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Recent Treaties and Statutes

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ADMIRALTY—AMENDMENT TO FEDERAL MARITIME LIEN ACT—CHARTERER CONCLUSIVELY PRESUMED TO AUTHORIZE LIENS FOR NECESSARIES AND REPAIRS

Prior to August 10, 1971, supplier-creditors[1] who furnished necessaries[2] to a vessel by order of a charterer and his agents had been precluded by subsection R of the Ship Mortgage Act[3] from acquiring a maritime lien on the vessel if the charter party contained a prohibition of lien clause.[4] While a shipowner and his agents were conclusively presumed to authorize encumbrance of the vessel,[5] the charterer and his agents were rebuttably presumed to possess such authority.[6] The presumption could be rebutted by proof that the charter party—always available on the ship for inspection by the supplier-creditor—included a prohibition of lien clause.[7] Because of the ease of rebutting the presumed authority of a charterer, the

1. Supplier-creditors include terminal operators, stevedores, chandlers, repairmen and other materialmen who furnish goods and services on the credit of the vessel.

2. 46 U.S.C. § 971 (1970). Necessaries are defined by maritime case law. *See generally In re* Burton S.S. Co., 3 F.2d 1015 (D. Mass. 1925).

3. Federal Maritime Lien Act, 46 U.S.C. § 973 (1970).

4. A prohibition of lien clause in a lay, *see* Thomas v. Osborn, 60 U.S. (19 How.) 22 (1856), or an installment sales contract, *see* The S.W. Somers, 22 F.2d 448 (D. Md. 1927), likewise precluded encumbrance of the vessel by the owner *pro hac vice* or the conditional vendee in possession. 46 U.S.C. § 973 (1970). Prior to the Federal Maritime Lien Act of 1910, 36 Stat. 605, liens on vessels for wages, supplies and repairs could be created by a conditional vendee, in spite of a contractual agreement to the contrary. *See* The Sea Witch, 34 F. 654 (S.D.N.Y. 1888); Hawes v. The James Smith, 11 F. Cas. 869 (No. 6238) (D. Mass. 1858); The Ferax, 8 F. Cas. 1147 (No. 4737) (D. Mass. 1849). Otherwise, 46 U.S.C. § 973 was essentially a codification of maritime case law. W.A. Marshall & Co. v. S.S. President Arthur, 279 U.S. 564 (1929); The Coaster, 273 F. 609 (W.D. Wash. 1921).

5. 46 U.S.C. § 972 (1970).

6. 46 U.S.C. § 973 (1970).

7. Dampskibsselskabet Danneborg v. Signal Oil & Gas Co., 310 U.S. 268 (1940); Diaz v. The S.S. Seathunder, 191 F. Supp. 807 (D. Md. 1961). Subsection R ends: "nothing in this chapter shall be construed to confer a lien when the furnisher knew or by exercise of reasonable diligence could have ascertained, that because of the terms of the charter party . . . the person ordering the repairs, supplies, or other necessaries was without authority to bind the vessel therefor." 46 U.S.C. § 973 (1970).

inclusion of a prohibition of lien clause in a charter party became accepted practice.[8] Since the in rem procedure was unavailable, American supplier-creditors were assuming a substantial risk of loss of unpaid credit as against foreign flag vessels under charter.[9] Congress, after hearing testimony from American stevedore and marine servicing organizations and shipowners' representatives,[10] concluded that the foreign flag vessel owners should bear the risk of loss of unpaid credit since they could easily shift the loss to the charterer by contract bond.[11] Subsection R of the Ship Mortgage Act has been amended so that a charterer and his agents are conclusively presumed to authorize encumbrance of a chartered vessel for repairs, supplies, towage and other necessaries furnished.[12] Federal Maritime Lien Act, 46 U.S.C. § 973 (1970), *as amended*, Aug. 10, 1971, Pub. L. 92-79, 85 Stat. 285.

The contractual or quasi-contractual maritime lien hypothecates a vessel in an in rem proceeding.[13] The hypothecation of a vessel is a pragmatic procedure that satisfies the needs of maritime commerce.[14] In order for a vessel to be profitable, services and supplies must be readily available to minimize "dead," "turn around" and "in ballast" time[15] and to maximize time at sea with cargo.[16] Services and

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8. 7 U.S. CODE CONG. & AD. NEWS 1859, 1860 (1971).

9. *Id.*

10. The Merchant Marine and Fisheries Committee of the House of Representatives heard testimony that stevedores in the San Francisco Bay area had sustained two million dollars in losses. *Id.*

11. 7 U.S. CODE CONG. & AD. NEWS at 1861. Regardless of the terms of the charter party, the charterer or his agent encumbers the vessel with a maritime lien upon the non-payment of ordered supplies or services. If the charter party contains a prohibition of lien clause and performance bonding clause, the encumbrance of the vessel by the charterer constitutes a breach of contract which would allow the shipowner to collect the contract bond as indemnification.

12. Section 973 now reads: "The officers and agents of a vessel specified in section 972 . . . include such officers and agents when appointed by a charterer, by an owner pro hac vice, or by an agreed purchaser in possession of the vessel."

13. *See* Harmer v. Bell (The Bold Buccleugh), 13 Eng. Rep. 884 (1851). The maritime lien is the foundation of the in rem proceeding. The hypothecation of the vessel perfects the supplier-creditor's non-possessory, inchoate security interest in the vessel.

14. *See* Dampskibsselskabet Danneborg v. Signal Oil & Gas Co., 310 U.S. 268 (1940). *See generally* 4,885 Bags of Linseed, 66 U.S. (1 Black) 108 (1861).

15. This proposition is true for any mode of transportation, regardless of the element to be traversed—land, sea or air. The more time spent in outfitting, repairing or traveling without paying cargo, the lower the overall profitability of the carrier.

16. W.A. Marshall & Co. v. S.S. President Arthur, 279 U.S. 564 (1929).

supplies for the vessel are more readily available when the supplier-creditor is certain of payment in a credit transaction.[17] The lien in rem procedure gives the supplier-creditor a relatively sure and simple means of securing the credit extended to a vessel. In turn, security facilitates the servicing and supplying of a vessel and maximizes the profitability of carriage.[18] Therefore, maritime liens are given not to protect the supplier-creditors, but rather to promote and benefit maritime commerce.[19] Since maritime liens are secret,[20] they can work great hardships in the maritime community unless they are strictly limited to situations of maritime necessity[21] and customary usage.[22] In *The General Smith*,[23] the Supreme Court held that under general maritime law there was no lien for supplies[24] furnished to a vessel in its home port.[25] In *The Lottawanna*,[26] the Court declined to overrule *The General Smith* and called on Congress for corrective legislation.[27] Congress responded in 1910 and 1920 with the Federal Maritime Lien Act.[28] The Act abolished the home port-foreign port

17. This is a basic proposition of any credit transaction. It is especially true in maritime commerce, where the credit extension can take place thousands of miles from any source of satisfaction of the credit other than the ship itself. The Edith, 94 U.S. 518 (1876).

18. Piedmont & Georges Creek Coal Co. v. Seaboard Fisheries Co., 254 U.S. 1 (1920). *See also* The Fearless, 14 F.2d 1004 (D.N.J. 1925), *aff'd*, 14 F.2d 1006 (3d Cir. 1926). The lien is a privileged claim on a vessel in respect to service or supplies which facilitate the use of the vessel in navigation. The Westmoor, 27 F.2d 886 (D. Ore. 1928).

19. *See generally* United States v. Carver, 260 U.S. 482 (1923); The South Coast, 251 U.S. 519 (1920); The Valencia, 165 U.S. 264 (1897); The Kate, 164 U.S. 458 (1896).

20. The lien is neither possessory nor perfected by the common law means of a filing that constitutes public notice of the security interest. *See, e.g.*, UNIFORM COMMERCIAL CODE art. 9, §§ 401-02.

21. The Minnie and Emma, 21 F.2d 991 (D. Md. 1927); *In re* Burton S.S. Co., 3 F.2d 1015 (D. Mass. 1925).

22. Osaka Shosen Kaisha v. Pacific Export Lumber Co., 260 U.S. 490 (1923).

23. 17 U.S. (4 Wheat.) 438 (1819).

24. The same rule was applicable to certain services. *See, e.g.*, The Alligator, 161 F. 37 (3d Cir. 1908).

25. The Court presumed that a supplier-creditor did not intend to rely on the credit of the vessel. The St. Jago de Cuba, 22 U.S. (9 Wheat.) 409 (1824). A state created lien for home port supplies could be enforced in federal admiralty courts. The J.E. Rumbell, 148 U.S. 1 (1893).

26. 88 U.S. (21 Wall.) 558 (1874).

27. 88 U.S. (21 Wall.) at 581-82.

28. 46 U.S.C. §§ 971-75 (1970).

distinction [29] and eliminated the necessity of proving that the credit of the vessel was relied upon when the owner or his agent contracted in person or was in port when the supplies were ordered. [30] Finally, the Act codified the existing maritime principle that the supplier furnishes supplies on credit to a chartered vessel at his own risk. [31]

The amendment of Subsection R portends significant consequences for the international maritime community and American maritime jurisprudence. First, the amendment represents a radical departure from the traditional English, European and American maritime principle that the charterer cannot bind the vessel for services and supplies that he must furnish. [32] Secondly, while reaffirming the purpose of the maritime lien to facilitate profitable carriage, [33] Congress considers the lien a security device created primarily for the benefit of the supplier-creditor and closely related to the common law mechanic's lien. [34] In this respect, Congress fails to perceive the fundamental differences between maritime and common law liens, especially the inherent danger of a secret lien. [35] Thirdly, the

29. *See generally* The Roanoke, 189 U.S. 185 (1903).

30. W.A. Marshall & Co. v. S.S. President Arthur, 279 U.S. 564 (1929); *In re* Burton S.S. Co., 3 F.2d 1015 (D. Mass. 1925).

31. Act of June 23, 1910, ch. 373, 36 Stat. 604; New Bedford Dry Dock Co. v. Purdy, 258 U.S. 96 (1922). *See, e.g.,* The Kate, 164 U.S. 458 (1896); The Patapsco, 80 U.S. (13 Wall.) 329 (1871); The Yankee, 233 F. 919 (3d Cir. 1916). *See also* Thomas v. Osborn, 60 U.S. (19 How.) 22, 29-31 (1856).

32. *See* 60 U.S. (19 How.) at 29-30. The Merchant Shipping Act of 1894, 57 & 58 Vict., c. 60, did not change British maritime case law. There is no lien for necessaries or repairs for a vessel. While the claims of supplier-creditors, "necessaries men," rank as non-maritime claims, *see* The Zigurds [1932] P. 113, the supplier-creditor who has retained possession of the vessel obtains a ranking possessory lien similar to the common law materialman's lien. The Immaculata Concezione 9 P.D. 37. *See also* Jacobs v. Latour [1828] 5 Bing. 130. Since the supplier-creditor has no maritime lien or similar charge against the vessel, he cannot proceed in rem if his contract was made with a demise charterer. *See* Smith's Dock Co. v. The St. Merriel [1963] 2 W.L.R. 488. *See generally* 11 STEVENS BRITISH SHIPPING LAWS paras. 74-75 (1963).

33. "Granting the materialman a lien encourages the prompt furnishing of necessaries to vessels so that they can be speedily turned around and put to sea. This is especially significant today . . . ." 7 U.S. CODE CONG. & AD. NEWS at 1861.

34. *Id.* at 1859.

35. *See generally* Osaka Shosen Kaisha v. Pacific Export Lumber Co., 260 U.S. 490 (1923). The classic example of the danger of the secret lien and prejudice to a good faith purchaser for value is found in Harmer v. Bell (The Bold Buccleugh), 13 Eng. Rep. 884 (1851).

shipowner now bears a risk of loss neither contemplated in the negotiations nor shifted to him by the terms of the charter party. Almost all charter parties presently in force have a full performance bonding clause and a default clause.[36] When the amount of the bond was set, the shipowner contemplated that the prohibition of lien clause would operate to deny supplier-creditors a maritime lien. Therefore, the amount of the bond would be patently insufficient should the vessel now be libelled in rem. Further, the default clause is a nullity when the vessel is *in custodia legis* pursuant to an action under the amendment. Fourthly, the application of the amendment to charter parties engaged and liens and proceedings arising before August 10, 1971, has not been decided.[37] Before the amendment can be declared retrospective, it must first defeat the presumption of prospectivity. The amendment must then survive due process or ex post facto analysis.[38] Total prospectivity—applying the amendment only to charter parties contracted after August 10, 1971—would emasculate the statute. Since most charters are at least five years in duration, the supplier-creditor would be required to ascertain the date of every charter for at least the next five years to be reasonably certain of his rights and remedies. This result would benefit neither the supplier-creditor nor maritime commerce, as it would create two rules of maritime lien law. Total retrospectivity—applying the amendment to all charters and recognizing a lien for supplies furnished before enactment[39]—may put an intolerable strain on judicial administration[40] and concepts of due process.[41] Partial retro-

36. The terms of American and European (Gencom) demise charters are essentially the same. *See, e.g.,* N. HEALY & B. CURRIE, CASES AND MATERIALS ON ADMIRALTY 408-11 (1965).

37. There are no cases to date in the federal courts arising under the new amendment.

38. *See* Schaefer, *Precedent and Policy,* 34 U. CHI. L. REV. 3, 15 (1966).

39. The lien may be considered final when cut off by laches. *See* G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 482-83 (1957).

40. The strain on the judiciary is more theoretical than actual since no cases were reported in the first six months of the amendment's enactment.

41. The classic test of retrospectivity is whether the statute affects substantive rights or affords a procedural remedy. *See, e.g.,* Sturges v. Carter, 114 U.S. 511 (1885). "In the case of *The Society for Propagating the Gospel v. Wheeler,* 2 Gall. 139, Mr. Justice Story thus defines . . . a retrospective law: 'Upon principle, every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective.' " 114 U.S. at 519.

spectivity—applying the amendment to all charters but only recognizing a lien for supplies furnished after enactment—would be a possible solution. This approach would validate congressional intent by applying the amendment uniformly to all charters while minimizing due process objections. Finally, by securing the credit extended by the suppliers, the amendment aids the foreign bare-boat charterer in acquiring supplies and repairs in American ports. In effect, a charterer is considered a shipowner when dealing with supplier-creditors of necessaries. While congressional analysis of maritime liens may not be satisfactory, the redistribution of risk of loss seems equitable and reasonable. The amendment will not injure financially responsible foreign charterers or shipowners and should be a positive benefit to American supplier-creditors.

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A lien which "attached" before August 10, 1971, may be two or three "voyages" old by the time a libel in rem is prosecuted under the amendment. Conceivably, the lien could survive laches and operate to impair the rights of current "voyage" claimants (foreign or American), despite Supplemental Rules C and E of the Federal Rules of Civil Procedure. After the proceeding in rem, the liens of these claimants will have been "scraped clean" whether or not they had actual notice of the proceeding. G. GILMORE & C. BLACK, *supra* note 39, at 482-83. A court could easily consider the combination of a retrospective attachment of a lien under the amendment with an in rem proceeding as fundamentally unfair. Retrospectivity of the amendment and the proceeding in rem could destroy or impair the vested maritime rights of the most recent claimants.

TERRITORIAL JURISDICTION—MASSACHUSETTS JUDICIAL EXTENSION ACT—STATE LEGISLATURE EXTENDS JURISDICTION OF STATE COURTS TO 200 MILES AT SEA

The Massachusetts Director of the Division of Marine Fisheries released a report informing the state of an impending ecological disaster involving all of the important commercial fishery species of the Northwest Atlantic, including those found in the Georges Bank area, 50-100 miles off Nantucket.[1] In calling for emergency unilateral United States action,[2] this position paper cited numerous factors which, collectively, have led to the depletion of marine fisheries.[3] Prior Massachusetts law empowered the Director of Marine Fisheries to promulgate regulations affecting marine fishing within the "coastal waters" of the Commonwealth.[4] The present Act was passed to avert the approaching disaster and prevent the possible annihilation of adjacent marine resources.[5] The Act empowers the Director of Marine Fisheries[6] to adopt any new rules and regulations necessary to preserve and protect all marine fishery resources to a distance of 200 miles out to sea, or to a point where the water depth reaches 100

1. MASS. MARINE FISHERIES ADV. COMM'N, SPECIAL POSITION PAPER prepared by Frank Grice, Director, Division of Marine Fisheries.

2. "Realistically, this could best be accomplished by unilateral or bilateral action by the nations most traditionally involved, the United States and Canada." *Id.* at 6.

3. Among the factors listed as contributing to the depletion of the fisheries were: "pulse fishing"—intense efforts in a particular fishery until it is no longer able to be fished economically; massive fishing by Soviet and European fishing fleets which utilize increasingly effective techniques; inadequate scientific knowledge of the damage created by such thorough fishing; and inadequate preventative regulations by the International Commission for the Northwest Atlantic Fisheries. *Id.* at 1-6.

4. MASS. ANN. LAWS ch. 130, §§ 17-17A (1965), *as amended* (Supp. 1971). The approval of the Commissioner of Natural Resources and the Marine Advisory Commission [MFAC] was also needed. "Coastal waters" are equated with "territorial waters." ch. 130, § 1. "Territorial waters" extend one marine league from the extreme low water mark (three nautical miles). ch. 1, § 3.

5. The emergency preamble containing these findings was explicitly adopted by the legislature. MASS. ANN. LAWS ch. 130, § 17(10)(Supp. 9, 1972), *amending* ch. 130, § 17 (1965), *as amended* (Supp. 1971).

6. The amendment is to § 17. Thus, the requirement of approval by the Marine Fisheries Advisory Commission and the Commissioner of Natural Resources, which is contained in § 17A, is eliminated. The approval of the Governor is still needed.

fathoms, whichever is farther.[7] MASS. ANN. LAWS ch. 130, § 17 (10) (Supp. 9, 1972), *amending* ch. 130, § 17 (1965), *as amended* (Supp. 1971).

The constitutionality of the Massachusetts legislation depends upon the answers to two separate questions:[8] first, whether the statute conflicts with positive federal law and thus violates the supremacy clause;[9] and secondly, whether the statute conflicts with the general body of decisional law relating to improper interference with the federal foreign relations power. Initial indications of positive federal action toward the establishment of an extended fisheries zone are found in the Truman Proclamation of 1945.[10] United States pressures for international control of the Northwest Atlantic fisheries resulted in the International Convention for the Northwest Atlantic Fisheries.[11] The Convention granted the International Commission for the Northwest Atlantic Fisheries (ICNAF) power to propose regulations[12] for species control in the Northwest Atlantic and to carry out scientific investigation necessary for effective management of the species within that area.[13] Recent protocols to the Convention extend jurisdiction to all signatories for purposes of insuring

7. 100 fathoms is approximately 600 feet and this is the depth at which control of the continental shelf terminates under international law. *See* note 17 *infra.* Additionally, a maximum fine of $10,000 is established for violation of the rules and regulations promulgated pursuant to § 17(10).

8. *See* Maier, *The Bases and Range of Federal Common Law in Private International Matters,* 5 VAND. J. TRANSNAT'L L. 133 (1971).

9. U.S. CONST. art. 6, cl. 2.

10. Pres. Proc. No. 2668, 10 Fed. Reg. 12304 (1945). This was evidence that a change in United States policy regarding an extended fisheries zone was forthcoming, but indicated that the United States would not follow the Latin American examples of declarations of exclusive jurisdictional extensions. *See* Garaioca, *The Continental Shelf and the Extension of the Territorial Sea,* 10 MIAMI L.Q. 490 (1956).

11. [1950] 1 U.S.T. 477, T.I.A.S. No. 2089, 157 U.N.T.S. 157, 16 U.S.C. §§ 981-91 (1970), *as amended* (Supp. 1972). The Convention has been signed by a great majority of the nations utilizing the resources of this region.

12. Proposals are not binding against signatories unless consented to. *Id.* art. VIII.

13. This area encompasses the extended jurisdiction of Massachusetts. *Id.* art. I, § 1. The Massachusetts Commissioner of Natural Resources complains that the ICNAF concerns itself with species control only after the species has been overfished to the point of annihilation, that the procedures for ratification of proposals are lengthy and cumbersome, and that the Commission does not deal with the real problem—total fishing pressure. MASSACHUSETTS DEP'T NAT. RESOURCES, ENVIRONMENTAL RESOURCE, No. 1 (1971).

compliance by ships and nationals of all other signatories. Moreover, the protocols simplify and expedite the process of ratifying the ICNAF's management proposals.[14] Enabling legislation in the United States specifically prohibits state interference with the ICNAF that might prevent the Commission from discharging its duties. Additionally, the legislation states that this Convention neither expands nor limits state authority to control fisheries.[15] Supplemental federal law was created by the United States' ratification of the conventions proposed at the Geneva Conferences on the Sea. These conventions reaffirmed the freedom of the high seas, specifically the freedom to fish[16] above the continental shelf[17] and beyond territorial waters. However, freedom of the seas is limited by a contiguous zone not exceeding twelve miles in width,[18] and is further restricted by special interests of coastal states in adjacent high-sea fisheries.[19] The failure of the Geneva Conferences to cope with the twin problems of the width of the territorial sea and the right to a contiguous fishing zone resulted in unilateral federal legislation establishing a contiguous fishing zone with exclusive United States fishing rights.[20] State jurisdiction is explicitly restricted by the Act to

14. [1970] 1 U.S.T. 567, T.I.A.S. No. 6840, [1970] 1 U.S.T. 576, T.I.A.S. No. 6841, 16 U.S.C. §§ 981-91 (1970), *as amended* (Supp. 1972). For legislative history see 1971 U.S. CODE CONG. & ADMIN. NEWS 1379.

15. 16 U.S.C. §§ 981, 987(c)-(d) (1970), *as amended* (Supp. 1972). Essentially, this was done to prevent disputes concerning regulation within the territorial waters and to prevent extensions of state jurisdiction. 1950 U.S. CODE CONG. & ADMIN. NEWS 3931, 3942.

16. Convention on the High Seas, [1962] 2 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82.

17. Convention on the Continental Shelf, [1964] 1 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 312.

18. Convention on the Territorial Sea and the Contiguous Zone, [1964] 2 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205. The Convention limits a contiguous zone to four stated purposes, none of which involve fisheries regulation. *Id.* art. 24, § 1(a).

19. Convention on Fishing and Conservation of the Living Resources of the High Seas, [1966] 1 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 285. This Convention was more controversial and has been ratified by few of the major fishing nations except the United States and the United Kingdom. Special interests of coastal states will allow emergency unilateral action to prevent annihilation of an adjacent fishery if the measures adopted are not discriminatory to foreign fishermen. *Id.* art. 7.

20. 16 U.S.C. §§ 1091-94 (1970). The legislative history shows that all factors were carefully weighed. Official comments of the State Department were considered to insure that the Act did not invite reciprocal action against our

territorial waters.[21] Acts of state legislatures that are contrary to, or that interfere with, the laws of Congress are invalid under the supremacy clause.[22] Positive federal law is most commonly created through Congressional legislation and by implementation of international agreements pursuant to the treaty power.[23] Tests applied by the courts to analyze conflicts between state and federal statutes vary from the necessity of a conflict so "direct and positive" that the two statutes cannot stand together,[24] to a finding that the state act "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[25] The essence of these formulations is that state action may not interfere with the carrying out of national purposes, as evidenced by positive federal law[26] or by a congressional design to pre-empt the field.[27] Another basis for conflict is state interference with the foreign relations power of the federal government.[28] The drafters of the Constitution perceived that the states' inclination to adopt separate foreign policies was inimical to the best interests of the nation.[29] Unfortunately, criteria for determining the existence of such conflicts and guidelines for their resolution have been inadequately formulated by the courts.[30] The Supreme Court has responded to this situation with

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far-sea fishing fleets. 1966 U.S. CODE CONG. & ADMIN. NEWS 3282, 3283. The committee also found that a trend toward a 12-mile jurisdictional limit was in progress. *Id.* at 3286.

21. 16 U.S.C. § 1094 (1970). "Thus, the amendment would recognize the jurisdiction of the States within the 3-mile coastal area, but would disclaim any extension of coastal State jurisdiction to the fisheries zone contiguous area." 1966 U.S. CODE CONG. & ADMIN. NEWS 3282, 3291.

22. Perez v. Campbell, 402 U.S. 637, 649 (1972); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211 (1824).

23. Missouri v. Holland, 252 U.S. 416 (1920). Such law may also be created by executive action in act of state and sovereign immunity cases. *See* Maier, *supra* note 8, at 134.

24. Kelley v. Washington, 302 U.S. 1, 10 (1937).

25. Hines v. Davidowitz, 312 U.S. 52, 67 (1941). This formulation of the supremacy clause has been given continuous recognition. *See* 402 U.S. at 649.

26. United States v. Mayo, 47 F. Supp. 552 (D.C.N.D. Fla.), *aff'd,* 319 U.S. 441 (1943).

27. Florida Avocado Growers v. Paul, 373 U.S. 132, 141 (1963).

28. Maier, *supra* note 8, at 134.

29. "The importance of national power in all matters relating to foreign affairs and the inherent danger of state action in this field are clearly developed in Federalist papers No. 3, 4, 5, 42, and 80." 312 U.S. at 62 n.9.

30. Maier, *supra* note 8, at 141.

vague generalities.[31] Specific factual resolutions offer little more in the way of adequate guidance. Three general tests were enunciated in *Clark v. Allen*[32] for the court to consider in determining whether a state's action is an unconstitutional interference with foreign relations. These tests were followed, to some degree, by the last major Supreme Court pronouncement in the area, *Zschernig v. Miller.*[33] The three *Clark* tests as interpreted in *Zschernig* are: first, whether there is an improper purpose of interference with foreign relations;[34] secondly, whether a direct impact upon international relations has been shown;[35] and finally, whether the state law has a possible adverse effect upon the power of the government to carry out existing foreign policy.[36] The *Zschernig* court found the state statute unconstitutional on the basis of all three tests.[37]

A reasonable construction of positive federal law leads to the inescapable conclusion that regulations promulgated under the Massachusetts act will be held unconstitutional.[38] Clearly the act is contrary to the enabling legislation implementing the ICNAF, since Massachusetts would be interfering with the regulations of the Commission.[39] The statute also violates the implicit assumption of 16

31. Examples include: the "supremacy of the national power in the field of foreign affairs," or "local interests versus national purposes," 312 U.S. at 62, 63; and "adverse effect" or "direct impact" on foreign relations, 389 U.S. at 440, 441.

32. 331 U.S. 503, 516-17 (1947).

33. "Consequently, *Zschernig* implicitly adopts all three of the tests for unwarranted interference found in *Clark* but does nothing to clarify either the extent to which each is applicable or the weight which each is to be given in later cases." Maier, *supra* note 8, at 139.

34. *Id. See also* Ioannou v. New York, 371 U.S. 30, 32-34 (1962) (dissenting opinion).

35. 389 U.S. at 441. As construed in *Zschernig,* this direct impact is on foreign relations generally—a vague test at best.

36. Both this test and the preceding one were seemingly combined, and thus diffused. *Id.*

37. A notable exception is Bethlehem Steel Corp. v. Board of Comm'rs, 276 Cal. App. 2d 221, 80 Cal. Rptr. 800 (1969). The California Court of Appeals declared the California "Buy American" Act unconstitutional and in so doing utilized all of the *Zschernig* tests, emphasizing the improper purpose test. 276 Cal. App. 2d at 229, 80 Cal. Rptr. at 805-06.

38. The Massachusetts Commissioner of Natural Resources realizes that the Act is unconstitutional, but appeals to a higher law—"conserving our living resources." ENVIRONMENTAL RESOURCE No. 1, *supra* note 13.

39. Such interference within the territorial waters and impliedly beyond these waters is excluded by the language of 16 U.S.C. § 987 (c)(1970).

U.S.C. § 987 (d) that state control of fisheries is limited to territorial waters.[40] Additionally, the enactment is in opposition to the explicit prohibition of 16 U.S.C. § 1094 on state control of the marine resources beyond the territorial waters. The act also violates the freedom of the seas by establishing restrictions on the freedom to fish[41] beyond both the territorial waters and the limited contiguous zone.[42] Finally, Massachusetts is not the recognized forum from which a national special interest in adjacent marine fisheries may be asserted under the Fishing Convention.[43] A finding of unconstitutionality would, therefore, be necessitated by any formulation of the tests utilized in resolving conflicts arising under the supremacy clause. A court would hold either that the subject matter has been expressly pre-empted by Congress,[44] or that there is a "direct and positive" conflict[45] as well as a possible obstacle to the accomplishment of congressional objectives.[46] If the statute is not declared violative of the supremacy clause, it will certainly be declared an unconstitutional interference with foreign relations. Application of the first of the *Clark* tests would clearly invalidate the legislation as having the improper purpose of directly influencing foreign relations. Additionally, this act is a far cry from a mere inheritance statute: if regulations are promulgated they will involve possible seizure of the ships and nationals of other countries on the high seas, thus creating a very direct impact upon foreign relations in violation of the second *Clark* test. The statute also violates the third *Clark* test by inducing a possible adverse effect upon foreign relations.[47] This is especially true

40. "The fishing grounds are international; so are the problems that gave rise to the Convention on which this bill is based. Thus, preservation and regulation of the fishing must proceed on an international basis." 1950 U.S. CODE CONG. & ADMIN. NEWS 3931, 3933.

41. Convention on the High Seas, *supra* note 16.

42. Convention on the Territorial Sea and the Contiguous Zone, *supra* note 18.

43. The state of Massachusetts did not contend in any way that it was utilizing the emergency procedures of the Fishing Convention, and it is doubtful that foreign states would recognize any attempt to do so.

44. 373 U.S. at 141.

45. 302 U.S. at 10.

46. 312 U.S. at 67.

47. *See also* Moore, *Federalism and Foreign Relations*, 1965 DUKE L.J. 248, in which the author applies the *Clark* tests and finds unconstitutional the 1963 Florida Territorial Waters Act, designed to restrict fishing by aliens within Florida territorial waters. Though a 1964 application of the Act precipitated an international incident, the U.S. Supreme Court affirmed the Florida conviction of

in light of the continuing international conflict over the extension of territorial waters and the careful attention that was placed on this situation in drafting the 1966 contiguous zone bill. Obviously, the major purpose of this Massachusetts law was to pressure the federal government to move unilaterally to prevent the destruction of adjoining marine fisheries. However, authorities on the problem of fisheries control contend that the maximum sustainable yield can be achieved only by international regulation, either by a single agency[48] or through regional arrangements.[49] They further contend that unilateral action will be more harmful than beneficial.[50] In any event, the balancing of priorities necessary to develop a viable fisheries policy cannot be dominated by local interests, no matter how forcibly presented, and this will be perceived by any court deciding the constitutionality of this statute.

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several Cubans. Barrios v. Florida, 174 So. 2d 20 (Fla. 1965), *aff'd*, 384 U.S. 208 (1966).

48. *See* Eichelberger and Christy, *Comments on International Control of the Sea's Resources*, in THE LAW OF THE SEA 299-308 (L. Alexandre ed. 1967).

49. Burke, *A Contemporary Legal Problem in Ocean Development*, 3 INT'L LAW 536 (1969); Nomura, *Fisheries Jurisdiction Beyond the Territorial Sea*, 44 WASH. L. REV. 307 (1968).

50. Unilateral action may be self-defeating as it may result in reciprocal action against our far-sea fishing fleets. Nomura, *supra* note 48, at 327. Also this system will not allow for the maximum sustainable yield to be calculated, nor encourage unified management over migratory species. On the contrary, it will unduly limit the freedom of the seas and prevent the necessary accumulation of scientific data.

TERRITORIAL JURISDICTION—MINING THE DEEP SEABED—INTERNATIONAL PROBLEMS AND NATIONAL RESOLUTIONS

The policy of the United States on submarine minerals was first announced in the Truman Proclamation of 1945:[1] national jurisdiction extends to the subsoil seabed of the continental shelf which is beneath the high seas and contiguous to the United States coast.[2] This policy rapidly found acceptance in international law[3] and was ratified in article 1 of the Convention on the Continental Shelf.[4] The Convention states that a coastal nation's jurisdictional rights extend beyond the 200 meter isobath to where "the depth of the superjacent water admits of the exploitation of natural resources of the seabed and subsoil."[5] Therefore, territorial jurisdiction is defined by two conceptual parameters: extension and exploitation. First, although there is a split of authority,[6] article 1 has been generally interpreted to mean that the jurisdiction of a coastal nation for mineral mining purposes extends to the entire subsurface seabed as far as the continental margin.[7] International custom has approved the assurance

1. Proclamation No. 2667, dated Sept. 28, 1945, captioned "Policy of the United States with Respect to the Natural Resources of the Subsoil and Seabed of the Continental Shelf," 3 C.F.R. (1943-1948 Comp.).

2. This proclamation has been argued to represent the traditional American position with respect to seabed mineral jurisdiction. *See* Ely, *United States Seabed Minerals Policy*, 4 NATURAL RESOURCES LAWYER 597 (1971).

3. 13 DEP'T STATE BULL. 484 (1945).

4. Convention of the Continental Shelf, *opened for signature*, April 29, 1958, [1964] 1 U.S.T. 471, T.I.A.S. No. 5578, 449 U.N.T.S. 311 (effective for the United States June 10, 1964).

5. In discussing articles 1-3 of the Convention, the International Court of Justice held in the *North Sea Continental Shelf Cases* that, although the doctrine of the continental shelf was a "recent instance of encroachment on maritime expanses which, during the greater part of history appertained to no-one," nonetheless the widespread international acceptance of the doctrine had established it as customary international law. North Sea Continental Shelf Cases, [1969] I.C.J. 1, 51.

6. For example, some authorities have asserted that the continental shelf extends only to the 200 meter mark and that the inclusion of the exploitability test was to allow the development of adjacent areas. *See* COMMISSION ON MARINE SCIENCE, ENGINEERING AND RESOURCES, OUR NATION AND THE SEA: A PLAN FOR NATIONAL ACTION (1969).

7. "While the matter is not free from doubt, the latter view [that the Continental Shelf extends to where the continental slope meets the abyssmal depths] appears to be consistent with the 'plain meaning' of the Convention and the preponderance of evidence in its legislative history and has found support with

of such extended or "emergent" rights[8] in coastal countries.[9] Secondly, the "exploitability" criterion of article 1 has been criticized as a trend in favor of "creeping national jurisdiction."[10] Ultimately, the tendency of coastal nations to favor extended national maritime jurisdiction[11] has created a serious conflict between the traditional doctrine of freedom of the seas and the equally traditional concept of sovereign territorial rights. The proposed Deep Seabed Act would both implement and revise the 1970 Draft Convention on the international seabed, which was submitted by the United States in the United Nations. Under the terms of the proposed Act, private exploitation of the seabed area would be regulated by national licensing, subject to exclusive national jurisdiction, with international license registration and cooperation. Deep Seabed Hard Mineral Resources Act, S. 2801, 92d Cong., 1st Sess. (1971).[12]

In an earlier effort to reverse the unilateral extension of territorial jurisdiction by coastal nations, the United States submitted to the United Nations Committee on the Peaceful Uses of the Deep Seabed and Ocean Floor a draft convention on the international seabed.[13] The purpose of the proposal was to initiate negotiations concerning the establishment of international controls over the mining of the deep seabed. Additionally, the proposal provided guidelines for interim legislation by coastal states pending adoption of the multi-

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the Department of the Interior and most writers in this country. The broad construction also appears to be consistent with the doctrine of the continental shelf in customary international law." Krueger, *The Background of the Doctrine of the Continental Shelf and the Outer Continental Shelf Lands Act,* 10 NATURAL RESOURCES J. 442, 475 (1970).

8. The International Court of Justice in the *North Sea Continental Shelf Cases* undertook to distinguish between "pre-existing" and "emergent" customary law with regard to the offshore rights of coastal states. The I.C.J. thought that the right of a coastal state to exploit the seabed adjacent to its coast was certainly "pre-existing." On the other hand, how far the right of exploitation extended was "emergent." North Sea Continental Shelf Cases, [1969] I.C.J. at 39, 40.

9. [1969] I.C.J. at 33.

10. *See* Stevenson, *The United States Proposal for Legal Regulation of Seabed Mineral Exploitation Beyond National Jurisdiction,* 4 NATURAL RESOURCES LAWYER 570 (1971).

11. *See generally* Krueger, *supra* note 7, at 478-81.

12. S. 2801, 92d Cong., 1st Sess., 117 CONG. REC. 164 (daily ed. Nov. 2, 1971).

13. U.N. Doc. No. A/AC.138/25; 9 INT'L LEGAL MATERIALS 1046 (1970) (hereinafter cited as Draft Convention).

lateral treaty.[14] The Draft Convention called for radical changes in past policy. First, article 1 proposed a treaty which provided for national licensing by coastal states for two areas: the area within the 200 meter isobath was to be subject to the coastal state's exclusive jurisdiction and control; the area from the 200 meter isobath to the continental margin was to become a "trusteeship zone" subject to coastal state's jurisdiction.[15] Additionally, a substantial proportion of the capital assets generated from exploitation of the trusteeship zone was to be transferred to an international regulatory agency. The agency would then distribute these assets among underdeveloped countries.[16] More importantly, the Draft Convention spoke in terms of national legislative implementation. Article 2 stated that no state might acquire any right, title or interest in the trusteeship zone or its resources except as provided in the Convention.[17] By not speaking in terms of contracting nations in article 2, the apparent intention of the drafters was to legislate for third-party states. Although article 34 of the Vienna Convention does not allow a treaty to bind non-consenting third parties, article 38 allows the operative law contained in a treaty to become conclusive as to non-contracting states if it is so widely accepted as to become a part of customary international law.[18] Therefore, the thrust of the Draft Convention clearly indicated a regulatory and not a contractual scheme, designed to cut back on unilateral territorial claims of sovereignty over the high seas.

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14. Laglin, *Past, Present, and Future Developments of the Customary Law of the Sea,* 117 CONG. REC. 190 (daily ed. Dec. 17, 1971).

15. Draft Convention, *supra* note 12, arts. 27 & 75.

16. Draft Convention, *supra* note 12, arts. 27, 74 & 75.

17. Draft Convention, *supra* note 12, art. 2.

18. Under article 34 of the Vienna Convention, a treaty "does not create either obligations or rights for a third state without its consent." It is imagined, therefore, that the proposers of the Draft Convention anticipated that it might become so widely accepted internationally that it would obtain the status of customary law—in which case third parties might be bound under article 38 of the Vienna treaty. To avoid being subject to the provisions of the convention, a third party state would have to offer some form of active resistance. That the "customary law" approach was on the minds of the drafters in putting article 2 in legislative form seems apparent. This technique, taken in conjunction with article 38 of the Vienna Convention, points all the more forcefully to a regulatory as opposed to a consensual scheme. *See generally* Jennings, *Jurisdictional Adventures at Sea—Who Has Jurisdiction Over the Natural Resources of the Seabed?* 4 NATURAL RESOURCES LAWYER 829 (1971); Jennings, *The United States Draft Treaty on the International Seabed Area,* 20 INT'L & COMP. L.Q. 433 (1971).

The proposed Deep Seabed Act is national interim legislation which has been submitted to implement the terms of the Draft Convention.[19] First, the Act provides that the Secretary of the Interior may grant licenses to mine the "deep seabed" to citizens or corporations of the United States for a fifteen year period.[20] These licenses will create rights which are exclusive as against all national subjects of the United States and of any reciprocating state.[21] Secondly, an international regulatory clearing house is to be created. The clearing house will record notices of applications for licenses and the approval, denial, transfer or relinquishment of these licenses.[22] Thirdly, the Act provides for a fund to be appropriated by Congress for the benefit of developing, reciprocating nations.[23] Fourthly, in anticipation of the full legal architecture contemplated by the Draft Convention, the tenth section of the Act provides that the licenses are subject to any "international regime for the development of the deep seabed ...." In turn, the international regime must recognize the validity of granted licenses for their respective terms and allow the United States to reimburse any licensee for loss of investment.[24] Fifthly, the Act vests in personam jurisdiction in the Secretary of the Interior over United States miners and requires the latter to submit to the same authority exercised by any reciprocating state.[25] Finally and most importantly, the Act defines "deep seabed," *i.e.* the licensed area, as being the seabed and subsoil vertically below, lying seaward of the United States and of foreign states, as defined in the 1958 Convention on the Continental Shelf.[26]

In an international context and as a matter of political reality, one thing can certainly be said of the proposed Act: it is more acceptable to the international community than is its counterpart, the Draft Convention. Subject to section ten, the Act disregards the exclusive-trusteeship jurisdictional dichotomy of the Draft Convention. As is apparent from its definition of "deep seabed," the Act makes no provision for a "trusteeship zone." Additionally, the jurisdiction of the proposed international regulatory clearing house, covering the deep seabed, extends only to the area seaward of the continental

19. S. 2801, 92d Cong., 1st Sess. (1971).
20. S. 2801, 92d Cong., 1st Sess. §§ 4(c), 5(a) (1971).
21. S. 2801, 92d Cong., 1st Sess. § 4(a) (1971).
22. S. 2801, 92d Cong., 1st Sess. § 5(c) (1971).
23. S. 2801, 92d Cong., 1st Sess. § 9 (1971).
24. S. 2801, 92d Cong., 1st Sess. § 10 (1971).
25. S. 2801, 92d Cong., 1st Sess. § 3(a) (1971).
26. S. 2801, 92d Cong., 1st Sess. § 2(b) (1971).

shelf. Therefore, as defined in the 1968 Convention on the Continental Shelf, international jurisdiction would extend seaward of the continental margin. Since the majority of minerals that currently can be exploited are found within only the area known as the continental margin,[27] such a provision would seem to be more conducive to acquiesence by coastal states that desire to exploit the deep seabed with a minimum amount of international control. In contrast, the proposition contained in the Draft Convention that the capital assets derived from within the continental margin should be heavily "taxed" to provide subsistence for underdeveloped countries probably would not be politically acceptable to any coastal nation, including the United States.[28] Similarly, the Act appears to be far more realistic than the Convention in leaving its substantive terms to the course of future negotiations. For example, the proportion of assets realized to be rendered to underdeveloped countries and the nature of the international agency to be formed are subject to future negotiations. Moreover, because the Act creates a right-duty relationship with foreign nations only when reciprocating legislation is enacted by them, the Act relies on international cooperation, rather than international regulation, for its enforcement. There is no international mandate, as in article 2 of the Draft Convention, which might give non-reciprocating states cause to fear that they will become subject to the terms of a customary rule of international law without their own legislative assent. These factors can only enhance the appeal of the Act among coastal states anxious to protect their traditional spheres of offshore jurisdiction. Finally, while it is arguable that any effort to reverse the current proclivity of coastal countries to unilateral assertions of national jurisdiction is futile, it is equally arguable that some restrictions are necessary and perhaps even indispensable. The plight of the small land-locked country whose access to seabed minerals and fishery rights is limited presents a case in point. Formerly, these rights were completely guaranteed by the doctrine of freedom of the seas. Presently, they are being pre-empted by coastal state action. This small example may serve as an indicator that a problem as broad as the proper method of utilizing the sea's resources should not depend on a coastal sovereign's capricious exercise of power for its resolution. While unilateral action is unacceptable, any rule of international law that is to develop realistically must take into account the sovereign state's traditional demands. In order to posit a viable rule, international law must generate a reasonable accommodation,

27. *See* Ely, *supra* note 2, at 599-600.
28. Ely, *supra* note 2, at 601-10.

equalization and interrelation between the conflicting demands and needs of all nations. The proposed Act more clearly recognizes these conflicting demands than does the Draft Convention. Whether the Act will viably resolve the conflict remains to be seen from the course of future negotiations.[29]

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29. Significantly, Congress may be influenced by domestic as well as international or transnational considerations. The need for some type of unilateral action by the United States for purely domestic reasons is evident in a Massachusetts territorial extension act. For a complete report of this act see pp. 490-96 *supra.*