, and the subsoil thereof, underlying the high seas beyond the limits of present national jurisdiction, and the use of their resources in the interests of mankind

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The General Assembly,

Recalling its resolution 2467 A (XXIII) of 21 December 1968 to the effect that the exploitation of the resources of the sea-bed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction should be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States, taking into account the special interests and needs of the developing countries,

Convinced that it is essential, for the achievement of this purpose, that such activities be carried out under an international régime including appropriate international machinery,

Noting that this matter is under consideration by the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction,

Recalling its resolution 2340 (XXII) of 18 December 1967 on the importance of preserving the sea-bed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction from actions and uses which might be detrimental to the common interests of mankind,

Declares that, pending the establishment of the aforementioned international régime:

(*a*) States and persons, physical or juridical, are bound to refrain from all activities of exploitation of the resources of the area of the sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction;

(*b*) No claim to any part of that area or its resources shall be recognized.

1833rd plenary meeting,
15 December 1969.

2749 (XXV). Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction

The General Assembly,

Recalling its resolutions 2340 (XXII) of 18 December 1967, 2467 (XXIII) of 21 December 1968 and 2574 (XXIV) of 15 December 1969, concerning the area to which the title of the item refers,

Affirming that there is an area of the sea-bed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction, the precise limits of which are yet to be determined,

Recognizing that the existing legal régime of the high seas does not provide substantive rules for regulating the exploration of the aforesaid area and the exploitation of its resources,

Convinced that the area shall be reserved exclusively for peaceful purposes and that the exploration of the area and the exploitation of its resources shall be carried out for the benefit of mankind as a whole,

Believing it essential that an international régime applying to the area and its resources and including appropriate international machinery should be established as soon as possible,

Bearing in mind that the development and use of the area and its resources shall be undertaken in such a manner as to foster the healthy development of the world economy and balanced growth of international trade, and to minimize any adverse economic effects caused by the fluctuation of prices of raw materials resulting from such activities,

Solemnly declares that:

1. The sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction (hereinafter referred to as the area), as well as the resources of the area, are the common heritage of mankind.

2. The area shall not be subject to appropriation by any means by States or persons, natural or juridical, and no State shall claim or exercise sovereignty or sovereign rights over any part thereof.

3. No State or person, natural or juridical, shall claim, exercise or acquire rights with respect to the area or its resources incompatible with the international régime to be established and the principles of this Declaration.

4. All activities regarding the exploration and exploitation of the resources of the area and other related activities shall be governed by the international régime to be established.

5. The area shall be open to use exclusively for peaceful purposes by all States, whether coastal or land-locked, without discrimination, in accordance with the international régime to be established.

6. States shall act in the area in accordance with the applicable principles and rules of international law, including the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted by the General Assembly on 24 October 1970, in the interests of maintaining international peace and security and promoting international co-operation and mutual understanding.

7. The exploration of the area and the exploitation of its resources shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States, whether land-locked or coastal, and taking into particular consideration the interests and needs of the developing countries.

8. The area shall be reserved exclusively for peaceful purposes, without prejudice to any measures which have been or may be agreed upon in the context of international negotiations undertaken in the field of disarmament and which may be applicable to a broader area. One or more international agreements shall be concluded as soon as possible in order to implement effectively this principle and to constitute a step towards the exclusion of the sea-bed, the ocean floor and the subsoil thereof from the arms race.

9. On the basis of the principles of this Declaration, an international régime applying to the area and its resources and including appropriate international machinery to give effect to its provisions shall be established by an international treaty of a universal character, generally agreed upon. The régime shall, *inter alia,* provide for the orderly and safe development and rational management of the area and its resources and for expanding opportunities in the use thereof, and ensure the equitable sharing by States in the benefits derived therefrom, taking into particular consideration the interests and needs of the developing countries, whether land-locked or coastal.

10. States shall promote international co-operation in scientific research exclusively for peaceful purposes:

(*a*) By participation in international programmes and by encouraging co-operation in scientific research by personnel of different countries;

(*b*) Through effective publication of research programmes and dissemination of the results of research through international channels;

(*c*) By co-operation in measures to strengthen research capabilities of developing countries, including the participation of their nationals in research programmes.

No such activity shall form the legal basis for any claims with respect to any part of the area or its resources.

11. With respect to activities in the area and acting in conformity with the international régime to be established, States shall take appropriate measures for and shall co-operate in the adoption and implementation of international rules, standards and procedures for, *inter alia*:

(*a*) The prevention of pollution and contamination, and other hazards to the marine environment, including the coastline, and of interference with the ecological balance of the marine environment;

(*b*) The protection and conservation of the natural resources of the area and the prevention of damage to the flora and fauna of the marine environment.

12. In their activities in the area, including those relating to its resources, States shall pay due regard to the rights and legitimate interests of coastal States in the region of such activities, as well as of all other States, which may be affected by such activities. Consultations shall be maintained with the coastal States concerned with respect to activities relating to the exploration of the area and the exploitation of its resources with a view to avoiding infringement of such rights and interests.

13. Nothing herein shall affect:

(*a*) The legal status of the waters superjacent to the area or that of the air space above those waters;

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

14. Every State shall have the responsibility to ensure that activities in the area, including those relating to its resources, whether undertaken by governmental agencies, or non-governmental entities or persons under its jurisdiction, or acting on its behalf, shall be carried out in conformity with the international régime to be established. The same responsibility applies to international organizations and their members for activities undertaken by such organizations or on their behalf. Damage caused by such activities shall entail liability.

15. The parties to any dispute relating to activities in the area and its resources shall resolve such dispute by the measures mentioned in Article 33 of the Charter of the United Nations and such procedures for settling disputes as may be agreed upon in the international régime to be established.

1933rd plenary meeting,
17 December 1970.

REPORT ON THE DEEP SEABED HARD MINERALS ACT,
COMMITTEE ON INTERIOR AND INSULAR AFFAIRS, No. 754
94th Congress (1976) pp. 5-14

BACKGROUND OF MANGANESE NODULE MINING

The area lying seaward of the continental margin, generally referred to as the deep seabed, is known to be rich in mineral resources. For the moment very little is known about the *subsurface* potential of the deep seabed. With respect to the surface of the seabed, however, we know that extensive deposits of manganese nodules containing over 20 metallic elements are abundant. Potentially minable nodules will contain at least 25 percent manganese, 1.25 percent nickel, 1 percent copper and 0.22 percent cobalt.

There are three types of mining systems presently being considered for manganese nodule mining:

(*a*) Continuous path dredging involves a suspended conduit that connects a dredge head and the ship, which transverses the mine site, collecting ore over a certain sweep width.

(*b*) Fixed area dredging is conducted by a collecting device whose central portion remains stationary on the ocean bottom until ore lying within the radius of the sweeping device has been collected. During the process, the surface ship or platform remains stationary above.

(*c*) Continuous line bucket dredging involves a long continuous rope to which are attached dredge buckets. As the ship moves sideways, the loop of dredge buckets is dragged across the ocean bottom, scooping up ore.

Pilot tests of the continuous path dredging system and the continuous line bucket system have been conducted, but few of the results have been publicly released. The technological sophistication of all these mining devices will make them both expensive and design-sensitive to particular types of nodule deposits and surrounding topography.

Several metallurgical processes have been experimentally tried in the winning of metals from manganese nodules, however, only hydrometallurgical techniques are presently being considered for commercial processing. The metallurgical process is specifically sensitive to such factors as the physical characteristics of the nodules, their iron content, trace metal content, assay or grade and detrital materials. This is a critical aspect of nodule mining—the degree to which both equipment development and type of metallurgical process are dependent upon definite knowledge of the mine site to be developed.

NEED FOR SEABED MINERALS

The seabed minerals are important. The major products will be copper, nickel, manganese, cobalt, and molybdenum. It is well known that all of these metals are essential to a modern industrial economy. Manganese is vital in the production of all steel and imparts properties of toughness to certain steels. Nickel is the essential ingredient in stainless steels and in high temperature—high performance alloys. Cobalt is of great utility in making magnets and is essential in the making of "space age" alloys. Molybdenum is an essential ingredient in special steels. The uses of copper for electrical apparatus of all kinds and in piping and hardware are well known.

What is not well known about these materials is that we are either not self sufficient or entirely lack domestic supplies. We have only one small nickel mine and must import over 70 percent of our total consumption of nickel. We have no domestic cobalt or manganese production and are 100 percent dependent on new primary supply from imports. Although we are the largest copper producer in the world, we are not self sufficient, and our copper imports have been predicted to increase. Today we import 15 percent of our copper.

The effect of these imports on our balance of payments is substantial. In 1975, imports amounted to almost $1,000,000,000. In future years this is expected to rise rapidly. Recovery of seabed minerals could almost eliminate this outflow of dollars by 1990.

The technology of seabed resource development is at hand and production is certain to occur between now and 1980 if secure legal arrangements are achieved by the passage of this legislation. Several companies have dredged nodules from the deep ocean in substantial quantity. At least two successful processes for extracting metals from the deep seabed ores (manganese nodules) have been tested in pilot plants. The pace of technology is further illustrated by the recent formation of three separate international consortia to undertake engineering development of means of nodule recovery.

These considerations alone may not demonstrate a need for urgency with respect to the development of the deep seabeds; however, other factors do create a degree of urgency. These involve our lead in prospecting, technology, and marketing, as well as the need to maintain industry initiative and momentum and the need to encourage pioneering industrial activity which may give rise eventually to even greater mineral resources benefits in the oceans.

NEED FOR INVESTMENT GUARANTEE

* * *

The technology which is currently being developed for nodule mining is extremely sophisticated and expensive. The oceanographic ship and its equipment used in the prospecting phase alone can cost $1,500-

$4,000 per day, while the costs jump to $2,500–$5,000 per day when more intensive exploration work begins. Shipboard equipment must include highly complex devices for acoustical, optical and magnetic observation, together with grab samplers, prospecting dredges, and box and piston corers for sampling.

From what we know, our technology, both in the systems which must be used to mine in approximately 15,000 feet of water where these nodules are found and in the metallurgical processes which must be used to win the metals, is advanced beyond the other countries, Japan, Germany, France, Great Britain, and the Soviet Union who have also shown an immediate interest in deep sea mining. Nevertheless, our technological lead is fragile. If others develop manganese nodules before we do and obtain an important marketing advantage, the resource will be developed but, at least for some time to come, we will still be importing it. Moreover, we may see our companies flee the United States to engage in joint ventures under the flags of other countries. This would decrease the possibility that manganese nodule mining would become a new United States industry.

It is, therefore, incumbent upon the Congress to assure that corporate initiative and technological achievement are not stifled by the United States' own actions. Indeed, it is important that corporate initiative be encouraged. If it is, we may begin to see production from ocean nodules as early as 1978 and substantial commercial production underway not later than 1982.

For this reason, the Committee believes that the investment guarantee provisions of S. 713 are needed and are in the national interest.

The technology is available. Under existing law the freedom of the seas rule permits American companies to mine nodules today. It is to a large extent the uncertain future of the legal situation which is inhibiting exploitation. Large sums of money are required to carry out final engineering work and to erect complex mining equipment and metallurgical plants. Industry must have the assurance of being able to mine a particular ore from a patricular site long enough to achieve a return on its investment. Industry needs the assurance that any future Law of the Sea treaty will not in effect expropriate their investment and put them out of economic operation. This legislation provides the assurances that are necessary for industry to move ahead and at the same time provides the regulation—non-existent now—which will ensure that development of the deep seabed will be carried out in conformance with an express public policy and sound environmental practices.

It should be noted that in the past the United States has indicated that any Law of the Sea treaty must guarantee access to seabed minerals under reasonable conditions. If, in fact, this is the kind of treaty ratified by the United States there would be little, if any, payment to industry under this bill. S. 713 does not provide insurance against the normal risks of a pioneer business. It is solely directed toward changes in existing international law agreed to by the United States.

RELATIONSHIP TO EXISTING INTERNATIONAL LAW

S. 713 is entirely consistent with existing international law, and does not in any way deprive other states of any of their existing rights. In fact S. 713 is grounded on three international law doctrines: (1) the freedom of the seas, (2) the extraterritorial authority of a sovereign state to regulate the conduct of its nationals; and (3) comity.

Article 2 of the 1958 Geneva Convention on the High Seas specifically recognizes and adopts the freedom of the seas doctrine. It states that the high seas freedoms "shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas." S. 713 epitomizes this concept. It provides a statutory means for U.S. nationals to exercise the freedom of the seas they enjoy by virtue of their status as being subject to the jurisdiction of the United States, while deliberately mandating that such exercize "will not unreasonably interfere with other reasonable uses of the high seas, as defined by any treaty or convention to which the United States is signatory, or by customary international laws."

Second, S. 713 expressly limits its scope to the extraterritorial high seas regulation of U.S. nationals. It does not purport in any manner to impose regulation by the United States of any kind upon the activities of foreign nationals on the High Seas.

Finally, the bill incorporates the international law doctrine of comity by providing for recognition of the rights of reciprocating states which establish an interim policy and practice comparable to that established by this legislation. In the event that an international agreement binding upon the United States enters into force establishing a regime for the development of mineral resources of the deep seabed no licenses shall be issued under this Act inconsistent with the regime.

Thus, far from constituting a unilateral act, this legislation incorporates careful and complete recognition of existing international law while anticipating a new international agreement and specifically providing that such agreement will supersede this act.

RELATIONSHIP TO LAW OF THE SEA NEGOTIATIONS

The Administration has continually taken the position that enactment of S. 713 would "adversely affect progress on the deep seabeds as well as other aspects of the Law of the Sea negotiation."

The Committee completely supports the concept of a Law of the Sea treaty. We have repeatedly indicated our support of the United States' position in the current negotiations.

The Committee recognizes that the Government must protect a variety of important interests in the development of ocean law including our mineral resource interests. We agree that only through a successful Law of the Sea Conference will the world achieve harmony and stability in the many new and varied uses of ocean space, including deep sea mining, which are developing right now. Haphazard development of international law in this area may not adequately protect our own or any other country's interests in navigation, pollution control, freedom of scientific research and the rational development of both living and mineral resources of the ocean and seabeds.

* * *

The basic issue is whether we continue to wait for a treaty and risk a loss of American industrial initiatives. The Adminstration spokesmen have stated that a timely and satisfactory Law of the Sea treaty is obtainable. The facts do not bear this out. The United Nations Seabed Committee spent many sessions in preparatory work but failed to make significant progress toward agreement. The Law of the Sea Conference, now in session in New York, consists of some 150 nations of widely disparate views. The issues are not confined to the question of the deep seabed but include navigation rights of several kinds, fisheries, Continental Shelf resources, and a multiplicity of subissues. As one might expect, there is no sign of imminent agreement.

The Administration has indicated that the portions of the single negotiating text developed at the 1975 Geneva Session dealing with seabed mining are totally unacceptable to the United States. The Committee completely agrees.

Two of the Congressional delegates to the New York session, Representatives McCloskey and Gilman, have filed a very comprehensive report on the first 4 weeks of the session. Their report points out the chances of final agreement by May 7, are very slim and the chances of serious deadlock are very great. (The report is printed in full in Appendix I of this report.)

The Committee has concluded that we can no longer delay in our own national efforts to create conditions conducive to the recovery of the resources of the deep seabed. We cannot accept the same old story from the treaty negotiators that progress is greater than it appears and that success is just around the corner. The Committee firmly believes that S. 1134 *is consistent* with our national interest in developing new sources of minerals and *is not inconsistent* with our long-term national goal of a broad international agreement on a new system of Law of the Sea.

SENATE BILL 713
94th Congress 2nd Session

Section 2. (a) FINDINGS.--The Congress finds--

(1) that the Nation's hard mineral resource requirements will continue to expand in order to supply national industrial needs and that the demand for certain hard minerals will increasingly exceed available domestic sources of supply;

(2) that, in the case of some minerals, the Nation is totally dependent upon foreign sources of supply and that the acquisition of mineral resources from foreign sources is a substantial factor in the national balance-of-payments position;

(3) that the national security interests of the United States require the availability of mineral resources which are independent of the export policies of foreign nations;

(4) that there is an alternate source of supply of certain minerals which are significant in relation to national needs contained in the manganese nodules which exist in great abundance on the ocean floor;

(5) that to the extent that such nodules are located outside the territorial limits and beyond the Continental Shelf of any nation, the nodules are available for utilization by any nation with the ability to develop them;

(6) that United States mining companies have developed the technology necessary for the development and processing of deep seabed nodules and, given the necessary security of tenure, are prepared to make the necessary capital investment for such development and processing; and

(7) that the increasing complexity of the world's problems has required the nations of the world to become more interdependent, especially in such matters as the resources of the land and the sea, transportation and communication, food, population, human rights, arms control, world order under law and cultural relations;

(8) that solutions to the problems of and interdependent world requires a reciprocal recognition by all nations of the legitimate interests of one another; and

(9) that it is in the national interest of the United States to utilize existing technology and cpabilities by providing for interim legislation which will authorize investment guarantees and insurance in order to encourage further efforts to insure national access to available deep seabed hard minerals and to provide the means whereby the national program may be merged into an international program which evolves from negotiations on the Law of the Sea resulting in a treaty which is subsequently ratified by and becomes binding upon the United States.

(b) PURPOSES--The Congress declares that the purposes of this Act are--

(1) to establish a national program to promote the orderly development of certain hard mineral resources of the deep seabed, pending the establishment of an international regime for that purpose; and

(2) to insure the establishment of all practicable requirements

necessary to protect the quality of the marine environment to the extent that that environment may be affected by deep seabed hard mineral mining development.

DEFINITIONS
Section 3. For the purposes of this Act--

(a) "Secretary" means the Secretary of the Interior;

(b) "deep seabed" means the seabed, and the subsoil thereof, lying seaward and outside the Continental Shelf of any nation;

(c) "Continental Shelf" refers to the seabed and the subsoil of the submarine areas adjacent to the coast of any nations (including the coasts of islands), but outside the area of the territorial sea, to a depth of two hundred meters or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas;

...

(e) "hard mineral" or "hard mineral resources" refers to nodules or accretions containg, but not limited to, iron, manganese, nickel, cobalt, and copper;

...

(m) "reciprocating State" means any foreign State, designated by the President as a State with requirements and procedures comparable to those of the United States under this Act, and which has undertaken to recognize licenses issued under this Act; and

...

ACTIVITIES PROHIBITED
Section 4. (a) Except (1) as authorized pursuant to the provisions of this Act, including subseation (b) hereof, (2) as authorized under alicense issued by a reciprocating State, or (3) as may be authorized under a treaty, convention, or other international agreement, which is ratified by and binding upon the United States, no person subject to the jurisdiction of the United States shall engage directly or indirectly in the development of hard mineral resources of the deep seabed. The prohibition of this subsection does not apply to equipment engineering development, prospecting, or scientific research, nor to the rendering of contractual engineering construction, or other service, not amounting to actual exploration or commercial recovery, nor to the furnishing of machinery, products, supplies, or materials to any organization or person lawfully engaged in such development. Provided, That the development does not infringe upon a license recognized as exclusive under the provisions of section 5(b) hereof.

...

LICENSE TO DEVELOP
Section 5 (a) GENERAL--Pursuant to the provisions of this Act, the Secretary shall accept applications from, and issue licenses to, eligible applicants for the development of hard meineral resources of the deep seabed....Before he may issue a license

the Secretary must first determine, in the consideration of each license application--

(1) that the applicat is financially responsible and has demonstrated the ability to comply with applicable laws, regulations, and license conditions;

(2) that the operations under the license will not unreasonably interfere with other reasonable uses of the high seas, as defined by any treaty or convention to which the United States is signatory, or by customary international law;

(3) that the issuance of a license does not conflict with any obligations of the United States, established by treaty or other international agreement: and

(4) that operations under the license will not pose an unreasonable threat to the integrity of the marine environment and that all reasonable precautions will be taken to minimize any adverse impact on that environment.

(b) NATURE AND DURATION OF LICENSE--(1) Subject to the provisions of section 12 hereof, any license issued pursuant to this Act shall be exclusive as against all persons sublect to the jurisdiction of the United States or of any reciprocating State, and shall authorize development of the hard mineral resources of the deep seabed within specified blocks thereof: Provided, That in no event shall any license issued under this Act authorize the commercial recovery of such resources prior to January 1, 1977: And provided further, That, except to the extent that such licenses are authorized pursuant to the provisions of a future international agreement ratified by and binding upon the United States establishing a regime for the development of the international seabed area beyond the limits of coastal State territorial or resource jurisdiction, no licenses shall be issued under this Act subsequent to the date on which such international agreement shall be ratified by and become binding upon the United States.

...

INTERNATIONAL REGIME

SECTION 12. At such time as a future international agreement, providing for the establishment of an international regime for the development of the hard mineral resources of the deep seabed, shall be ratified and become binding upon the United States, no additional licenses shall be issued pursuant to this Act, To the extent that they are consistent with the provisions of the international regime, licenses previously issued shall continue in effect, and, to the extent possible under the international agreement, the United States shall exercise its rights and responsibilities under the agreement to insure their continuation under the international regime.

INVESTMENT GUARNATY

SECTION 13. To the extent that a future international agreement, ratified by and binding upon the United States, shall differ from the requirements of this Act, the United States shall provide the licensee with compensation in an effectively relizable form representing the reduction in value of the investment resulting form imposition of differing requirements or loss of rights granted under this Act: Provided, That the liability for compensation shall, until after an authorization for commercial recoery has been granted, be limited to compensation in relation to equipment and facilities utilized for exploration purposes: Provided further, That the Secretary of Commerce shall determine in the first instance the amount owing on the claims for compensation under this section: Provided further, That after an authorization for commercial recovery has been granted, the value of the investment shall be determined by subtracting from the value of the original investment any gross profits realized from development and processing operations: And provided further, That the liability under this section shall terminate tên years after commercial recovery has begun.

INVESTMENT INSURANCE

SECTION 14. (a) On annual payment by any licensee of a premium to be determined by the Skcretary of Commerce, utilizing standard insurance practices and based upon the relative risks involved, the United States shall insure the licensee, in an amount not exceeding the value of the investment, for any damages suffered through the impairment of the insured investment, or through the removal of hard minerals from the licensed block, by any other person against whom a legal remedy either does not exist or is unavailable in any legal forum to which the licensee has accesss. The Secretary of Commerce shall determine the amount owing on any claim for reimbursement under this section.

(b) Insurance under this section shall be available solely upon the request of the licensee and after the Secretary of Commerce has determined that the insurance coverage requested is not readily available at a reasonable price elsewhere.

...

RECIPROCATING STATES

SECTION 19. (a) The Secretary shall, in promulgating regulations under this Act, attempt to harmonize his regulations with the laws, regulations, or other officail acts of any other State which has enacted legislation or regulations or taken, pursuant ti its own laws and procedured, equivalent official acts for purposes similar to those of this Act. When the Secretary finds, in consultation with the Secretary of State, that the laws and regulations of the United States and similar actions by any other State are in essential harmony one with the other, such other State shall be deemed to be a reciprocating State for the purposes of this Act.

(b) Any license or similar legal entitlement issued by a reciprocating State shall be accorded equivalent legal status as though it were issued by the Secretary: Provided, That the reciprocating State accords the same legal status to licenses issued by the Secretary: Provided further, That sections 13 and 14 of this Act shall not apply to persons subject to the jurisdiction of the United States in respect to mining licenses or similar legal entitlements issued to them by a reciprocating State.

NOTES

Bills similar to Senate Bill 713 have been introduced in the last several sessions of Congress. In the 94th Congress Senate Bill 713 and a comparable House bill were both reported out of committee but never came to a vote. Deep seabed legislation was again introduce in the 95th Congress.

ADDRESS BY SECRETARY OF STATE HENRY KISSINGER
TO THE 1976 ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION
printed in, REPORT ON THE DEEP SEABED MINERALS ACT, COMMITTEE ON INTERIOR AND INSULAR AFFAIRS, No. 754, 94th Congress (1976) pp. 35-41.

The issues before the Law of the Sea Conference cover virtually every area and aspect of man's uses of the seas, from the coastline to the farthest deep seabed. Like the oceans themselves, these various issues are interrelated parts of a single entity. Without agreement on all the issues, agreement on any will be empty, for nations will not accept a partial solution—all the less so as some of the concessions that have been made were based on the expectation of progress on the issues which are not yet solved.

* * *

The deep seabeds

The third, and the most complex and vital issue remaining before the Conference is the problem of the deep seabeds.

For decades we have known that the deep seabeds contain great potential resources of nickel, manganese, cobalt and copper—resources whose accessibility would contribute significantly to global economic growth in the future. It is only recently that the technology has been developed which can enable us to reach those deposits and extract them.

The Conference has not yet approached agreement on the issue of the deep seabeds because it has confronted serious philosophical disagreements. Some have argued that commercial exploitation unrestrained by international treaty would be in the best interests of the United States. In fact this country is many years ahead of any other in the technology of deep sea mining, and we are in all respects prepared to protect our interests. If the deep seabeads are not subject to international agreement the United States can and will proceed to explore and mine on its own.

First, to ensure an equitable decisionmaking system, the United States continues to believe that the Treaty should authorize the formation of an International Seabed Resource Authority to supervise exploration and development of the deep seabeds. The Authority would be comprised of four principal organs: An Assembly of all member states, to give general policy guidance; a Council, to serve as the executive, policy-level and main decisionmaking forum, setting operational and environmental rules for mining, and supervising the contracts for deep seabed mining; a Tribunal, to resolve disputes through legal processes; and a Secretariat, to carry out the day-to-day administrative activities of the Authority.

The United States proposes:

That the power of the Authority be carefully detailed by the Treaty in order to preserve all those rights regarding the uses of the seas which fall outside the competence of the Authority, and to avoid any jurisdictional overlap with other international organizations;

That the composition and structure of the Council reflect the producer and consumer interests of those states most concerned with seabed mining. All nations whose vital national economic concerns are affected by decisions of the Authority must have a voice and influence in the Council commensurate with their interests; and

That the proposed permanent seabed Tribunal adjudicate questions of interpretation of the Treaty and of the powers of the International Authority raised by parties to the Treaty or by private companies engaged in seabed mining. Without a Tribunal, unresolved contention is a certainty. Such a body will be necessary if any seabed proposal is to win wide acceptance.

Second, to insure that all nations, developed and developing, have adequate access to seabed mining sites:

The United States proposes that the Treaty should guarantee nondiscriminatory access for states and their nationals to deep seabed resources under specified and reasonable conditions. The requirement of guaranteed access will not be met if the Treaty contains arbitrary or restrictive limitations on the number of mine sites which any nation might exploit. And such restrictions are unnecessary because deep seabed mining cannot be monopolized; there are many more productive seabed mining sites than conceivably can be mined for centuries to come.

The United States accepts that an "Enterprise" should be established as part of the International Seabed Resource Authority and given the right to exploit the deep seabeds under the same conditions as apply to all mining.

The United States could accept as part of an overall settlement, a system in which prime mining sites are reserved for exclusive exploitation by the Enterprise or by the developing countries directly—if this approach meets with broad support. Under this system, each individual contractor would propose two mine sites for exploitation. The Authority would then select one of these sites which would be mined by the Authority directly or made available to developing countries at its discretion. The other site would be mined by the contractor on his own.

The United States proposes that the international Authority should supervise a system of revenue sharing from mining activities for the use of the international community, primarily for the needs of the poorest countries. These revenues will not only advance the growth of developing countries; they will provide tangible evidence that a fair share in global economic activity can be achieved by a policy of cooperation. Revenue sharing could be based either on royalties or on a system of profit sharing from contract mining. Such a system would give reality to the designation of the deep seabeds as the common heritage of all mankind.

Finally, the United States is prepared to make a major effort to enhance the skills and access of developing countries to advanced deep seabed mining technology in order to assist their capabilities in this field. For example, incentives should be established for private companies to participate in agreements to share technology and train personnel from developing countries.

But while such a course might bring us a short-term advantage, it poses long-term dangers. Eventually any one country's technical skills are bound to be duplicated by others. A race would then begin, to carve out deep sea domains for exploitation. This cannot but escalate into economic warfare, endanger the freedom of navigation, and ultimately lead to tests of strength and military confrontations. America would not be true to itself, or to its moral heritage, if it accepted a world in which might makes right—where power alone decided the clash of interests. And, from a practical standpoint, no one recognizes more clearly than American industry investment, access, and profit can best be protected in an establishing and predictable environment.

On the other hand, there are those who would place all the deep seabed's resources under an international authority. Such a proposal would not provide adequate incentives and guarantees for those nations whose technological achievement and entrepreneurial boldness are required if the deep seabeds are to benefit all mankind. It would give control to those who do not have the resources to undertake deep seabed mining.

Let me briefly review the specific issues before us and then set forth the proposals which we believe can form the basis for a new consensus on the deep seabeds.

First, the decision-making machinery for managing the deep seabeds. There has been considerable debate over the form and the powers of the decision-making machinery established under the Treaty.

The United States is prepared to accept international machinery; but such machinery must be balanced, equitable, and ensure that the relative economic interests of the countries with important activities in the deep seabeds be protected, even though those countries may be a numerical minority.

Second, access to the deep seabeds. The Conference has been struggling with the issues of which nations, which firms, and which international authorities will have direct access to, and share in the benefits from the developing of deep seabed resources. The United States understands the concern that the riches of the seas not be the exclusive preserve of only the most powerful and technologically advanced nations. We recognize that the world community should share in the benefits of deep seabed exploitation.

What the United States cannot accept is that the right of access to seabed minerals be given exclusively to an international authority, or be so severely restricted as effectively to deny access to the firms of any individual nation including our own. We are gratified to note an increasing awareness of the need to avoid such extreme positions and to move now to a genuine accommodation that would permit reasonable assurances to all states and their nationals that their access to these resources will not be denied.

Third, the effect of seabed mining on land-based producers. Land-based producers of seabed minerals are concerned that seabed production may adversely affect their national economies. This is an especially serious problem since many of these producers are poor, developing countries.

We take these concerns seriously. But at the same time it must be recognized that commercial seabed production of these metals is at least five years away. For many years thereafter, seabed production will amount to only a fraction of total global production. Moreover, global metal markets are expanding and should easily be able to accommodate additional production from the seabeds without adversely affecting revenues of land-based producer countries.

U.S. proposals for the deep seabeds

The United States is prepared to make a major effort to resolve these issues equitably and to bring the Law of the Sea Conference to a swift and successful conclusion. In this spirit, the United States offers the following proposals.

Third, in response to the legitimate concerns of land-based producers of minerals found in the deep seabeds, we offer the following steps as an additional major contribution to the negotiations:

The United States is prepared to accept a temporary limitation, for a period fixed in the Treaty on production of the seabed minerals tied to the projected growth in the world nickel market, currently estimated to be about 6 percent a year. This would in effect limit production of other minerals contained in deep seabed nodules, including copper. After this period, the seabed production should be governed by overall market conditions.

The United States proposes that the International Seabed Authority have the right to participate in any international agreements on seabed-produced commodities in accordance with the amount of production for which it is directly responsible. The United States is prepared to examine with flexibility the details of arrangements concerning the relationships between the Authority and any eventual commodity agreements.

The United States proposes that some of the revenues of the International Seabed Resource Authority be used for adjustment assistance and that the World Bank, regional development banks, and other international institutions assist countries to improve their competitiveness or diversify into other kinds of production if they are seriously injured by production from the deep seabeds. An urbent task of the International Authority, when it is established, will be to devise an adjustment assistance program in collaboration with other international institutions for countries which suffer economic dislocations as a result of deep seabed mining.

* * *

The United States believes that the world community has before it a grave responsibility. Our country cannot delay in its efforts to develop an assured supply of critical resources through our deep seabed mining projects. We strongly prefer an international agreement to provide a stable legal environment before such development begins. one that ensures that all resources are managed for the good of the global community and that all can participate. But if an agreement is not reached this year it will be increasingly difficult to resist pressure to proceed unilaterally. An agreement on the deep seabed can turn the world's interdependence from a slogan into a reality. A sense of community which nations have striven to achieve on land for centuries could be realized in a regime for the oceans.

NOTES

1. The developing countries, earlier named the "Group of 77" but now consisting of over 115 members,are primarily interested obtaining a share of deepsea mining proceeds. They also desire to protect their members who are land based producers of the minerals found in the nodules.

2. The most difficult issue in the Law of the Sea Conference deep seabed negotiations has been the question whether an international group would have authority to conduct mining operations and whether that authority would be exclusive. The developing countries are afraid that given the high capital requirements of deep seabed mining and the large technological advantage of the United States and a few other countries, mining will be monopolized by a few countries if individual States or private

companies are allowed to mine.

3. There are a total of almost 160 nations participating in the Law of the Sea negotiations. Each nation has one vote. Thus the developing countries could easily dominate any issues left to the Authorities discretion since the Authority will have the same voting arrangement. The industralized countries want many aspects of mining to be covered by provisions not subject to such voting. They also want a subgroup of the assembly, with voting power reflecting respective economic interests to be given primary decison making authority.

4. A deep seabed mining operation requires an investment of $350-650 million and annual operating costs of $100-160 million. Annual net revenues of $40-60 million per operation are expected. If individual States or private companies conduct operations a percentage of their revenues would go to the Authority. No specific royalty has yet been proposed.

5. Although the quality of mining sites varies, there are considered to many more productive sites than can be mined in many centuries. Mining companies presently plan to recover nickel, copper, cobalt and some manganese from the nodules. The lion's share of the economic return comes from the nickel recovery. The impact of these new supplies on the world market would be significant. Each full scale mining operation could produce almost 10% of the present world consumption of nickel. One of the important issues is the duration, and level of any production quota to lessen the impact on the developing countries that are dependent on exporting these minerals.

6. A two thirds vote of those nations present and voting is necessary for the adoption of any Law of the Sea agreement. Therefore approval on the part of a majority of the developing countries is required since they account for over two thirds of the total votes.

7. After the two negotiating sessions held in 1976 the countries were still at an impasse. Subequent to those sessions a workshop was set up for futher efforts toward agreement. The following are summaries of the proposals that were submitted:

Group of 77 Proposals

Under the paper submitted by the Group of 77, activities covered by the contract and the extent of the participation of developing countries therein, as well as the proper financial arrangements.

Provisions were also made to cover cases where more than one application is received, whereby selection would be on a competitive basis, and any preference and priority would be accorded at a subsequent stage to an applicant who had previously entered into a contract for a separate stage or stages of operations. The Authority could reinitiate the procedure for selection of applicants if, after a specified period and after negotiations had been entered into, a contract had not been concluded.

The Authority was empowered to determine that, in certain parts of the contract area, activities should only be conducted by it either through the Enterprise or in association with developing countries, the Enterprise having the first right of refusal. When considering applications for such area the Authority was required to ensure that the developing country or countries would obtain substantial benefits. Reference to the issue of a quota or anti-monopoly provision was maintained in the text of Workshop Paper No. 1.

Proposals by USSR

Under the paper submitted by the USSR, the activities in the area should be conducted both by States parties and directly by the Authority. The Authority would determine the part or parts of the area in which it would conduct its activities. The Authority's area would not exceed that in which activities would be carried out by States parties.

The activities of State parties would be conducted on the basis of contracts with the Authority and they would come under its effective financial and administrative supervision. States parties might carry out activities through State enterprises or juridical persons registered in and sponsored by States. States parties sponsoring such entities would be responsible for taking all necessary measures to ensure that such entities complied with the Convention, its rules, regulations and procedure adopted by the Authority. All States parties would have equal rights to participate in activities in the area irrespective of their geographical location, social system and level of industrial development, and particular consideration would be given to the needs of developing countries, particularly the land-locked or geographically disadvantaged.

It was emphasized that the right of States to conduct exploration and exploitation activities in the area followed naturally from the concept of "common heritage of mankind" since States are juridical representatives of mankind under international law, and that those rights should therefore be guaranteed in the Convention itself and not left to the discretion of the Authority.

Furthermore, the system of exploitation would need to take account of the legitimate rights and interests of the socialist system, being one of the main systems in the world; no sea-bed régime and machinery would be viable without taking that into account. Although the paper did not contain any quota clause, it was emphasized that such a clause should none the less be an integral part of the system of exploitation as presented in the paper.

Proposals by United States

Under the paper submitted by the United States, there would be a parallel or dual access system. It was pointed out that a parallel system could be a method of accommodating the interests of all States and the international community in general, so as to best reflect the principle of the common heritage of mankind. States parties or other entities and the Enterprise would carry out activities in the area directly by entering into contracts with the Authority. All such activities would be in accordance with Annex I and the rules, regulations and procedures adopted by the Authority. The Authority would have effective fiscal and administrative supervision over all activities in the area to secure effective compliance with Part I of the Convention, Annex I and the rules and regulations of the Authority.

States parties who sponsor other entities would assist the Authority by taking all appropriate measures to ensure such compliance. The Authority should promote and encourage activities in the area and should avoid discrimination in granting access and in implementing its powers and functions.

The Authority would be forbidden to impair any rights granted under Part I of the Convention and must fully safeguard such rights. Pursuant to specific articles in Part I of the Convention dealing with scientific research, technology transfer and the distribution of revenues, the Authority would be empowered to give special consideration to the interests and needs of developing countries, particularly the land-locked and geographically disadvantaged. Such special consideration would not be deemed to be discriminatory.

Title to the resources would be vested in the Contractor at the moment the resources were recovered from the area pursuant to a contract. A contract would be entered into by the Authority if the applicant was qualified by virtue of his financial standing and technological capability. The Enterprise and States parties would be presumed to be so qualified. An applicant would also be required to submit a work programme to the Authority which would fully take into account the Authority's rules and regulations. All contractors would be required to accept the supervision of the Authority.

Subject only to those requirements, the Authority would award a contract; but if it had received simultaneously an application for a contract in the same area, the contract would be awarded on a competitive basis. If no such competing application were received, a properly qualified applicant would be granted a contract within 90 days and the Authority would not have the right to refuse to enter into such a contract if the financial arrangements criteria set forth in paragraph 9 (d) had been satisfied and the contract was in all other respects in strict conformity with the Convention and the Authority's rules and regulations.

It would be the obligation of the Contractor to provide the funds, materials, equipment, skills and know-how as necessary for the conduct of operations under the contract. The paper made clear that the procedural and substantive provisions of Annex I relating to contracts would apply *mutatis mutandis* to the Enterprise. It was emphasized that the parallel system could only serve as the basis for a compromise if the Enterprise were on an equal footing with other applicants for contracts.

in the area should be conducted exclusively by the Authority (1) directly through the Enterprise in accordance with a formal written plan of work, or (2) as determined by the Authority, through a form of association between the Enterprise and the specified entities pursuant to a contract. For the purpose of securing compliance at all times with the relevant provisions and instruments, the Authority should exercise full and effective control over the activities in the area.

States parties should assist the Authority by taking all measures necessary to secure such compliance. The paper further provided that the Authority should avoid discrimination in the exercise of its power and functions and that all rights granted should be fully safeguarded. Special consideration for developing countries, including the conduct of activities by the Authority in certain parts of the area solely in association with them, should not be deemed discriminatory.

Flexibility was maintained in the provision as to when title to minerals and processed substances could be passed

from the Authority. The Authority would be required to adopt appropriate administrative procedures, rules and regulations for making an application and for the qualifications of an applicant. Such qualifications included financial standing, technological capability and satisfactory performance under previous contracts with the Authority, if any. In assessing the qualifications of a State party its character as a State should be taken into account.

Every applicant should be treated on an equal footing and would be required to fulfil four specific requirements: the undertaking to comply with and to accept as enforceable all the obligations; acceptance of control by the Authority; satisfactory assurance of fulfilment of obligations in good faith; the undertaking to promote the interests of developing countries by association or other means. In view of the two main methods of operation embodied in article 22, one new paragraph was added to provide that the procedures for the Enterprise should be governed by such provisions as the Authority might establish in its rules and regulations and by the Statute of the Enterprise. Its activities should be conducted in accordance with the resource policy and the relevant decisions of the Authority in implementation thereof.

The Authority should determine as to when to conduct activities in the area in association with entities. With respect to selection of applicants, the Authority would be empowered, on its own initiative, or upon receiving an application, to initiate selection procedures for applicants and to publish and make known a time-limit for receiving other applications.

Subject to the foregoing, the Authority should enter into negotiations with the applicant on the terms of a contract, provided that the applicant possessed the requisite qualifications and complied with the procedures established for applications; that the application did not relate to those parts of the area retained solely for the conduct of activities by the Enterprise or by it in association with the developing countries; and that the contract complied with the resource policy and the relevant decisions of the Authority. The terms of a contract to be negotiated were clearly set out in the text. They included the respective contributions of the Authority and the Contractor in association, including the contribution of funds, materials, equipment, skills and know-how as necessary for the conduct of operations

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B. Environmental Impact and Regulation of Deep Seabed Mining

FRANK, ENVIRONMENTAL ASPECTS OF DEEPSEA MINING*
15 Virginia Journal of International Law, 815 (1975), pp. 815-20.

The red clay sediment discharged during deepsea manganese nodule exploitation forms a dark "plume" over a large area of the ocean's surface. It has been estimated that the sediment may take five years to settle 100 yards downward. If, as is forecast, many companies ultimately mine, the blue of the ocean will be turned reddish-brown over tens of thousands of square miles. More importantly, the top layer of a substantial portion of the ocean, the so-called "euphotic zone" where photosynthesis gives birth to the primary organisms in the food chain, may be fundamentally changed.[1] Bottom layers might likewise be altered in some heretofore unknown manner.[2] No one knows the ultimate implication of these alterations of nature.[3]

Because of the plume and various other effects, deepsea mining will inevitably have a profound impact on the ocean environment. The basic problem today is that neither government, industry, nor the environmental community has adequate information to make a sound judgment of the consequences to the marine ecology of this new activity: *e.g.*, whether the consequences are so adverse as to suggest mining should not occur, or should be severely limited.

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1. Amos, Garside, Haines, & Roels, *Effects of Surface-Discharged Deep-sea Mining Effluent*, in FERROMANGANESE DEPOSITS ON THE OCEAN FLOOR 271 (D. Horn ed. 1972); U.S. DEP'T INTERIOR, DRAFT ENVIRONMENTAL STATEMENT PROPOSED FOR UNITED STATES INVOLVEMENT IN LAW OF THE SEA NEGOTIATIONS GOVERNING THE MINING OF DEEP SEABED HARD MINERAL RESOURCES SEAWARD OF THE LIMITS OF NATIONAL JURISDICTION 2.113 (1974) [hereinafter cited as ENVIRONMENTAL IMPACT STATEMENT].
2. Statement of O. Roels, *Hearings on Amend. No. 946 to S.1134 Before the Subcomm. on Minerals, Materials and Fuels of the Senate Comm. on Interior and Insular Affairs*, 93d Cong., 2d Sess., pt. 2, at 1092 (1974) [hereinafter cited as *Senate Hearings*].
3. Knauss, *Ocean Pollution: Status and Prognostication*, in LAW OF THE SEA INSTITUTE, EIGHTH ANNUAL CONFERENCE, PROCEEDINGS 313, 326-27 (1973).

*used with permission of the Virginia Journal of International Law Association

Unfortunately, no one now understands the environmental implications of mining the ocean's floor. According to the draft environmental impact statement on deepsea mining prepared by the Department of the Interior, there are gaps in techniques of observation of ecological baselines and of forecasting any natural or artificial change in the ocean environment.[12] Deepsea fauna are relatively unknown, with a large fraction of species not ever having been described.[13] Further, the state of the art of benthic sampling is inadequate to support intelligent decision-making.[14] The Department of the Interior therefore concludes that "sufficient data is not available to assess accurately the effects of many of the actions involved in deep seabed mining at this time."[15]

Part of the problem is the inherent difficulty of forecasting environmental consequences of a novel activity for which the equipment has not even been fully developed. But another aspect is that the executive branch of the United States Government has not requested adequate funds to undertake the necessary baseline studies and experimentation. Although the environmental impact statement strongly recommends study and experimental work,[16] and the National Oceanographic and Atmospheric Administration of the Department of Commerce pressed for at least two years to seek $9 million of appropriations for a Deep Ocean Mining Environmental Study, other parts of the executive branch delayed the project. A modest $3 million appropriation for a more limited study has been requested this year.[17] In sum, while the government is promoting the development of deepsea mining, *inter alia* through the negotiation of a Law of the Sea treaty mentioned below, it has not yet taken those steps necessary to learn of the ecological consequences of the activity it is promoting.

These ecological consequences may not simply be dismissed because they are unknown. For although the adversity of its impact and the magnitude of that adversity is uncertain, it is clear that deepsea nodule mining will have an impact on the marine environment in various predictable ways. For example, regardless of the technique used in mining, sediment

12. ENVIRONMENTAL IMPACT STATEMENT, *supra* note 1, at 1.65.
13. *Id.* at 2.141.
14. *Id.* at 3.33.
15. *Id.* at 5.1.
16. *E.g.*, *id.* at 3.7.
17. The struggle between NOAA and other parts of the Executive branch is well known to the industry and the environmental communities. However, public documentation of this is unavailable.

from the ocean floor will be lifted with the nodules.[18] Some sediment may separate during the ascent to the surface, but most will probably be washed free on board the mining vessel and either discharged over the side or possibly returned to the sea at intermediate depths through a discharge pipe.[19] The discharge of sediment creates the dark plume referred to earlier, and could well fundamentally change the character of the euphotic zone in the area.[20] One study concludes that mixing deep-ocean water and sediment with surface water may cause a stimulation of photoplankton and blooms of organisms which do not normally occur in the pelagic zone of areas overlying manganese nodule concentrations (perhaps because of sediment-associated vitamins).[21] Some speculate that such a redistribution of photoplankton species may be beneficial, or may be irrelevant since the areas of the ocean in which presently-projected mining will occur appear to be the least biologically active.[22] On the other hand, no one is aware of the full implications of tinkering with such basic elements in the life chain. Furthermore, the esthetics of changing ocean color aside, surface-discharged deepsea sediments may well alter light penetration in lower layers and reduce photosynthesis there, leaving effects which are also heretofore unknown.[23]

A second impact is likely to result from the disturbance to biologic activity and sediment on the ocean bottom caused by operation of either the suction or bucket system.[24] One could argue that such consequences will have an insignificant impact since bottom currents naturally transfer sediment, since most of it will settle, and since ocean bottom areas where mining is likely to occur have little biologic activity.[25] But again, the role of these fauna in the ocean environment is unclear;[26] the ocean bottom in some areas contains long-lived, late pubescent fauna — one benthic clam requires 200 years to reach sexual maturity[27] — and if large areas of the ocean floor are exploited, then the Department of the Interior concludes that a "serious concern may be found in the preservability of deep-ocean fauna"[28] and that some types of mining "could diminish the probability of some species reproducing themselves thus leading to a more rapid extinc-

18. ENVIRONMENTAL IMPACT STATEMENT, *supra* note 1, at 3.16 *et seq.*
19. *Id.* at 3.21, 3.22.
20. Amos, *supra* note 1; ENVIRONMENTAL IMPACT STATEMENT, *supra* note 1, at 2.113.
21. *Environmental Impact Statement, supra* note 1, at 3.28-9 and 3.332.
22. Statement of O. Roels, *Senate Hearings, supra* note 2, at 1092.
23. ENVIRONMENTAL IMPACT STATEMENT, *supra* note 1, at 3.28.
24. *Id.* at 3.16 *et seq.*
25. Statement of O. Roels, *Senate Hearings, supra* note 2, at 1092.
26. *See* ENVIRONMENTAL IMPACT STATEMENT, *supra* note 1, at 2.124-27.
27. *Id.* at 3.10.
28. *Id.* at 3.54.

tion rate of this unique fauna."[29] The Department of the Interior concludes regulation will be required to prevent the "potential damage" of too "aggressive" floor mining.[30]

All U.S. mining companies, except one, will apparently extract only copper, nickel, and cobalt from nodules.[31] After the extraction process, a great deal of waste, including manganese tracings, will be disposed. The huge quantities of manganese tracings and other waste may be dumped on land or in the ocean, but neither the economic feasibility nor the environmental impact of either disposal method has been evaluated. An interesting analogy may be made to the problem created by the dumping in Lake Superior of low-grade iron ore waste by the Reserve Mining Company.[32] Neither the Government nor, apparently, the company was aware that the waste contained asbestos elements which, it is now claimed, are carcinogenic.[33]

A fourth possible consequence could result from the processing of the nodules at sea. Most U.S. companies maintain that they will not process at sea during the early years of mining.[34] But no existing regulation or law would prevent such processing, and at least one foreign company has stated it may engage in primary refinement or "beneficiation" of ore at sea because that reduces transport costs.[35] Highly pollutive chemicals with heavy alkaline and acid bases are used in such processing, and they will undoubtedly be dumped at the mining site or in nearby areas.

Assuming that processing will not be accomplished at sea, the fifth probable consequence might arise in a shift in the location of processing facilities from the "hinterland" to coastal areas. According to the Department of the Interior, the development of extractive plants near the shoreline will "increase the probability of adverse impact in these areas."[36] But the nature or magnitude of the adverse environmental impact on the coastal zone has never been analyzed.

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29. *Id.* at 3.10.

30. *Id.* at 3.40.

31. *Senate Hearings, supra* note 2, at 797.

32. *See* Washington Post, Feb. 23, 1975, at B2, col. 1; United States v. Reserve Mining Co., 380 F.Supp. 11 (D. Minn.), *remanded*, 498 F.2d 1073 (8th Cir.), *continuation of stay of injunction denied*, 380 F.Supp. 11 (D. Minn. 1974).

33. THIRD MEETING OF THE SECOND SESSION OF THE CONFERENCE IN THE MATTER OF POLLUTION OF LAKE SUPERIOR AND ITS TRIBUTARY BASIN IN THE STATES OF MINNESOTA, WISCONSIN AND MICHIGAN, PROCEEDINGS (1972); N.Y. Times, Oct. 2, 1974, at 29, col. 1.

34. Statement of M. Dubs on behalf of the American Mining Congress and Kennecott Copper Corp., *Senate Hearings, supra* note 2, at 1016, 1021; ENVIRONMENTAL IMPACT STATEMENT, *supra* note 1, at 1.81.

35. Statement of O. Roels, *Senate Hearings, supra* note 2, at 1094. *See also* Mero, *Potential Economic Value of Ocean Floor Manganese Nodule Deposits*, in FERROMANGANESE DEPOSITS ON THE OCEAN FLOOR 191 (D. Horn ed. 1972).

36. ENVIRONMENTAL IMPACT STATEMENT, *supra* note 1, at 5.2.

Mining systems require substantial amounts of power. The Department of the Interior opines that future systems with large energy requirements may need to utilize nuclear reactors at sea.[37] The potential environmental hazard from reactors is well known; the risks of using reactors at sea for mining have never been explored.

The seventh consequence herein exposed is also unknown, for the origin of deepsea nodules is unknown. However, it is most likely that the nodules will play a role in the interface process between ocean water and the ocean bottom.[38] Therefore the removal of the metal nodules may itself have an effect on the basic ocean biologic system.

A final environmental concern involves an andromeda strain type problem. The ocean bottom is essentially a self-contained unit; its life does not mingle with the rest of the earth. Deepsea mining will bring up from that unknown world large amounts of ancient sediment containing ancient spores and organisms which may have created strange, alien antibodies which continue to survive. Scientists simply are unaware of what will happen when any such antibodies are set free in the new environment. It is possible that they will infect plant life or humans and that we will not have cures.

II. The Law of the Sea Regime

In 1970, the General Assembly of the United Nations adopted a resolution calling for the convocation of a Law of the Sea Conference which would, *inter alia*, establish a regime covering the mining of mineral nodules in areas beyond national jurisdiction.[39] After a series of preparatory meetings, the Conference held its first formal session in Caracas, Venezuela, in the summer of 1974 and has held a second eight-week session from March 17 to May 9, 1975, in Geneva.

A stated United States objective at the Conference is to promote the establishment of a regime under which deepsea mining could commence.[40] The Conference has reached a consensus that there should be an international Seabed Authority which would regulate deepsea nodule mining.[41] But the negotiators have not yet decided upon such basic attributes of the

37. *Id.* at 1.47.

38. Bonatti, Kraemer, & Rydell, *Classification and Genesis of Submarine Iron-Manganese Deposits*, in Ferromanganese Deposits on the Ocean Floor 149 (D. Horn ed 1972).

39. G.A. Res. 2749, 25 U.N. GAOR Supp. 28, at 24, U.N.Doc. A/8028 (1970).

NOTES

Debate on both the national and international levels has centered on the economics of exploitation of deep seabed minerals and the division of the proceeds. The burden of environmental protection falls to the following provisions:

Senate Bill 713

Section 5....Before he may issue a license, the Secretary must first determine...(4) that operations under the license will not pose an unreasonable threat ot the integrity of the marine

environment and that all reasonable precautions will be taken to minimize any adverse impact on that environment.

Section 7. The Secretary shall consult with appropriate Federal agencies and departments regarding environmental criteria and shall establish environmental standards based to the maximum extent practicable on available technical date and scientific data, applied in a consistent manner under the rules and regulations of section 18, to which operations under a license issued under this Act shall adhere. The Secretary may from time to time, propose revisions of the rules and regulations regarding environmental standards as available data may warrant.

THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA
Revised Single Negotiating Text
A/Conf.62/WP.8/Rev.1/Part I

PROTECTION OF THE MARINE ENVIRONMENT

Article 12

With respect to activities in the Area, necessary measures shall be taken in order to ensure effective protection for the marine environment from harmful effects which may arise from such activities. To that end the Authority shall adopt appropriate rules, regulations and procedures for inter alia:

(a) The prevention of pollution and contamination, and other hazards to the marine environment, including the coastline, and of interference with the ecological balance of the marine environment, particular attention being paid to the need for protection from the consequences of such activities as drilling, dredging, excavation, disposal of waste, construction and operation or maintenance of installations, pipelines and other devices related to such activities;

(b) The protection and conservation of the natural resources of the Area and the prevention of damage to the flora and fauna of the marine environment.

SECTION 5. OTHER PROPOSED USES OF THE NONLIVING AND ENERGY RESOURCES OF THE OCEAN

A. Energy from the Ocean

The recent realization that fossil fuels are neither cheap nor unlimited and the recognition of the high economic and environmental costs of nuclear power have prompted a search for new energy sources. Many of the proposed new sources involve the use of the oceans.

i.)ocean thermal energy conversion(OTEC)- OTEC facilities

would produce electricity by using the difference in temperatures between cold deep waters and the warm surface waters to drive a turbine connected to a generator. Ammonia in a closed system would be heated by the warm waters. This would cause the ammonia to boil. It would expand and pass through a turbine. After passing through the generator cold deep seawater would be used to cool and condense the ammonia. The ammonia would continuously cycle through the system. This is basically the same way that conventional generators work. They employ much more intense heat and convert water to steam to drive the turbine. Ammonia is used in lieu of steam in the OTEC facility since the difference between the warm and cold seawater as the temperature difference created in a nuclear or fossil fuel plant.

OTEC facilities are presently designed to be movable but they will be anchored to the sea bed at the operating site and will be almost totally submerged. A pipe 25-50 meters in diameter and 500-1000 meters long will be necessary to transport the cold water up to the surface.

Much of the present research is directed to the locating of potential sites. The areas off the Southeastern states have been identified as potential sites. The best sites appear to be in the tropics several hundred miles form shore.

Two primary environmental effects are anticipated from OTEC facilities. The first is a slight reduction in the temperature of the surface waters around the plant. This change may have some secondary effects. For example, it has been suggested that down wind rain may be reduced due to the lower amount of evaporation from the cooled waters. The second impact results from the introduction of nutrients in the deep waters into the warmth and light of the suface. Observations of natural upwellings and experimentation suggests that this impact may provide an excellent setting for mariculture.

(ii) wind-A strong and constant wind is needed for power production. A constant wind is important since it is expensive to provide back-up power for times when winds are calm. Wind velocity is important because the power content of wind is proportional to the cube of wind velocity. Thus when wind speed doubles, power output increases eight times.

Good winds are found in several offshore areas and there have been several proposal for the construction of floating windmills. Particularily good winds are found at the edge of the Continental Shelf offshore from North Carolina to the Canadian border. It has been proposed that the country could meet a

large part of its energy demands by constructing about 3000 of these windmills along the Atlantic coast. It is claimed that the cost of the power would be one half that of nuclear plants.

(iii) Other proposals include the construction of devices to capture the energy of waves both along the shore and in deeper waters; the production of power by using salintiy differences; and plans to make use of the energy in tides and currents.

B. Water Column Mining

There are many minerals dissolved in seawater and the total amount of these minerals is almost unlimited. A common problem in the recovery of any of these minerals is that they are generally present in such minute concentrations compared to land based ores that extraction costs are prohibitive. In the past some bromine, salt and magnesium were produced from seawater. Today only magnesium and a small part of salt production are derived from seawater. It would take a major breakthrough in technology to make seawater mining of other elements economically feasible.

C. Other Proposals

Other proposals for use of the ocean include floating airports, artifical islands, and cities at sea.

CHAPTER FOUR

MARINE POLLUTION CONTROL

SECTION 1. INTERNATIONAL LAW

The international law of marine pollution is derived from several sources. The custom and practice of civilized nations is one such source. Where no convention or treaty controls, authorities look to custom and usage to determine international law. Principles of customary international law which pertain to marine pollution are found in two opinions. In the Trail Smelter Arbitration, 3 U.N. Rep. Intl. Arb. Awards 1905 (1949), 35 Am. J. Int'l. L. 684 (1941), the tribunal held that states had an obligation not to use their territory in such a way as might damage their neighbors. The International Court of Justice has likewise held that States have an obligation not to knowingly allow their territory to be used for acts which will be harmful to the rights of other states. Corfu Channel Case, (1949) 1 C. J. Rep. 4, 22. These principles would seem to prevent a nation polluting its waters to the extent that the polluting activity causes serious harm to the rights or territories of other nations.

As the following materials indicate, the law of marine pollution control is now primarily governed by public international agreements.

UNITED NATIONS CONFERENCE ON THE HUMAN ENVIRONMENT, REPORT, U.N. Doc. A/CONF. 48/14 (1972)

"Principles"

. . . .

7. States shall take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea.

1958 GENEVA CONVENTION ON THE HIGH SEAS, April 29, 1958, 450 U.N.T.S. 82 (effective for United States Sept. 30, 1962).

. . . .

Article 24

Every State shall draw up regulations to prevent pollution of the seas by the discharge of oil from ships or pipelines or resulting from the exploitation and exploration of the seabed and its subsoil, taking account of existing treaty provisions on the subject.

Article 25

1. Every State shall take measures to prevent pollution of the seas from the dumping of radio-active waste, taking into account any standards and regulations which may be formulated by the competent international organizations.

2. All States shall co-operate with the competent international organizations in taking measures for the prevention of pollution of the seas or air space above, resulting from any activities with radio-active materials or other harmful agents.

Allegrone, MARINE OIL POLLUTION:
THE EMERGING REGIME FOR THE ENFORCEMENT OF
VESSEL SOURCES OF POLLUTION
(unpublished seminar paper 1976)

. . . The 1958 Convention on the High Seas, established at the First Law of the Sea Conference in Geneva, set out the basic rights of states to enforce oil pollution laws.[4] The 1954 International Convention for the Prevention of Oil Pollution was amended twice, once in 1962 and again in 1969; these conventions established zones in which oil could not be discharged and set down standards for showing a violation.[5] Also in 1969, two United Nations conventions were passed, the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties,[6] (the so-called Intervention Convention), which gave coastal states the right to intervene if such action was necessary to eliminate harm to its coastline; and the International Convention on Civil Liability for Oil Pollution Damage,[7] (the Civil Liability Convention), which was the first attempt by governments to adopt uniform international rules and procedures for determining questions of liability and providing compensation to persons affected by oil from ships.

Growing demand for sufficient liability coverage for oil pollution damage lead to three significant agreements in the early 1970's. In 1971 the United Nations agreed upon the International Oil Pollution Compensation Fund, (the Fund Convention) which would serve to supplement the Civil Liability Convention.[8] In the same year, the private sector entered the field with two agreements which would serve to provide liability coverage while the Civil Liability and Fund Conventions were being ratified; they were the Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution (TOVALOP)[9] and the Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution (CRISTAL),[10] where

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[4]Article 24 states: "Every State shall draw up regulations to prevent pollution of the seas by the discharge of oil from ships . . . taking account of existing treaty provisions on the subject." 13 U.S.T. 2312, T.I.A.S. 5200.

[5]Council on Environmental Quality, Fourth Annual Report 332.

[6]9 Int'l Legal Mat'ls 25 (1969). Entered into law 6 May 1975.

[7]9 Int'l Legal Mat'ls 45 (1969). Entered into law 19 June 1975.

[8]11 Int'l Legal Mat'ls 284 (1971). The Fund Convention has a two-fold purpose: 1)to provide compensation to the victims of oil pollution who have suffered damage to the extent that they fail to be protected by the Civil Liability Convention, and 2) indemnifying shipowners and their insurers for the additional burdens which the Civil Liability Convention imposes on them. The Civil Liability Convention's maximum damage recovery is $14,112,000. The Fund Convention will extend compensation up to a maximum of $32,400,000 (or up to $64,800,000 if 2/3 of the IMCO Assembly so votes). For more detail see, L.F.E. Goldie, "Liability for Oil Pollution Disasters: International Law and the Delimitation of Competenses in a Federal Policy", 6 J. of Maritime L. and Comm. 303 (1975).

[9] 8 Int'l Legal Mat'ls 497 (1969).

10 G. Houston Lay, New Directions in the Law of the Sea, Vol. II, Documents, (1973) at 646.

the cargo owners agreed to supplement the tanker owner's funds.[11]

Finally, and most importantly, the Inter-governmental Maritime Consultative Organization Convention for the Prevention of Oil Pollution by Ships was passed in 1973.[12] This convention set new oil pollution standards and explicitly chose neither to permit nor forbid individual nations from passing stricter measures than the Convention.[13] Upon entry into force it will replace the 1954 Convention as amended.

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[11] It is anticipated that both TOVALOP and CRISTAL will probably end when the Civil Liability Convention and the Fund Convention become law. The Civil Liability Convention entered into force on 19 June 1975 and the Fund Convention should receive a sufficient number of ratifications soon.

[12] 12 Int'l Legal Mat'ls 1319 (1974).

[13] Dennis Livingstone, "Oil on the Seas", 16 Environment 38, (Sept. 1974) at 41.

INTERNATIONAL CONFERENCE ON MARINE POLLUTION: INTERNATIONAL CONVENTION FOR THE PREVENTION OF POLLUTION FROM SHIPS*

[Done at London, November 2, 1973]

INTERNATIONAL CONVENTION FOR THE PREVENTION OF POLLUTION FROM SHIPS, 1973

Text of the Articles of the Convention as adopted by the Conference

THE PARTIES TO THE CONVENTION,

BEING CONSCIOUS of the need to preserve the human environment in general and the marine environment in particular,

RECOGNIZING that deliberate, negligent or accidental release of oil and other harmful substances from ships constitutes a serious source of pollution,

RECOGNIZING ALSO the importance of the International Convention for the Prevention of Pollution of the Sea by Oil, 1954, as being the first multilateral instrument to be concluded with the prime objective of protecting the environment, and appreciating the significant contribution which that Convention has made in preserving the seas and coastal environment from pollution,

DESIRING to achieve the complete elimination of intentional pollution of the marine environment by oil and other harmful substances and the minimization of accidental discharge of such substances,

CONSIDERING that this object may best be achieved by establishing rules not limited to oil pollution having a universal purport,

HAVE AGREED as follows:

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*[Reproduced from I.M.C.O. Document MP/CONF/WP.35 of November 2, 1973. [The Convention will be opened for signature from January 15, 1974 through December 31, 1974. The Convention includes five annexes and two protocols. Annexes III, IV, and V are so-called "optional annexes", and a state may declare that it does not accept any one or all of these. Annex I (p. 1335) concerns the regulations for oil pollution prevention; Annex II (p. 1386) deals with the control of pollution by noxious liquid substances; Annex III (p. 1421) contains the regulations for the prevention of pollution by harmful substances carried in packaged forms; Annex IV (p. 1424), the regulations for the prevention of pollution by sewage from ships; Annex V (p. 1434), the regulations for the prevention of pollution by garbage from ships. Protocol I contains the provisions for reports on incidents involving harmful substances, and Protocol II concerns arbitration.

ARTICLE 3

Application

(1) The present Convention shall apply to:

(a) ships entitled to fly the flag of a Party to the Convention; and

(b) ships not entitled to fly the flag of a Party but which operate under the authority of a Party.

(2) Nothing in the present Article shall be construed as derogating from or extending the sovereign rights of the Parties under international law over the sea-bed and subsoil thereof adjacent to their coasts for the purposes of exploration and exploitation of their natural resources.

(3) The present Convention shall not apply to any warship, naval auxiliary or other ship owned or operated by a State and used, for the time being, only on government non-commercial service. However, each Party shall ensure by the adoption of appropriate measures not impairing the operations or operational capabilities of such ships owned or operated by it, that such ships act in a manner consistent, so far as is reasonable and practicable, with the present Convention.

ARTICLE 4

Violation

(1) Any violation of the requirements of the present Convention shall be prohibited and sanctions shall be established therefor under the law of the Administration of the ship concerned wherever the violation occurs. If the Administration is informed of such a violation and is satisfied that sufficient evidence is available to enable proceedings to be brought in respect of the alleged violation, it shall cause such proceedings to be taken as soon as possible, in accordance with its law.

(2) Any violation of the requirements of the present Convention within the jurisdiction of any Party to the Convention shall be prohibited and sanctions shall be established therefor under the law of that Party. Whenever such a violation occurs, that Party shall either:

(a) cause proceedings to be taken in accordance with its law; or

(b) furnish to the Administration of the ship such information and evidence as may be in its possession that a violation has occurred.

(3) Where information or evidence with respect to any violation of the present Convention by a ship is furnished to the Administration of that ship, the Administration shall promptly inform the Party which has furnished the information or evidence, and the Organization, of the action taken.

(4) The penalties specified under the law of a Party pursuant to the present Article shall be adequate in severity to discourage violations of the present Convention and shall be equally severe irrespective of where the violations occur.

Regulation 9

Control of Discharge of Oil

(1) Subject to the provisions of Regulations 10 and 11 of this Annex and paragraph (2) of this Regulation, any discharge into the sea of oil or oily mixtures from ships to which this Annex applies shall be prohibited except when all the following conditions are satisfied:

(a) for an oil tanker, except as provided for in sub-paragraph (b) of this paragraph:

(i) the tanker is not within a special area;

(ii) the tanker is more than 50 nautical miles from the nearest land;

(iii) the tanker is proceeding en route;

(iv) the instantaneous rate of discharge of oil content does not exceed 60 litres per nautical mile;

(v) the total quantity of oil discharged into the sea does not exceed for existing tankers 1/15,000 of the total quantity of the particular cargo of which the residue formed a part, and for new tankers 1/30,000 of the total quantity of the particular cargo of which the residue formed a part; and

(vi) the tanker has in operation, except as provided for in Regulation 15(3) of this Annex, an oil discharge monitoring and control system and a slop tank arrangement as required by Regulation 15 of this Annex;

(b) from a ship of 400 tons gross tonnage and above other than an oil tanker and from machinery space bilges excluding cargo pump room bilges of an oil tanker unless mixed with oil cargo residue:

(i) the ship is not within a special area;

(ii) the ship is more than 12 nautical miles from the nearest land;

(iii) the ship is proceeding en route;

(iv) the oil content of the effluent is less than 100 parts per million; and

(v) the ship has in operation an oil discharge monitoring and control system, oily water separating equipment, oil filtering system or other installation as required by Regulation 16 of this Annex.

(2) In the case of a ship of less than 400 tons gross tonnage other than an oil tanker whilst outside the special area, the Administration shall ensure that it is equipped as far as practicable and reasonable with installations to ensure the storage of oil residues on board and their discharge to reception facilities or into the sea in compliance with the requirements of paragraph (1)(b) of this Regulation.

(3) Whenever visible traces of oil are observed on or below the surface of the water in the immediate vicinity of a ship or its wake, Governments of Parties to the Convention should, to the extent they are reasonably able to do so, promptly investigate the facts bearing on the issue of whether there has been a violation of the provisions of this Regulation or Regulation 10 of this Annex. The investigation should include, in particular, the wind and sea conditions, the track and speed

of the ship, other possible sources of the visible traces in the vicinity, and any relevant oil discharge records.

(4) The provisions of paragraph (1) of this Regulation shall not apply to the discharge of clean or segregated ballast. The provisions of sub-paragraph (1)(b) of this Regulation shall not apply to the discharge of oily mixture which without dilution has an oil content not exceeding 15 parts per million.

(5) No discharge into the sea shall contain chemicals or other substances in quantities or concentrations which are hazardous to the marine environment or chemicals or other substances introduced for the purpose of circumventing the conditions of discharge specified in this Regulation.

(6) The oil residues which cannot be discharged into the sea in compliance with paragraphs (1), (2) and (4) of this Regulation shall be retained on board or discharged to reception facilities.

Regulation 10

Methods for the Prevention of Oil Pollution from Ships While Operating in Special Areas

(1) For the purpose of this Annex the special areas are the Mediterranean Sea area, the Baltic Sea area, the Black Sea area, the Red Sea area and the "Gulfs area" which are defined as follows:

(a) The Mediterranean Sea area means the Mediterranean Sea proper including the gulfs and seas therein with the boundary between the Mediterranean and the Black Sea constituted by the 41°N parallel and bounded to the west by the Straits of Gibraltar at the meridian of 5°36'W.

(b) The Baltic Sea area means the Baltic Sea proper with the Gulf of Bothnia, the Gulf of Finland and the entrance to the Baltic Sea bounded by the parallel of the Skaw in the Skagerrak at 57°44.8'N.

(c) The Black Sea area means the Black Sea proper with the boundary between the Mediterranean and the Black Sea constituted by the parallel 41°N.

(d) The Red Sea area means the Red Sea proper including the Gulfs of Suez and Aqaba bounded at the south by the rhumb line between Ras si Ane (12°8.5'N, 43°19.6'E) and Husn Murad (12°40.4'N, 43°30.2'E).

(e) The "Gulfs area" means the sea area located north west of the rhumb line between Ras al Hadd (22°30'N, 59°48'E) and Ras Al Fastch (25°04'N, 61°25'E).

(2) (a) Subject to the provisions of Regulation 11 of this Annex, any discharge into the sea of oil or oily mixture from any oil tanker and any ship of 400 tons gross tonnage and above other than an oil tanker shall be prohibited, while in a special area.

(b) Such ships while in a special area shall retain on board all oil drainage and sludge, dirty ballast and tank washing waters and discharge them only to reception facilities.

(3) (a) Subject to the provisions of Regulation 11 of this Annex, any discharge into the sea of oil or oily mixture from a ship of less than 400 tons gross tonnage, other than an oil tanker, shall be prohibited while in a special area, except when the oil content of the effluent without dilution does not exceed 15 parts per million or alternatively when all of the following conditions are satisfied:

(i) the ship is proceeding en route;

(ii) the oil content of the effluent is less than 100 parts per million; and

(iii) the discharge is made as far as practicable from the land, but in no case less than 12 nautical miles from the nearest land.

(b) No discharge into the sea shall contain chemicals or other substances in quantities or concentrations which are hazardous to the marine environment or chemicals or other substances introduced for the purpose of circumventing the conditions of discharge specified in this Regulation.

(c) The oil residues which cannot be discharged into the sea in compliance with sub-paragraph (a) of this paragraph shall be retained on board or discharged to reception facilities.

(4) The provisions of this Regulation shall not apply to the discharge of clean or segregated ballast.

(5) Nothing in this Regulation shall prohibit a ship on a voyage only part of which is in a special area from discharging outside the special area in accordance with Regulation 9 of this Annex.

(6) Whenever visible traces of oil are observed on or below the surface of the water in the immediate vicinity of a ship or its wake, the Governments of Parties to the Convention should, to the extent they are reasonably able to do so,

promptly investigate the facts bearing on the issue of whether there has been a violation of the provisions of this Regulation or Regulation 9 of this Annex. The investigation should include, in particular, the wind and sea conditions, the track and speed of the ship, other possible sources of the visible traces in the vicinity, and any relevant oil discharge records.

(7) Reception facilities within special areas:

(a) Mediterranean Sea, Black Sea and Baltic Sea areas.

(i) The Government of each Party to the Convention, the coastline of which borders on any given special area undertakes to ensure that not later than 1 January 1977 all oil loading terminals and repair ports within the special area are provided with facilities adequate for the reception and treatment of all the dirty ballast and tank washing water from oil tankers. In addition all ports within the special area shall be provided with adequate reception facilities for other residues and oily mixtures from all ships. Such facilities shall have adequate capacity to meet the needs of the ships using them without causing undue delay.

(ii) The Government of each Party having under its jurisdiction entrances to seawater courses with low depth contour which might require a reduction of draught by the discharge of ballast undertakes to ensure the provision of the facilities referred to in sub-paragraph (a)(i) of this paragraph but with the proviso that ships required to discharge slops or dirty ballast could be subject to some delay.

(iii) During the period between the entry into force of the present Convention (if earlier than 1 January 1977) and 1 January 1977 ships while navigating in the special areas shall comply with the requirements of Regulation 9 of this Annex. However the Governments of Parties the coastlines of which border any of the special areas under this sub-paragraph may establish a date earlier than 1 January 1977 but after the date of entry into force of the present Convention, from which the requirements of this Regulation in respect of the special areas in question shall take effect:

(1) if all the reception facilities required have been provided by the date so established; and

(2) provided that the Parties concerned notify the Organization of the date so established at least six months in advance, for circulation to other parties.

(iv) After 1 January 1977, or the date established in accordance with sub-paragraph (a)(iii) of this paragraph if earlier, each Party shall notify the Organization for transmission to the Contracting Governments concerned of all cases where the facilities are alleged to be inadequate.

(b) Red Sea area and "Gulf area"

(i) The Government of each Party the coastline of which borders on the special areas undertakes to ensure that as soon as possible all oil loading terminals and repair ports within these special areas are provided with facilities adequate for the reception and treatment of all the dirty ballast and tank washing water from tankers. In addition all ports within the special area shall be provided with adequate reception facilities for other residues and oily mixtures from all ships. Such facilities shall have adequate capacity to meet the needs of the ships using them without causing undue delay.

(ii) The Government of each Party having under its jurisdiction entrances to seawater courses with low depth contour which might require a reduction of draught by the discharge of ballast shall undertake to ensure the provision of the facilities referred to in sub-paragraph (b)(i) of this paragraph but with the proviso that ships required to discharge slops or dirty ballast could be subject to some delay.

(iii) Each Party concerned shall notify the Organization of the measures taken pursuant to provisions of sub-paragraph (b)(i) and (ii) of this paragraph. Upon receipt of sufficient notifications the Organization shall establish a date from which the requirements of this Regulation in respect of the area in question shall take effect. The Organization shall notify all Parties of the date so established no less than twelve months in advance of that date.

(iv) During the period between the entry into force of the present Convention and the date so established, ships while navigating in the special area shall comply with the requirements of Regulation 9 of this Annex.

(v) After such date oil tankers loading in ports in these special areas where such facilities are not yet available shall also fully comply with the requirements of this Regulation. However, oil tankers entering these special areas for the purpose of loading shall make every effort to enter the area with only clean ballast on board.

(vi) After the date on which the requirements for the special area in question take effect, each Party shall notify the Organization for transmission to the Parties concerned of all cases where the facilities are alleged to be inadequate.

(vii) At least the reception facilities as prescribed in Regulation 12 of this Annex shall be provided by 1 January 1977 or one year after the date of entry into force of the present Convention, whichever occurs later.

Regulation 11

Exception

Regulations 9 and 10 of this Annex shall not apply to:

(a) the discharge into the sea of oil or oily mixture necessary for the purpose of securing the safety of a ship or saving life at sea; or

(b) the discharge into the sea of oil or oily mixture resulting from damage to a ship or its equipment;

(i) provided that all reasonable precautions have been taken after the occurrence of the damage or discovery of the discharge for the purpose of preventing or minimizing the discharge; and

(ii) except if the owner or the Master acted either with intent to cause damage, or recklessly and with knowledge that damage would probably result; or

(c) the discharge into the sea of substances containing oil, approved by the Administration, when being used for the purpose of combating specific pollution incidents in order to minimize the damage from

pollution. Any such discharge shall be subject to the approval of any Government in whose jurisdiction it is contemplated the discharge will occur.

Regulation 12

Reception Facilities

(1) Subject to the provisions of Regulation 10 of this Annex, the Government of each Party undertakes to ensure the provision at oil loading terminals, repair ports, and in other ports in which ships have oily residues to discharge, of facilities for the reception of such residues and oily mixtures as remain from oil tankers and other ships adequate to meet the needs of the ships using them without causing undue delay to ships.

(2) Reception facilities in accordance with paragraph (1) of this Regulation shall be provided in:

(a) all ports and terminals in which crude oil is loaded into oil tankers where such tankers have immediately prior to arrival completed a ballast voyage of not more than 72 hours or not more than 1,200 nautical miles;

(b) all ports and terminals in which oil other than crude oil in bulk is loaded at an average quantity of more than 1,000 metric tons per day;

(c) all ports having ship repair yards or tank cleaning facilities;

(d) all ports and terminals which handle ships provided with the sludge tank(s) required by Regulation 17 of this Annex;

(e) all ports in respect of oily bilge waters and other residues, which cannot be discharged in accordance with Regulation 9 of this Annex; and

(f) all loading ports for bulk cargoes in respect of oil residues from combination carriers which cannot be discharged in accordance with Regulation 9 of this Annex.

(3) The capacity for the reception facilities shall be as follows:

(a) Crude oil loading terminals shall have sufficient reception facilities to receive oil and oily mixtures which cannot be discharged in accordance with the provisions of Regulation 9(1)(a) of this Annex from all oil tankers on voyages as described in paragraph (2)(a) of this Regulation.

(b) Loading ports and terminals referred to in paragraph (2)(b) of this Regulation shall have sufficient reception facilities to receive oil and oily mixtures which cannot be discharged in accordance with the provisions of Regulation 9(1)(a) of this Annex from oil tankers which load oil other than crude oil in bulk.

(c) All ports having ship repair yards or tank cleaning facilities shall have sufficient reception facilities to receive all residues and oily mixtures which remain on board for disposal from ships prior to entering such yards or facilities.

(d) All facilities provided in ports and terminals under paragraph (2)(d) of this Regulation shall be sufficient to receive all residues retained according to Regulation 17 of this Annex from all ships that may reasonably be expected to call at such ports and terminals.

(e) All facilities provided in ports and terminals under this Regulation shall be sufficient to receive oily bilge waters and other residues which cannot be discharged in accordance with Regulation 9 of this Annex.

(f) The facilities provided in loading ports for bulk cargoes shall take into account the special problems of combination carriers as appropriate.

(4) The reception facilities prescribed in paragraphs (2) and (3) of this Regulation shall be made available no later than one year from the date of entry into force of the present Convention or by 1 January 1977, whichever occurs later.

(5) Each Party shall notify the Organization for transmission to the Parties concerned of all cases where the facilities provided under this Regulation are alleged to be inadequate.

Regulation 13

Segregated Ballast Oil Tankers

(1) Every new oil tanker of 70,000 tons deadweight and above shall be provided with segregated ballast tanks and shall comply with the requirements of this Regulation.

(2) The capacity of the segregated ballast tanks shall be so determined that the ship may operate safely on ballast voyages without recourse to

the use of oil tanks for water ballast except as provided for in paragraph (3) of this Regulation. In all cases, however, the capacity of segregated ballast tanks shall be at least such that in any ballast condition at any part of the voyage, including the conditions consisting of lightweight plus segregated ballast only, the ship's draughts and trim can meet each of the following requirements:

(a) the moulded draught amidships (dm) in metres (without taking into account any ship's deformation) shall not be less than:

$$dm = 2.0 + 0.02\ L,$$

(b) the draughts at the forward and after perpendiculars shall correspond to those determined by the draught amidships (dm), as specified in sub-paragraph (a) of this paragraph, in association with the trim by the stern of not greater than 0.015 L, and

(c) in any case the draught at the after perpendicular shall not be less than that which is necessary to obtain full immersion of the propeller(s).

(3) In no case shall ballast water be carried in oil tanks except in weather conditions so severe that, in the opinion of the Master, it is necessary to carry additional ballast water in oil tanks for the safety of the ship. Such additional ballast water shall be processed and discharged in compliance with Regulation 9 and in accordance with the requirements of Regulation 15 of this Annex, and entry shall be made in the Oil Record Book referred to in Regulation 20 of this Annex.

(4) Any oil tanker which is not required to be provided with segregated ballast tanks in accordance with paragraph (1) of this Regulation may, however, be qualified as a segregated ballast tanker, provided that in the case of an oil tanker of 150 metres in length and above it fully complies with the requirements of paragraphs (2) and (3) of this Regulation and in the case of an oil tanker of less than 150 metres in length the segregated ballast conditions shall be to the satisfaction of the Administration.

Regulation 14

Segregation of Oil and Water Ballast

(1) Except as provided in paragraph (2) of this Regulation, in new ships of 4,000 tons gross tonnage and above other than oil tankers, and in new

oil tankers of 150 tons gross tonnage and above, no ballast water shall be carried in any oil fuel tank.

(2) Where abnormal conditions or the need to carry large quantities of oil fuel render it necessary to carry ballast water which is not a clean ballast in any oil fuel tank, such ballast water shall be discharged to reception facilities or into the sea in compliance with Regulation 9 using the equipment specified in Regulation 16(2) of this Annex, and an entry shall be made in the Oil Record Book to this effect.

(3) All other ships shall comply with the requirements of paragraph (1) of this Regulation as far as reasonable and practicable.

Regulation 15

Retention of Oil on Board

(1) Subject to the provisions of paragraphs (5) and (6) of this Regulation, oil tankers of 150 tons gross tonnage and above shall be provided with arrangements in accordance with the requirements of paragraphs (2) and (3) of this Regulation, provided that in the case of existing tankers the requirements for oil discharge monitoring and control systems and slop tank arrangements shall apply three years after the date of entry into force of the present Convention.

(2) (a) Adequate means shall be provided for cleaning the cargo tanks and transferring the dirty ballast residue and tank washings from the cargo tanks into a slop tank approved by the Administration. In existing oil tankers, any cargo tank may be designated as a slop tank.

(b) In this system arrangements shall be provided to transfer the oily waste into a slop tank or combination of slop tanks in such a way that any effluent discharged into the sea will be such as to comply with the provisions of Regulation 9 of this Annex.

(c) The arrangements of the slop tank or combination of slop tanks shall have a capacity necessary to retain the slops generated by tank washing, oil residues and dirty ballast residues but the total shall be not less than 3 per cent of the oil carrying capacity of the ship, except that, where segregated ballast tanks

are provided in accordance with Regulation 13 of this Annex, or where arrangements such as eductors involving the use of water additional to the washing water are not fitted, the Administration may accept 2 per cent. New oil tankers over 70,000 tons deadweight shall be provided with at least two slop tanks.

(d) Slop tanks shall be so designed particularly in respect of the position of inlets, outlets, baffles or weirs where fitted, so as to avoid excessive turbulence and entrainment of oil or emulsion with the water.

(3) (a) An oil discharge monitoring and control system approved by the Administration shall be fitted. In considering the design of the oil content meter to be incorporated in the system, the Administration shall have regard to the specification recommended by the Organization.* The system shall be fitted with a recording device to provide a continuous record of the discharge in litres per nautical mile and total quantity discharged, or the oil content and rate of discharge. This record shall be identifiable as to time and date and shall be kept for at least three years. The oil discharge monitor and control system shall come into operation when there is any discharge of effluent into the sea and shall be such as will ensure that any discharge of oily mixture is automatically stopped when the instantaneous rate of discharge of oil exceeds that permitted by Regulation 9(1)(a) of this Annex. Any failure of this monitoring and control system shall stop the discharge and be noted in the Oil Record Book. A manually operated alternative method shall be provided and may be used in the event of such failure, but the defective unit shall be made operable before the oil tanker commences its next ballast voyage unless it is proceeding to a repair port. Existing oil tankers shall comply with all of the provisions specified above except that the stopping of the discharge may be performed manually and the rate of discharge may be estimated from the pump characteristic.

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* Reference is made to Recommendations on International Performance Specifications for Oily-Water Separating Equipment and Oil Content Meters adopted by the Organization by Resolution A.233(VII).

(b) Effective oil/water interface detectors approved by the Administration shall be provided for a rapid and accurate determination of the oil/water interface in slop tanks and shall be available for use in other tanks where the separation of oil and water is effected and from which it is intended to discharge effluent direct to the sea.

(c) Instructions as to the operation of the system shall be in accordance with an operational manual approved by the Administration. They shall cover manual as well as automatic operations and shall be intended to ensure that at no time shall oil be discharged except in compliance with the conditions specified in Regulation 9 of this Annex.*

(4) The requirements of paragraphs (1), (2) and (3) of this Regulation shall not apply to oil tankers of less than 150 tons gross tonnage, for which the control of discharge of oil under Regulation 9 of this Annex shall be effected by the retention of oil on board with subsequent discharge of all contaminated washings to reception facilities. The total quantity of oil and water used for washing and returned to a storage tank shall be recorded in the Oil Record Book. This total quantity shall be discharged to reception facilities unless adequate arrangements are made to ensure that any effluent which is allowed to be discharged into the sea is effectively monitored to ensure that the provisions of Regulation 9 of this Annex are complied with.

(5) The Administration may waive the requirements of paragraphs (1), (2) and (3) of this Regulation for any oil tanker which engages exclusively on voyages both of 72 hours or less in duration and within 50 miles from the nearest land, provided that the oil tanker is not required to hold and does not hold an International Oil Pollution Prevention Certificate (1973). Any such waiver shall be subject to the requirement that the oil tanker shall retain on board all oily mixtures for subsequent discharge to reception facilities and to the determination by the Administration that facilities available to receive such oily mixtures are adequate.

(6) Where in the view of the Organization equipment required by Regulation 9(1)(a)(vi) of this Annex and specified in sub-paragraph (3)(a) of this Regulation is not obtainable for the monitoring of discharge of light

* Reference is made to "Clean Seas Guide for Oil Tankers", published by the International Chamber of Shipping and the Oil Companies International Marine Forum.

refined products (white oils), the Administration may waive compliance with such requirement, provided that discharge shall be permitted only in compliance with procedures established by the Organization which shall satisfy the conditions of Regulation 9(1)(a) of this Annex except the obligation to have an oil discharge monitoring and control system in operation. The Organization shall review the availability of equipment at intervals not exceeding twelve months.

(7) The requirements of paragraphs (1), (2) and (3) of this Regulation shall not apply to oil tankers carrying asphalt, for which the control of discharge of asphalt under Regulation 9 of this Annex shall be effected by the retention of asphalt residues on board with discharge of all contaminated washings to reception facilities.

Regulation 16

Oil Discharge Monitoring and Control System and Oily Water Separating Equipment

(1) Any ship of 400 tons gross tonnage and above shall be fitted with an oily water separating equipment or filtering system complying with the provisions of paragraph (6) of this Regulation. Any such ship which carries large quantities of oil fuel shall comply with paragraph (2) of this Regulation or paragraph (1) of Regulation 14.

(2) Any ship of 10,000 tons gross tonnage and above shall be fitted:

(a) in addition to the requirements of paragraph (1) of this Regulation with an oil discharge monitoring and control system complying with paragraph (5) of this Regulation; or

(b) as an alternative to the requirements of paragraph (1) and sub-paragraph (2)(a) of this Regulation, with an oily water separating equipment complying with paragraph (6) of this Regulation and an effective filtering system, complying with paragraph (7) of this Regulation.

(3) The Administration shall ensure that ships of less than 400 tons gross tonnage are equipped, as far as practicable, to retain on board oil or oily mixtures or discharge them in accordance with the requirements of Regulation 9(1)(b) of this Annex.

(4) For existing ships the requirements of paragraphs (1), (2) and (3) of this Regulation shall apply three years after the date of entry into force of the present Convention.

(5) An oil discharge monitoring and control system shall be of a design approved by the Administration. In considering the design of the oil content-meter to be incorporated into the system, the Administration shall have regard to the specification recommended by the Organization.* The system shall be fitted with a recording device to provide a continuous record of the oil content in parts per million. This record shall be identifiable as to time and date and shall be kept for at least three years. The monitoring and control system shall come into operation when there is any discharge of effluent into the sea and shall be such as will ensure that any discharge of oily mixture is automatically stopped when the oil content of effluent exceeds that permitted by Regulation 9(1)(b) of this Annex. Any failure of this monitoring and control system shall stop the discharge and be noted in the Oil Record Book. The defective unit shall be made operable before the ship commences its next voyage unless it is proceeding to a repair port. Existing ships shall comply with all of the provisions specified above except that the stopping of the discharge may be performed manually.

(6) Oily water separating equipment or an oil filtering system shall be of a design approved by the Administration and shall be such as will ensure that any oily mixture discharged into the sea after passing through the separator or filtering systems shall have an oil content of not more than 100 parts per million. In considering the design of such equipment, the Administration shall have regard to the specification recommended by the Organization.*

(7) The oil filtering system referred to in paragraph (2)(b) of this Regulation shall be of a design approved by the Administration and shall be such that it will accept the discharge from the separating system and produce an effluent the oil content of which does not exceed 15 parts per million. It shall be provided with alarm arrangements to indicate when this level cannot be maintained.

Regulation 17

Tanks for Oil Residues (Sludge)

(1) Every ship of 400 tons gross tonnage and above shall be provided with a tank or tanks of adequate capacity, having regard to the type of machinery and

* Reference is made to the Recommendation on International Performance Specifications for Oily-water Separating Equipment and Oil Content Meters adopted by the Organization by Resolution A.233(VII).

length of voyage, to receive the oily residues (sludges) which cannot be dealt with otherwise in accordance with the requirements of this Annex, such as those resulting from the purification of fuel and lubricating oils and oil leakages in the machinery spaces.

(2) In new ships, such tanks shall be designed and constructed so as to facilitate their cleaning and the discharge of residues to reception facilities. Existing ships shall comply with this requirement as far as is reasonable and practicable.

Regulation 18

Pumping, Piping and Discharge Arrangements of Oil Tankers

(1) In every oil tanker, a discharge manifold for connexion to reception facilities for the discharge of dirty ballast water or oil contaminated water shall be located on the open deck on both sides of the ship.

(2) In every oil tanker, pipelines for the discharge to the sea of effluent which may be permitted under Regulation 9 of this Annex shall be led to the open deck or to the ship's side above the waterline in the deepest ballast condition. Different piping arrangements to permit operation in the manner permitted in sub-paragraphs (4)(a) and (b) of this Regulation may be accepted.

(3) In new oil tankers means shall be provided for stopping the discharge of effluent into the sea from a position on upper deck or above located so that the manifold in use referred to in paragraph (1) of this Regulation and the effluent from the pipelines referred to in paragraph (2) of this Regulation may be visually observed. Means for stopping the discharge need not be provided at the observation position if a positive communication system such as telephone or radio system is provided between the observation position and the discharge control position.

(4) All discharges shall take place above the waterline except as follows:

(a) Segregated ballast and clean ballast may be discharged below the waterline in ports or at offshore terminals.

(b) Existing ships which, without modification, are not capable of discharging segregated ballast above the waterline may discharge segregated ballast below the waterline provided that an examination of the tank immediately before the discharge has established that no contamination with oil has taken place.

Regulation 20

Oil Record Book

(1) Every oil tanker of 150 tons gross tonnage and above and every ship of 400 tons gross tonnage and above other than an oil tanker shall be provided with an Oil Record Book, whether as part of the ship's official log book or otherwise, in the form specified in Appendix III to this Annex.

(2) The Oil Record Book shall be completed on each occasion, on a tank-to-tank basis, whenever any of the following operations take place in the ship:

(a) For oil tankers

(i) loading of oil cargo;

(ii) internal transfer of oil cargo during voyage;

(iii) opening or closing before and after loading and unloading operations of valves or similar devices which inter-connect cargo tanks;

(iv) opening or closing of means of communication between cargo piping and seawater ballast piping;

(v) opening or closing of ships' side valves before, during and after loading and unloading operations;

(vi) unloading of oil cargo;

(vii) ballasting of cargo tanks;

(viii) cleaning of cargo tanks;

(ix) discharge of ballast except from segregated ballast tanks;

(x) discharge of water from slop tanks;

(xi) disposal of residues;

(xii) discharge overboard of bilge water which has accumulated in machinery spaces whilst in port, and the routine discharge at sea of bilge water which has accumulated in machinery spaces.

(b) For ships other than oil tankers

(i) ballasting or cleaning of fuel oil tanks or oil cargo spaces;

(ii) discharge of ballast or cleaning water from tanks referred to under (i) of this sub-paragraph;

(iii) disposal of residues;

(iv) discharge overboard of bilge water which has accumulated in machinery spaces whilst in port, and the routine discharge at sea of bilge water which has accumulated in machinery spaces.

(3) In the event of such discharge of oil or oily mixture as is referred to in Regulation 11 of this Annex or in the event of accidental or other exceptional discharge of oil not excepted by that Regulation, a statement shall be made in the Oil Record Book of the circumstances of, and the reasons for, the discharge.

(4) Each operation described in paragraph (2) of this Regulation shall be fully recorded without delay in the Oil Record Book so that all the entries in the book appropriate to that operation are completed. Each section of the book shall be signed by the officer or officers in charge of the operations concerned and shall be countersigned by the Master of the ship. The entries in the Oil Record Book shall be in an official language of the State whose flag the ship is entitled to fly, and, for ships holding an International Oil Pollution Prevention Certificate, (1973) in English or French. The entries in an official national language of the State whose flag the ship is entitled to fly shall prevail in case of a dispute or discrepancy.

(5) The Oil Record Book shall be kept in such a place as to be readily available for inspection at all reasonable times and, except in the case of unmanned ships under tow, shall be kept on board the ship. It shall be preserved for a period of three years after the last entry has been made.

[sic - there was no paragraph (6)]

(7)/ The competent authority of the Government of a Party to the Convention may inspect the Oil Record Book on board any ship to which this Annex applies while the ship is in its port or offshore terminals and may make a copy of any entry in that book and may require the Master of the ship to certify that the copy is a true copy of such entry. Any copy so made which has been certified by the Master of the ship as a true copy of an entry in the ship's Oil Record Book shall be made admissible in any judicial proceedings as evidence of the facts stated in the entry. The inspection of an Oil Record Book and the taking of a certified copy by the competent authority under this paragraph shall be performed as expeditiously as possible without causing the ship to be unduly delayed.

Regulation 21

Special Requirements for Drilling Rigs and other Platforms

Fixed and floating drilling rigs when engaged in the exploration, exploitation and associated offshore processing of sea-bed mineral resources and other platforms shall comply with the requirements of this Annex applicable to ships of 400 tons gross tonnage and above other than oil tankers, except that:

(a) they shall be equipped as far as practicable with the installations required in Regulations 16 and 17 of this Annex;

CONVENTION FOR THE PREVENTION OF POLLUTION FROM LAND-BASED SOURCES

Opened for signature June 4, 1974, reprinted in 13 Int'l Legal Mat'ls 544 (1974).

ARTICLE 2

The present Convention shall apply to the maritime area within the following limits :

a) those parts of the Atlantic and Arctic Oceans and the dependent seas which lies North of 36° north latitude and between 42° west longitude and 51° east longitude, but excluding :

   i) the Baltic Sea and Belts lying to the south and east of lines drawn from Hasenore Head to Gniben Point, from Korshage to Spodsbierg and from Gilbierg Head to Kullen, and

   ii) the Mediterranean Sea and its dependent seas as far as the point of intersection of the parallel of 36° north latitude and the meridian of 5°36' west longitude ;

b) that part of the Atlantic Ocean north of 59° north latitude and between 44° west longitude and 42° west longitude.

ARTICLE 3

For the purpose of the present Convention :

a) "Maritime area" - means the high seas, the territorial seas of Contracting Parties and waters on the landward side of the base lines from which the breadth of the territorial sea is measured, extending, in the case of watercourses up to the freshwater limit unless otherwise decided under Article 16 of the present Convention;

b) "Freshwater limit" - means the place in the watercourse where, at low tide and in a period of low freshwater flow, there is an appreciable increase in salinity due to the presence of sea-water.

c) "Pollution from land-based sources" - means the pollution of the maritime area :

i) through watercourses,

ii) from the coast, including introduction through underwater or other pipelines,

iii) from man-made structures placed under the jurisdiction of a Contracting Party within the limits of the area to which the present Convention applies.

ARTICLE 10

The Contracting Parties agree to establish complementary or joint programmes of scientific and technical research, including research into the best methods of eliminating or replacing noxious substances so as to reduce marine pollution from land-based sources, and to transmit to each other the information so obtained. In doing so they will have regard to the work carried out, in these fields, by the appropriate international Organizations and Agencies.

The programmes will take into account similar programmes pursued in accordance with Conventions already in force and the appropriate international organisations and Agencies.

ARTICLE 13

The Contracting Parties undertake to assist one another as appropriate to prevent incidents which may result in pollution from land-based sources, to minimize and eliminate the consequences of such incidents, and to exchange information to that end.

1972 CONVENTION ON THE PREVENTION OF MARINE POLLUTION BY DUMPING OF WASTES AND OTHER MATTER

reprinted in 67 Am.J.Int'l. Law 626 (1973)

ARTICLE II

Contracting Parties shall, as provided for in the following Articles, take effective measures individually, according to their scientific, technical and economic capabilities, and collectively, to prevent marine pollution caused by dumping and shall harmonize their policies in this regard.

ARTICLE III

For the purposes of this Convention:

1. (a) "Dumping" means:

(i) any deliberate disposal at sea of wastes or other matter from vessels, aircraft, platforms or other man-made structures at sea;

(ii) any deliberate disposal at sea of vessels, aircraft, platforms or other man-made structures at sea;

(b) "Dumping" does not include:

(i) the disposal at sea of wastes or other matter incidental to, or derived from the normal operations of vessels, aircraft, platforms or other man-made structures at sea and their equipment, other than wastes or other matter transported by or to vessels, aircraft, platforms or other man-made structures at sea, operating for the purpose of disposal of such matter or derived from the treatment of such wastes or other matter on such vessels, aircraft platforms or structures;

(ii) placement of matter for a purpose other than the mere disposal thereof, provided that such placement is not contrary to the aims of this convention;

(c) The disposal of wastes or other matter directly arising from, or related to the exploration, exploitation and associated off-shore processing of seabed mineral resources will not be covered by the provisions of this Convention.

2. "Vessels and aircraft" means waterborne or airborne craft of any type whatsoever. This expression includes air cushioned craft and floating craft, whether self-propelled or not.

3. "Sea" means all marine waters other than the internal waters of States.

4. "Wastes or other matter" means material and substance of any kind, form or description.

5. "Special permit" means permission granted specifically on application in advance and in accordance with Annex II and Annex III.

6. "General permit" means permission granted in advance and in accordance with Annex III.

7. "The Organisation" means the organisation designated by the Contracting Parties in accordance with Article XIV2.

ARTICLE IV

1. In accordance with the provisions of this Convention Contracting Parties shall prohibit the dumping of any wastes or other matter in whatever form or condition except as otherwise specified below:-

a. The dumping of wastes or other matter listed in Annex I is prohibited;

b. The dumping of wastes or other matter listed in Annex II requires a prior special permit;

c. The dumping of all other wastes or matter requires a prior general permit.

2. Any permit shall be issued only after careful consideration of all the factors set forth in Annex III, including prior studies of the characteristics of the dumping site, as set forth in Sections B and C of that Annex.

3. No provision of this Convention is to be interpreted as preventing a Contracting Party from prohibiting, insofar as that Party is concerned, the dumping of wastes or other matter not mentioned in Annex I. That Party shall notify such measures to the Organisation.

ARTICLE VII

1. Each Contracting Party shall apply the measures required to implement the present Convention to all:

a. vessels and aircraft registered in its territory or flying its flag;

b. vessels and aircraft loading in its territory or territorial seas matter which is to be dumped;

c. vessels and aircraft and fixed or floating platforms under its jurisdiction believed to be engaged in dumping.

2. Each Party shall take in its territory appropriate measures to prevent and punish conduct in contravention of the provisions of this Convention.

3. The Parties agree to cooperate in the development of procedures for the effective application of this Convention particularly on the high seas, including procedures for the reporting of vessels and aircraft observed dumping in contravention of the Convention.

4. This Convention shall not apply to those vessels and aircraft entitled to sovereign immunity under international law. However each party shall ensure by the adoption of appropriate measures that such vessels and aircraft owned or operated by it act in a manner consistent with the object and purpose of this Convention, and shall inform the Organisation accordingly.

5. Nothing in this Convention shall affect the right of each Party to adopt other measures, in accordance with the principles of international law, to prevent dumping at sea.

ARTICLE X

In accordance with the principles of international law regarding State responsibility for damage to the environment of other States or to any other area of the environment, caused by dumping of wastes and other matter of all kinds, the Contracting Parties undertake to develop procedures for the assessment of liability and the settlement of disputes regarding dumping.

ANNEX I

1. Organohalogen compounds.
2. Mercury and mercury compounds.
3. Cadmium and cadmium compounds.
4. Persistent plastics and other persistent synthetic materials, for example, netting and ropes, which may float or may remain in suspension in the sea in such a manner as to interfere materially with fishing, navigation, or other legitimate uses of the sea.
5. Crude oil, fuel oil, heavy diesel oil, and lubricating oils, hydraulic fluids, and any mixtures containing any of these, taken on board for the purpose of dumping.
6. High-level radioactive wastes or other high-level radioactive matter, defined on public health, biological or other grounds, by the competent international body in this field, at present the International Atomic Energy Agency, as unsuitable for dumping at sea.

7. Materials in whatever form (e.g. solids, liquids, semi-liquids, gases or in a living state) produced for biological and chemical warfare.

8. The preceding paragraphs of this Annex do not apply to substances which are rapidly rendered harmless by physical, chemical or biological processes in the sea provided they do not:

(i) make edible marine organisms unpalatable, or

(ii) endanger human health or that of domestic animals.

The consultative procedure provided for under Article XIV should be followed by a Party if there is doubt about the harmlessness of the substance.

9. This Annex does not apply to wastes or other materials (e.g. sewage sludges and dredged spoils) containing the matters referred to in paragraphs 1-5 above as trace contaminants. Such wastes shall be subject to the provisions of Annexes II and III as appropriate.

ANNEX II

The following substances and materials requiring special care are listed for the purposes of Article VI 1a.

A. Wastes containing significant amounts of the matters listed below:

arsenic)
lead)
copper) and their compounds
zinc)
organosilicon compounds)
cyanides
flourides
pesticides and their by-products not covered in Annex I.

B. In the issue of permits for the dumping of large quantities of acids and alkalis, consideration shall be given to the possible presence in such wastes of the substances listed in paragraph A and to the following additional substances:

beryllium)
chromium) and their compounds
nickel)
vanadium)

C. Containers, scrap metal and other bulky wastes liable to sink to the sea bottom which may present a serious obstacle to fishing or navigation.

D. Radioactive wastes or other radioactive matter not included in Annex I. In the issue of permits for the dumping of this matter, the Contracting Parties should take full account of the recommendations of the competent international body in this field, at present the International Atomic Energy Agency.

ANNEX III

Provisions to be considered in establishing criteria governing the issue of permits for the dumping of matter at sea, taking into account Article IV 2 include:-

A. CHARACTERISTICS AND COMPOSITION OF THE MATTER

1. Total amount and average composition of matter dumped (e.g., per year).

2. Form, e.g., solid, sludge, liquid, or gaseous.

3. Properties: physical (e.g., solubility and density), chemical and biochemical (e.g., oxygen demand, nutrients) and biological (e.g., presence of viruses, bacteria, yeasts, parasites).

4. Toxicity.

5. Persistence: physical, chemical and biological.

6. Accumulation and biotransformation in biological materials or sediments.

7. Susceptibility to physical, chemical and biochemical changes and interaction in the aquatic environment with other dissolved organic and inorganic materials.

8. Probability of production of taints or other changes reducing marketability of resources (fish, shellfish, etc.).

B. CHARACTERISTICS OF DUMPING SITE AND METHOD OF DEPOSIT

1. Location (e.g., co-ordinates of the dumping area, depth and distance from the coast), location in relation to other areas (e.g., amenity areas, spawning, nursery and fishing areas and exploitable resources).

2. Rate of disposal per specific period (e.g., quantity per day, per week, per month).

3. Methods of packaging and containment, if any.

4. Initial dilution achieved by proposed method of release.

5. Dispersal characteristics (e.g., effects of currents, tides and wind on horizontal transport and vertical mixing).

6. Water characteristics (e.g., temperature, pH, salinity, stratification, oxygen indices of pollution - dissolved oxygen (DO), chemical oxygen demand (COD), biochemical oxygen demand (BOD) - nitrogen present in organic and mineral form including ammonia, suspended matter, other nutrients and productivity).

7. Bottom characteristics (e.g., topography, geochemical and geological characteristics and biological productivity).

8. Existence and effects of other dumpings which have been made in the dumping area (e.g., heavy metal background reading and organic carbon content).

9. In issuing a permit for dumping, Contracting Parties should consider whether an adequate scientific basis exists for assessing the consequences of such dumping, as outlined in this Annex, taking into account seasonal variations.

C. GENERAL CONSIDERATIONS AND CONDITIONS

1. Possible effects on amenities (e.g., presence of floating or stranded material, turbidity, objectionable odour, discolouration and foaming).

2. Possible effects on marine life, fish and shellfish culture, fish stocks and fisheries, seaweed harvesting and culture.

3. Possible effects on other uses of the sea (e.g., impairment of water quality for industrial use, underwater corrosion of structures, interference with ship operations from floating materials, interference with fishing or navigation through deposit of waste or solid objects on the sea floor and protection of areas of special importance for scientific or conservation purposes).

4. The practical availability of alternative land-based methods of treatment, disposal or elimination, or of treatment to render the matter less harmful for dumping at sea.

A. Oil Pollution and Spillage

OIL AND HAZARDOUS SUBSTANCE LIABILITY, 33 U.S.C. §1321 (Supp. V, 1975).

"SEC. 311. (a) For the purpose of this section, the term—

"(1) 'oil' means oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil;

"(2) 'discharge' includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying or dumping;

"(3) 'vessel' means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water other than a public vessel;

"(4) 'public vessel' means a vessel owned or bareboat-chartered and operated by the United States, or by a State or political subdivision thereof, or by a foreign nation, except when such vessel is engaged in commerce;

"(5) 'United States' means the States, the District of Columbia, the Commonwealth of Puerto Rico, the Canal Zone, Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands;

"(6) 'owner or operator' means (A) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, and (B) in the case of an onshore facility, and an offshore facility, any person owning or operating such onshore facility or offshore facility, and (C) in the case of any abandoned offshore facility, the person who owned or operated such facility immediately prior to such abandonment;

"(7) 'person' includes an individual, firm, corporation, association, and a partnership;

"(8) 'remove' or 'removal' refers to removal of the oil or hazardous substances from the water and shorelines or the taking of such other actions as may be necessary to minimize or mitigate damage to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches;

"(9) 'contiguous zone' means the entire zone established or to be established by the United States under article 24 of the Convention on the Territorial Sea and the Contiguous Zone;

"(10) 'onshore facility' means any facility (including, but not limited to, motor vehicles and rolling stock) of any kind located in, on, or under, any land within the United States other than submerged land;

"(11) 'offshore facility' means any facility of any kind located in, on, or under, any of the navigable waters of the United States other than a vessel or a public vessel;

"(12) 'act of God' means an act occasioned by an unanticipated grave natural disaster;

"(13) 'barrel' means 42 United States gallons at 60 degrees Fahrenheit;

"(14) 'hazardous substance' means any substance designated pursuant to subsection (b)(2) of this section.

"(b)(1) The Congress hereby declares that it is the policy of the United States that there should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone.

"(2)(A) The Administrator shall develop, promulgate, and revise as may be appropriate, regulations designating as hazardous substances, other than oil as defined in this section, such elements and compounds which, when discharged in any quantity into or upon the navigable waters of the United States or adjoining shorelines or the waters of the contiguous zone, present an imminent and substantial danger to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, shorelines, and beaches.

"(B)(i) The Administrator shall include in any designation under subparagraph (A) of this subsection a determination whether any such designated hazardous substance can actually be removed.

"(ii) The owner or operator of any vessel, onshore facility, or offshore facility from which there is discharged during the two-year period beginning on the date of enactment of the Federal Water Pollution Control Act Amendments of 1972, any hazardous substance determined not removable under clause (i) of this subparagraph shall be liable, subject to the defenses to liability provided under subsection (f) of this section, as appropriate, to the United States for a civil penalty per discharge established by the Administrator based on toxicity, degradability, and dispersal characteristics of such substance, in an amount not to exceed $50,000, except that where the United States can show that such discharge was a result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States for a civil penalty in such amount as the Administrator shall establish, based upon the toxicity, degradability, and dispersal characteristics of such substance.

"(iii) After the expiration of the two-year period referred to in clause (ii) of this subparagraph, the owner or operator of any vessel, onshore facility, or offshore facility, from which there is discharged any hazardous substance determined not removable under clause (i) of this subparagraph shall be liable, subject to the defenses to liability provided in subsection (f) of this section, to the United States for either one or the other of the following penalties, the determination of which shall be in the discretion of the Administrator:

"(aa) a penalty in such amount as the Administrator shall establish, based on the toxicity, degradability, and dispersal characteristics of the substance, but not less than $500 nor more than $5,000; or

"(bb) a penalty determined by the number of units discharged multiplied by the amount established for such unit under clause (iv) of this subparagraph, but such penalty shall not be more than $5,000,000 in the case of a discharge from a vessel and $500,000 in the case of a discharge from an onshore or offshore facility.

"(iv) The Administrator shall establish by regulation, for each hazardous substance designated under subparagraph (A) of this paragraph, and within 180 days of the date of such designation, a unit of measurement based upon the usual trade practice and, for the purpose of determining the penalty under clause (iii)(bb) of this subparagraph, shall establish for each such unit a fixed monetary amount which shall be not less than $100 nor more than $1,000 per unit. He shall establish such fixed amount based on the toxicity, degradability, and dispersal characteristics of the substance.

"(3) The discharge of oil or hazardous substances into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone in harmful quantities as determined by the President under paragraph (4) of this subsection, is prohibited, except (A) in the case of such discharges of oil into the waters of the contiguous zone, where permitted under article IV of the International Convention for the Prevention of Pollution of the Sea by Oil, 1954, as amended, and (B) where permitted in quantities and at times and locations or under such circumstances or conditions as the President may, by regulation, determine not to be harmful. Any regulations issued under this subsection shall be consistent with maritime safety and with marine and navigation laws and regulations and applicable water quality standards.

"(4) The President shall by regulation, to be issued as soon as possible after the date of enactment of this paragraph, determine for the purposes of this section, those quantities of oil and any hazardous substance the discharge of which, at such times, locations, circumstances, and conditions, will be harmful to the public health or welfare of the United States, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches except that in the case of the discharge of oil into or upon the waters of the contiguous zone, only those discharges which threaten the fishery resources of the contiguous zone or threaten to pollute or contribute to the pollution of the territory or the territorial sea of the United States may be determined to be harmful.

"(5) Any person in charge of a vessel or of an onshore facility or an offshore facility shall, as soon as he has knowledge of any discharge of oil or a hazardous substance from such vessel or facility in violation of paragraph (3) of this subsection, immediately notify the appropriate agency of the United States Government of such discharge. Any such person who fails to notify immediately such agency of such discharge shall, upon conviction, be fined not more than $10,000, or imprisoned for not more than one year, or both. Notification received pursuant to this paragraph or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement.

"(6) Any owner or operator of any vessel, onshore facility, or offshore facility from which oil or a hazardous substance is discharged in violation of paragraph (3) of this subsection shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard is operating of not more than $5,000 for each offense. No penalty shall be assessed unless the owner or operator charged shall have been given notice and opportunity for a hearing on such charge. Each violation is a separate offense. Any such civil penalty may be compromised by such Secretary. In determining the amount of the penalty, or the amount agreed upon in compromise, the appropriateness of such penalty to the size of the business of the owner or operator charged, the effect on the owner or operator's ability to continue in business, and the gravity of the violation, shall be considered by such Secretary. The Secretary of the Treasury shall withhold at the request of such Secretary the clearance required by section 4197 of the Revised Statutes of the United States, as amended (46 U.S.C. 91), of any vessel the owner or operator of which is subject to the foregoing penalty. Clearance may be granted

in such cases upon the filing of a bond or other surety satisfactory to such Secretary.

"(c)(1) Whenever any oil or a hazardous substance is discharged, into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, the President is authorized to act to remove or arrange for the removal of such oil or substance at any time, unless he determines such removal will be done properly by the owner or operator of the vessel, onshore facility, or offshore facility from which the discharge occurs.

"(2) Within sixty days after the effective date of this section, the President shall prepare and publish a National Contingency Plan for removal of oil and hazardous substances, pursuant to this subsection. Such National Contingency Plan shall provide for efficient, coordinated, and effective action to minimize damage from oil and hazardous substance discharges, including containment, dispersal, and removal of oil and hazardous substances, and shall include, but not be limited to—

"(A) assignment of duties and responsibilities among Federal departments and agencies in coordination with State and local agencies, including, but not limited to, water pollution control, conservation, and port authorities;

"(B) identification, procurement, maintenance, and storage of equipment and supplies;

"(C) establishment or designation of a strike force consisting of personnel who shall be trained, prepared, and available to provide necessary services to carry out the Plan, including the establishment at major ports, to be determined by the President, of emergency task forces of trained personnel, adequate oil and hazardous substance pollution control equipment and material, and a detailed oil and hazardous substance pollution prevention and removal plan;

"(D) a system of surveillance and notice designed to insure earliest possible notice of discharges of oil and hazardous substances to the appropriate Federal agency;

"(E) establishment of a national center to provide coordination and direction for operations in carrying out the Plan;

"(F) procedures and techniques to be employed in identifying, containing, dispersing, and removing oil and hazardous substances;

"(G) a schedule, prepared in cooperation with the States, identifying (i) dispersants and other chemicals, if any, that may be used in carrying out the Plan, (ii) the waters in which such dispersants and chemicals may be used, and (iii) the quantities of such dispersant or chemical which can be used safely in such waters, which schedule shall provide in the case of any dispersant, chemical, or waters not specifically identified in such schedule that the President, or his delegate, may, on a case-by-case basis, identify the dispersants and other chemicals which may be used, the waters in which they may be used, and the quantities which can be used safely in such waters; and

"(H) a system whereby the State or States affected by a discharge of oil or hazardous substance may act where necessary to remove such discharge and such State or States may be reimbursed from the fund established under subsection (k) of this section for the reasonable costs incurred in such removal.

The President may, from time to time, as he deems advisable revise or otherwise amend the National Contingency Plan. After publication of the National Contingency Plan, the removal of oil and hazardous substances and actions to minimize damage from oil and hazardous substance discharges shall, to the greatest extent possible, be in accordance with the National Contingency Plan.

"(d) Whenever a marine disaster in or upon the navigable waters of the United States has created a substantial threat of a pollution hazard to the public health or welfare of the United States, including, but not limited to, fish, shellfish, and wildlife and the public and private shorelines and beaches of the United States, because of a discharge, or an imminent discharge, of large quantities of oil, or of a hazardous substance from a vessel the United States may (A) coordinate and direct all public and private efforts directed at the removal or elimination of such threat; and (B) summarily remove, and, if necessary, destroy such vessel by whatever means are available without regard to any provisions of law governing the employment of personnel or the expenditure of appropriated funds. Any expense incurred under this subsection shall be a cost incurred by the United States Government for the purposes of subsection (f) in the removal of oil or hazardous substance.

"(e) In addition to any other action taken by a State or local government, when the President determines there is an imminent and substantial threat to the public health or welfare of the United States, including, but not limited to, fish, shellfish, and wildlife and public and private property, shorelines, and beaches within the United States, because of an actual or threatened discharge of oil or hazardous substance into or upon the navigable waters of the United States from an onshore or offshore facility, the President may require the United States attorney of the district in which the threat occurs to secure such relief as may be necessary to abate such threat, and the district courts of the United States shall have jurisdiction to grant such relief as the public interest and the equities of the case may require.

"(f)(1) Except where an owner or operator can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any vessel from which oil or a hazardous substance is discharged in violation of subsection (b) (3) of this section shall, not withstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) for the removal of such oil or substance by the United States Government in an amount not to exceed $100 per gross ton of such vessel or $14,000,000, whichever is lesser, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. Such costs shall constitute a maritime lien on such vessel which may be recovered in an action in rem in the district court of the United States for any district within which any vessel may be found. The United States may also bring an action against the owner or operator of such vessel in any court of competent jurisdiction to recover such costs.

"(2) Except where an owner or operator of an onshore facility can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any such facility from which oil or a hazardous substance is discharged in violation of subsection (b) (3) of this section shall be liable to the United States Government for the actual costs incurred under subsection (c) for the removal of such oil or substance by the United States Government in an amount not to exceed $8,000,000, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. The United States may bring an action against the owner or operator of such facility in any court of competent jurisdiction to recover such costs. The Administrator is authorized, by regulation, after consultation with the Secretary of Commerce and the Small Business Administration, to establish reasonable and equitable classifications of those onshore facilities having a total fixed storage capacity of 1,000 barrels or less which he determines because of size, type, and location do not present a substantial risk of the discharge of oil or a hazardous substance in violation of subsection (b) (3) of this section, and apply with respect to such classifications differing limits of liability which may be less than the amount contained in this paragraph.

"(3) Except where an owner or operator of an offshore facility can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any such facility from which oil or a hazardous substance is discharged in violation of subsection (b) (3) of this section shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) for the removal of such oil or substance by the United States Government in an amount not to exceed $8,000,000, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. The United States may bring an action against the owner or operator of such a facility in any court of competent jurisdiction to recover such costs.

"(g) In any case where an owner or operator of a vessel, of an onshore facility, or of an offshore facility, from which oil or a hazardous substance is discharged in violation of subsection (b) (3) of this section, proves that such discharge of oil or hazardous substance was caused solely by an act or omission of a third party, or was caused solely by such an act or omission in combination with an act of God, an act of war, or negligence on the part of the United States Government, such third party shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) for removal of such oil or substance by the United States Government, except where such third party can prove that such discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of another party without regard to whether such act or omission was or was not negligent, or any combination of the foregoing clauses. If such third party was the owner or operator of a vessel which caused the discharge of oil or a hazardous substance in violation of subsection (b) (3) of this section, the liability of such third party under this subsection shall not

exceed $100 per gross ton of such vessel or $14,000,000, whichever is the lesser. In any other case the liability of such third party shall not exceed the limitation which would have been applicable to the owner or operator of the vessel or the onshore or offshore facility from which the discharge actually occurred if such owner or operator were liable. If the United States can show that the discharge of oil or a hazardous substance in violation of subsection (b) (3) of this section was the result of willful negligence or willful misconduct within the privity and knowledge of such third party, such third party shall be liable to the United States Government for the full amount of such removal costs. The United States may bring an action against the third party in any court of competent jurisdiction to recover such removal costs.

"(h) The liabilities established by this section shall in no way affect any rights which (1) the owner or operator of a vessel or of an onshore facility or an offshore facility may have against any third party whose acts may in any way have caused or contributed to such discharge, or (2) The United States Government may have against any third party whose actions may in any way have caused or contributed to the discharge of oil or hazardous substance.

"(i) (1) In any case where an owner or operator of a vessel or an onshore facility or an offshore facility from which oil or a hazardous substance is discharged in violation of subsection (b) (3) of this section acts to remove such oil or substance in accordance with regulations promulgated pursuant to this section, such owner or operator shall be entitled to recover the reasonable costs incurred in such removal upon establishing, in a suit which may be brought against the United States Government in the United States Court of Claims, that such discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether such act or omission was or was not negligent, or of any combination of the foregoing causes.

"(2) The provisions of this subsection shall not apply in any case where liability is established pursuant to the Outer Continental Shelf Lands Act.

"(3) Any amount paid in accordance with a judgment of the United States Court of Claims pursuant to this section shall be paid from the funds established pursuant to subsection (k).

"(j) (1) Consistent with the National Contingency Plan required by subsection (c) (2) of this section, as soon as practicable after the effective date of this section, and from time to time thereafter, the President shall issue regulations consistent with maritime safety and with marine and navigation laws (A) establishing methods and procedures for removal of discharged oil and hazardous substances, (B) establishing criteria for the development and implementation of local and regional oil and hazardous substance removal contingency plans, (C) establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil and hazardous substances from vessels and from onshore facilities and offshore facilities, and to contain such discharges, and (D) governing the inspection of vessels carrying cargoes of oil and hazardous substances and the inspection of such cargoes in order to reduce the likelihood of discharges of oil from vessels in violation of this section.

"(2) Any owner or operator of a vessel or an onshore facility or an offshore facility and any other person subject to any regulation issued under paragraph (1) of this subsection who fails or refuses to comply with the provisions of any such regulations, shall be liable to a civil penalty of not more than $5,000 for each such violation. Each violation shall be a separate offense. The President may assess and compromise such penalty. No penalty shall be assessed until the owner, operator, or other person charged shall have been given notice and an opportunity for a hearing on such charge. In determining the amount of the penalty, or the amount agreed upon in compromise, the gravity of the violation, and the demonstrated good faith of the owner, operator, or other person charged in attemping to achieve rapid compliance, after notification of a violation, shall be considered by the President.

"(k) There is hereby authorized to be appropriated to a revolving fund to be established in the Treasury not to exceed $35,000,000 to carry out the provisions of subsections (c), (d), (i), and (l) of this section. Any other funds received by the United States under this section shall also be deposited in said fund for such purposes. All sums appropriated to, or deposited in, said fund shall remain available until expended.

"(l) The President is authorized to delegate the administration of this section to the heads of those Federal departments, agencies, and instrumentalities which he determines to be appropriate. Any moneys in the fund established by subsection (k) of this section shall be available to such Federal departments, agencies, and instrumentalities to carry out the provisions of subsections (c) and (i) of this section. Each such department, agency, and instrumentality, in order to avoid duplication of effort, shall, whenever appropriate, utilize the personnel, services, and facilities of other Federal departments, agencies, and instrumentalities.

"(m) Anyone authorized by the President to enforce the provisions of this section may, except as to public vessels, (A) board and inspect any vessel upon the navigable waters of the United States or the waters of the contiguous zone, (B) with or without a warrant arrest any person who violates the provisions of this section or any regulation issued thereunder in his presence or view, and (C) execute any warrant or other process issued by an officer or court of competent jurisdiction.

"(n) The several district courts of the United States are invested with jurisdiction for any actions, other than actions pursuant to subsection (i) (1), arising under this section. In the case of Guam and the Trust Territory of the Pacific Islands, such actions may be brought in the district court of Guam, and in the case of the Virgin Islands such actions may be brought in the district court of the Virgin Islands. In the case of American Samoa and the Trust Territory of the Pacific Islands, such actions may be brought in the District Court of the United States for the District of Hawaii and such court shall have jurisdiction of such actions. In the case of the Canal Zone, such actions may be brought in the United States District Court for the District of the Canal Zone.

"(o) (1) Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel, or of any owner or operator of any onshore facility or offshore facility to any person or agency under any provision of law for damages to any publicly owned or privately owned property resulting from a discharge of any oil or hazardous substance or from the removal of any such oil or hazardous substance.

"(2) Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil or hazardous substance into any waters within such State.

"(3) Nothing in this section shall be construed as affecting or modifying any other existing authority of any Federal department, agency, or instrumentality, relative to onshore or offshore facilities under this Act or any other provision of law, or to affect any State or local law not in conflict with this section.

"(p) (1) Any vessel over three hundred gross tons, including any barge of equivalent size, but not including any barge that is not self-propelled and that does not carry oil or hazardous substances as cargo or fuel, using any port or place in the United States or the navigable waters of the United States for any purpose shall establish and maintain under regulations to be prescribed from time to time by the President, evidence of financial responsibility of $100 per gross ton, or $14,000,000 whichever is the lesser, to meet the liability to the United States which such vessel could be subjected under this section. In cases where an owner or operator owns, operates, or charters more than one such vessel, financial responsibility need only be established to meet the maximum liability to which the largest of such vessels could be subjected. Financial responsibility may be established by any one of, or a combination of, the following methods acceptable to the President: (A) evidence of insurance, (B) surety bonds, (C) qualification as a self-insurer, or (D) other evidence of financial responsibility. Any bond filed shall be issued by a bonding company authorized to do business in the United States.

"(2) The provisions of paragraph (1) of this subsection shall be effective April 3, 1971, with respect to oil and one year after the date of enactment of this section with respect to hazardous substances. The President shall delegate the responsibility to carry out the provisions of this subsection to the appropriate agency head within sixty days after the date of enactment of this section. Regulations necessary to implement this subsection shall be issued within six months after the date of enactment of this section.

"(3) Any claim for costs incurred by such vessel may be brought directly against the insurer or any other person providing evidence of financial responsibility as required under this subsection. In the case of any action pursuant to this subsection such insurer or other person shall be entitled to invoke all rights and defenses which would have been available to the owner or operator if an action had been brought against him by the claimant, and which would have been available to him if an action had been brought against him by the owner or operator.

"(4) Any owner or operator of a vessel subject to this subsection, who fails to comply with the provisions of this subsection or any regulation issued thereunder, shall be subject to a fine of not more than $10,000.

"(5) The Secretary of the Treasury may refuse the clearance required by section 4197 of the Revised Statutes of the United States, as amended (4 U.S.C. 91), to any vessel subject to this subsection, which does not have evidence furnished by the President that the financial responsibility provisions of paragraph (1) of this subsection have been complied with.

"(6) The Secretary of the Department in which the Coast Guard is operated may (A) deny entry to any port or place in the United States or the navigable waters of the United States, to, and (B) detain at the port or place in the United States from which it is about to depart for any other port or place in the United States, any vessel subject to this subsection, which upon request, does not produce evidence furnished by the President that the financial responsibility provisions of paragraph (1) of this subsection have been complied with.

491 F. 2d

1163 (9th Cir. 1973)

WEIGEL, District Judge:

This case presents a question of first impression as to the validity of Regulations of the Department of the Interior prohibiting discharges of oil into the navigable waters of the United States. As applied to the facts in this case, we have concluded that both the regulations and the statute upon which they are based are valid.

Appellant Robert Blaine Boyd was charged by information with violation of 33 U.S.C. § 1161(b)(4) which declares it to be a crime for any captain of a vessel in United States navigable waters to fail to notify immediately the "appropriate" federal agency in the event of a known "discharge of oil from such vessel." [1] Conviction may result in a fine of not more than $10,000 or imprisonment for not more than one year or both. The type of discharge which brings the provisions of paragraph (4) into operation is defined therein by reference to paragraph (2) of subsection 1161(b) which provides:

> *The discharge of oil into or upon the navigable waters of the United States, . . . in harmful quantities as determined by the President under paragraph (3) of this subsection, is prohibited, except . . . (B) where permitted in quantities and at times and locations or under such circumstances or conditions as the President may, by regulation, determine not to be harmful.* Any regulation issued under this subsection shall be consistent with maritime safety and with marine and navigation laws and regulations and applicable water quality standards. (Emphasis added.)

Paragraph (3) provides for the issuance of regulations by the President to delineate those quantities of discharges which will be "harmful to the public health or welfare of the United States, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches. . . ."

These provisions were enacted as part of the general statutory scheme embodied in section 1161 for the control of oil pollution. Section 1161 is, in turn, part of the Water Quality Improvement Act of 1970 (Pub.L. 91-224, Title I, § 102, 84 Stat. 91, 97-117, codified in 33 U.S.C. § 1151 et seq.), which amended, *inter alia*, section 11 of the Federal Water Pollution Control Act of 1956 (Ch. 518, § 1, 70 Stat. 498).

Pursuant to subsection 1161(b)(3), the President by Executive Order (Exec. Ord. #11548, July 22, 1970, 3 C.F.R. 539 (Supp.1972)) delegated to the Secretary of the Interior his regulation-making duties. On September 9, 1970, Secretary Hickel issued the Regulations which were duly noticed and eventually codified as Environmental Protection Agency, Regs., Discharge of Oil, 40 C.F.R. Part 110. Of these Regulations, subsections 110.3 and 110.6 are salient to this case.

> *§ 110.3 Discharge into navigable waters harmful.*
>
> For purposes of Section 11(b) of the Federal Act [*i. e.*, subsection 1161(b)], discharges of such quantities of oil into or upon the navigable waters of the United States or adjoining shorelines *determined to be harmful to the public health or welfare of the United States include discharges which: . . . (b) cause a film or sheen upon or discoloration of the sur-*

face of the water or adjoining shorelines. . . . (Emphasis added.)

§ *110.6 Exception for vessel engines.*

For purposes of Section 11(b) of the Federal Act, discharges of oil *from a properly functioning vessel engine* are *not* deemed to be harmful. . . . (Emphasis added.)

Reading the statute and regulations together, a discharge of oil from a ship is "harmful" and prohibited, if it produces a sheen on the water's surface and if it does not come from a properly functioning vessel engine. Under subsection 1161(b)(4), any ship captain who does not immediately notify the appropriate agency of such a discharge may be criminally prosecuted. (The administrative determination of discharges "in harmful quantities", stated in Regs. §§ 110.3, 110.6, will hereafter be referred to as the "sheen test".)

This brings us to the facts of this case. Just before trial the parties stipulated that: On September 4, 1971, Boyd was captain of the merchant ship M/V MERCATOR, a crab processing vessel which was then moored at a wharf on the Salmon Bay Waterway in Seattle. A crewman on the ship was transferring diesel fuel oil from the port to the starboard fuel tank by means of a hose. He accidentally knocked the hose out of the starboard tank, and "approximately thirty gallons" of oil were discharged into the water, causing a visibly iridescent slick or sheen on the surface. Captain Boyd knew of this spill at the time, but he failed to notify the U. S. Coast Guard or any other government agency. The next morning a Coast Guard safety patrolman noticed the oil slick around the MERCATOR and reported it.

Upon being charged with a failure to report under subsection 1161(b)(4), Boyd had moved to dismiss the information on two grounds. His first claim was that it did not state facts sufficient to constitute an offense against the United States; his second, that paragraphs (2) and (4) of subsection 1161(b) are unconstitutional. After the filing of extensive briefs and after a hearing, the district judge granted the motion to dismiss. The prosecution filed for reconsideration, and after another hearing the judge again granted the dismissal. However, on May 2, 1972, the judge wrote a letter to the parties stating that he had decided his prior decision was erroneous. He declared that the sheen test was a "proper determination" of harmfulness of discharge ". . . and must stand unless shown to have been arbitrarily or capriciously concluded. No such showing has been made."[2] The motion to dismiss was thus finally denied, and only thereafter did the parties enter into the stipulation of facts as set out above. Since a dismissal motion raising the issues of law had been denied, the stipulation concludes: "[T]he facts set forth above, without more, provide a sufficient basis from which the Court can find, beyond a reasonable doubt, that . . . Boyd is guilty of the offense charged. . . ."

After trial to the court, the judge convicted Boyd, suspended sentence, and placed him on probation for one year.

Boyd's major contention on appeal is this: The sheen test improperly defines as "harmful" a broader class of oil discharges than Congress intended; the direct result is to make criminal a failure to report a discharge in cases where it is not harmful; therefore, the entire regulatory scheme (originally codified in 18 C.F.R. §§ 610.1–610.9, and now codified in 40 C.F.R. §§ 110.1–110.9), of which the sheen test is the cornerstone, is invalid as an abuse of the rule-making power which Congress gave to the Executive Branch. Boyd also argues that subsection 1161(b)(4) is void for vagueness.

We turn first to the attack on the Regulations themselves. Where a statute specifically delegates to an administrative agency the power to make rules, courts recognize a presumption that such rules, when duly noticed, are valid. *See, e. g.*, Gray v. Powell, 314 U. S. 402, 411–412, 62 S.Ct. 326, 86 L.Ed. 301 (1941); A.T. & T. Co. v. United States, 299 U.S. 232, 236–237, 57 S.Ct. 170, 81 L.Ed. 142 (1936); Pacific States Box & Basket Co. v. White, 296 U.S. 176, 186, 56 S.Ct. 159, 80 L.Ed. 138 (1935). The presumed validity of a general regulation, in contrast to that of an individual adjudication, does not require special findings. Pacific States Box & Basket Co. v. White, *supra*, at 186, 56 S.Ct. 159. This presumption is rebuttable, particularly where the governing statute is penal, upon a showing that the challenged regulation is an un-

reasonable exercise of the delegated power—*i.e.*, inconsistent with the statute. *See, e. g.*, Commissioner v. Acker, 361 U.S. 87, 90–92, 80 S.Ct. 144, 4 L.Ed.2d 127 (1959); United States v. Calamaro, 354 U.S. 351, 358–359, 77 S.Ct. 1138, 1 L.Ed.2d 1394 (1957). The burden placed on Captain Boyd is thus a heavy one, for he must show that the sheen test determination of harmfulness cannot be considered a reasonable expression of the Congressional will, even though Congress has given the Executive broad authority to make that determination.

[6] To meet this burden, Boyd argues at the outset that Congress did not intend all oil discharges to be deemed "harmful", and therefore there is a certain class of *de minimis* discharges to which the sanctions of subsection 1161(b)(4) do not apply. We agree. If Congress had meant the reporting requirement to apply to all discharges, it could have said so in plain language, rather than delegate determination of a "harmful" spill to the President as it did in paragraphs (2) and (3).[5]

The question before us is whether or not the sheen test, on the particular facts in this case, is a valid basis for distinction between those discharges which are harmful and those which are not.

Arguing against validity, Boyd asks the Court to judicially notice that not every quantity of oil creating a sheen or discoloration on a water surface is "harmful"; that, for example, a single drop is not harmful. Here the prosecution was for a spill of some thirty gallons. The facts in this case, not hypothetical situations, should govern our decision. *See* United States v. Raines, 362 U.S. 17, 21–23, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960). Even assuming that Boyd might have standing to complain of hypothetical applications of the sheen test, he cannot rely upon judicial notice as to the effect of oil spills. *See* 9 Wigmore, Evidence, § 2571, pp. 547–550 (3rd ed. 1940). Boyd's argument is, therefore, speculation, unsupported by the record.

Appellant next contends that the sheen test was devised in order to achieve workable administration, thereby subverting Congressional intent. He quotes from the affidavit of Kenneth Biglane, an Interior Department administrator whose self-described duties included the formulation and direction of "national programs to respond to discharges of oil and hazardous materials and to prevent such discharges, pursuant to sections 11 and 12 of the Federal Water Pollution Control Act [i. e., §§ 1161–1162], as amended. . . ." Concerning the sheen test, the Biglane affidavit states:

> A major purpose of [this regulation] is to define discharge of oil for the purposes of the notification requirement of section . . . 1161(b)(4). For this purpose the film or sheen test is especially well suited, since its effect is to require notification of any oil discharges whose effect can be seen as a film or sheen of oil upon the surface of the water. Thus it is a simple matter for a responsible person to know which discharges must be reported. It has been my experience in investigating oil spills that persons at the scene, and persons responsible for the spill, are frequently unaware of how much oil has been discharged and its effect on the environment, even within very broad limits. Thus a notification requirement based on the amount discharged would be unworkable in many cases.

On the basis of these observations by Biglane, appellant contends that the sheen test sacrifices statutory intent on the altar of "workability". While the Biglane affidavit does show that one reason for the sheen test was workable administration, this is by no means an irrational factor for the Department to consider. As a practical matter, the sheen test is more appropriate than, for example, a numerical test, or a determination that a "substantial" amount of spilled oil is harmful. A numerical test creates not only the inherent difficulty of accurate observation as to the quantity discharged, it also may spawn an incentive to be inaccurate so as to avoid

5. The original House bill, H.R. 4148, would have required reporting only with respect to discharges "in *substantial* quantities". (Emphasis added.) Conf.Rep.No.91-940, 91st Cong., 2d Sess., 1970 U.S.Code Cong. and Admin.News, pp. 2712, 2713—re § 17 (b) of H.R. 4148. The Senate amendment, S. 7, prohibited *all* discharges, except where permitted by Presidential regulations consistent with maritime laws and water quality standards. *Id.* at p. 2719—re § 12(b)(1) of S. 7. Section 102 of the conference substitute struck down both versions and was eventually enacted into law. This history at least demonstrates that Congress did not deem every oil spill to be a "harmful" one, since the changes in the legislation from original introduction to final enactment were not insignificant.

the obligation of reporting. Moreover, if the term "substantial" were used, there would be endless confusion over its meaning. In any case, ease of administration is not an "impermissible factor" in the Department's determination. *Cf.* Environmental Defense Fund, Inc. v. Ruckelshaus, 142 U.S.App.D.C. 74, 439 F.2d 584, 597 (1971).

There is no evidence that the sheen test was devised to alter the meaning of the statute, or to avoid making a determination of harmfulness. On the contrary, the Biglane affidavit expressly states that "smaller spills (10 barrels or less) [6] have a seriously degrading effect on the environment . . . particularly . . . [in areas] near the coastline. . . . Where a discharge of oil is large enough to cause a film or sheen on the surface of the water, it is large enough to cause significant harm to the environment." This statement is supported by reference to summaries of scientific studies attached as exhibits and is not refuted by appellant. Thus the Biglane affidavit evidences the Department's administrative assessment of enforcement problems as well as its investigation and determination of what constitutes a harmful discharge. The two considerations are not mutually exclusive.

Appellant further contends that the exception to the sheen test—i. e., "discharges of oil from a properly functioning vessel engine . . . "—demonstrates the irrationality of the sheen test itself. He points out that this exception allows a ship captain to escape the nonreporting penalty for any amount of oil spilled from a properly functioning engine, whether or not it is enough to create a sheen. In other words, the harmfulness of the spill is made to depend on its source. While at first blush this may seem a curious result, we are persuaded that the exception is reasonable. The exception relates to a specific class and, as the trial judge wrote in his letter denying Boyd's motion to dismiss, "is necessary and proper if there is to be traffic upon the seas and inland navigable waters." Footnote 2, *supra*.

Determination of harmfulness "to the public health or welfare of the United States" requires balancing the competing interests of environmental protection and unrestricted passage on navigable waters. It is precisely this balancing which the "properly functioning engines" exception reflects. Indeed, the exception was included in the Regulations at the behest of Congress. When the Regulations were originally proposed, after passage of the Act, the sheen test did not contain the exception. During committee hearings on the proposed Regulations, Senator Muskie remarked:

> . . . At a minimum the President can and should immediately by regulation prohibit the discharge of oil which exceeds the amount normally anticipated in operation of a vessel. . . .
>
> It is obvious, then, that *both committees* [the House and Senate committees working on the bill] *felt that the minimal amounts of oil discharged in the normal operation of a properly functioning vessel engine ought not to be subject to the notice requirements of the law.* . . . (Emphasis added.)
>
> Hearings on Proposed Regulations of the Department of the Interior on Oil Pollution under the Water Quality Improvement Act of 1970, before the Subcommittee on Air and Water Pollution, Senate Committee on Public Works, 91st Cong., 2d Sess. at 34 (Aug. 4, 1970).

After these hearings, the exception was adopted by the Department. As qualified thereby, the sheen test met no further Congressional objections.

We now briefly address Boyd's contention that the statute, construed together with the Regulations, violates Fifth Amendment due process of law. This claim rests on the premise that subsection 1161(b)(4), when coupled with the sheen test, is void for vagueness. *See*, Connally v. General Construction Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926) (classic statement of vagueness doctrine). However, as has been discussed, one salutary aspect of the sheen test is the simplicity of its application. The statute and Regulation read together amount to a clear command to a ship captain: "If you can see the spill, report it!" That duty of reporting, depending as it does simply on one's sense of sight, is anything but vague. No man "of common intelligence must necessarily guess at [the statute's] meaning and differ as to its application. . . . " *Id.*

A spill of approximately thirty gallons may seem small to some, particularly in comparison to the 1967 *Torrey Canyon* casualty off the shores of England and France, or the Santa Barbara blowout in 1969. However, Congress enacted a law of broad application when it caused the provisions of subsection 1161(b) to be triggered by any oil discharge in a "harmful" quantity. Nothing has been shown, on the facts in this case, to indicate that the Department's Regulations determining harmfulness go beyond the statutory mandate.

Judgment affirmed.

APEX OIL v. UNITED STATES
530 F.2d 1291
(8th Cir. 1976), cert. denied,
45 U.S.L.W. 3250 (Nov. 5, 1976)

Before HEANEY, ROSS and WEBSTER, Circuit Judges.

HEANEY, Circuit Judge.

Apex Oil Company, a Missouri corporation whose business includes the transportation and storage of various types of fuel oil, appeals from a final judgment of conviction on two counts of a three-count indictment for failing to notify an appropriate agency of the United States government of a known oil spill in violation of the Water Pollution Control Act, 33 U.S.C. § 1321(b)(5). It was fined a total of $20,000 and placed on probation for three years. The execution of $15,000 of the fine was stayed on the condition that the corporation not violate any law relating to pollution during the probationary period. Two issues are raised on appeal: (1) whether the corporation is a "person in charge" within the meaning of 33 U.S.C. § 1321(b)(5), and (2) whether the evidence was sufficient to support the conviction. We affirm.

I.

Section 1321(b)(5) of Title 33 of the United States Code, upon which the convictions are based, states in relevant part:

> Any person in charge of * * * an onshore facility * * * shall, as soon as he has knowledge of any discharge of oil * * * from such * * * facility in violation of paragraph (3) of this subsection, immediately notify the appropriate agency of the United States Government of such discharge. Any such person who fails to notify immediately such agency of such discharge shall, upon conviction, be fined not more than $10,000, or imprisoned for not more than one year, or both. Notification received pursuant to this paragraph or information obtained by the exploitation of such notifications shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement.

The appellant argues that only an individual, or natural person, and not a corporation, can be a "person in charge" within the meaning of the statute and hence, it cannot be prosecuted.

A "person," as defined by the Act, "includes an individual, firm, *corporation*, association, and a partnership[.]" 33 U.S.C. § 1321(a)(7) (Emphasis supplied.) Apex Oil, thus, raises a distinction between the meaning of "person" when used alone and its meaning when used in conjunction with the words "in charge." It is a distinction which the Act does not itself make. *United States v. Hougland Barge Line, Inc.*, 387 F.Supp. 1110, 1113 (W.D.Pa.1974). *See* 33 U.S.C. § 1321(a). It is, moreover, a distinction that cannot be supported by the purposes of the Act.

Section 1321(b)(5) prompts the timely reporting and discovery of oil discharges into or upon the navigable waters of the United States to facilitate the mitigation of pollution damage. It is designed to insure, so far as possible, that small discharges will not go undetected and that the possibility of effective abatement will not be lost. *United States v. Mobil Oil Corporation*, 464 F.2d 1124, 1127 (5th Cir. 1972); *United States v. General American Transportation Corp.*, 367 F.Supp. 1284, 1288 (D.N.J.1973). The purpose is best served by holding the corporation responsible under the provision of the statute. We agree with the analysis of the Fifth Circuit:

> The owner-operator of a vessel or a vacility [sic] has the capacity to make timely discovery of oil discharges. The owner-operator has power to direct the activities of persons who control the mechanisms causing the pollution. The owner-operator has the capacity to prevent and abate damage. Accordingly, the owner-operator of a facility governed by the WPCA, such as the Mobil facility here, must be regarded as a "person in charge" of the facility for the purposes of § 1161. A more restrictive interpretation would frustrate congressional purpose by exempting from the operation of the Act a large class of persons who are uniquely qualified to assume the burden imposed by it.
>
> We conclude that an owner-operator is "in charge" of his facility within the meaning of § 1161. It necessarily follows that a corporate owner, a "person" within the statutory definition, is a "person in charge" of the facilities it owns and operates[.]

United States v. Mobil Oil Corporation, supra at 1127. *Accord, United States v. Republic Steel Corporation,* 491 F.2d 315 (6th Cir. 1974) (per curiam).

The contention of Apex Oil, premised on *United States v. Skil Corporation,* 351 F.Supp. 295 (N.D.Ill.1972), that only an individual or natural person can be a "person in charge" under the statute, removes an important incentive for a corporation to train and supervise its employees on the reporting requirements of the Act. Indeed, such a construction of the statute would, in the case of a corporation bent upon evading the civil penalty of § 1321(b)(6), provide an incentive not to report all small spills that are not likely to be detected or traced to their origin. It would pit the employee, on pain of fine or conviction under § 1321(b)(5), against his employer. The appellant's contention is counterproductive to the purposes of the Act.

Nor do we agree with the argument of Apex Oil that the inclusion of the corporation within the meaning of "person in charge" is inconsistent with the use in the civil penalty provision of § 1321(b)(6) of the words "owner or operator." The fallacy of the argument is exposed by the definition of "owner or operator." Section 1321(a)(6) states:

> "[O]wner or operator" means (A) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, and (B) in the case of an onshore facility, and an offshore facility, any person owning or operating such onshore facility or offshore facility, and (C) in the case of any abandoned offshore facility, the person who owned or operated such facility immediately prior to such abandonment[.]

The phrase "owner or operator" thus designates persons of a particular proprietary class as does the phrase "person in charge." There is no inconsistency. The corporation, being a "person" within the statutory definition, is included within the meaning of both.[8]

The appellant also places reliance upon its reading of the legislative history and the regulations of the Coast Guard. Both speak in terms of an individual as being a "person in charge."

But the legislative history is, at best, inconclusive and does not provide the support necessary to depart from the conclusion, based upon the statutory definition of "person" and the purposes of the Act, that a corporation is a "person in charge" under § 1321(b)(5). Moreover, it must be observed that corporate actions necessarily require the conduct of individuals. The corporation acts no less through its supervisor at the oil facility than it does through a director or officer. To the extent that guidance can be gleaned from the legislative history, it suggests that liability under the statute is to be limited to those responsible for the operation of the oil facility. The corporation is certainly within that class. *United States v. Mobil Oil Corporation, supra* at 1128; *United States v. General American Transportation Corp., supra* at 1288. *See* Conference Report No. 91-940, 1970 U.S.Code Cong. & Admin.News p. 2719. Finally, we note that the appellant argues solely from the language of the House Bill which used the phrase "individual in charge" and which was abandoned for the Senate's broader phrase "person in charge." *See United States v. Mobil Oil Corporation, supra* at 1128.

The regulations of the Coast Guard are equally unpersuasive. It is true that they define "person in charge" as being an individual. *See* 33 C.F.R. § 153.01(g). But it is also true that they do not address the issue before us. The purpose

8. We do not suggest that the class of persons included within the meaning of "owner or operator" and "person in charge" are identical.

of the regulations is to proscribe the manner in which the reporting duties of the statute will be fulfilled in daily practice. *See* 33 C.F.R. § 153.100(b). This purpose necessarily requires that the regulations speak to the individuals who act for the corporation. *See Ritchie Grocer Co. v. Aetna Casualty & Sur. Co.*, 426 F.2d 499, 500 (8th Cir. 1970) (per curiam); *Parker v. United States*, 126 F.2d 370, 374 (1st Cir. 1942). It does not follow, however, that only individuals can be liable under the criminal provisions of § 1321(b)(5). When the administrative expertise is not addressed to the issue under consideration, there is no occasion to defer to its determination. Moreover, were we convinced that the regulations spoke to the issue, we would find that they erroneously interpreted the meaning of the statute. *See Wilderness Society v. Morton*, 156 U.S.App.D.C. 121, 479 F.2d 842, 865 (en banc), *cert. denied*, 411 U.S. 917, 93 S.Ct. 1550, 36 L.Ed.2d 309 (1973).

II.

[6, 7] Apex Oil also argues that the proof was insufficient to support the convictions. The case was tried on stipulated facts, the pertinent portions of which we repeat.

Count two of the indictment arose out of an offloading operation at one of the appellant's facilities located at the foot of Mullanphy Street in St. Louis, Missouri. During that operation, on the morning of January 12, 1974, approximately ten gallons of aromatic No. 2 oil spilled into the Mississippi River. Robert J. Smith, an employee of Apex Oil, was in charge and is the only known witness to the spill. He notified neither the Coast Guard nor the Environmental Protection Agency. The spill was later traced by the Coast Guard, upon the report of a third party, to the Apex Oil facility. No officer or director of the corporation had knowledge of the spill prior to the determination by the Coast Guard of the spill's origin.

The facts surrounding Count three of the indictment are substantially similar. On January 14, 1972, two hundred ninety-four gallons of No. 6 oil spilled into the Mississippi River. The spill was discovered the same morning by a Coast Guard Port Safety Team. The employee in charge of the facility at the time of the spill, James Washington, did not notify the Coast Guard or the Environmental Protection Agency. No officer or director of Apex Oil had knowledge of the spill prior to its discovery by the Coast Guard.

From these facts, the appellant argues that the government failed to prove that it was "in charge" at the time of the spills and that it had knowledge of their occurrence.

Each argument is meritless. The corporation is no less "in charge" of the oil facility than is its employee. *See New York Central & H.R.R. Co. v. United States*, 212 U.S. 481, 494, 29 S.Ct. 304, 306, 53 L.Ed. 613, 621 (1909); *United States v. Hilton Hotels Corporation*, 467 F.2d 1000, 1004 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125, 93 S.Ct. 938, 35 L.Ed.2d 256 (1973). Further, the knowledge of the employees is the knowledge of the corporation. *See United States v. A & P Trucking Co.*, 358 U.S. 121, 125, 79 S.Ct. 203, 206, 3 L.Ed.2d 165, 169 (1958); *Ritchie Grocer Co. v. Aetna Casualty & Sur. Co.*, *supra* at 500.

The judgment of conviction on Counts two and three is affirmed.

U.S. v. LE BEOUF BROS. TOWING CO., INC., 537 F.2d 149 (5th Cir. 1976), Appeal docketed, U.S. Supreme Court, No. 76-1075, 45 U.S. L.W. 3543 (Jan. 7, 1977).

GEE, Circuit Judge.

These two cases, which were consolidated on appeal, require us to determine the scope of the statutory immunity entailed when a corporation's agent reports an oil spill to the Coast Guard in the manner required by section 11(b)(4) of the Water Quality Improvement Act of 1970 (WQIA), 33 U.S.C. § 1161(b)(4) (1970), and section 311(b)(5) of its successor statute, the Federal Water Pollution Control Act Amendments of 1972 (FWPCA), 33 U.S.C. § 1321(b)(5) (Supp. 1974). The lower courts in both cases ruled that the statutes confer immunity from any statutorily-imposed penalties that are "criminal in nature." We disagree and reverse in both cases.

Both the 1970 and 1972 statutes require "any person in charge" of a vessel or an onshore or offshore facility to notify the Coast Guard of any oil discharge into the water in quantities determined harmful by the President, provide a criminal penalty for failure to make the required notification, and prohibit use of information reported or derived from that report against the reporting person "in any criminal case." Both cases here concern oil spills that the lower courts found were properly reported by agents of the appellees under the mandatory disclosure provisions. In *Le Beouf*, the lower court granted summary judgment against the government's suit to recover a $2,500 penalty assessed by the Coast Guard under section 11(b)(5) of the WQIA, 33 U.S.C. § 1161(b)(5) (1970), which imposes strict liability for a penalty, denominated "civil," of up to $10,000 on the owner or operator of any vessel or facility from which oil is knowingly discharged in harmful quantities. In *T/B CTCO*, the lower court dismissed the government's *in rem* action against appellee CTCO's barges for violation of the Rivers and Harbors Appropriations Act of 1899 (Refuse Act), 33 U.S.C. §§ 407 *et seq.* (1970), which prohibits the discharge of refuse into navigable waters, *id.* § 407, makes any violation of the Act by a person or corporation a misdemeanor punishable by a fine or imprisonment, *id.* § 411, and authorizes an *in rem* action for the amount of the fine against any vessel used in the violation, *id.* § 412. Ruling that the statutory immunity provisions--section 11(b)(4) in *Le Beouf*, and its virtually identical successor, section 311(b)(5) in *T/B CTCO*—should be interpreted to bar imposition of any monetary sanction that is what they deemed "criminal in nature," both courts reasoned that allowing use of evidence derived from a party's compliance with the compulsory reporting requirement would implicate the fifth amendment privilege against self-incrimination and frustrate the purpose of the immunity provision by discouraging disclosure of spills.

Both courts unnecessarily concerned themselves with the nature of the monetary penalties imposed. Such inquiries are necessary only when some constitutional protection is implicated by the imposition of a penalty or the statutory language is ambiguous. In this case, no constitutional right is involved. The fifth amendment privilege against self-incrimination does not extend to corporations. *California Bankers Association v. Shultz*, 416 U.S. 21, 55, 94 S.Ct. 1494, 39 L.Ed.2d 812 (1974); *George Campbell Painting Corp. v. Reid*, 392 U.S. 286, 88 S.Ct. 1978, 20 L.Ed.2d 1094 (1968). If appellees were individuals, then we would of necessity examine the nature of the so-called "civil penalties" to determine if the immunity provision as it applied to them required a broad interpretation in order to pass constitutional muster, *cf. Kastigar v. United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972), or even to decide if the penalties are unconstitutional as applied. But since these corporate defendants cannot claim a pertinent constitutional protection, the issue is purely one of statutory construction, and appellees are foreclosed by the clear statutory wording. The immunity provision, by its terms, extends only to "criminal" cases, while Congress in the very next paragraph expressly labeled the sanction in 33 U.S.C. § 1161(b)(5) about which *Le Beouf* complains a "civil penalty." Only the most compelling demonstration of a contrary legislative intent would persuade us to ignore the plain words of the statute. The wording is unequivocal; by it Congress cannot

have intended to extend immunity to civil cases, regardless of their "nature." Likewise, forfeiture actions brought *in rem* under the Refuse Act are civil proceedings; *see United States v. T/B NMS*, 330 F.Supp. 781, 782 (S.D.Tex.1971) (Bue, J.); *Shipman v. United States*, 309 F.Supp. 441, 442 (E.D. Va.1970) (citing cases), and thus do not trigger the immunity provision.

Appellees suggest that the interpretation which we adopt thwarts the statutory purpose of assuring prompt notification of oil spills. But congressional schemes need not seem to courts symmetrical, consistent, or even effective to be valid. Furthermore, appellees and the lower courts misconceive the multipurpose nature of the statutory scheme. Congress intended both to prevent harmful spills and to minimize the damage caused by such spills. The notice/immunity section serves the subsidiary purpose of encouraging prompt notification of spills without infringing the protection against self-incrimination. At the same time, the section imposing civil penalties seeks, at least in part, to transfer cleanup costs to those most culpable. Appellees argue that enforcing civil penalties against those who give notice of spills discourages reporting of smaller, less-noticeable spills that might otherwise go undiscovered. But they forget that the penalty assessment provision furthers the statute's deterrent function and at the same time gives the Coast Guard discretion to reduce the penalty where warranted. The criminal penalties for failure to report a spill should sufficiently encourage corporate employees to report spills, even if their corporate employers thereby incur fines. Thus, the statute has internal consistency, even though its provisions occasionally—and necessarily, in view of the Act's multiple objectives—work at cross purposes. As for T/B CTCO, while the policies underlying the forfeiture provision of the Refuse Act are less clear—since the funds derived from it are not earmarked to cover cleanup expenses—the multipurpose statutory framework of the FWPCA described above suggests that Congress thought removing the threat of criminal prosecution a sufficient inducement for the "person in charge" to report spills. We conclude that it did not intend to extend that immunity to *in rem* forfeiture proceedings.

REVERSED and REMANDED for proceedings not inconsistent with this opinion.

Notes

1. 1. Under the Ports and Waterways Safety Act of 1972, 33 U.S.C. §§ 122-27, Congress, anticipating the 1973 IMCO Convention, authorized the Coast Guard to adopt regulations relating to ship design, structure, and operation applicable to any vessel entering United States navigable waters. Regulations adopted in late 1975, require segregated ballast systems for oil tankers and safety rules similar to IMCO standards. 40 Fed. Reg. 48,280 (1975). The Argo Merchant oil spill incident in December, 1976, as well as other spillages of Liberian registered tankers caused deep concern over the adequacy of these standards. Reaction to those developments was proceeding along two fronts in early 1977. First, heavy pressure was brought to bear on the Coast Guard to promulgate and enforce more stringent ship design and navigation standards than those developed by IMCO. Second, the Senate Commerce Committee held hearings on new proposed legislation that would provide a 200 mile pollution enforcement zone, standards for vessel equipment and design, and improved vessel traffic control systems.

   2. Under the Limitation of Liability Act of 1851 (46 U.S.C. §§183-189), which was passed to allow the American merchant marine to compete on equal terms with their European counterparts, the liability of shipowners for personal injury or property damages is limited to the value of the vessel after the accident. How is that Act affected by the liability provisions of the 1972 Act?

   3. Suppose the United States is guilty of negligence in clean-up operations or in maintaining buoys; is the United States liable for damage to on-shore property, state wildlife resources or commercial fishermen? See Burgess v. M/V Tamano, 373 F. Supp. 839 (D. Me. 1974).

UNION OIL COMPANY et al., Appellants,

v.

James J. OPPEN and John J. Masterson et al., Appellees.

501 F.2d. 558(9th Cir. 1974)

OPINION

Before ELY and SNEED, Circuit Judges, and SOLOMON,* District Judge.

SNEED, Circuit Judge:

This is another case growing out of the Santa Barbara oil spill of 1969. The plaintiffs are commercial fishermen. Each of their complaints alleges that the cause of action has been brought under the provisions of the Outer Continental Shelf Lands Act of 1953, 43 U.S.C. § 1331 et seq.; that the defendants joined in an enterprise, the day-to-day operation of which was within the control and under the management of defendant Union Oil Company, to drill for oil in the waters of the Santa Barbara Channel; that during the period commencing on or about January 28, 1969, vast quantities of raw crude oil were released and subsequently carried by wind, wave and tidal currents over vast stretches of the coastal waters of Southern California; and that as a consequence the plaintiffs have suffered various injuries for which damages are sought. Jurisdiction rests on 28 U.S.C. § 1333 and 43 U.S.C. § 1333(b).

On May 1, 1970, counsel for all parties to this suit entered into a Stipulation which was approved by the district court. This Stipulation, *inter alia*, provided for the consolidation of certain cases, attorneys' fees, the use of special masters, the allocation of authority among counsel for the various plaintiffs with respect to control of any negotiations and the preservation of certain rights on behalf of both plaintiffs and defendants.

For the purposes of the present appeal, however, the most important provisions in this Stipulation are those which deal with the facts and with the extent to which the defendants have agreed to pay the plaintiffs for their damages. The relevant portion of the Stipulation relating to the facts reads as follows:

> On or about January 28, 1969, oil began to escape under and near Union Oil Company of California's Platform "A" located on the Outer Continental Shelf of the United States in the Santa Barbara Channel. The undersigned agree that the following is a fair statement of the facts with respect to the Santa Barbara Channel occurrence (hereinafter "occurrence"):
>
> A. Certain operations conducted on Platform "A" resulted in the release of unascertained amounts of crude oil from the ocean floor underneath and near Platform "A".
>
> B. Such crude oil release was carried by natural forces of winds and tides to various areas of the ocean's surface and towards and in some instances to the adjacent coast lines.
>
> C. An unascertained amount of damage has resulted from said occurrence.

Paragraph 3 of the Stipulation, which sets out the defendants' undertaking to pay damages, provides as follows:

> In order to provide a basis for the disposition of the above referenced claims it is agreed by the undersigned defendants that they will pay to the above referenced persons and/or

* Honorable Gus J. Solomon, Senior United States District Judge, District of Oregon, sitting by designation.

plaintiffs who are, or who by reason of subsequent joinder herein become, parties hereto, *all legally compensable damages arising from a legally cognizable injury* caused by the aforementioned occurrence as such damages are determined pursuant to the following provisions; *provided however, that the payment assumed hereby will not exceed such amount and such claim as said defendants or their contractors would be responsiblue for in the case of negligence.* Payment of said damages persuant hereto shall operate as an assignment of said claims to said defendants. No claim for punitive or exemplary damages shall be asserted and no such damages shall be awarded. (emphasis added).

In May of 1972, the defendants moved for partial summary judgment before the special masters to strike from plaintiffs' prayers "that item of damage usually denominated as 'ecological damage'." More specifically, the defendants sought to eliminate from the prayers any element of damages consisting of profits lost as a result of the reduction in the commercial fishing potential of the Santa Barbara Channel which may have been caused by the occurrence. According to the defendants, such long-term ecological damage is not compensable under the law and thus is not within their undertaking as set forth in the Stipulation.

The motion was denied by the special masters in a brief order which recognized that injuries resulting from "an interference by defendants with [plaintiffs'] economic right to fish in public waters" were legally compensable. The defendants then went into district court to object to this order, and again moved for a partial summary judgment.

Once more the motion was denied. In his order the district judge first observed that paragraph 3 of the Stipulation, although carefully phrased, had the practical effect of a confession of liability for tort negligence. Continuing, the judge accepted the defendants' statement of the issue, *viz*:

> Does the alleged diminution of the aquatic life of the Santa Barbara Channel claimed to have resulted from the occurrence constitute a legally compensable injury to the Commercial Fishermen claimants?

The district judge then went on to hold that such a question must be answered in the affirmative. This result, he pointed out, is in no way dependent on whether the plaintiffs have a proprietary interest in, or ownership of, the sea life in the Santa Barbara Channel. As the district judge saw it, "the loss of a prospective economic advantage occasioned by the alleged diminishment of the quantities of available sea life formed a sufficient basis for the recovery under the law of negligence."

The district judge certified the order as a proper subject for an interlocutory appeal, and the defendants petitioned this Court for leave to appeal under 28 U.S.C. § 1292(b). The petition was granted, and the issue now before us is whether the district court properly denied the defendants' motion. We hold that the district court properly interpreted paragraph 3 of the Stipulation, and that its action in denying the defendants' motion was proper.

I.

The Applicable Law

Determination of the proper law by which the defendants' motion for partial summary judgment is to be judged turns out to be analytically complex but less significant functionally than one would have imagined. As the plaintiffs assert in their complaints, these cases are brought under the Outer Continental Shelf Lands Act ("Lands Act"), 43 U.S.C. § 1331 et seq. Pursuant to Section 1333(a)(1) of this Act, federal law is made applicable "to the subsoil and seabed of the Outer Continental Shelf and to all artificial islands and fixed structures which may be erected thereon. . . ." However, as the Supreme Court has pointed out in Rodrigue v. Aetna Casualty Company, 395

U.S. 352, 365, 89 S.Ct. 1835, 23 L.Ed.2d 360 (1969), state law is adopted as a surrogate for federal law under the Act to the extent that such state law is "applicable and not inconsistent with . . . other Federal laws." *See* 43 U.S.C. § 1333(a)(2). Thus, when applied in the context of the Act, state law becomes federal law-federally enforced. 395 U.S. at 365, 89 S.Ct. 1835.

It is apparent from the briefs of the parties that their analysis did not advance beyond the point of concluding that, since there appeared to be no inconsistent federal law, the law of California was controlling. However, this Court's opinion in Oppen v. Aetna Insurance Company, 485 F.2d 252 (9th Cir., 1973), makes clear that the parties' analysis is not necessarily determinative of the issue before us. There remains yet a third possibility—i. e. that admiralty law is exclusively applicable to the present controversy. As was said in *Aetna Insurance*, the Lands Act does not eliminate this possibility.

The Supreme Court in Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972), has instructed us that the determination of whether the admiralty jurisdiction of the federal courts embraces a tortious act depends, not only on the place of the tort, but also on whether the wrong bears a significant relationship to a traditional maritime activity. *Id.* at 268, 93 S.Ct. 493. Acting on this instruction, this Court in *Aetna Insurance* held that an injury to maritime vessels and an interference with their right of navigation, resulting from the same oil spill which is involved here, constituted a maritime tort cognizable in admiralty. In so holding, it was recognized that the "activity" whose relationship to traditional maritime activity was to be examined was that of the injured party, not that of the tortfeasor. For this reason, the fact that drilling for oil from fixed platforms located over the outer Continental Shelf is not in itself a traditional maritime activity was held not to constitute a basis for refusing to classify the wrong as a maritime tort.

It follows that in order to determine the applicability of admiralty law to the facts of this case, it is necessary to inquire whether a reduction in plaintiffs' anticipated profits, caused by what for present purposes we must assume to be the negligent conduct of the defendants, bears a significant relationship to traditional maritime activity. Were it necessary for this issue to be decided to dispose of this case, our inclination would be to hold that such a relationship does exist. In numerous ways, the fishing industry is clearly a part of traditional maritime activity; and to assert otherwise would amount to a repudiation of much of maritime history. For example, fishermen have been treated as seamen for purposes of enforcing their rights against the fishing vessel and its owner; *see e. g.*, Old Point Fish Company v. Haywood, 109 F.2d 703 (4th Cir., 1940); The Z R-3, 18 F.2d 122 (W.D. Wash.1927). *See also* 46 U.S.C. §§ 531-534; Gilmore and Black, The Law of Admiralty 257 (1957) (hereinafter cited as Gilmore and Black); Robinson, Admiralty 281 (1939); and the vessels themselves have been the object of federal legislation designed to afford their owners many of the benefits which the law otherwise provides to maritime vessels generally. *See, e. g.*, 46 U.S.C. § 922 (The Ship Mortgage Act).

Our preference for maritime law as the law by which the defendants' motion for partial summary judgment is to be measured is strengthened when Section 1333(a)(2) of the Lands Act is closely examined. The use of state law as a surrogate for federal law is limited to "that portion of the *subsoil* and *seabed* of the outer Continental Shelf, and *artificial islands* and *fixed structures* erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf . . . ." (emphasis added). 43 U.S.C. § 1333(a)(2). The sea, as such, is not mentioned in the Act; nor in our view was it intended to be. Quite understandably state law, which can intrude only to a limited extent in matters traditionally subject to admiralty jurisdiction, *see* Askew v. American Waterways Operators, Inc., 411 U.S. 325, 93 S.Ct. 1590, 36 L.Ed.2d 280 (1973); Skiriotes v. Florida, 313 U.S. 69, 76-77, 61 S.Ct. 924, 85 L.Ed. 1193 (1941); Manchester v. Massachusetts, 139 U.S. 240, 11 S.Ct. 559, 35 L.Ed. 159 (1891), was not intended to embrace traditional maritime activity.

As the Supreme Court in Rodrigue v. Aetna Casualty Company, *supra*, has indicated, in enacting the Lands Act Congress chose to treat drilling platforms as artificial islands rather than as ships subject to admiralty jurisdiction in order to afford the workers on such islands the protections to which they would otherwise be entitled by reason of their citizenship in the adjacent states —subject, of course, to federal enforcement and the power of the federal government to make inconsistent laws and regulations. However, in order to serve this purpose, it is not necessary for us to read the Act as requiring that state law be treated as federal law for purposes of determining the consequences of torts which occur in and on the sea, and which have the required nexus with traditional maritime activity. Thus, it would appear that an injury which occurs *in* the sea, as is the case here, should not be held to be properly cognizable under the provisions of the Lands Act.

We are, however, not driven to the choice between maritime law and the law of California. So far as our research reveals, neither forum has made a definitive ruling on the precise issue before us. As a consequence, it has become necessary for us to examine a fairly large body of authorities, drawn from numerous jurisdictions and secondary sources, in order to reach what we regard as the proper resolution of this dispute. In that the same authorities and sources must be examined and evaluated without regard to whether this process is characterized as an examination of admiralty law or the law of California, we are convinced that under either body of law the actions of the special masters and the district judge in denying the defendants' motion for partial summary judgment were correct.

Moreover, maritime law itself frequently looks to both the statutory and decisional law of the states for sources from which to fashion its principles. *See* Moragne v. States Marine Lines, Inc., 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed. 2d 339 (1970) (new maritime cause of action for wrongful death to be implemented by reference to other federal law and state statutory and decisional law); Shutler, Pollution of the Sea By Oil, 7 Houston L.Rev. 415, 434 (1970); Comment, Oil Pollution of the Sea, 10 Harv.Int.L.J. 316, 347 (1969). Although in some instances this derivative assistance may entail the application of state law principles, unlike our diversity jurisdiction there is no requirement—albeit some scholars have suggested such a course for certain areas in admiralty—that state law be adopted. *See* Robertson, Admiralty and Federalism 194-201 (1970) and the authorities cited therein.

In any event, we shall proceed in a manner that we believe is faithful to the spirit of California tort law in disposing of the issue before us. For this reason we are content to say that for purposes of this case we regard it as irrelevant whether our efforts are designated as an exposition of admiralty law or the law of California.

II.

Recovery for Pure Economic Loss in Negligence: The General Rule.

Defendants support their motion for partial summary judgment by pointing to the widely recognized principle that no cause of action lies against a defendant whose negligence prevents the plaintiff from obtaining a prospective pecuniary advantage. *See, e. g.*, Prosser, Law of Torts 952 (4th ed. 1971) (hereinafter Prosser); Harvey, Economic Losses and Negligence, 50 Can.Bar Rev. 580 (1972); Note, 49 Can.Bar Rev. 619

(1971); Note, Negligence and Economic Loss, 117 The Solicitors' Jour. 255 (1971); Note, Negligent Interference with Economic Expectancy: The Case for Recovery, 16 Stan.L.Rev. 664 (1964). *See also* Restatement (Second) of Torts, Tent.Draft No. 14, § 766B. As the defendants see it, any diminution of the sea life in the Santa Barbara Channel caused by the occurence, which, it must be remembered, is attributable to the defendants' negligence by reason of the parties' Stipulation, consists of no more than the loss of an economic advantage which is not a "legally cognizable injury" and thus not "legally compensable."[3]

Their argument has strength. It rests upon the proposition that a contrary rule, which would allow compensation for all losses of economic advantages caused by defendant's negligence, would subject the defendant to claims based upon remote and speculative injuries which he could not foresee in any practical sense of the term. Accordingly, in some cases it has been stated as the general rule that the negligent defendant owes no duty to plaintiffs seeking compensation for such injuries. In other of the cases, the courts have invoked the doctrine of proximate cause to reach the same result; and in yet a third class of cases the "remoteness" of the economic loss is relied upon directly to deny recovery. The consequence of these cases is that a defendant is normally relieved of the burden to defend against such claims, and the courts of a class of cases the resolution of which is particularly difficult.

The general rule has been applied in a wide variety of situations. Thus, the negligent destruction of a bridge connecting the mainland with an island, which caused a loss of business to the plaintiff who was a merchant on the island, has been held not to be actionable. Rickards v. Sun Oil Company, 41 A.2d 267, 23 N.J.Misc. 89 (1945). A plaintiff engaged in commercial printing has been held unable to recover against a negligent contractor who, while engaged in excavation pursuant to a contract with a third party, cut the power line upon which the plaintiff's presses depended. Byrd v. English, 117 Ga. 191, 43 S.E. 419 (1903); *contra*, J. W. Moore (North Shields) Ltd. v. Sharp, 108 Sol.J. 453 (1964). *But see* S. C. M. (U. K.) v. W. J. Whittall & Sons, Ld., [1970] 3 All E. R. 245; Seaway Hotels Ltd. v. Gragg, [1959] Ont. 177, 17 D.L.R.2d 292 (High Ct.), aff'd [1959] Ont. 581, 21 D.L.R.2d 264 (Ct.App.1960). A defendant who negligently injures a third person entitled to life-care medical services by the plaintiff is liable to the third person but not to the plaintiff. Fifield Manor v. Finston, 54 Cal.2d 632, 7 Cal.Rptr 377, 354 P.2d 1073 (1960) (subrogation also denied because third party's claim not assignable). The operators of a dry dock are not liable in admiralty to charterers of a ship, placed by its owners in the dry dock, for negligent injury to the ship's propeller where the injury deprived the charterer of the use of the ship. Robins Dry Dock & Repair Company v. Flint, 275 U.S. 303, 48 S.Ct. 134, 72 L.Ed. 290 (1927). Mr. Justice Holmes, in writing this opinion, observed that ". . . a tort to the person or property of one man does not make the tort-feasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong." 275 U.S. at 309, 48 S.Ct. at 135.

The citation of cases applying the general rule could be extended, but this abridged collection is sufficient to emphasize the point that it operates in a wide variety of settings. For purposes of our analysis, however, one further setting in which the rule has been applied requires mention—that being the area of the law dealing with products liability. In this area, the issue is usually couched in terms of whether a purchaser can recover in tort from a negligent manufacturer, with whom the purchaser is not in privity, for economic losses caused by the failure of the purchased article to perform in accordance with the purchaser's reasonable expectations. Defendants in the present action rely heavily on California cases which indicate that no such recovery is possible.

3. We decline to reach the issue of whether defendants' oil drilling operations constitute an "ultrahazardous activity" and express no opinion as to the applicability of this doctrine to the facts presently before us.

In Seely v. White Motor Company, 63 Cal.2d 9, 45 Cal.Rptr. 17, 403 P.2d 145 (1965), for example, the plaintiff, who had purchased a truck for use in his business, sought to recover from the manufacturer damages representing both the cost of repairs and lost profits attributable to defects in the performance of the truck as well as that portion of the purchase price which he had previously paid. The manufacturer had expressly warranted the truck "to be free from defects in material and workmanship under normal use and service" and had limited its liability thereunder "to making good at its factory any part or parts thereof. . . ." The trial court permitted a recovery of the lost profits and the previously paid portion of the purchase price, but denied recovery for the cost of repairs. On appeal, the manufacturer contended that the damage award allowed by the trial court had exceeded that permissible under the theory of strict liability in tort, which theory had superseded the law of warranty in California by reason of Greenman v. Yuba Power Products, Inc., 59 Cal.2d 57, 27 Cal.Rtpr. 697, 377 P.2d 897 (1962).

The Supreme Court of California held that the abandonment of warranty did not extend to the commerical aspects of a transaction. As to those aspects, it was held that recovery must be based on the principles of warranty law and not on strict liability in tort. Inasmuch as the defendant in *Seely* had warranted that the truck was "free from defects in material and workmanship under normal use and service," the damages allowed by the trial court were held to have been proper. This was true, observed the court, even though they would not have been had the doctrine of strict liability in tort been applicable. The court's observation was bolstered by dictum, upon which the defendants in this case place great reliance, which stated that under California law pure economic losses are not recoverable in an action based on negligence. The dictum consists of the following statement:

> A consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market. . . . *Even in actions for negligence, a manufacturer's liability is limited to damages for physical injuries and there is no recovery for economic loss alone.*

63 Cal.2d at 18, 45 Cal.Rptr. at 23, 403 P.2d at 151. (emphasis added).

Two things should be said concerning the court's reference to the scope of liability in negligence. The first is that it must be understood as having been made in the context of an unavoidable undertaking to fix the spheres in the field of products liability within which warranties and strict liability were to operate. Too much should not be made of a restraint imposed on the scope of liability for negligence when it has been developed for the purpose of preserving an area within which warranties can function. The second is that this restraint has been cogently criticized as being unnecessary to an appropriate accommodation of warranty and tort liability. *See* Franklin, When Worlds Collide: Liability Theories and Disclaimers in Defective Product Cases, 18 Stan.L. Rev. 974, 1002-03 (1966). The recovery of economic losses sustained by an ultimate consumer, even absent privity with a negligent manufacturer, may or may not be desirable; but its allowance, in any event, would not make warranty principles redundant.

III.

Some Exceptions to the General Rule.

Doubt concerning the scope of *Seely* dictum is strengthened when the numerous exceptions or qualifications to the general rule are considered.

Prosser recognizes that a recovery for pure economic losses in negligence has been permitted in instances in which there exists "some special relation between the parties." Prosser at 952. The failure of the plaintiff to obtain a contract because of a telegraph company's negligent transmission of a message has been held to be legally cognizable, and is cited as an example of the "special relationship" qualification. *Id.*, at 952, n. 79. *See also* McQuilkin v. Postal Telegraph Cable Company, 27 Cal.App. 698, 151 P. 21 (1915) (injury from lost advantageous contract must not be remote and uncertain). Other examples which have been cited are the negligent failure to perform a gratuitous promise to obtain insurance, and the negligent delay in acting upon an application for insurance. *See* Prosser, at 952, n. 80, 81.

A more recent development in California law involves the right to recover, ab-

sent privity, from a defendant whose negligent failure to obtain a proper attestation of the will of a third party has deprived the plaintiff of a bequest which had been granted in the improperly attested will. Biakanja v. Irving, 49 Cal.2d 647, 320 P.2d 16 (1958). On appeal to the Supreme Court of California, the plaintiff's pure economic loss was held to be a legally cognizable injury, a position which has been subsequently reaffirmed in Lucas v. Hamm, 56 Cal.2d 583, 15 Cal.Rptr. 821, 364 P.2d 685 (1961) (recovery denied because of the absence of negligence).

The approach adopted by the California Supreme Court in *Biakanja* is particularly instructive. After stating that the question before it was "whether defendant was under a duty to exercise due care to protect plaintiff from injury and was liable for damages caused plaintiff by his negligence even though they were not in privity of contract," the court stated:

> The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm.

49 Cal.2d at 650, 320 P.2d at 19 (1958). It is thus obvious that California does not blindly follow the general rule upon which the defendants here rely.

It is but a short step from these two California cases to a body of law existing both in this country and in the British Commonwealth in which defendants engaged in certain professions, businesses, or trades have been held liable for economic losses resulting from the negligent performance of tasks within the course of their callings. One Commonwealth scholar has stated that "in a proper case a person may recover economic loss caused by the negligence of persons such as bankers, commission agents, real estate agents, accountants, surveyors, valuers, analysts, insurance brokers, stock brokers, government employees, doctors, architects, car salesmen who undertake to have cars insured, car testers, and drawers of cheques." Harvey, Economic Losses and Negligence, 50 Can.Bar Rev. 580, 603-04 (1972). *See also*, Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. [1964] A. C. 465.

The American cases reflect a similar development. There are numerous cases indicating that economic losses may be recovered for the negligence of pension consultants, accountants, architects, attorneys, notaries public, test hole drillers, title abstractors, termite inspectors, soil engineers, surveyors, real estate brokers, drawers of checks, directors of corporations, trustees, bailees and public weighers.

Recovery for pure economic loss legally attributable to the defendant's negligence has also been recognized in traditional maritime settings. Thus, fishermen in Scotland who worked under a profit-sharing arrangement with the owner of a trawler damaged by the defendant's negligence have been permitted to recover their portion of the anticipated profits of the fishing venture even though they suffered no physical injury. Main v. Leask [1910] S.C. 771 (Ct. of Session). More important, however, is the fact that this Circuit has reached precisely the same conclusion in an admiralty proceeding. Carbone v. Ursich, The Del Rio, 209 F.2d 178 (9th Cir., 1953). In so doing, we refused to apply the teaching of Robins Dry Dock and Repair Company v. Flint, *supra*, to the situation with which the fishermen were confronted, and observed:

> This long recognized rule [the right of fishermen to recover their share of the prospective catch] is no doubt a manifestation of the familar principle that seamen are the favorites of admiralty and their economic interests entitled to the fullest possible legal protection. These considerations have given rise to a special right comparable to that of a master to sue for the loss of services of his servant, or the right of a husband or father to sue for the loss of services of wife or child.

209 F.2d at 182.

Another instance in which a claim for economic loss, unaccompanied by any physical injury to the person or property of the claimant, has been recognized under admiralty law is illustrated by Aktieselskabet Cuzco v. The Sucarseco, 294 U.S. 394, 55 S.Ct. 467, 79 L.Ed. 942 (1935). The issue before the Court in that case was whether the owners of cargo, shipped on a vessel which ultimately collided with defendant's vessel, could recover for their general average contribution when both vessels were at fault and both were damaged. The Supreme Court held in the affirmative. Although the cargo was physically damaged by the collision, this fact appears to have had no bearing on the Court's resolution of the issue. Rather, the Court recognized that the right of the cargo owners to have their general average contribution restored sprang directly from the tort and was in no sense derivative or parasitically dependent upon the presence of a physical injury.

The right to recover for economic losses which are parasitic to an injury occurring to person or property is not questioned. *See e. g.*, Reynolds v. Bank of American National Trust and Savings Association, 53 Cal.2d 49, 345 P.2d 926 (1959) (loss of use of airplane destroyed by defendant's negligence held to be recoverable). Furthermore, this is the case even though frequently the magnitude of the economic loss so far overshadows that of the physical injury as to warrant the assertion that the general rule, barring recovery absent a physical injury, is but a formalism. *See* Harvey, *supra* at 585, 594–95.

This much abridged catalogue of exceptions and qualifications to the general rule can be brought to a close for purposes of our analysis by calling attention to several cases in which pollution of a stream has enabled one whose business is injured thereby to recover his lost profits. For example, in Fort Worth & Rio Grande Railway Company v. Hancock, 286 S.W. 335 (Tex.Civ.App.1926) the plaintiff, who operated a swimming pool in the channel of a river, was per-

mitted to recover lost profits which had resulted from the defendant's negligent pollution of the river. Similarly, downstream riparian owners, engaged in operating a business dependent upon fishing, have been permitted to recover for the injury to their business caused by the pollution of the stream. *See* Masonite Corporation v. Steede, 198 Miss. 530, 547, 23 So.2d 756 (1945); Hampton v. North Carolina Pulp Company, 223 N.C. 535, 27 S.E.2d 538 (1943). It should be noted that in each of these cases the plaintiff was a riparian owner, and in the latter two there was no indication that the defendant's conduct was merely negligent and not intentional. However, in neither *Masonite* nor *Hampton* does there appear any recognition that mere negligence would have absolved the defendants. Both assumed the existence of a nuisance which could well have rested upon the defendants' negligent conduct. *See* Prosser at 575.

Moreover, the plaintiffs' status as riparians does not make improper the classification of these cases as exceptions to, or qualifications of, the general rule which is relied upon by the defendants in the present action. The injury for which damages were sought in each case was the loss of anticipated profits —a pure economic loss as that term is normally understood. To permit riparianship to transmute this loss into an ordinary property loss for the purpose of allowing recovery does no harm. However, harm would be done if the fact that the plaintiffs in this case are not riparian owners was held to deprive them of the comfort these authorities provide.

IV.

The Instant Action.

It is thus apparent that we are not foreclosed by precedent from examining on its merits the issue presented by the defendants' motion for partial summary judgment. As we see it, the issue is whether the defendants owed a duty to the plaintiffs, commercial fishermen, to refrain from negligent conduct in their drilling operations, which conduct reasonably and foreseeably could have been anticipated to cause a diminution of the aquatic life in the Santa Barbara Channel area and thus cause injury to the plaintiffs' business.

In finding that such a duty exists, we are influenced by the manner in which the Supreme Court of California has approached the duty issue in tort law. In holding that the mother of a child, killed by the defendant's negligent operation of an automobile, could recover for emotional disturbance and shock even though she was not within the zone of physical impact, the court in Dillon v. Legg, 68 Cal.2d 728, 69 Cal.Rptr. 72, 441 P.2d 912 (1968) stated that:

> Defendant owes a duty, in the sense of a potential liability for damages, only with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous, and hence negligent, in the first instance. (See Keeton, Legal Cause in the Law of Torts (1963) 18-20; Seavey, Mr. Justice Cardozo and the Law of Torts (1939) 52 Harv.L.Rev. 372; Seavey, Principles of Torts (1942) 56 Harv.L. Rev. 72.)
>
> Harper and James state the prevailing view. The obligation turns on whether 'the offending conduct foreseeably involved unreasonably great risk of harm to the interests of someone other than the actor. . . . [T]he obligation to refrain from . . . particular conduct is owed only to those who are foreseeably endangered by the conduct and only with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous. Duty, in other words, is measured by the scope of the risk which negligent conduct foreseeably entails.' (2 Harper & James, The Law of Torts, *supra*, at p. 1018; fns. omitted.)
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> * * * * * *

Since the chief element in determining whether defendant owes a duty or an obligation to plaintiff is the fore-

seeability of the risk, that factor will be of prime concern in every case. Because it is inherently intertwined with foreseeability such duty or obligation must necessarily be adjudicated only upon a case-by-case basis.

68 Cal.2d at 739–740, 69 Cal.Rptr. at 79, 441 P.2d at 919–920.

While it is true that the earlier decision of the California Supreme Court in *Biakanja* does not accord "foreseeability of the risk" the commanding position which it was afforded in Dillon v. Legg, we can not escape the conclusion that under California law the presence of a duty on the part of the defendants in this case would turn substantially on foreseeability. That being the crucial determinant, the question must be asked whether the defendants could reasonably have foreseen that negligently conducted drilling operations might diminish aquatic life and thus injure the business of commercial fishermen. We believe the answer is yes. The dangers of pollution were and are known even by school children. The defendants understood the risks of their business and should reasonably have foreseen the scope of its responsibilities. To assert that the defendants were unable to foresee that negligent conduct resulting in a substantial oil spill could diminish aquatic life and thus injure the plaintiffs is to suppose a degree of general ignorance of the effects of oil pollution not in accord with good sense.

An examination of the other factors mentioned in *Biakanja* only strengthens our conclusion that the defendants in this case owed a duty to the plaintiffs. Thus, the fact that the injury flows directly from the action of escaping oil on the life in the sea, Askew v. American Waterways Operators, Inc., 411 U.S. at 333 n. 5, 93 S.Ct. 1590, the public's deep disapproval of injuries to the environment and the strong policy of preventing such injuries, all point to existence of a required duty.

The same conclusion is reached when the issue before us is approached from the standpoint of economics. Recently a number of scholars have suggested that liability for losses occasioned by torts should be apportioned in a manner that will best contribute to the achievement of an optimum allocation of resources. *See e. g.*, Calabresi, The Cost of Accidents, 69–73 (1970) (hereinafter Calabresi); Coase, The Problem of Social Cost, 3 J. Law & Econ. 1 (1960). This optimum, in theory, would be that which would be achieved by a perfect market system. In determining whether the cost of an accident should be borne by the injured party or be shifted, in whole or in part, this approach requires the court to fix the identity of the party who can avoid the costs most cheaply. Once fixed, this determination then controls liability.

It turns out, however, that fixing the identity of the best or cheapest cost-avoider is more difficult than might be imagined. In order to facilitate this determination, Calabresi suggests several helpful guidelines. The first of these would require a rough calculation designed to exclude as potential cost-avoiders those groups/activities which could avoid accident costs only at an extremely high expense. Calabresi at 140–43. While not easy to apply in any concrete sense, this guideline does suggest that the imposition of oil spill costs directly upon such groups as the consumers of staple groceries is not a sensible solution. Under this guideline, potential liability becomes resolved into a choice between, on an ultimate level, the consumers of fish and those of products derived from the defendants' total operations.

To refine this choice, Calabresi goes on to provide additional guidelines which, in this instance, have proven none too helpful. For example, he suggests an evaluation of the administrative costs which each party would be forced to bear in order to avoid the accident costs. Calabresi at 143–44. He also states that an attempt should be made to avoid an allocation which will impose some costs on those groups or activities which neither consume fish nor utilize those products of the defendants derived from their operations in the Santa Bar-

bara Channel. Calabresi at 144–50. On the record before us, we have no way of evaluating the relative administrative costs involved. However, we do recognize that it is probable that by imposing liability on the defendants some portion of the accident costs in this case may be borne by those who neither eat fish nor use the petroleum products derived from the defendants' operations in Santa Barbara.

Calabresi's final guideline, however, unmistakably points to the defendants as the best cost-avoider. Under this guideline, the loss should be allocated to that party who can best correct any error in allocation, if such there be, by acquiring the activity to which the party has been made liable. Calabresi at 150–52. The capacity "to buy out" the plaintiffs if the burden is too great is, in essence, the real focus of Calabresi's approach. On this basis there is no contest—the defendants' capacity is superior.

Our holding that the defendants are under a duty to commercial fisherman to conduct their drilling and production in a reasonably prudent manner so as to avoid the negligent diminution of aquatic life is not foreclosed by the fact that the defendants' negligence could constitute a public nuisance under California law. Contrary to the situation that existed in Oppen v. Aetna Insurance Company, *supra*, in which we held that an interference with the public's right of navigation in the navigable waters of California did not vest a private cause of action in those who lost the use of their private pleasure craft, in the case now before us the plaintiffs assert an injury to their commercial enterprises, not to their "occasional Sunday piscatorial pleasure." *Id.* at 260. The right of commercial fishermen to recover for injuries to their businesses caused by pollution of public waters has been recognized on numerous occasions. *See* Masonite Corporation v. Steede, *supra*; Hampton v. North Carolina Pulp Company, *supra*; Prosser, Private Action for Public Nuisance, 52 Va.L.Rev. 997, 1013–16 (1966). The injury here asserted by the plaintiff is a pecuniary loss of a particular and special nature limited to the class of commercial fishermen which they represent.

This injury must, of course, be established in the proceedings that will follow this appeal. To do this it must be shown that the oil spill did in fact diminish aquatic life, and that this diminution reduced the profits the plaintiffs would have realized from their commercial fishing in the absence of the spill. This reduction of profits must be established with certainty and must not be remote, speculative or conjectural. *See* McCormick, Damages, 97–101 (1935). These are not small burdens, nor can they be eased by our abhorrence of massive oil spills. All that we do here is to permit the plaintiffs to attempt to prove their case, and to reject the idea urged upon us by the defendants that a barrier to such an effort exists in the form of the rule that negligent interference with an economic advantage is not actionable.

Finally, it must be understood that our holding in this case does not open the door to claims that may be asserted by those, other than commercial fishermen, whose economic or personal affairs were discommoded by the oil spill of January 28, 1969. The general rule urged upon us by defendants has a legitimate sphere within which to operate. Nothing said in this opinion is intended to suggest, for example, that every decline in the general commercial activity of every business in the Santa Barbara area following the occurrences of 1969 constitutes a legally cognizable injury for which the defendants may be responsible. The plaintiffs in the present action lawfully and directly make use of a resource of the sea, *viz.* its fish, in the ordinary course of their business. This type of use is entitled to protection from negligent conduct by the defendants in their drilling operations. Both the plaintiffs and defendants conduct their business operations away from land and in, on and under the sea. Both must carry on their commercial enterprises in a reasonably prudent manner. Neither should be permitted negligently to inflict commercial injury on the other. We decide no more than this.

Affirmed.

ELY, Circuit Judge (concurring):

I concur in the result. Since, however, the written briefs filed by the parties contain no discussion of admiralty law, I conclude that all of the parties believed that, under their stipulation, the controversy would be resolved by application of California's law relating to torts. I therefore disassociate myself from that portion of my Brother Sneed's opinion which deals with the law of admiralty. I view those comments as constituting dictum unnecessary to our disposition of the appeal.

Note

Oppen v. Aetna Ins. Co., 485 F.2d 252 (9th Cir. 1973) was another of the many lawsuits which arose out of the Santa Barbara oil spill. It was brought by the owners of private pleasure crafts who sought recovery for impairment of their navigation rights in the channel and for damages to their boats through contact with the oil.

In determining that both claims were maritime torts within admiralty jurisdiction (28 U.S.C. 1333), the Ninth Circuit applied the "Executive Jet" test, which requires that the tort have a maritime situs and maritime nexus. The Court then dismissed the claim for impairment of navigation since it was not compensable under Federal maritime law because the spill interfered only with the public right to navigation and the plaintiffs could show no special damage. The claim for the physical damage to plaintiff's crafts were upheld.

Problem

The Warwick is a small river in Virginia which empties into the James River a short distance from the city of Hampton Roads. The City of Newport News (the City) has for many years operated pumping stations to pump sewage to sewage plants operated by the Hampton Roads Sanitation District Commission (the Commission). Because of pumping station overflows, raw sewage is frequently discharged into the river, causing the closing of oyster beds leased from the state of Virginia by William Moore.

Moore brings an action against the City and the Commission charging them with negligence and nuisance. The Commission has not been shown to have violated any statutory or regulatory provision with regard to its discharges. Should the City and the Commission be held liable? See Moore v. Hampton Roads Sanitation District Commission, _____ F.2d _____ (4th Cir. 1976).

Mr. Justice DOUGLAS delivered the opinion of the Court.

This action was brought by merchant shippers, world shipping associations, members of the Florida coastal barge and towing industry, and owners and operators of oil terminal facilities and heavy industries located in Forida, to enjoin application of the Florida Oil-Spill Prevention and Pollution Control Act, L.Fla.1970, c. 70-244 (hereafter referred to as the Florida Act). Officials responsible for enforcing the Florida Act were named as defendants, but the State of Florida intervened as a party defendant, asserting that her interests were much broader than those of the named defendants. A three-judge court was convened pursuant to 28 U.S.C. § 2281.

The Florida Act imposes strict liability for any damage incurred by the State or private persons as a result of an oil spill in the State's territorial waters from any waterfront facility used for drilling oil or handling the transfer or storage of oil ("terminal facility") and from any ship destined for or leaving such facility. Each owner or operator of a terminal facility or ship subject to the Act must establish evidence of financial responsibility by insurance or a surety bond.[1] In addition, the Florida Act provides for regulation by the State Department of Natural Resources with respect to containment gear and other equipment which must be maintained by ships and terminal facilities for the prevention of oil spills.

Several months prior to the enactment of the Florida Act, Congress enacted the Water Quality Improvement Act of 1970, 33 U.S.C. § 1161 et seq. (hereinafter referred to as the Federal Act). This Act subjects ship owners and terminal facilities to liability without fault up to $14,000,000 and $8,000,000, respectively, for cleanup costs incurred by the Federal Government as a result of oil spills. It also authorizes the President to promulgate regulations requiring ships and terminal facilities to maintain equipment for the prevention of oil spills. It is around that Act and the federally protected tenets of maritime law evidenced by Southern Pacific Co. v. Jensen, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086, and its progeny that the controversy turns. The District Court held that the Florida Act is an unconstitutional intrusion into the federal maritime domain. It declared the Florida Act null and void and enjoined its enforcement. 335 F. Supp. 1241.

[1] The case is here on direct appeal. We reverse. We find no constitutional or statutory impediment in permitting Forida, in the present setting of this case, to establish any "requirement or liability" concerning the impact of oil spillages on Florida's interests or concerns. To rule as the District Court has done is to allow federal admiralty jurisdiction to swallow most of the police power of the States over oil-spillage—an insidious form of pollution of vast concern to every coastal city or port and to all the estuaries on which the life of the ocean and the lives of the coastal people are greatly dependent.

I

It is clear at the outset that the Federal Act does not preclude but in fact allows state regulation. Section 1161(*o*) provides that:

"(1) Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel, or of any owner or operator of any onshore facility or offshore facility to any person or agency *under any provision of law for damages to any publicly-owned or privately-owned property* resulting from a discharge of any oil or from the removal of any such oil.

"(2) Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing *any requirement or liability* with respect to the discharge of oil into any waters within such State.

"(3) Nothing in this section shall be construed . . . to affect any State or local law not in conflict with this section." (Emphasis added.)

According to the Conference Report, "any State would be free to provide requirements and penalties similar to those imposed by this section or *addi-*

tional requirements and penalties. These, however, would be separate and independent from those imposed by this section and would be enforced by the States through its courts."[3] The Florida Act covers a wide range of "pollutants," § 3(7), and a restricted definition of pollution. § 3(8). We have here, however, no question concerning any pollutant except oil.

The Federal Act, to be sure, contains a pervasive system of federal control over discharges of oil "into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone." § 1161(b)(1). So far as liability is concerned, an owner or operator of a vessel is liable to the United States for actual costs incurred for the removal of oil discharged in violation of § 1161(b)(2) in an amount "not to exceed $100 per gross ton of such vessel or $14,000,000, whichever is lesser," § 1161(f)(1), except for discharges caused solely by an act of God, act of war, negligence of the United States or act or omission of another party. With like exceptions the owner or operator of an onshore or offshore facility is liable to the United States for the actual costs incurred by the United States in an amount not to exceed $8,000,000. § 1161(f)(2–3). But in each case the owner or operator is liable to the United States for the full amount of the costs where the United States can show that the discharge of oil was "the result of willful negligence or willful misconduct within the privity and knowledge of the owner." Comparable provisions of liability spell out the obligations of "a third party" to the United States for its actual costs incurred for the removal of the oil. § 1161(g).

So far as vessels are concerned the federal Limitation of Liability Act, 46 U.S.C. §§ 181–189, extends to damages caused by oil spills even where the injury is to the shore. Richardson v. Harmon, 222 U.S. 96, 106, 32 S.Ct. 27, 30, 56 L.Ed. 110. That Act limits the liabilities of the owners of vessels to the "value of such vessels and freight pending." 46 U.S.C. § 189.

Section 12 of the Florida Act makes all licensees[4] of terminal facilities "liable to the state for all costs of cleanup or other damage incurred by the state and for damages resulting from injury to others," it not being necessary for the State to plead or prove negligence.[4] There is no conflict between § 12 of the Florida Act and § 1161 of the Federal Act when it comes to damages to property interests, for the Federal Act reaches only costs of cleaning up. As respects damages, § 14 of the Florida Act requires evidence of financial responsibility of a terminal facility or vessel—provisions which do not conflict with the Federal Act.

The Solicitor General says that while the Limitation of Liability Act, *so far as vessels are concerned,* would override § 12 of the Florida Act by reason of the Supremacy Clause, the Limitation of Liability Act has no bearing on "facilities" regulated by the Florida Act. Moreover, § 12 has not yet been construed by the Florida courts and it is susceptible of an interpretation *so far as vessels are concerned* which would be in harmony with the Federal Act. Section 12 does not *in terms* provide for unlimited liability.

Moreover, while the Federal Act determines damages measured by the cost to the United States for cleaning up oil pollution, the damages specified in the Florida Act relate in part to the cost to the State of Florida in cleaning up the spillage. Those two sections are harmonious parts of an integrated whole. Section 1161(c)(2) directs the President to prepare a National Contingency for the containment, dispersal and removal of oil. The plan must provide that federal agencies "shall" act "in coordination with State and local agencies." Cooperative action with the States is also contemplated by § 1161(e), which provides that "[i]n addition to any other action taken by a State or local government" the President may, when there is an imminent and substantial threat to the public health or welfare, direct the United States Attorney of the district in question to bring suit to abate the threat. The reason for the

provision in § 1161(o)(2) stating that nothing in § 1161 pre-empts any State "from imposing any requirement or liability with respect to the discharge of oil into any waters within such State" is that the scheme of the Act is one which allows—though it does not require—cooperation of the federal regime with a state regime.

If Florida wants to take the lead in cleaning up oil spillage in her waters, she can use § 12 of the Florida Act and recoup her costs from those who did the damage. Whether the amount of costs she could recover from a wrongdoer are limited to those specified in the Federal Act and whether in turn this new Federal Act removes the pre-existing limitations of liability in the Limitation of Liability Act are questions we need not reach here. Any opinion on them is premature. It is sufficient for this day to hold that there is room for state action in cleaning up the waters of a State and recouping, at least within federal limits so far as vessels are concerned, her costs.

Beyond that is the potential claim under § 12 of the Florida Act for "other damage incurred by the state and for damages resulting from injury to others." The Federal Act in no way touches those areas. A State may have public beaches ruined by oil spills. Shrimp, clam, oyster and scallop beds may be ruined and the livelihood of fishermen imperiled.[4] The Federal Act takes no cognizance of those claims but only of costs to the Federal Government, if it does the cleaning-up.

We held in Skiriotes v. Florida, 313 U.S. 69, 61 S.Ct. 924, 85 L.Ed. 1193, that while Congress had regulated the size of commercial sponges taken in Florida waters, it had not dealt with any diving apparatus that might be used. Florida had such a law and was allowed to enforce it against one of its citizens. Chief Justice Hughes, speaking for the Court, said: "It is also clear that Florida has an interest in the proper maintenance of the sponge fishery and that the statute so far as applied to conduct within the territorial waters of Florida, in the absence of conflicting federal legislation, is within the police power of the State." *Id.*, at 75, 61 S.Ct. at 928.

Similarly, in Manchester v. Massachusetts, 139 U.S. 240, 266, 11 S.Ct. 559, 565, 35 L.Ed. 159, we stated that if Congress fails to assume control of fisheries in a bay, "the right to control such fisheries must remain with the state which contains such bays."

Florida in her brief accurately states that no remedy under the Federal Act exists for state or private property owners damaged by a massive oil slick such as hit England and France in 1967 in the *Torrey Canyon* disaster. The *Torrey Canyon* carried 880,000 barrels of crude oil. Today not only is more oil being moved by sea each year but the tankers are much larger.

"The average tanker used during World War II had a capacity of 16,000 tons, but by 1965 that average had risen to 27,000 tons, and new tankers delivered in 1966 averaged about 76,000 tons. A Japanese company has launched a 276,000 ton tanker, and other Japanese yards have orders for tankers as large as 312,000 tons. More than 60 tankers of 150,000 tons or more are on order throughout the world, tankers of 500,000 to 800,000 tons are on the drawing boards, and those of more than one million tons are thought to be feasible. On the new 1,010 foot British tanker 'Esso Mercia' two officers have been issued bicycles to help patrol the decks of the 166,890 ton vessel.

"The size of the tanker fleet itself is growing at a rate that rivals the growth in average size of new tankers. In 1955 the world tanker fleet numbered about 2,500 vessels. By 1965 it had increased to 3,500, and in 1968 it numbered some 4,300 ships. At the present time nearly one ship out of every five in the world merchant fleet is engaged in transporting oil, and nearly the entire fleet is powered by oil."

Our Coast Guard reports that while in 1970 there were 3,711 oil spills in our waters, in 1971 there were 8,736. The damage to state interests already caused by oil spills, the increase in the number of oil spills, and the risk of ever-increasing damage by reason of the size of modern tankers underlie the concern of coastal States.

4. Section 12 also provides that the pilot or the master of any vessel or person in charge of any licensee's terminal facility who fails "to give immediate notification of a discharge to the port manager and the nearest coast guard station" may be imprisoned for not more than two years or fined not more than $10,000.

While the Federal Act is concerned only with actual clean-up costs incurred by the Federal Government, the State of Florida is concerned with its own clean-up costs. Hence there need be no collision between the Federal Act and the Florida Act because, as noted, the Federal Act presupposes a coordinated effort with the States, and any federal limitation of liability runs to "vessels" not to shore "facilities." That is one of the reasons why the Congress decided that the Federal Act does not pre-empt the States from establishing either "*any requirement or liability*" respecting oil spills.

Moreover, since Congress dealt only with "clean-up" costs, it left the States free to impose "liability" in damages for losses suffered both by the State and by private interests. The Florida Act imposes liability without fault. So far as liability without fault for damages to state and private interests is concerned, the police power has been held adequate for that purpose. State statutes imposing absolute liability on railroads for *all* property lost through fires caused by sparks emitted from locomotive engines have been sustained. St. Louis & San Francisco R. Co. v. Mathews, 165 U.S. 1, 17 S.Ct. 243, 41 L.Ed. 611. The Federal Act, however, while restricted to clean-up costs incurred by the United States, imposes limited liability for those costs and provides certain exceptions, unless willfulness is established. Where liability is imposed by § 1161(f)(g), previously summarized, the United States may recover the full amount of the costs where the oil spillage was the result of "willful negligence or willful misconduct." If the coordinated federal plan in actual operation leaves the State of Florida to do the clean-up work, there might be financial burdens imposed greater than would have been imposed had the Federal Government done the clean-up work. But it will be time to resolve any such conflict between federal and state regimes when it arises.

Nor can we say at this point that regulations of the Florida Department of Natural Resources requiring "containment gear" pursuant to § 7 (2)(a) of the Florida Act would be *per se* invalid because the subject to be regulated requires uniform federal regulation. Cf. Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 80 S.Ct. 813, 4 L.Ed.2d 852. Resolution of this question, as well as the question whether such regulations will conflict with Coast Guard regulations promulgated on December 21, 1972, pursuant to § 1161(j)(1) of the Federal Act, 37 Fed. Reg. 28250, should await a concrete dispute under applicable Florida regulations. Finally, the provision of the Florida Act requiring the licensing of terminal facilities, a traditional state concern, creates no conflict *per se* with federal legislation. Section 1171(b)(1) of the Federal Act provides that federal permits will not be issued to terminal facility operators or owners unless the applicant first supplies a certificate from the State that his operation "will be conducted in a manner which will not violate applicable water quality standards." And Tit. I, § 102(b), of the recently enacted Ports and Waterways Safety Act of 1972, Pub.L. 92–340, 86 Stat. 426, 33 U.S.C. § 1222(b) (1970 ed., Supp. II), provides that the Act does not prevent "a State or political subdivision thereof from prescribing for structures only higher safety equipment requirements or safety standards than those which may be prescribed pursuant to this title."

II

And so, in the absence of federal preemption and any fatal conflict between the statutory schemes, the issue comes down to whether a State constitutionally may exercise its police power respecting maritime activities concurrently with the Federal Government.

The main barriers found by the District Court to the Florida Act are Southern Pacific Co. v. Jensen, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086, and its progeny. *Jensen* held that a maritime worker on a vessel in navigable waters could not constitutionally receive an award under New York's workmen's compensation law, because the remedy in admiralty was exclusive. Later, in Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 40 S.Ct. 438, 64 L.Ed. 834, after Congress expressly allowed the States in such cases to grant a remedy, the Court held that Congress had no such power.

But those decisions have been limited by subsequent holdings of this Court. As stated by Mr. Justice Frankfurter in Romero v. International Terminal Operating Co., 358 U.S. 354, 373, 79 S.Ct. 468, 480, 3 L.Ed. 368, *Jensen* and its progeny mark isolated instances where "state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system." Mr. Justice Frankfurter added, however: "But this limitation still leaves the States a wide scope. State-created liens are enforced in admiralty. State remedies for wrongful death and state statutes providing for the survival of actions, both historically absent from the relief offered by the admiralty, have been upheld when applied to maritime causes of action. Federal courts have enforced these statutes. State rules for the partition and sale of ships, state laws governing the specific performance of arbitration agreements, state laws regulating the effect of a breach of warranty under contracts of maritime insurance—all these laws and others have been accepted as rules of decision in admiralty cases, even, at times, when they conflicted with a rule of maritime law which did not require uniformity." *Id.*, at 373–374, 79 S.Ct., at 480–481.

Moreover, in Just v. Chambers, 312 U.S. 383, 61 S.Ct. 687, 85 L.Ed. 903, we gave our approval to The City of Norwalk, D.C., 55 F. 98, written by Judge Addison Brown, holding that a State may modify or supplement maritime law even by creating a liability which a court of admiralty would recognize and enforce, provided the state action is not hostile "to the characteristic features of the maritime law or inconsistent with federal legislation," 312 U.S., at 388, 61 S.Ct., at 691. Mr. Chief Justice Hughes after citing Steamboat Co. v. Chase, 16 Wall. 522, 21 L.Ed. 369, and Sherlock v. Alling, 93 U.S. 99, 23 L.Ed. 819, went on to hold that, while no suit for wrongful death would lie in the federal courts under general maritime law, state statutes giving damages in such cases were valid. He said, "The grounds of objection to the admiralty jurisdiction in enforcing liability for wrongful death were similar to those urged here; that is, that the Constitution presupposes a body of maritime law, that this law, as a matter of interstate and international concern, requires harmony in its administration and cannot be subject to defeat or impairment by the diverse legislation of the States, and hence that Congress alone can make any needed changes in the general rules of the maritime law. But these contentions proved unavailing and the principle was maintained that a State, in the exercise of its police power, may establish rules applicable on land and water within its limits, even though these rules incidentally affect maritime affairs, provided that the state action 'does not contravene any acts of Congress, nor work any prejudice to the characteristic features of the maritime law, nor interfere with its proper harmony and uniformity in its international and interstate relations.' It was decided that the state legislation encountered none of these objections. The many instances in which state action had created new rights, recognized and enforced in admiralty, were set forth in *The City of Norwalk*, and reference was also made to the numerous local regulations under state authority concerning the navigation of rivers and harbors. There was the further pertinent observation that the maritime law was not a complete and perfect system and that in all maritime countries there is a considerable body of municipal law that underlies the maritime law as the basis of its administration. These views find abundant support in the history of the maritime law and in the decisions of this Court." 312 U.S., at 389–390, 61 S.Ct., at 692.

Mr. Chief Justice Hughes added that our decisions as of 1941, the date of Just v. Chambers, gave broad "recognition of the authority of the States to create rights and liabilities with respect to conduct within their borders, when the state action does not run counter to federal laws or the essential features of an exclusive federal jurisdiction." *Id.*, at 391, 61 S.Ct., at 693.

Historically, damages to the shore or to shore facilities were not cognizable in admiralty. See, *e. g.*, The Plymouth, 3 Wall. 20, 18 L.Ed. 125; Martin v. West, 222 U.S. 191, 32 S.Ct. 42, 56 L.Ed. 159. Mr. Justice Story wrote in 1813, "In regard to torts I have always understood, that the jurisdiction of the admiralty is exclusively dependent upon the locality of the act. The admiralty has not, and never (I believe) deliberately claimed to have any jurisdiction

over torts, except such as are maritime torts, that is, such as are committed on the high seas, or on waters within the ebb and flow of the tide."[9] Thomas v. Lane, 23 Fed.Cas. 957, 960, No. 13,902 (CC Me.).

On June 19, 1948, Congress enacted the Admiralty Extension Act, 46 U.S.C. § 740.[10] The Court considered the Act in Victory Carriers, Inc. v. Law, 404 U. S. 202, 92 S.Ct. 418, 30 L.Ed.2d 383. In that case, the Court held that the Admiralty Extension Act did not apply to a longshoreman performing loading and unloading services on the dock. The longshoreman was relegated to his remedy under the state workmen's compensation law. *Id.*, at 215, 92 S.Ct., at 426. The Court said, "At least in the absence of explicit congressional authorization, we shall not extend the historic boundaries of the maritime law." *Id.*, at 214, 92 S.Ct., at 426.[11]

The Admiralty Extension Act has survived constitutional attack in the lower federal courts [12] and was applied without question by this Court in Gutierrez v. Waterman S. S. Corp., 373 U.S. 206, 83 S.Ct. 1185, 10 L.Ed.2d 297. The Court recognized in *Victory Carriers*, however, that the Act may "intrude on an area that has heretofore been reserved for state law." *Id.*, 404 U.S., at 212, 92 S.Ct., at 425. It cautioned that under these circumstances, "we should proceed with caution in construing constitutional and statutory provisions dealing with the jurisdiction of the federal courts." *Ibid.* While Congress has extended admiralty jurisdiction beyond the boundaries contemplated by the framers, it hardly follows from the constitutionality of that extension that we must sanctify the federal courts with exclusive jurisdiction to the exclusion of powers traditionally within the competence of the States. One can read the history of the Admiralty Extension Act without finding any clear indication that Congress intended that sea-to-shore injuries be exclusively triable in the federal courts.

Even though Congress has acted in the admiralty area, state regulation is permissible, absent a clear conflict with the federal law. Thus in Kelly v. Washington ex rel. Foso Co., 302 U.S. 1, 58 S.Ct. 87, 82 L.Ed. 3, it appeared that, while Congress had provided a comprehensive system of inspection of vessels on navigable waters, *id.*, at 4, 58 S.Ct., at 89, the State of Washington also had a comprehensive code of inspection. Some of those state standards conflicted with the federal requirements, *id.*, at 14–15, 58 S.Ct., at 94; but those provisions of the Washington law relating to safety and seaworthiness were not in conflict with the federal law. So the question was whether the absence of congressional action and the need for uniformity of regulation barred state action. Mr. Chief Justice Hughes, writing for the Court, ruled in the negative, saying:

> "A vessel which is actually unsafe and unseaworthy in the primary and commonly understood sense is not within the protection of that principle. The state may treat it as it may treat a diseased animal or unwholesome food. In such a matter, the state may protect its people without waiting for federal action providing the state action does not come into conflict with federal rules. If, however, the state goes farther and attempts to impose particular standards as to structure, design, equipment, and operation, which in the judgment of its authorities may be desirable but pass beyond what is plainly essential to safety and seaworthiness, the state will encounter the principle that such requirements, if imposed at all, must be through the action of Congress which can establish a uniform rule. Whether the state in a particular matter goes too far must be left to be determined when the precise question arises." *Id.*, at 15, 58 S.Ct., at 94.

That decision was rendered before the Admiralty Extension Act was passed.

Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 80 S.Ct. 813, 4 L.Ed.2d 852, however, arose after that Act became effective. Ships cruising navigable waters and inspected and licensed under federal acts were charged with violating Detroit's Smoke Abatement Code. The company and its agents were, indeed, criminally charged with violating that Code. The Court in sustaining the state prosecution said:

"The ordinance was enacted for the manifest purpose of promoting the health and welfare of the city's inhabitants. Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power. In the exercise of that power, the states and their instrumentalities may act, in many areas of interstate commerce and maritime activities, concurrently with the federal government." *Id.*, at 442, 80 S.Ct., at 815.

The Court reasoned that there was room for local control since federal inspection was "limited to affording protection from the perils of maritime navigation," while the Detroit ordinance was aimed at "the elimination of air pollution to protect the health and enhance the cleanliness of the local community." *Id.*, at 445, 80 S.Ct., at 817. The Court, in reviewing prior decisions, noted that a federally licensed vessel was not exempt (1) "from local pilotage laws"; (2) "local quarantine laws"; (3) "local safety inspections"; or (4) "local regulation of wharves and docks." *Id.*, at 447, 80 S.Ct., at 818.

It follows, *a fortiori*, that sea-to-shore pollution—historically within the reach of the police power of the States—is not silently taken away from the States by the Admiralty Extension Act, which does not purport to supply the exclusive remedy.

As discussed above, we cannot say with certainty at this stage that the Florida Act conflicts with any federal Act. We have only the question whether the waiver of pre-emption by Congress in § 1161(*o*)(2) concerning the imposition by a State of "any requirement or liability" is valid.

It is valid unless the rule of *Jensen* and *Knickerbocker Ice* is to engulf everything that Congress chose to call "admiralty," pre-empting state action. *Jensen* and *Knickerbocker Ice* have been confined to their facts, *viz.*, to suits relating to the relationship of vessels, plying the high seas and our navigable waters, and to their crews. The fact that a whole system of liabilities was established on the basis of those two cases, led us years ago to establish the "twilight zone" where state regulation was permissible. See Davis v. Department of Labor and Industries of Washington, 317 U.S. 249, 252-253, 63 S.Ct. 225, 227, 87 L.Ed. 246. Where there was a hearing by a federal agency and a conclusion by that agency that the case fell within the federal jurisdiction, we made its findings final. *Ibid.* Where there were no such findings, we presumed state law, in terms applicable, was constitutional. 317 U.S., at 257-258, 63 S.Ct., at 229. That is the way the "twilight zone" has been defined.

Jensen thus has vitality left. But we decline to move the *Jensen* line of cases shoreward to oust state law from any situations involving shoreside injuries by ships on navigable waters. The Admiralty Extension Act does not pre-empt state law in those situations. See Nacirema Operating Co. v. Johnson, 396 U.S. 212, 90 S.Ct. 347, 24 L.Ed.2d 371.

The judgment below is reversed.

Judgment reversed.

PORTLAND PIPE LINE CORP. v. ENVIRONMENTAL IMPROVEMENT COM'N.

307 A.2d 1 (1973).

Like many other coastal states, Maine enacted a comprehensive statute designed to create liability for damages due to pollution discharges from ships. The act establishes a damage fund created by a tax levied on the oil being transported. Terminal facility operators are made strictly liable vicariously for damages caused by vessels using thier facilities.

The oil industry challenged the Maine Act alleging that it violated both the Maine Constitution and the United States Constitution on numerous grounds. The Maine Supreme Court sustained the Act against the constitutional challenges and then went on to consider whether the Act invaded the Admiralty jurisdiction of the Federal courts.

VIII Admiralty

Plaintiffs contend the Act unconstitutionally abridges Article III, Section 2, Clause 1, of the United States Constitution. That clause provides:

> "The judicial Power shall extend . . to all Cases of admiralty and maritime jurisdiction."

It is asserted that the Act "purports to make radical changes in substantive maritime law."

The Admiralty Clause does not permit either Congress or the States to deprive the Federal Courts of admiralty jurisdiction. Panama R.R. Co. v. Johnson, 264 U.S. 375, 44 S.Ct. 391, 68 L.Ed. 748 (1924). This Court has recognized as much in Warren v. Kelley, 80 Me. 512, 15 A. 49 (1888). See also, Berry v. M. F. Donovan & Sons, 120 Me. 457, 115 A. 250 (1921).

38 M.R.S.A. § 551(2)D provides that claims arising under the Act shall be recoverable only in the manner provided by the Act and that the remedies provided to those harmed by oil spills under the Act are to be "exclusive."

The doctrine of presumptive constitutionality of statutory enactments is given full effect in challenges based on the Admiralty Clause. Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 80 S.Ct. 813, 4 L.Ed.2d 852 (1960); Davis v. Dept. of Labor, 317 U.S. 249, 63 S.Ct. 225, 87 L.Ed. 246 (1942).

Applying this presumption, we do not find that the Legislature intended to preclude those injured by oil spills from seeking relief in a Federal Court.

Section 551 nowhere refers to Federal Courts.

We hold that the Legislature intended to act within its constitutionally limited area of power. The forum provided by the Act, the board of arbitration established by Section 551(3), is intended to be the "exclusive" *state* forum for resolving damage claims arising from oil spills.

Plaintiffs next contend that, although the arbitration procedure is the sole *state* forum available for the resolution of oil spill damages and that those injured by oil spills are free to seek relief in a Federal Court, the concurrent state remedy is not "saved to suitors" because it is not "a common law remedy."

The relief granted to suitors under the Act is a monetary award based upon damages and is the traditional form of relief at common law.

It is the method of determining damages, i.e., by a board of arbitration rather than by a judge or a jury, to which plaintiffs object.

Plaintiffs rely upon Southern Pacific Co. v. Jensen, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086 (1917). In *Jensen* an employee was killed while engaged in the unloading of his employer's steamship. The Workmen's Compensation Commission of New York awarded funeral expenses and periodic compensation to the widow and two children of the deceased. This compensation was related by formula to the deceased's weekly wage. The Commission's award was based upon absolute liability and was predicated upon the "arising out of" and in "the course of" requirements of the Workmen's Compensation statute.

While the *Jensen* Court was concerned with the absolute liability issue, such issue is not relevant to the specific question now before us. We are here concerned only with the state forum and procedure and will discuss substantive issues *infra*.

The Court in *Jensen* held:

> "The remedy which the Compensation Statute attempts to give is of a character wholly unknown to the common law, *incapable of enforcement* by the ordinary processes of any court and is not saved to suitors from the grant of exclusive jurisdiction." (Emphasis added) 244 U.S. at 218, 37 S.Ct. at 530.

The remedy provided by the New York statute required an application of a system of damages unknown to the common law. It also required continuing jurisdiction of

the Commission because the awards were to be altered or ceased in the event of certain contingencies. What seems of foremost importance is that the remedy provided by the State of New York could not have been provided by an admiralty court.

The remedy provided by the Act to those harmed by oil spills is not like the remedy in *Jensen*.

The remedy is provided by determining actual damages.

The relief is afforded by a lump sum payment. This remedy, a typical common law remedy could easily be enforced by an admiralty court.

Neither the savings clause nor the holding of *Jensen* were concerned with the nature of the forum. The concern was, rather, that the remedy offered to suitors by the state was not of a type, "known to the common law," a remedy which an admiralty court could enforce.

Since the remedy provided by the Act is one that is enforceable in an action in a common law court, it falls within the savings clause. Panama R.R. Co. v. Vasquez, 271 U.S. 557, 46 S.Ct. 596, 70 L.Ed. 1085 (1926).

Even if *Jensen* were construed to forbid states affording a common law remedy in a forum not known to the common law, it appears that holding has been limited to the specific facts of that case. *Jensen* has no remaining vitality beyond that which may continue as to State Workmen's Compensation laws. Standard Dredging Corp. v. Murphy, 319 U.S. 306, 63 S.Ct. 1067, 87 L.Ed. 1416 (1943). In *Standard Dredging* the Court refused to extend *Jensen* into the area of state unemployment insurance.

The State urges that in the wake of the confusion caused by *Jensen*, the Supreme Court has interpreted the savings clause in a manner so as to accommodate state and federal interests. The touchstone of the analysis is the federal interest in a uniform law of admiralty. See, Standard Dredging Corp. v. Murphy, supra, and Davis v. Dept. of Labor, supra.

In Romero v. International Terminal Operating Co., 358 U.S. 354, 79 S.Ct. 468, 3 L.Ed.2d 368 (1959), the court stated that

> ". . . if one thing is clear it is that the source of law in saving-clause actions cannot be described in absolute terms. Maritime Law is not a monistic system. The State and Federal Governments jointly exert regulatory powers today as they have played joint roles in the development of maritime law throughout our history." 358 U.S. at 374, 79 S.Ct. at 481.

No federal interest is infringed upon by the creation of a board of arbitration to decide those damage questions presented in a state forum.

On the other hand, the State's objective of providing prompt resolution of those claims is a valid interest, inasmuch as it facilitates the rapid clean-up of private property and provides support to those whose means of employment have been destroyed as a result of an oil spill.

For these reasons the plaintiffs' claim that the Act seeks to divest the federal courts of admiralty jurisdiction, and that the Act has established a procedure of arbitration for resolving damage claims which is not authorized by the "savings clause," must fail.

(B) It is the position of the plaintiffs that the Act creates *substantive* admiralty law which is either novel or which conflicts with existing admiralty law.

The permissible role of the states in creating substantive maritime law was recently considered in Askew v. American Waterways, 411 U.S. 325, 93 S.Ct. 1590, 36 L.Ed.2d 280 (1973). Relying upon Just v. Chambers, 312 U.S. 383, 61 S.Ct. 687, 85 L.Ed. 903 (1941) and The City of Norwalk, 55 F. 98 (S.D.N.Y.1893), the Court stated the law to be that

> ". . . a State, in the exercise of its police power, may establish rules applicable on land and water within its limits, even though these rules incidentally affect maritme affairs, provided that the state action 'does not contravene any acts of Congress, nor work any prejudice to the characteristic features of the maritime law, nor interfere with its proper harmony and uniformity in its international and interstate relations.'" 411 U.S. at 339, 93 S.Ct. at 1599.

The contention that the state may not create "new" maritime law is untenable.

The role of state created rights and obligations in the maritime area was discussed at length in Romero v. International Terminal Operating Co., supra.

> "Although the corpus of admiralty law is federal in the sense that it derives from the implications of Article III evolved by the courts, to claim that all enforced rights pertaining to matters maritime are rooted in federal law is a destructive oversimplification of the highly intricate interplay of the States and the National Government in their regulation of maritime commerce. It is true that state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system. But this limitation still leaves the States a wide scope." 358 U. S. at 373, 79 S.Ct. at 480.

Included in this "wide scope" is the establishment of a state regulatory system and the imposition of absolute liability upon these plaintiffs to protect Maine's coast from this "insidious form of pollution." Askew v. American Waterways.

The Court there stated that

> "Historically, damages to the shore or to shore facilities were not cognizable in admiralty." 411 U.S. at 340, 93 S.Ct. at 1599.

Suits to recover such damages were brought within the scope of admiralty jurisdiction by the enactment, in 1948, of the Admiralty Extension Act. (46 U.S.C. § 740). The Supreme Court considered that Act in Victory Carriers, Inc. v. Law, 404 U.S. 202, 92 S.Ct. 418, 30 L.Ed.2d 383 (1971). The Court held that the exclusive jurisdiction of the Federal Courts in admiralty should not be extended beyond that extended by the framers of the Constitution unless Congress clearly states such an intention.

In considering the effect of the Admiralty Extension Act upon an oil conveyance law similar in many respects to the Maine Act, the *Askew* Court stated that

> ". . . sea-to-shore pollution—historically within the reach of the police power of the State—is not silently taken away from the States by the Admiralty Extension Act, which does not purport to supply the exclusive remedy." 411 U.S. at 343, 93 S.Ct. at 1601.

The rigid requirement of uniformity stated in *Jensen* and Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 40 S.Ct. 438, 64 L.Ed. 834 (1920), was held not to preempt state action in the area of controlling oil pollution.

The opinion of the Court in *Askew* has resolved the question of whether or not the regulations and absolute liability imposed upon terminals violates the uniformity requirement of the Admiralty Clause against plaintiffs.

The issue raised here that was not before the Court in *Askew* is whether the imposition of vicarious liability upon plaintiffs is barred by the need for uniformity.

Plaintiffs cite Somes v. White, 65 Me. 542 (1876), for the proposition that vicarious liability may not be applied in maritime law. In *Somes* this Court refrained from adopting, for reasons of policy, a form of vicarious liability upon an owner of a ship. The fact that our Court did not believe that public policy required the adoption of vicarious liability on the facts before it in *Somes* is no basis for deciding that a legislative policy decision on different facts cannot stand.

Plaintiffs' argument seems to be, [relying upon *Jensen* and *Knickerbocker Ice Co.*] that uniformity of admiralty law is an end in and of itself.

> In our view of the cases, uniformity is required only when there is a *national* interest at stake.

Plaintiffs have cited no *national* interest which would be affected by the imposition upon oil terminals of vicarious liability. On the other hand the state interest in having an entity over which it can exercise jurisdiction in recovering costs and damages resulting from oil spills is both practical and compelling.

The imposition of vicarious liability does no violence to any *federal* interest and thus does not offend the uniformity requirement of the Admiralty Clause.

Since the Act does not violate the dormant Admiralty Clause, plaintiffs' claim of substantive violation of admiralty law must

fail unless they can demonstrate that the Act conflicts with specific federal enactments.

Plaintiffs contend that the Act is inconsistent with existing maritime law and thus violates the Admiralty Clause. They also contend that the Act is inconsistent with other Congressional enactments in violation of the Supremacy Clause.

We shall treat these alleged conflicts with federal law individually.

Plaintiffs recognize that the "presently operative" Congressional enactment in this area is the Water Quality Improvement Act of 1970. This Act was discussed at length by the Supreme Court in *Askew*. The Court upheld the waiver of preemption contained in the Federal Act. This waiver allows the states to impose unlimited, strict liability on terminals for "losses suffered both by the State and by private interests." Since the Federal Act contemplated State-Federal cooperation, the Court held that the recovery of Federal clean-up costs did not preclude the State from recovering the moneys it expended in clean-up operations.

The *Askew* decision left two questions unanswered. They are:

> "whether the amount of [clean-up] costs [recoverable by a State] . . . are limited to those specified in the Federal Act and whether in turn this new Federal Act removes the pre-existing limitations on liability in the Limitation of Liability Act . . ."

Plaintiffs argue that inasmuch as the Act provides no limit on the amount of clean-up costs recoverable by the State, it conflicts with the limit established in the Federal Act. Section 1321(*o*) of the Federal Act limits the liability of an onshore oil facility for costs of federal clean-up procedures to an amount not to exceed eight million dollars.

The Federal Act refers specifically to *federal* clean-up costs.

In light of the contemplated federal-state cooperation in containing and cleaning-up oil spills, it is unlikely that if such a joint effort resulted in the Federal Government spending eight million dollars, that Congress intended the State to go unreimbursed. The Senate Committee took care to point out that no provision of the Federal Act should be read to affect the right of a state to establish "absolute liability *without limits*" for oil discharges. S.Rep. No. 91–351, 91st Cong., 1st Sess. 20 (1969). (Emphasis added.) The conference report on this issue declared that a state is "free to provide requirements and penalties similar to those imposed by this section or additional requirements and penalties." H. R.Rep. No. 91–940, 91st Cong., 2d Sess. 42 (1970).

We hold that Congress did not intend to restrict the states to the eight million dollar limit imposed on reimbursement of federal clean-up costs.

The Legislature has not created a conflict with the Federal Act by failing to so limit liability under the Act.

This conclusion also resolves plaintiffs' contention that the Act conflicts with the Water Quality Improvement Act by providing fewer defenses to a reimbursement suit.

The State waives reimbursement of the costs of its clean-up operation in instances where the spill is the result of an act of God, war or government.

The Federal Act waives reimbursement when the spill is the fault of third persons.

The Maine Act, in addition, imposes vicarious liability upon an oil terminal for spills caused by vessels destined for or departing from that terminal. We believe the waiver of preemption found in 33 U.S.C. § 1321(*o*) is broad enough to allow the State to impose liability in instances where liability is not imposed by the federal law. That provision when construed with the statements of Congressional intent, cited supra, indicates to us that Congress left the states free to devise whatever standards of liability were deemed necessary to realize the State's objectives.

Since the liability imposed by the Act does not violate due process it is a valid legislative act not in conflict with the federal statute.

Plaintiffs next contend that the Act, inasmuch as it does not limit the liability of vessels, is in conflict with the fed-

eral Limitation of Liability Act. The liability of owners of vessels is limited to the "value of such vessels and freight pending." 46 U.S.C. § 189. This limitation extends to damages caused by oil spills even when the injury is to the shore. Richardson v. Harmon, 222 U.S. 96, 32 S.Ct. 27, 56 L.Ed. 110 (1911).

We note that the Act, *by its terms*, does not provide for unlimited liability. In fact the Act does not seek to define the limits of the liability of vessels. It merely states that they "shall be liable . . . for all costs of clean-up or other damage incurred by the State." 38 M.R.S.A. § 552(2).

This language is identical to that contained in the Florida Act before the Supreme Court in *Askew*. (Fla.Stat. § 376.-12, F.S.A.).

The State acknowledges in its brief that any suits against vessels for reimbursement, whether in a state or federal forum, must be decided by applying fixed maritime law. This would include, of course, an application of federal liability limits.

Plaintiffs argue that the regulatory powers of the Commission under 38 M.R.S.A. § 546(4) attempt to set up a "conflicting, inconsistent and duplicative" system of regulation.

Plaintiffs' burden in this instance is a heavy one.

They must show "repugnance or conflict . . . between the federal and state regulations" such that these provisions cannot "be reconciled or consistently stand together." Kelly v. Washington, 302 U.S. 1, 58 S.Ct. 87, 82 L.Ed. 3 (1937).

The one specific conflict set forth by plaintiffs concerns the establishment of anchorage areas by the Commission. The pertinent federal law directs the Secretary of Transportation to define anchorage grounds when required by "maritime or commercial interests." This power was granted to the Secretary in 1915. 38 Stat. 1053.

As yet no anchorage grounds have been designated in Maine by the Secretary of Transportation.

This is hardly a "repugnance or conflict" which cannot be reconciled.

In any event, the regulations promulgated by the Commission render plaintiffs' argument on this point moot. Article XII of those regulations provides:

> "In the case of any conflict of these regulations with Federal Law or with a mandatory rule, regulation or order fo (sic) the Federal Government or its agencies, such Federal Law, rule, regulation or order shall govern."

In light of this provision a facial attack of conflict with federal regulations must fail.

Plaintiffs' final contention is that the Act interferes with the conduct of foreign affairs and conflicts with international treaties.

The supremacy of the federal government in the area of foreign affairs is unquestioned. Hines v. Davidowitz, 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581 (1941).

When the federal government has by treaty established rights and obligations, the treaty is the supreme law of the land.

No state can add to or take from the force and effect of such treaty. Missouri v. Holland, 252 U.S. 416, 40 S.Ct. 382, 64 L.Ed. 641 (1920). We have recognized as much in Opinion of the Justices, 155 Me. 141, 152 A.2d 173 (1959).

The 1954 International Convention for the Prevention of Pollution of the Sea by Oil allows certain discharges of oil, i. e., to save a life or to secure the safety of the vessel. Plaintiffs urge that the Act, by imposing liability for all spills, contravenes the terms of the treaty.

However, Article XI of the treaty makes plain the intent of the Convention not to affect rules governing territorial sea.

That Article provides that nothing in the Convention should be construed as derogating from the powers of any of the parties to take measures *within its jurisdiction* concerning matters to which the Convention relates. In ratifying the Convention, the United States specified that its acceptance was subject

> "to the understanding that Article XI effectively reserves to the parties to the

Convention freedom of legislative action in *territorial* waters . . . anything in the Convention which may appear to be contrary notwithstanding." [1961] 3 U.S.T. 3024 T.I.A.S. 4900. (Emphasis added)

This freedom of action was granted to the states by Section 11 of the Water Quality Improvement Act.

The issue then becomes whether the jurisdiction of the Commission extends only to territorial waters.

38 M.R.S.A. § 544(1) extends the jurisdiction of the Commission 12 miles from the coastline of the State.

This plaintiffs claim is an overreaching of the 3-mile limit historically recognized by the United States.

In State v. Ruvido, 137 Me. 102, 15 A.2d 293 (1940), this Court said, quoting Commonwealth v. Manchester, 152 Mass. 230, 240, 25 N.E. 113, 116 (1890):

"We regard it as established that as between nations the *minimum* limit of a nation over tide waters is a marine league [3 miles] from its coast . . . ." (Emphasis supplied)

In State v. Richardson, Me., 285 A.2d 842 (1972), we stated in reference to *Ruvido* that

"By this principle the Court decided that the territorial waters over which Maine has jurisdiction and sovereignty embraces a three mile limit." 285 A.2d at 844 n. 3.

Since the United States has by treaty reserved the right to legislate in territorial waters alone, and has entered into an international agreement concerning the seas beyond its territorial waters, the freedom of the State of Maine to act in this area is limited to that area considered by the United States to be within its territory.

Our attention has not been called to a provision of any treaty, Act of Congress, or decision of the Supreme Court of the United States, limiting territorial jurisdiction of the United States to tidewaters within 3 miles of the coast of the United States.

Our research has disclosed no such provision.

This being so, we cannot say the provision of this statute which extends jurisdiction over tidewaters to a point 12 miles from the Maine coast is invalid.

We have carefully examined the provisions of 38 M.R.S.A. §§ 541–557, to determine whether or not, as the plaintiffs contend, the Act or any part thereof offends against either the Constitution of the State of Maine or the Constitution of the United States. While doing so, we have been mindful of the words of Mr. Justice Story, written for a unanimous Court, in Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 4 L.Ed. 97 (1816):

"This constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. It was foreseen that this would be a perilous and difficult, if not an impracticable, task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications, which, at the present, might seem salutary, might, in the end, prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers, as its own wisdom, and the public interests, should require." 14 U.S. (1 Wheat.) at 326–327.

The Legislature of Maine in passing the Act had a legitimate object to effectuate.

It has molded and modeled the exercise of its powers as its wisdom and the public interest required.

ATLANTIC RICHFIELD COMPANY v. EVANS, No. C75-648M
(D. Wash. Sept. 23, 1976)

Probable jurisdiction noted, U.S. Supreme Court, 45 U.S.L.W., 3586 (Feb. 28, 1977) sub nom. Ray v. Atlantic Richfield Co., No. 76-930.

Per curiam (Goodwin, C.J., McGovern & East, JJ.):

Atlantic Richfield Company (Arco) and Seatrain Lines, Inc., sued named officials of the State of Washington to enjoin enforcement of a 1975 Washington law regulating oil tankers operating in the Puget Sound. Jurisdiction is conferred by 28 U.S.C. §§1331 and 1337, and this three-judge court was convened in accordance with 28 U.S.C. §§2281, 2284.[1]

At the outset, the State of Washington challenges our jurisdiction, asserting sovereign immunity under the Eleventh Amendment. Aware of the rule in *Ex parte Young*, 209 U.S. 123 (1908), the State invites us to "overrule" it, or at least to restrict the scope of cases falling within the *Young* "exception" to the Eleventh Amendment. The invitation is attractively and persuasively argued, but we decline it. The Supreme Court, if it chooses to do so,[2] will have ample opportunity to reconsider *Young*.

The challenged statutes are found in Chapter 125, Laws of Washington, 1975, 1st Extra Sess., codified at R.C.W. §§88.16.170 *et seq.* (The Tanker Law). The Tanker Law regulates oil tankers operating in Puget Sound.[3] Section 2 of the Tanker Law requires any tanker in excess of 50,000 deadweight tons (dwt) to employ a locally licensed pilot. Section 3(1) absolutely prohibits "supertankers," that is, those larger than 125,000 dwt. And §3(2) prescribes some minimum design specifications (shaft horsepower, twin screws, double bottoms, and twin radars) for tankers between 40,000 and 125,000 dwt. A proviso in §3(2) waives these design specifications for tankers accompanied by an appropriate complement of tugboats.

Arco and Seatrain contend that the state's restrictions are preempted by federal regulation in the field, are violative of the commerce clause, and invade the foreign affairs powers of the United States.

We are persuaded that federal law has preempted the field. Title I of the Ports and Waterways Safety Act of 1972 (the PWSA), 33 U.S.C. §§1221 *et seq.*, establishes a comprehensive federal scheme for regulating the operations, traffic routes, pilotage, and safety design specifications of tankers. Under the PWSA, the Coast Guard can create traffic-control systems for Puget Sound, and it has done so. 33 C.F.R. pt. 161, subpt. B. The PWSA gives the Coast Guard authority to restrict and even exclude tankers from Puget Sound under adverse or hazardous conditions. 33 U.S.C. §1221(3)(iv).

Title II of the PWSA amended the Tank Vessel Act of 1936, 46 U.S.C. §391a. It empowered the Coast Guard to regulate design, construction, and maintenance of tankers operating in United States waters. *See* proposed regulations, 41 Fed. Reg. 15859 (Apr. 15, 1976).

The purpose of the original Tank Vessel Act, and of Title II of PWSA, was to establish a uniform set of regulations governing the types of ships permitted within the coastal waters of the United States and the conditions under which they would be permitted to operate. Balkanization of regulatory authority over this most interstate, even international, of transportation systems is foreclosed by the national policy embodied in the PWSA. The PWSA has preempted §3(2) of Washington's Tanker Law.

Washington asserts that the minimum design specifications required by §3(2) of the Tanker Law were not preempted, because they can be avoided if the tanker has a tugboat escort. Congress has given the Coast Guard authority to require tugboat escorts in Puget Sound under hazardous conditions. 33 U.S.C. §1221(3)(iv). And the Coast Guard has considered doing this. Department of Transportation, Coast Guard, Final Environmental Impact Statement [on the] Regulations for Tank Vessels Engaged in the Carriage of Oil in Domestic Trade 71 (Aug. 15, 1975). We believe that the tugboat-escort provision of the Tanker Law has also been preempted by the federal law.

Arco and Seatrain also argue that §2 of Washington's Tanker Law (requiring a local pilot on all tankers larger than 50,000 dwt) has been preempted. Insofar as the Tanker Law prohibits a tanker "enrolled in the coastwise trade" from navigating Puget Sound unless it has a local pilot, the statute is void; it conflicts with clear federal law on that subject. 46 U.S.C. §§215, 364 (1970).

Recognizing the difficulty of its position, the State of Washington argues that its Tanker Law is part of a comprehensive coastal management plan, and that it should be upheld on that ground. "Cooperative federalism" has been the congressional policy for designing a United States environmental policy. The Congress funded and encouraged the coastal states to design comprehensive and forward-looking coastal management plans. 16 U.S.C. §§1451 *et seq.* Congress has invoked "cooperative federalism"—or at least some state involvement—in virtually all of its water-related regulatory programs: The Federal Water Pollution Control Act, 33 U.S.C. §§1151 *et seq.*; the Clean Air Act, 42 U.S.C. §1857; the Estuarine Act of 1968, 16 U.S.C. §§1221 *et seq.*; and the Deepwater Ports Act of 1974, 33 U.S.C. §§1501 *et seq.*

Congress has used "cooperative federalism" in forming environmental regulations. But the State of Washington fails to note that in those statutes Congress explicitly invited state participation in various phases of the formation of the regulatory scheme. The PWSA, on the other hand, does not invite such state participation; it does not share regulatory authority over oil tankers with the states.

Supporting its position, Washington cites *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 [3 ELR 20362] (1973), and *Huron Portland Cement v. City of Detroit*, 362 U.S. 440 (1960). The *Askew* case upheld Florida's law imposing strict liability in tort on oil spillers. The Court held that the state regulatory scheme did not conflict with federal regulation of oil tankers. But that Florida statute did not attempt to regulate the design of the tanker or tanker operations, which were already federally regulated. The *Askew* case involved the Federal Water Quality Control Act, not the PWSA, and the holding of the Court was in part reflective of the congressional policy of "cooperative federalism" in the Federal Water Quality Control Act.

In the *Huron Portland Cement* case, a city's smoke-control ordinance was applied against a vessel engaged in interstate commerce. The Court observed that the environmental purpose of Detroit's ordinance was not preempted by federal safety inspection regulations. There was "no overlap between the scope of the federal ship inspection laws and that of the municipal ordinance," 362 U.S. at 446. Since the PWSA introduced environmental considerations into

the federal tanker regulations,[4] the State of Washington cannot say that there is "no overlap" between the state and federal laws.

Finally, the State of Washington asserts that the Commerce Department's approval of its coastal management plan (to which the Tanker Law is related) somehow waives federal preemption of the area. The Secretary of Commerce can approve a state's coastal management plan (thereby making it eligible for federal funding) only if "the views of Federal agencies principally affected by such program have been adequately considered." 16 U.S.C. §1456(b) (1970). The Secretary may or may not have "considered" the views of the Coast Guard. The Secretary may or may not have noticed the preemptive effect of the PWSA on Washington's Tanker Law. That is not before us. We cannot read the Secretary's approval of a coastal management plan, to which the Tanker Law is only collaterally related, as foreclosing our inquiry into the federal preemption of oil tanker regulations.

Finally, the state and the other states filing amici briefs have argued with some conviction that a state's officials, responsible to its voters, are better able to protect the state's shoreline environment than is the Commandant of the Coast Guard, headquartered on the other side of the continent. This argument presents legislative, rather than judicial, policy considerations.

Because the Washington Tanker Law conflicts with federal law preempting the same subject matter, the state law is void. The plaintiffs have asserted a number of other grounds for declaring the statute void. It is unnecessary to reach these other points.

It is likewise unnecessary to grant an injunction. It is presumed that the responsible officials of the State of Washington will not undertake to enforce the statute pending such further appeals as may be taken. The clerk will enter judgment.

Neither party shall have costs.

ORDER

This matter came before the undersigned, one of the three judges empanelled to hear and determine the above-entitled cause, in accordance with Title 28 U.S.C. §§2281 and 2284 and in furtherance of the unanimous opinion of the said three judges which has now been filed herein. It is hereby ordered, adjudged and decreed that Chapter 125, Laws of Washington, 1975, 1st Extra Session, codified at R.C.W. §§88.16.170 *et seq.* (The Tanker Law) be and the same is hereby declared null and void and of no force and effect. It is further

Ordered that the application of the plaintiff for an order enjoining the responsible officials of the State of Washington from enforcing the said statute pending any appeal of this matter be and the same is hereby denied; and it is further

Ordered that no party to the cause shall recover costs.

MARINE PROTECTION, RESEARCH AND SANCTUARIES ACT OF 1972, 33 U.S.C. §1401 et seq.

§ 1401. Congressional finding, policy and declaration of purpose.

(a) Unregulated dumping of material into ocean waters endangers human health, welfare, and amenities, and the marine environment, ecological systems, and economic potentialities.

(b) The Congress declares that it is the policy of the United States to regulate the dumping of all types of materials into ocean waters and to prevent or strictly limit the dumping into ocean waters of any material which would adversely affect human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities.

(c) It is the purpose of this chapter to regulate (1) the transportation by any person of material from the United States and, in the case of United States vessels, aircraft, or agencies, the transportation of material from a location outside the United States, when in either case the transportation is for the purpose of dumping the material into ocean waters, and (2) the dumping of material transported by any person from a location outside the United States, if the dumping occurs in the territorial sea or the contiguous zone of the United States. (Pub. L. 92-532, § 2, Oct. 23, 1972, 86 Stat. 1052, amended Pub. L. 93-254, § 1(1), Mar. 22, 1974, 88 Stat. 50.)

§ 1402. Definitions.

For the purposes of this chapter the term—

(a) "Administrator" means the Administrator of the Environmental Protection Agency.

(b) "Ocean waters" means those waters of the open seas lying seaward of the base line from which the territorial sea is measured, as provided for in the Convention on the Territorial Sea and the Contiguous Zone (15 UST 1606; TIAS 5639).

(c) "Material" means matter of any kind or description, including, but not limited to, dredged material, solid waste, incinerator residue, garbage, sewage, sewage sludge, munitions, radiological, chemical, and biological warfare agents, radioactive materials, chemicals, biological and laboratory waste, wreck or discarded equipment, rock, sand, excavation debris, and industrial, municipal, agricultural, and other waste; but such term does not mean sewage from vessels within the meaning of section 1322 of this title. Oil within the meaning of section 1321 of this title shall be included only to the extent that such oil is taken on board a vessel or aircraft for the purpose of dumping.

(d) "United States" includes the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Canal Zone, the territories and possessions of the United States, and the Trust Territory of the Pacific Islands.

(e) "Person" means any private person or entity, or any officer, employee, agent, department, agency, or instrumentality of the Federal Government, of any State or local unit of government, or of any foreign government.

(f) "Dumping" means a disposition of material: *Provided*, That it does not mean a disposition of any effluent from any outfall structure to the extent that such disposition is regulated under the provisions of the Federal Water Pollution Control Act, as amended, under the provisions of section 407 of this title, or under the provisions of the Atomic Energy Act of 1954, as amended, nor does it mean a routine discharge of effluent incidental to the propulsion of, or operation of motor-driven equipment on, vessels: *Provided further*, That it does not mean the construction of any fixed structure or artificial island nor the intentional placement of any device in ocean waters or on or in the submerged land beneath such waters, for a purpose other than disposal, when such construction or such placement is otherwise regulated by Federal or State law or occurs pursuant to an authorized Federal or State program: *And Provided further*, That it does not include the deposit of oyster shells, or other materials when such deposit is made for the purpose of developing, maintaining, or harvesting fisheries resources and is otherwise regulated by Federal or State law or occurs pursuant to an authorized Federal or State program.

(g) "District court of the United States" includes the District Court of Guam, the District Court of the Virgin Islands, the District Court of Puerto Rico, the District Court of the Canal Zone, and in the case of American Samoa and the Trust Territory of the Pacific Islands, the District Court of the United States for the District of Hawaii, which court shall have jurisdiction over actions arising therein.

(h) "Secretary" means the Secretary of the Army.

(i) "Dredged material" means any material excavated or dredged from the navigable waters of the United States.

(j) "High-level radioactive waste" means the aqueous waste resulting from the operation of the first cycle solvent extraction system, or equivalent and the concentrated waste from subsequent extraction cycles, or equivalent, in a facility for reprocessing irradiated reactor fuels, or irradiated fuel from nuclear power reactors.

(k) "Transport" or "transportation" refers to the carriage and related handling of any material by a vessel, or by any other vehicle, including aircraft.

(l) "Convention" means the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter.

(Pub. L. 92-532, § 3, Oct. 23, 1972, 86 Stat. 1052, amended Pub. L. 93-254, § 1(2), Mar. 22, 1974, 88 Stat. 50.)

SUBCHAPTER I.—REGULATION

§ 1411. Prohibited acts.

(a) Except as may be authorized by a permit issued pursuant to section 1412 or section 1413 of this title, and subject to regulations issued pursuant to section 1418 of this title,

(1) no person shall transport from the United States, and

(2) in the case of a vessel or aircraft registered in the United States or flying the United States flag or in the case of a United States department, agency, or instrumentality, no person shall transport from any location

any material for the purpose of dumping it into ocean waters.

(b) Except as may be authorized by a permit issued pursuant to section 1412 of this title, and subject to regulations issued pursuant to section 1418 of this title, no person shall dump any material transported from a location outside the United States (1) into the territorial sea of the United States, or (2) into a zone contiguous to the territorial sea of the United States, extending to a line twelve nautical miles seaward from the base line from which the breadth of the territorial sea is measured, to the extent that it may affect the territorial sea or the territory of the United States. (Pub. L. 92-532, title I, § 101, Oct. 23, 1972, 86 Stat. 1053, amended Pub. L. 93-254, § 1(3), Mar. 22, 1974, 88 Stat. 51.)

§ 1412. Dumping permit program.

(a) Environmental Protection Agency permits.

Except in relation to dredged material, as provided for in section 1413 of this title, and in relation to radiological, chemical, and biological warfare agents and high-level radioactive waste, for which no permit may be issued, the Administrator may issue permits, after notice and opportunity for public hearings, for the transportation from the United States or, in the case of an agency or instrumentality of the United States, or in the case of a vessel or aircraft registered in the United States or flying the United States flag, for the transportation from a location outside the United States, of material for the purpose of dumping it into ocean waters, or for the dumping of material into the waters described in section 1411(b) of this title, where the Administrator determines that such dumping will not unreasonably degrade or endanger human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities. The Administrator shall establish and apply criteria for reviewing and evaluating such permit applications, and, in establishing or revising such criteria, shall consider, but not be limited in his consideration to, the following:

(A) The need for the proposed dumping.

(B) The effect of such dumping on human health and welfare, including economic, esthetic, and recreational values.

(C) The effect of such dumping on fisheries resources, plankton, fish, shellfish, wildlife, shore lines and beaches.

(D) The effect of such dumping on marine ecosystems, particularly with respect to—

(i) the transfer, concentration, and dispersion of such material and its byproducts through biological, physical, and chemical processes.

(ii) potential changes in marine ecosystem diversity, productivity, and stability, and

(iii) species and community population dynamics.

(E) The persistence and permanence of the effects of the dumping.

(F) The effect of dumping particular volumes and concentrations of such materials.

(G) Appropriate locations and methods of disposal or recycling, including land-based alternatives and the probable impact of requiring use of such alternate locations or methods upon considerations affecting the public interest.

(H) The effect on alternate uses of oceans, such as scientific study, fishing, and other living resource exploitation, and non-living resource exploitation.

(I) In designating recommended sites, the Administrator shall utilize wherever feasible locations beyond the edge of the Continental Shelf. In establishing or revising such criteria, the Administrator shall consult with Federal, State, and local officials, and interested members of the general public, as may appear appropriate to the Administrator. With respect to such criteria as may affect the civil works program of the Department of the Army, the Administrator shall also consult with the Secretary. In reviewing applications for permits, the Administrator shall make such provision for consultation with interested Federal and State agencies as he deems useful or necessary. No permit shall be issued for a dumping of material which will violate applicable water quality standards. To the extent that he may do so without relaxing the requirements of this subchapter, the Administrator, in establishing or revising such criteria, shall apply the standards and criteria binding upon the United States under the Convention, including its Annexes.

(b) Permit categories.

The Administrator may establish and issue various categories of permits, including the general permits described in section 1414(c) of this title.

(c) Sites and times for dumping.

The Administrator may, considering the criteria established pursuant to subsection (a) of this section, designate recommended sites or times for dumping and, when he finds it necessary to protect critical areas, shall, after consultation with the Secretary, also designate sites or times within which certain materials may not be dumped.

(d) Fish wastes.

No permit is required under this subchapter for the transportation for dumping or the dumping of fish wastes, except when deposited in harbors or other protected or enclosed coastal waters, or where the Administrator finds that such deposits could endanger health, the environment, or ecological systems in a specific location. Where the Administrator

makes such a finding, such material may be deposited only as authorized by a permit issued by the Administrator under this section.

(e) Foreign State permits; acceptance.

In the case of transportation of material, by a vessel or aircraft registered in the United States or flying the United States flag, from a location in a foreign State Party to the Convention, a permit issued pursuant to the authority of that foreign State Party, in accordance with Convention requirements, and which otherwise could have been issued purusant to subsection (a) of this section, shall be accepted, for the purposes of this subchapter, as if it were issued by the Administrator under the authority of this section. (Pub. L. 92-532, title I, § 102, Oct. 23, 1972, 86 Stat. 1054, amended Pub. L. 93-254, § 1(4), Mar. 22, 1974, 88 Stat. 51.)

§ 1413. Dumping permit program for dredged material.

(a) Issuance by Secretary of the Army.

Subject to the provisions of subsections (b), (c), and (d) of this section, the Secretary may issue permits, after notice and opportunity for public hearings, for the transportation of dredged material for the purpose of dumping it into ocean waters, where the Secretary determines that the dumping will not unreasonably degrade or endanger human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities.

(b) Independent determination of need for dumping, other methods of disposal, and appropriate locations.

In making the determination required by subsection (a) of this section, the Secretary shall apply those criteria, established pursuant to section 1412 (a) of this title, relating to the effects of the dumping. Based upon an evaluation of the potential effect of a permit denial on navigation, economic and industrial development, and foreign and domestic commerce of the United States, the Secretary shall make an independent determination as to the need for the dumping. The Secretary shall also make an independent determination as to other possible methods of disposal and as to appropriate locations for the dumping. In considering appropriate locations, he shall, to the extent feasible, utilize the recommended sites designated by the Administrator pursuant to section 1412(c) of this title.

(c) Disagreement of Administrator with determination of Secretary of the Army.

Prior to issuing any permit under this section, the Secretary shall first notify the Administrator of his intention to do so. In any case in which the Administrator disagrees with the determination of the Secretary as to compliance with the criteria established pursuant to section 1412(a) of this title relating to the effects of the dumping or with the restrictions established pursuant to section 1412(c) of this title relating to critical areas, the determination of the Administrator shall prevail. Unless the Administrator grants a waiver pursuant to subsection (d) of this section, the Secretary shall not issue a permit which does not comply with such criteria and with such restrictions.

(d) Waiver of requirements.

If, in any case, the Secretary finds that, in the disposition of dredged material, there is no economically feasible method or site available other than a dumping site the utilization of which would result in non-compliance with the criteria established pursuant to section 1412(a) of this title relating to the effects of dumping or with the restrictions established pursuant to section 1412(c) of this title relating to critical areas, he shall so certify and request a waiver from the Administrator of the specific requirements involved. Within thirty days of the receipt of the waiver request, unless the Administrator finds that the dumping of the material will result in an unacceptably adverse impact on municipal water supplies, shell-fish beds, wildlife, fisheries (including spawning and breeding areas), or recreational areas, he shall grant the waiver.

(e) Federal projects involving dredged material.

In connection with Federal projects involving dredged material, the Secretary may, in lieu of the permit procedure, issue regulations which will require the application to such projects of the same criteria, other factors to be evaluated, the same procedures, and the same requirements which apply to the issuance of permits under subsections (a), (b), (c), and (d) of this section. (Pub. L. 92-532, title I, § 103, Oct. 23, 1972, 86 Stat. 1055.)

§ 1414. Permit conditions.

(a) Designated and included conditions.

Permits issued under this subchapter shall designate and include (1) the type of material authorized to be transported for dumping or to be dumped; (2) the amount of material authorized to be transported for dumping or to be dumped; (3) the location where such transport for dumping will be terminated or where such dumping will occur; (4) the length of time for which the permits are valid and their expiration date; (5) any special provisions deemed necessary by the Administrator or the Secretary, as the case may be, after consultation with the Secretary of the Department in which the Coast Guard is operating, for the monitoring and surveillance of the transportation or dumping; and (6) such other matters as the Administrator or the Secretary, as the case may be, deems appropriate.

(b) Permit processing fees; reporting requirements.

The Administrator or the Secretary, as the case may be, may prescribe such processing fees for permits and such reporting requirements for actions taken pursuant to permits issued by him under this subchapter as he deems appropriate.

(c) General permits.

Consistent with the requirements of sections 1412 and 1413 of this title, but in lieu of a requirement for specific permits in such case, the Administrator or the Secretary, as the case may be, may issue general permits for the transportation for dumping, or dumping, or both, of specified materials or classes of materials for which he may issue permits, which he determines will have a minimal adverse environmental impact.

(d) Review.

Any permit issued under this subchapter shall be reviewed periodically and, if appropriate, revised. The Administrator or the Secretary, as the case may be, may limit or deny the issuance of permits, or he may alter or revoke partially or entirely the terms of permits issued by him under this subchapter, for the transportation for dumping, or for the dumping, or both, of specified materials or classes of materials, where he finds that such materials cannot be dumped consistently with the criteria and other factors required to be applied in evaluating the permit application. No action shall be taken under this subsection unless the affected person or permittee shall have been given notice and opportunity for a hearing on such action as proposed.

(e) Information for review and evaluation of applications.

The Administrator or the Secretary, as the case may be, shall require an applicant for a permit under this subchapter to provide such information as he may consider necessary to review and evaluate such application.

(f) Public information.

Information received by the Administrator or the Secretary, as the case may be, as a part of any application or in connection with any permit granted under this subchapter shall be available to the public as a matter of public record, at every stage of the proceeding. The final determination of the Administrator or the Secretary, as the case may be, shall be likewise available.

(g) Display of issued permits.

A copy of any permit issued under this subchapter shall be placed in a conspicuous place in the vessel which will be used for the transportation or dumping authorized by such permit, and an additional copy shall be furnished by the issuing official to the Secretary of the department in which the Coast Guard is operating, or its designee. (Pub. L 92-532, title I, § 104, Oct. 23, 1972, 86 Stat. 1056.)

§ 1415. Penalties.

(a) Assessment of civil penalty by Administrator; remission or mitigation; court action for appropriate relief.

Any person who violates any provision of this subchapter, or of the regulations promulgated under this subchapter, or a permit issued under this subchapter shall be liable to a civil penalty of not more than $50,000 for each violation to be assessed by the Administrator. No penalty shall be assessed until the person charged shall have been given notice and an opportunity for a hearing of such violation. In determining the amount of the penalty, the gravity of the violation, prior violations, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation shall be considered by said Administrator. For good cause shown, the Administrator may remit or mitigate such penalty. Upon failure of the offending party to pay the penalty, the Administrator may request the Attorney General to commence an action in the appropriate district court of the United States for such relief as may be appropriate.

(b) Criminal penalties.

In addition to any action which may be brought under subsection (a) of this section, a person who knowingly violates this subchapter, regulations promulgated under this subchapter, or a permit issued under this subchapter shall be fined not more than $50,000, or imprisoned for not more than one year, or both.

(c) Separate offenses.

For the purpose of imposing civil penalties and criminal fines under this section, each day of a continuing violation shall constitute a separate offense as shall the dumping from each of several vessels, or other sources.

(d) Injunctive relief.

The Attorney General or his delegate may bring actions for equitable relief to enjoin an imminent or continuing violation of this subchapter, of regulations promulgated under this subchapter, or of permits issued under this subchapter, and the district courts of the United States shall have jurisdiction to grant such relief as the equities of the case may require.

(e) Liability of vessels in rem.

A vessel, except a public vessel within the meaning of section 13 of the Federal Water Pollution Control Act, as amended, used in a violation, shall be liable in rem for any civil penalty assessed or criminal fine imposed and may be proceeded against in any district court of the United States having jurisdiction thereof; but no vessel shall be liable unless it shall appear that one or more of the owners, or bareboat charterers, was at the time of the violation a consenting party or privy to such violation.

(f) Revocation and suspension of permits.

If the provisions of any permit issued under section 1412 or 1413 of this title are violated, the Administrator or the Secretary, as the case may be, may revoke the permit or may suspend the permit for a specified period of time. No permit shall be revoked or suspended unless the permittee shall have been given notice and opportunity for a hearing on such violation and proposed suspension or revocation.

(g) Civil suits by private persons.

(1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any prohibition, limitation, criterion, or permit established or issued by or under this subchapter. The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such prohibition, limitation, criterion, or permit, as the case may be.

(2) No action may be commenced—

(A) prior to sixty days after notice of the violation has been given to the Administrator or to the

Secretary, and to any alleged violator of the prohibition, limitation, criterion, or permit; or

(B) if the Attorney General has commenced and is diligently prosecuting a civil action in a court of the United States to require compliance with the prohibition, limitation, criterion, or permit; or

(C) if the Administrator has commenced action to impose a penalty pursuant to subsection (a) of this section, or if the Administrator, or the Secretary, has initiated permit revocation or suspension proceedings under subsection (f) of this section; or

(D) if the United States has commenced and is diligently prosecuting a criminal action in a court of the United States or a State to redress a violation of this subchapter.

(3)(A) Any suit under this subsection may be brought in the judicial district in which the violation occurs.

(B) In any such suit under this subsection in which the United States is not a party, the Attorney General, at the request of the Administrator or Secretary, may intervene on behalf of the United States as a matter of right.

(4) The court, in issuing any final order in any suit brought pursuant to paragraph (1) of this subsection may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

(5) The injunctive relief provided by this subsection shall not restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or limitation or to seek any other relief (including relief against the Administrator, the Secretary, or a State agency).

(h) Emergencies.

No person shall be subject to a civil penalty or to a criminal fine or imprisonment for dumping materials from a vessel if such materials are dumped in an emergency to safeguard life at sea. Any such emergency dumping shall be reported to the Administrator under such conditions as he may prescribe. (Pub. L. 92-532, title I, § 105, Oct. 23, 1972, 86 Stat. 1057.)

§ 1416. Voiding of pre-existing licenses; impairment of navigation; consistent State programs; existing conservation program not affected.

(a) After the effective date of this subchapter, all licenses, permits, and authorizations other than those issued pursuant to this subchapter shall be void and of no legal effect, to the extent that they purport to authorize any activity regulated by this subchapter, and whether issued before or after the effective date of this subchapter.

(b) The provisions of subsection (a) of this section shall not apply to actions taken before the effective date of this subchapter under the authority of the Rivers and Harbors Act of 1899, as amended.

(c) Prior to issuing any permit under this subchapter, if it appears to the Administrator that the disposition of material, other than dredged material, may adversely affect navigation in the territorial sea of the United States, or in the approaches to any harbor of the United States, or may create an artificial island on the Outer Continental Shelf, the Administrator shall consult with the Secretary and no permit shall be issued if the Secretary determines that navigation will be unreasonably impaired.

(d) After the effective date of this subchapter, no State shall adopt or enforce any rule or regulation relating to any activity regulated by this subchapter. Any State may, however, propose to the Administrator criteria relating to the dumping of materials into ocean waters within its jurisdiction, or into other ocean waters to the extent that such dumping may affect waters within the jurisdiction of such State, and if the Administrator determines, after notice and opportunity for hearing, that the proposed criteria are not inconsistent with the purposes of this subchapter, may adopt those criteria and may issue regulations to implement such criteria. Such determination shall be made by the Administrator within one hundred and twenty days of receipt of the proposed criteria. For the purposes of this subsection, the term "State" means any State, interstate or regional authority, Federal territory or Commonwealth or the District of Columbia.

(e) Nothing in this subchapter shall be deemed to affect in any manner or to any extent any provision of the Fish and Wildlife Coordination Act as amended. (Pub. L. 92-532, title I, § 106, Oct. 23, 1972, 86 Stat. 1058.)

§ 1417. Enforcement.

(a) Utilization of other departments, agencies, and instrumentalities.

The Administrator or the Secretary, as the case may be, may, whenever appropriate, utilize by agreement, the personnel, services and facilities of other Federal departments, agencies, and instrumentalities, or State agencies or instrumentalities, whether on a reimbursable or a nonreimbursable basis, in carrying out his responsibilities under this subchapter.

(b) Delegation of review and evaluation authority.

The Administrator or the Secretary may delegate responsibility and authority for reviewing and evaluating permit applications, including the decision as to whether a permit will be issued, to an officer of his agency, or he may delegate, by agreement, such

responsibility and authority to the heads of other Federal departments or agencies, whether on a reimbursable or nonreimbursable basis.

(c) Surveillance and other enforcement activity.

The Secretary of the department in which the Coast Guard is operating shall conduct surveillance and other appropriate enforcement activity to prevent unlawful transportation of material for dumping, or unlawful dumping. Such enforcement activity shall include, but not be limited to, enforcement of regulations issued by him pursuant to section 1418 of this title, relating to safe transportation, handling, carriage, storage, and stowage. The Secretary of the Department in which the Coast Guard is operating shall supply to the Administrator and to the Attorney General, as appropriate, such information of enforcement activities and such evidentiary material assembled as they may require in carrying out their duties relative to penalty assessments, criminal prosecutions, or other actions involving litigation pursuant to the provisions of this subchapter. (Pub. L. 92–532, title I, § 107, Oct. 23, 1972, 86 Stat. 1059.)

§ 1418. Regulations.

In carrying out the responsibilites and authority conferred by this subchapter, the Administrator, the Secretary, and the Secretary of the department in which the Coast Guard is operating are authorized to issue such regulations as they may deem appropriate. (Pub. L. 92–532, title I, § 108, Oct. 23, 1972, 86 Stat. 1059.)

§ 1419. International cooperation.

The Secretary of State, in consultation with the Administrator, shall seek effective international action and cooperation to insure protection of the marine environment, and may, for this purpose, formulate, present, or support specific proposals in the United Nations and other component international organizations for the development of appropriate international rules and regulations in support of the policy of this chapter. (Pub. L. 92–532, title I, § 109, Oct. 23, 1972, 86 Stat. 1060.)

§ 1420. Authorization of appropriations.

There are hereby authorized to be appropriated not to exceed $3,600,000 for fiscal year 1973, not to exceed $5,500,000 for each of the fiscal years 1974 and 1975, not to exceed $5,300,000 for fiscal year 1976, and not to exceed $1,325,000 for the transition period (July 1 through September 30, 1976), for the purposes and administration of this subchapter, and for succeeding fiscal years only such sum as the Congress may authorize by law. (Pub. L. 92–532, title I, § 111, Oct. 23, 1972, 86 Stat. 1060, amended Pub. L. 93–472, Oct. 26, 1974, 88 Stat. 1430; Pub. L. 94–62, § 1, July 25, 1975, 89 Stat. 303.)

§ 1421. Annual report to Congress.

The Administrator shall report annually, on or before June 30 of each year, with the first report to be made on or before June 30, 1973 to the Congress, on his administration of this subchapter, including recommendations for additional legislation if deemed necessary. (Pub. L. 92–532, title I, § 112, Oct. 23, 1972, 86 Stat. 1060.)

Test Case on Ocean Dumping: Must Philadelphia Move Toward On-Land Disposal of Sewage Sludge?*

Man has been dumping his wastes into the oceans since time immemorial, but the quantity and toxicity of these discharges has increased steadily as our industrial society has become more complex. Though scientists have just begun to study the environmental impact of these personal and industrial wastes and though tracking the paths of discharged metals and bacteria through shifting ocean currents is a frustrating and difficult task, the results thus far obtained from such investigation are not encouraging. Common sense alone suggests that the ocean's ability to absorb poisonous wastes is not infinite.

In response to this problem, Congress passed the Marine Protection, Research, and Sanctuaries Act of 1972. The Act declares that the policy of the United States shall be to "regulate the dumping of all types of materials into ocean waters and to prevent or strictly limit the dumping into ocean waters of any material which would adversely affect human health, welfare or amenities, or the marine environment, ecological systems or economic potentialities." Under the final regulations and criteria promulgated by the Environmental Protection Agency in 1973 pursuant to the statute, the Administrator has the discretion to issue one year "interim permits" for dumping toxic wastes in the ocean provided that the dumper either designs and implements land-based waste disposal projects that will phase out all ocean dumping, or ultimately reduces the toxic components of its wastes so as to qualify for a "special permit," which must prescribe stricter numerical standards for allowable discharges. After several years of lax performance, the EPA has recently taken a vigorous stand on such an implementation procedure in the case of "Philadelphia sludge." Because other major seacoast cities, including Boston and New York, would prefer to go to sea with sewage sludge, whatever the environmental costs, the Philadelphia story is an important test case.

In 1973 and 1974, Philadelphia routinely applied for and received interim permits from the EPA authorizing the city annually to dump 150 million gallons of industrial and human sewage sludge from two treatment plants into the Atlantic Ocean at a dumpsite 40 miles off the Maryland coast. Philadelphia applied for its third annual permit in early 1975, expecting to obtain it as a matter of course. On February 13, the Region III Administrator granted another interim permit, but this time it included language ordering Philadelphia to halve all ocean sludge dumping by 1979, and to terminate it by 1981.

The new requirement stunned Philadelphia officials, who were faced with the task of designing and implementing a system to replace dumping within six years. Philadelphia Water Commissioner Carmen F. Guarino angrily declared that compliance with the EPA order would be impossible. Predictably, the city filed to have the regional decision reviewed by Environmental Protection Agency Administrator Russell Train. An adjudicatory hearing held in May of this year produced seven volumes of testimony, and Train is expected to release his ruling in early fall.

The Marine Protection, Research and Sanctuaries Act of 1972 authorizes the Administrator to issue a permit only where he "determines that such dumping will not unreasonably degrade or endanger human health, welfare, or amenities, or the marine environment, ecological systems or economic potentialities." In order to ensure that long range dumping will not unreasonably degrade the environment, the EPA regulations provide that the Administrator can grant only a one year non-renewable interim permit for ocean dumping of sewage sludge, with or without imposed conditions such as phase-outs, when "blacklisted" materials such as the heavy metals cadmium and mercury, and "graylisted" materials, such as other metals and biodegradable organic matter, are present in the sludge in high concentrations. In applications for all permit types, both Train and former Administrator Ruckelshaus have interpreted the Act as requiring the applicant to clearly prove that no unreasonable degradation will result from the proposed dumping.

Because Philadelphia sewage plants treat a large amount of industrial waste, the resultant sludge is especially toxic. Not only does the sludge contain unacceptable quantities of lead, copper, iron, zinc, arsenic and bacteria, but it exceeds the maximum limit for cadmium by more than 175 times and the mercury level by more than six times. Respondents EPA Region III, the National Wildlife Federation, the Environmental Defense Fund and the State of Maryland claimed that continued ocean dumping by Philadelphia would degrade and endanger both human health and the marine environment. Though scientists find it hard to pinpoint the exact uptake of heavy metals and bacteria by the clams, quahogs, sea scallops and crabs that inhabit the general area of the dumpsite, all of these organisms are known to be contaminated and to present a health hazard to humans who eat them. Weather conditions have forced barge captains to discharge full loads of sewage before reaching the marked dumping area on at least two occasions; because the captains did not report the short dumps immediately, fishermen

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were not warned that these normally safe waters were polluted. Scientific cruises have not yet traced exactly where currents send the released sludge, or how the material breaks down in water, but cruise data has documented statistically significant buildups of metals characteristic of Philadelphia sludge at stations within and seaward of the boundaries of the Philadelphia dumpsite.

Because ocean dumping studies are new and their conclusions uncertain, the city of Philadelphia contended that "the facts now available present only the most tenuous and preliminary suggestion that the City's ocean dumping is having any affect on the marine environment." But despite this attempt to reverse the burden of proof established by the Marine Protection Act, the Regional Administrator found that the city did not clearly show that its prospective dumping would *not* degrade or endanger the environment, and ruled that he therefore had no choice but to deny an interim permit or grant one with limited scope.

When Train granted Philadelphia's request for an adjudicatory hearing, he warned city officials that they not only had to convince him that Philadelphia's dumping caused no unreasonable environmental damage, but also had to overcome the presumptive validity of the Region III Administrator's imposition of the land treatment requirement. Because the Marine Protection Act provides that the Administrator "may" grant a permit when proposed dumping would not degrade the environment, he also has full discretion to deny a permit even when plaintiffs fulfill their burden of proof, and Philadelphia faced a difficult task in attempting to prove any abuse of such wide discretion.

In view of permit evaluation criteria, the Regional Administrator's action appears beyond challenge. Given that he has full discretion to grant or deny an interim permit whenever maximum "blacklist" and "graylist" levels are exceeded, or to impose conditions such as phase-outs on a granted permit, the Region III Administrator acted fully within the limits of his powers in setting a six year limit on Philadelphia dumping.

In addition to setting toxicity levels, the regulations outline several conditions that an applicant must fulfill before receiving an interim permit.[12] Each application is to include an environmental assessment of the potential environmental impact of the proposed dumping, as well as a thorough review of the actual need for dumping and a discussion of possible alternatives. An interim permit technically requires that a recipient develop and actively implement a plan either to eliminate ocean disposal entirely or to limit dumping to wastes that meet permissible toxicity levels. Though Philadelphia did not fulfill any of these requirements in its first permit application, the EPA was willing to issue a permit, perhaps because the Agency chose to be conservative in applying a totally new system of regulations to an age-old disposal method. However, the regulations also suggest that any successive interim permits be issued only "upon satisfactory completion of each phase of the development and implementation of the plan." Thus, it appears that Philadelphia was fortunate to receive second and third interim permits at all, since Water Commissioner Guarino failed to design an implementation plan, much less to advance one.

Faced with almost certain defeat on the issues of the environmental harm of the discharges and the legality of the order, Philadelphia turned predictably to economic and technical feasibility objections. Its main contention on appeal was that the six year phase-out scheme was too short to allow Philadelphia to do the research and monitoring necessary to determine the most environmentally beneficial land-based system. Even environmentalists expressed little sympathy with this position, for if Commissioner Guarino had followed the interim permit requirements in the regulations, he would have been prepared with some kind of feasible alternative by the time of the hearing. He created further doubt about his good faith when he hired a consulting firm in Chicago to study possible plans, well aware that the chosen firm specialized in sanitary engineering and had no experience with ocean dumping or land application problems. Meanwhile, the Commissioner failed to utilize the willing resources of Pennsylvania's own university scientists, or the expertise of the United States Department of Agriculture Biological Waste Management Laboratory at Beltsville, Maryland.

Even on the question of feasibility, Philadelphia's position proved weak in the hearings, as a number of promising and pre-tested alternatives for land based treatment were unveiled. First, witness after witness urged that sludge be applied to strip mined land for reclamation purposes, because of its outstanding soil building properties. Though the reclaimed land might not be safe to use for food crops, any vegetation cover over Pennsylvania's hundreds of thousands of acres of stripped land would be an aesthetic and environmental improvement. This alternative would actually help the state mining industry, for Pennsylvania's Surface Mining Conservation and Reclamation Act[13] imposes reclamation requirements on strip miners. The same statute authorized creation of a fund which could be used to study and implement the sludge application plan.

A second promising proposal was the Barber-Colman PURETEC acidified wet air oxidation process, a high temperature and pressure process for destroying sludge organics and recovering sludge nutrients and heavy metals. Philadelphia has already begun testing this program on a small scale, with successful results. Not only would recycling of precious heavy metals be an environmental benefit, but the processing costs of ten dol-

lars per dry ton of sludge would be much less than ocean dumping costs.

Philadelphia could also digest, compost or heat-dry sludge for use as fertilizer on ornamental gardens and highway median strips and municipal parks. Ironically, the city has actually bought this same material from other cities for its own use. Philadelphia would not have to do virgin research, for a USDA composting operation has been performed successfully at Beltsville, Maryland, where the high grade finished product remains much in demand. The Beltsville plant actually composted lagooned Philadelphia sewage sludge in May of 1974 without difficulty and that experience proved that a site of only 25 to 40 acres could handle Philadelphia's entire sludge output of 190 dry tons per day.

Testimony at the adjudicatory hearing uncovered several other land alternatives in addition to the ones mentioned above, from simple disposal plans to major recycling efforts. The overall benefits of a land-based project appeared impressive. The land environment surpasses the ocean environment in its ability to protect the biosphere from contaminants because soil organisms break down organic compounds and metals are bound to soil particles and retained by plants in their roots. Problems that arise are more easily contained and analyzed on land; for example, if future research found a sludge component to be carcinogenic, scientists would know where to go to recover the material. Though some metals such as cadmium do eventually rise up the stems to the leaves of plants, grazing animals do not incorporate the metals in muscle or milk, but only in waste products.

Despite all the apparent benefits, Philadelphia raised several objections to the feasibility of the land-based programs, arguing for example that development of any alternative sewage sludge project would be expensive. But, as respondents pointed out, the four million dollars necessary to buy the city a barge and tug, which it now leases, would also finance 133 $30,000 tank trucks with flotation tires to transport the sludge to land application sites. In response to Commissioner Guarino's constant objection that six years was not enough time to phase out all ocean dumping, the respondents contended that, first, many of the proposed alternatives had been adequately tested elsewhere, so Philadelphia could utilize available research; and second, Philadelphia could use double shifts if necessary on experimentation and construction projects in order to meet the deadlines. Finally, Philadelphia officials raised the spector of public outrage, citing the recent refusal of the rural town of Letterkenny, Pennsylvania, to accept a municipal sludge project. However, Philadelphia officials failed to add that no public education efforts had been undertaken before the finished proposal was presented to the town. Indeed, the Letterkenny illustration was a straw man, since the owners of the 10,000 acre Kings Ranch outside of Philadelphia were willing to accept half of Philadelphia's annual sludge immediately, in its liquid form, to fertilize pasture land.

As a last resort, Philadelphia contested the "arbitrariness" of the Regional Administrator's imposing a flat ban on ocean dumping at a set date, particularly in view of EPA's provision of financial and scientific assistance in New York City's flexible three-stage study of sludge disposal alternatives. But the position of the cities is different. New York City owns an entire fleet of ocean going barges, while Philadelphia leases a single barge. Moreover, not only does New York have more sewage to dispose of, it also has far fewer strip mines to reclaim and ranches to fertilize.

If the Philadelphia phase-out order is to be compared to any other EPA decision, it should be the Dupont case of October 3, 1974. In that situation, as in Philadelphia's, there were major uncertainties about the environmental effects of proposed dumping, though studies had identified the chemical nature of the waste to be dumped. In ruling on Dupont's permit request, Administrator Train summed up his view of the Administrator's role:

> Under the Statute, it is the Administrator's responsibility to determine that dumping will not result in unreasonable environmental degradation. That determination cannot be made in good faith without reasonable confidence in the sufficiency and reliability of the available scientific data. I have no such confidence in the information presented in this case . . . [F]urther technical studies are necessary before a permit could be granted for ocean disposal of the Dupont wastes.

This statement alone indicates what Train's decision should be in the Philadelphia case. Indeed, as the National Wildlife Federation pointed out in its brief, the Dupont waste was a better candidate for ocean dumping than Philadelphia's sewage sludge because, first, the Dupont dumping was to take place 200 rather than 40 miles from land, and second, bio-assay tests found the Dupont wastes to be of relatively low toxicity, while Philadelphia presented no such evidence.

In summary, Philadelphia had no solid ground on which to base its objections to the Region III Administrator's phase-out of water disposal. This order was in no way arbitrary, but followed both the letter and spirit of the Marine Protection, Research, and Sanctuaries Act. The EPA regulations and criteria implementing statutes were not unreasonable in requiring an applicant for an interim permit to develop and implement a plan to replace ocean dumping with a land-based alternative. After all, by allowing municipalities to continue dumping extremely toxic wastes while developing land application procedures, the interim permit scheme was an administratively-developed compromise that leaned heavily toward the economic needs of cities.

While the nation's long range goal should be to minimize the quantity of wastes and maximize our recycling skills, short term realities are such that we must dump wastes somewhere—and land-based disposal and treatment of sludge appear environmentally superior to ocean dumping. Philadelphia was an appropriate place for the EPA to begin to enforce specific

phase-out plans for ocean dumping, a policy which should be extended to other coastal cities in the near future. On July 18th, while Train was still deliberating on Philadelphia's appeal, the Region III Administrator ordered a five year phase-out dumping plan for the city of Camden, which uses the same dump site as Philadelphia. The message is clear. Interim permits are no longer to be used to excuse pollution. Cities are to comply with the regulations of the Marine Protection Act by developing and implementing phase-out plans—or be denied permits altogether. One way or the other, the Environmental Protection Agency finally seems determined to clean up the oceans.

This article was taken from 5 ELR 10144. The Administrator of the E.P.A. has upheld this decision. 5 ELR 10213.

C. Ocean Outfalls

OCEAN OUTFALL: THE ANSWER TO COASTAL PROBLEMS? DARE COUNTY MAY BE N. C. TESTING GROUND, University of North Carolina Sea Grant College Newsletter (March, 1977).

Dare County may be the first testing grounds for an ocean outfall in North Carolina. Two years ago the Dare County Board of Commissioners began grappling in earnest with plans for a municipal sewage treatment plant for the larger communities in the county. In October 1976 a proposal to study the possibility of an outfall in the county was completed by Henry von Oesen Associates, a Wilmington engineering firm.

William E. Burnett, one of the firm's engineers, is convinced that Dare County is one of the best sites for an outfall in North Carolina. "There is no other way of disposing of the wastewater in Dare County that is environmentally sound and cost effective,"he said.

The engineering firm's study plan has now passed the approval of the state's reviewing agency, the Division of Environmental Management of the Department of Natural and Economic Resources. Dare County officials are waiting for EPA approval before they proceed with the study. Once the final study is complete, approval of both agencies will be required before actual construction is begun.

The preliminary plan calls for construction of an outfall which would ultimately serve Kitty Hawk, Nags Head, Kill Devil Hills, Manteo and the Wanchese Harbor fisheries complex. According to Burnett, the outfall would be built either in Nags Head or Kill Devil Hills. The plan is based on a projected flow of 3.5 million gallons of treated wastewater per day for the year 1990. The outfall pipe would reach out into the ocean about a mile and discharge would be into 45 or 50 feet of water.

The tentative plan also proposes that domestic sewage be treated to a secondary level at a treatment plant located on about 15 acres of land near Kill Devil Hills. Secondary treatment removes about 90 percent of the suspended solids from the wastewater and the majority (but not all) of the bacteria and viruses.

In selecting an ocean outfall as the most promising plan for Dare County, the engineering firm rejected three other alternatives commonly used in the United States. One possibility would be to discharge the wastewater from a regional treatment plant into the estuarine waters of the Currituck, Albemarle or Pamlico Sounds. The water in those areas, Burnett points out, is shallow. Disposal of sewage into the sounds could eventually upset the balance of plant and animal life in the estuaries. Burnett also fears that the discharge might aggravate the problem of milfoil, an aquatic plant whose rapid growth has clogged parts of Currituck Sound. And, finally, Burnett was concerned that pollution of the estuaries might mean the closing of more of the state's shellfishing waters.

A second alternative, land disposal, would involve spraying treated wastewater over about 900 acres of land. Peat soils and a water table that is almost at the soil's surface make the land on the mainland of Dare County unacceptable. About 85 percent of the land on Dare County's Outer Banks is environmentally sensitive park land. Burnett was unable to find a suitable area large enough for land disposal on the islands. He felt that using several smaller plots would have made the cost of the project prohibitive.

A third option which has been unsuccessfully tried once in North Carolina is deep well injection. It requires piping treated wastewater into wells drilled into the earth's surface. Since 1973, North Carolina law has prohibited deep well injection. "You really don't know what happens to the effluent and whether it might mix with drinking water," said Burnett.

MEHRTENS, District Judge.

The City of North Miami, Florida, brought this action seeking a declaratory judgment, mandamus and injunctive relief against the Environmental Protection Agency (EPA) and various administrators to prevent the EPA from approving applications by Metropolitan Dade County for funds to construct three regional treatment facilities. The complaint by the City of North Miami challenges the EPA for failure to comply with the requirements of the Water Pollution Control Act Amendments of 1972 (WPCA), Public Law 92-500, 86 Stat. 816, 33 U.S.C. § 1251 et seq. (1972), and the National Environmental Policy Act of 1969 (NEPA), Public Law 91-190, 83 Stat. 852, 42 U.S.C. § 4321 et seq. (1970), in reviewing applications for funds for the implementation of the Dade County Water Quality Management Plan (Master Plan).

The intervenors defending the challenge to the EPA are Metropolitan Dade County, a political subdivision of the State of Florida, also representing its Water and Sewer Authority and a nonprofit coalition consisting of the following non-governmental organizations: Tropical Audubon Society, League of Women Voters of Metropolitan Dade County, Progress for Dade, Inc. Builders Association of South Florida, Izaak Walton League of America, Miami Building and Construction Trades Council, Greater Miami Chamber of Commerce, and Engineering Contractors Association of South Florida, Inc. Also intervening is the City of Miami, a potential indirect beneficiary of federal funds as they would finance the additional sewage treatment necessary to allow completion of its internal sewage collection system.

The complaint by the City of North Miami originally was filed in the District Court for the District of Columbia, and pursuant to the order of Judge John J. Sirica was transferred to the Southern District of Florida on May 29, 1974. A temporary restraining order entered by Judge Sirica preserved the status quo until June 13, 1974, when plaintiff's Motion for Preliminary Injunction was considered and denied. On June 13, 1974, the parties entered into a stipulation, approved by the Court, designed to preserve the status quo pending an agreed expeditious disposition of this cause upon cross motions for summary judgment. The City of North Miami and the intervenors moved for summary judgment on June 24, 1974, on which date responses to outstanding requests for discovery were served by the federal defendants.

Having considered the motion for summary judgment and supporting affidavits by the federal defendants, filed on May 29, 1974, it appears that there are no genuine issues of material fact, and that the federal defendants are entitled to judgment as a matter of law, based on the following facts and conclusions of law.

FINDINGS OF FACT

Material Facts as to Which There Is No Genuine Issue

1. On September 25, 1970, Secretary of the Interior, Walter B. Hickel, at the request of Governor Claude R. Kirk, Jr., of Florida, convened a conference concerning pollution of the navigable waters including tributaries, embayments and coastal waters of Dade County, Florida, pursuant to Section 10 of the Federal Water Pollution Control Act, as amended, 33 U.S.C. § 1151 et seq. On October 20, 1970, the first session was held in Miami. Agencies attending were the Florida Department of Air and Water Pollution Control, the United States Department of the Interior and the Federal Water Quality Administration.

2. The final Federal Report concluded that (1) the 1,000 miles of canals of Dade County were grossly polluted and in violation of the County and state water quality standards; (2) widely used septic tanks were a public health hazard that contributed to over-enrichment and algae nuisances in adjacent waterways; (3) small "package" treatment plants constituted a potentially significant source of organic and bacterial pollution; (4) present methods for disposal through ocean outfalls *without adequate treatment* required modification because of public health hazards and detrimental

effects of water quality; and (5) the *major* cause of poor water quality in Dade County was inadequately treated municipal sewage effluent. The conferees further concluded that pollution which endangers the health and welfare of Dade County residents was occurring, and that existing anti-pollution measures were inadequate.

3. The conferees recommended that the Metropolitan Dade County Commission present a master plan for abatement of pollution from all sources in Dade County by November 1, 1971. A time schedule for construction, for financing, for preparation of preliminary plans and specifications, for award of contracts, and for operation of such facilities was required.

The conferees also recommended (1) cessation of all waste water discharges into the inland canal system of Dade County not later than January 1, 1973; (2) providing a minimum of secondary treatment (90% BOD removal and year-round chlorination) for all ocean discharges not later than January 1, 1974; (3) that all new construction be connected to adequate sewage collection and treatment systems; and (4) that the County prepare an action plan to control additional sources of pollution during the period of design and construction of the pollution abatement program. They further recommended the prohibition of additional waste water discharges to lower Biscayne Bay, its tributaries and canals that drain to the Everglades. Removal of discharge to these waters was to be accomplished as rapidly as possible, but not later than January 1, 1974.

4. As a result, the County applied for a planning grant under Section 3(c) of the Federal Water Pollution Control Act in February of 1971.

5. An "Amended Supplement to the 1961 Master Plan" set forth the concept of three regional waste water treatment and collection systems to be located in North Dade County, Central Dade County and South Dade County, Florida.

The conferees found Dade County's amended interim regional plan was acceptable as a first step in the development of the "Master Plan" but found it lacked an adequate time schedule for construction, arrangements for financing and consideration of *water reuse*. These shortcomings were then treated in the County's 1972 "Interim Water Quality Management Plan for Metropolitan Dade County, Florida". This plan was structured largely by the conclusions and recommendations of the three conference sessions.

6. Subsequently, the EPA and the federal Department of Housing and Urban Development issued planning grants to Dade County.

7. On June 2, 1972, the Board of County Commissioners of Dade County, Florida, selected several consulting firms to prepare an "Environmental Assessment of the Interim Water Quality Management Plan". The firms selected included local private consulting agencies, as well as companies or agencies from New York and Missouri. On September 1, 1972, the "Environmental Assessment" was completed.

8. On December 22, 1972, the EPA released a draft environmental impact statement entitled "Ocean Outfalls and Other Methods of Treated Wastewater Disposal in Southeast Florida" (hereinafter "Disposal Methods EIS"). Public hearings were held on the Disposal Methods EIS on January 24-27, 1973, and the final EIS encompassing approximately 343 pages of text and 389 pages of appendices, was released on March 21, 1973.

On April 13 and 27, 1973, draft environmental impact statements were also released on South, Central and North Dade County projects. Public hearings were held on May 14, 1973, and final statements were issued on September 10 and October 9, 1973. The final Environmental Impact Statements for North, Central and South Dade County encompassed 206, 100 and 192 pages of text and 245, 177 and 128 pages of appendices, respectively. Public hearings were also held on May 22, 1972, in connection with a draft EIS for the Palm Beach County Sewage Treatment Program, which hearings were published on December 20, 1972 and were incorporated within the Disposal Methods EIS at Appendix H. Public notice was given and public comments were received with respect to all EISs. Written comments were printed as part of the final state-

ments.

9. Applications were filed with the EPA on behalf of the North, Central and South Dade County projects for federal funding under Title II of the Federal Water Pollution Control Act as amended in 1972. Approval of these projects was certified by the State of Florida by including them within the project priority list for fiscal year 1973 and 1974 funds pursuant to federal regulation 40 C.F.R. § 35.915. Approximately $14 million of fiscal year 1973 funds were earmarked by priority list for Central Dade; additional federal funds for fiscal year 1974 amounting to about $73 million were earmarked for the three projects. Both project priority lists were subsequently approved by EPA. Fiscal year 1973 and fiscal year 1974 lists were consolidated by action of the Florida Pollution Control Board on April 2, 1974.

10. At present Dade County is the number one polluter within the entire eight state southeastern EPA region. Every day Dade County discharges through three ocean outfall lines approximately 94 million gallons of sewage into the Atlantic Ocean at depths as low as 18 feet below the surface. Of this total amount of sewage, approximately 22 million gallons per day consist of completely raw sewage, while some 25 million gallons per day are only "skimmed" of "floatable solids".

11. The environmental impact statements, the Water Quality Management Plan and Environmental Assessment of the Water Quality Management Plan recommend substantially the following treatment systems for the three segments of Dade County:

(A) *North Dade*—construction of a new area-wide secondary treatment plant capable of handling 80 million gallons of sewage per day and providing 90% removal of suspended solids and biochemical oxygen demand, to be located on an 80-acre site within the Interama tract[2] of North Miami, Florida; treated effluent is to be discharged through a new ocean outfall beyond the seaward reef to a point approximately 3 miles from shore, 90 feet below the surface of the ocean; sludge will be pumped to Virginia Key for further treatment and reuse by land application.

(B) *Central Dade*—upgrading of the existing Virginia Key sewage plant and construction of a new secondary plant resulting in a total capacity of 115 million gallons per day with 90% removal; the existing ocean outfall would be extended and enlarged; sludge will be treated at Virginia Key together with and in the same manner as that from North Dade.

(C) *South Dade*—construction of a 50 million gallons per day area-wide secondary treatment plant replacing nine smaller plants; treated effluent will be discharged by injection in deep wells within the "boulder zone" of the Florida Aquifer; sludge will be treated and disposed of as land fill or soil conditioner.

[1] 12. Having reviewed the environmental impact statements filed in this cause, the Court finds that the federal defendants adequately studied the potential adverse environmental effects of the proposed ocean disposal of secondary treated effluent, as well as the potential adverse impact of deep well disposal of treated wastes.

13. Similarly, the following alternatives to deep well and ocean disposal were adequately considered:

(a) Discharge into the canals and intracoastal waterway;

(b) Land disposal;

(c) Septic tank disposal;

(d) Shallow well disposal;

(e) Discharge to the Florida Everglades;

(f) Advanced or tertiary waste treatment;

(g) Use of recycled effluent in connection with cooling of power plants;

(h) No action.

14. The alternative of land disposal itself received approximately 123 pages of discussion of its varying aspects within the four Environmental Impact Statements, and reference materials for the discussion indicated sixty-five (65) technical works and publications of experts in various technical disciplines. The Environmental Impact Statements revealed that the land disposal alternative was rejected for Dade County, Florida, due to the following factors:

(a) The high water table and porosity

of the soil;

(b) The large land area required (12,000–15,000 acres for 80 million gallons per day); and associated high costs of land acquisition;

(c) The occurrence of sudden large rainfalls;

(d) The high salt content of the wastewater;

(e) The secondary effects of draining large areas of wetlands adjacent to the Everglades and conservation areas;

(f) The need for large storage areas for periods when additional water and nitrogen cannot be taken up by the crops;

(g) The need for a "safety valve" in any event to accommodate large quantities of wastewater during periods of malfunction;

(h) The advisability of secondary treatment in any event prior to pumping effluent to western areas for recharge and reuse; and

(i) The adaptability of secondary treatment to upgrading to future advanced waste treatment or land application;

(j) Possible public health hazard of such a system.

15. The Environmental Impact Statements also specifically directed comments to the views of Dr. John R. Sheaffer, a proponent of the land disposal alternative, as well as local advocate of this alternative. (Disposal Methods EIS at 287–291, 306–308, 330–331, 334–335, 341, F1; North Dade EIS at 191–199, 310–312)

16. The four Environmental Impact Statements filed in this cause reflect written comments and responses thereto on the significant facets of the Master Plan for Dade County and alternative proposals as well.[3]

CONCLUSIONS OF LAW

1. The Court has jurisdiction pursuant to the following federal laws: 5 U.S.C. §§ 701–706 (Administrative Procedure Act); 28 U.S.C. § 1331(a) (Federal Question); 28 U.S.C. §§ 2201–2202 (Declaratory Judgment); 28 U.S.C. § 1361 (mandamus); 42 U.S.C. § 4321 et seq. (NEPA) and 33 U.S.C. § 1151 et seq. (The Federal Water Pollution Control Act). The amount in controversy exceeds $10,000 exclusive of interest, costs and attorneys' fees.

2. Plaintiff claims that the environmental impact statements prepared by the EPA in connection with the North Dade project ("Ocean Outfalls and Other Methods of Treated Wastewater Disposal in Southeast Florida", hereinafter "Disposal Methods EIS", and "Final Environmental Impact Statement, North Dade County, Florida", hereinafter "North Dade EIS") are inadequate in that certain alternatives to ocean disposal of treated waste, particularly land application, were not explored in sufficient detail.[4] Plaintiff further alleges that the statements and other documents and deposition testimony of federal officials evince a "predisposition" against land application and in favor of ocean disposal which runs contrary to the intent of NEPA. Finally, plaintiff contends that Russell Train, the Administrator of the Environmental Protection Agency, has failed to "encourage" the use of alternative waste treatment systems involving land application and wastewater reuse as required by Section 201 of the Federal Water Pollution Control Act, 33 U.S.C. § 1281.

Defendants, on the other hand, contend that the environmental impact statements prepared by the EPA satisfy all the requirements of NEPA as interpreted by the courts and furthermore, that a decision to fund the proposed projects cannot and should not be enjoined by this Court under the standard of review permitted of substantive agency decision.

3. The standard of judicial review under NEPA of an EPA decision to fund or embark upon a particular project is limited to whether the decision is arbitrary, capricious or an abuse of discretion. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971). The Fifth Circuit Court of Appeals recently pointed out in Environmental Defense Fund, Inc. v. Corp. of Engineers, 492

F.2d 1123, 1138, 1139, (5th Cir. 1974), that while substantive review of agency decisions is required, that review is "limited" and exceedingly "narrow". The Court noted that it is not empowered to substitute its judgment for that of the agency. On the contrary:

> "[I]ts function is only to assure that the (Impact) statement sets forth the opposing scientific views, and does not take the arbitrary and impermissible approach of completely omitting from the statement, and hence from the focus that the statement was intended to provide for the deciding officials, any reference whatever to the existence of responsible scientific opinions concerning possible environmental effects." Committee for Nuclear Responsibility v. Seaborg, 149 U.S.App.D.C. 380, 463 F.2d 783, 787 (1971)

It is further clear that:

> "So long as the officials or agencies have taken a 'hard look' at environmental consequences mandated by Congress, the court does not seek to . . . inject itself within the area of discretion of the executive as to the choice of action to be taken." NRDC v. Morton, (1971), 148 U.S.App.D.C. 5, 458 F.2d 827, 838.

With these principles as a guide the Court examines the impact statements and the procedures followed by defendants in preparing them.

4. The four Environmental Impact Statements are, on their face, both complete and detailed. Source materials relied upon are extensive and referenced. Competing points of view are discussed in the statement and the agency's assessment, in cases of divergent views, is fully articulated. It is also clear that EPA took the required "hard look" at the alternatives to the master plan including "the principal focus of Plaintiff's concern", "recycling alternatives to ocean disposal and deepwell injection".

The requirement of NEPA "to study, develop and describe appropriate alternatives to recommended courses of action" has been fully and extensively met in a detailed manner. 42 U.S.C. § 4332(2)(D). This requirement has not been construed as being an unbending standard. The courts have noted that the discussion of environmental effects of alternatives need not be exhaustive, but must only permit a reasonable choice of alternatives so far as environmental aspects are concerned. Natural Resources Defense Council, Inc. v. Morton, *supra*.

The "Disposal Methods EIS" alone devoted one complete section of thirty-two (32) pages to the land disposal alternative for sewage effluent. Disposal Methods EIS at 209–241. That section of the EIS examined the (1) water quality goals effected by the proposal; (2) the various types of land disposal systems; (3) the comparative characteristics of the basic systems; (4) the environmental impacts of public health significance; (5) soil responses to the system; (6) vegetation responses; (7) the preliminary design of such a system; (8) the adverse impacts which could not be avoided in the system; and (9) the irreversible and irretrievable commitments of resources implicit in such a system. Reference material for the section included sixty-five (65) technical works and publications of experts in various technical disciplines. [Disposal Methods EIS at 236–241.] The statement informed the reader of both the possible benefits and detriments of such systems. Rather than the "slanting" or "bias" alleged by plaintiff, the statement recognizes many of the benefits of such a system (Disposal Methods EIS at 221). However, there are many reasons advanced by the EPA for its decision to reject this alternative. These too are spelled out in considerable detail in the EIS.

Two reasons are particularly persuasive to the Court because neither could have been ignored by a responsible decision maker. First, the potential public health danger in land disposal that is discussed by Dr. Flora Welling, Administrator of the State of Florida Department of Health [North Dade EIS at 275].

> "In summary then, I do believe that using secondary wastewater for spray irrigation, except under rigidly controlled conditions, is a threat to public health not only through aerosol infection of man but also through virus contamination of the aquifer. There-

fore, only virus free wastewater effluents should be used for spray irrigation with careful monitoring of the treatment system. If even minor breakdowns should occur, an alternative disposal method, preferably an outfall pipe into the Gulf, should be available.

"As additional research results become available, hopefully, more definitive answers will be forthcoming. However, until that time, we must approach wastewater spray irrigation very cautiously in my opinion."

Second, the huge land area required for plaintiff's proposed system and the astronomical cost of such land. Even plaintiff's expert, Dr. Sheaffer, indicated that 48,000 acres of land might be required for a county-wide system and 15,000 acres would be required for North Dade County alone. The cost of land alone would be $288 million dollars or double the entire project's present projected cost. In addition, the Administrator of EPA had to consider many other facts generally adverse to plaintiff's system, including:

(a) The separation of high saline waste waters from coastal areas from the fresher waste water from the western areas;

(b) The utilization of existing farm land, including either direct governmental control through purchase or condemnation or legal controls over private enterprise farm practices;

(c) The conversion of undeveloped land;

(d) The replacement of natural vegetation with year-round harvestable crops which cannot be used for direct human consumption;

(e) The provisions for disposal of the natural vegetation and harvested crop in such a manner as not to violate water or air quality standards;

(f) The control of the water table to permit hydraulic loading and survival of the cover crop;

(g) The conversion of wet-lands to dry-lands to prevent ground water contamination;

(h) The provisions for storage of excess waste water during wet seasons and harvest times;

(i) The provisions for disposal of excess reclaimed irrigation water;

(j) The need to discharge to stream irrigation drainage pumped from the area;

(k) The problem of harvesting and disposing of the crops grown on the land;

(l) The probable need for the county to own and operate a farm;

(m) The irrigation scheme would be far more expensive to construct and operate than the disposal systems recommended in the Plan;

(n) The necessity of pumping effluent long distances to get land of sufficient area and reasonable cost.

Each of these factors is discussed at length in the EIS. They provide sound support for the EPA's decision.

After an exhaustive examination of the land disposal alternative, the statements summarized the findings of the agency: (Disposal Methods EIS at 14-16, North Dade EIS at 215-217)

"Land disposal of treated wastewater can provide additional water purification (after waste treatment), conserve freshwater, and utilize nutrients and other constituents for productive purposes when applied to crops. Studies on the health risks of land disposal indicate a continuing concern, while still drawing the general conclusion that it is safe and acceptable if soil, hydrologic, and climatic conditions are favorable. However, this method of waste water disposal has limited applications in Southeast Florida because of the high ground water table and the unsuitability of the soil of some available unurbanized land."

The facts concerning these and other problems of such a system convince the Court that the decision of the Administrator of EPA was neither arbitrary nor capricious and did not constitute an abuse of discretion since it was based upon a "record upon which a decision maker could arrive at an informed decision". Environmental Defense Fund, Inc. v. Corps of Engineers of the United States Army, 342 F.Supp. 1211 (E.D. Ark.1972), aff'd, 470 F.2d 289 (8th Cir.), cert. denied, 412 U.S. 931, 93 S.Ct. 2749, 37 L.Ed.2d 160 (1973). Moreover, the Court believes that the four Environmental Impact Statements prepared

by EPA herein sufficiently "alert the public, other interested agencies, the Council of Environmental Quality, the President and the Congress of possible environmental consequences of proposed agency action". Sierra Club v. Froehlke, 486 F.2d 946 (7th Cir. 1973). This the Court believes, sufficiently meets the requirements of NEPA "to the fullest extent possible."

Further, the EPA was entitled to reject land application on the basis of the overriding environmental factors noted above[5] without performing detailed on-site surveys. A statement of this principle is found in Cape Henry Bird Club v. Laird, 359 F.Supp. 404, 421 (W.D.Va.1973), aff'd, 484 F.2d 453 (4th Cir. 1973):

> "NEPA, however, does not require mass studies and compilations and computations of data for an alternative, the feasibility of which could be determined after only minor study. While the plaintiffs desire detailed studies and collections of such data, the court believes that the Corps need collect only as much data as will be necessary for the Corps to determine that the alternative is either infeasible or warrants further attention. NEPA does not preclude an agency from relying on past experience, judgment, and knowledge of the area when it makes a determination about the feasibility of a project's alternatives." *Cape Henry Bird Club, supra,* at 421–422.

5. Plaintiff has filed controverting affidavits in an attempt to raise issues of fact to defeat summary judgment in favor of the federal defendants. Plaintiff specifically contests the following opinions of the defendants' experts:

(1) Discharges from septic tanks, package treatment plants and ocean outfalls presently threaten the health and welfare of citizens of Dade County in total loadings of contaminants to the ocean;

(2) Major reductions in total loadings of contaminants to the ocean, considering future growth, will be accomplished;

(3) Implementation of the proposed system will largely eliminate the present threats to the nearshore coastal waters;

(4) Extension of ocean outfalls will enable more rapid assimilation of discharge by the action of the Florida current of the Gulf Stream.

It is not this Court's function to intervene in battles between experts, or to "rule on the relative merits of competing scientific opinion" but rather only:

> "to assure that the statement sets forth the opposing scientific views, and does not take the arbitrary and impermissible approach of completely omitting from the statement, and hence from the focus that the statement was intended to provide for the deciding officials, any reference whatever to the existence of responsible scientific opinions concerning possible adverse environmental effects." Committee for Nuclear Responsibility v. Seaborg, *supra,* at 787.

Therefore, the conflicting points of scientific opinion are not material issues of fact before this Court.

6. Plaintiff cites the acquisition of the Interama site by Dade County as evidence that the federal agency was predisposed against land application and in favor of ocean disposal prior to the EIS preparation. The site acquisition does not constitute a significant federal action before which there must be full compliance with Section 102 of NEPA. The Interama site was a large block of land well situated for a secondary sewage treatment plant and subject to adaptation to either advanced waste treatment or land application; it was chosen for a number of reasons noted above. (See North Dade EIS at 136–146, response to comment 5 at 196) The courts have held that the fact that certain actions were taken prior to the EIS is not a fatal error. See, *e. g.*, Jicarilla Apache Tribe v. Morton, 471 F.2d 1275 (9th Cir. 1973). Further, the County's contractual commitment for the purchase is expressly conditioned on ultimate federal approval.

7. In this case, over 1,700 pages have been printed and filed concerning the environmental impact of the three major "anti-pollution" facilities. The court in Maryland National Capitol Planning Commission v. Schulz, 5 E.R.C. 1340, 1343 (D.C.D.C.1973), makes an impor-

tant point:

> "The plaintiffs have ably dissected the statement and have directed their attack to many of the conclusions reached therein and, because the conclusions are not to their liking, have suggested that the statement is in the nature of an 'after the fact rationalization' rather than a good faith effort at weighing the various environmental consequences. That the plaintiffs do disagree with some of the conclusions comes as no surprise. On the contrary it would be surprising if any concerned party could concur fully in all the conclusions reached in a document comprising more than 300 pages requiring subjective assessments of each problem involved. That, however, is hardly ground to disregard the pro and con discussions in the statement of the various issues involved in the project. It is certainly not grounds for assuming that the subjective conclusions are merely after-the-fact rationalizations. In the eyes of many proponents of various points of view which have been downgraded or discarded in an impact statement that statement may well seem to be imperfect, but '[I]t is doubtful that any agency, however objective, however sincere, however well-staffed, and however well-financed, could come up with a perfect environmental impact statement in connection with any major project.'"

Here, with a series of impact statements, the same point is even more noticeable.

8. The Court notes that the compliance with the master plan will enable Metropolitan Dade County to comply with the July 1, 1977, requirements of 33 U.S.C. § 1311(b)(1), the date by which all publicly owned treatment works must achieve secondary treatment. Metropolitan Dade County is also past the January 1, 1973, deadline provided in Section 403.086, Florida Statutes, F.S.A. for achieving secondary treatment by municipal treatment facilities. It is the Court's view that the EPA and the Intervenors have demonstrated with substantive competent evidence that the decision to fund the "anti-pollution" master plan was not arbitrary, capricious or an abuse of discretion. In sum, in the opinion of this Court, defendants have done to the fullest extent possible everything the NEPA and the WPCA require them to do before proceeding with the "major Federal action significantly affecting the environment". Accordingly, it is

Ordered and adjudged that:

1. The motions of defendants and defendant-intervenors for summary judgment be and the same are hereby granted. In the absence of a genuine dispute of material fact and defendants being entitled to a favorable judgment as a matter of law, summary final judgment is hereby entered in favor of defendants and defendant-intervenors and against the City of North Miami.

2. Plaintiff's Motion for Summary Judgment be and the same is hereby denied, there being no material facts in dispute as to defendants' compliance with the National Environmental Policy Act of 1969 or the Federal Water Pollution Control Amendments of 1972.