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United States Oceans Policy: Perspective 1974

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I. Introduction

In 1967 the question of the adoption of new rules to govern the exploitation of ocean resources and the use of ocean space, as well as amendment of existing law of the sea conventions, was placed before the United Nations by the island nation of Malta. As a result, the international community has engaged during the past six years in intensive discussions and negotiations concerning law of the sea issues. During the past three years, the United Nations Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction (“Seabed Committee” hereinafter) has served as a preparatory body for the Third United Nations Conference on the Law of the Sea (“Third Conference” hereinafter) presently scheduled to be held during April and May of 1974. The negotiations leading to that conference, both within and without the framework of the Seabed Committee, have not always gone smoothly. Nonetheless, the schedule has been established, and the community of nations intensified its effort during 1973 to come to grips with the complex issues involved in the exploitation of ocean resources and the general use of ocean space.

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All of the comments made in this paper are my own personal interpretations and do not necessarily reflect the views of the United States Government. Further, nothing contained in this paper was imparted to me exclusively in connection with my service on the Advisory Committee on the Law of the Sea, and all comments are based on publicly available information.


2 The Seabed Committee was established by G.A. Res. 2467 (XXXII) (1968). It originally consisted of 42 nations, but membership was expanded to 86 in December, 1970, G.A. Res. 2750-G (XXV) (1970), operative para. 5 and to 91 (including the People’s Republic of China) in 1971, G.A. Res. 2881 (XXVI) (1971), operative para. 3.

3 In December, 1970, the General Assembly adopted Resolution 2750-G (XXV) (1970) calling for the Third Conference to be held sometime during 1973 unless postponed by the twenty-seventh session of the General Assembly in 1972 on grounds of insufficient progress of preparatory work. By G.A. Res. 3029-A (XXVII) (1972) the Seabed Committee was instructed to hold two more preparatory sessions during 1973, a procedural meeting of the Third Conference being scheduled for the winter, 1973.

4 G.A. Res. 3029-A (XXVII) (1972), operative para. 4. The site specified in the resolution for the Third Conference is Santiago, Chile, but the coup d’etat which occurred there in September, 1973, makes it problematical that the meeting will be initiated there.
As part of the negotiation process, the United States has during the past six years developed and announced elements of a national oceans policy which it seeks to implement through the agreements to be reached at the Third Conference. There are many factors which enter into the determination of national policy, including the views of various industrial and other interest groups which would be affected by changes in the law of the sea. Although it is beyond the scope of this article to examine all of the factors which entered into the policy formulation process, it is my purpose to outline and discuss briefly the essential elements of United States oceans policy on the eve of the convocation of the Third Conference. It should be understood that the policies described in this article were those extant as of August 31, 1973—it is quite possible that such policies could be modified prior to initiation of the Third Conference.

In reviewing the elements of United States oceans policies, one should be aware that the underlying premises leading to those policies have varied and, indeed, are still changing. Our policy began as a reaction to the Maltese initiative in the United Nations and for a time was defensive in nature. It then developed in response primarily to pressures from the Department of Defense and the objectives sought were, as one might expect, oriented essentially to national security matters. Within the past two years there has been a shift away from defense pressures and toward resource extractive interests. Thus, if the policies described hereafter appear at times to have a patchwork quilt quality, it is not the fault of the negotiators or the drafters of policy statements but rather the shifting winds of emphasis generated by the Administration on matters foreign and domestic.

II. Sources of United States Policy

The development and exposition of United States foreign policy are a complex process which seldom adheres to textbook methods or established lines of executive authority. I shall therefore set forth here the various sources and evidences of oceans policy which I have considered in developing this article. Such a presentation is designed to serve two purposes: (1) it is a caveat to the reader concerning the sources of my conclusions, and (2) it is a bibliography for those who might wish to pursue the matter of policy interpretation on their own.

At the highest level presidential statements must be considered national policy (at least in foreign affairs, and that is the area with which we are dealing in the law of the sea negotiations). The principal presidential pronouncements


6 For a discussion of the role of these interest groups in the formulation of United States oceans policy, see Knight, The Role of United States Oceans Policy, in INTERNATIONAL RELATIONS AND THE FUTURE OF OCEAN SPACE, Studies in International Affairs No. 10, Institute of International Studies, The University of South Carolina (1973).

7 For an account of the process with respect to United States oceans policy, see Hollick, UNITED STATES OCEANS POLITICS, 10 SAN DIEGO L. REV. 467, 480-85 (1973).

8 Footnotes 9 through 20 contain citations to all of the basic source materials involved in United States oceans policy.
on the topic of law of the sea have been President Johnson's statement at the commissioning of the research vessel, The Oceanographer, in 1966 and President Nixon's later, more comprehensive statement of May 23, 1970, a copy of which appears at the conclusion of this article. Unfortunately, lawyers, scientists, bureaucrats, and others are still quibbling about precisely what the latter statement means in certain passages or why the federal government has or has not (depending on who is speaking) emphasized certain aspects of the statement. Thus, even at the highest level there appears some ambiguity on policy, although in fairness it must be admitted that a certain amount of flexibility is always required in such policy positions. Additional expositions on United States oceans policy have been made by President Nixon in each of his annual foreign policy reports to Congress. A second source of policy is the draft treaty articles which have been submitted from time to time to the Seabed Committee by the United States. In August, 1970, the United States submitted a comprehensive draft seabed treaty. This was followed a year later by a three-part proposal on the breadth of the territorial sea, passage through straits, and fisheries. A revised draft treaty
article on fisheries was introduced at the July-August, 1972, meeting of the Seabed Committee. During the July-August, 1973, Seabed Committee meeting, draft treaty articles were introduced on the subjects of protection of the marine environment, rights and duties of states in coastal seabed economic areas, marine scientific research, and compulsory dispute settlement. These must be regarded as having the highest official sanction, for their submission is permitted only upon clearance by the National Security Council. Of equal value in assessing United States policy positions are working papers submitted to the Seabed Committee. Two such papers have been submitted: one dealing with fisheries and the other with pollution.

Congressional resolutions, though not carrying the force of law, must also be considered as evidences of United States oceans policy, especially if they endorse the policies being supported by the Executive Branch of government. In 1973 both the Senate and the House of Representatives adopted resolutions supporting the basic outlines of United States oceans policy as reflected in presidential statements and subsequent draft treaty articles.

Ranking perhaps below official draft articles, but extremely valuable for their explanations and justifications of policy, are the formal statements made by representatives of the United States to the Seabed Committee during its semi-
annual sessions. Although the general principles contained in such messages are cleared through the negotiating instructions approved by the National Security Council, specific wording is generally left to the negotiating team—the Inter-Agency Law of the Sea Task Force ("Task Force" hereinafter)—and its executive committee. Also in this category are briefings and testimony given by members of the Task Force in open congressional committee and subcommittee sessions, and similar unclassified statements to the State Department's Advisory Committee on the Law of the Sea. Finally, there are the miscellaneous negotiating, educational, and other activities in which members of the Task Force and the United States delegation to the Seabed Committee must engage, whether the Seabed Committee is in or out of session. These include impromptu responses to policy statements by other nations (some made with more consultation and preparation than others), unofficial conversations with representatives of other nations, and speeches and papers before private and unofficial gatherings on the subject.

The policy picture is complicated by the fact that national positions tend to change over the course of negotiations. Clearly, all that our negotiating team


23 Concerning the nature and composition of the Task Force, see Hollick, supra note 5 at 493.


25 The Adviory Committee on the Law of the Sea was created in February, 1972, to serve as an advisory body to the Chairman of the Task Force and the head of the United States delegation to the Seabed Committee. It is presently composed of some sixty members divided into eight subcommittees (petroleum, hard minerals, international finance and taxation, international law and relations, marine environment, fisheries, marine science, and maritime industries).

does should remain essentially consistent with President Nixon's statement of May 23, 1970 (at least until a new oceans policy statement is issued); yet even within that seemingly limited framework substantial flexibility has been evident. The reader is thus cautioned that what follows is only one derivation of United States oceans policy from among all the sources listed above.

III. Description and Discussion of Policy Objectives

Although the agenda of issues being considered in the current law of the sea negotiations are quite lengthy, there appear to be five basic subject matter areas which this nation is presently emphasizing through its policy proposals. Two of these relate to the exploitation of resources of the marine environment, while the other three relate to general uses of ocean space. They may be briefly summarized as follows:

1. The question of the regime to govern exploration for and exploitation of the nonliving resources of the seabed and subsoil. This issue is divided into two subparts: one concerns the regime applicable to the area under adjacent coastal state jurisdiction, including the questions of the extent of such national jurisdiction and the coastal state's rights and duties with respect to activities conducted therein; the other concerns the area beyond such national control, generally referred to as the "deep seabed."

2. The question of management of living marine resources, wherever situated. In some proposals, but not that of the United States, the issue of the limits of national jurisdiction arises here, too.

3. The question of the breadth of the territorial sea and the concomitant right of navigation and overflight on the high seas and through international straits.

4. The question of freedom of scientific research in the ocean.

5. The question of protection of the marine environment.

The underlying premises behind the various policy positions taken on these issues were set forth in President Nixon's Third Annual Report on United States Foreign Policy as follows:

First, multilateral agreement is essential . . . .
Second, freedom of navigation and overflight must be protected . . . .
Third, an equitable system must be established for regulating the

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27 See, for example, the List of Subjects and Issues Relating to the Law of the Sea adopted by Subcommittee II of the Seabed Committee on August 16, 1972, U. N. Doc. A/AC.138/83 at 18-21 (1972), reprinted in 11 INT'L LEGAL MATERIALS 1174 (1972). The list which serves as the agenda for the Third Conference, contains 25 items, 61 sub-items, and 19 sub-sub-items.
exploitation of the resources of the ocean and seabeds beyond national jurisdiction . . . .

Fourth, it is not possible for any nation, acting unilaterally, to ensure adequate protection of the marine environment. As will be seen, these elements form an essential basis of most of the positions described below.

A. Nonliving Marine Resources

1. Areas Subject to Coastal State Jurisdiction

There are two basic issues to be negotiated in connection with this subtopic: (a) the seaward extent of the area subject to coastal state jurisdiction, and (b) the nature of the regime to govern nonliving resource extraction activities conducted in that area. As to the first issue, governmental and nongovernmental proposals have ranged from those which would limit coastal state jurisdiction to extremely narrow areas to those which would afford national competence to the edge of the continental margin and, in some cases, beyond. The initial United States policy position on this question was taken in the 1970 presidential statement and the ensuing draft seabed treaty in which it was proposed that exclusive national jurisdiction be limited to the two hundred meter isobath, that an intermediate or trusteeship zone (to be administered by the coastal state but to be considered as an international area) extend from the two hundred meter isobath to the edge of the continental margin, and that the area beyond the margin be subject to international administration. This original proposal was largely ignored in terms of responses from other delegations during subsequent meetings of the Seabed Committee. During this period of "silent treatment" many of the less developed countries began to believe that they could best serve their economic interests by securing broad coastal state jurisdiction over both living and nonliving resources of the adjacent ocean area. Thus, the once unique two hundred mile territorial sea and fisheries claims of Chile, Ecuador, and Peru suddenly became the widely supported "patrimonial seas" or "economic resource zones" of the early 1970's. There have been a number of different formulations of the resource zone concept during the past two years and no single definitive approach has yet been adopted. However, the essence of all such proposals is

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29 Supra, notes 10 and 12.
30 When the seabed question was first raised in the United Nations, glowing accounts were widely circulated of vast wealth available from seabed resources. As a result, less developed countries were initially inclined toward some sort of international regime which would include revenue sharing or other methods of participation for nations without advanced marine technology. As more facts were developed about the value of marine mineral resources, however, the economic return figures began to shrink, and more interest was expressed in the traditional petroleum and natural gas resources available from relatively near shore areas. For a succinct history of the seabed question see Knight, supra note 12, at 477-86.
that each coastal state should possess some form of exclusive or preferential right over all living and non-living resources in the ocean adjacent to and a substantial distance seaward of its coast (200 miles or the edge of the continental margin, whichever is further seaward, being the popular suggestion). 32

It is in this context of growing support among less developed countries for such an economic resource zone regime that one must view the apparent modification of United States policy evidenced by the statement of the representative of the United States delegation to the Seabed Committee on August 10, 1972, where he observed:

"In order to achieve agreement, we are prepared to agree to broad coastal state economic jurisdiction in adjacent waters and seabed areas beyond the territorial sea as part of an overall law-of-the-sea settlement." 33

The statement went on to note that "[w]e can accept virtually complete coastal state resource management jurisdiction over resources and adjacent seabed areas if this jurisdiction is subject to international treaty limitations in five respects." 34 The qualifications are extremely important and constitute the element of this nation's oceans policy which distinguishes it from those countries asserting more absolute or exclusive maritime zones. 35

During the July-August, 1973, meeting of the Seabed Committee, the United States presented a concrete proposal elaborating on the general theme which had been introduced a year earlier. The "Draft Articles for a Chapter on the Rights and Duties of States in the Coastal Seabed Economic Area" 36 provided that the rights of the coastal state would include "the exclusive right to explore and exploit and authorize the exploration and exploitation of the natural resources of the seabed and subsoil in accordance with its own laws and regulations ...." 37 The landward and seaward boundaries of the "Coastal Seabed Economic Area" were deliberately left blank in keeping with past practice of making the "limits" issue a flexible negotiating point. 38 However, in the tabling


32 Almost all such proposals make clear that these resource zones are in no way intended to interfere with the right of navigation on the high seas and are not to be confused with claims of 200-mile territorial seas in which the adjacent coastal state asserts virtually complete sovereignty. The United States Department of Defense is not particularly sanguine about such provisions however, because of their fear of "creeping jurisdiction" (see post Part III.C of text).


34 Id.

35 There are in fact six qualifications to the United States acceptance of broad coastal state seabed resource zones, for as Mr. Stevenson stated, the grant of jurisdiction must be through international agreement as opposed to unilateral pronouncement or claim.


37 Id. Art. 1(1).

38 Id. Art. 1(2).
speech for the draft treaty articles, Mr. John R. Stevenson observed that the generally preferred seaward limit was two hundred miles, although some states preferred a seaward limit which would embrace the continental margin where that margin extended beyond two hundred miles. In the summary of his statement he mentioned that the United States "would welcome the opportunity of continuing consultations with other States on that outer boundary [since] . . . a precise method of delimiting that area would have to be found." Concerning the landward limit, Mr. Stevenson commented that simplicity and logic dictated the seaward limit of the territorial sea, but that some account might have to be taken of states' vested rights within the two hundred meter isobath under the Convention on the Continental Shelf. Thus a landward limit of the economic zone might consist of a distance of twelve miles or the two hundred meter isobath, whichever was farther seaward.

The five elements referred to in Mr. Stevenson's August 10, 1972, statement, and which are specified in the United States draft articles of July 16, 1973, relate to: (1) maintenance of navigational rights, (2) protection of the marine environment, (3) protection of investments, (4) revenue sharing, and (5) dispute settlement. Because of their importance in the hierarchy of United States oceans policy, each of these elements will be briefly examined.

First, the United States would like international standards to prevent unreasonable interference with other uses of the ocean as a result of the exercise of resource jurisdiction by coastal states. The primary concern is that there be no unreasonable interference with navigation, overflight, and other traditional uses of the ocean as a result of resource extractive activities taking place in coastal areas. The draft treaty articles provide that:

Nothing in this Chapter shall affect the rights of freedom of navigation and overflight and other rights to carry on activities unrelated to seabed resource exploration and exploitation in accordance with general principles of international law. . . .

THE coastal State shall ensure that there is no unjustifiable interference with other activities in the marine environment. . . .
All activities in the marine environment shall be conducted with reasonable regard to the rights of the coastal State. . . .

In putting forward these draft articles, the United States is evidencing its concern—almost preoccupation—with a loosely defined phenomenon called "creeping jurisdiction" in which a coastal state's limited jurisdiction purportedly tends to grow through the gradual addition of more "rights" and "interests," into a virtual territorial sea. The United States is therefore unwilling to accept further expanded jurisdiction over high seas areas unless there are adequate guarantees preserving naval and commercial vessel mobility in any such regime. Our interest in navigation and overflight is primarily a national security matter which will be considered later in relation to other security issues.

The United States has recognized the need in certain situations for regulation of navigation and has therefore included in its draft articles provisions relating to navigation near offshore installations (see also the United States proposals concerning coastal state jurisdiction over navigation with respect to passage through international straits, Part III C). The coastal state is authorized to establish reasonable safety zones around the permitted offshore installations, but such zones must comply with international standards in existence or to be promulgated by the Intergovernmental Maritime Consultative Organization ("IMCO" hereinafter) "regarding the breadth, if any, of safety zones around offshore installations [and] regarding navigation outside the safety zones, but in the vicinity of offshore installations."46

Second, the United States seeks international standards to protect the ocean from pollution. The draft articles provide that:

[The coastal State shall take appropriate measures to prevent pollution of the marine environment from the activities set forth in Article 1 and shall ensure compliance with international standards in existence or promulgated by the [Intergovernmental Seabed Resource] Authority or the Inter-Governmental Maritime Consultative Organization, as appropriate, to prevent such pollution.]

Further discussion of this issue will be postponed until Part III E.

Third, the United States seeks international standards to protect the integrity of investment in the marine environment. The object is to protect the inevitable investment in offshore petroleum and natural gas resources of developing countries by the petroleum industries. The United States is particularly sensitive to the expropriation issue at this time in view of recent petroleum, copper, and other industry seizures in Latin America. It is hoped that treaty provisions can be imposed on the coastal states' resource jurisdiction over broad marine areas which will guarantee the integrity of investments made by foreign companies. The new draft treaty articles provide on this point that:

45 Id. Art. 3(1).
46 Id. Arts. 1(4) and 3(2).
47 Id. Art. 2(b).
The coastal State shall ensure that licenses, leases, or other contractual arrangements which it enters into with the agencies or instrumentalities of other States, or with natural or juridical persons which are not nationals of the coastal State, for the purpose of exploring for or exploiting seabed resources are strictly observed according to their terms. Property of such agencies, instrumentalities or persons shall not be taken except for a public purpose, on a non-discriminatory basis, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken and adequate provision shall have been made at or prior to the time of the taking to ensure compliance with the provisions of this paragraph.  

To make such a provision effective, it must have teeth; there are a number of possibilities for making such a guarantee meaningful including denying any infringing coastal state participation in a revenue sharing program with respect to offshore resources. United States policy with respect to this detail has not yet surfaced.

Fourth, and as alluded to in the last paragraph, the United States seeks sharing of revenues derived from seabed exploitation for international community purposes. The draft treaty articles provide that:

The coastal State shall make available in accordance with the provisions of Article ____, such share of revenues in respect of mineral resource exploitation from such part of the Coastal Seabed Economic Area as is specified in that Article.  

It is not clear from precisely which offshore areas such revenues would come. One possibility is that revenues generated from resource production landward of the two hundred meter isobath, an area already under exclusive national jurisdiction pursuant to the Convention on the Continental Shelf, would not be involved. Rather, some percentage of revenues derived from production between the two hundred meter isobath and the two hundred mile (or other) limit of an economic resource zone would be shared, and all such revenues beyond the two hundred mile limit would be earmarked for international purposes. Of interest is the statement made by Mr. Stevenson in his August 10 presentation, that the United States was repeating its revenue sharing offer as part of an overall settlement despite the conclusion that “a significant portion of the total international revenues will come from the continental margin off the United States in early years.”  

Finally, the United States seeks agreement on a system of peaceful and compulsory settlement of disputes in any area subject to national jurisdiction. In its original draft seabed treaty, the United States set forth in some detail provisions for a tribunal to settle disputes arising out of matters relating to the

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48 Id. Art. 2(d).
49 Id. Art. 2(e).
50 See text accompanying note 39 supra.
51 Statement of John R. Stevenson before the Seabed Committee, August 10, 1972, supra note 22.
Although little debate on dispute settlement procedures took place within the context of a seabed treaty in the Seabed Committee subsequent to the United States proposal, Mr. Stevenson stated on August 10, 1972, that "the principle of compulsory dispute settlement is essential." The draft treaty articles on the rights and duties of states in the seabed economic area provide that "[a]ny dispute with respect to the interpretation or application of the provisions of this chapter shall, if requested by either party to the dispute, be resolved by the compulsory dispute settlement procedures contained in [the treaty]."

On August 22, 1973, the United States introduced draft treaty articles on the subject of compulsory dispute settlement. The draft articles provide for the use of the classical methods of dispute settlement (negotiation, good offices, mediation, conciliation, and arbitration), but also provide that notwithstanding the availability of these procedures, "any Contracting Party which is a party to a dispute relating to the interpretation or application of this Convention which is required by this Convention to be submitted to compulsory dispute settlement procedures on the application of one of the parties, may refer the dispute at any time to the Law of the Sea Tribunal." The Tribunal's judges are to be selected through procedures similar to those used by the International Court of Justice and are to be lawyers of recognized competence in law of the sea matters; further, the Tribunal may be assisted by technical assessors when disputes involve technical questions.

The United States oceans policy position with respect to coastal state jurisdiction over nonliving resources of the seabed and subsoil appears then to be that the United States would support the patrimonial sea or economic resource zone concept, including its extension to a breadth of two hundred miles (or beyond, to the limit of the continental margin), provided that such a regime be established by international treaty agreement and further provided that such an agreement contain satisfactory provisions with respect to the five elements identified and discussed above. Virtually all debate concerning the economic resource zone concept to date has turned about the question of exploitation of oil, gas, sulphur, and other minerals from the seabed and subsoil. However, another facet of United States policy with respect to economic zones relates to nonextractive uses of ocean space, particularly the construction and operation of facilities utilizing artificial installations. A portion of the draft treaty articles on rights and duties of states in the economic zone was therefore devoted to this issue, which itself was generated by a Nixon Administration decision to pursue the alternative of increased crude oil imports as a short-term solution to the so-called energy crisis. Since the use of deep draft port and harbor facilities

55 Id. Art. 2.
56 For an analysis of the energy issue as well as the rationale behind the supertanker-superport approach to the problem, see Knight, International Legal Problems in the Construction and Operation of Offshore Deep Draft Port Facilities, in HAZARDS OF MARITIME NAVIGA-
constructed outside the limit of the territorial sea appears to be the most efficient method of importing crude oil, a part of the United States oceans policy position has now become the legitimization in international law of the construction and operation of such facilities.

The draft treaty articles provide that in addition to resource exploration and exploitation rights, the coastal state shall have the right in the economic zone to authorize and regulate (a) the construction, operation and use of offshore installations affecting its economic interests, and (b) drilling for purposes other than exploration and exploitation of resources. Further provisions of the draft articles specify that the coastal state may establish reasonable safety zones around such installations, that such installations do not possess the status of islands and that they therefore have no territorial sea or economic resource zone of their own, and that their presence does not affect the delimitation of the territorial sea. This authorization is sufficiently general to extend beyond the "superport" concept and would presumably encompass such enterprises as floating airports and cities, offshore power installations, artificial reefs, multipurpose "sea islands," and even the stationing of icebergs towed from Antarctica to be used as sources of fresh water for the adjacent land mass and its population.

2. The Deep Seabed

Assuming that some agreement can be reached on the seaward extent of national jurisdiction, there still remains the question of the regime to govern extraction of resources of the seabed and subsoil beyond that limit. At present the petroleum and natural gas potential of such an area is highly speculative. However, the exploitation of manganese nodules for their primary metals content of nickel, manganese, copper, and cobalt appears to be commercially feasible within this decade, perhaps within the next three to five years, given the proper legal/institutional environment.

As already noted, in the fall, 1970, the United States proposed a comprehensive regime to govern exploitation of the deep seabed mineral resources. On the issue of seabed policy, the United States representative to the Seabed Committee stated on August 10, 1972:

The basic interests we seek to protect in an international seabed regime are reflected in the five points to which I referred earlier, coupled with our proposal for international machinery to authorize and regulate exploration and use of the resources of the area.

Thus, most of the negotiation under way now on this topic turns about the pre-
cise nature of the international machinery, the composition of its decision mak-
ing authority, the rules under which it will dispose of resources under its juris-
diction, the nature and objectives of revenue sharing, and other details. Prop-
osals have been introduced in the Seabed Committee, however, which the
United States feels are outside its range of acceptable seabed policies. One such
proposals, made by a group of Latin American nations, would authorize the inter-
national seabed agency itself (or in joint ventures with stages or companies)
to exploit the seabed resources. A cornerstone of United States seabed policy
is firm opposition to any proposal of this nature. Mr. Stevenson, in his August
10, 1972, speech stated:

[W]e believe it is important to dispel any possible misconceptions that
my Government would agree to a monopoly by an international operating
agency over deep seabed exploitation or to any type of economic zone that
does not accommodate basic United States interests with respect to resources
as well as navigation.

One is thus led to the conclusion that so long as the five principles enunciated
in connection with coastal state jurisdiction are incorporated, and some form of
international machinery which will give appropriate decisional authority to
technologically advanced states and avoid creation of an agency monopoly is
developed, the United States is relatively flexible at this time on the elements
of a seabed regime.

Another essential element of United States seabed policy is that this nation
favors, for the time being at least, international rather than national solutions
to the problem of the absence of an economically secure regime to govern the
mining of manganese nodules. Bills were introduced in the Ninety-Second Con-
gress and reintroduced in the Ninety-Third Congress, which would, through
reciprocal national legislation, create a system, administered by each participating
nation only with respect to its own nationals, permitting exploration for and
exploitation of seabed minerals. Although it is undeniable that the mere intro-
duction of such bills and the strong support evidenced by the domestic mining

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62 The United States has proposed a 24-member Council, divided into groups of 6 and 18,
the former constituted of nations with the highest gross national products, the latter constituted
of developing nations (with representation for landlocked states). To take affirmative action, a
majority of both groups, in addition to a majority of the whole, would be required. For an
analysis of various proposals for the governing body of an international seabed authority, see
63 For an in-depth identification and analysis of the elements of the United States Draft
United Nations Convention on the International Seabed Area concerning these issues, see
Knight, supra note 12, at 496-534.
64 Working Paper on the Regime for the Sea Bed and Ocean Floor and Its Subsoil Beyond
65 Statement by John R. Stevenson before the Seabed Committee, August 10, 1972, supra
note 22.
66 S. 2801 and H.R. 13904, 92d Cong., 2d Sess. (1972); See, Hearings on Deep Seabed
Hard Mineral Resources (H.R. 13904) before the Subcommittee on Oceanography of the
House Committee on Merchant Marine and Fisheries, 92d Cong., 2d Sess. (1972); and Hear-
ings on S. 2801 before the Subcommittee on Minerals, Materials, and Fuels of the Senate Com-
mittee on Interior and Insular Affairs, 92d Cong., 2d Sess. (1972). No action was taken by
 either subcommittee on the bills during the ninety-second session of Congress.
67 S. 1134 and H.R. 9, 93d Cong., 1st Sess. (1973) are identical in language to their
predecessors in the Ninety-Second Congress.
industry\textsuperscript{68} gave impetus to more progressive action in developing an international seabed regime in the Seabed Committee, their passage could easily prejudice current negotiations—and United States oceans policy—by encouraging unilateral responses from developing coastal states with respect to near shore resources.\textsuperscript{69} In testimony on March 1, 1973, before the Subcommittee on Oceanography, House Merchant Marine and Fisheries Committee, the Administration took a position in opposition to enactment of such bills until such time as either (1) it becomes clear that unsatisfactory progress is being made toward adoption of an international seabed regime in the current negotiations or (2) the Third Conference has concluded without taking appropriate action on the subject.\textsuperscript{70}

In view, however, of the rapid developments in technology, the United States indicated in both its March 1, 1973, congressional testimony and its March 19, 1973, statement in Subcommittee I of the Seabed Committee that it favored provisional entry into force of those portions of the permanent seabed regime and machinery applicable to deep seabed mineral development. The essential objective of this aspect of national oceans policy is to ensure that the short-term development of seabed minerals is done in accordance with the international regime to be agreed upon. The advantages of such a system of provisional entry into force of the seabed treaty are that:

It would enable nations to gain benefits from resource development promptly; it would provide an opportunity to collect and disseminate information on the technology and impact of resource development in its early growth years; it would substantially expedite the preparation of detailed annexes to the treaty, which would then be promulgated by the permanent machinery and could be judged against the background of a sound data base acquired during the provisional period; it would ensure that the resources were developed under international administration from the start; and it would stimulate States to expedite the ratification process.\textsuperscript{71}

In response to the United States initiative for a provisional regime, the Seabed Committee forwarded to the United Nations Secretariat a recommendation for a report which would describe “examples of precedents of provisional application, pending their entry into force, of all or part of multilateral treaties. . . .”\textsuperscript{72}

\textsuperscript{68} For an exposition of the industry view, see Humphreys, An International Regime for the Exploration for and Exploitation of the Resources of the Deep Seabed—The United States Hard Mineral Industry Position, 5 NATURAL RESOURCES LAW. 731 (1972).


The Secretariat's study was presented to the Seabed Committee during its July-August, 1973, meeting in Geneva and identified a number of such precedents, thus increasing the probability that such a course of action would ultimately be adopted.73

B. Fisheries

The United States has historically opposed the practice and has challenged the international legality of the unilateral extension of exclusive fisheries zones beyond reasonably narrow limits.74 For many years this nation asserted that no state could exercise exclusive fisheries jurisdiction beyond the then widely accepted three mile territorial sea. However, as part of a rising tide of unilaterally extended exclusive fisheries jurisdiction zones, the United States adopted in 1966 a fisheries zone extending twelve miles from the coastline.75 Accordingly, this nation now acknowledges the right of coastal states to extend their fisheries jurisdiction to that distance. However, the United States has been adamant in its opposition to the exercise or assertion of exclusive coastal state jurisdiction over fisheries beyond the twelve mile limit and has continued to oppose claims and acts by Latin American, African, and other nations which have sometimes resulted in the seizure of United States fishing vessels.

One of the difficulties in developing a uniform national policy on international fisheries is that the fisheries industry is bifurcated. The majority of our fishing effort goes into "coastal" fisheries, i.e., living resources located relatively near our own shores. However, a substantial portion of the industry is distant water oriented, fishing for shrimp off the coasts of Latin American nations and for tuna in the South Pacific and East Atlantic oceans. Thus any policy developed by the United States must seek to preserve the economic interests of both sections of the domestic fishing industry.76

It is also worth noting, before elaborating on United States fisheries policy, that the resumption of hostilities between the United Kingdom and Iceland, initiated by Iceland’s extension of its exclusive fisheries zone to fifty miles on September 1, 1972,77 has resulted in this dispute being submitted to the International Court of Justice.78 The I.C.J. is not known for the blinding speed

74 See, e.g., Herrington, U.S. Policy on Fisheries and Territorial Waters, 26 DEPT STATE BULL. 1021 (1952).
76 With this one exception, I have not in this article identified the various industrial and special group interests which are materially assisting in shaping United States oceans policy. For a treatment of that subject, see Knight, The Role of Special Domestic Interests in the Formulation of United States Oceans Policy, supra note 6.
77 Ministry of Fisheries of Iceland, Regulations of July 14, 1972, Concerning the Fishery Limits Off Iceland, effective September 1, 1972; reprinted in 11 INT’L LEGAL MATERIALS 1112 (1972).
78 The I.C.J. issued an interim order in the case on August 17, 1972 [reprinted in 11 INT’L LEGAL MATERIALS 1069 (1972)]. On August 18, 1972, it directed that the first pleadings be addressed to the question of the jurisdiction of the Court to entertain the dispute [re-
with which it reaches decisions, but it is possible that the I.C.J. would issue an opinion on the merits prior to completion of the Third Conference which could have a profound effect on the outcome of the current negotiations with respect to fisheries.

The United States position on fisheries, which constitutes a clear departure from past national practices, is contained in the draft treaty article on fisheries submitted to the Seabed Committee during its July-August, 1971, session, and as revised for submission to the July-August, 1972, session. The essential elements of the revised position include:

1. Coastal states will have regulatory (conservation) authority over and preferential rights to all coastal species off their coasts, to the limits of their migratory range. The same principle is applicable to anadromous species with the preference going to the state in whose fresh waters they spawn.

2. Coastal states are obligated to provide access by other states to any portion of such resources not fully utilized by the coastal state, with appropriate priorities to states which have traditionally fished the resource or states in the region, including landlocked states.

3. Coastal and anadromous resources which are located in or migrate through waters adjacent to more than one coastal state are to be regulated by agreement among the affected states (the revised proposal contains sections on enforcement and dispute settlement to provide the framework for this cooperative process).

4. Highly migratory oceanic resources (tuna, whales, etc.) are to be regulated by international fishery organizations.

5. The conservation standard is to be maximum sustainable yield, taking into account relevant environmental and economic factors.

This "species approach" has the advantage of treating the biologic unit as a whole rather than subjecting it to a plethora of jurisdictions or irrational (in the biologic sense) boundaries. In the words of the summary of an explanatory statement of the United States fisheries position:

"[T]he legal regime for the management of marine fisheries must, if it is to be most effective in achieving the conservation and rational utilization..."

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of the resources, take into account the essential differences and characteristics of individual fishery resources which determine the type of management systems best suited to them, respectively.\textsuperscript{81}

The species approach categorizes marine fishes into three groups: coastal, anadromous, and highly migratory oceanic. The first category, coastal, being located primarily in waters above the continental margin, is "peculiarly susceptible of management by the coastal state or when its distribution or coastwise migration makes it appropriate, by neighboring coastal states working together."\textsuperscript{39,82}

The position on coastal species was further elaborated in these words:

\begin{quote}
These are the species upon which local, coastal fishermen are exclusively dependent because of the small size, short range, and limited carrying capacity typical of their vessels. Aside from the food source such fisheries provide, they also have important social and economic implications which are often more important to the coastal state than the efficient production of raw protein.\textsuperscript{83}
\end{quote}

The position of the United States on the second category of fish, anadromous species,\textsuperscript{84} was set forth in some detail in the \textit{Fisheries Working Paper}.\textsuperscript{85}

In developing its position the United States noted that: (1) anadromous species are highly dependent "upon the maintenance by their 'host' state of a suitable environment for a key position of their life history";\textsuperscript{86} (2) this dependence upon the freshwater environment posed "survival hazards not faced by purely marine species";\textsuperscript{87} that (3) these hazards—or mortality factors—can be overcome only at a great deal of expense; and (4) host states have tended to invest heavily in the required protective activities. The economic and biologic bases for the United States position in favor of preferences for coastal states with respect to the harvesting of anadromous species are that: the distinct stocks and substocks of anadromous species have unique genetic pools which must be separately managed in order to avoid eliminating stocks which have not fared well in the freshwater environment during a particular year, and that the fish are at their largest just before re-entering fresh water.\textsuperscript{89} Thus, the United States position paper concludes:

\begin{itemize}
\item \textsuperscript{82} U.N. Doc. A/AC.138/SC.II/SR.60 at 2 (1973).
\item \textsuperscript{83} \textit{Id.}
\item \textsuperscript{84} Anadromous species are defined in the United States working paper on the subject as those which require a fresh-water environment for their spawning, egg incubation, and, in most cases, the rearing of juveniles, and upon the marine environment for the majority of their growth and maturation. Among anadromous species are the Pacific and Atlantic salmons, trouts, shads, striped bass, smelts, and sturgeons.
\item \textsuperscript{85} \textit{Fisheries Working Paper, supra} note 19.
\item \textsuperscript{86} \textit{Fisheries Working Paper, supra} note 19, at 2.
\item \textsuperscript{87} \textit{Id.} at 3.
\item \textsuperscript{88} Among the mortality factors cited were natural obstacles to upstream migration (landslides, log jams), man-made obstacles (hydroelectric and flood control dams), diversion of water for irrigation or industrial use, thermal pollution, silting of spawning gravel, and oxygen deficits caused by sewage and other biodegradable wastes.
\item \textsuperscript{89} \textit{Fisheries Working Paper, supra} note 19, at 4-5.
\end{itemize}
Bearing in mind these two considerations—the need for independent management of individual genetic units which are intermingled during most of their marine existence and the net increase in biomass during at least the latter part of the marine existence—a high seas fishery for salmon is unsound both in terms of the economics of the fisheries and the biology of the animals.90

The basis for affording the state in whose fresh waters anadromous species spawn the preference was then based on the economic investment argument outlined earlier. The United States delegate asserted:

What justifies giving the host state sole management authority is the fact that if it is to take the appropriate measures in its inland waters, it must be assured that salmon will be harvested close to the coast, and not in the open ocean where the salmon races intermingle and thus cannot be rationally managed.91

The third category of fish—highly migratory oceanic fishes92—have extensive migratory ranges. This dictates that the fishing vessels pursuing such species also be able to move rapidly and freely over extensive ocean areas. The United States position suggests that although agreement might be reached on the rights of access necessary for the harvest of such species in the waters of one nation’s two hundred mile economic resource zone by the vessels of another nation, “the practice of the two hundred mile zone doctrine—as opposed to its theory—has not been such as to lead one to find much comfort in that argument.”93 The Fisheries Working Paper concludes that:

When such artificial constraints [as exclusive fishing zones] are imposed on the freedom of movement of tuna vessels, efficiency drops, catches are reduced, the supply available to mankind is diminished, and what supply there is, is available at a higher cost—a higher cost not only to the consumer, but to the world as a whole.94

The paper also observed that the requirements of scientific research and the application of conservation measures with respect to such species were also ill served by national jurisdictional exclusivity.95 With respect, for instance, to a conservation system based on national quotas, the Fisheries Working Paper suggested that “Since the populations do occur in several national jurisdictions and also beyond and they are fished by nationals of several countries, the application of such a co-ordinated quota requires international management of the fishery for conservation purposes.”96 It is obvious that the economic and biologic arguments advanced by the United States in favor of coastal state preferences for

90 Id. at 5.
91 Statement of Howard W. Pollock, supra note 80, at 5.
92 Highly migratory oceanic fishes are defined in the Fisheries Working Paper as being characterized by extremely broad distributional ranges and large-scale, often transoceanic, migrations. The prime example is, of course, the tunas.
93 Fisheries Working Paper, supra note 19, at 8.
94 Id.
95 Id. at 8-10.
96 Id. at 10.
anadromous species and international management for highly migratory oceanic fishes are sound. It is also obvious that these arguments were developed in an effort to protect specific United States fishery industry interests—viz., the salmon and tuna industries, respectively—and not out of an altruistic desire to achieve rational fisheries management. Thus, the acceptance of the “species” approach turns as much on the perceptions by other nations of what self-interests are being served in the United States position on fisheries as it does on the biologic/economic logic of the position.

Should the United States be unable to sell its species approach, it is clear that there is room in United States oceans policy for acceptance of the zonal approach. There is certainly much support in industry and in Congress for immediate imposition of a zonal approach (a two hundred mile limit) in order to conserve rapidly diminishing fishery resources off the coast of the United States. 97 Although unilateral action is unlikely at the present time (a two hundred mile bill passed by Congress would very likely receive a presidential veto because of current oceans policy and the ongoing negotiations leading to the Third Conference), it seems almost a certainty should the Third Conference fail to produce some acceptable agreement on international fisheries management issues.

The United States policy on fisheries was summed up at the July-August, 1972, meeting of the Seabed Committee as follows:

"Our basic interest is to assure rational use and conservation of all fish stocks. To achieve this, we believe coastal States should have substantial jurisdiction over all fisheries, including anadromous species, except where the migratory habits of certain fish stocks dictate another system. . . . In coastal areas jurisdiction should be limited by such international standards as would assure conservation and full utilization of the living resources. . . .

Thus, we can support broad coastal State jurisdiction over coastal and anadromous fisheries beyond the territorial sea subject to international standards designed to insure conservation, maximum utilization and equitable allocation of fisheries, with compulsory dispute settlement, but with international regulation of high migratory species such as tuna. 98

This, one presumes, is the “word” on United States fisheries policy, yet the language contains a sufficient measure of flexibility to prevent any hard conclusions about the limits to which the nation’s negotiators might be willing to go for the sake of agreement.

C. Territorial Sea Breadth: Navigation and Overflight on the High Seas and Through International Straits

Two major United States interest groups—the Department of Defense

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97 See, e.g., H.R. 200 and S. 380, 93d Cong., 1st Sess., 1973, which would extend the United States exclusive fishery zone from 12 to 200 miles or to the outer limits of the continental shelf, respectively. See also H.R. 9137, 93d Cong., 1st Sess., 1973, which would extend the United States exclusive fishery zone to 200 miles on an interim basis, pending conclusion of a suitable international agreement.

98 Statement of John R. Stevenson, August 10, 1972, supra note 22, at 64.
and the commercial maritime community—have a significant stake in the outcome of the Third Conference with respect to issues concerning freedom of navigation on the high seas. The importance of maintaining a free flow of commerce on the seas cannot be overemphasized. This has been highlighted by the so-called “energy crisis” and the recent decision to increase ocean-borne shipments of crude oil from the Middle East to alleviate present and impending shortages of power for our industrial society. But beyond the obvious high profile issues there exists a continuous, intricate, and essential exchange of commodities among nations which takes place primarily, indeed almost exclusively, at sea. To disrupt that exchange by imposing additional costs or other burdens to maritime commerce would be to disrupt the basis for our present civilization. To the extent that United States oceans policy seeks to avoid the imposition of additional costs or burdens to maritime commerce, it is in keeping with high ideals and sound logic. Yet the navigation issue was first raised in the development of United States oceans policy in the context of the needs and desires of the Department of Defense, not the commercial maritime community. I have therefore developed this portion of the article in terms of defense interests, for in expounding its policy on this issue the United States has, rightly or wrongly, irrevocably tied the question of free navigation to its world military position.

The Department of Defense has from the outset played an instrumental role in developing current United States oceans policy. The primary concerns of the Department of Defense are twofold: (1) that the world ocean remain available for free and unimpeded navigation of naval vessels, and (2) that the seabed beneath the world ocean beyond the continental shelves remain available for the implantation of antisubmarine warfare (ASW) tracking and detection devices.

The matter of securing access to the seabed for implantation of ASW tracking and detection devices is dealt with in the United States draft seabed treaty where “other uses” of the seabed beyond the limits of national jurisdiction are to be kept open on a non-exclusive basis. Article III of the draft seabed treaty provides that the International Seabed Area—the area beyond the two hundred meter isobath line—shall be open to use by all states, without discrimination, except where otherwise provided by the Convention. The draft treaty provides “otherwise” only with respect to exploration and exploitation of certain natural resources, presumably leaving all other uses to be covered by the “open to use by all States” provision. As noted by a United States representative, “[t]he rights of states to conduct activities other than exploration and exploitation of natural resources in the International Trusteeship Area and beyond would be expressly protected by the convention.”

The issues of the breadth of the territorial sea and free transit through international straits were covered in Articles I and II of the three part draft treaty submitted to the Seabed Committee in 1971. Those articles provide for a max-
minimum breadth for the territorial sea of twelve nautical miles, and a right of transit through international straits equivalent to that now in force on the high seas, including the rights of submerged passage and overflight. This position was supposedly necessitated by the fact that a large number of straits now containing corridors of high seas, thus ensuring an unimpeded right of passage, would become entirely territorial waters if the breadth of the territorial sea were extended to twelve miles. The demand for free transit through such waters has been made a nonnegotiable cornerstone of the United States position. In a speech before Subcommittee II of the Seabed Committee during its July-August, 1971, meeting, the United States representative stated that his Government "would be unable to conceive of a successful Law of the Sea Conference that did not accommodate the objectives of these Articles." Such a proposal departs substantially from the existing international law on the subject which recognizes only a right of innocent passage (defined as passage which is not prejudicial to the peace, good order, or security of the coastal state) through international straits comprised of territorial areas. Further, under present law, submarines are required to navigate on the surface and show their flags when transiting such straits and overflight is not included as an incident of innocent passage. Thus, this nation is seeking substantial changes in the present international law with regard to the right of passage through straits.

Negative responses to the straits and territorial sea breadth proposals were rather vehement, with some justified in their concern over the potential danger from pollution and the threat of military confrontation in areas adjacent to their national territories. Recognizing these valid interests of the coastal state the United States put forward specific proposals at the July-August, 1972, meeting of the Seabed Committee concerning navigational safety in straits and pollution prevention which should to some extent alleviate the coastal states' concerns. Specifically, the United States proposed a system of strict liability and coastal state enforcement for vessels and aircraft transiting straits based on rules and regulations to be established by the Inter-Governmental Maritime Consultative Organization (IMCO) (for vessels) and the International Civil Aviation Organization (for aircraft). This concession notwithstanding, the United States has raised the militarism issue and must pay the price for that approach in the negative reaction of many states. In spite of the reaction, however, the position was reiterated in August, 1972:

It is our candid assessment that there is no possibility for agreement on the breadth of the territorial sea other than twelve nautical miles. The

106 Territorial Sea Convention, Article 14(6).
107 See, e.g., the excerpts from foreign delegations' statements in response to Articles I and II in Knight, The 1971 United States Proposals on the Breadth of the Territorial Sea and Passage Through International Straits, supra note 13 at 774-79.
United States and others have also made it clear that their vital interests require that agreement on a twelve mile territorial sea be coupled with agreement on free transit of straits used for international navigation and these remain basic elements of our national policy which we will not sacrifice.  

A counterproposal on the straits passage issue sponsored by eight nations was submitted during the March-April, 1973, meeting of the Seabed Committee. That proposal would give great discretion and authority to coastal states with respect to vessels navigating near their shores. Its clear incompatibility with United States interests prompted the United States representative to express "deep disappointment" at the proposal which, in his words, "confused the issue of passage in the territorial sea in areas other than international straits with the very different issue of transit through and over international straits." Mr. Moore attempted to clarify the issue by identifying three separate aspects of the freedoms of navigation and overflight:

- First is the preservation of high seas navigation freedoms beyond the territorial sea. Such freedoms should be fully protected in connection with any possible coastal state economic jurisdiction beyond a 12-mile territorial sea. 
- Second... is a truly meaningful right of innocent passage within an agreed 12-mile territorial sea in areas other than straits used for international navigation. [With agreement on a 12-mile territorial sea] it will be even more important to protect the community interest in navigation in the territorial sea. 
- Third... is the right of vessels and aircraft of all nations to transit freely through and over straits used for international navigation. 

The United States representative reiterated these distinctions in the subsequent (July-August, 1973) meeting of the Seabed Committee. He emphasized that "the doctrine of innocent passage was not adequate when applied to straits used for international navigation and did not see any need to revise the concept of innocent passage."

In short, it is the straits issue which is paramount.
and it is clear that the achievement of many other national objectives in the current law of the sea negotiations hinges on the United States' ability to achieve an acceptable agreement concerning navigation in international straits.

D. Freedom of Scientific Research

Although actively promoted by the marine science community in the United States, this nonresource issue did not receive much emphasis in United States oceans policy deliberations prior to 1973. In draft treaty articles submitted and statements made before 1973, the only reference to scientific research in the oceans was contained in the draft seabed treaty which required parties thereto "to encourage, and to obviate interference with, scientific research." However, at the March-April, 1973, meeting of the Seabed Committee two major speeches on the subject of marine scientific research were given by representatives of the United States, and during the July-August, 1973, meeting, the United States submitted the "Draft Articles for a Chapter on Marine Scientific Research." Before analyzing the policy evidenced by these statements and documents, however, brief digressions on the existing international law of marine scientific research and conflicting views with respect to future international policy are in order.

Within the territorial sea, a coastal state has an absolute right of refusal with respect to proposed research activities. On the high seas, which begin legally at the seaward limit of the territorial sea, and the deep ocean floor, beyond the limit of the continental shelf, there is no presently recognized right of limitation of research by coastal states. Article 5(8) of the Convention on the Continental Shelf provides for the following regime with respect to research activities on the continental shelf:

The consent of the coastal State shall be obtained in respect of any research concerning the continental shelf and undertaken there. Nevertheless, the coastal State shall not normally withhold its consent if the request is submitted by a qualified institution with a view to purely scientific research into the physical or biological characteristics of the continental shelf, subject to the proviso that the coastal State shall have the right, if it so
Industrialized nations with the potential to convert raw scientific data into economic benefit or military power tend to favor removal of all limitations on scientific research in the oceans including those now present with respect to the continental shelf. Developing nations perceive that completely unrestrained and unregulated scientific research only promises to widen the economic gap between developed and developing nations principally because the latter do not possess the technical skills or industrial wherewithal to gain from such data even should it be provided to them by the developed nations' research institutes. This perception has led, as will be noted below, to one of the principal facets of United States policy on the marine science question. It is within this framework, then, that one must view the United States policy initiatives.

On March 26, 1973, a member of the United States delegation to the Sea-bed Committee delivered a paper to Subcommittee III pointing out the research efforts to date concerning the study of the ocean floor, giving particular emphasis to the potential benefits to be derived therefrom. Mr. Albers concluded his speech by emphasizing two points, viz., "the importance of the study of the ocean basins for knowledge of earth processes, hazards and resources," and that "opportunity for scientific research should be freely open to all and for the benefit of all."

A week later Dr. Philip Handler, President of the National Academy of Sciences, delivered a statement to Subcommittee III in which he posited that "science did, indeed, contribute to technological and economic development"; that much of today's ocean science was "conducted on a co-ordinated, multiple-ship and multiple-nation basis"; and therefore, a desirable goal should be "to ensure, through appropriate treaty agreement, that the realization of the commonly accepted goals of scientific research at sea [were] facilitated, not hindered."

To balance the obvious concerns of coastal states against this desire for the facilitation of ocean research, Dr. Handler introduced the National Academy of Science's proposal for an agreement on marine scientific research. This proposal has as its heart the distinction between "open research" and "limited research," the former being "research intended for the benefit of all mankind and characterized by full publication of results," while the latter is "exploration intended for the economic benefit of a limited group, as evidenced by restrictions on publication and the availability of data and samples." The marine scientific community, Handler stated, was exclusively concerned with open research. The proposal would envision no restrictions on basic open research beyond the territorial sea and would encourage agreement on open research within the territorial sea subject to certain arrangements. Then, on July 19, 1973, the...
United States presented to the Seabed Committee draft treaty articles on the subject of marine scientific research. These draft articles must therefore be considered as the latest and most authoritative position of the United States on this topic.

Article 1 sets the tone for the United States policy on the issue by providing that:

Scientific research in the sea being essential to an understanding of the global environment, the preservation and enhancement of the sea and its rational and effective use, States shall promote and facilitate the development and conduct of all scientific research in the sea for the benefit of the international community. All States, irrespective of geographic location, as well as appropriate international organizations may engage in scientific research in the sea, recognizing the rights and interests of the international community and coastal States, particularly the interests and needs of developing countries, as provided for in this Convention.

There then follow a number of provisions concerning the conduct of scientific research in the oceans, including specifications that (a) such research be conducted with reasonable regard to other uses of the sea (and that such other uses be conducted with reasonable regard to the conduct of scientific research), (b) such research be conducted with strict and adequate safeguards for the protection of the marine environment, (c) such activities should not form the legal basis for any claim to any part of the sea or its resources, and (d) states should promote international co-operation in scientific research exclusively for peaceful purposes.

With these preliminaries aside, Article 6 then provides, with respect to the territorial sea of coastal states, that "[c]oastal States in the exercise of their sovereignty shall co-operate in facilitating the conduct of scientific research in their territorial sea and access to their ports by research vessels." This follows the basic approach recommended by the National Academy of Sciences, although it does little more than place an obligation on coastal states to negotiate in good faith concerning the conditions of access to their territorial seas by ocean research vessels and personnel. In that respect it is not unlike the obligation created by Article 3 of the Convention on the High Seas concerning landlocked states and their coastal neighbors whereby the latter are required to provide appropriate transit and port access rights "by common agreement." The mandatory

126 Id. Art. 1.
127 Id. Art. 2.
128 Id. Art. 3.
129 Id. Art. 4.
130 Id. Art. 5.
language of Article 3 of the Convention on the High Seas, as well as the mandatory language of Article 6 of the United States draft articles on marine scientific research, is qualified ("common agreement," or "cooperation") to such an extent that in fact no mandatory obligation attaches in either case.

Beyond the limit of the territorial sea and within the area of any economic resource zone established by agreement, Article 7 provides:

States and appropriate international organizations shall ensure that their vessels conducting scientific research shall respect the rights and interests of the coastal State in its exercise of such jurisdiction, and for this purpose shall

a. provide the coastal State at least —— days advance notification of intent to do such research, containing a description of the research project which shall be kept up to date;

b. certify that the research will be conducted in accordance with this Convention by a qualified institution with a view to purely scientific research;

c. ensure that the coastal State has all appropriate opportunities to participate or be represented in the research project directly or through an appropriate international institution of its choice; the coastal State shall give reasonable advance notification of its desire to participate or be represented in the research within —— days after it has received notification;

d. ensure that all data and samples are shared with the coastal State;

e. ensure that significant research results are published as soon as possible in an open readily available scientific publication and supplied directly to the coastal State;

f. assist the coastal State in assessing the implications for its interests of the data and results directly or through the procedures established pursuant to Article 5;

g. ensure compliance with all applicable international environmental standards, including those established or to be established by [appropriate organizations].

Beyond the limit of an economic resource zone, scientific research would, presumably, be subject to no national restrictions.

The United States proposal would reverse the "burden of proof" from the regime of Article 5(8) of the Convention on the Continental Shelf by permitting research to proceed after expiration of a notice period provided that certain assurances are given and certain conditions concerning the conduct of the expedition observed. The only power of the coastal state (in addition, of course, to being able to compel adherence to the assurances and conditions) is to have representation in the venture.

In the general debate on the scientific research issue in the Seabed Committee, it has become clear that developing coastal states will probably be reluctant to support an open research proposal such as that proffered by the United States unless some quid pro quo can be secured. The most often discussed of such bargaining elements is the provision of technical assistance to developing states in return for the right of access. To date there have been much confusion and little

understanding of precisely what is meant by the concept of "technical assistance" (or "technology transfer" as it is sometimes called) in the context of the law of the sea negotiations. In his speech of July 24, 1973, introducing the draft treaty articles on marine scientific research, Mr. McKernan attempted to clarify the United States position on this issue. The summary record reports that:

With regard to the developing countries, he had already stated in August 1972 that the United States was willing to support multilateral efforts to enable those countries to interpret and use scientific data for their own benefit, to broaden their knowledge in the field of marine scientific research, and to obtain equipment for such research. His delegation reaffirmed its willingness to consider specific proposals in that respect. He hoped that such proposals would be made during the debate on the transfer of research technology. It would also be useful to establish regional centres for training in marine science. International machinery could be established to assist the developing countries in assessing for their own interests the implications of research data and results. The United States had proposed that the flag-State of research vessels should be required to assist the coastal State in interpreting data and results when scientific research was conducted in areas beyond the territorial sea, where the coastal State exercised jurisdiction over sea-bed resources and coastal fisheries.\(^\text{134}\)

In a subsequent statement on the same day, Mr. McKernan elaborated upon this theme, noting that the technical assistance program which the United States envisioned was a two stage process involving, first, the receipt of assistance by developing nations in interpreting data about marine areas of concern to them in a manner favorable to their interests, and second, the development of means "to enable all countries not only to interpret the data for themselves, but also to engage in scientific research in the marine environment."\(^\text{3}\) McKernan also reiterated the United States willingness, in principle, to commit funds to support:

\[\text{M}ultilateral efforts by all appropriate international agencies to create and enlarge the ability of developing States to interpret and use data for their economic benefit and other purposes; to augment their expertise in the field of research; and to obtain scientific research equipment.\(^\text{136}\)

To summarize, the United States supports a regime imposing as few restrictions on marine scientific research as politically feasible, while offering, as *quid pro quo* for such a regime, technical and financial support for an as yet ill-defined program of technical assistance.

### E. Protection of the Marine Environment

Elements of the United States oceans policy with respect to protection of the marine environment from degradation by pollution are contained in virtually all of the proposals and policy statements issued to date. Outside the context of the Seabed Committee, the United States has pressed for agreement on the ocean
dumping convention which was signed in London last year,\textsuperscript{137} and is working with the institutions being established as a follow-up to the United Nations Conference on the Human Environment on land based pollution issues. It is the United States' view that these two issues are beyond the competence and mandate of the Seabed Committee and that the latter group should limit its antipollution concern to seabed mineral exploitation matters and certain aspects of vessel pollution.\textsuperscript{138} In that regard, the United States supports the concept of strict liability with respect to cleanup costs and pollution damage from seabed exploration and exploitation activities.

The United States is also working within the IMCO on the problem of spillage from accidents involving tankers carrying crude petroleum, as well as general navigational safety, including mandatory shipping routes and separation lanes.

Within the Seabed Committee, the United States has submitted two major policy documents—first, a working paper on competence to establish standards for the control of vessel source pollution,\textsuperscript{139} and second, a set of draft treaty articles on the protection of the marine environment and the prevention of marine pollution.\textsuperscript{140} In the working paper the United States commented on the sources of marine pollution, suggesting that with respect to land based sources "the Seabed Committee does not have the expertise to deal adequately with the technical aspects of these complex problems."\textsuperscript{141} Natural seepage of oil from the seabed was also dismissed from consideration since there was "no known method of controlling this source."\textsuperscript{142} Pollution from seabed mineral development, although contributing only five per cent of nonland-based ocean pollution, was nevertheless dealt with in the draft seabed treaty and was therefore not discussed in the working paper.\textsuperscript{143} Pollution from vessels, constituting ninety-five per cent of nonland-based ocean pollution, was identified in the working paper as the major topic of that presentation. Three principal methods of introducing pollutants into the marine environment from vessels were identified: (1) collisions and other maritime casualties, (2) loading and bunkering operations, and (3) operational discharges.\textsuperscript{144} The paper noted that the latter source was the major contributor to vessel pollution.

The issue dealt with in the substantive portion of the paper was the "consideration of standards to control vessel source pollution," and, more specifically, "the authority to establish standards which will eliminate or minimize environmental damage caused by vessels."\textsuperscript{145} The paper concluded that "[o]nly a system
of exclusively international standards will provide an effective means to control vessel source pollution while protecting the community interest in both of these fundamental objectives.\textsuperscript{146} In support of the proposition that coastal states should not be the exclusive arbiters of international pollution standards, the working paper enumerated five reasons in support of internationally established standards:

\begin{enumerate}
\item The necessity for ensuring a proper balance between environmental protection and avoiding unnecessary increases in transportation costs;
\item The necessity for uniform standards to be observed by all states;
\item The achievement of "effective" protection of the full marine environment (noting the unity of the world ocean and the proper transfer of pollutants by currents);
\item The responsiveness of an international approach to changes in the technology for the control of pollution and to new knowledge about threats to the marine environment; and
\item The prospects for elimination of competitive economic concerns arising from imposition of environmental controls by one state that other states might not impose.\textsuperscript{147}
\end{enumerate}

The working paper concluded with a summary of vessel source pollution:

Standards for the control of vessel source pollution must effectively protect the fundamental environment and navigational interests of all nations. If authority to establish such standards were given to coastal States, whether that authority were exclusive or only supplemental, there could be no assurance that adequate account would be taken of the need to accommodate such interests. There could also be no assurance that such standards would effectively serve either interest. This does not mean that special standards could not be established to deal with the problems of special areas, but such standards should be established internationally. The global nature of the marine pollution problem requires that solutions to this problem, as with other international problems, must be international.\textsuperscript{148}

The draft articles on pollution present a definitive source of the United States policy position on marine pollution. Those articles will be briefly summarized below.

With respect to the competence to establish standards to protect the marine environment, Article III authorizes the seabed organization established by the Third Conference to establish international standards with respect to seabed activities (within and beyond any economic resource zone), and authorizes IMCO\textsuperscript{149} to establish international standards with respect to vessels.\textsuperscript{150} Such
standards may, according to Article III, "include special standards for special areas and problems, taking into account particular ecological circumstances." The United States, apparently anticipating the criticism of the proposal with respect to the role of IMCO, which has been denounced by many developing nations as being little more than an instrumentality of the maritime powers, explained the action it had taken within IMCO to ensure broad representation and effectiveness of operation.

To ensure that new problems were adequately and rapidly dealt with and that all countries interested in participating in the establishment of such standards would have an opportunity to do so, the United States had proposed in the IMCO Council the creation of a marine environment protection committee for dealing with vessel-source pollution. That committee, whose membership would be open to all interested States, would be empowered to adopt regulations and circulate them directly to Governments without review or approval by the IMCO Assembly or Council. The regulations would then come into effect automatically unless opposed by a specified number, or category, of States.

Article IV requires states to "adopt laws and regulations implementing international standards," and provides further that they "may adopt and implement higher standards" in three situations: (a) in the exercise of their rights in their economic resource zone with respect to resource extractive activities and other permitted activities therein; (b) for vessels entering their ports and offshore facilities; and (c) for their nationals, natural or juridical, and vessels registered in their territory or flying their flag.

The remainder of the articles deal with the knottier problem of enforcement of such standards. Coastal states are provided authority to enforce standards in their economic resource zones with respect to activities over which they have jurisdiction, although the international seabed agency is given a right of inspection to ensure compliance. With respect to vessels, a state is given enforcement authority with respect to vessels registered in its territory and flying its flag, vessels using its ports or offshore facilities, irrespective of the location of the violation, and vessels in its territorial sea for violations therein.

Section D of the draft articles contains provisions relating to cooperative enforcement measures against vessels, including the rights to monitor vessels and to deny ports of entry to non-complying vessels. A cooperative system between port states, flag states, and coastal states with respect to alleged violations of international standards is also set forth. A summary of the respective roles of flag, port, and coastal states was given by the United States representative in his tabling speech for the draft articles where he observed that:

151 Id. Art. III(3).
154 Id. Art. VI.
155 Id. Art. VII.
156 Id. Arts. VIII and IX.
157 Id. Arts. X through XIII.
The flag State would continue to have enforcement responsibilities over its vessels, although such authority would not be exclusive, and would assume a specific obligation to enforce international standards in the case of vessels flying its flag, subject to the right of other States to have recourse to compulsory dispute settlement procedures to ensure that the obligation was fully discharged.

The port State would be able to enforce pollution control standards in the case of vessels using its ports, regardless of where violations took place.

The coastal State would have rights and remedies that would fully protect its environmental interests; provision was made for dealing with the four major marine pollution problems facing a coastal State: serious maritime casualties off its coasts, violations of international standards presenting imminent danger of major harmful consequences, persistent and unreasonable failure of a State to enforce the international standards with respect to vessels flying its flag, and general violations of the standards.

Section E deals with extraordinary enforcement measures and intervention against vessels, providing specifically that:

Beyond the territorial sea, a coastal State may take such reasonable emergency enforcement measures as may be necessary to prevent, mitigate, or eliminate imminent danger of major harmful damage to its coast or related interests from pollution arising from a particular occurrence reasonably believed to be related to a violation of the applicable international standards.

Naval vessels are exempted from the coverage of the draft articles through a provision on sovereign immunity providing each state ensure “that all such vessels and aircraft owned or operated by it act in a manner consistent with the object and purpose of this Chapter.”

Finally, it should be noted that the flag-state, port-state approach of the United States is designed primarily to avoid the creation of pollution control zones extending throughout the economic resource areas which will inevitably be created at the Third Conference. In a statement made during the July-August, 1973, meeting of the Seabed Committee, the United States representative pointed out that the majority of the coastal nations of the world were “zone locked,” i.e., vessels bound from their ports to areas beyond any economic resource zone would of necessity pass through the economic resource zone (and, if the zonal approach were taken, the pollution control zone) of at least one other nation. If pollution control zones were used to inhibit maritime transport, the effect would obviously be felt not only by the United States and other maritime powers, but by the majority of the world’s coastal nations.

In summary, the United States policy on protection of the marine environment within the context of the law of the sea negotiations appears to consist of the following elements: (1) land based pollution is beyond the scope of the law of the sea negotiations and must be dealt with in another forum; (2) pollution

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160 Id. Art. XXIII.
from seabed mineral extraction activities should be controlled by the establishment of international standards by the seabed authority to be created and enforced by the state in whose economic resource zone the activity takes place; and (3) vessel pollution should be controlled by the establishment of international standards by IMCO, implemented by coastal states in areas subject to their jurisdiction, and enforced by a joint flag-port-coastal state cooperative effort.

IV. Congressional Endorsement

While by no means supporting Administration oceans policy in every particular, both houses of Congress did during 1973 adopt resolutions which provided endorsement of the general objectives envisioned in the President's ocean policy statement of May 23, 1970. These objectives were specified in the Senate resolution as:

(1) Protection of—
   (a) the freedoms of the high seas, beyond a twelve-mile territorial sea, for navigation, communication, and scientific research, and [P]
   (b) free transit through and over international straits;

(2) Recognition of the following international community rights:
   (a) protection from ocean pollution.
   (b) assurance of the integrity of investments.
   (c) substantial sharing of revenues derived from exploitation of the seabed particularly for the benefit of developing countries,
   (d) compulsory settlement of disputes, and
   (e) protection of other reasonable uses of the oceans, beyond the territorial sea including any economic intermediate zone (if agreed upon);

(3) an effective International Seabed Authority to regulate orderly and just development of the mineral resources of the deep seabed as the common heritage of mankind, protecting the interests of both developing and developed countries;

(4) conservation and protection of living resources with fisheries regulated for maximum sustainable yield, with coastal State management of coastal and anadromous species, and international management of such migratory species as tuna.

Three brief comments are in order on this resolution (and its House counterpart). First, the term "protection" (paragraph one) is rather broad and leaves open substantial room for negotiation. To give but one example, "protection of . . .

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162 Nixon, supra note 10.
164 The House version of the resolution, H. R. Res. 330, 93d Cong., 1st Sess., 119 Cong. Rec. 2510 (1973), provides in this section for protection of "freedom of the seas, beyond a twelve-mile territorial sea, for navigation, commerce, transportation, communication, and scientific research," thus broadening slightly the coverage.
165 The House version speaks of "recognition of the following international community interests," which is more accurate, H. R. Res. 330, supra note 163.
166 The House version uses the words "economic assistance" rather than "benefit."
167 The House version refers to "coastal state management of anadromous species, and host state management of anadromous species," which, again, is probably more accurate.
scientific research” would undoubtedly encompass agreement such as that proposed in the United States draft treaty articles on marine scientific research which affords some role to the coastal state.

Second, the five subitems set out in paragraph two are identical with the five elements proposed by the United States as being necessary for that nation’s acceptance of the economic resource zone concept (and which were also included in the original May 23, 1970, presidential oceans policy statement). Within the generality of both the presidential statement and the congressional resolutions, there is sufficient room for negotiation such that optimal outcomes can be achieved. If either the presidential statement or the congressional resolutions had gone into more detail, that necessary flexibility would have been regrettably lost.

Finally, the paragraph of the resolution dealing with fisheries endorses the “species” approach discussed above. As noted earlier, international acceptance of the species approach does not seem particularly likely at this time—a zone regime being the more probable outcome of the Third Conference. It should be noted that the congressional resolutions only “endorse” the policies presently being pursued and do not limit that endorsement to these policies alone, nor do they reject future endorsement of other policies. Were this not the case, paragraph four of the resolutions might disadvantageously lock the United States negotiators into a position which was not readily salable.

In sum, it appears that both the Administration and the Congress agree on the basic outlines of United States oceans policy.

V. Conclusion

At the time of submission of this article, there were serious questions whether the Third Conference would be initiated on schedule in Santiago because of insufficient progress of preparatory work. Because of the vast array of national and international objectives of major importance to be dealt with at the Third Conference, this would be a most unwelcome development for all mankind. At whatever pace the negotiations and deliberations proceed, it cannot be denied that the policies developed and pursued by the government of the United States of America will have a profound effect on the ultimate outcome. Thus all citizens, and especially members of the bar, should be fully aware of the United States policy on ocean affairs and should make their influence felt whether they support or disagree with that policy. It has been the purpose of this article to provide a factual discussion of United States oceans policy in hopes that more individuals will be in a position to take an active role in shaping and developing that policy as it ripens into international law.
"United States Policy for the Seabed" Statement by President Nixon, May 23, 1970

The nations of the world are now facing decisions of momentous importance to man's use of the oceans for decades ahead. At issue is whether the oceans will be used rationally and equitably and for the benefit of mankind or whether they will become an arena of unrestrained exploitation and conflicting jurisdictional claims in which even the most advantaged states will be losers.

The issue arises now—and with urgency—because nations have grown increasingly conscious of the wealth to be exploited from the seabeds and throughout the waters above and because they are also becoming apprehensive about ecological hazards of unregulated use of the oceans and seabeds. The stark fact is that the law of the sea is inadequate to meet the needs of modern technology and the concerns of the international community. If it is not modernized multilaterally, unilateral action and international conflict are inevitable.

This is the time, then, for all nations to set about resolving the basic issues of the future regime for the oceans—and to resolve it in a way that redounds to the general benefit in the era of intensive exploitation that lies ahead. The United States, as a major maritime power and a leader in ocean technology to unlock the riches of the ocean, has a special responsibility to move this effort forward.

Therefore, I am today proposing that all nations adopt as soon as possible a treaty under which they would renounce all national claims over the natural resources of the seabed beyond the point where the high seas reach a depth of 200 meters (218.8 yards) and would agree to regard these resources as the common heritage of mankind.

The treaty should establish an international regime for the exploitation of seabed resources beyond this limit. The regime should provide for the collection of substantial mineral royalties to be used for international community purposes, particularly economic assistance to developing countries. It should also establish general rules to prevent unreasonable interference with other uses of the ocean, to protect the ocean from pollution, to assure the integrity of the investment necessary for such exploitation, and to provide for peaceful and compulsory settlement of disputes.

I propose two types of machinery for authorizing exploitation of seabed resources beyond a depth of 200 meters.

First, I propose that coastal nations act as trustees for the international community in an international trusteeship zone comprised of the continental margins beyond a depth of 200 meters off their coasts. In return, each coastal state would receive a share of the international revenues from the zone in which it acts as trustee and could impose additional taxes if these were deemed desirable.

As a second step, agreed international machinery would authorize and regulate exploration and use of seabed resources beyond the continental margins.

The United States will introduce specific proposals at the next meeting of the United Nations Seabeds Committee to carry out these objectives.

Although I hope agreement on such steps can be reached quickly, the negotiation of such a complex treaty may take some time. I do not, however, believe it is either necessary or desirable to try to halt exploration and exploitation of the seabeds beyond a depth of 200 meters during the negotiating process.

Accordingly, I call on other nations to join the United States in an interim policy. I suggest that all permits for exploration and exploitation of the seabeds beyond 200 meters be issued subject to the international regime to be agreed upon. The regime should accordingly include due protection for the integrity of investments made in the interim period. A substantial portion of the revenues derived by a state from exploitation beyond 200 meters during this interim period should be turned over to an appropriate international development agency for assistance to developing countries. I would plan to seek appropriate congressional action to make such funds available as soon as a sufficient number of other states also indicate their willingness to join this interim policy.

I will propose necessary changes in the domestic import and tax laws and regulations of the United States to assure that our own laws and regulations do not discriminate against U.S. nationals operating in the trusteeship zone off our coast or under the authority of the international machinery to be established.

It is equally important to assure unfettered and harmonious use of the oceans as an avenue of commerce and transportation and as a source of food. For this reason the United States is currently engaged with other states in an effort to obtain a new law-of-the-sea treaty. This treaty would establish a 12-mile limit for territorial seas and provide for free transit through international straits. It would also accommodate the problems of developing countries and other nations regarding the conservation and use of the living resources of the high seas.

I believe that these proposals are essential to the interests of all nations, rich and poor, coastal and landlocked, regardless of their political systems. If they result in international agreements, we can save over two-thirds of the earth's surface from national conflict and rivalry, protect it from pollution, and put it to use for the benefit of all. This would be a fitting achievement for this 25th anniversary year of the United Nations.