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Natural Sovereignty on the High Seas

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NATURAL SOVEREIGNTY ON THE HIGH SEAS

by

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Abstract of

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Unprecedented claims which expand sovereignty over the high seas pose a continuing threat to the public order of the world's oceans. Extreme and frequently vigorously disputed opposing views on such claims are typified by the current positions of the United States and the CEP States (Chile, Ecuador, and Peru). These disputed positions and their relative flexibility can be established and could be presented to the International Court of Justice for settlement. The Court would analyze the facts in light of recent legal opinions: the Court's own January 1969 Judgment in the North Sea Cases would be the most current, related, and authoritative indication of what their judgment would be. This judgment would be representative of an international position in disputes involving natural sovereignty on the high seas. This judgment would serve both as a challenge and opportunity for the United States to assume leadership in settlement of future disputes.

PREFACE

Purpose. The purpose of this paper is to examine a current dispute involving resources in the sea, determine the issues involved, and hypothesize a solution. Specifically, the dispute chosen involves Latin American claims to extensive sovereign fishery rights in adjacent coastal waters and objections to these claims. The United States and the parties to a declaration made in Santiago, Chile, in 1882, Chile, Ecuador, and Peru, have been chosen as most representative of the opposing positions. The International Court of Justice, primarily utilizing as a framework for analysis the dicta, findings, and opinions in their February 1969 Judgment in the North Sea Cases, has been chosen as the arena within which to hypothesize a solution.

Scope. Only where necessary to define issues will the details of fishing conservation methods and techniques, fisheries economics, or ocean science technology be discussed. The scope, as already noted, is confined to a few countries in a small area. However, it is felt that this microview serves to illustrate most of the issues involved in living ocean resource exploration and exploitation today.

Sources. In most cases it has been possible to use actual or translated material relative to negotiations,

disputes, agreements, declarations, and findings in order to determine primary issues and positions.

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INTRODUCTION

The Problem. Unprecedented claims to expanded sovereignty over the waters of the high seas pose a continuing threat to the public order of the world's oceans. The CEP States (Chile, Ecuador, and Peru) in their Declaration of Santiago in 1952 exemplify this expansion.[1] The United States has consistently been representative of nations opposing further encroachments on the high seas. It is possible to examine the actions of the CEP States and the United States, determine their present position, and draw conclusions as to the relative flexibility of each. Further, utilizing the dicta and holdings of the January 1969 Judgment of the International Court of Justice (ICJ) in the North Sea Cases (North Sea Continental Shelf Cases of 1969), conclusions can be drawn as to how the ICJ, representing the international community, might react were these positions presented to them for resolution.[2]

Scope. Beginning in the early 1940's claims to varying degrees of control, jurisdiction, and in some cases sovereignty over the seas and seabeds off coastal nations began to expand both in number and variety. The most extensive claims have been those made by various Latin American States including Peru,[3] Chile,[4] Ecuador,[5] Costa Rica,[6] El Salvador,[7] Honduras, and Uraguay.[8] These claims involve both the seabed and the superjacent waters out to and sometimes beyond 200 miles measured from various tidal shoreline boundaries. These claims have led at their worst to bloodshed[9] and at their best to laws further straining relations.[10] Peru has been most consistent in her claims and, in company with Chile and Ecuador in the Declaration of Santiago, most typifies the expanded sovereignty position.

Many nations have opposed these expanding claims to coastal waters. The United States has been consistent in this regard.[11] With respect to the Latin American claims she occupies the unique position of having close regional ties with the nations concerned and a long history of fishing off their coasts.

Simultaneously with the CEP claims and United States protests and far removed from Latin America another dispute has been in process over resource boundaries in the sea. These claims have been made, disputed, and apparently resolved without resort to bloodshed and at most with only

minor strains to relations. The contesting nations, West Germany, Denmark, and the Netherlands, have taken their dispute to the ICJ and a decision has been rendered.

In rendering the aforementioned decision the ICJ in its judgment spoke at some length to various aspects of boundary determination in the world oceans. Some of this has applicability to other claims to expanding areas of sovereignty in the high seas.

It is the purpose, then, of this paper to consider the positions of the United States and the CEP States as reasonably typical of current opposing views on expanding exclusive claims to living resources in the coastal seas. It will then be possible to hypothetically present these positions to the ICJ and draw conclusions as to the judgment most likely to be reached by it. This paper will go into details concerning the physical environment, conservation, and economics of these living resources only as necessary to support these conclusions.

Limitations. It is possible to contend that the preceding scenario is unlikely. The United States does not normally take disputes to the ICJ.[12] As will be discussed later, the CEP States have declined in the past to present this particular dispute to that forum.

Claims and disputes over boundaries in the sea will continue to proliferate as land resources are used up and

as populations expand, however. Since the Law of the Sea Conference at Geneva in 1958 only once has any action been taken which might reasonably be construed as representative of an international position on any of the Conventions adopted there. This was the North Sea Cases Judgment. Prior to 1969 the ICJ Anglo-Norwegian Fisheries Judgment of 1951 held the distinction of being the most recent such representative action.[13] Regardless of the plausibility of the scenario the approach is considered reasonable. That is, we shall attempt to find a peaceful solution to a current problem in international law by utilizing the most current, related, and authoritative statement available to examine two positions which represent reasonable extremes. It is not unreasonable to assume that similar attempts on the part of nations would influence them in decisions and negotiations.

Examining a general problem in a specific context can also have some drawbacks. In this case we are examining a dispute involving living resources of the sea in the light of a judgment involving the continental shelf and mineral resources underlying the waters containing those living resources. There are certainly physical differences between the seabed and the superjacent waters. Definitions as to what constitutes the continental shelf do not always coincide. Nevertheless, both situations do involve boundary claims in the sea, both are regional in nature, and both have economic and social underpinnings.

The ICJ is not the same forum as, for example, the General Assembly of the United Nations. It is possible, therefore, to question its ability to be representative of the international community. However, the makeup of the Court is diverse. Sitting on the Cases were representatives of both views, in particular Phillip Jessup of the United States and Bustamonte y Rivero of Peru. National bias in the ICJ is demonstrable.[14] Judges do favor their own countries although the pattern is not related to the importance of the decision. Rather, the more subtle influence of "culturally inculcated values" seems to account for any prospensity of judges to vote with their own countries. This fact when combined with the diversity of the ICJ does not violate criteria for impartial adjudication, however. It will be assumed, therefore, that the ICJ provides one of the best means for taking an international pulse. Additionally, Phillip Jessup states: "The International Court of Justice could, . . . resume its contribution to the process of building the rule of law among nations (and) become the normal instrument by which friendly powers resolve their differences before they fester."[15]

Very few limitations as to source material were encountered.

Organization. The organization of this paper follows that of the problem statement. That is, the actions and

reactions of the United States and the CEP States are examined. Next the pertinent aspects of the ICJ North Sea Cases Judgment are presented. Finally, conclusions are presented in two parts. First, the positions of the CEP States and the United States and their relative flexibility are set forth. Second, a hypothesized judgment of the ICJ resolving or providing guidance toward resolution is presented.

An appendix has been included describing the background of the North Sea Cases. While not essential to the thesis, it adds to it. It is both interesting and valuable to note some of the economic, geographic, social, and legal parallels which can be drawn.

FOOTNOTES

[1]Declaración Sobre Zona Marítima, August 18, 1947, XIV Revista Peruana de Derecho International, No. 45, January to June 1945, p. 104-105 translated in U.S. Naval War College International Law Situations and Documents 1956 (Washington: U.S. Govt. Print. Off., 1957), p. 265-267.

[2]International Court of Justice, North Sea Continental Shelf, Judgment, ICJ Reports, p. 3 (Netherlands: 20 February 1969).

[3]E. Garcia Sayan, Notes on the Maritime Sovereignty of Peru (Geneva: 1958), appendix 1, p. 45-46.

[4]United Nations Legislative Series, Laws and Regulations on the Regime of the High Seas (New York: 1951), p. 6.

[5]Declaración, p. 265.

[6]Organization of American States, Background Material on the Activities in the Organization of American States Relating to the Law of the Sea (Washington: Pan American Union Department of International Law, December 1957), p. 42.

[7]Background Material, p. 43.

[8]Ibid.

[9]The New York Times, 29 March 1955, p. 16:4.

[10]U.S. Laws, Statutes, etc., An Act to Protect the Rights of the United States on the High Seas and in Territorial Waters of Foreign Countries, 68 Stat. 883, Public Law 680, U.S.C., Supp. III (1952 Edition) (1956), (Washington: U.S. Govt. Print. Off., 1956), p. 633.

[11]Barry Auguste, The Continental Shelf (Paris: Librarie Minard, 1960), p. 144.

[12]The New York Times, 1 March 1970, sec. 4, p. 1:5.

[13]International Court of Justice, Fisheries Case, Judgment ICJ Report 116 (Netherlands: 18 December 1951).

[14]T. R. Hensky, "National Bias and the International Court of Justice," Midwest Journal of Political Science, November 1968, p. 568-586.

[15]The New York Times, 29 March 1955, p. 16:4.

CHAPTER II

INITIAL UNITED STATES ACTIONS

Initial Stimulation.

> I wish you would talk with the Secretary (Hull) and tell him I suggest that you proceed immediately to the study of the possibility of adopting a new policy relating to off-shore fishing in Alaska. The policy would be based on the fact that every nation has the right to protect its own food supply in waters adjacent to its coast in which its fish, crabs, etc., live at certain times of the year on their way to and from the actual shore line of rivers.[1]

This memorandum was sent by President Franklin Delano Roosevelt to R. Walter Mone, Counselor of the Department of State, on 21 November 1937. Correspondence on and interest in the subject matter certainly existed in the United States prior to this date. This memorandum is for our discussion a sufficient and significant starting point, however. It ultimately led to the Truman Proclamations of 1945 on coastal fisheries[2] and the continental shelf.[3]

In June 1943, Secretary of the Interior Harold L. Ickes suggested in a letter to President Roosevelt that the Continental Shelf probably contained "oil and other resources" out to its farthest limits and was in addition "a fine breeding place for fishes of all kinds."[4] "I suggest," Ickes said, "the advisability of laying the ground work now for availing ourselves fully of the riches in this submerged land and in the waters over them."[5]

President Roosevelt reiterated his previous interest in the Alaskan fisheries and, as a result of this letter, endorsed Mr. Ickes' thoughts by again passing the matter to Secretary Hull for action.[6] After considerable prodding by the President and the Interior Department, Secretary Hull placed the matter in the hands of Assistant Secretary of State Long in June of 1944. Mr. Long convened a series of meetings and on 13 July 1944 chaired an interdepartmental conference of Department of State and Department of Interior representatives. Extracts from the minutes of this "historic" conference are pertinent.[7] Mr. Straus (Assistant Secretary of the Interior) expressed interest "in taking steps which might guaranteee to this country control and utilization of the resources of the sea areas adjacent to our coast corresponding to the extent of the continental shelf". He requested guidance from the Department of State as to what "might be possible toward the main object of developing a formula under which the United States would be freed from the present handicap of the rule of the three-mile limit and could assure itself of the exclusive use and control (author's emphasis) of the resources of the continental shelf". Mr. Long "suggested that the continental shelf seemed to offer a reasonable basis on which to assert a wider jurisdiction for control".

In the ensuing discussion special circumstances regarding fisheries were recognized and two points were made clear. First, there existed the problem of limiting foreign operations close by United States shores. Second, there was the question of protecting American enterprise established near the shores of other countries. Dr. Gabrielson (Director of the Fish and Wildlife Service) emphasized that "fisheries presented an immediate rather than a future problem" and urged immediate action to prevent "heavy encroachment by foreign nationals" on our fisheries. Such a plea would not be out of place in 1970. It is also worthy of note that the United States position in 1944 as voiced by the same Fish and Wildlife Service was that: "a basic solution requires a procedure for the national exploration jointly with superior equities of coastal states recognized."[8]

Even with the brief passages preceding we can recognize the key factors leading up to the Truman Proclamation of 1945. We note the Interior Department pushing the State Department for guidance in establishing better seabed and coastal waters control. With only a little imagination we can guess at the economic interests which may have been pushing the Interior Department at this point. We can cite the trend toward building controls around the physical concept of a continental shelf. We can see the genesis of a policy which begins as complete control over fisheries and

expands to complete control and jurisdiction over all resources on and over the continental shelf to some as yet undefined limit. This policy, however, is not the one which appears in the Truman Proclamations of 1945.

It is recognized that fisheries are a more complex subject both by nature and in international affairs than, for example, mineral resources on the seabed.[9] The fish are alive and move about. It is also observable in the United States that the economic and political voice of those who exploit the oil under the seabed is louder than that of the fishing interests. These facts would indicate that anything less than total control and exclusive use of the seabed and subsoil off United States shores was much less likely than some sort of compromise in the fishing industry. With these thoughts in mind we continue.

Predictably then--at least with hindsight--and following more meetings and debate, two texts were generated. One dealt with fisheries and one with the natural resources of the subsoil and seabed of the continental shelf. These were transmitted by the Department of State to Secretary of the Interior Ickes on 5 December 1944.[10] The package was approved by him and forwarded to President Roosevelt. He approved it on 31 March 1945 subject to discussions with foreign governments, Congress, and preparation of necessary documents.

The discussions with several nations including Canada, Newfoundland, Mexico, Great Britain, U.S.S.R., France, Norway, Netherlands, Cuba, Ireland, Denmark, and Portugal indicated no opposition.[11] Some misconceptions concerning the two texts and the relationship between the subsoil and seabed and the superjacent waters did arise. These were apparently cleared up, however, when the United States said that: "the coastal fishing policy is not designed to safeguard exclusive U.S. utilization of the fisheries off of our coast: on the contrary, it calls for the making of agreements with countries whose nationals have hitherto operated in the respective conservation zones."[12]

What were these texts? The texts of the Truman Proclamations issued on 28 September 1945 dealt with fisheries on the one hand and the resources of the seabed and subsoil of the continental shelf on the other. Their essence is contained in the following extracts from an official press release issued on 28 September 1945:

> The President issued two proclamations on September 28 asserting the jurisdiction of the United States over the natural resources of the continental shelf under the high seas contiguous to the coasts (author's emphasis) of the United States and its territories, and providing for the establishment of conservation zones for the protection of fisheries in certain areas of the high seas contiguous to the United States. . . .[13]

The distinction drawn between "jurisdiction" and "protection" in the preceding is important and the proclamation portion of the Fisheries Proclamation is pertinent. It states,

> In view of the pressing need for conservation and protection of fishery resources, the Government of the United States regards it as proper to establish conservation zones in those areas of the high seas contiguous to the coasts of the United States wherein fishing activities have been or in the future may be developed, and maintained on a substantial scale. Where such activities have been or shall hereafter be developed and maintained by its nationals alone, the United States regards it as proper to establish explicitly bounded conservation zones in which fishing activities shall be subject to the regulation and control of the United States. Where such activities have been or shall hereafter be developed and maintained jointly by nationals of the United States and nationals of other States, explicitly bounded conservation zones may be established under agreements between the United States and such other States; and all fishing activity in such zones shall be subject to regulation and control as provided in such agreements. The right of any State to establish conservation zones off its shores in accordance with the above principles is conceded, provided that corresponding recognition is given to any fishing interests of nationals of the United States which may exist in such areas. The character as high seas of the areas in which such conservation zones are established and the right to their free and unimpeded navigation are in no way thus affected.[14]

It should be noted that no mention is made of physical limits of fisheries. Similarly in the Proclamation on the Continental Shelf no mention is made of outer limits. However, with regard to the Proclamation on the Continental Shelf the President made the statement that: "It will,

however, make possible the orderly development of an underwater area 750,000 miles in extent. Generally, submerged land which is contiguous to the continent and which is covered by no more than 100 fathoms of water is considered as the continental shelf."[15] Concerning disputed boundaries the Proclamation itself states: "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."[16]

> While the Truman Proclamation was preshadowed to some extent by the United Kingdom-Venezuela Treaty of 1942 which provided for the division of the seabed of the Gulf of Paria (between Venezuela and Trinidad) between them, the Truman Proclamation was the first clear-cut statement of principle on the subject to be promulgated by any state.[17]

FOOTNOTES

[1]Marjorie Whiteman, Digest of International Law (Washington: April 1965), v. IV, p. 945.

[2]Presidential Proclamation Number 2668, Policy of the United States With Respect to Coastal Fisheries in Certain Areas of the High Seas, 10 Fed. Reg. 12304, 28 September 1945 (Washington: U.S. Govt. Print. Off., 1945).

[3]Presidential Proclamation Number 2667, Policy of the United States With Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, 10 Fed. Reg. 12303, 28 September 1945 (Washington: U.S. Govt. Print. Off., 1945).

[4]Whiteman, v. IV, p. 946.

[5]Ibid.

[6]Ibid., p. 948.

[7]Ibid., p. 948-951.

[8]Organization of American States, Annals of the Organization of American States (Washington: Pan American Union, 1956), v. 8, p. 162.

[9]F. T. Christy and A. Scott, The Common Wealth in the Ocean Fisheries (Baltimore: Johns Hopkins Press, 1965), p. 83.

[10]Whiteman, v. IV, p. 952.

[11]Ibid., p. 953.

[12]Ibid.

[13]U.S. Department of State, Bulletin (Washington: U.S. Govt. Print. Off., 30 September 1945), no. 327, p. 424.

[14]Presidential Proclamation Number 2668.

[15]U.S. Department of State, p. 484.

[16] Presidential Proclamation Number 2667.

[17] S. J. Grunawalt, "The Acquisition of the Resources of the Bottom of the Sea--A New Frontier of International Law," Military Law Review, 1966, p. 111.

CHAPTER III

INITIAL CEP STATES POSITION

The Shelf. It would be interesting to conjecture how the Truman Proclamations would have read had the relationship of fisheries to minerals been the same in the United States in 1945 as in Peru. Our primary concern at this juncture, however, is to look at the expanding Latin American territorial sea claims and determine the basis upon which so much "adjacent" water is claimed. Except to point out real or hypothetical relationships to the geological continental shelf we shall confine ourselves to these waters. It is noted that many feel as Auguste who says: "It may be concluded that the conjunction of 'Shelf' and superjacent waters is more in keeping with the economic motive of fisheries (which he holds to be the greater motivating factor in shelf claims), and consequently, of the concept of the Continental Shelf."[1] However, we derive our inspiration from Mouton who concludes that "coastal waters are the most productive, but independent of the existence of a Continental Shelf (as off of Peru)." He continues: "In other words there is no reason to tie production of fish to the existence of a shelf . . . (and) . . . it should not be made into a criterion for delimitation of rights concerning fisheries."[2] Acceptance of Mouton's thesis may do some damage to one argument posed

by the CEP States that a "great 'bioma' (an area within which all natural elements affecting fisheries are and must remain inextricably linked both in nature and in discussion) implanted in this region of the Pacific" gives them special rights to an "extension . . . (of) . . . their sovereignty over the sea."[3] Acceptance, however, will not damage our conclusions and where it might we shall so note. In fact, Christy and Scott point out that "a stronger biological argument (than the 'bioma' theory) could be advanced against widening the fishing zone of the coastal state since fish don't respect boundaries . . . so fish stocks themselves ought to be managed to take account of entire life cycle and ecology."[4]

The Declaration. Conservation of fisheries (for whatever reason) is a primary motivation behind the expanded CEP claims. Approaches to fisheries conservation are many and varied. Suffice to say here that the techniques range from total abstention, through shared catches, to no regulation whatsoever. All are dependent on a sound technical knowledge of the fishery. This requires considerable amounts of data. Acquisition and analysis of this knowledge and data is difficult and expensive even for the United States. The inability of lesser developed countries to gain this knowledge easily and the fact that no one else has it has contributed considerably to the CEP States discomfort. Jumping over other

factors for the moment let us look at what this 'discomfort' ultimately led to. On 18 August 1952 the CEP States declared in relation to their "zona maritimas" that:

> (I) Owing to the geological and biological factors affecting the existence, conservation and development of the marine fauna and flora of the waters adjacent to the coasts of the declarant countries, the former extent of the territorial sea and contiguous zone is insufficient to permit of the conservation, development and use of those resources, to which the coastal countries are entitled.
>
> (II) The Governments of Chile, Ecuador, and Peru therefore proclaim as a principle of their international maritime policy that each of them possesses sole sovereignty and jurisdiction over the area of sea adjacent to the coast of its own country and extending not less than 200 nautical miles from the said coast.
>
> (III) Their sole jurisdiction and sovereignty over the zone thus described includes sole sovereignty and jurisdiction over the sea floor and subsoil thereof.
>
> (IV) . . .
>
> (V) (They would) . . . permit the innocent and inoffensive passage of vessels of all nations. . . .[5] (emphasis added)

Costa Rica,[6] El Salvador,[7] Honduras, and Uruguay[8] have also made claims to sovereignty over a 200-mile zone. Other Latin American nations including Argentina, Brazil, Guatemala, and Mexico have claimed jurisdiction over the waters above the continental shelf. An excellent treatment of all types of claims and claiming processes is contained in Johnston.[9] All claims, including those of the CEP States, include

guarantees of innocent passage and freedom of navigation on the high seas and none exceed the CEP claims in extent.[10] According to Auguste, the Latin American States have exercised their control over the "maritime zone," fisheries, and superjacent waters with the CEP States taking the lead in enforcing their jurisdiction over this area.[11]

With these thoughts in mind, then, let us also follow the leaders and see what went into the initial CEP position.

Initial Positions. The models used for initial unilateral claims to 200 mile fishing zones made by Chile[12] and Peru[13] in 1947 were the Truman Proclamations of 1945. The differences between these Proclamations have been noted previously. The United States claims to resources on the seabed and in the subsoil extend out to about 200 miles in some areas and average about 42 miles.[14] These claims were considered sufficient justification for claims by Chile and Peru to fishery resources, i.e., if the North Americans can claim all of the resources on their continental shelf why cannot we who have no such shelf claim the resources in the waters off our coasts?[15]

While the Truman Proclamations served as models, however, the genesis of the CEP claims did not originate in 1945. Even as far back as 1758 Vattel stated that seas near the coast are a natural object of ownership. Further, he said

that if particularly profitable fisheries exist along the coast of a nation there is no reason why she should not appropriate this gift of nature and keep the great commercial advantages: particularly if there are enough fish to supply neighboring nations. Going just a bit further he said that such claims of sovereignty are respected or eliminated depending on that nation's ability to bring force to bear.[16]

In 1916 and 1918 Stone and Suarez (Argentine publicists) emphasized "the importance of the 'Shelf' to the principal commercial fisheries, and recommended that the adjacent state assert jurisdiction over the epicontinental sea, i.e., the waters above the 'shelf', to obtain control of those fisheries."[17] Further, they suggested economic interests as the basis upon which to found a legal right to the 'shelf'. Not until 1942 and a treaty between Great Britain and Venezuela did mineral resources arise as a rationale for rights on the shelf.[18]

During the Second World War an Inter-American Defense Zone 300 miles wide was established around the American continents. While this author could find no reference to this as a factor in later 200 mile claims it is not inconceivable that it was considered or at least planted mental seeds in those claiming extensive boundaries.

Economic interests in fisheries continued to grow in Latin America. As discussed by the International Law

Association (IIA), the extension of mineral resource claims on and below an unexplored and perhaps unexploitable continental shelf into a fisheries resource claim in the coastal waters did not seem unreasonable.[19]

Chile made the initial claim to a 200 mile maritime zone on 23 June 1947.[20] Peru followed shortly thereafter on 1 August 1947.[21] Ecuador did not extend her claim to 200 miles until she became a party to the 18 August 1952 Declaration on the "Zona Maritima" which was negotiated by the governments of Chile, Ecuador, and Peru at Santiago, Chile.[22]

Peru's initial unilateral claim closely paralleled Chile's "maritime zone" in that it included all waters necessary to reserve, protect, maintain, preserve, and exploit the natural resources and wealth. Additionally, Chile recognized the rights of others to make reciprocal claims. Both claims were more extensive than the pathfinding Argentine claims. They both had no defined boundaries. They did not utilize the specific concept that all adjacent living resources constitute an entity. They did, however, speak to a "Zona Maritima" for the first time. Peru included her islands and a zone 200 miles from every point of their contour. In 1956 Peru said that her regulations were waived for foreign vessels working for and delivering fish to Peruvian industrial plants.[23] The later growth of her fishing fleet has obviated the need for many such waivers, however.

The CEP States have discarded notions of geological unity in their claims. The geological shelf is not claimed as a base for fishery protection but is claimed as a part of a larger maritime zone. In spite of these differences from most other Latin American claims, however, there are similarities. All speak of zones of control of natural resources and all address the need for controlling areas historically regarded as high seas. Auguste says: "The central aim was the protection of the areas mentioned against indiscriminant fishery exploitation."[24] The question of how discriminating one can be will be raised later.

A Permanent Commission of the Conference for the Exploitation and Conservation of the Maritime Resources of the South Pacific was established by the 1952 Santiago Conference.[25] This commission standardizes regulations for hunting and fishing. The individual nations enforce these regulations through a system of penalties. A proviso was added that licenses to fish would only be issued in the maritime zones for such fishing as does not impair conservation or provides fish for domestic consumption or industry. In a supplementary agreement to the previously quoted Declaration of Sovereignty over the Maritime Zone of Two Hundred Miles, the CEP States also agreed to cooperate fully in all matters pertaining to any of their maritime zones and to undertake no negotiations which would imply a dimunition of their sovereignty over the zone.

These, then, constitute the underpinnings of the initial positions of the CEP States. We have seen how the CEP States reacted to the 1945 Truman Proclamations. We have examined the origins of those proclamations. We can now go on to United States reactions and the interplay between the United States and the CEP States as differences arose, fisheries exploitation expanded, and present positions developed.

FOOTNOTES

[1]Auguste, p. 82.

[2]M. Mouton, The Continental Shelf (Hague: 1952), p. 55.

[3]Whiteman, p. 1202.

[4]Christy and Scott, p. 185.

[5]Declaración Sobre Zona Maritima, p. 265-267.

[6]Background Material, p. 42.

[7]United Nations Legislative Series, Laws and Regulations on the Regime of the Territorial Sea, ST/LEG/SER.B/6 (New York: 1957), p. 14.

[8]Mouton, p. 43.

[9]Douglas Johnston. The International Law of Fisheries (New Haven: Yale University Press, 1965), p. 41.

[10]Auguste, p. 163.

[11]Ibid., p. 165.

[12]United Nations Legislative Series, Laws and Regulations on the Regime of the High Seas, ST/LEG/SER.B/1 (New York: 1951), p. 6.

[13]E. Garcia Sayan, Notes on the Maritime Sovereignty of Peru (Geneva: 1958), p. 45.

[14]Lewis Alexander, "The Nature of Marine Geography," Lecture, University of Rhode Island (Kingston, R.I.: 1 November 1969).

[15]Organization of American States, Third Meeting of the Inter-American Council of Jurists, Mexico City, 17 January 1956, Report of the Executive Secretary (Washington: Pan American Union Department of International Law, April 1956), p. 11; Auguste, p. 11.

[16]E. De Vattel, The Law of Nations on the Principles of Natural Law (Washington: Carnegie Foundation Classics of International Law, 1916), v. 3, p. 39.

[17]Auguste, p. 42.

[18]Ibid., p. 59.

[19]International Law Association, Report of the 45th Conference (Lucerne: 1952), p. 157.

[20]United Nations, High Seas, p. 6.

[21]Auguste, p. 134.

[22]Declaracion Sobre Zona Maritima, p. 265.

[23]B. Bayitch, International Law of Fisheries (Coral Gables, Florida: 1957), p. 35.

[24]Auguste, p. 138.

[25]"Organization of the Standing Committee of the Conference on the Use and Conservation of the Marine Resources of the South Pacific," U.S. Naval War College International Law Situations and Documents 1956(1957) (Washington: U.S. Govt. Print. Off., 1957), p. 267-269.

CHAPTER IV

UNITED STATES/CEP STATES--REACTIONS, NEGOTIATIONS AND DEVELOPMENT

Introduction.

> The fishery question has been the point of the whole problem of territorial waters from its very beginning.[1]

Reaction to the extensive claims to exclusive jurisdiction and use of coastal waters for fisheries conservation and exploitation seem to bear out this statement made in 1942. These reactions have been as varied as the claims so consistently defended by Latin American countries. Some contend that they exceed the Truman Proclamation.[2] Others (including surprisingly, though not consistently, Mexico) have contended that they are simply opportunism manifested by territorial sea extensions.[3] Auguste says that both the United States and the CEP States are using continental shelf doctrine to cover predatory claims.[4] Marjorie Whiteman contends that the motivations of fear of depletion and desire for revenue are underlying but invalidating justifications.[5] Christy predicts that Peru's fishery growth will lead to similar claims in Africa and elsewhere.[6]

Regardless of these reactions, however, decisive if unorthodox actions by Latin American States are not unknown,

especially when they become aware of wealth leaving their countries with only small or no return. The United States as one of the principal customers for Latin American raw materials is not infrequently, albeit reluctantly, involved in these reactions in a controversial manner. Such is the case with regard to CEP 200 mile claims which United States observers predicted in 1944.[7] It will be noted in this chapter that Peru is mentioned or used as an example more often than Chile and Ecuador or the CEP States acting together. Her actions are, however, in accord with CEP practice and agreements although she has in fact assumed a leadership position among these states and among Latin American States. The reasons for her position of leadership become evident when her fisheries statistics are examined. She has the most at stake.

The CEP States' interpretation of the Truman Proclamations have led to sharp exchanges, both physical and written, between these nations and the United States. In the absence of a final solution and in view of the failure of earlier negotiations the United States has and continues today to modify her laws to protect fishermen arrested in waters in which others' rights to make such arrests are not recognized by her.[8]

Reaction and Negotiation. The United States and others protested the Peruvian and Chilean Declaration in 1947. Consistently noted was the allegation that: "the decree fails. with respect to fishing to accord recognition to the rights and interests of the United States in the high seas off the coasts of (Peru and Chile)".[9]

In 1950 the International Law Association stated its position. The association said that the recognition of control and jurisdiction of the coastal state over seabed and subsoil outside territorial waters does not affect the status of high seas of the waters above such seabed.[10]

Denmark, Sweden, the Netherlands, the United Kingdom, and the United States voiced similar objections to the 1952 CEP declaration at Santiago. More cause for objection was provided by succeeding captures of United States fishing vessels. In a note delivered in May of 1955 the United States suggested that the entire matter be taken to the ICJ to seek an agreement concerning conservation of the fisheries in which they and the CEP States have a common interest.[11] The CEP States declined but proposed instead that the United States join them in negotiating a conservation agreement. Though still somewhat piqued by Peruvian seizure of the United States fishing vessels Artic Maid and Santa Anna in March of 1955 the United States agreed. (It is pertinent to note that simultaneously with preparations for this meeting the CEP

States were successfully establishing the "special interests of the coastal state" in coastal fisheries at the International Technical Conference on the Conservation of Living Resources of the Sea.[12]) The United States proposed three major points for discussion. These all spoke to conservation in the Southeast Pacific and more specifically to determining the type of agreement required for such participating conservation.[13] The CEP States, acting as always in concert, replied with a request that the United States immediately submit their proposals for such conservation and take into account prevention of incidents involving United States fishermen.

On 20 September the United States presented these proposals. They accented United States concern for tuna and discussed the studies conducted by and operations of the Inter-American Tropical Tuna Commission. The United States stated that the convention establishing that commission adequately covered the matter of tuna and bait fish. The United States delegation then observed that since the CEP States had not previously accepted an invitation to participate in the Commission perhaps a statement by them of deficiencies in the convention would help determine a means of agreement. The United States also made additional detailed proposals for a new commission and included considerations of research, expenses, special rights of coastal states, and arbitral

procedures in case of disagreement.[14] Finally, the United States delegation replied that conclusion of an agreement would certainly lead to lessening or elimination of incidents involving United States fishermen.[15]

The CEP countries did not find the United States proposals acceptable. They proposed some alternatives. They called for exclusive coastal state control and licensing out to at least 12 miles and then 50 to 60 miles beyond that depending on unilateral declarations by the coastal state. In the remaining area (the best fishing zones having been covered by the preceding) they would submit to the rules established by a new commission. They stated, however, that these rules must coincide with joint or individual regulations promulgated by the CEP States out to 200 miles.[16]

The CEP States did not move from this position for the remainder of the negotiations. United States proposals concerning treatment of foreign fishing vessels, recognition of special dependence of coastal areas upon sustenance from the sea and measures amounting to less than their exclusive jurisdiction of large areas off their coasts did not prove of interest to the CEP delegations. Finally the CEP States insisted on acceptance of their concept of an "ecosystem" or "bioma" existing off their coasts which created a unity between the coastal state and its waters and which required preferential rights. They said: "Precisely the extension

which the three countries have given to their sovereignty over the sea has, as its scientific basis, the defense of the great 'bioma' implanted in this region of the Pacific; and not merely the conservation of stocks of fish in which other countries have a commercial interest."[17] The United States rejected this concept. She pointed out that tuna move through and beyond these "bioma" indiscriminately.[18] She suggested that the ecosystem, if it existed, ranged from Chile to California and suggested that any commission have a broad enough membership base to cover the entire area. The United States delegation further attempted to allay claims that United States policy was to make unilateral fishery claims under the Truman Proclamation of 1945. They pressed for world fishing rights for all countries rather than conservation and protection of fishing resources as desired by the CEP States.[19] It was pointed out that the United States has entered into more international agreements with more nations for fishery conservation than any other country.[20]

The CEP claims to exclusive jurisdiction could not be overcome. On 5 October 1955 negotiations were terminated with little result.

Conventions on the Law of the Sea. In January of 1956 the Inter-American Council of Jurists met in Mexico City in preparation for a later conference at Ciudad Trujillo in March

of 1956 and ultimately the United Nations Conference on the Law of the Sea in 1958. The result of the first two conferences was the Resolution of Ciudad Trujillo adopted on 28 March 1956.[21] Agreement was not reached with respect to fisheries and their juridical regime. The United States insisted on reciprocal recognition rights of United States nationals in any conservation zones established by unilateral declaration.[22] Cooperation in conservation through agreement and the special interest of the coastal state in the continued productivity of adjacent living resources were agreed upon but undefined principles. The Resolution concluded: "There exists a diversity of positions. . . ."[23] The United States was frequently in the minority in voting and discussion. She stood alone in opposing the "juridical conscience of the American States" appellation attached to the results of the Mexico City meeting.[24] CEP and United States positions remained consistent with those at Santiago. One possible exception was that the United States seemed to more strongly recognize the special interest of the coastal state in high seas living resource productivity.[25] The United States claimed as she stood alone at Mexico City that no study, analysis, or discussion of the final resolution had taken place. The record shows this to be so. Apparently the resolution was at least in part emotionally motivated. The Ciudad Trujillo meeting was less emotional and more productive.[26]

Later in 1956 the International Law Commission (ILC) of the United Nations submitted to the General Assembly of the United Nations a draft concerning many aspects of law of the sea.[27] This draft was specific in not recognizing exclusive fishing zones beyond the territorial sea or over all of the continental shelf. It allowed for conservation agreements but binding only on signatory states. It did recognize that adequate protection against waste and extermination of marine fauna did not exist. It was acknowledged that this could induce states to make unilateral claims at variance with the law: primarily because they would totally exclude foreign nationals. The draft report concluded that conservation programs can be more effectively carried out through international cooperation and preferably on a separate species or at least a regional basis. Compulsory arbitration of disputes was strongly recommended. The Commission then said that all proposed measures would fail in an important part of their purpose if they did not smooth difficulties arising from exaggerated claims.

It was emphasized in the foregoing ILC report that the need exists to increase yields not merely to conserve. The right of a coastal state to prescribe regulations unilaterally <u>if no other nationals are engaged in fishing</u> was set forth. Special interest was defined as the right to take part on an equal footing in any system of research and regulation in that area.

The Commission noted that requests to extend the territorial sea from nations primarily dependent on fisheries had been received. They pleaded a lack of biological and economic competence and made no concrete proposals. All present acknowledged the need for conservation but made claims too disparate for consensus.[28]

In 1958 the Conferences on the Law of the Sea met at Geneva. A Convention on Fishing and Conservation of the Living Resources of the High Seas (hereinafter referrred to as the Fishing Convention) was adopted there.[29] The provisions of this document will not be detailed here as most of the subject matter has already been discussed. It agrees for the most part with the previously discussed ILC draft which was submitted to the Conference as the basis for starting discussion.

The Fishing Convention did contain an article not proposed by the ILC. This was article seven proposed by Iceland.[30] It said that a people "overwhelmingly dependent" on coastal fishing for its livelihood or economic development can limit fishing preferentially and unilaterally. If others disagree the dispute should be settled by the binding arbitration of the special commission spelled out in the Convention.[31] Negotiations with other states seeking agreement must, however, be undertaken prior to this referral. The special interest of the state in maintaining productivity was recognized.

By February of 1970 the Fishing Convention had been ratified by only 25 nations. This number includes the United States but not the CEP States and was sufficient to bring the Convention into force.

Practice Immediately After the Fisheries Convention. Open negotiations between the CEP States and the United States have not resumed since 1955. In 1960 another Conference on the Law of the Sea was convened at Geneva. Virtually no additional progress was made. In fact, at the close of the Conference the Peruvian delegation declared that: "the rules of public law enacted by Peru regarding the exercise of its maritime jurisdiction continue in force."[32] Many felt that this attitude gave the impression that the Latin American States thrive on chaos. Auguste said: "Concessions are never and ought never to be one-sided."[33] Examination of the voting on various amendments proposed to the Fishing Convention is enlightening. Auguste concluded that: "These States (the CEP States) would not compromise on any suggestion short of exclusive rights."[34] Negotiations between Ecuador and the United States in 1953 had indicated that it might be possible that some rapproachement might be attainable with her separately from Peru and Chile--a possible chink in the armor.[35] However, a statement in September of 1963 by Ecuadorian Foreign Minister Neftole Ponce Miranda

to the effect that the CEP position has developed standing with time negates this thought.[36] Further tuna boat seizures by Ecuador as recently as February 1970 indicate that their position remains fixed. Perhaps the strength of the CEP position can in some ways be attributed to Peru's leadership, especially in the exploitation and protection of her claims. The size of some of the fines levied by all of the states and the numbers of tuna boat seizures by them have been large in number, however. They are well documented in the press and summarized later in this paper.

Representative registration fees were set by Peru at $200.00 per vessel with a $12.00 fee per ton of catch. Permits are issued only for tuna and skipjack and for bait.[37] The United States amended her August 1954 fine reimbursement act in 1968 to include these fees.[38]

Through 1967, 75 United States fishing boats had been seized by Latin American States and $487,470 in fines paid.[39] Over $330,000 of this was reimbursed. Fifty percent of United States tuna boats have at one time or another been chased, seized, harassed or shot at off CEP shores. United States fishermen claim losses of $775,000 between 1961 and 1969 based on 91 seizures. Violence has increased and some United States fishermen have described the CEP States as becoming "trigger happy."

In 1968 fines of $256,928 were levied ($120,000 by Ecuador, $28,128 by Peru, and $114,800 by Mexico) on United States fishermen for fishing in extended Latin American and Mexican waters. In 1969 only 14 United States owned boats were seized in Latin America and these were fined a total of $96,000.[40] The United States concluded an agreement with Mexico in 1968, permitting reciprocal fishing rights and problems between the two are ended.

Economic Aspects. The economic aspects of fisheries are too diverse to treat here. We will, however, use the United States and Peru to describe some highlights pertinent to this discussion.

Peru's fisheries exploitation is significantly greater than that of Chile and Ecuador. Peru has gone from a catch of 47,700 metric tons in 1948 to world leading catches over 10,000,000 metric tons since 1967.[41] Fishmeal and fish oil account for a fifth of her total exports.[42] The growth of her supporting industries, such as nylon net manufacture, have been dramatic. Based on a gross national product (GNP) of approximately four billion dollars in 1967, the fishing industry accounts for about 11% of this total.[43] It is estimated that some 100,000 people are directly involved in fishing with more than three times that number involved in the entire industry. The number of Peruvian fishing vessels over

35 feet in length has increased over 20 times since 1948 with the attendant building and support facilities growing apace.[44]

Approximately half of Peru's catch is exported, about 30% of this to the United States as fishmeal.[45] Over 39% of Peru's entire foreign trade is with the United States.[46] All of Peru's licensing and other fees are earmarked for use in fisheries research by the 1952 Santiago Declaration. About $1,000,000 was used for this purpose in 1966.[47] Anchovetta constitute 98% of the Peruvian catch. A relatively cheap fish, its price on the world market does not place Peru in first place in dollar value even though she leads in weight. There is no reason to doubt that she will expand to other species and even other waters depending on how her anchovetta stocks hold up. The quantity of anchovetta consumed by guano producing birds probably matches the total CEP catch. The importance of this valuable and cheap natural fertilizer to Latin American agriculture is well known.

There has been some conjecture in recent months as to whether the size of the anchovetta catch may be on the verge of exceeding the point of sustainable yield necessary for both the fisheries and the guano producing birds. No scientific evidence exists, however, to substantiate this. Agreements as to fishmeal export quotas between Angola, Iceland, Norway, Peru, and South Africa were reached in 1960 with the formation of the Fish Meal Exporters Organization.[48] These

nations together control 90% of the world fishmeal market. Peru's quota was 60% of the total but as others couldn't fill their quotas Peru has assumed those portions: she was up to 72% by 1965.

The dependence of the United States economy on fisheries does not match that of Peru when comparing GNP's. She does, however, consume about 73 pounds of fish products per person per annum (as compared with 34 pounds in Latin America).[49] Large tuna and shrimping fleets as well as other shellfish catching efforts constitute a large part of her fish catch dollar value. Over $1,500,000,000 is added to the United States GNP by the fishing industry each year. The value of her catch was $441,000,000 in 1967.[50] The level of the United States catch has been steady at about 4.1 billion pounds for several years.[51] The United States imports almost 10 billion pounds of fish per year and in 1967 this was valued at $735,000,000.[52] The primary use of much of this is for fishmeal used for poultry and livestock feed. Even though 133,000 people were counted as United States fishermen in 1967, fishing still accounted for less than one-tenth of one percent of her GNP.[53]

The United States fishing industry has been plagued by various internal restrictive laws which have hampered her fisheries development. For example, her fishermen must purchase their boats from United States builders who are not

competitive in the world market. Her primary problems, however, are twofold. First, her fisheries are not competitive in the United States labor market. Many jobs are available in the United States which pay more and are less onerous than shipping out on a fishing boat. Second, fish and fish products are not all competitive with foreign products. Notable exceptions are tuna and shellfish.

One additional note before going on to conservation. The search for fishery statistics dealing with dollar values of catch and of the value of the industry as a whole is a frustrating one. For example, it is possible to quote at least three "authoritative" sources for the value of Peru's 1967 catch varying from $131,000,000 to $181,000,000. The figures heretofore quoted, however, serve to illustrate some problems and some relative values adequately.

Conservation. Efforts at fisheries conservation and study of all aspects of fisheries have gained impetus in recent years. At the same time the United States' record for conservation of her own fisheries and those of others has not been consistently good. This is in spite of the fact that the United States has consistently been willing to enter into agreements for fisheries conservation.[54]

Senator Warren Magnuson, Chairman of the United States Senate Committee on Commerce has said:

> Lack of coordination among those harvesting these natural resources (fisheries) could lead to the ruination and extermination of certain species. Valuable fishing grounds are now in danger of being fished to extinction and can only be saved through international agreements. Other living resources need and, to survive, must have this protection.[55]

Chapman, although opposing the 200 mile limit recognizes it as natural and necessary as fish migrate: especially so in the absence of the "hard, struggling, difficult and costly science" required to attend to conservation.[56]

The haddock fishery off the New England coast of the United States is threatened with exhaustion and the tuna fishing season in 1970 off San Diego, California, is one day long. The woes of the whaling and salmon industries are old stories. Such threats add to the efforts of both inclusive and exclusive fisheries advocates and cause all "limited areas" fishery arguments such as "historic rights" and "abstention" to become anarchronistic or at least continuously recycled.

The United States has claimed that it does not exhaust fisheries and only follows the seasonal character of fish for economic reasons. Fish and Wildlife Service publications of the United States do indicate, however, that between 1917 and 1945 significant overfishing bordering on exhaustion of coastal United States tuna fisheries has taken place.[57]

In 1950 W. M. Chapman, Director of Research of the American Tunaboat Association, said that nearly all waters fished by the United States and those to which we are expanding are covered by a proclamation of some sort. He said that the United States fishes extensively between 3 and 200 miles off of Peru.[58] Chapman also indicated some violations of territorial waters. The United Nations Food and Agricultural Organization (F.A.O.) says that the tuna are totally dependent on bait fish and that this bait is usually taken within 3 miles offshore (although it need not be, it is much easier there).[59]

Christy points out that the doctrine of "Freedom of the Seas" is based on the inexhaustibility of ocean resources.[60] He concludes that this doctrine is something less than unassailable today. He also points out that one advantage accruing to a smaller nation making a broad claim is that: "agreements and concessions for fishing may be used for reciprocal advantage on the high seas and elsewhere."[61]

An American international lawyer, Daniel Wilkes, contends that the basic premise that: "a state conserves fish for its local fishermen by extending its territorial sea" is a myth.[62] In discussing a three to twelve mile territorial sea extension he points out that nothing biological keeps fish within those limits. Extending this he says that, based on the end of conservation, 200 miles is the only one that

makes any sense. He points out fundamental problems, however: a moral problem of discriminating against another nation's fishermen in a worldwide resource like an area fishery exists: a problem, with many variables, of fish not respecting adjacent boundaries exists: a reciprocity problem exists. Where would a fishing nation making such a claim be welcome if her stocks became depleted? Wilkes concludes that equitable, not chance, distribution of fisheries resources is the only method by which conflicts may be avoided and he calls for collective regulation of the resource.

Social Aspects. In general, conservation aspects of our problems have been of concern to the CEP States only insofar as fighting to conserve them for their own use. The United States confrontation with the problems of conservation has, as we have seen, this aspect and many more. On the other hand the social aspects of the fisheries problem seem to have far more meaning for Latin American States than for the United States.

The matter of national pride stands high on the list of CEP aspects of fisheries. They lead the world in fish production. A rapid material advance has been made possible by exploiting the fisheries. Johnston says that the dignity of the governments if sometimes not the electorate is enhanced by these factors.[63] Fisheries have served as a lever to

boost their influence in the world community although the goal of a thriving fishery has not been lost.[64]

On the other hand, there is the strong emotional feeling in the so-called Lesser Developed Countries (LDC) among which Chile, Ecuador, and Peru are included. In 1957 Ambassador Escudero of Ecuador told the United Nations General Assembly that the smaller coastal states have a right to extend their territorial seas. This is so because big countries are the only ones who exploit on a large scale and coastal extensions are merely "compensating measures to correct an injustice."[65] This statement points up a basic dilemma: which takes precedence, the economic development of a country or international law? In fact, the coastal state usually states what is reasonable for self-protection and others can then attempt to refute the practice.[66] New or changed law then either develops or does not depending on the eventual outcome. This process was placed in a somewhat different context by the United States representative on the United Nations Seabed Committee, Ambassador Phillips, when he said, with respect to the seabed, that the LDC paint developed maritime powers as monopolizing seabed technology by greedily rushing to exhaust resources before any regime, regional or otherwise, can regulate its exploitation.[67] The same attitude is discernible in fisheries and is perhaps best illustrated by the Peruvian magazine Pesca of September 1969 which

pictures a giant Uncle Sam (U.S.) with one foot in the waters off San Diego, California, and the other being shot at in midair by a Peruvian Navy ship off the coast of Peru.[68] Gleeful expressions are evident on the faces of the Peruvian naval personnel. A small country and its government with a Navy of 600 officers and 5,000 men can gain considerably by holding off a giant or even appearing to do so.[69] Additional insights into these feelings can be found in Ernaudi.[70]

The CEP States have been apparently gaining ground in pressing their claims in the United Nations where recent votes tend to indicate a "paper majority" as the LDC line up together more and more on the one country, one vote basis which exists. The United States response to this has been to assert that the sheer weight of such a majority vote cannot be regarded as an "international consensus."[71]

As to the strained relations between the CEP States and the United States, they remain strained. Other mutual economic problems and interdependence, however, have currently pushed fisheries into the background.

Recent Developments and Some Peripatetic Past Allusions. Talks have proceeded in private between the United States and the CEP States intermittently since August of 1969 with no published signs of progress to date.[72] Some United States statesmen have threatened to invoke existing law and require

return of ships on loan to the CEP States if they don't change their policies.[73] However, others such as Lissitzyn contend that the 200 mile limit is not an important issue.[74] Lest anyone suspect that the Latin American position has changed, however, he need only consult Peruvian Fisheries Minister General Javier Tantalean who said in January 1970 that: "(Peru must) occupy all 200 miles of littoral seas to insure sovereignty."[75] In 1966 the Government of Ecuador officially proclaimed a 200-mile territorial sea and on 25 July 1969 Peru made the same claim.[76]

During colonial periods Latin American countries did not take part in the establishment of international practices. Ambassador Lima of El Salvador stated in 1957 that they do not, therefore, consider themselves bound today in light of new political, economic, and social conditions. Whether or not, therefore, Latin American actions are legal now, he continued, this does not affect movement towards a new legal order. It has even been argued that although the subject has been debated at length and the United States has made many threats she has taken no positive action to recover fines. The April 1968 amendment to the United States Foreign Assistance Act suspended aid to "ship snatchers" but no suspensions have since come to pass.[77] When President Rhee of Korea issued a decree almost identical to that of Peru in

1957 no outcry was heard from the United States. Do these and similar instances constitute acquiescence?

One recently published book by a Latin American jurist, Garaico, quotes the 1956 Mexico City Conference and the "juridical conscience" expressed there as sufficient justification for CEP claims. He quotes a 1967 statement by United States Congress Representative Rogers who proposed expanding the United States territorial sea to 150 miles before, in the words of Mr. Garaico, United States rules are "pirateados por extranjeros incursos". He said that no further comment on the United States position is needed--she is obviously coming around to the 200 mile limit.[78]

Judge Alverez of the ICJ provided perhaps the best summary of today's CEP position in 1956 in a separate opinion in the Fisheries Case.[79] He said that the general principles of law are not enough. Modifications must be considered and if no principles exist in a given situation some must be created to conform to existing conditions.[80] The United States for example, has made unilateral claims of various kinds such as ADIZ (Air Defense Identification Zones) and the Continental Shelf Proclamation.

Suffice to say that the fisheries question is as important to the CEP States as petroleum deposits are to the United States.

In 1969 the United States President's Commission on Marine Science Engineering and Resources (hereinafter referred to as the Commission) filed a report charting the path for future United States marine development. The stated objectives of this commission were to develop resources "to help end the tragic cycles of famine and dispair".[81] This is to be achieved through promotion of conservation, orderly exploitation, a consistent foreign policy, and insistence on a fair United States share. Simultaneously, the report continues, the United States should not promote conflict but should attempt to contribute positively to order.

The Commission's report recommends that United States fishermen be further protected against foreign seizure. This is to be done through additional insurance against loss of fish, income lost while seized, and damages.[82] The Commission said this is the only effective opposition to the 200 mile claims. It would also require the Secretary of State to withhold funds from any country seizing a boat and not paying United States claims.

The Commission said that there was no reason that tuna fishing cannot proceed without hurting anchovetta. They contend that withdrawal of United States boats would curtail use of the oceans living resources.

Pointing to Peru's claims of conservation motivation the report contends that Peru and Chile have overfished migratory sperm whales passing through their 200 mile zones.[83] The object of this accusation was to point out that whales, like sardines, don't know the extent of boundaries. The species not the boundaries are important.

The Commission recommended that the United States ratify the Optional Protocol Concerning the Compulsory Settlement of Disputes which was drafted at the 1958 Geneva Convention on the Law of the Sea.[84] This protocol would apply to any disputed interpretation arising out of any of the Conventions on the Law of the Sea.

Finally, the Commission recommended that some preference be given to the coastal state even beyond the 12 mile limit.[85] All states should be allotted quotas and a coastal state should be guaranteed either a percentage or the right to participate later if she does not now. Giving a share to a state before she has a fisheries operation might destroy incentive. Christy has stated that one way to do this is through commissions with greater autonomy. He says that we can conserve the wealth of the oceans only through regional agreements wherein nations "sign away a little power."[86]

On 21 February 1970 the United States State Department said that the time is right for conclusion of a new international treaty fixing the territorial sea at 12 miles and

granting carefully defined preferential fishing rights for coastal states on the high seas.[87]

The New York Times says:

> This proposal could indicate a disposition to move at last toward a compromise agreement to end this country's prolonged dispute with several Latin American states over American fishing activities off the West Coast of the Southern Hemisphere.[88]

FOOTNOTES

[1]S. A. Riesenfeld, Protection of Coastal States Under International Law (Washington: Carnegie Endowment for International Peace, 1942), p. 3.

[2]J. L. Kunz, "The Continental Shelf and the International Law," American Journal of International Law, 1956, v. 50, p. 94; International Law Commission, Summary Record of Second Session 1950, A/CN4/SR69, 1950 (New York: 1950), p. 21.

[3]Auguste, p. 18; International Law Commission, Second Session, p. 21.

[4]Auguste, p. 18.

[5]Marjorie Whiteman, "The Territorial Sea," Proceedings of the American Journal of International Law, 1956, p. 17

[6]F. Christy and A. Scott, The Common Wealth in Ocean Fisheries, Some Problems of Growth and Economic Allocation (Baltimore: Johns Hopkins Press, 1965), p. 114.

[7]Organization of American States, Annals 1956 (Washington: Pan American Union, 1956), p. 138.

[8]U.S. Laws, Statutes, etc., Protection of Vessels on the High Seas and in Territorial Waters of Foreign Countries, Public Law 680, 83rd Congress (Washington: U.S. Govt. Print. Off., 1954).

[9]U.S. Naval War College, "U.S. Note of Protest to Chile," International Law Situation and Documents 1956 (Washington: U.S. Govt. Print. Off.), p. 450.

[10]International Law Association, Report of the 44th Conference (Copenhagen: 1950), p. 133.

[11]War College, p. 275.

[12]Auguste, p. 209.

[13]Whiteman, p. 1103.

[14]Ibid., p. 1104.

[15]Ibid., p. 1105.

[16]Ibid.

[17]Ibid., p. 1202.

[18]Ibid., p. 1205.

[19]Ibid., p. 1108.

[20]Ibid., p. 1109; U.S. Senate Committee on Commerce, Treaties and Other International Agreements Containing Provisions on Commercial Fisheries, Marine Resources, Sport Fisheries, and Wildlife to Which the United States is Party (Washington: U.S. Govt. Print. Off., 1965), p. 1.

[21]Organization of American States, Final Act, Inter-American Specialized Conference on Conservation of Natural Resources: The Continental Shelf and Marine Waters, Ciudad Trujillo, March 15-28, 1956 (Washington: Pan American Union, 1956), p. 13.

[22]Digest, p. 962.

[23]Ciudad Trujillo, p. 14.

[24]Johnson, p. 339.

[25]Ciudad Trujillo, p. 13.

[26]Johnston, p. 339.

[27]International Law Commission, Report of the 8th Session 1956, A/3159, 1956 (New York: 1956), p. 31.

[28]Organization of American States, Background Material Relating to the Law of the Sea (Washington: Pan American Union Department of International Law, December 1957), p. 1.

[29]United Nations, Convention on Fishing and Conservation of the Living Resources of the High Seas, A/CONF.13/L.54 (New York: 1958).

[30]Appendix II of this paper contains the text of Article 7 of the Fishing Convention.

[31]Digest, p. 1139.

[32]United Nations, Documents, Law of the Sea Conference, Geneva 1960, A/CONF.19/L16 (New York: 1960), p. 81.

[33]Auguste, p. 243.

[34]Ibid., p. 332.

[35]Digest, p. 1092.

[36]Ibid., p. 1208.

[37]B. Bayitch, International Law of Fisheries (Coral Gables, Florida: 1957), p. 32.

[38]U.S. Laws, Statutes, etc. An Act to Protect the Rights of the United States on the High Seas and In Territorial Waters of Foreign Countries, Public Law 680 (1954) amended, U.S. Code, Supp. III (1952 Edition) (1956) (Washington: U.S. Govt. Print. Off., 1962), p. 633; War College, p. 436.

[39]U.S. President's Commission on Marine Science, Engineering and Resources, Panel Report on Marine Resources and Legal-Political Arrangements for Their Development (Washington: U.S. Govt. Print. Off., 1969), p. VIII-57.

[40]Ocean Science News, 6 March 1970, p. 2.

[41]U.N. Food and Agricultural Organization, Yearbook of Fishery Statistics, International Trade, 1967 (New York: 1957).

[42]Howell Davies, ed., The South American Handbook 1969 (London: Trade and Travel Publications, Ltd., 1969), p. 281.

[43]"Peru," Encyclopedia Britannica 1970 Yearbook (1969), 1970, p. 481d.

[44]Christy, p. 121.

[45]"Peru," p. 481d.

[46]Davies, p. 281.

[47]U.S. National Council on Marine Resources and Engineering Development, Marine Science Activities of the Nations of Latin America (Washington: U.S. Govt. Print. Off., 1968), p. 37.

[48]Christy, p. 94.

[49]Johnson, p. 41.

[50]Panel Report on Marine Resources, p. VII-2; Yearbook.

[51]Panel Report on Marine Resources, p. VII-2.

[52]Ibid.

[53]Ibid., p. VIII-21.

[54]Senate Committee on Commerce, p. IV.

[55]Ibid., p. III.

[56]W. Chapman, "Fishery Resources in Offshore Waters," Unpublished paper, 1966.

[57]U.S. Department of the Interior Fish and Wildlife Service, Fishery Resources of the United States of America (Washington: U.S. Govt. Print. Off., 1945), p. 41.

[58]U.S. Senate Committee on Interior and Insular Affairs Hearings on Senate Resolution 1901, 83rd Congress (Washington: U.S. Govt. Print. Off., 1953), p. 373.

[59]U.N. Food and Agricultural Organization, "Survey of United States Tuna Industry," Fisheries Bulletin, June 1954, v. VII, no. 2, p. 69; The New York Times, 25 August 1952, p. 2:4; The New York Times, 22 October 1952, p. 18:3; The New York Times, 29 January 1955, p. 3:2; Auguste, p. 184.

[60]Christy, p. 179.

[61]Ibid., p. 176.

[62]Daniel Wilkes, "The Use of World Resources Without Conflict: Myths About the Territorial Sea," Wayne Law Review, v. 14, no. 2, 1968, p.451.

[63]Johnston, p. 141-148.

[64]Ibid., p. 141 and p. 139.

[65]U.N. General Assembly, Verbatim Record of the Debate in the Sixth Committee of the General Assembly at Its Eleventh Session, A/CONF.13/19(1957) (New York: 1957), p. 155.

[66]Auguste, p. 61; M. McDougal and W. Burke, "Crisis in the Law of the Sea: Community Perspectives versus National Egoism," Yale Law Journal, v. 67 (1958), p. 563.

[67]"The UN's Moratorium and What It Means," Ocean Industry, v. 5, no. 3, March 1970, p. 46.

[68]Pesca, September 1969, cover.

[69]L. Einaudi, The Peruvian Military, A Summary Political Analysis, Memorandum RM-6048-RC (Santa Monica, Calif.: Rand Corporation, May 1969), p. 1.

[70]Ibid.

[71] Moratorium, p. 45.

[72] The New York Times, 20 February 1970, p. 16:1.

[73] Ocean Science News, p. 2.

[74] Oliver Lissitzyn, International Law Today and Tomorrow (Dobbs Ferry, New York: Oceana Publications, Inc., 1965), p. 85.

[75] "Food From the Sea," Ocean Science News, 6 March 1970, p. 5.

[76] J. Block, "Threats to Freedom of Navigation," The JAG Journal, December 1969-January 1970, p. 77.

[77] The New York Times, 3 April 1968, p. 5:4.

[78] T. Garaicoa, El Dominio del Mar (Quayaquil: Departmento De Publicaciones De La Universidad De Quayaquil, 1968), p. 98.

[79] War College, p. 145.

[80] Ibid., p. 147.

[81] Panel Report on Marine Resources, p. VIII-45.

[82] Ibid., p. VIII-68.

[83] Ibid., p. VIII-57.

[84] Ibid., p. VIII-67.

[85] Ibid., p. VIII-68.

[86] Christy, p. 204.

[87] The New York Times, 22 February 1970, p. 5:1.

[88] The New York Times, 16 March 1970, p. 40:1.

CHAPTER V

THE INTERNATIONAL COURT OF JUSTICE

> I believe furthermore that the Judgment of the Court in the North Sea Continental Shelf cases will also be a guide in other similar controversies, to help states settle by negotiation or other peaceful means of their own choice, their eventual differences in this respect.[1]
>
> Judge Luis Padilla

Introduction. Discovery of the above passage in a separate opinion in the North Sea Cases Judgment gladdened the noninternational lawyer heart of your author. To that point he thought that perhaps he was the only one who saw application of the judgment in these cases to a fisheries dispute. In this chapter we will draw primarily from the dicta, findings, dissents, and separate opinions in the North Sea Cases Judgment. These extracts include as many direct quotations as possible in order that the reader may see for himself the ICJ's thoughts. They have been selected for possible bearing on the Latin American and United States disputes. Appendix I contains background material on the final judgment as it pertains to the North Sea Cases themselves. We will conduct a short preamble detour by way of the Anglo-Norwegian Fisheries Case.[2] Until the North Sea Cases there had been no opportunity for the ICJ to speak out on the subject of resources

in the sea and boundaries therefor since the 1958 Conventions on the Law of the Sea. The Fisheries Case is the only other case of significance since the early 1940's when the disputes considered in this paper had their beginnings.

The findings and dicta in either of the above cases certainly do not apply "across the board" to the fisheries questions at hand. There are definite parallels, however, and it is upon these that we shall base later conclusions. It may be that in some instances no such base exists. In this case the most that will be done is to indicate the present trend and make no predictions. The author has minimized his discussion of the words of the Court inasmuch as his method of extracting those words and arranging them constitutes a sufficient form of discussion. Judge Phillip Jessup of the United States said of Denmark, West Germany, and the Netherlands that: "It is fortunate that the three states are committed to various methods of amicable settlement in spite of the difficult problems involved."[3]

Anglo-Norwegian Fisheries Case. Some salient points in this case are well worth noting as a prelude to our North Sea Cases Judgment discussions. The ICJ in 1951 approved the Norwegian claim to use of straight baselines drawn "between islands, rocks, and islets, across the sea areas separating them, even when such areas do not fall within the conception

of a bay" as proper for measuring the territorial sea.[4] The case was noteworthy for three reasons.

First, with respect to delimitation of sea areas the ICJ said:

> 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 action of delimitation is necessarily a unilateral action, because only the coastal state is competent to undertake it, the validity of the delimitation with regard to other states depends upon international law.[5]

Second, the Court recognized the relevance of socio-economic criteria such as dependence on the fisheries. They approved of the use of such criteria in "determining the validity of claims by coastal states seeking an extensive area of unshared exploitation authority beyond the limits acceptable to an interested noncoastal state that was long engaged in exploiting the resource within the disputed zone."[6]

Finally, the court recognized that, depending on local situations, any number of lines can be drawn. The extent of exclusive fishery rights cannot be the result of "formulation of any general rule of law."[7]

With this somewhat lengthy preamble let us look at the North Sea Cases Judgment.

North Sea Cases Judgment. This portion of our discussion is lengthy. It could be shorter. This was tried. However, much of the thought was lost. It is, therefore, without

embarrassment that we shall present what appears to be unnecessarily long but which is in fact as short as your author could make it without reproducing the extremely lengthy judgment and opinions themselves or losing ideas.

The majority opinion in this case was reached by 11 votes to 6. Eleven separate individual opinions or statements were written in addition to the majority opinion. Two of these were declarations (one a dissent, one a concurrence), four were separate concurring opinions and five were dissenting opinions. Basic questions were raised such as what constitutes international law and can such law be formulated in timely fashion so that problems created by rapidly advancing technology can be solved peaceably. It is not surprising that unanimity was not possible.

Sovereignty. The question of sovereignty is basic to our thesis and to the Courts dicta and findings. The Court said:

> There is also a direct correlation between the notion of closest proximity to the coast and the sovereign jurisdiction which the coastal state is entitled to exercise and must exercise, not only over the seabed underneath the territorial waters but over the waters themselves, which does not exist in respect of continental shelf areas where there is no jurisdiction over the superjacent waters, and over the seabed only for purposes of exploration and exploitation.[8]

The Court expanded on "proximity" by stating:

> 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. . . . Terms such as "near," "close to its shores," "off its coast," . . . "adjacent to," "contiguous," etc., . . . 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 the 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 coast than to any other.[9]

The Court continued: "Hence it would seem that the notion of adjacency . . . does not imply any fundamental or inherent rule the ultimate effect of which would prohibit any State (otherwise than from agreement) from exercising continental shelf rights in respect of areas closer to the coast of another state." The Court also concluded that: "The appurtenance of a given area, considered as an entity, in no way governs the precise delimitation of its boundaries anymore than uncertainty as to boundaries can effect territorial rights."[10]

Speaking of the continental shelf the Court stated that there is an "inherent right" of the coastal state which is

> . . . one of 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 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.[11] (author's emphasis)

Using these statements the Court concluded that neither the "equidistance principle" claimed by the Netherlands and Denmark nor the Federal Republic's notion of a "just and equitable share" was valid.[12] The Court instead stated that the Truman Proclamation of 28 September 1945 provided the guiding concepts. That is: ". . . of delimitation of mutual agreement and delimitation in accordance with equitable principles. . . ."

The Court concluded that in the sense that they involve a "recent instance of encroachment on maritime expenses" the contiguous zone and continental shelf are "concepts of the same kind."[13] However, the Court contends that the seabed and subsoil are part of the logical extension of the principle that the "land dominates the sea" but the "legal source of the power" for State territorial extension lies on the land and not in the water.[14]

Parties to a Convention. The Court dwelt at some length on the subject of the application of a Convention which a state has signed but not ratified (in our case the Convention on Living Resources).[15] The Court stated: "The

Federal Republic was one of the signatories of the Convention (1958 Geneva Convention on the Continental Shelf) but has never ratified it, and is consequently not a party." The Court continued: ". . . it is not lightly to be presumed that a State which has not carried out these formalities, (ratification) . . . has nonetheless become bound in some other way."[16] However, that state would also "simply be told that, not having become a party to the convention it could not claim any rights under it until the professed willingness and acceptance had been manifested in the prescribed form."[17]

Resources and Special Circumstances. The Court said that the "question of natural resources is less one of delimitation than of eventual exploitation."[18] The Court said that the question of delimitation must be handled in the spirit that: "it is necessary to seek not one method of delimitation but one goal."[19] "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. . . . Some (considerations) are related to the geological, others to the geographical aspect of the situation. . . . These criteria . . . can provide adequate bases for decision. . . ."[20] Another factor to be considered is the "unity of any deposits."[21] The Court said that: "it

frequently occurs that the same deposit lies on both sides of a line dividing a continental shelf between two States, and since it is possible to exploit such a deposit from either side, a problem arises on account of the risk of prejudicial or wasteful exploitation by one or other of the States concerned."[22] (author's emphasis) One suspects that fish would have a much more difficult time deciding which side of any line they were on.

The requirement that States exhaust all avenues which could lead to peaceful agreement prior to coming to the Court for a decision was emphasized by the Court. It can be argued that this is not so. One might say that the parties to the North Sea cases had agreed to negotiate in advance and had exhausted all avenues due to the very fact that they asked the Court to determine only "what principles and rules of international law are applicable." They did not ask for defined boundaries. However, had the Court decreed that the equidistance principle was in fact the rule of law there would have been no reason to negotiate further. If such a finding were to be accepted by the parties the position of the Netherlands and Denmark would have been upheld and in fact what appears to have been their intransigence in attempting to arrive at agreement would have borne fruit. The Netherlands and Denmark in fact stated in their brief that: "The Parties being in disagreement, unless another boundary

is justified by special circumstances, the boundary between them is to be determined by application of the principle of equidistance . . . (expressed in Article 6, paragraph 2, of the Geneva Convention of 1958 on the Continental Shelf)."[23] The Court pointed out that: "further negotiations between the Parties for the prolongation of the partial boundaries broke down mainly because Denmark and the Netherlands respectively wished this prolongation also to be effected on the basis of the equidistance principle, ..."[24]

Having said this the Court decided that, since the equidistance principle alone was not required, it did not have to decide whether "negotiations for an agreed boundary must prove abortive" before the principle could be applied.[25] It did, however, state that:

> The parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it.[26]

Further, the parties are obligated to act in such a way that: "equitable principles are applied."[27] The methods of settlement are "fundamental" as is emphasized by the "observable fact that judicial or arbitral settlement is not universally accepted."[28] (author's emphasis) The Court held that the

Netherlands and Denmark "saw no reasons to depart from that rule (equidistance)" and therefore had not "satisfied the conditions" for attempting to reach agreement "in accordance with equitable principles."[29]

Delimitation. The Court stated that there was "no a priori reason why the Court must reach identical conclusions in regard to them (the boundaries between the Federal Republic and the other parties)--if for instance geographical features present in one case were not present in another."[30] The Court went on to say that: "no one single method of delimitation was likely to prove satisfactory in all circumstances, and that delimitation should, therefore, be carried out by agreement or by reference to arbitration; and secondly that it should be effected on equitable principles."[31] (author's emphasis) They went on to state that: "not only must the acts (of delimitation) concerned amount to settled practice" but they must also be "carried out in such a way as to be evidence of a belief that this practice is rendered obligatory by the evidence of a rule of law requiring it."[32] Further, the mere fact that the equidistance method is not a mandatory rule of customary law, does not mean that: "there has to be as an alternative some other single equivalent rule."[33] (Author's emphasis)

The Court went on to state that in the question of delimitation on "a broader basis" (presumably broader than that of just the continental shelf) that there is no question of any decision ex aequo et bono (i.e., equitable settlement of a dispute in disregard if necessary of international law). They stated as a rule of law "in this field" that "equitable principles" must be applied but also said: "Equity does not necessarily imply equality. There can never be any question of completely refashioning nature. . . ."[34]

Separate Opinions, Dissenting Opinions, and Declarations in the North Sea Cases.

Points of Law. Our purpose in this paper is to consider primarily the Court's judgment rather than a detailed pursuit of all of its antecedents and other related conventions, meetings, and discussions. However, it is appropriate to include at least some of the main points included in the dissents and concurring separate opinions of members of the Court.

While the lengths of the dissents vary from a few words to several pages perhaps the opinions expressed by the Vice President of the Court, Judge M. Koretsky, are typical. Referring to all of the work done by various bodies leading to codification of the law of the sea in 1958 at Geneva he said: "The scale and thoroughness of this process for the forming

and formulation of principles and rules of international law should lead to the consideration in a new light of what is accepted as the result of such work of codification."[35] He carefully separated the "maritime area" outside of the "territorial sea" and "the seabed and subsoil" by stating that the "coastal State has 'sovereign rights'" over the former "not affecting 'the legal status of the superjacent waters as high seas'."[36] He feels that the "factors to be taken into account" in the Court's findings are generally "of a non-juridical character" and that: "Questions of an (economico-) political nature should . . . be excluded."[37] Judge K. Tanaka carried this one step further and suggested that the Court's answer "amounts to the suggestion to the Parties that they settle their dispute by negotiations according to ex aequo et bono without any indication as to what are 'the principles and rules of international law'."

In a separate opinion Judge Bustamante y Rivero states that the Court would "ignore reality" if the criterion of social and economic import were ignored.[38] Judge Jessup carries this on by saying in a separate opinion that: "it is of course obvious that the reason why they are particularly concerned with the delimitation of their respective positions is known or probable existence of deposits of oil and gas in that seabed."[39] He further points out that location of resources may be one of the criteria to be taken

into account "in order to achieve a just and equitable apportionment."[40] Additionally, specifically, and at length Judge Jessup spoke to the desirability of equitable joint exploration and exploitation and cited numerous successful examples.

Judge G. Morelli makes the interesting statement that by signing the Convention the "Federal Republic expressed an opinion which . . . may be qualified as an opinio juris" (an opinion shared by Judge (ad hoc) Sorensen)[41] but "not a statement of will, which could only be expressed by ratification."[42] This would seem to bolster Judge Tanaka's opinion that the Court missed an opportunity to "make a contribution to the progressive development of international law" by "according the equidistance principle the status of a world law."[43] Judge Morelli qualifies his dissent, however, by stating that while the "criterion of equidistance" is a rule of law, when it is "in flagrant conflict with equity" States concerned must negotiate an agreement.[44]

Judge Lachs based his dissent on his opinion that: "the number of ratifications and accessions cannot, in itself, be considered conclusive with regard to the general acceptance of a given instrument."[45] He notes that: "70 States are at present engaged in the exploration and exploitation of continental shelf areas" and after lengthy juggling of numbers concludes that in spite of the number of ratifications the

true "number of parties to the Convention on the Continental Shelf is very impressive, including as it does the majority of States actively engaged in the exploration of continental shelves."[46] "Thus," says Judge Morelli, "under the pressure of events, a new institution has come into being."[47]

Judge M. Sorensen makes a comparison in his dissent between the continental shelf, the territorial sea, the contiguous zone, and special fishery conservation areas. He states that: "for all three situations it (the 1958 Geneva Conference) adopted identical solutions as formulated in Article 12 of the Convention on the Territorial Sea and the Contiguous Zone."[48] (Author's emphasis)

Judge Padilla Nervo in a separate opinion reiterated: "that only by agreement can, in the last resort, these problems be settled."[49] He further stated that: "the obligation to negotiate is a principle of international law" and "the absence of agreement' cannot be considered a weapon in the hands of any State. . . ."[50]

While the cases involved the continental shelf and Article Six of the Shelf Convention specifically, several of the Judges referred to living resources and the superjacent waters in their opinions.

Living Resources. Judge Jessup quoted the preamble of the 1958 Geneva Convention on Fishing and Conservation of

the Living Resources of the High Seas. He said the preamble is illustrative of the essence of cooperation, that is: ". . . that the nature of the problems involved in the conservation of living resources is such that there is a clear necessity, that they be solved, whenever possible, on the basis of international co-operation through the concerted action of all the States concerned. . .. ."[51]

Several judges discussed fisheries and various country's proclamations on their seabed extensions but none so eloquently as Judge Farad Ammoun. In a separate opinion some three times as long as the Court's opinion it must also be conceded that Judge Ammoun covered a number of topics. However, he did refer specifically to the CEP States and selected comments are of value to this discussion.

Judge Ammoun said that the "facts which constitute the custom in question" (the equidistance principle) show "an intention to adapt the law of nations to social and economic evolution and to the progress of knowledge." He said that this has given impetus "to the extension, sometimes ill-considered, of deep-sea fishing, which has its dangers for the conservation of marine species and, in general, of the biological resources which have become more and more necessary for the feeding of rapidly growing populations."[52] He then refers specifically to the "chain of proclamations" and includes Chile, Ecuador, and Peru.[53] He says that: "it

must be admitted that these encroachments on the high seas, . . . are the expression of new needs of humanity." He continues: "Reasons of an economic nature . . . concerning fisheries . . . and their conservation and their equitable division between nations, may henceforward justify the limitation of that freedom."[54] He alludes also to the fear of "the enterprises of industrialized nations, which were better equipped for a de facto monopoly of this exploitation (of the epicontinental platform or maritime area)."[55] Judge Ammoun later discusses the guiding role of Peru, who has no continental shelf. He asks: "How is it, it was emphasized in Peru, that the only States which can take advantage of a natural phenomenon which permits them to annex immense areas of subsoil and of the high seas, can profit from them exclusively, and can condemn those who are handicapped by geographical configurations to stand idly by in face of the immense riches secreted by their adjacent waters, and that to the profit of capitalist enterprises better endowed than their own and powerfully protected?" The immense riches refer to the "piscatory riches" which must be preserved "in order that the production of guano should not be prejudiced" which coincides "with the interest of agricultural production throughout the world." He then quoted the declaration of Chile, Ecuador, and Peru claiming "not less than 200 nautical miles."[56] He goes on to describe how Ghana

expressed concern that the continental shelf definition adopted by the Geneva Conference of 1958 "might operate to the disadvantage of those countries (certain smaller states)" and says this "cry of alarm by Ghana, on behalf of the smaller countries, remains as a witness to a disturbing reality."[57]

Judge Ammoun in restating the 200 metres depth line or beyond stated: "This fictitious extension of the continental shelf . . . weakens the case of those who having adopted it, oppose the claims of those . . . not endowed with a continental shelf . . . (who seek) . . . to find legitimate compensation in the resources of the waters adjacent to their coasts."[58] He then elaborates on some preferential fishing zone claims that occurred before the freedom of the sea was established as a principle of the international law. He sums up by saying that the "shelf and the (epicontinental) platform are not mutually exclusive."[59] Having said all of this, which would certainly include the major points which would be made by the CEP States, he then says that: "there must not be deduced, . . . a unity of legal regime." He says that: "the legal content of what has been called sovereignty by the States of Latin America is limited" to, among other things, fishing (as are others to minerals, etc.) in pursuit of her economic, social, and political development.[60] He also feels that the Court should have considered territorial seas, straits, lakes, contiguous zones, and fishing zones

as well as continental shelf delimitations as precedents for decision in this case. On the subject of what makes up a regional custom he says that: "In the absence of express or tacit consent, a regional custom cannot be imposed on a state which refuses to accept it" and quotes the ICJ Asylum Case Judgment of 20 November 1950 as precedent.[61] Finally, agreeing with the majority and quoting from the Court's Judgment he says that: "the Parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiations as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement. . . ."[62]

In concluding this chapter it is appropriate that we record the findings of the Court.

> 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 subparagraph, 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 regime 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 elements 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.[63]

FOOTNOTES

[1]*Shelf Judgment*, p. 99.

[2]*Fisheries Case*.

[3]*Shelf Judgment*, p. 84.

[4]*Fisheries Case*, p. 80.

[5]*Ibid*., p. 82.

[6]Johnston, p. 182; *Fisheries Case*, p. 80-82.

[7]*Fisheries Case*, p. 81.

[8]*Shelf Judgment*, p. 37.

[9]*Ibid*., p. 30.

[10]*Ibid*., p. 31.

[11]*Ibid*., p. 22.

[12]*Ibid*., p. 30.

[13]*Ibid*., p. 51.

[14]*Ibid*.

[15]United Nations, *Convention on Fishing and Conservation of the Living Resources on the High Seas*, A/CONF.13/L.54 (New York: 1958). The CEP States have not ratified this Convention.

[16]*Shelf Judgment*, p. 25.

[17] Ibid., p. 26.

[18] Ibid., p. 21.

[19] Ibid., p. 50.

[20] Ibid.

[21] Ibid., p. 51.

[22] Ibid., p. 57.

[23] Ibid., p. 10.

[24] Ibid., p. 17.

[25] Ibid., p. 27.

[26] Ibid., p. 47.

[27] Ibid.

[28] Ibid.

[29] Ibid., p. 48.

[30] Ibid., p. 19.

[31] Ibid., p. 36.

[32] Ibid., p. 44.

[33] Ibid., p. 46.

[34] Declarations were appended to the majority opinion by Judges Zalrulla. Khan and Bengzon; separate opinions were written by President Bustamante Rivero and Judges Jessup, Padilla Nervo and Ammoun; dissenting opinions were written by Vice President Koretsky and Judges Tanaka, Morelli, Lachs and Sorensen.

[35] *Shelf Judgment*, p. 159.

[36] *Ibid.*

[37] *Ibid.*, p. 168.

[38] *Ibid.*, p. 60.

[39] *Ibid.*, p. 67.

[40] *Ibid.*, p. 68.

[41] *Ibid.*, p. 247.

[42] *Ibid.*, p. 198.

[43] *Ibid.*, p. 196.

[44] *Ibid.*, p. 214.

[45] *Ibid.*, p. 227.

[46] *Ibid.*

[47] *Ibid.*, p. 230.

[48] *Ibid.*, p. 250.

[49] *Ibid.*, p. 86.

[50] *Ibid.*, p. 88.

[51] *Ibid.*, p. 82.

[52] *Ibid.*, p. 104.

[53] *Ibid.*

[54] *Ibid.*, p. 105.

[55] Ibid., p. 104.

[56] Ibid., p. 108.

[57] Ibid., p. 110.

[58] Ibid., p. 111.

[59] Ibid., p. 114.

[60] Ibid., p. 118.

[61] Ibid., p. 131.

[62] Ibid., p. 47 and p. 146.

[63] Ibid., p. 57.

CHAPTER VI

CONCLUSIONS

Introduction. In order to express clearly the conclusions which may be reached in light of our previous discussions, it will be necessary to break them down into three parts. First, we will present the current formal positions of the United States and CEP States. These will be formulated as submissions to the International Court of Justice: although they could well be presented in the same form to any other tribunal or arbitral body. Secondly, we will measure the flexibility of these positions. This measurement will be performed as if the states operated in a vacuum, that is, in the absence of any other international interests or positions by other nations or bodies. Finally, we will place the formal positions before the International Court of Justice and see what that body, operating primarily in the especial light of the North Sea Cases Judgment, might conclude.

The Positions.

CEP States. Placing ourselves in this Latin American arena our position would be presented as follows:

> May it please the Court to recognize and declare:
>
> 1. That a coastal state has a special interest in the maintenance of the productivity of the living resources in any area of the high seas

adjacent to its territorial sea and that she may adopt measures deemed reasonable and necessary by her to protect and conserve those resources.

2. That the coastal fisheries off of Chile, Ecuador, and Peru are part of an ecological whole with the land and the seabed and that in order to conserve this whole for the benefit of these coastal states, whose very existence depends thereon, it is necessary to extend those States sovereign rights to whatever reasonable distance necessary to protect those rights and to conserve the living resources and in any event to a distance not less than 200 miles.

3. That pending final resolution of disputes involving conservation of living resources in the high seas of coastal nations all other nations must be bound by whatever measures are considered appropriate by those coastal nations.

4. That Chile, Ecuador, and Peru because of the unique features of their common fisheries form a regional entity and that they have peacefully resolved their common problems in fisheries conservation in this special case according to the spirit and the letter of the United Nations Charter and that therefore no further action by anybody is necessary to substantiate their sovereign rights to these common fisheries.

United States. The United States position would be presented as follows:

May it please the Court to recognize and declare:

1. That the delimitation of exclusive fisheries off of the coasts of Chile, Ecuador, and Peru cannot exceed the limits of the territorial sea and contiguous zone as recognized in customary international law.

2. That in the high seas beyond the aforementioned zone disputes as to conservation measures must be negotiated having due regard for the rights

of all states to engage in fishing on the high seas and for the conservation of living resources within their broadest ranges of migration.

3. That even recognizing the special interest of any state in the conservation of the living resources of the high seas and in the absence of agreement in that area no right exists for such states or small groups of such states to make unilateral claims to sovereignty over those resources.

4. That the United States has the right to continue fishing the stocks of fish for which she is presently and has historically been the only other nation so engaged and for other stocks such as bait fish that she be allowed to catch a share equal to her usual proportion of the total catch of those stocks.

5. That pending resolution of these matters or any similar matters no use of force or imposition of legal restraints such as fees, licenses, or fines shall be imposed by any of the Parties.

Flexibility.

United States. The United States position is flexible. She would not negotiate away her right to share in any fishing activities in the high seas off any state where she has regularly fished. She is, however, willing to negotiate on the basis that coastal states have both special interests and special rights in the high seas off their coasts. She would consider favorably negotiations of unequal treaties as to percentages of catch granted to coastal states. These agreements would only be made, however, if she received guarantees that her rights would be respected and that coherent conservation measures would be undertaken jointly. The United States would probably be willing, as she has been

on the Inter-American Tropical Tuna Commission, to undertake the larger share of expense involved in determining what measures are necessary. The United States would tend to favor conservation by species within a large area. She might be willing to submit the entire matter to the International Court of Justice if the CEP States agreed to abide by that Court's decision. She is tending toward favoring utilization of the arbitration procedures set up in the Fishery Convention and the Optional Protocol. She has shown a prior willingness to negotiate directly.

CEP States. The position of the CEP States is presently relatively inflexible. They have conceded no major points in any prior negotiations nor in any recent pronouncements. They have had occasion to observe a softening of the United States position with regard to fishery resources. They have had no occasion to observe any lessening of United States claims to exclusive use of mineral resources on her continental shelf. They consider their fishery resources to be at least as important to them as the mineral resources of the continental shelf are to the United States. The CEP States may in time be willing to negotiate reciprocal treaties. This time will come when their own resources either migrate or approach exhaustion: when research indicates that the foregoing is about to occur: when due to

the increased capability of their fishing fleets they wish to gain reciprocal fishing rights in areas not adjacent to their coasts: when sufficient pressure is brought economically or militarily to make such treaties attractive: or when they feel additional political or economic leverage is probable.

The Court. The International Court of Justice would probably find as follows:

1. The United States and CEP States are parties to many regional agreements, both economic and political, not the least of which is the Organization of American States. They have in the past managed to solve their mutual difficulties peaceably and the Court finds that only their mutual intransigence prevents such settlement in this instance.

2. In the case of all of the Parties to this case the Court finds that definite evidence of destructive exploitation exists with respect to fisheries conservation.

3. The Court finds that the Parties have shown more interest in their own national interests than in finding a rule of law within which they can operate effectively and efficiently.

4. The Court recognizes that the 1958 Convention on Living Resources fails to allow for economics and problems of fishery relationships. Regulation by convention does not

necessarily solve the problems created by faulty practices arising from incorrect definition or interpretation of the subject matter.

5. The Court recognizes the reasonableness of the claims made by the CEP States as they represent interests vital to the protection and security of their countries. The Court does not recognize the legality of these claims as they relate to the international community.

6. Inasmuch as the CEP States have not ratified the 1958 Convention on Living Resources it is not in effect for them. Recognizing that areas differ, the Court can see no reason for uniform worldwide guidelines. However, the Court sees the problem at hand as less one of delimitation than of eventual exploitation and that exclusive claims should be minimized in the case of living resources consistent with protection of a total fishery. The distinction between territorial seas and contiguous zones is in men's not fishes' minds.

7. The Court recognizes that coastal states' rights exist ipso facto and not only if "just and equitable."

8. The Court recognizes that preferential rights are more in keeping with the development of the international community than exclusive use. However, respect for third parties is essential; fixed and static positions are negated by present international law. If one state makes a unilateral

claim, as is permissible, others must accept this control before it becomes legal: reasonableness does not constitute legality. The CEP States practice is not conciliatory.

9. Developing law must consider social factors.

10. In the future, due to fishing fleet development and fish resource migration or depletion, the CEP States may seek reciprocal rights off other's coasts, i.e., their vital interests may expand.

11. In light of the foregoing remarks and the fact recognized by the Court that there is a trend toward regional agreements and away from seeking assistance from international tribunals (as the Court's calendar clearly shows) the Court finds as follows:

> (A) That living resources must be measured by stocks not miles.
>
> (B) That the parties should enter into regional negotiations immediately utilizing the following guidelines:
>
> (1) The coastal state has preferential but not exclusive rights to living resources off of her coasts.
>
> (2) That the provisions of Article 7 of the 1958 Convention on Living Resources **are** applicable except that: the procedure for arbitration failing agreement referenced therein **or** the 1958 Optional Protocol should be used in case of deadlock but that after twelve months of negotiation if no agreement is reached then one **or** the others procedure must be used. The Court notes that she is the final arbiter in the Optional Protocol.

(3) That an agreement similar to that which established the Inter-American Tropical Tuna Commission with suitable quotas established is reasonable.

(4) That a peaceful status quo with respect to level of fishing activity shall be maintained by the Parties until a settlement is reached except that no fines or fees shall be levied but all catches shall be accounted for and all fishing craft issued interim licenses by a joint commission of the Parties, such commission to be immediately established and maintained until final agreement is reached.

Recommendations. The North Sea Cases Judgment was interpreted by this author as a challenge: the United States has an opportunity to pick up the Court's challenge and lead the way. No nation can get exactly what it wants but American attitudes are critical. She has extensive coasts, capital, technological skills, power, influence, and a foreign policy that in many ways is enlightened. She has a unique opportunity to help develop law in her own interests and for the common good.

Four areas or approaches to the problems discussed in this paper are recommended for further research. First, the role of the United States oil industry in establishing United States positions and the international law of the sea should be investigated to see if an unwanted impact on fisheries policies results. Second, the acceptability of various final solutions to the conservation of Latin American fishery resources should be established. Third, an immediate

determination should be made as to whether sufficient scientific evidence now exists to indicate these fishery resources are in jeopardy. Finally, the effect of a lack of or a vagueness of international law, defined as a lack of jurisdictional control on the exploration, exploitation, and conservation of fishery resources, should be analyzed.

BIBLIOGRAPHY

Alexander, Lewis M. A Comparative Study of Offshore Claims in Northwestern Europe. Final Report Under Contract No. 1349(03) ONR, February 1960.

_____. "The Nature of Marine Geography." Lecture at University of Rhode Island September 10, 1969 and November 1, 1969. Unpublished, 1969.

_____. The Law of the Sea--Offshore Boundaries and Zones. Columbus: Ohio State University Press, 1967.

_____. "National Jurisdiction and the Law of the Sea." Natural Resources Journal, University of New Mexico Law School, July 1968, p. 373-400.

_____. Offshore Claims in Northwestern Europe. Technical Report Under Contract No. 1349(03) Office of Naval Research, September 1959.

_____. Offshore Geography of Northwestern Europe. New York: Rand McNally and Company, 1963.

Alexander, Tom. "All That Gas In the North Sea." Fortune, August 1966, p. 110-115.

Auguste, Barry B. L. The Continental Shelf. Paris: Librairie Minord, 1960.

Bayitch, B.A. International Law of Fisheries. Coral Gables, Fla: 1957.

Block, John R. "Threats to Freedom of Navigation." The JAG Journal, January 1970, p. 75-79.

Bowett, D. W. The Law of the Sea. Dobbs Ferry, N.Y.: Oceana Publications, Inc., 1967.

Brouwer, L.E.J. and Shawcross. The North Sea and the Law of the Continental Shelf. London: Geographical Publications Limited, 1964; Tunbridge Wells, England: Robert Stace and Company Limited, 1964.

Burke, W. T. Contemporary Legal Problems in Ocean Development. Stockholm, Sweden: International Institute for Peace and Conflict Research, 6 March 1968.

Burke, W.T. Ocean Sciences, Technology and the Future International Law of the Sea. Columbus: Ohio State University Press, 1966.

Chapman, W. M. "Problems of the North Pacific and Atlantic Fisheries." Unpublished paper presented at Annual Meeting of Fisheries Council of Canada, 10 May 1967.

_____. "Fishery Resources in Offshore Waters." Unpublished paper. Law of the Sea Institute, University of Rhode Island, Kingston, R.I.

Christy, F.T. and Scott, A. The Common Wealth in the Ocean Fisheries. Baltimore: Johns Hopkins Press, 1965.

Cooper, B. and Gaskell, T.F. North Sea Oil--The Great Gamble. London: William Heinemann Ltd., 1966.

"Cover Picture." Pesca, September 1969, cover.

Crutchfield, J.A. ed. The Fisheries, Problems in Research Management. Seattle: University of Washington Press, 1965.

Davies, Howell ed. The South American Handbook 1969. London: Trade and Travel Publications, Ltd., 1969.

Dean, A.H. "The Convention on Law of the Sea, What was Accomplished." American Journal of International Law, 1958, p. 609+, v. 52.

DeVattel, E. The Law of Nations on the Principle of Natural Law. Washington: Carnegie Foundation of International Law, 1916. v. 4, no. 3.

Einaudi, L.R. The Peruvian Military, A Summary Political Analysis. Santa Monica, Calif.: The Rand Corporation, May 1969.

Encyclopedia Brittanica. Book of the Year, 1970. Chicago: 1970.

Garacicca, T.A. El Dominio del Mar. Quayaquil: Departmento De Publicaciones De La Universidad De Quayaquil, 1968.

Garcia Sayan, E. Notes on the Maritime Sovereignty of Peru. Geneva: 1958.

Griffin, W. L. "The Emerging Law of Ocean Space." The International Lawyer, July 1967, p. 548-587.

Grunawalt, R. J. "The Acquisition of the Resources of the Bottom of the Sea--A New Factor of International Law." Military Law Review, 1966, p. 27-10-31 to 27-100-34.

Gullion, Edmund A. Uses of the Seas. Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1968.

Hensky, T. R. "National Bias and the International Court of Justice." Midwest Journal of Political Science, November 1968, p. 568-586.

International Court of Justice. Fisheries Case. Judgment, ICJ Report 116. Netherlands: 18 December 1951.

_____. North Sea Cases. Judgment, ICJ Report 1969, p. 3. Netherlands: 20 February 1969.

International Law Association. Report of the 45th Conference. Lucerne: 1952.

_____. Report of the 44th Conference. Copenhagen: 1950.

International Law Commission. Report of the 8th Session. A/3159. New York: 1956.

_____. Summary Record. A/CN.4/SR.69. New York: 1950, p. 21.

International Oceanographic Commission, UNESCO. Draft of a General Scientific Framework for World Ocean Study. Paris: IFMRP, 1966.

Johnston, Douglas M. The International Law of Fisheries. New Haven and London: Yale University Press, 1965.

Julie, I. Informacion Estadua Sobre Embarcaciones Utilizados en la Pesca Industrial en el Peru 1953-1962. La Punta, Callao, Peru: Instituto de Investigacion de Los Recursos Marinos, 1963.

Kunz, J. L. "The Continental Shelf and the International Law: Confusion and Abuse." American Journal of International Law, 1956. v. 50, p. 828-53.

Leonard, Larry L. International Regulation of Fisheries. Washington: Carnegie Foundation for International Peace, 1944.

Lissitzyn, Oliver J. International Law Today and Tomorrow. Dobbs Ferry, N.Y.: Oceana Publications, Inc., 1965.

McDougal, M. S. and Burke, W. T. "Crisis in the Law of the Sea: Community Perspectives vs. National Egoism." Yale Law Journal, 1958. v. 67, p. 539-589.

_____. The Public Order of the Oceans, A Contemporary International Law of the Sea. New Haven: Yale University Press, 1962.

Mouton, M. W. The Continental Shelf. The Hague: 1952.

The New York Times, 18 May 1945-16 March 1970, passim.

Ocean Science News, 6 March 1970.

"Offshore Claims and Problems in the North Sea." The American Journal of International Law, 1969, p. 505-522.

Organization of American States. Annals. Washington: Pan American Union, 1956, v. 8.

_____. Background Material on the Activities of American States Relating to the Law of the Sea. Washington: Pan American Union, 1957.

_____. Final Act, Inter-American Specialized Conference on Conservation of Natural Resources: The Continental Shelf and Marine Waters, Ciudad Trujillo, March 15-28. Washington: Pan American Union, 1956.

_____. Final Act of the Second Conference on the Exploitation and Conservation of the Maritime Resources of the South Pacific, Lima, Dec. 1-4, 1954. Washington: Pan American Union, 1954.

_____. Final Act of the Third Meeting of the Inter-American Council of Jurists, Mexico City, Mexico, January 17-February 4, 1956. Washington: Pan American Union, 1956.

Organization of American States. Memorandum on Certain Aspects of United States Policy Regarding the Conservation of the Resources of the Continental Shelf and Marine Waters. U.S. Delegation Presentation to the Inter-American Specialized Conference on Conservation of Natural Resources: The Continental Shelf and Marine Waters, Ciudad, Trujillo, March 15-28, 1956. Washington: Pan American Union, 1956.

_____. Third Meeting of the Inter-American Council of Jurists, Mexico City, Mexico, 17 January 1956, Report of the Executive Secretary. Washington: Pan American Union Department of International Law, April 1956.

Riesenfeld, S.A. Protection of Coastal Fisheries Under International Law. Washington: Carnegie Endowment for International Peace, 1942.

Shalowitz, Aaron L. Shore and Sea Boundaries. Washington: U.S. Govt. Print. Off., 1962.

Sorensen, Max. "Law of the Sea." International Conciliation, November 1958, p. 195-256.

Thomas, Trevor M. "The North Sea and Its Environs, Future Reservoirs of Fuel?" Geographical Review, 1966, p. 12-39.

United Nations. Convention on Fishing and Conservation of the Living Resources of the High Seas. A/CONF.13/L.54. New York: 1958.

_____. Documents, Law of the Sea Conference, Geneva, 1960. A/CONF.19/L.1-16 and A/CONF.19/1-7. New York: 1960.

_____. Food and Agricultural Organization. Fisheries Bulletin. New York: April-June 1954, v. VII, no. 2.

_____. General Assembly. Report of the International Law Commission Covering the Work of the Eighth Session, 1956. Supplement No. 9 (A/3159). New York: 1956.

_____. _____. Report of the International Law Commission Covering the Work of the Second Session, 5 June-29 July 1950. Supplement no. 12 (A/1316). New York: 1950.

United Nations. General Assembly. Report of the International Law Commission, Covering the Work of Its Second Session, Fifty-ninth Meeting, 17 March 1950. Supplement No. 17 (A/CN.4). New York: 1950.

_____. _____. Verbatim Record of the Debate in the Sixth Committee of the General Assembly at Its Eleventh Session. A/CONF.13/19(1957). New York: 1957.

United Nations Legislative Series. Laws and Regulations on the Regime of the High Seas. ST/LEG/SER.B/1. New York: 1951.

_____. Laws and Regulations on the Regime of the Territorial Sea. ST/LEG/SER.B/6. New York: 1956.

"The UN's Moratorium and What It Means." Ocean Industry, March 1970, p. 15.

United Nations. Secretariat. Legal Aspects of the Question of the Preservation 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 Interest of Mankind. Add. 1 (A/AC.135/19). New York: 18 June 1968.

_____. Secretary General. Resources of the Sea Part I: Mineral Resources of the Sea Beyond the Continental Shelf. Add. 1 (E/4449). New York: 19 February 1968.

U.S. Congress. House of Representatives. Committee on Science and Astronautics. Hearings. Washington: U.S. Govt. Print. Off., 1960.

_____. Senate. Committee on Commerce. Hearings. Washington: U.S. Govt. Print. Off., 1965.

_____. _____. Committee on Commerce. Treaties and Other International Agreements Containing Provisions on Commercial Fisheries, Marine Resources, Sport Fisheries, and Wildlife to Which the United States is Party. Washington: U.S. Govt. Print. Off., 1965.

_____. _____. Committee on Interior and Insular Affairs. Hearings. Washington: U.S. Govt. Print. Off., 1953. 2 pts.

U.S. Department of Interior. Fishery Resources of the United States of America. Washington: U.S. Govt. Print. Off., 1945.

U.S. Department of State. Bulletin No. 327. Washington: U.S. Govt. Print. Off., 30 September 1945.

_____. Conservation Problems Among Chile, Ecuador, Peru and the United States, Santiago, Chile, 1955. Washington: U.S. Govt. Print. Off., 1955.

_____. Digest of International Law. Edited by Marjorie M. Whiteman. Washington: U.S. Govt. Print. Off., April 1965. v. IV.

U.S. Laws, Statutes, etc. An Act to Protect the Rights of the United States on the High Seas and In Territorial Waters of Foreign Countries. 68 Stat. 883, Public Law 680, U.S.C., Supp. III (1952 Edition) (1956). Washington: U.S. Govt. Print. Off., 1962, p. 633.

_____. Policy of the United States With Respect to Coastal Fisheries in Certain Areas of the High Seas. Presidential Proclamation No. 2668, 10 Fed. Reg. No. 12304. Washington: U.S. Govt. Print. Off., 28 September 1945.

_____. Policy of the United States With Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf. Presidential Proclamation No. 2667, 10 Fed. Reg. 12303 (1945). Washington: U.S. Govt. Print. Off., 28 September 1945.

U.S. National Council on Marine Resources and Engineering Development. Marine Science Activities of the Nations of Latin America. Washington: U.S. Govt. Print. Off., April 1968.

U.S. Naval War College. International Law Situation and Documents 1956 (1957). Washington: U.S. Govt. Print. Off., 1957.

U.S. President's Commission on Marine Science, Engineering and Resources. Our Nation and the Sea. Washington: U.S. Govt. Print. Off., January 1969.

_____. Panel Reports. Washington: U.S. Govt. Print. Off., 1969, 3v.

Weissberg, G. Recent Developments in the Law of the Sea and the Japanese-Korean Fishery Dispute. Hague: Martines Nighoff, 1966.

Whiteman, Marjorie M. "The Territorial Sea." Proceedings of the American Society of International Law, 1956.

Wilkes, Daniel. "The Use of World Resources Without Conflict: Myths About the Territorial Sea." Wayne Law Review, 1968, v. 14, no. 2, p. 441-470.

APPENDIX I

NORTH SEA CASES BACKGROUND

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NORTH SEA CASES BACKGROUND

History. Historically, "most of the widely accepted laws and customs of offshore claims throughout the world have been evolved in Northwestern Europe."[1] A look at some of this history will serve our previously stated goal of setting the stage for later discussion and establishing perception by the Parties of the marine environment.

Dutch and Danish offshore claims can be traced back to the late middle ages. For our purposes, however, 1598 is far enough back. In that year the Danes established an eight mile territorial limit. In 1610 Grotius, (Hugh De Groot) Dutch jurist and statesman, suggested the maximum range of shore-based cannon as a possible limit for offshore control. The Dutch have had probably the strongest record of support for the principle of freedom of the seas, however, to which Grotius' 1609 brief The Right Which Belongs to the Dutch to Take Part in the East Indian Trade bears witness.[2]

The Germans (fish and thus sea-oriented as states even if not organized as a state for a couple of hundred more years) suffered mightily after 1648 and the Treaty of Westphalia. The mouths of her rivers were closed off by the Dutch on the Rhine and by the Swedes and Danes on the

Wesser, Elbe and Ober. This severely limited the world commerce which had been significantly productive in the last half of the 16th century.

Colonial interests and fishing in the North Sea have continued to expand the offshore interests of the Parties. In 1869 Great Britain recognized North Germany's claims to a three mile exclusive fishery. This was measured from the extreme limit which the ebb tide leaves dry off the North German coast (a wide range of variations of tide used to delimit shore lines in Northwestern Europe are in use today).[3] Aside from fishing rights, however, German offshore claims have been conservative.

By the end of the 19th century, and perhaps significantly but at least coincidentally with the launching of the Great German Navy by the German Navy Law of 1900, the "pattern of offshore claims in Northwestern Europe was fairly well established."[4]

In the 20th century Mouton speaks to the "non-existence of a continental shelf in the North Sea where no shelf exists."[5] He cites Krumel who says that the North Sea shelf is a "submerged" or "drowned land" since mammoth bones have been found there.[6] This fact may have psychological value, according to Mouton, but it doesn't advance any right or title.[7] Mouton goes on to develop the thesis that the North Sea is a part of the high seas and subject to its legal status.[8]

In 1923 Denmark and Germany reached agreement on a median line for their marine territorial boundary. Joint development but continued disagreement over sovereignty still exists with respect to Dutch and German boundaries in the Ems-Dollart region.

On 26 February 1942 the Anglo-Venezuelan Treaty was concluded. The forerunner of the Truman Declaration of 1945, this was an agreement between England and Venezuela not to claim submarine rights on the other side of a dividing line between the two countries, i.e., between Trinidad and mainland Venezuela.

In 1945 the United States unilaterally published the Truman Proclamation. We shall see later that this proclamation was used by the ICJ as an example of the principles to be applied in the solution to the Cases. The Proclamation proclaimed United States "jurisdiction and control" over its adjacent continental shelf.[9]

In 1950 the International Law Commission (ILC) recognized the economic, social, and juridical points of view of the importance of exploration of the seabed and subsoil of the continental shelf.[10] The ILC discussed the use of the resources of the shelf for "the benefit of mankind" and "agreed that boundaries should exist between states for control and jurisdiction." This concept, however, was to be independent of the "concept of occupation" and "the protection of the

resources should be independent of the concept of continental shelf."

Later in 1951 Jacob Van Der Lee suggested that as a result of seabed exploration innocent passage might be affected (a Gulf Coast prediction!) and advocated sufficient safeguards to ensure proper passage.[11]

Since 1952 Germany, Denmark, the Netherlands and Great Britain have discussed at intervals the subject of artificial islands and their effect on shelf definition. They have not, however, attached much importance to potential problems in this area.[12]

In 1952 Mouton states that on the subject of the division of a common shelf, "We can be very short about this subject, because we believe that it should be left entirely to the countries concerned."[13] With regard to concessions Mouton further postulates "not two straws in a glass" insofar as exploitation of a resource discovery which straddles a boundary is concerned.[14] He goes on to state that, "We cannot see the necessity of General Rules." He did, however, postulate that the configuration of the coastline and economic value should not be criteria. He gives space to Danish and Dutch remarks rebutting the foregoing comments and claiming the "geometric middle between states."[15]

In 1956 the International Law Commission made the following statement:

> Since in all cases of boundary making, the objective is agreement between the parties concerned, the convention provides for a median line only in the absence of such agreement, and justifies a departure from such mathematical line where an historical title or other special circumstance exists.[16]

In 1958 the Convention on the Continental Shelf (hereinafter referred to as the Convention) was formulated at Geneva. This convention was the culmination of legal development with regard to offshore claims on the continental shelf. Article 6, section 2 of this convention is at the heart of the Cases and states:

> Where the same continental shelf is adjacent to the territories of the 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.[17]

Whatever its other ramifications this Convention eliminated need for further consideration of the Netherlands adopted doctrine of acquisition by occupation.[18] The Parties to the Cases signed the Convention but as of this date West Germany has not ratified it.

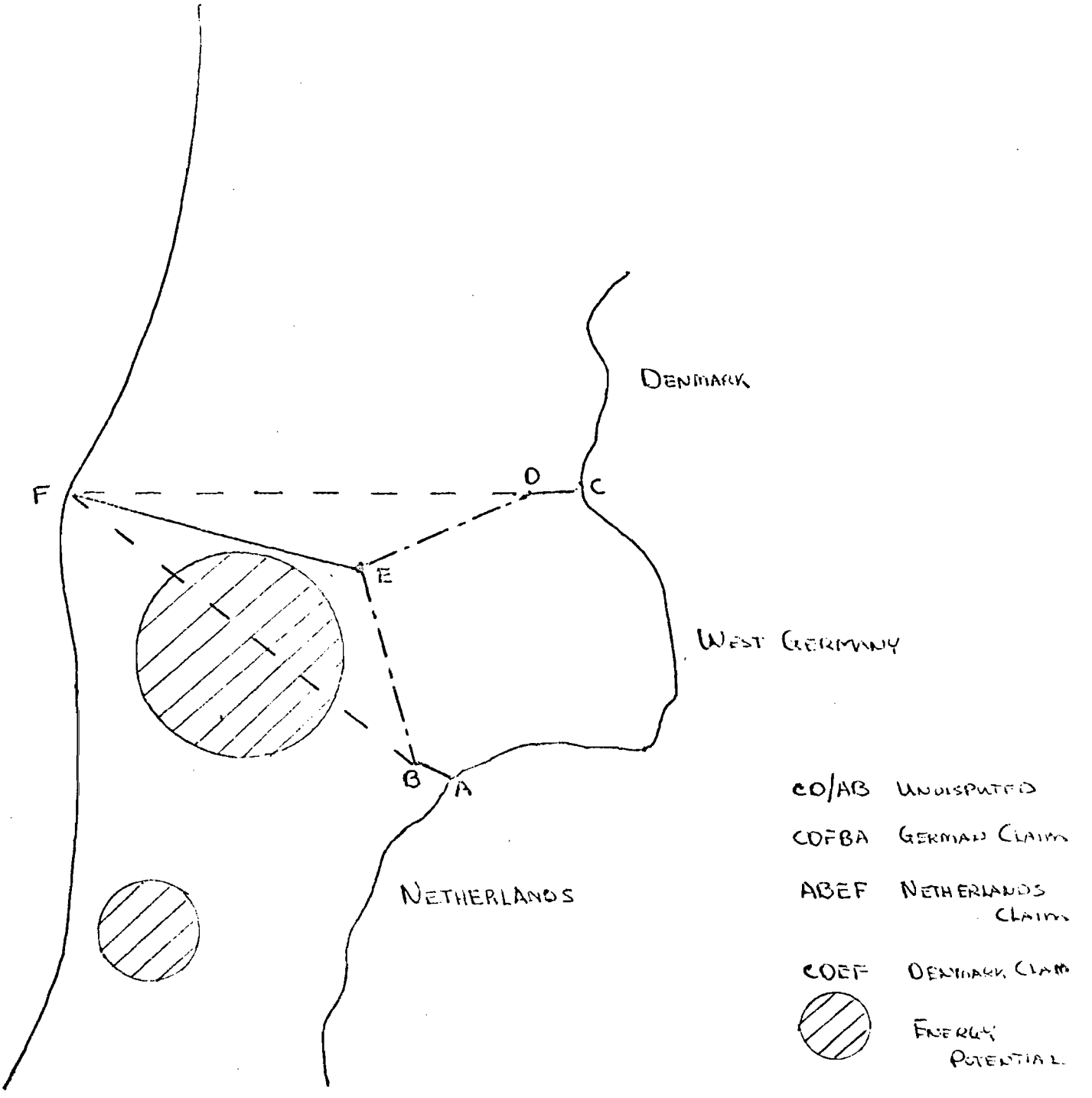
Since 1958 significant exploration by seismic, magnetic, and other means has been made of the North Sea shelf (in spite of some minor complaints to the effect that seismic "noisy noise annoys an oyster").[19]

Exploitation of gas and oil has begun. An attempt was made in 1960 to complete the geological map between England and the Parties' coastlines (perhaps with sinister intent) but no clear-cut splits were found. Shelf ownership, therefore, could not and to date cannot be determined by "natural" means.

In 1968 the cry went up loudly and clearly from many nations that: "Their (the seas) resources are, therefore, the heritage of all mankind, and should be treated as such."[20] The 1 December 1969 New York Times in an editorial reiterates this as a continuing "strong feeling."

Geography. With the preceding remarks as historical backdrop we can now switch to the actual physical setting which is of concern in the Cases. This setting is in an area of the North Sea off of the coasts of the Netherlands, West Germany and Denmark. It is bounded on the West by a lateral median line drawn between the United Kingdom and Norway, Denmark, and the Netherlands. Inclusion of West Germany would only serve to move the median line East to the detriment of all but the United Kingdom. This will not be considered pertinent here although conceivably the United Kingdom could raise the point at some future date.

On the North the area is bounded by the median (equidistant) line between Norway and Denmark and on the South by the median line between the Netherlands and Belgium. Figure 1



DISPUTED NORTH SEA BOUNDARIES

FIGURE 1

shows the actual disputed boundaries, triangle CDEBA comprising the desires of West Germany and CDEBA comprising those which the Netherlands and Denmark feel are appropriate under the Convention.[21] The lines CD and AB were agreed to in 1964 by all Parties.[22]

The entire area within the disputed boundaries lies at a depth of less than 200 meters.[23] It is thus all continental shelf, defined in Article 1 of the Convention as:

> . . . 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.[24]

Social and Economic. From a socioeconomic standpoint the area within the disputed boundaries has grown increasingly important since 1959. The reason is simple. Energy in the form of gas and oil lies under the North Sea bed. Gas was first discovered under a sugar beet field in the town of Slochteren in Groningen in the Netherlands near the coast and the German border. The discovery was made by a Royal Dutch Shell, and Standard Oil Company combine. Reserves in this field have been estimated at around fifty-two billion cubic feet (versus United States estimated reserves of two hundred and ninety-seven billion cubic feet).[25] While this two hundred and seventy million year old field is under land, seismic evidence indicates that "the ancient Zechsteen Sea

sand layer with gas entrapped stretches out in a wide belt, mostly westward, from Slochteren out under the North Sea and almost to the Coast of England."[26] Hundreds of potential gas-bearing formations have been located. The British started drilling in the North Sea in 1964 and hit gas in 1965. The average "hit" rate has been one in four wells for the British area versus a world average of one strike in ten drilling efforts.[27]

Drilling in the German sector (undisputed) has been limited and unfruitful (eleven straight "dry holes").[28] Since 1966 very little exploration has been done by the Federal Republic. The Netherlands is presently at a relative standstill although Royal Dutch Shell was involved in a find in April of 1969.[29] Denmark has not started drilling. Reasons for this seemingly desultory effort in such a promising area are not primarily technological, however. The West German Government has had to untangle its internal legal procedures prior to proceeding. In 1964 it halted all efforts pending the ratification of the 1958 Geneva Convention.[30] Further holdups have resulted from the Cases before the ICJ. The lack of legal clarity is, according to a German spokesman, "making itself felt."[31]

Denmark has granted search concessions (the A. P. Moeller Shipping Co. has a 50 year concession) but to date no discoveries have been made.[32]

The Dutch have held up drilling pending clarification of their own laws and establishment of long-range guidelines for exploration and exploitation.[33] Among the headlines in the New York Times in 1965 could be found "Dutch Hold Keys to North Sea Oil," and "Government is Dealing From Strength as it Prepares Rules on Exploration," and finally "30 Concerns Eager to Start Drilling, Though Irked by Incentive Royalty Plan." The incentive plans are considered risky by some. However, even though precise information remains proprietary, the odds must be reasonable. One American oil executive has stated that the North Sea is the biggest casino in the world and everybody is shooting dice.

One small piece of "intelligence" is noted by the shaded circles on Figure 1. Seismic studies conducted by three oil companies working in concert from 1962-64 have indicated that there is a high probability of oil and gas existence in the shaded circles.[34] The relationship between these areas and the disputed boundaries serves to indicate a reason for West German reluctance to ratify the Convention and the pursuit of her cause in the ICJ.

In the preceding paragraphs we have seen a brief microview of some of the social and economic aspects of the Parties. It is also pertinent, however, to consider the macroview. Dr. George Tugendhat, British Fuel Economist has said, ". . . having planned for scarcity, European planners are

faced with plentitude instead."[35] Coal has been the primary energy source in Western Europe for 250 years. It has been carefully protected from competing energy sources by subsidies, tariffs, bans, and high transportation costs. The result has been high cost European energy. Now, gas and possibly oil enters the picture and becomes potentially available in vast quantities.

Gas doesn't pollute, is easily controlled (once transportation in the form of ships and pipelines is available), and requires simple equipment. Exploration expenses, high insurance rates, and significant initial outlay for this transportation and equipment is still offset by the value of the resources involved. The coal industry will be displaced, home and industrial equipment must be produced, and an energy transportation revolution is likely to transpire. These factors cannot help but have significant effect, particularly with a nuclear power revolution lurking over the horizon ready to burst forth just about the time a new oil and gas economy is stabilized. European economic rigidity exemplified by the British coal-backed Labor Party and Netherlands' action to tie gas prices to those of oil may slow the tide but will not stop it.

With all the potential, prestige, and problems involved in exploiting the North Sea one fact is certain, that is, the "North Sea is never out of the minds of those living on its shores."[36]

FOOTNOTES

[1]Lewis Alexander, A Comparative Study of Offshore Claims in Northwestern Europe, Final Report Under Contract No. 1349(03) ONR (Washington: Office of Naval Research, February 1960), p. 12.

[2]Ibid., p. 134.

[3]Ibid., p. 147.

[4]Lewis Alexander, Offshore Geography of Northwestern Europe (New York: Rand McNally and Company, 1963), p. 16.

[5]Mouton, p. 12.

[6]Ibid., p. 35.

[7]Ibid.

[8]Ibid.

[9]U.S. Laws, Statutes, etc., Policy of the United States With Respect to the Natural Resources of the Subsoil and Seabed of the Continental Shelf, Presidential Proclamation No. 2667, 10 Fed. Reg. 12303 (1945) (Washington: U.S. Govt. Print. Off., 28 September 1945).

[10]United Nations, General Assembly, Report of the International Law Commission Covering the Work of the Second Session, 5 June-29 July 1950, 5th Session Supplement No. 12 (A/1316) (Lake Success, New York: 1950), p. 22.

[11]Mouton, p. 226.

[12]Ibid.

[13]Ibid., p. 294.

[14]Ibid.

[15]Ibid., p. 333.

[16]United Nations, General Assembly, Report of the International Law Commission Covering the Work of the 8th Session, 1956, 11th Session, Supplement No. 9 (A/3159) (New York: 1956).

[17]United Nations Conference on the Law of the Sea, Convention on the Continental Shelf, A/CONF.13/L.55 (New York: 29 April 1958).

[18]United Nations Secretariat, Legal Aspects of the Question of the Reservation Exclusively for Peaceful Purposes of the Sea Bed and the Use of Their Resources in the Interest of Mankind, Add. 1, A/AC.135/19 (New York: 18 June 1968), p. 4.

[19]L. Brower and Shawcross. The North Sea and the Law of the Continental Shelf (Great Britain: Geographical Publications Limited and Robert Stace and Company Limited, 1964), p. 21.

[20]Secretariat, p. 4.

[21]International Court of Justice, North Sea Cases, ICJ Report 1969, p. 3 (Netherlands: 20 February 1969), p. 16.

[22]Ibid., p. 14.

[23]R. Grunawalt, "The Acquisition of the Resources of the Bottom of the Sea--A New Factor of International Law," Military Law Review, 1966, p. 14.

[24]Convention on the Continental Shelf.

[25]B. Cooper and T. Gaskell, North Sea Oil--The Great Gamble (London: William Heinsmann Ltd., 1966), p. 10; Tom Alexander, "All That Gas in the North Sea," Fortune, August 1966, p. 111.

[26]Fortune, p. 74.

[27]Ibid.

[28]"West German Consortium Suspends Drilling After 11 Unsuccessful Attempts to Find Gas in German Coastal Area," The New York Times, 24 May 1967, p. 67:5.

[29]"Standard Oil N.J. and Royal Dutch Shell Group Make New Find," The New York Times, 15 April 1969, p. 68:4.

[30]"Race For Oil Outside Territorial Waters Legal Aspects Discussed," The New York Times, 9 February 1964, p. 8:1.

[31]"West Germany Claims Sovereignty Over Sea Bed Off Coast to 620 Feet Warns Etc.," The New York Times, 25 January 1964, p. 48:8.

[32]"Race for Oil"; Fortune, p. 135.

[33]Trevor Thomas, "The North Sea and Its Environs, Future Reservoirs of Fuel?" Geographical Review (New York: American Geographical Society, 1966), p. 17.

[34]"British Gas Industry to Raise $576 Million Loan on European Capital Market to Help Finance Operations," The New York Times, 18 March 1969, p. 63:2.

[35]Fortune, p. 111.

[36]Brouwov, p. V.

APPENDIX II

ARTICLE SEVEN OF CONVENTION ON FISHING AND CONSERVATION OF THE LIVING RESOURCES OF THE HIGH SEAS

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Article 7

1. Having regard to the provisions of paragraph 1 of article 6, any coastal State may, with a view to the maintenance of the productivity of the living resources of the sea, adopt unilateral measures of conservation appropriate to any stock of fish or other marine resources in any area of the high seas adjacent to its territorial sea, provided that negotiations to that effect with the other States concerned have not led to an agreement within six months.

2. The measures which the coastal State adopts under the previous paragraph shall be valid as to other States only if the following requirements are fulfilled:

(a) That there is need for urgent application of conservation measures in the light of the existing knowledge of the fishery;

(b) That the measures adopted are based on appropriate scientific findings;

(c) That such measures do not discriminate in form or in fact against foreign fishermen.

3. These measures shall remain in force pending the settlement, in accordance with the relevant provisions of this Convention, of any disagreement as to their validity.

4. If the measures are not accepted by the other States concerned, any of the parties may initiate the procedure contemplated by article 9. Subject to paragraph 2 of article 10, the measures adopted shall remain obligatory pending the decision of the special commission.

5. The principles of geographical demarcation as defined in article 12 of the Convention on the Territorial Sea and the Contiguous Zone shall be adopted when coasts of different States are involved.