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MULTIPLE JURISDICTION—WILL IT SAVE OR DESTROY THE OCEANS?
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The recent trend of claims to the ocean and its riches has led far beyond the liberal twelve nautical mile territorial sea limit that the United States is prepared to recognize.[1] In particular, two documents, the Declaration of Santo Domingo, proposing a "patrimonial sea" of 200 miles,[2] and the draft articles on an "exclusive economic zone" of 200 miles submitted by Kenya,[3] are likely to find much favor at the substantive session of the Third Law of the Sea Conference to be held at Caracas in the summer of 1974.[4]

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1. Tables of specific zonal claims demanded by states are found in the following sources, which show the increasing jurisdictional claims over the past fifteen years: F.V. GARCIA-AMADOR, THE EXPLOITATION AND CONSERVATION OF THE RESOURCES OF THE SEA 31-42 (1959); *id.* (Addendum 1963); *Hearing on Executives, J, K, L, M, N Before the Senate Comm. on Foreign Relations,* 86th Cong., 2d Sess. (1960); 10 INT'L LEGAL MATERIALS 1255 (1971); BRITISH INSTITUTE OF INTERNATIONAL AND COMPARATIVE LAW, 2 NEW DIRECTIONS IN THE LAW OF THE SEA 835-54 (1973). On the United States position see Draft Articles on the Breadth of the Territorial Sea, Straits, and Fisheries, U.N. Doc. A/AC.1381/SC.II/L.4 (1971).

2. U.N. Doc. A/AC.138/80 (1972). BRITISH INSTITUTE OF INTERNATIONAL AND COMPARATIVE LAW, 1 NEW DIRECTIONS IN THE LAW OF THE SEA 247 (1973).

3. Kenya Draft Article on Exclusive Economic Zone Concept, U.N. Doc. A/AC.138/SC.II/L.10 (1972), U.N. Doc. A/8721 (1972).

4. The institutional history of the Caracas Conference is as follows. Two Law of the Sea Conferences in 1958 and 1960 were responsible for the four Geneva Conventions on (1) The Territorial Sea and the Contiguous Zone, (2) The High Seas, (3) Fishing and the Conservation of the Living Resources of the High Seas, and (4) The Continental Shelf. For a discussion of the conventions see THE LAW OF THE SEA (L. Alexander, ed. 1967). The United Nations General Assembly, under Resolution 2340 (XXII) adopted on December 18, 1967, established an Ad Hoc Committee to Study the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction. The following year the Committee became a 42-member Standing Seabed Committee seeking to prevent militarization of the seabed and to ensure that resources are used "in the interest of mankind." On December 17, 1970, in Resolution 2750 (XXV), the General Assembly

Emerging from conflicts of interest, which have gradually eroded the historic boundaries of the territorial sea and the Continental Shelf, is a much different concept involving *multiple jurisdictional zones* of varying dimensions for the coastal state. Although the 1958 Geneva Convention on the Continental Shelf and Contiguous Zones provided that contiguous zones should not exceed the twelve mile limit,[5] the widespread appeal by individual states for acknowledgment of broader zones *for special purposes* must be taken as an indicator of current state practice and preferences.

The position of this paper is that the existence of "zones" of national jurisdiction outside territorial waters need not be viewed as damaging to the orderly development and codification of international law. In fact, a concept of multiple jurisdictions is perhaps necessary if the conflicts of interest over navigation, commerce, fishing, mineral extraction, conservation and pollution are to fall within any directives for resolution in international law. The problem is that the concept may destroy what it seeks to save if the nature and dimensions of the jurisdictional zones fail to focus on

called for a new Law of the Sea Conference, to be held in Caracas, Venezuela between June 20 and August 29, 1974, and established three subcommittees whose functions are, respectively, (1) to draft treaty provisions embodying the international seabed regime, (2) to consolidate issues relating to the law of the sea, and (3) to consider the questions of scientific exploration, exploitation and preservation of the marine environment. G.A. Res. 2580, 25 U.N. GAOR, U.N. Doc. A/8028 (1970), G.A. Res. 2749 (XXV), U.N. Doc. E/AC.51/54 (1971). The Committee, which had grown to 86 and subsequently to 91 members, became the preparatory committee for the 1974 Conference and met in June 1973 at Geneva to establish Conference guidelines.

Very few discussions of the issues covered by the 1958 and 1960 Conventions give adequate emphasis to environmental matters. Legal surveys of the international environmental matters include Bleicher, *An Overview of International Environmental Regulation,* 2 ECOLOGY L.O. 1 (1972); Jordan, *Recent Developments in International Environmental Pollution Control,* 15 MCGILL L.J. 279 (1969); Petaccio, *Water Pollution and the Future Law of the Sea,* 21 INT'L & COMP. L.Q. 15-42 (1972).

5. Articles on Law of the Sea, art. 3, Int'l L. Comm'n Report, 11 U.N. GAOR, Supp. 9, U.N. Doc. A/3159 (1958). The 1960 Conference rejected an eighteen state proposal, and one by Mexico, favoring a territorial sea of twelve miles. Instead, the substance of the Canadian-United States proposal was accepted in which a state is entitled to a territorial sea of six nautical miles with an additional six nautical miles in which the state has exclusive fishing rights. U.N. Doc. A/CONF.19/8 (1960).

the most central of the disputed issues. What is needed is a comprehensive treatment of all of the jurisdictional issues affecting the shallow waters along the world's coastlines, not a piecemeal analysis of one type of jurisdiction judged merely on its own merits.

Political analysis of the conflicting issues and the multiple jurisdiction approach suggests that the proposals for a patrimonial sea and for an exclusive economic zone both suffer from mistaken emphasis and hence are likely to aggravate existing tensions. An optimum strategy would solve the central problem behind the claims for broader jurisdiction without making undue legal sacrifices. The question of fishing rights, more than any other, has led to expansive claims to the oceans and has complicated negotiations on the Territorial Sea and the Continental Shelf.[6] The patrimonial sea and the exclusive economic zone do, however, respond to the demands of the coastal state for rights to the harvesting of fish 200 miles from its coastlines, but they also compel an extension of the rights to seabed and subsoil exploitation, thus transforming the doctrine of the Continental Shelf as well. To yield on the secondary issue of mineral exploitation in attempting to solve the fisheries proglem via a general exclusive economic zone would mean no less than partition of the oceans. On the other hand, in focusing on the fishing question by extending the contiguous fishing zone to 200 miles, the most vigorous demands of the revisionist (expansionist) states would have been met and the movement to expand claims in other issue areas effectively diffused.

Once the basic structure of the jurisdictional levels for security and navigation (Territorial Sea), mineral exploitation (Continental Shelf), and harvesting of fish (an extensive fishing zone) has been envisioned, other issues such as conservation of living resources and pollution of the waters can readily be incorporated. As has also been suggested relative to the patrimonial sea,[7] the rights

6. Nelson, *The Patrimonial Sea,* 22 INT'L & COMP. L.Q. 668, 681 (1973).

7. The Summary Records of Plenary Meetings of the 1960 United Nations Conference on the Law of the Sea indicated that fishing rights were the principle issue in most of the claims to extensive jurisdiction. Sweden, for example, was opposed "to the entirely novel concept of fishery zones in which coastal States would enjoy exclusive fishing rights" in the Ninth Plenary Meeting on April 22, 1960. But in the Eleventh Plenary Meeting three days later, Australia maintained that "it was apparent that, for a great many States, the major interest in extend-

to fish harvests far beyond one's territorial sea could be balanced by a corresponding duty to implement conservation and anti-pollution norms. Indeed, since conservation and pollution concerns are the very issues that have stimulated the second most extensive jurisdictional claims, this paper suggests that a Preferential Fisheries/Environmental Zone of 200 miles be established as the third jurisdictional level. Either self-help or community responsibility could provide legal justification for such environmental protection of the biosphere fostered by state action.

These conclusions emerge from a three part examination of the current crisis in the law of the sea. Part I analyzes the conflicting political and legal objectives within the issue of jurisdictional control, the progress made in efforts at individual solutions, and the failure to find a unified solution in the territorial waters doctrine. Part II assesses the concept of multiple jurisdiction as it evolved in the early 1970's—its promises and its dangers. Part III considers how creation of a fishing-environmental zone might ameliorate the basic grievances while salvaging the Territorial Waters doctrine and retaining traditional provisions regarding the Continental Shelf. Such a tripartite jurisdictional structure appears the most expedient solution to the ocean crisis and the one most conscious of historic claims.

I. THE CRISIS IN HISTORICAL PERSPECTIVE:

Jurisdictional Conflicts Undermining a Comprehensive Territorial Waters Boundary

Hidden deep within the issue of jurisdictional control are a

ing their maritime jurisdiction lay in securing more extensive fishing rights." The Committee of the Whole adopted a proposal of Iceland, by a vote of 31 to 11 with 46 abstentions, that would seem to have opened the door for broader claims: "Where a people is overwhelmingly dependent upon its coastal fisheries for its livelihood or economic development and it becomes necessary to limit the total catch of a stock or stocks of fish in areas adjacent to the coastal fisheries zone, the coastal State shall have *preferential rights* under such limitations to the extent rendered necessary by its dependence on the fishery." (emphasis added). At the Twelfth Plenary Meeting of the 1960 Conference (April 25), the representative of India emphasized that the proponents of the twelve-mile limit "did not wish to enlarge the territorial sea for its own sake" but in order to safeguard important isolated interests such as fishing and national security.

number of poorly resolved political and legal objectives. The territorial waters "doctrine" has been called on to smooth these contradictions but instead has sharpened them. The doctrine is barely able to encompass the divergent interests of domestic pressure groups within a single nation, let alone those of the autonomous nation-states—and for good reasons.[8] A comprehensive territorial waters boundary must be flexible—large enough to satisfy one interest, while small enough to meet the demands of another. It is, therefore, necessary to examine four fundamental interests—conservation and harvesting of fish stocks, environmental protection, navigation and commerce, and resource exploitation—which have strained the territorial waters doctrine with opposing tensions and have opened to doubt whether a "just right" compromise is a feasible option.

A. *The Issues*

1. *Conservation and Harvesting of Fish Stocks.*—Why should a nation-state want to expand its boundary waters jurisdiction at all? The most immediately pressing reason is that put forth by those states currently claiming the most extensive territorial waters—preservation of fish stocks and/or dominant, if not exclusive, rights to their harvesting.

These claims are justified on the grounds that, bluntly stated, the history of international attempts at conservation of whale and fish populations is the history of failure. International cooperative restrictions have attempted for decades to protect female whales with calves, to exclude certain regions from the whale harvest, to shorten the harvest period, to strengthen collective licensing and

8. The United States position regarding an international seabed agency to administer resource extraction beyond the continental shelf is itself undergoing domestic challenges from the Navy, the fishing industry, and assorted interest groups, suggesting that the Nixon administration may not push very hard for its own proposal in 1974. Hollick, *Seabeds Make Strange Politics,* 9 FOREIGN POLICY 148 (1972). Mirrored at the international level, the clash of interests becomes more formidable. Luard, *Who Gets What on the Seabed?*, 9 FOREIGN POLICY 132 (1972). Environmental protection, which further complicates the issues treated at the first two conferences, is receiving more international legal attention today. For more details on the legal developments treated below see C. DORAN, M. HINZ, & P. MAYER-TASCH, UMWELTSCHUTZ—POLITIK DES PERIPHEREN EINGRIFFS: EINE EINFUHRUNG IN DIE POLITISCHE OKOLOGIE (1973.

inspection procedures, and generally to safeguard the remnant of the whale herds.[9] But excessively high maximum kill limits and lacunae in provisions regulating inspection of whaling ships have negated these efforts.[10] Similarly, multilateral fishing treaties have been unsuccessful in preserving fish stocks. The earliest fisheries treaties ignored the question of conservation completely or estab-

9. A series of conventions and protocols (1931, 1937, 1938) prohibited the killing of calves and females accompanied by calves. Parl. Papers, 1937 REGULATION OF WHALING, CMD. No. 5487 (1937), 1 U.S.T. 880. U.S. DEPARTMENT OF STATE, 3 TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA, 1776-1949, 26-33 (compiled under the direction of Charles I. Bevans 1969). Licenses were to be required of all vessels engaged in the hunting of whales, and statistics of whale kills were to be submitted voluntarily to the International Bureau in Oslo. Sanctuaries were created for whales south of 40 degrees South latitude and in the Arctic Ocean; consciously excluded was the north Pacific, albeit one of the richest whale habitats. When reduction of the whaling season in the Antarctic to three winter months failed to stem the decline in the whale population, an International Whaling Commission was created in 1947 to implement a quota system based on the so-called Blue Whale Unit (BWU). Convention with Other Governments on Whaling, Dec. 2, 1946, T.I.A.S. No. 1849; WHALING, CMND. No. 6941 (1946); WHALING, CMND. No. 6990 (1946). The blue whale was thought equivalent to two fin whales or two and one-half hump-back whales. A difficulty with the system was that the ratios had little to do with the relative abundance of whales and more to do with their commercial value; moreover the system merely led to general destruction of all whales because the maximum kill was set too high. Indeed, so high was the limit that as whales became scarcer the maximum kill limit could not even be achieved. *See* L. CALDWELL, IN DEFENSE OF EARTH: INTERNATIONAL PROTECTION OF THE BIOSPHERE 63-65 (1972); C. JOHN COLOMBOS, THE INTERNATIONAL LAW OF THE SEA 416-19 (6th rev. ed. 1967); A. REASTAD, LA CHASSE À LA BALEINE EN MER LIBRE (1928); Leonard, *Recent Negotiations Toward the International Regulation of Whaling,* 35 AM. J. INT'L L. 90 (1941).

10. Lacunae in the treaties are exemplified by the provisions requiring supposedly neutral inspectors on board whaling ships to ensure that the whaling code was observed. Ships devoted to the freezing or salting of whale meat were excluded from these provisions, a loophole not corrected until 1963 when a convention between Great Britain, Japan, the Netherlands, Norway and the Soviet Union required observers on all ships engaged in whaling in Antarctic waters. Hyde, *The Antarctic Whaling Dispute,* 3 PROGRESS 111 (1964); Surrency, *International Inspection in Pelagic Whaling,* 13 INT'L & COMP. L.Q. 666 (1964). Further regional closed seasons were placed on such species as the blue, hump-back and sperm whales; but because of the enormous range of these mammals and their vulnerability on the surface of the water as air-breathers, such restrictions were futile. Faced with the prospect that Japan and the Soviet Union were together able to exterminate the few remaining members of the whale population,

lished closed seasons that could not be effective.[11] The more recent treaties, incorporating fish size and net mesh size limits, suffer first from enormous time lags between the signature and final ratification of multilateral environmental treaties and secondly, from the lack of adequate monitoring facilities or procedures. For instance, only in 1964 when the halibut catch had plummeted, was Japan willing to accede to the 1923 Convention between the United States and Canada, which recognized a closed season on halibut fisheries in the Bering Sea, but by that time the season had to be

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the United States Government finally passed legislation in 1970 to ban the import of whale products and to classify the whale as an endangered species, but not without bitter opposition from the Navy and the domestic whaling industry. CALDWELL, *supra* note 9, at 66. N.Y. Times, Nov. 24, 1970, at 24, col. 1; Nov. 28, 1970, at 25, col. 3; Nov. 29, 1970, at 40, col. 1; Dec. 3, 1970, at 21, col. 2; and Dec. 7, 1970, at 44, col. 1. Efforts to protect the whale or at least rationally to control the whale harvest provide an interesting case study of government policy dominated by antiregulatory commercial interest groups. *See* D. JOHNSTON, THE INTERNATIONAL LAW OF FISHERIES 396 (1965). The July 1971 meeting of the International Whaling Commission, likewise, did not adopt measures to apply restrictions on Japanese and Russian whaling fleets or to set quotas for the North Pacific. The Washington Post, July 6, 1971; *Issues Before the 26th General Assembly,* INTERNATIONAL CONCILIATION 86-87 (1971). On June 26, 1973, the American proposal to the fourteen-member International Whaling Commission, calling for a moratorium on the killing of all whales, was put to a final vote and fell short of the three-quarters majority required for adoption. Japan, the Soviet Union, Iceland, Norway and South Africa voted against the proposal.

11. Among the first bilateral treaties attempting to regulate fisheries was the Anglo-French Declaration, which reserved oyster fishing within three miles of the British coast to the British and within three miles of the French coast to the French. Anglo-French Convention on Fisheries Act of 1839, 2 & 3 Vict. c. 96. COLOMBOS, *supra* note 9, at 402-03. French and British warships were given the power to arrest vessels infringing on these rules, and a Tribunal competent to decide on a violation of the rules was established. A Convention signed in 1882 by Great Britain, Belgium, France, Germany and Holland extended multilateral controls into the North Sea. 46 & 47 Vict. c. 22. COLOMBOS, *supra* note 9, at 408-09; Daggett, *The Regulation of Maritime Fisheries by Treaty,* 28 AM. J. INT'L L.Q. 693 (1934). Although the Convention provided for the registration of fishing boats and for the search of vessels suspected of contravening any of the provisions, three weaknesses marred the agreement. First, only the navies of the national suspected of infringement were capable of arresting the infringing vessel, and then capable only of taking it to a port of its flag-state. Secondly, the Convention seemed to ease relations among the fishermen of the various nations more than it addressed problems of conservation. Thirdly, no quotas or other restrictions on the size of the catch emerged from the provisions. Until recently, the international legal

reduced to only one week in April.[12] Likewise, the Inter-American Tropical Tuna Commission, established in 1949, finally adopted a resolution in 1964 advocating a catch quota on yellow fin tuna, but the resolution still has not come into effect because Peru has refused to accept the treaty provisions.[13]

These failures of multilateral fishing agreements are perhaps responsible for the position taken in articles 6 and 7 of the 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas: Since

> a coastal State has a special interest in the maintenance of the productivity of the living resources in any area of the high seas

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community has emphasized collective research more than collective agreement on controls. The International Council for the Exploration of the Seas, organized between 1889 and 1901, published data according to fish species and geographic location. Other research groups such as the International Commission for the Scientific Exploration of the Mediterranean Sea (1919), the International Convention for the Northwest Atlantic Fisheries (1938), and the Indo-Pacific Fisheries Council (1948) provided similar data on a regional basis. Herrington & Kask, *International Conservation Problems and Solutions in Existing Conventions,* U.N. Doc. A/CONF.10/7 145-66 (1956).

12. 117 BRITISH AND FOREIGN STATE PAPERS 382 (1923); CALDWELL, *supra* note 9, at 67, 68; The Times, Nov. 23, 1964, at 11, col. 4. Similarly, stricter rules were applied on a broader basis to fishing in the Atlantic and Arctic Oceans at the International Overfishing Conference of 1946 when net mesh size and size limits on fish were regulated. CMND. 6791, 7387, 9704. But not until 1953 was the Convention ratified by all signatories and not until 1958 did the major fishing nation, Russia, join the Convention. Convention with Canada on Preservation of Halibut Fishery of Northern Pacific Ocean & Bering Sea, Mar. 2, 1953, [1954] 1 U.S.T. 5, T.I.A.S. No. 2900; 8 Eliz. II, c. 7; COLOMBOS, *supra* note 9, at 413, 414. In 1931, Canada, the United States and Japan held a Tripartite Fisheries Conference at Tokyo which established rules for the preservation of fisheries in the North Pacific; these countries signed an International Convention for North Pacific Fisheries in May 1952. Convention with Canada & Japan on High Seas Fisheries of the North Pacific Ocean, May 9, 1952, [1953] 1 U.S.T. 380, T.I.A.S. No. 2786. *See* Allen, *A New Concept for Fisheries Treaties,* 46 AM. J. INT'L L. 319 (1952); Selak, *The Proposed International Convention for the High Seas Fisheries of the North Pacific Ocean, id.* at 323. For the special legal problems in Pacific Ocean fisheries see Oda, *Japan and the International Fisheries,* 4 JAP. ANN. INT'L L. 50-62 (1960), and Oda, *Japan and International Conventions Relating to North Pacific Fisheries,* 43 WASH. L. REV. 63 (1967); Johnson, *Fishing Developments in the Pacific,* DEVELOPMENTS IN THE LAW OF THE SEA 1958-1964, at 48-73 (1965).

13. Convention with Costa Rica on Inter-American Tropical Tuna Comm'n, May 31, 1949, [1950] 1 U.S.T. 247, T.I.A.S. No. 2044.

> adjacent to its territorial sea [article 6, ¶ 1], 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 [article 7, ¶ 1].[14]

This provision was constrained by the qualification that scientific evidence must display an urgent need for conservation and by the rule that conservation measures must not discriminate against the fishermen of any nation. The enforcement provisions of articles 6 and 7 are also quite rigorous in demanding acceptance of the compulsory arbitration of the International Court of Justice in disputes among members. But the main point is that the Geneva Convention recognizes the *right* of coastal states to take steps to conserve living resources beyond the traditional territorial waters.[15]

It is not surprising then that nations in the vicinity of offshore fish stocks are seeking to preserve them by unilateral means.[16] The issue is more pressing in three circumstances: (1) when the revenue

14. U.N. Doc. A/CONF. 13/42 (1958). *See also* COLOMBOS, *supra* note 9, at 426-30, where provisions 1-9 are reproduced in full. Excellent analyses are GARCIA-AMADOR, *supra* note 9; R. FALK, THE STATUS OF LAW IN INTERNATIONAL SOCIETY 540-53 (1970); S. ODA, INTERNATIONAL CONTROL OF SEA RESOURCES (1963); Gros, *La Convention sur la Peche et la Conservation des ressources biologiques de la Haute Mer,* 97 RECUEIL DES COURS 1-89 (1958); *Convention on Fishing and Conservation of the Living Resources of the High Sea,* 58 J. INT'L L. & DIPLOMACY 124-54 (1959).

15. *See also* Bishop, *International Law Commission Draft Articles on Fisheries,* 50 AM. J. INT'L L. 627 (1956); Dean, *The Geneva Conference on the Law of the Sea: What Was Accomplished,* 52 AM. J. INT'L L. 611 (1958); Oda, *The Geneva Conventions: Some Suggestions to their Revision,* 1 NATURAL RESOURCES LAWYER 103-14 (1968). Oda, *Japan and International Conventions Relating to North Pacific Fisheries* (*supra* note 12), discusses Japan's hesitancy to endorse a global policy, which would restrict its exploitation of distant fisheries.

16. For analyses of the implications of this trend towards self-definition by coastal states of conservation measures to protect offshore fisheries along their coastlines see GARCIA-AMADOR, *supra* note 9, at 13-85, 134-212; D. BOWETT, THE LAW OF THE SEA (1967); F. CHRISTY & A. SCOTT, THE COMMON WEALTH IN OCEAN FISHERIES (1965); JOHNSTON, *supra* note 13, at 445-65; M. McDOUGAL & W. BURKE, THE PUBLIC ORDER OF THE OCEANS: A CONTEMPORARY INTERNATIONAL LAW OF THE SEA 964-1007 (1962); S. ODA, INTERNATIONAL CONTROL OF SEA RESOURCES (1963), and more recently Katz, *Issues Arising in the Icelandic Fisheries Case,* 22 INT'L & COMP. L.Q. 83-108 (1973).

from the fishing industry is a large percentage of a state's national income; (2) when the state is unable to compete effectively with the long-range, highly mechanized fishing fleets of Japan, the Soviet Union, the United States, Britain and the Scandinavian countries; and (3) when fish stocks are in clear danger of exhaustion. The convergence of these circumstances with respect to Peru, Ecuador and Chile has led to territorial sea claims of from 50 to 200 miles to guarantee these states exclusive rights to *harvest* (in order to conserve) these living resources.

Peru, a nation with a very low per capita income, derives much revenue from the harvest of the anchovy. The tiny fish is used to produce large quantities of fish meal for foreign export. The Peruvian anchovy fleet alone is capable of harvesting ten million tons of anchovies per year, yet the catch in 1972 was only four and a half million tons and is estimated to decline even further in 1973 to a mere three million tons.[17] Competition with other fleets in these waters is likely to encourage Peru to drive the anchovy to extinction in hopes of getting as large a share of the declining fish population as possible. Monopolistic control of these waters, at least, would enable the government to establish a conservation regime without the fear of losing a portion of the catch to foreign fleets in the interim. Although the 1958 Geneva Convention allows coastal states to prescribe conservation rules outside territorial waters, provided the rules are not prejudicial to the fishermen of other nations, the difficulty in concluding such multilateral agreements in time to stave off the exhaustion of fish stocks invites consideration of monopolistic measures to this end. In fact, prejudicial *exclusion* of those fleets that indiscriminately take all varieties and sizes of fish (because of the mechanized nature of the netting procedures) and that inadvertently destroy spawning areas may be one of the few conservation rules capable of *preserving* the fish stocks. Similar arguments support the stance of Ecuador,

17. Report of the Secretary General, Marine Science and Technology: Survey and Proposals, U.N. ESC D/4487 (1968); UN FAO, The State of World Fisheries: World Food Problems 7 (1968); UN FAO, Work of FAO and Related Organizations Concerning Marine Science and Its Applications, 74 FAO Fisheries Technical Paper (1968); Bernstein, *New Current May Harm Peru Fishing,* Newhouse News Service (June 6, 1973); Holt, *The Food Resources of the Ocean,* in MAN AND THE ECOSPHERE: READINGS FROM SCIENTIFIC AMERICAN 84-96 (1971).

Chile and Peru on exclusive rights to the tuna harvest, although migratory fish undoubtedly are harder to protect by unilateral action.

Iceland's cod war with Britain illustrates the political consequences of the ambiguity of the definition of territorial waters. More than 80 per cent of Iceland's export earnings come from fishing,[18] and according to Icelandic observers, overfishing by the efficient, modern techniques of the British fleet is depleting the fish stocks on the rich North Atlantic grounds and leading to the netting of younger and younger fish each year.[19] To bolster their assertion that the 50-mile exclusive fisheries zone is not just designed to provide themselves with income but is a conservation mearure as well, the Islanders are willing to allow British trawlers to approach closer to the coastline under rules that "would conserve the fish population for the years ahead."[20] But "economic necessity" is the overriding principle upon which Iceland defends her claims to a 50-mile fishery zone.

Similarly, a resolution entitled "Principles of Mexico on the Juridical Regime of the Sea," adopted by a vote of fifteen to one (United States dissenting) at the 1956 Meeting of the Inter-American Council of Jurists in Mexico City, made it clear that the less-developed coastal states on the American continent believe that "enlargement of the zone of sea traditionally called 'territorial waters' is justifiable" and can be established by each state "within reasonable limits, taking into account geographical, geological, and biological factors, as well as *the economic needs of its population,* and its security and defense."[21] Once again in the Declaration of Montevideo in 1970, nine Latin American nations argued that coastal states have a right

> to prescribe necessary measures to protect . . . [the natural resources of the sea] within jurisdictional zones that are broader than the traditional ones [up to 200 miles] . . . [because (1)] the scientific and technological progress made in exploitation . . . [of these resources] has created a correlative danger of exhaustion of biologi-

18. U.N. STATISTICAL Y.B. (1970); U.N. Y.B. INT'L TRADE STATISTICS (1970).
19. Katz, *supra* note 16.
20. *Id.* at 91.
21. 50 U.S. NAVAL WAR COLLEGE, INTERNATIONAL LAW SITUATIONS AND DOCUMENTS, 1955, at 244 (1957).

> cal species, . . . [and (2)] rules relative to delimitation of national sovereignty and jurisdiction over the sea . . . [must always recognize the] *special economic and social requirements of the less developed states.*[22]

The Lima Declaration that same year acknowledged the right of states to self-protection against the "dangers and damages resulting from indiscriminate and abusive practices in the extraction of marine resources."[23]

The Principle of Mexico was justifiably criticized on the grounds that "the delimitation of territorial waters is not a question that falls within the internal and exclusive jurisdiction of the coastal State."[24] But then international law, faced with the problem of fixing the boundaries of the territorial sea, cannot ignore the possible "economic necessity" of extensive fishing jurisdiction. For underlying all of these Declarations is a fact poorly articulated in the industrialized countries, *i.e. the best single predictor of the claims to the territorial sea is the size of a nation's fish catch relative to its GNP.*[25] In other words, although Britain, the United States, the

22. Declaration of Montevideo on the Law of the Sea (1970), 9 INT'L LEGAL MATERIALS 1081 (1970).

23. Declarations of the Latin American States on the Law of the Sea (1970), 10 INT'L LEGAL MATERIALS 207 (1971).

24. The quotation is from a criticism voiced by Cuba. W. BISHOP, INTERNATIONAL LAW, CASES AND MATERIALS 492-93 (2d ed., 1962).

25. Of thirteen variables considered possible predictors, the variable, which alone explained the most variance in the claims made by states regarding their territorial waters, was the size of their fish catch relative to GNP. This means that the more important commercial fishing is to the economy of a state, the more likely the state is to demand broader territorial waters. When other variables were added through step-wise regression, the width of a nation's continental shelf was the second best predictor (with a negative coefficient representing an inverse relationship) to the territorial waters claims. The absolute size of a nation's fish catch was third, followed by GNP (which was inversely related). At this cut-off point, absolute fish catch was the most significant of the variables, again indicating the centrality of fishing rights to a solution of the territorial waters question. In general, the states with large economies and wide continental shelves tended to oppose the expansive doctrine of the territorial waters. The justification of these positions is perhaps that the governments with large economies often are dependent upon foreign markets for goods, thus necessitating unimpeded navigation. They also have the economic capacity to reach coastal areas other than their

Soviet Union or Japan may have an absolute fish catch comparable to that of the nations claiming the most extensive territorial waters, the GNP's of the former nations are much less heavily dependent on that catch.

It is one thing for a few poor states to fight among themselves over access to fishing grounds. It is entirely another when a few very rich governments contest a few very poor states, for whom fishing represents crucial income, for rights to a declining fish harvest in areas adjacent to their coasts. The implications for international adjudication in equity terms should not escape legal observers. Furthermore, as a result of indiscriminate netting and processing via mechanized techniques, the capital-rich nations have flooded domestic markets, thereby keeping the price of this fundamental but no longer "free" good at an absurdly deflated level. The 200-mile territorial waters claims are designed to correct this market incongruity as well as the economic inequity. The price increase consequent to reliance on the less damaging and less capital-intensive techniques of the poorer states is an unavoidable, but insignificant, cost to pay for preserving the world's remaining fish stocks. To meet these demands of the coastal fishing states via other international agreements is in large part to remove the pressure for expanded territorial waters. Not to meet these demands is to fail to achieve consensus on the territorial sea question.

The Lima Declaration also made explicit a related, though broader, concern which might justify extension of jurisdictional boundaries—"grave dangers of contamination of the waters and disturbance of the ecological balance."[26]

2. *Environmental Protection.*—Pollution is defined for international marine purposes as "the introduction by man, directly or indirectly, of substances or energy into the marine environment (including estuaries) resulting in such deleterious effects as harm to living resources, hazards to human health, hindrance to marine

own. Likewise, the states with narrow continental shelves perhaps seek protection of various interests through a broad band of territorial waters inasmuch as the 200 meter-depth continental shelf limit restricts their offshore jurisdiction for geophysical reasons. Doran, *Transnational Perspectives on Resources, Ecology, and the Territorial Waters: Why the Disagreement?* (manuscript under review for publication).

26. *Supra* note 23.

activities including fishing, impairment of quality for use of seawater and reduction of amenities."[27] A number of international treaties have sought to curb marine pollution. As early as 1926 a Conference of Experts representing sixteen advanced countries sought "necessary measures to ensure that ships classed as warships should take all possible precautions to prevent pollution by oil."[28] Zones normally extending 50 miles outward from a nation's coastline were recommended as areas in which the discharge of oil or toxic chemicals was to be prohibited. No attempt, however, was made either to monitor shipping practices or to enforce the recommendations; nor are there records of violations, so loose was the treaty interpretation.

Bilateral treaties often contained clauses restricting the discharge of waste.[29] But not until the resolutions adopted by the International Convention for the Prevention of Pollution of the Sea by Oil signed in London in 1954 and in the 1959 Conference held at Copenhagen on Oil Pollution of the Sea were detailed prohibitions established.[30] Zones were assigned in the territorial waters and harbors of the contracting parties where the dumping of oily bilge was prohibited. The irony was that the Inter-Governmental Maritime Consultative Organization (IMCO) could only *recommend* that the prohibitions be extended to all remaining areas of the oceans.[31] The fragmentary nature of multilateral environmental reform is illustrated by the 1954 Brussels International Convention for the Prevention of Pollution of the Sea by Oil, signed by 28 nations and put into effect in 1958, which prohibited oil spills within 100 miles of coastal waters (already virtually banned 28 years earlier) with the two additional prescriptions that

27. 51 U.N. ECOSOC 5, U.N. Doc. E/5003 (1971).

28. U.S. GOVERNMENT, *Report of the Inter-department Committee on Oil Pollution of Navigable Waters* (1926), in 1 M. GIDEL, LA DROIT INTERNATIONAL PUBLIC DE LA MER 480-84 (1932). *See also* COLOMBOS, *supra* note 9, at 431; *1924 Stockholm Conference of the International Law Association* 31 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 336-42 (1924).

29. See 3 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 1044 (1964) for examples of such treaties.

30. INT'L CONF. ON POLLUTION OF THE SEA BY OIL, CMND. No. 9197 (1954). *See* COLOMBOS, *supra* note 9, at 432-33. The Convention was amended in 1962 and again in 1969 as reported in 9 INT'L LEGAL MATERIALS 1 (1970).

31. The Times (London), July 5, 1959.

infractions be publicly disclosed and that shipmasters maintain a log of oil discharges.[32]

These provisions gave way to stricter accountability in two subsequent treaties arising out of an IMCO conference among 40 nations in late 1969.[33] Various oil disasters such as the break-up of the *Torrey Canyon,* the Santa Barbara Channel spills, and the damage to the hull of the *Manhattan* on its historic voyage through the Northwest Passage, stimulated a pronounced trend toward granting greater national authority for environmental protection in international waters.[34] In November 1969, the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties gave the participants the right to prevent, mitigate or eliminate grave and imminent danger to coastlines caused by oil pollution resulting from a casualty.[35] Yet the measures are constrained: they do not apply to noncommercial vessels, the action must be proportionate to the damage, and excessive measures are compensable. The important point, however, is that the treaty facilitates, after consultation, immediate responses to oil pollution on the high seas.

One writer regards this Convention as a "pace-setting milestone" in international law since it granted states the right of self-help in cases of oil discharges that threaten coast lines.[36] While it is true that the Convention for the first time extended such rights beyond the territorial sea to actions on the high seas, the novelty of the provision is open to doubt. As early as 1911, the Madrid Declaration of the Institute of International Law reminded governments that "all alterations injurious to the water, the emptying

32. Petaccio, *supra* note 4, at 15-21. *See* 9 INT'L LEGAL MATERIALS 6-8 (1970).

33. Two Conventions Concerning Oil Pollution (in addition to the amended International Convention for the Prevention of Pollution of the Sea by Oil, see *supra* note 27) were signed at Brussels in 1969 under the auspices of the Inter-Governmental Maritime Consultative Organization. HOUSE COMM. ON MERCHANT MARINE AND FISHERIES, HOUSE REPORT ON THIRD EXTRAORDINARY SESSION OF IMCO ON INTERNATIONAL CONTROL OF OIL POLLUTION, H.R. REP. No. 628, 90th Cong., 1st Sess. (1967); MARITIME POLLUTION DAMAGE, CMND. No. 4403 (1970); 9 INT'L LEGAL MATERIALS 1, 25 (1970).

34. *See* Nanda, *The 'Torrey Canyon' Disaster: Some Legal Aspects,* 44 DENVER L.J. 400 (1967).

35. 9 INT'L LEGAL MATERIALS 25 (1970).

36. Petaccio, *supra* note 4, at 18.

therein of injurious matter (from factories, etc.) is forbidden . . . ."[37] The London meeting of the IMCO, moreover, had already prohibited the dumping of oily wastes in the North Sea, the Baltic Sea, portions of the Atlantic and within 100 miles of the Mediterranean and other coasts by tankers in excess of 150 gross tons; a caveat, nonetheless, permitted such discharge if no reception facilities were available at either end of the voyage.[38] More significantly, the 1958 Geneva Convention on the High Seas had already *demanded* the efforts to prevent oil pollution which the 1969 Convention later declared as a right: article 24 of the 1958 Convention directed individual states to "draw up regulations to prevent pollution of the seas by the discharge of oil from ships or pipelines."[39]

The second 1969 IMCO treaty, the International Convention on Civil Liability for Oil Pollution Damage, holds more promise of protection than earlier efforts because it determines the limits of liability when oil spills result from maritime accidents.[40] Shipowners may be held responsible for damage to beaches or other facilities following a collision that results from causes other than acts of war or natural phenomena of an "exceptional, inevitable and irresistable character." Most importantly, compensation can be obtained in the national courts *in all contracting states.*[41] This is a much stronger provision than, for example, that of the Faulkner Committee on the Prevention of Pollution of the Sea by Oil of 1953, which refused to recognize the right of the British Government to arrest infringing ships on the high seas, that right being reserved to the country of their flag.[42] Despite urging from the United States for a broader provision, oil pollution is the only type of pollution covered.

Although neither of the 1969 treaties has been ratified by all of the signatory parties, the former has the additional distinction

37. WHITEMAN, *supra* note 28, at 1046. *See also* ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 365 (1911).

38. The Times (London), April 13, 1962, at 12, col. 2.

39. COLOMBOS, *supra* note 9, at 433-34.

40. 9 INT'L LEGAL MATERIALS 45 (1970). *See* W. FRIEDMANN, THE FUTURE OF THE OCEANS 19 (1971); *Quiet Enjoyment: Arms and Police Forces for the Ocean,* 1 PACEM IN MARIBUS (1971); *The Emerging Ocean Regime: Area of Competence and Legal Framework,* 2 PACEM IN MARIBUS (1971).

41. 9 INT'L LEGAL MATERIALS 47, 48 (1970).

42. COLOMBOS, *supra* note 9, at 431.

that three of the parties, the United Kingdom, Canada and New Zealand, maintained that unilateral action to prevent pollution damage is *already permitted by general international law.*[43] Norway, Singapore and Iceland did not dissent on this point, but urged that the matter be clarified through treaty.

Even stronger domestic legislation has challenged the traditional doctrine of the territorial sea in environmental matters. The Canadian Arctic Waters Pollution Prevention Act approved by the Parliament in June 1970 seeks to protect Canada's shorelines outward to a distance of 100 miles on the grounds that the hazards of navigation and the ecological effect of oil spills are greater in the Arctic than elsewhere.[44] Article 6 of the Act makes the owner of a ship or cargo liable for injury to the environment and provides that all claims "may be sued for and recovered in any court of the competent jurisdiction in Canada."[45] What sets the Act apart from the 1969 Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties is (1) that it is a *unilateral declaration* not requiring consultation (as provided for in article 1 of the 1969 Treaty) and (2) that it is to apply not only to a specific emergency but also as a general norm to all vessels operating within 100 nautical miles of Canada's Arctic coasts. The Act thus broadly defines a new environmental protection perimeter heretofore unrecognized by convention or customary international law.

Similarly, in the Oil in Navigable Waters Act of 1971, Great Britain has asserted the right to "destroy" (a bit strong?) registered non-British ships on the high seas when they threaten to degrade British coastlines or territorial waters.[46] In addition Ceylon, India and Pakistan have also agreed to establish conservation measures within a 100-mile contiguous zone in the Indian Ocean.[47]

43. IMCO Doc. LEG/WG (I) III/WP.2 (1969); IMCO Doc. LEG/CONF/3 (1969); IMCO Doc. LEG/CONF/C. 1/SR.1 (1969); Norway (LEG/CONF/3) (1969), Singapore (LEG/CONF/3) (1969), and Ireland (LEG/CONF/C4/SR3) (1969). 9 INT'L LEGAL MATERIALS 66 (1970). *See also* Katz, *supra* note 16.

44. The Canadian Arctic Waters Pollution Prevention Act of 1970 c. 47. *See also* 9 INT'L LEGAL MATERIALS 607, 610-11. The text is reproduced in the appendix to Bilder, *The Canadian Arctic Waters Pollution Prevention Act: New Stresses on the Law of the Sea,* 69 MICH. L. REV. 1-54 (1970); Henkin, *Arctic Anti-Pollution: Does Canada Make—or Break—International Law?* 65 AM. J. INT'L L. 131 (1971).

45. *Id.* at art. 6, ¶ 3. Bilder, *supra* note 44 at 42.

46. Oil in Navigable Waters Act 1971, c. 21.

47. *Infra* note 79, at 770.

Governments, it appears, increasingly seek greater jurisdictional authority to deal with ecological issues.

3. *Navigation and Commerce.*—The contradiction between a larger territorial sea to protect fish stocks and to prevent environmental degradation and the narrower traditional sea to protect rights of international commerce and navigation is immediately apparent.

If coastal governments were to extend control beyond the three-mile limit, the freedom of navigation would likely suffer. A twelve-mile limit would place 116 international straits and passages under the sovereign control of various nations.[48] Consequently, the large naval fleets of the major powers, for centuries accustomed to using these waters, would suddenly find their movements curtailed. According to customary international law, naval ships might enjoy the right of innocent passage through such waters during peacetime but would not be permitted to anchor.[49] Moreover, outright exclusion of warships from a state's territorial waters and prohibition of naval maneuvers and gunnery practice, each based on the right of security and self-defense, would now occur over a much larger region. Governments with sizeable navies would find circumscribed their task of patrolling coastal areas and their movement from one major body of water to another. Governments without large navies, namely the small states that have often been the targets of shows of force, might favor the broader concept of the territorial sea to protect themselves since they would not suffer as great a corresponding loss of naval freedom outside their own waters. The position of the landlocked states is somewhat different; since in most cases they have neither naval capacity nor accesses

48. Cousteau and Piccard, *Dying Oceans, Poisoned Seas,* 98 TIME 74 (1971). Security zones now in operation are unilateral assertions of statecraft having the weight of widespread custom. Both Canada and the United States demand that foreign planes identify themselves within several hundred miles of the Pacific and Atlantic coasts prior to landing. But naval zones of a similar type do not, and probably should not, exist. J.T. MURCHISON, THE CONTIGUOUS AIR SPACE ZONE IN INTERNATIONAL LAW (1956); 51 U.S. NAVAL WAR COLLEGE, INTERNATIONAL LAW SITUATION AND DOCUMENTS, 1956, 578 (1957).

49. W. HALL. A TREATISE ON INTERNATIONAL LAW 307 (1924); IL YUNG CHUNG, LEGAL PROBLEMS INVOLVED IN THE CORFU CHANNEL INCIDENT 222 (1959). *But see* L. OPPENHEIM, 1 INTERNATIONAL LAW 511 (8th ed. H. Lauterpacht 1955). Oppenheim's opinion appears to have the support of a majority of legal writers today. However, national laws and naval custom may be at variance with these views.

to protect, they are dependent more on commerce and political alliance.

International commerce on the high seas, likewise, could be affected by an expansive territorial sea doctrine, but the nature of such an effect is difficult to predict. Closure of the Suez Canal in 1956 led to a greater use of huge oil tankers capable of traveling economically around the Horn of Africa. The closure, therefore, had no noticeable impact on the supply of oil in Western Europe, but some impact on the price. Although coastal states are not permitted to levy taxes or tolls on ships passing through territorial waters, a number of abuses could develop that might hinder traffic.[50] For instance, coastal states could demand restrictive "rules of the road" or pilotage practices, which would severely reduce the amount and kind of traffic passing through particular straits.[51] Indeed, the temptation would be great to regard a strait or narrow passage (as nations usually regard canals) as a source of income, especially since international law allows payment for "special services," such as pilotage provided by the coastal state in its territorial waters.[52]

A territorial sea of twelve miles or wider could obstruct maritime

50. "There is no doubt," asserts Colombos, "that each State has an absolute right to enforce its customs and revenue laws within its territorial waters." COLOMBOS, *supra* note 9, at 136. British Memorandum to the United States Government of July 14, 1923; L. GREEN, INTERNATIONAL LAW THROUGH THE CASES 424 (1959); P. JESSUP, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION 79 (1927).

51. Art. 23, 1958 Geneva Convention on the Territorial Sea: "If any warship does not comply with the regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance which is made to it, the Coastal State may require the warship to leave the territorial sea." MCDOUGAL & BURKE, *supra* note 16, at 238-63; SMITH, THE LAW AND CUSTOM OF THE SEA 41-49 (1959).

52. By the Treaty of Copenhagen signed March 14, 1857, Denmark agreed to discontinue the levy of tolls in the Great and Little Belts and the Sound, which connects the Kattegat and the Baltic Sea. Denmark paid an indemnity for having charged tolls in the past. The Dardanelles were closed both during the Balkan War of 1912-13 and World War I. Russian demands are at variance with the terms of the Montreux Convention held in 1936, which retained limitations on passage through the Straits. Britain controlled the Straits of Gibraltar during World War II, excluding enemy warships. Rilsel, *The Turkish Straits in the Light of Recent Turkish-Russian Correspondence,* 41 AM. J. INT'L L. 727 (1947); *See also* ABBOT, AN INTRODUCTION TO THE DOCUMENTS RELATING TO THE INTERNATIONAL STATUS OF GIBRALTAR, 1704-1934 (1935). *See also* COLOMBOS, *supra* note 9, at 136.

traffic on other grounds as well. A number of conferences and international agreements have regulated the inspection of vessels for purposes of quarantine, disinfection, and verification of bills of health.[53] While the Sargasso Sea Documents of 1965 attempt to reduce the complications and formality of these procedures,[54] a determined government could flout the intentions of these international agreements in order to interfere with travel in its broadened territorial waters, particularly if the control of a strategic passage were at stake. Likewise, governments have the right, perhaps an "absolute right," to enforce customs and revenue laws within their territorial waters.[55] In 1736, Britain passed a Hovering Act affirming the principle of a five-mile zone from the coast for the enforcement of customs laws—a principle that the British Government has since renounced.[56] Currently, more than 25 governments insist on such a principle outside the three-mile limit. Within expanded "territorial waters" there would be no question about the right of customs enforcement or of the potential for mischief accompanying the calculated use of the practice in curtailing maritime traffic.

In short, a more expansive territorial sea doctrine can lead in only one direction based on current patterns of state practice, namely toward restrictions on the traditional rights of navigation. Moreover, the detrimental impact is likely to fall more on the major maritime powers while the benefits, if any, are likely to accrue to the poorer states with extensive, unprotected coastlines and neighboring straits and passages.

53. Two Sanitary Conferences were held in Constantinople in 1856 and 1871, one in Vienna in 1874, one in Rome in 1885, and a more productive one in Venice in 1892 following a demand for reform written by de Landa for the Institute of International Law. Attended by 67 countries, the London Conference sponsored by IMCO has simplified health agreements that modern medicine in some cases has made redundant.

54. These documents permit the complicated formalities insisted upon at certain ports by health authorities, customs and immigration officers whenever a merchant ship calls at a foreign port. COLOMBOS, *supra* note 9, at 136.

55. Cousteau and Piccard, *supra* note 48.

56. The United States government, nonetheless, has insisted on a twelve-mile customs zone based on British precedent. The standard case is *The Grace and Ruby*, 283 F. 475 (1922) in which a British schooner was held for violation of the Prohibition Act, 41 Stat. 305, and Rev. Stat. 2872, 2874. When seized by revenue officers four miles offshore, the schooner was in the process of transferring liquor to Gloucester. At least eight other United States federal court cases sustain this ruling. *See* W. BISHOP, *supra* note 24, at 522 n.117.

4. *Resource Exploitation.*—Despite scientific evidence that the size of natural resource deposits on and under the ocean floor may be no larger (and perhaps smaller) than in adjacent land areas and that the costs of extraction are far greater, a "Resource Rush" is on among the nations of the world, leaving as a heritage a potentially vast increase in claims on the territorial sea.[57] The Truman Proclamation of September 28, 1945, although defending the right to "free and unimpeded navigation" beyond the traditional territorial waters, asserted that "self-protection" compels a nation to "watch over" the utilization of resources "off its shores."[58] Mexico, the first state to recognize the continental shelf doctrine following the Truman Proclamation, emphasized that its action did not "imply that the Government of Mexico intends to fail to recognize legitimate rights of third parties on a basis of reciprocity or that the Government of Mexico intends to affect legitimate rights of free navigation on the high seas . . . ."[59] *Insofar* as the jurisdiction over natural resources and the jurisdiction over the unimpeded flow of traffic on the high seas are *separately* delineated, increasing development of the ocean's mineral and nutrient wealth by individual governments need not threaten the doctrine of *Mare Liberum,* except for obvious and unavoidable physical limitations on movement created by industrial installations, oil rigs and stationary equipment. Likewise, the Grotian doctrine is not likely to impede development efforts on the seabed provided that minimum care is taken to chart oil fields, to channel traffic around the few areas where obstacles present hazards to shipping and to prohibit development along the most heavily traveled routes.

But the myth that jurisdiction over territorial waters and over

57. According to Cloud, *Mineral Resources From the Sea,* RESOURCES AND MAN: A STUDY AND RECOMMENDATIONS 135-55 (1969), a number of scientists have predicted a virtual mineral cornucopia above and beneath the seabed while others involved with extraction have been far less euphoric. Among the former, see Spilhaus, *Exploiting the Sea,* INDUSTRIAL RESEARCH, SPECIAL REPORT ON THE SEA 62-68 (1967); Borgese, *The Republic of the Deep Seas,* 1 THE CENTER MAGAZINE 18-27 (1968); Mero, *The Future of Mining the Sea,* OCEANOLOGY INTERNATIONAL 73-78 (1966); and Stephens, *Ocean Harvest,* 13 SEA FRONTIERS 158-68 (1967). For the sceptical viewpoint, see Emory, *Geologic Methods for Locating Mineral Deposits on the Ocean Floor,* MARINE TECHNOLOGY SOCIETY, TRANSACTIONS 2D MARINE TECHNOLOGY CONFERENCE 24-43 (1966).

58. Presidential Proclamation No. 2667, 59 Stat. 884 (1945).

59. W. BISHOP, *supra* note 24, at 538-40.

the seabed are one has continued to obscure legal claims. This is understandable since there is no agreement among states on the extent of national jurisdiction over the seabed. As was argued in the Abu Dhabi award of 1952, *international* agreement, if not control, is required to prevent state *A* "thousands of miles from nation *B*" from staking out "claims in the Continental Shelf contiguous to nation *B* by 'squatting' on *B*'s doorstep—at some point just outside nation *B*'s [traditional] territorial water limit."[60] International agreement is also necessary in determining "fair and reasonable" zones or spheres of resource exploitation. Precedents for such zones have already been set regarding the whale harvest in areas of the North Pacific and oil drilling in the North Sea. But landlocked states also ought to find representation in matters concerning resource exploitation of the ocean wealth and perhaps can obtain it only with concerted political pressure within legal forums and the United Nations.

Article 1 of the 1958 Geneva Convention on the Continental Shelf recognized that coastal states enjoy "sovereign rights"—but only for the purpose of exploration and exploitation of natural resources—over "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."[61] But to date only 51 members of the United Nations have ratified this Convention. Likewise, of the other conventions coming out of the Law of the Sea Conferences of 1958 and 1960, only 51 signed the High Seas Convention, 43 the Convention on the Territorial Sea, and 33 the Convention on Fishing and Conservation.[62] The lack of international agreement on any of the issues affecting the ocean area beyond the traditionally delineated territorial waters may be interpreted as nothing less than refusal to accept limitations on national sovereignty, with all of its implications.

60. Cosford, *Continental Shelf and the Abu Dhabi Award,* 1 McGILL L.J. 109 (1953); Young, *Lord Asquith and the Continental Shelf,* 46 AM. J. INT'L L. 512 (1952); 1 INT'L & COMP. L.Q. 247 (1952).

61. *See* Gutteridge, *The 1958 Geneva Convention on the Continental Shelf,* BRIT. Y.B. INT'L L. 102 (1959); Whiteman, *Conference on the Law of the Sea: Convention on the Continental Shelf,* 52 AM. J. INT'L L. 629 (1958).

62. Johnson, *Will the Law Be For—or Against —the Sea?* 8 VISTA 18 (1973).

Unfortunately, however, there is a question whether the Convention itself established such limits to national jurisdiction or merely escaped the issue in an open-ended definition. When Dr. Garcia-Amador, as Chairman of the International Law Commission, suggested the definition, which in essence became that incorporated in article 1 of the Convention, he stated that "the words 'adjacent to the coastal state' in his proposal placed a very clear *limitation* on the submarine areas covered by the article. *The adjacent areas ended* at the point where the slope down to the ocean began, which was *not more than 25 miles from the coast.*"[63] Yet precisely because the limit was left vague in the Convention, the new legal standard it proposed has been no standard at all. In the North Sea Continental Shelf Cases of 1969, the International Court of Justice asserted that "by no stretch of imagination can a point on the continental shelf situated say a hundred miles, or even much less, from a given coast, be regarded as 'adjacent' to it."[64] But because the North Sea is generally less than 200 meters deep and because the Court was addressing article 5 of the Convention, the National Petroleum Council has questioned whether the Court decision applies to article 1 at all.[65] Louis Henkin responded that the Convention covers "all coastal waters up to the 200-meter isobath, regardless of 'adjacency'; adjacency becomes critical, however, as one gets beyond the 200-meter isobath."[66] Adjacency, he argued, is *the* test of authority; that is, "seabed, whatever its geological designation" as continental slope, terrace, shelf, etc. is included in the Convention "only *if and to the extent that it is adjacent to the coastal states.*"[67] McDougal and Burke likewise interpret adjacency rather than technology as the ultimate limit on the jurisdiction of coastal states over seabed resources.[68] Friedmann accord-

63. [1956] 1 Y.B. INT'L L. COMM'N 135 U.N. Doc. A/CN. 4/101 (1956). Quoted by Henkin, *International Law and "the Interests": the Law of the Seabed,* 63 AM. J. INT'L L. 507 (1969). (emphasis added).

64. [1969] I.C.J. REP. 3, ¶ 41; 8 INT'L LEGAL MATERIALS 340 (1969).

65. Interim Report of the National Petroleum Council, *Petroleum Resources under the Ocean Floor* (July 9, 1968); Findlay, *The Outer Limit of the Continental Shelf,* 64 AM. J. INT'L L. 42 (1970).

66. Henkin, *A Reply to Mr. Finlay,* 64 AM. J. INT'L L. 62, 70 n.17 (1970).

67. Henkin, *supra* note 63, at 507 n.5.

68. Henkin, *supra* note 66, at 69 n.16, referencing MCDOUGAL & BURKE, *supra* note 16, at 686. Henkin also quotes Burke, *Law, Science, and the Ocean,* Occasional Paper No. 3, The Law of the Sea Institute 23-24 (1969), that it seems

ingly noted the urgent necessity of establishing "definite vertical or horizontal limits on the continental shelf" covered by the Convention.[69] It is imperative that both the vertical isobath and the outer bounds of adjacency are made explicit in the new convention on the law of the sea. For without a precisely defined limit to national jurisdiction over seabed resources, governments and interest groups may tie up the Court in litigation while the oceans are partitioned by the few nations sufficiently advanced technologically to exploit them.

To prevent such fragmentation of the oceans, Malta's ambassador to the United Nations, Arvid Pardo, in a now-famous speech to the General Assembly in 1967,[70] outlined control and supervision of oceanbed activities by an international agency. Financial benefits flowing from agency supervision would be used to aid the developing countries, and further militarization of the ocean floor would be prohibited.[71] By stressing that beyond the traditional territorial seas the ocean's wealth is no nation's exclusive property, Pardo's proposal gained the support of the less-developed countries and resulted in an endorsement by the United Nations General Assembly of the principle that the seabed resources are "the common inheritance of mankind."[72] The reaction of the major powers to the Pardo proposal was scarcely warm.[73] In addition, neither the Latin American states nor the Soviet Union was prepared to submit to an international control agency. Similarly, the advanced industrial states were reluctant to support a resolution of the General Assembly in January 1970 recommending limits to national jurisdiction of ocean resources.

With the interest of mankind's "common inheritance" at stake, the General Assembly, in December 1970, called for a third Law of the Sea Conference (the forthcoming Caracas Conference) to

"impossible to accept the notion that the Convention presently allocates sovereign rights to the extent the NPC [National Petroleum Council] suggests."

69. Friedmann, *The North Sea Continental Shelf Cases—A Critique*, 64 AM. J. INT'L L. 229, 240 (1970).

70. U.N. Doc. A/6695 (1967).

71. *Id.*

72. G.A. Res. 2749 U.N. Doc. A/8028 (1970).

73. Responses of the national governments to the Pardo resolution and the notes verbaux of the Ad Hoc Committee are in U.N. Doc. A/AC 135/1 and Adds. 1-10 (1968). *See also* U.N. Docs. A/AC 135/10 Rev. 1 (1968); A/AC 135/11 Add. 1 (1968); A/AC 135/14 (1968).

establish "an equitable international regime" for the area "beyond the limits of national jurisdiction" wherein resources of the seabed and the ocean floor and the subsoil can be put to responsible use.[74] Importantly, it recognizes that one of the first steps toward attaining this goal is a precise definition of the area, which implicitly means a precise definition of the limits of national jurisdiction. It acknowledges further that related issues—specifically, regimes of the high seas, the continental shelf, the territorial seas and contiguous zones; fishing and conservation of the living resources of the high seas; and preservation of the marine environment and scientific research—are distinct problems that will impinge directly on the equity of its solution regarding resource exploitation. How far have the preconference arrangements succeeded in these goals?

All of the ocean-regime proposals coming out of the Seabed Committee to date are quite explicit on the area beyond national jurisdiction, and provide for the establishment of some type of international seabed authority in this area.[75] There is less consensus about the functions and powers of the agency.[76] But the greatest disagreement surrounds the most important question of where "the limits of national jurisdiction" lie. All but two of the draft proposals evade completely the question of territorial limits for seabed exploitation.[77] A group of five landlocked and two coastal states (called the Afghanistan group) suggests depth-plus-distance

74. *See* note 4 *supra,* in U.N. Doc. A/8028 (1970).

75. *See* 10 INT'L LEGAL MATERIALS 973 (1971).

76. The Soviet draft is the only draft which does not give the International Seabed Authority exclusive jurisdiction over the "international seabed area," including licensing, environmental protection, and allocation of revenues. *Id.* 944-1022. The Soviet position possibly results from a feeling of minority status in the control of such an agency, a feeling based on the fact that the Soviets have been out-voted in the U.N. General Assembly year after year. Possibly, too, the Communists fear an inability to gear-up for a race with the capitalist states to exploit the richest offshore areas.

77. The Soviet draft, for example, merely states "Question of the limits of the seabed." *Id.* at 995. The Latin America proposal admits that the area "beyond the limits of national jurisdiction" is "the common heritage of mankind" but did not suggest what those limits may be. *Id.* at 1003. The British proposal asserts merely that "the agreement should define the area in which the regime is to apply." U.N. Doc. A/AC.138/46 (1971), 25 U.N. GAOR, Supp. 21, U.N. Doc. A/8021 (1970), Annex VI. Until the area is first defined, however, neither the widespread accession of national governments to the plan nor the viability of the administration is assured.

formulas for determining national jurisdictions, which would benefit landlocked states: adjacency is defined as either a depth not exceeding 200 meters or a belt of seas 40 miles from the baseline of the territorial sea (which itself is set at a maximum of 12 miles). In addition, there will be another 40-mile-wide belt of seabed and subsoil contiguous to the "adjacent" area within which the International Seabed Resources Authority must obtain consent of the coastal state for any direct operations or issuance of licenses therein. The United States draft defines precisely the limits of national jurisdiction at 200 meters and suggests that the coastal state hold the rest of its margin in trusteeship for all mankind. An International Seabed Resources Authority would collect mineral royalties and enforce antipollution norms, and not less than half the resulting proceeds would be distributed among the poorer nations.[78]

The Afghanistan and the United States drafts courageously define the limits of national jurisdiction. To date, however, neither has found the degree of acceptance required for ultimate incorporation in the convention and subsequent ratification into international law. In fact, the Continental Shelf doctrine itself is in danger of being replaced by an Exclusive Economic Zone doctrine as proposed by Kenya in 1973 (see Part II *infra*). Causes of the current impasse are more political than legal, and thus demand scrutiny on this plane.

B. *The Convergence of Divergencies*

When one takes into consideration the divergent interests of various governments, or even of a single government, concerning the extent of national jurisdiction over the oceans, the problems facing the upcoming conference on the law of the sea come into sharper focus.[79] Consider, on the one hand, the retention of a very

78. U.N. Doc. A/AC 138/25 (1970). *See* Jennings, *The United States Draft Treaty on the International Seabed Area—Basic Principles,* 20 INT'L & COMP. L.Q. 433 (1971).

79. A sensitive understanding of the political as well as the legal confrontation between the Northern and Southern hemispheres of the international system is found in R. FALK, THE STATUS OF LAW IN INTERNATIONAL SOCIETY 540 (1970). A strongly environmental orientation is in L. CALDWELL, *supra* note 9. Insight into internal decision-making of United States ocean policy is available in E. Wenk, THE POLITICS OF THE OCEAN (1972).

narrow territorial sea. This, of course, would safeguard traditional maritime freedoms and privileges. The small coastal states may be willing to accept a narrow territorial sea on the grounds that it would require a smaller coast guard for patrol purposes and fewer legal responsibilities. But those among them that are dependent on fishing for substantial income are likely to be driven toward expansive definitions of the territorial sea to safeguard this specialized interest. Likewise, those governments possessing minimal continental shelves and little technological capacity for immediate resource exploitation would object to a narrow territorial sea; indeed the second best predictor of the *width* of territorial waters claims is the *narrowness* of the continental shelf. Nor would a greatly restricted boundary for national jurisdiction please governments prone to environmental concern, whether because their coastal waters remain still quite pure and therefore unusually valuable or because water pollution is already so bad that they are forced into a large-scale clean-up. Such governments would seek maximum claims to territorial waters to preserve resources, which other richer governments might otherwise exploit, or unilaterally prevent further degradation of the biosphere.

Consider, on the other hand, a very broad territorial sea of 100 miles in width or more. This, as previously demonstrated, would clearly receive the support of countries dependent on coastal fishing for income and anxious about competition with the modern, mechanized fleets of the principal fishing nations. It would also satisfy the demands of governments seeking to protect their beaches from oil spills and their coastal waters from abusive environmental practices. Very broad territorial seas, however, would encompass in many regions virtually all of the continental margin, including shelf, slope and rise, where the bulk of the natural resources are accessible to exploitation.[80] The landlocked and a few shelf-locked states understandably oppose such a definition because it would exclude them from participation in seabed exploitation. Once adamant in support of unfettered national control of seabed resources, the major oil companies now harbor second-thoughts. Catalyzed perhaps both by piquant legal observations

80. THE LAW OF THE SEA—OFFSHORE BOUNDARIES AND ZONES (L. Alexander ed. 1967); Weeks, *World Offshore Petroleum Resources,* 49 BULL. AM. ASSOC. PETROL. GEOL. 1680 (1965).

(such as those of Henkin in criticism of the National Petroleum Council's 1969 endorsement of unbounded national control of offshore waters) that it might be "more advantageous to the United States to limit its own continental shelf in order to limit the shelves of other nations, especially if the deep seabed beyond these narrow shelves is to be open for exploitation on a competitive basis, . . ."[81] and by the rush of broad national claims, the oil companies currently seem to favor either of two courses: (1) limitation of national jurisdiction over seabed resources everywhere to a narrow, specific boundary, or (2) control of resource exploitation on the continental slope and rise by a loosely administered international agency dominated by the governments that principally benefit from corporate profits.[82]

A compromise solution on the territorial shelf issue as it applies to resource extraction alone is undoubtedly possible, but far more complicated and troubling is the larger question of how that compromise would affect the territorial sea, including the conservation and harvesting of the living resources, pollution controls, and, of course, navigation and commerce rights.

Two conclusions may be drawn regarding the evolution of jurisdictional conflicts and attempts to provide a unitary standard of national jurisdiction for all claims within the territorial sea concept.

First, states currently seeking to extend the boundaries of their territorial waters do not necessarily demand a single, broad and overriding concept of jurisdiction. Their claims may be seen largely as defensive moves to protect specific vital interests not otherwise adequately provided for by treaties or customary international law. Since the jurisdiction associated with the territorial waters concept appears to confer inherent and exclusive rights to states, it is used as a cover to safeguard individual national interests such as fishing rights *in lieu of adequate protection from alternative sources* such as a universally recognized contiguous fisheries zone. There is no evidence that these states demand at present all of the rights and obligations conferred by an expansive version of the territorial sea

81. Henkin, *supra* note 63, at 508, 509.

82. AMERICAN PETROLEUM INSTITUTE, THE OCEAN FRONTIER AND AMERICA'S FUTURE (1969); Devaux-Charbonnel, *Law and Offshore Oil in France Today,* 41 WORLD PETROLEUM 114 (1970); *Ocean Firm Launches 100-200 Million Dollar Mining Venture,* 4 OCEAN INDUSTRY 66 (1969).

doctrine. The danger in the current impasse, however, is that the doctrine could become politicized, making broad jurisdictional claims a symbol of autonomy and national prowess instead of a basis for legal argument.

Secondly, a universal territorial waters doctrine, encompassing all types of jurisdiction within a single geographic boundary, is perhaps an impossibility because of the diverse, intensely controversial jurisdictional issues involved. The more divergent the state interests, the more likely that any single state or group of states will be legally disadvantaged; in fact, single solution approaches, whether based on nationalist or internationalist conceptions of jurisdiction, have failed to resolve the conflicts of interest. It is apparent that some variety of claims must be allowed by international law, within the bounds of comity and rational categorization, for an acceptable convention on the territorial waters question to be formulated.

The concept of multiple jurisdiction, wherein each of several zones would carry a differing degree of national authority and geographic scope depending on the type of control involved, is such an alternative. Faced with the possibility that the more absolute and complex nature of the territorial waters doctrine may obstruct and postpone agreement among countries on the legitimate bounds of national jurisdiction, governments and international agencies alike have welcomed the multiple jurisdiction approach. Multiple jurisdiction is thus both a reflection of current political tensions and an outgrowth of state practice and legal claims.

II. Multiple Jurisdiction: A New Concept in the Law of the Sea

There are perhaps two maxims that must guide international legal theorists assessing future regimes of the sea: (1) parceling of the sea or seabed is intolerable, and (2) limits to national jurisdictions are essential. On the other hand, it is the essential task of negotiators to develop a formula that is acceptable to the majority of governments, and to answer each of their demands in the most judicious fashion possible. International law must make *unnecessary* further encroachments on the Commons, (areas outside national jurisdiction), safeguarding at once both the rights of each state and the ecological laws of nature. The early years of this decade have witnessed the development of new concepts for the

law of the sea that promise to resolve the conflict of interests currently threatening peaceful use of the Commons. But the tendency toward piecemeal rather than comprehensive solutions has led to the indiscriminate application of these concepts in proposals that counter both maxims and would only aggravate conflicting interests.

A. *The Vision and Its Promise*

Only a year before his untimely death, Wolfgang Friedmann saw the justice and need, notwithstanding the danger, of the current trend toward expansive jurisdictional claims:

> Even those who, like the present writer, are deeply concerned at the erosion of the freedom of the seas, must acknowledge that, quite apart from an understandable desire to counter the expanding claims of other coastal states to continental margin resources, the fishery practices of nations that fish the world over with modern equipment lend considerable justification to the protective measures of the Santiago states [1952] and the growing number of others that are following their example [in claiming 200 mile territorial waters] . . . The growing threat to marine life is rapidly emerging as an even more urgent international problem than the jurisdiction over the mineral resources of the seas. . . . Failing any extension of effective international conservation and pollution controls in the foreseeable future, the further extension of national jurisdictional claims, *i.e.*, of national sovereignty, vertically extended from surface to subsoil, would appear inevitable.[83]

Friedmann, however, also envisioned an alternative that would be just and expedient without endangering the rights of freedom of navigation on the high seas.

> Between the various conflicting interests it may be possible to reach a compromise by which territorial waters are kept at the present generally accepted limit of twelve miles, while coastal states are given the power to extend pollution and conservation controls for a further 100-mile stretch.[84]

In other words, Friedmann proposed that international law recognize a new jurisdictional zone, distinct from the territorial waters

83. Friedmann, *Selden Redivivus—Towards a Partition of the Seas?*, 65 AM. J. INT'L L. 757, 763 (1971).

84. *Id.* at 769, 770.

zone and of much greater expanse, within which a coastal state would have control solely over pollution and conservation matters.

In its broadest outlines, this proposal is without doubt a reasoned legal compromise. On the one hand, it is anchored in the legal basis for limited national initiatives already recognized in customary and treaty law. On the other hand, it would establish by international convention the geographic limits over which coastal states may have jurisdiction of two problems that have been threatening the territorial waters doctrine. Together with a precisely delineated "continental shelf," the "territorial waters" and the "pollution/conservation zone" would comprise a legal structure that may be termed "Multiple Jurisdiction." It is the belief of this author that only through some form of Multiple Jurisdiction can the conflicts of interest over the oceans be resolved. But it is questionable whether the three levels in the Friedmann proposal would be able to satisfy enough interest to unburden the territorial waters doctrine and save the Commons.

Any compromise will probably be unacceptable, unless it meets the demand that underlies the majority of the 200-mile jurisdictional claims—rights to fish harvests in adjacent coastal waters. The developing countries have made it clear that they are interested not merely in *conserving* the scarce resources along their coasts but also in *guaranteeing their right to a fair share* of these scarce resources. And, whereas seabed resources are only beginning to be exploited, fish stocks are the first of the ocean's disappearing resources.[85] Laissez faire fishing rights, the developing nations

85. Beneath the reassuring statistics of increased annual fish catches—a doubling of the total world catch in the decade of the 1960's—lies the prospect of catastrophe for the fishing industry. Annual figures for the fish harvest have been inflated by the increasing numbers of boats in operation. Russia, Poland, Japan, and Spain employ boats with larger engines, bigger nets and sonar equipment for fishing at long distances from home ports. In fact, the catch per boat has steadily declined, driving coastal fishermen and especially those from the poorer nations with less sophisticated equipment out of the competition. The figures have also been deflated by the spectacular new stocks of fish discovered off the Peruvian and African coasts, discoveries that, limited by geography, are unlikely to recur. Moreover, the stocks are not being replenished as rapidly as in the past because of the destruction of breeding grounds and the practice of taking the young as well as the mature fish. Elliott, *Fishing Control—National or International?*, 28 THE WORLD TODAY 133 (1972). Based on a three-year survey, Jean-Jacques Cousteau estimated that marine life has already been reduced by 40%; and Jacques Piccard

know, will not give them an equal portion of the fish harvest in the coastal waters. On the contrary, the poorer the coastal state, the less it shares in the benefits of its nearby waters. The bulk of the harvest inevitably goes to a few international fishing "majors," so that "international rights" means in effect "international privileges." Foreshadowed by the tuna and the cod "wars," such asymmetric competition would not merely preclude ratification of the convention but is likely to lead to political tensions and armed violence along a North-South cleavage.[86]

At the 1960 Conference on the Law of the Sea, Dr. Garcia-Amador, after weighing the prevailing trends of opinion of the 1958 Conference, proposed a solution to the fisheries question, which is compatible with Friedmann's concept of multiple jurisdiction.[87] Making a distinction between exclusive and preferential rights, Garcia-Amador argued that international law can satisfy the fishing needs of the coastal states without sacrificing a narrow territorial waters boundary. On the one hand, "considering that the living resources of the sea were legally *res communis,*" claims to exclusive fishing rights beyond the territorial waters would, "by the traditional principles of international law, be subject to categorical rejection."[88] But, international conferences, including the 1958 Conference, have come to recognize that a coastal state "could have a *special interest* in certain living resources of the sea because of the vital importance of its coastal fisheries to its economy or food supply."[89] Thus, "the idea of conferring upon the coastal State exclusive rights in respect of the conservation, and even the exploitation of certain living marine resources, or of all of them, beyond the limits of the territorial sea was not inconsistent with international law in the latter's present state of development, for the reason that those rights would safeguard the special interest of the coastal state."[90] This special interest alone, however, "could never justify complete exclusion of foreign fishing craft

observed that this trend would result in the complete extinction of marine life within 25 years. *See* Friedmann, *supra* note 83, at 769.

86. Doran, *Conflict, the Missing Variable in the "Limits to Growth" Model,* EXPLORING THE LIMITS TO GROWTH (D. Orr ed. 1974).

87. U.N. Doc. A/CONF. 19/8 ¶¶ 12-22 at 40, 41 (1960).

88. *Id.* at ¶ 15.

89. *Id.* at ¶ 16.

90. *Id.* at ¶¶ 15, 16.

from the fishing ground concerned."[91] Only conservation measures "in the interest of optimum sustainable yield" together with this special interest could justify absolute exclusion.[92] Together, nature's conservation demands and the coastal state's special interest give that state preferential rights to the fisheries beyond its territorial waters.

The 1958 Conference adopted a resolution recognizing the "preferential requirements of the coastal State resulting from its dependence on the fishery concerned while having regard to the interest of other States,"[93] whenever it became necessary to limit total catch for conservation purposes. But this recognition was limited first to the situation of nations "overwhelmingly dependent" upon the coastal fisheries for their "livelihood or economic development" and secondly, to the case of countries whose coastal population both depends on fish for its primary source of animal protein and fishes mainly from small boats.[94] Dr. Garcia-Amador argued that a third instance of special interest should be acknowledged to have preferential rights, namely the "much more common case . . . of a coastal State whose nationals were habitually engaged, in a sea area contiguous to its territorial sea, in fishing activities which were of economic importance to it."[95] Recognition of effective preferential rights in all three of these cases, he asserted, "was the minimum concession the non-coastal States could make to the special interest of such States,"[96] and it would overcome most, if not all, of the difficulties presently obscuring the territorial waters doctrine.

> That recognition would go a long way towards satisfying the requirements which had led certain States to make extensive claims in respect of the breadth of their territorial sea, claims which were largely intended to safeguard needs in respect of fisheries. The preferential rights of the coastal State could, in certain cases, even justify the exclusion of foreign fishermen, if such exclusion became necessary for purposes of conservation, in other words, where the total catch of a stock or stocks of fish had to be substantially cur-

91. *Id.* at ¶ 16.
92. *Id.* at ¶ 16.
93. *Id.* at ¶ 17.
94. *Id.* at ¶ 17. *See* A/CONF. 13/L. Res. 6 at 56, (1958).
95. *Supra* note 87, at ¶ 18.
96. *Id.* at ¶ 19.

> tailed. Maximum protection would thus be given to the legitimate interests of the coastal State in a way which would be impracticable with a contiguous zone [with exclusive rights] that must necessarily be limited in scope. Moreover, that desirable result would be attained without conferring upon the coastal State rights and obligations unrelated to fisheries, and prerogatives which it might exploit to the detriment of the legitimate interests of others.[97]

Here is a fishing zone compatible with the territorial sea and the continental shelf. It promises an approach to multiple jurisdiction as proposed by Friedmann but with slightly more emphasis on coastal state privileges. But recent trends in treaty legislation point to another far more absolute and extensive jurisdictional concept that threatens, in an unprecedented manner, the traditional rights of nations.

B. *The Patrimonial Sea—Unnecessary and Insufficient*

Regardless of the geographic extent of the boundaries determining coastal jurisdiction, the nature of that jurisdiction and its exclusiveness remain important political and legal issues. Two proposals, the draft articles on an exclusive economic zone submitted by Kenya,[98] and the Declaration of Santo Domingo submitted by a group of Caribbean countries,[99] not only assert an extension of national jurisdiction to 200 miles but challenge the underlying legal foundations of the territorial sea and continental shelf ideas as well. Careful analysis of this patrimonial sea concept is thus essential.

First, the patrimonial sea concept tends to confuse a specialized interest in the protection of fishing rights with a much more general incentive to extend total economic sovereignty in coastal areas. States have often claimed special fishing privileges, and customary international law recognizes the legitimacy of some of these claims. But neither state practice nor treaty legislation acknowledges an overlap between fishing rights and other economic matters. Making the zone preferential instead of exclusive fails to ease the problem because it merely reduces the degree of privilege accorded a state, not the scope of jurisdiction. Empirical research

97. *Id.* at ¶ 19.
98. *Supra* note 2.
99. *Supra* note 3.

indicates that the issue of fishing rights is a paramount one and must be faced; but the entire superstructure of the patrimonial sea concept cannot be constructed on the growth of historic claims in a single issue area.

Secondly, larger economic claims are bound to interfere with the freedom of navigation in areas previously designated as the high seas. The degree of interference varies with the intent and terminology of the particular legal agreement. The Montevideo Declaration established maritime limits beyond the territorial sea that were not to be construed as "prejudicial" to the navigation of ships or planes. But the delegates of five of the nine participating states, Brazil, Panama, Ecuador, Nicaragua and Peru, indicated that they preferred a much more restrictive interpretation including control of the air space and limitation of navigation to innocent passage.[100] Movement of naval vessels on maneuvers and patrol certainly would be curtailed, as would vessels contemplating anchorage in these waters.

The concept of the patrimonial sea announced in the Declaration of Santo Domingo also is ambiguous regarding its intended restrictions.[101] Beneath the title "Patrimonial Sea," article 5 emphasizes that the "ships and aircraft of all States" should enjoy the right of freedom of navigation and overflight. But the article goes on to say that there will be no restrictions "other than those resulting from the exercise by the Coastal States of its rights within the area."[102] Since these latter rights are left unspecified, the reader can only speculate on their content. Open-ended "rights" such as these, however, could in this writer's opinion easily be invoked to prevent the passage of foreign ships or planes.

Likewise, the draft articles submitted by Kenya proposing an exclusive economic zone seem to favor unfettered navigation. Article III mentions navigation "without prejudice." Yet article I, which establishes the tone for the entire document argues that "all States have a right to determine the limits of their jurisdiction over the seas adjacent to their coast beyond a territorial sea of 12 miles in accordance with the criteria which take into account their own geographical, geological, biological, ecological, economic, and na-

100. GARCIA-AMADOR, LATIN AMERICA AND THE LAW OF THE SEA 88 (1972).
101. *Supra* note 6.
102. *Supra* note 2, at 247.

tional security factors."[103] It is the national security factors that might intervene in determining which shipping was acceptable to the coastal state and which was not. Perhaps for this reason the United States draft legislation is explicit (article II) regarding freedom of navigation in international straits, granting ships and aircraft the same transit rights as they have "on the high seas," not just those enjoyed within territorial waters.[104]

A third reason for questioning the patrimonial sea variety of multiple jurisdiction is that it aggravates the plight of the landlocked states. While the Kenya proposal would delegate to the coastal state the right to permit fishing by landlocked states, this permit would go to "neighboring" states and "developing" states and not to landlocked states in general (article VI). Regional solutions to law of the sea problems are the goals of article VI,[105] but there is no guarantee that landlocked states within a region would receive equitable shares of the sea's living resources. Landlocked states outside the region would be doubly excluded from access to the ocean's riches: once by geography and again by legal consensus.

Fourthly, despite mention of "regulation and exploitation of both living and non-living resources of the Zone and their preservation," the rights of exploitation are not accompanied by correlative duties of environmental protection or conservation.[106] Indeed, one might anticipate that unless the species approach were invoked to protect migratory fish (whereby a coastal state would have rights to the species to the limits of its migratory range), the exclusive zone could become a poaching haven. Legally protected by the exclusive zone concept, a coastal state could exhaust a migratory species in the vicinity of its own coastline. Catalyzed by the knowledge that each state has exclusive authority to establish fishing rules within its own zone but no authority to prevent fishing outside that zone, an exclusive zone would encourage deleterious over-

103. *Supra* note 3, at 1.

104. U.N. Doc. A/AC.138/SC.II/L.4, *supra* note 1; S. LAY, NEW DIRECTIONS IN THE LAW OF THE SEA 552, 553 (1973).

105. *Supra* note 6, at 683.

106. *Supra* note 3, at 1-2. Articles II and IV of the Kenya document speak of conservation and environmental protection as rights, which the coastal state may exercise if it desires.

fishing, which would result in exhaustion of various species of migratory fish.

Without a migratory species provision, moreover, multilateral fish agreements could be ineffectual in coastal states within whose exclusive jurisdiction the spawning beds or primary range of a fish was located. Relieved of most of the fear of harvesting competition inside its zone, such a coastal state might treat a migratory fish species as essentially an expendable stock.

Fifthly, the patrimonial sea can only give impetus to the further partition of the ocean floor. Both the Kenya and the Santo Domingo provisions supply evidence of this since the seabed, to a limit of 200 nautical miles, would be considered exclusively in the coastal state's jurisdiction as part of its economic zone. The Santo Domingo document specifies that the Continental Shelf may extend beyond this limit, giving the coastal state rights to the ocean floor "to where the depth of the superjacent waters admits of exploitation of the natural resources of the said areas."[107] Adopting some of the terminology common to the 1945 Truman Proclamation and the 1958 Convention on the Continental Shelf, this patrimonial sea provision is a regression from the progress made by the 1958 Convention to stem the fragmentation of the Commons initi-

107. Kenya proposal: "The exercise of jurisdiction over the Zone shall encompass all the economic resources of the area, living and non-living, either on the water surface or within the water column, or on the soil or sub-soil of the seabed and ocean floor below" (article IV). *Id.* at 2. "The Economic Zone shall not in any case exceed 200 nautical miles, measured from the baselines for determining territorial sea" (article VII). *Id.* at 2. Declaration of Santo Domingo: Regarding the Patrimonial Sea, "the coastal State has sovereign rights over the renewable and non-renewable natural resources, which are found in the waters, in the seabed and in the subsoil of an area adjacent to the territorial sea called the patrimonial sea." *Supra* note 2, at 247. Regarding the Continental Shelf, paragraphs 2 and 4 together indicate that the Continental Shelf could extend beyond the patrimonial sea's 200 mile maximum. "The continental shelf includes the sea-bed 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 the exploitation of the natural resources of the said areas. In that part of the continental shelf covered by the patrimonial sea the legal regime provided for this area shall apply. With respect to the part beyond the patrimonial sea, the regime established for the continental shelf by International Law shall apply." Only the remains of the oceans, "the sea-bed and its resources, beyond the patrimonial sea and beyond the continental shelf not covered by the former, are the common heritage of mankind." *Id.* at 248.

ated by the Proclamation. The patrimonial sea proposal, in fact, ensures that the seabed, regardless of depth, to a distance of 200 miles from the coastline, remains inaccessible to all but the coastal state or its designated user. Not only is the 25-mile "adjacency" limit of the Continental Shelf completely discarded, but room is left for expansion of national claims even beyond 200 miles!

Despite its apparent purpose, the patrimonial sea concept is neither a truly comprehensive solution nor an adequate one. Exclusive economic jurisdiction is something of a Trojan Horse regarding the possible extension of complete sovereignty, as the provisions referring to national security and controls on navigation indicate. Rather than resolving political conflict, such jurisdictional notions are likely to stimulate a broader range of conflicts. A more flexible approach to multiple jurisdiction perhaps can supply both appropriate safeguards and greater legal agreement.

Recognition of these problems probably evoked the more reasonable recommendations of the General Report of the African States Regional Seminar on the Law of the Sea, held in Yaoundé, June 20-30, 1972.[108] According to these recommendations, the territorial sea should not extend beyond a limit of twelve nautical miles. Beyond this territorial sea, coastal states have the right to establish an exclusive economic zone (open to landlocked states within the region as well) whose purposes would be (a) to control regulation and national exploitation of the *living* resources of the seas, and (b) to prevent and control pollution. The continental shelf or seabed economic zone, embodying all economic resources comprising both living and nonliving resources such as oil, natural gas and other mineral resources, would be distinct from this fisheries and pollution zone. The tri-partite jurisdictional structure of the Yaoundé recommendations is the strongest, most cogently reasoned governmental proposal to date.

Unfortunately, the Yaoundé proposal displays significant weaknesses as well. Lacking a definition of the limits of jurisdiction of the fisheries/environmental and the seabed economic zones, the proposal fails to restrain expansionism in either. Thus, the Yaoundé recommendations stop short of a solution, overlooking the possibility of a negotiated trade-off between an extensive fish-

108. U.N. Doc. A/AC.138/70 (1972), BRITISH INSTITUTE OF INTERNATIONAL AND COMPARATIVE LAW, 1 NEW DIRECTIONS IN THE LAW OF THE SEA 250-53 (1973).

eries/environmental zone and a constrained seabed regime. Secondly, placed in the context of regionalism rather than universalism, the proposal does not really speak to the issue of global environmental protection. Nor does the proposal insist on environmental *obligations* but instead would appear only to confer environmental rights on coastal states. Similar in structure, the multiple jurisdictional initiative, advanced in this article, contains suggestions for filling some of these legal and political lacunae.

III. Defining the Limits: A Proposal

In this section, this paper examines one possible mitigating solution presented by Multiple Jurisdiction. It is not offered as a utopian solution. Rather, it is a feasible option that would prevent total usurpation of the oceans by national interests. It would provide environmental remedies with some of the discipline of national law enforcement without infringing on the traditional rights of free navigation and without denying individual states legitimate access to seabed resources beyond the precisely delineated continental shelf. And it would recognize the urgent need for an expansive fisheries zone, a need which for so long has precluded any agreement on the law of the sea. Under such a solution, international law does not bow to national initiatives. On the contrary, the international community establishes the nature and limits of those initiatives.

A. *The Tri-Partite Structure*

1. *The Territorial Waters: Coastal Security vs. Freedom of Navigation and Scientific Exploration.*—Historically, the three-mile limit for territorial waters arose from the test expressed by a Dutch judge, Bynkershoek, in 1702: "The control from the land ends where the power of men's weapons ends; for it is this . . . that guarantees possession."[109] In the eighteenth century man's weapon was the cannon and the distance of "cannon shot" was equated with one league or three nautical miles (although the range of cannon did not reach three miles until the 1850's).[110] Were this rule

109. For quotation from *De dominio Maris* (1702), see W. Bishop, *supra* note 24, at 482.

110. Kent, *The Historical Origins of the Three-Mile Limit,* 48 Am. J. Int'l L. 537 (1954).

to be applied to twentieth century weapons systems, it would lose all meaning. What, then is the test for determining the breadth of the belt of waters under sovereignty of the coastal state? Since Multiple Jurisdiction makes conservation/pollution controls, fishing rights, and resource exploitation separate levels of jurisdiction with their own distinct boundaries, the ultimate test for the territorial waters would be the narrowest belt that would provide adequate coastal security without interfering unduly with freedom of navigation and scientific research. This test, in fact, favors the twelve-mile limit—the most widely employed state practice.[111] As argued in the previous section, any attempt to extend national sovereignty beyond the twelve-mile limit will incur an unreasonable cost to maritime traffic in terms of detours, delays, higher consumer prices, and possible naval confrontations. Further, a larger zone would add little, if any, to the defense program of the state.

While the desire of some states for additional coastal security is understandable, other remedies are more feasible and effective for this purpose than are substantial increases in territorial sovereignty. Alone, the legal exclusion of naval fleets from coastal waters cannot provide security, and if adequate security arrangements are provided, either through reliance on internal military capacity or through military alliance with a foreign power, the need for more extensive coastal privileges becomes unnecessary. Governments must recognize that their potential gains in return for the option to exclude foreigners from their waters would be more than offset by their potential losses in terms of incentives to naval disturbances. As the Corfu Channel Case of 1946 demonstrates, a government has the right to sovereignty in its own territorial waters but, likewise, it has obligations to preserve the rights of innocent passage.[112] Ambiguity regarding passage of naval ships in extended territorial waters is likely to invite challenges to navigation restrictions in dozens of locations.

A narrow territorial sea will also guarantee that truly scientific research of an oceanographic nature can continue unfettered by

111. 2 S. LAY, NEW DEVELOPMENTS IN THE LAW OF THE SEA 835-54 (1973).

112. [1949] I.C.J. 4; U.N. Sec., Survey of International Law, U.N. Doc. A/CN. 4/1/Rev. 1. 34 (1949).

the "red tape" of national controls.[113] Such research has always been published openly in scholarly journals and is thus the property of no single nation. As demonstrated in the next section, no conflict exists between applied research on fishery stocks, oil and gas, or the impact of pollution on resources, and the desire of states to retain control of their own resources. Insofar as applied research can be applied universally, it will benefit the international community as a whole. Insofar as it has purely local vulue, it will find subsequent application only under the rules that guide resource extraction and processing. If these rules are restrictive, then the coastal state has nothing to fear from the latter type of applied research because it cannot possibly benefit the sponsor at the cost of the local government. Hence, there is no need to ban either "basic" or "applied" research in coastal waters; indeed to do so by expanding the territorial waters concept would be to set back oceanographic research programs to the era when technology was unavailable for continental shelf exploration.

2. *The Continental Shelf: Doorstep Resources vs. The Property of Mankind.*—The rights of individual states must always be balanced against the rights of the international community in determining the limits of jurisdiction. International law cannot deny natural resources to a government, especially the government of a poor nation, when those resources rest on the nation's doorstep. But international law must determine where one state's jurisdiction ends and another's begins. The 1958 Convention on the Continental Shelf failed to accomplish this purpose by pretending that a static notion of technology could apply a standard, but as technology probed deeper and deeper into the seabed, the limits to jurisdiction disappeared.[114]

113. Bernstein, *Battle Brews Between Have, Have-Not Nations on Sea Law,* Newhouse News Service (June 10, 1973). Schaefer, *The Changing Law of the Sea—Effects on Freedom of Scientific Investigation,* in THE LAW OF THE SEA—THE FUTURE OF THE SEA'S RESOURCES 113 (L. Alexander ed. 1968); Schaefer, *Freedom of Scientific Research and Exploration in the Sea,* 4 STAN. J. INT'L STUDIES 46 (1969).

114. A similarly bogus standard was established to control the whale kill. For every blue whale killed a larger number of the more abundant species could be killed. The result was simply a decline in the total whale population. *Supra* notes 9, 10. Bogus standards are obviously the easiest to contrive because they demand very little compromise on the part of opponents to standard-setting. Such standards are the most dangerous when processes are irreversible as they often are in

As Andrassy, Henkin, Friedmann and others have long held, the continental shelf must receive both a depth and a width delimitation if it is to be fair to all coastal states.[115] A state ought to have the opportunity to choose which of two measures of the shelf it wishes: (1) the 200 meter isobath, or (2) a boundary of 25 miles as suggested by Dr. Garcia-Amador. States with narrow shelves will choose the distance test, whereas states with broad, shallow shelves will choose the depth test. In either case, the measures are precise and generous. Outside the boundaries of the continental shelf, the nonliving resources of the sea and seabed are the property of all mankind and thus, perhaps, should be under the jurisdiction of an international seabed authority.

The issue of international seabed administration "beyond the limits of national jurisdiction" cannot be solved by avoiding a precise definition of the continental shelf boundaries, as attempted by the majority of proposals to the Seabed Committee. Indeed, for many countries the attractiveness of the whole seabed authority idea is dependent on those boundaries. Narrow boundaries to the continental shelf may encourage the majority of countries to seek international administration as an alternative to open competition with more rapacious governments. Broad boundaries are likely to encourage indifference to centralized administration because the effect of the choice would be felt far in the future and because most of the profitable areas for exploitation will already have disappeared under national aegis.

Discussions at the upcoming Caracas Conference dealing with the centralized international administration of the seabed inevita-

environmental matters. A catch limitation on Pacific halibut in terms of season limit meant that it took only five months instead of nine to catch the same quantity of fish. Profits increased and the fish stock almost disappeared. *See* Gordon, *The Economic Theory of a Common-Property Resource: The Fishery*, in ECONOMICS OF THE ENVIRONMENT 88 (R. Dorfman & N. Dorfman eds. 1972).

115. L. HENKIN, LAW FOR THE SEA'S MINERAL RESOURCES (1968), favors a 200-meter isobath together with a buffer zone that would allow mining privileges to coastal states. J. ANDRASSY, INTERNATIONAL LAW AND THE RESOURCES OF THE SEA (1970), recommends a 30-mile shelf coupled with rights to exploitation beyond that boundary to a depth of 200 meters. In the 21ST REPORT OF THE COMMITTEE TO STUDY THE ORGANIZATION OF PEACE, THE UNITED NATIONS AND THE BED OF THE SEA (II) (1969), the Commission recommended a 200-meter depth or a 50-mile distance, whichever the coastal state preferred. *See also* FRIEDMAN, *supra* note 40, at 77-81.

bly will focus on three sets of institutional questions: (1) How is the agency to be administered? (2) How is revenue to be obtained? (3) In what proportion, if at all, is the revenue to be distributed among countries? These questions will be examined in order.

(1) The nature of authority within the international administrative agency is important because the agency would have responsibility for rate levies, choice of geographic emphasis, the monitoring of accounting procedures used by mining corporations and the distribution of receipts. If the directorate is dominated by the advanced industrial states, the Third World is likely to be alienated from the proposal. If, on the other hand, the directorate is dominated by states with a capitalist orientation, the Communist countries are likely to dissent. The support of all these groups is essential to the success of centralized administration.

(2) Licensing is an inefficient means of obtaining revenue. As Evan Luard asserts, the French and British proposals for the administration of the seabed are susceptible to criticism because they envision national governments engaging in the business of selling licenses for resource extraction.[116] This would transfer competition from the companies actually doing the mining or drilling to the governments themselves, who would have to compete with one another to find buyers. The whole approach of dividing up the seabed into national or corporate plots for some kind of licensing is, according to Brian Johnson, no matter how supervised, unavoidably cumbersome.[117] But licensing is an insufficient technique for other reasons as well.

Licensing is too inflexible and precipitous. Once granted, the licenses will become politically sensitive and difficult to revoke. If not revocable, the licenses lose all significance as devices of management control. Furthermore, too little information exists regarding the price at which the licenses should be sold. Since the buyers' market is a small one, competition within the market place among the buyers can hardly determine a valid price. Too low an auction price will bilk the developing countries, or other recipients, of the income that the licenses are to generate.

Finally, licenses are a very ineffective means of correlating revenue with output. How can the seller (or the buyer for that matter)

116. Luard, *supra* note 8; 25 U.N. GAOR, Supp. 21, U.N. Doc. A/8021 (1970), Annex VI and VII.

117. *Supra* note 62.

really know the value of the resource at the time of the bidding? The tendency in general will be for the bidder to under-bid, yielding a very fragmentary flow of revenue back to the administrative agency. This problem is not so grave within states because petroleum and mineral revenues are subsequently taxed in the form of corporate profits.

(3) The American proposal envisions distributing from 50 to 66 per cent of the revenues from resource extraction to the developing countries.[118] The manner of calculation, however, is left for subsequent debate. "Profits" and "income" vary greatly as a basis for the revenue calculation, just as "licenses" and "rents" have differing revenue effects. Only by specifying the nature of the accounting procedures can the impact of centralized administration on equity be accurately assessed.

For these reasons, a better solution may be as follows:

> (a) Be prepared to gather support for centralized administration by allowing a majority of the directorateship to come from Third World countries and a guaranteed minimum per cent of the membership to come from Communist nations;
> (b) substitute or append taxing powers to those of licensing;
> (c) use some of the revenue to convert United Nations financing from a voluntary to a permanent basis; and
> (d) alter the distribution of rewards to recognize the needs of the poorer coastal states, which may be among the principal critics of the scheme.

By opening up the seabed authority to blocks of critics who fear it because they fear lack of representation, centralized administration has a chance of success. By incorporating fiscal powers into the institution's authority, the agency will be a more effective manager of resource extraction.[119]

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118. U.N. Doc. A/AC.138/25 (1970).

119. The full implications of a taxing solution must also include the conversion of social costs into product costs and the controlled development of the resource. Commoner, *The Economic Costs of Economic Growth,* in ECONOMICS OF THE ENVIRONMENT, *supra* note 114, at 261; Kneese & Bower, *Causing Offsite Costs to be Reflected in Waste Disposal Decisions,* in MANAGING WATER QUALITY: ECONOMICS, TECHNOLOGY, INSTITUTIONS (1968); Russell and Landsberg, *International Environmental Problems—A Taxonomy,* 172 SCIENCE 1307 (1971); Turvey, *On Divergencies Between Social Cost and Private Cost,* 30 ECONOMICA 309 (1963).

The French proposal envisions a tax solution, but one administered by the national governments with no obligation to distribute any of the proceeds internationally.[120] Centralization of tax procedures would have advantages of efficiency and fairness difficult to achieve in national forums. Properly conceived, a tax solution would key revenue to output. Incentives would thereby be created for exploration and development because the entity doing the extraction would pay only when it is successful and then proportional to its success. By raising or lowering the tax level, the rate of development can be varied and the level of revenue can be altered. Once the raw materials have been marketed and the taxes have been paid, resources from international waters would compete more fairly with those acquired under national jurisdiction. By properly taxing operations beyond the continental shelf, governments would not seek to exhaust foreign reserves first, while retaining those close to home. The taxation rate and method thus would have important geographic effects. Because of the high cost of extraction on the continental slope and rise, however, such competition would probably occur only somewhat later in the century.

Furthermore, by altering the pattern of recenue allocation, the proposal can become more attractive to dissenters. One contingency plan for distribution of taxable proceeds is as follows:

> 1/8 to the coastal state,
> 3/8 to the developing world in general,
> 3/8 to the governments or entities responsible for extraction, and
> 1/8 to the United Nations, enabling it to become self-sufficient. All nations, especially those developed nations that have contributed the largest shares, would be free of this obligation in the future. (Further, the advantage to the United Nations in terms of political autonomy is a welcome bonus.)

Taxable proceeds would be figured on income, not on profits, rents or licenses. Only by attempting to meet the demands of the various interests through such structural flexibility, are the negotiators at Caracas likely to find an institutional compromise that is fair, effective and widely acceptable.

3. *Environmental-Fisheries Zone: Protection and Preferential Harvesting of the Living Resources of the Seas.*—The sole purpose

120. *Supra* note 116, at Annex VII.

of conservation and environmental protection measures is to safeguard the biosphere and scarce living resources. Nature's laws as well as man's laws must be respected. This fact sets this type of jurisdiction apart from all the others. Moreover, the urgency of proper jurisdiction is greater here than elsewhere. Empirical research[121] indicates that the main cause of jurisdictional disputes in the coastal arena is the unresolved fisheries issue based on the relative economic importance of fishing activities to the coastal state. Since it would be difficult for either an international agency or the coastal state to legislate and enforce fish quotas relative to GNP, perhaps the only way to guarantee the coastal state is fair share of scarce living resources is through an expansive fisheries zone.

In this regard the position of Dr. Garcia-Amador (*supra* Part II-A) appears fair and responsible. Preferential fishing zones for the poorer coastal states dependent on income from fishing are defensible and hardly injurious to other uses of the oceans. Combined with the rights and obligations in the field of conservation and environmental protection, the preferential zone is a reasonable compromise. The concept of multiple jurisdiction advocated here is thus at once both comprehensive and generous to revisionist demands without capitulating to wholesale partition. It urges the creation of a fishing-conservation zone of 200 miles wherein the coastal state exercises primary authority in these matters, while retaining the traditional provisions of the Territorial Sea and Continental Shelf doctrine. But for this jurisdictional structure to work, for the coastal states to accept this alternative to an expansive territorial sea, the Convention must recognize further that the predictions of imminent extinction of the living resources of the sea demand immediate conservation measures. In other words, the international community must accept that these preferential rights may require exclusion of some foreign fishermen from coastal waters, that these preferential rights may for a time *resemble* exclusive rights because of the vital need "to maintain or restore the optimum sustainable yield" of fish stocks.[122]

For these reasons, this author suggests that an appropriate re-

121. *Supra* note 25.

122. *Supra* note 87, at ¶ 21. Dr. Garcia-Amador maintained further that although a state possessing historic rights also should have "the right to special or

sponse to the most pressing jurisdictional issue would be creation of an environmental-fisheries zone wherein (1) the coastal state is charged to protect the living resources and is guaranteed preferential rights to their harvesting, and (2) the present need for limitations on the total catch is acknowledged by international resolution, justifying immediate exclusion of those foreign fishing vessels using indiscriminatory, destructive fishing techniques in waters contiguous to the territorial sea of a coastal state. Considering the extent to which the coastal state is dependent on the fish harvest for income, as well as the fact that the fishing "majors" are also likely to be the major benefactors of the mineral wealth in these waters, the justice of the environmental-fisheries zone and the Multiple Jurisdiction approach is apparent. Although the cost of these fish will undoubtedly rise in the advanced countries when their large catches are curtailed, that cost will be but a reflection, long overdue, of the *true cost* of this rapidly disappearing resource.

In view of the failure of international efforts to safeguard the fish and whale stocks and of the determined drive on the part of some governments to protect their own coastlines through unilateral action, it is perhaps best to recognize very broad contiguous zones of up to 200 miles for these purposes. The decision to yield to the nationalists on environmental considerations is not merely political, although the effect would be to aid acceptance of the two prior positions at a high level ratification. Rather, to hold the contrary, and assert that the seabed regime or other international agency is capable of strong measures of environmental protection, is to make two assumptions that have no basis in fact.

First, given that a single set of global environmental standards should exist (and this is not entirely clear), such standards do not

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preferential treatment as compared to other non-coastal States," preferential rights of a coastal state should prevail over historic rights (in event of any conflict between these rights) in the two cases envisioned by resolution VI of the 1958 Conference. *Id.* at ¶ 21. On the other hand, in the third case where fishing is of economic importance but not "overwhelmingly" vital to the livelihood of the coastal state, "both the nationals of a coastal State therein and those of a State possessing historic rights were entitled to the *same* preferential treatment over foreign fishermen," exceptions to be made in favor of the coastal State *only* if "the nationals of the State invoking its historic rights exploited the resources concerned" on such a large scale that it "materially affected the interests of the coastal State." *Id.* at ¶ 22.

currently exist.[123] To be effective, the enforcement of environmental protection must be based on acceptable standards. But standards can only be acceptable if there is some consensus, within the community in which the standards are to apply, that they are equitable and that environmental protection is necessary. To determine how necessary the standards are in various regions, data must be collected—a task only recently and partially begun.[124] Even assuming, however, that the information were available, there is no evidence that governments would find a single set of global standards acceptable.

Secondly, assuming the existence of global environmental standards, the problem of enforcement begins. Enforcement requires not only monitoring facilities but also policing. No international agency has the naval capacity required to police the high seas, much less the world's coasts. Individual governments do have coast guards, and given sufficient indignation occasioned by coastal pollution, they are likely to seek remedies, especially as a collateral effort of a domestic clean-up. The owner of property is normally the first to protect it.[125] Likewise, those nations with great coastal responsibilities are likely to be the first to demand safeguards and to enforce them.

As has been shown, customary law and recent treaty legislation have granted states some minimal redress when faced with environ-

123. A very good argument can be made for varying the standard with the environmental costs, the costs of production, the demand for product and local physical conditions. Obviously a single standard would not suffice at the global level. Ruff, *The Economic Common Sense of Pollution,* 19 THE PUBLIC INTEREST 69 (1970). A recent proposal that seems to ignore this characteristic of standards is Humpstone, *Pollution: Precedent and Prospect,* 50 FOREIGN AFFAIRS 325 (1972).

124. The 1972 Stockholm Conference on the Environment set up a ring of monitoring stations staffed, financed and in part administered by national governments. Legal aspects of this activity are incorporated in several articles from a single volume, Goldie, *Development of an International Environmental Law,* in LAW, INSTITUTIONS AND THE GLOBAL ENVIRONMENT 104 (J. Hargrove ed. 1971); Serwer, *International Co-Operation for Pollution Control,* in LAW, INSTITUTIONS AND THE GLOBAL ENVIRONMENT 178 (J. Hargrove ed. 1971); Z. Slouka, *International Environmental Controls in the Scientific Age,* in LAW, INSTITUTIONS AND THE GLOBAL ENVIRONMENT 208 (J. Hargrove ed. 1971).

125. An extended analysis of how ownership and quasi-ownership induce protective behavior is found in Dales, *Land, Water, and Ownership,* 1 CAN. J. ECON. 791 (1968); Calabresi, *Transaction Costs, Resource Allocation, and Liability Rules,* 11 J.L. ECON. 67 (1968); Reich, *The New Poverty,* 73 YALE L.J. 733 (1964).

mental catastrophe even outside territorial waters. The Truman Doctrine of 1945, the four 1958 Geneva Conventions, the two 1969 IMCO Conventions, the Montevideo and Lima Declarations of 1970, and the 1970 unilateral proclamations of Canada and Britain on environmental matters indicate a legal trend. But because a clearly developed legal philosophy of the international rights, obligations and limits of state action in environmental matters is missing, current unilateral environmental action is likely to be frustrated by the existing ambiguity in the laws of the sea.

B. *Legal Bases for National Environmental Controls: Two Interpretations*

At stake are two quite different legal viewpoints having the same consequence—environmental protection fostered by state action. The first approach favors state initiative in its own interest to safeguard coastlines, ports, and airspace along the territory of the state. The second approach encourages similar initiative but on behalf of the international community for which the state acts as a "custodian" of some portion of the oceans.[126] In both views, these rights or obligations—depending upon the intent of the law—are vested in the state by the international community. What legal justification supports each interpretation?

The former, self-interest approach, conforms to the traditional rights of self-help. Although related to the rights of self-preservation and self-defense, self-help is fundamentally different. According to Ian Brownlie, self-protection or necessity is a "logical and legal absurdity" and has little if any validity in contemporary

126. From early analyses of problems facing the first Law of the Sea Conference to recent studies of state action to protect fisheries and pollution interests, the question of national rights versus community obligations has dominated. *See, e.g.*, Elliott, *supra* note 80; FALK, *supra* note 14, at 545-48; Gotlieb & Daflen, *National Jurisdiction and International Responsibility: New Canadian Approaches to International Law,* 67 AM. J. INT'L L. 229 (1973) (proposing a *nonacquisitive* jurisdictional zone in regard to pollution control); Gotlieb, *The Canadian Contribution to the Concept of a Fishing Zone in International Law,* 1964 CAN. Y.B. INT'L L. 55, 64-71 (discussing in depth the Canadian conception of "a *functional* rather than *sovereign* approach to fisheries jurisdiction"); McDougal & Burke, *Crisis in the Law of the Sea: Community Perspectives Versus National Egotism,* 67 YALE L.J. 539 (1958). The 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas may help "to establish a new pattern of legal expectation as to what constitutes reasonable

international law.[127] Yet Iceland has argued that this right legitimizes its exclusive claims to a 50-mile fishery zone. Stephen R. Katz contends that unless the International Court of Justice decides that the doctrine of self-protection may be invoked not only when there is an imminent danger to "the very existence of the State" but also when there is a "disparity of interest" between the State and other nations, the doctrine of self-defense "remains as the only possible categorization of the rights asserted" by nations in taking unilateral action to protect their interests beyond traditional territorial waters.[128] Robert W. Tucker has convincingly argued that article 2, paragraph 4 of the United Nations Charter does not preclude the use of force for self-defense when it is the only recourse.[129] Brownlie, however, interprets article 51 as a constraint on this right, limiting it to a response to "an armed attack" on a member of the United Nations.[130] Bowett and Franck contend, on the one hand, that the traditional right of self-defense is not restricted by article 51, and, on the other, that that article should be interpreted

behavior" and thereby shift "the functional orientation of international order from one of jurisdiction toward one of conservation and *resource* management." FALK, *supra* note 14, at 548. (emphasis added). The Environmental-Fisheries Zone, which this paper proposes is, in the terminology of these authors, a nonacquisitive, nonsovereign managerial zone wherein the manager enjoys specific preferential rights which will enable him to perform his managerial function (*community obligation*) most effectively. Without a pre-existing international order capable of carrying out these global managerial obligations, "zonal thinking" of some kind is essential. The individual nation-state will inevitably be the *modus operandi* for protection of international interests for some time; it therefore should be accommodated for its global function by international recognition of its unique needs. It is not the purpose of this paper to enter here into the complex philosophical arguments pertaining to this legal question. But, in a world of scarce resources, the equity demands of the less-developed segment of the system must be met before a peaceful globel equilibrium can evolve. *Supra* note 86.

127. I. BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 48 (1963). Quoted by Katz, *supra* note 16, at 97.

128. Katz, *supra* note 16, at 103. Katz presents a thorough analysis of self-defense as a possible justification for Iceland's extensive claims. *See generally* D. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW (1958); Tucker, *Self-Defense and Self-help: A Review of Recent Controversies,* in PRINCIPLES OF INTERNATIONAL LAW 64-87 (H. Kelson; R. Tucker ed. 2d rev. ed. 1966); Tucker, *Reprisals and Self-Defense: The Customary Law,* 66 AM. J. INT'L L. 586 (1972); Weightman, *Self-defense in International Law,* 37 VA. L. REV. 1095 (1951).

129. Tucker, *supra* note 128, at 84-87.

130. BROWNLIE, *supra* note 114, at 272-73.

broadly to include the equally disastrous threats arising from what Katz has termed "economic aggression," "propaganda aggression" and "fishing aggression."[131]

But if self-preservation is too broad a concept to be useful legally, self-defense is too narrow to be a legitimate basis of environmental protection. Not only does self-defense connote (if not necessitate) the use of force, but (within the confines of article 51) it also implies action that is, as Daniel Webster asserted in 1842 in the Carolina Affair, "instant, overwhelming, and leaving no choice of means, and no moment of deliberation."[132] This condition may or may not fit the environmental context. The issue, however, is not whether the right of self-defense justifies defensive action against an immediate and overwhelming threat, but whether this right legitimizes claims to extensive jurisdictional zones. Although Bowett has found many historical claims to contiguous zones that invoked self-defense, he agrees with Brownlie that fishery zones have been based on either customary law or international agreement and that the creation of contiguous zones ought to be considered a positive right flowing from customary international law rather than a defensive response based on the right of self-defense.[133]

The concept of self-help is not only more appropriate to the environmental problems, but it is as well a positive right that can legitimize extension of jurisdictional zones for special purposes. Self-help is more readily interpreted to include economic and fishing, as well as military, aggression than is self-defense. According to Myres McDougal, self-help is a valid doctrine whenever interference with the "decision-making process of a government" makes political independence impossible.[134] Surely damage caused by excessive, unremitting pollution constitutes an interference with a government's capacity to provide for the health and safety of its

131. BOWETT, *supra* note 115, at 192; Franck, *Who Killed Article 2(4)?*, 64 AM. J. INT'L L. 809 (1970); Katz, *supra* note 16, at 101.

132. 2 J. MOORE, DIGEST OF INTERNATIONAL LAW 409-14 (1906). *See* Jennings, *The Caroline and MacLeod Cases*, 32 AM. J. INT'L L. 82 (1938).

133. *See* BOWETT, *supra* note 128, at 69; BROWNLIE, *supra* note 114, at 301-04; Katz, *supra* note 16, at 103-04.

134. M. MCDOUGAL and F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 80-83, 177 (1961).

people.[135] Self-help involves the obligation of sound judgment, and its applicability to the establishment of expansive zones of environmental jurisdiction rests on the scientifically-based judgment that conservation and antipollution measures are required at once. Since later review and impartial adjudication are not assured by the international community, the right of self-help cannot be extended to include punishment for anticipatory acts; on the other hand, it permits the establishment of reasonable standards, which might prevent future degradation. Evidence of environmental degradation is necessary prior to a unilateral response that can occur only after consultation and negotiations have failed or immediately subsequent to a crisis that is of such proportions as to preclude alternative solutions. Finally, for self-help to be the basis of international environmental law, the standards imposed must be just, and the response made to an act of degradation must not exceed in severity and impact the original act itself.

The other approach to unilateral environmental action, which vests powers of clean-up or prevention in a state on behalf of the entire international community, must look for precedent to the customary law regulating piracy. At least since the middle seventeenth century, pirates have been considered a menace to the international community.[136] Regarded as a common hazard, pirates,

135. Interference may also constitute "intervention." Under the Charter of the Organization of American States: "No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic and cultural elements." O.A.S. CHARTER art. 15. "Any other form of interference" conceivably could include damage caused by excessive pollution. Multilateral Treaty for Charter of the Organization of American States, Apr. 30, 1948 [1951] 2 U.S.T. 2394, T.I.A.S. No. 2361; THOMAS and THOMAS, NON-INTERVENTION: THE LAW AND ITS IMPORT IN THE AMERICAS (1956); 1 C. HYDE, INTERNATIONAL LAW 245 (2d ed. 1945); Fenwick, *Intervention: Individual and Collective,* 39 AM. J. INT'L L. 645 (1945).

136. The question whether individuals can be recognized as possessing international legal personality is still debated despite a history of legal practice in support of this view. "Properly speaking," writes J.W. Bingham, "piracy is a legal crime or offence under the law of nations." Under international law "piracy is only a special ground of state jurisdiction—of jurisdiction in every state." *Harvard Research in International Law, Piracy,* 26 AM. J. INT'L L. Supp. 739, 759 (1932). But J.B. Moore asserts regarding piracy: "Though statutes may provide

by their actions, have forfeited the protection of their flag.[137] Upon capture they have been subject to the courts of the state making the capture. So widely accepted is this norm of customary law that it has been codified in the 1958 Geneva Convention of the High Seas along with similar sanctions for ships involved in the slave trade. Should the international community view the consequences of unregulated and massive pollution or other resource degradation as equivalent menaces, the grounds for a codifiiation of treaty law vesting responsibilities of monitoring and enforcement in the individual states is, therefore, well established.

That states probably already have rights of environmental protection outside territorial waters in situations when the doctrine of self-help is applied is evident. The international community may also fortify this traditional right with more powerful sanctions to effectuate its global interests if analogy and precedent are used to codify new treaty arrangements. The immediacy with which international legal theory recognizes these interpretations will probably vary inversely with the creation of centralized environmental enforcement machinery, and directly with the severity of continuing environmental abuses. In the absence of such machinery, protection of the biosphere will not wait.

Hence this author takes the position that jurisdiction encompassing environmental protection should receive much greater—perhaps maximum—boundaries than jurisdiction in mat-

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for its punishment, it is an offense against the law of nations; . . ." 2 MOORE, INTERNATIONAL LAW 951 (1906). If one accepts the judgments of the International Military Tribunal at Nuremburg in 1946 as international law and not merely acts of the victors at war's end, the opinion of the Tribunal is relevant: "it was submitted that international law is concerned with the actions of sovereign States, and provides no punishment for individuals; and further, that where the act in question is an act of state, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the state. In the opinion of the Tribunal, both these submissions must be rejected. That international law imposes duties and liabilities upon individuals as well as upon states has long been recognized. . . . Crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." 22 PROCEEDINGS IN THE TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 411 (1946); 41 AM. J. INT'L L. 172 (1947); 20 TEMP. L.Q. 167 (1947).

137. The pirate is labeled *Hostis humani generis, the enemy of the human race.* Piracy normally involves interference with, and overthrow of, the proper authorities of an aircraft or ocean vessel. Zwanenberg, *Interference with Ships on*

ters of resource development. Indeed, environmental protection is more a responsibility than a right. The broader the contiguous zone to defend the environment, the heavier the government's obligations to taxpayer and biosphere alike![138]

IV. SUMMARY

Applied to the oceans, the concept of Multiple Jurisdiction reflects both political expediency and the need for prompt action. Even though a government enforces environmental standards in the ambience of its coastlines, it in no sense means that it has ownership of the entire ocean floor in its vicinity. Though interdependent, jurisdiction over pollution and jurisdiction over seabed resources remain distinct and separable. Likewise, the creation of zones of resource exploitation need not endanger the rights of navigation provided that those rights are rights traditionally enjoyed on the high seas and are not just equated with freedom of passage. Each functional zone should have explicit jurisdictional content,

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the High Seas, 10 INT'L & COMP. L.Q. 785, 798 (1961); Fenwick, *Piracy in the Caribbean*, 55 AM. J. INT'L L. 426 (1961); Dickenson, *Is the Crime of Piracy Obsolete?*, 38 HARV. L. REV. 334 (1924-25).

But the interesting aspect of piracy from the contemporary environmental point of view is that emphasized by article 19 of the 1958 Geneva Convention on the High Seas. Any state may seize a pirate ship or aircraft and the courts of that state may decide on the penalties to be imposed and may determine the disposition of ship and captured property. This codification of long-established state practice could, it would seem, be applied as well to major acts of pollution such as the break-up of an oil tanker in offshore waters provided that the damaged vessel was not otherwise tended by the owners or by the government of the flag state, and provided that the accident created an imminent threat to the beaches and territorial waters of an affected state.

138. The current irony of national laws and international legal practice is that coast guard authorities often refuse to police environmental regulations beyond the state's territorial waters. Polluters then merely travel beyond these waters to dispose of toxic chemicals, sludge and sewage solids. In effect national laws prohibiting dumping in territorial waters conspire to pollute the Commons. International treaties prohibiting dumping are clearly essential to stop these abuses. *See* COUNCIL ON ENVIRONMENTAL POLICY, REPORT TO THE PRESIDENT ON OCEAN DUMPING: A NATIONAL POLICY (1970). But even with such treaties, the question of enforcement becomes crucial. Unless national governments are allowed to enforce the legislation against their own nationals and the nationals of other states, *outward from the shoreline to 200 miles or so*, the treaties are likely to have symbolic value only.

but no more and no less than is essential to the fulfillment of its specific function.

Concepts such as the patrimonial sea or the exclusive economic zone fail to satisfy these criteria since they are not single-purpose zones but, in effect, represent a wholesale transfer of the boundaries of the territorial sea outward to a distance of 200 miles. Based on a faulty attempt to retain the unified ideal of the territorial sea, they yield far more in political and legal terms to the radical revisionist position than is reasonable or necessary.

A tri-partite jurisdiction approach, which would be both more focused and more comprehensive, has been suggested. It would distinguish (1) a narrow territorial sea for security, customs, scientific and navigational purposes, (2) an expansive fisheries/environmental zone, and (3) a moderately broad but delimited continental shelf for purposes of mineral recovery. Similar to the recommendation voiced at the Yaoundé meeting of African states in July 1972, this proposal is more specific in substance and more encompassing in its scope—geographically and philosophically.

To achieve international political agreement while destroying the Commons legally or environmentally would amount to a Pyrrhic solution. While not a panacea, but surely not an acceptance of *Mare Clausum,* the concept of Multiple Jurisdiction, properly defined, may provide lawyers and decision-makers with a realistic basis for coping with the evolution of new ocean problems and practices.