

INTERNATIONAL EQUITY AND THE LAW OF THE SEA

New Perspectives for Developing Countries

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Introduction

New questions, new problems, new opportunities are emerging¹, but the old seas remain the same. The seas offer dramatic new horizons to the sailor and to the shore-bound, to the statesman and to the strategist, to the economist and to the lawyer, to the miner and the fisherman, to the old seafaring nations and to the newcomers among the hundred-odd States. But these new horizons are being radically foreshortened by new technologies².

The developing countries have found that the international conferences on the law of the sea provide them with a unique opportunity for ensuring that their own ideas and needs are borne in mind in the formulation of the rules of international law and that the rules are formulated on the basis of equity. At first, the developing countries placed too much emphasis, relatively, on the classical concepts of international law. But, it must be remembered, that at the time of the early conferences on the law of the sea many States had not emerged from the shadow of their colonial status and others were, perhaps, ill-equipped to meet the challenge that confronted them. In respect of expertise in international negotiations and in the skilful use of all their intellectual resources the developing nations still have something to learn from the western world. Nevertheless they have managed to impress their ideas and needs on the developed world as, in subsequent conferences, agreement has been reached on the extension of territorial waters, the establishment of exclusive economic zones and on the International Sea-Bed Authority. These are all matters which directly or indirectly impinge on the economic status of the countries of the third world.

The developing countries are also pressing for a transfer of technology from the industrialized nations. This can be claimed as a matter of international equity since, without such transfer, there is real danger that the economic gap between the industrialized world and the third world will continue to widen. The developing nations seek a transfer of technology as the means of enabling them to enjoy to the full their legal rights under the various conventions relating to the law of the sea.

In the present decade the primary interest of nations in the sea and the sea-bed will be the recovery of organic and mineral resources. There are opportunities for industrial exploitation in the four general areas of minerals, gas and oil; food from the sea; pollution control; and construction in the shelf and beach zones³. It is in these areas that possibilities exist for rapid change, since these industries are so highly dependent on technology. The largest oil reserves may well be found not under the continental shelf adjacent to the coast, but on the continental slope or rise which is at ocean depths ranging to well below 3,000 metres. Divers and deep-sea stations will operate at even greater depths. The recovery of prosaic sand and gravel close to the coasts is substantial. Man has it in his power to increase not only the yield from the sea but also its essential food values. Only about 3 per cent of the potential organic resources of

1 Edmund A. Gullion, "New Horizons at Sea", in the *Uses of the Seas*, The American Assembly, page 2 (1968).

2 Edmund A. Gullion, *op. cit.*, page 1.

3 Gordon J. F. MacDonald, "An American Strategy for the Oceans", in the *Uses of the Seas*, The American Assembly, 1968, page 163.

the oceans as a whole is recovered today⁴. But, also given the appropriate international conservation measures, the annual world harvest might even be quadrupled without depleting fish stocks. A new science of farming the sea, or aquaculture, is coming into being and this is already producing some astonishing results, particularly in shellfish of the higher commercial qualities. The impulse to acquire and to profit can be expected to open new frontiers at sea as it has done on land⁵. But as we move toward a fuller harvest from the seas it is necessary to advance not only in scientific research and development, but also in international law and understanding.

The main problems can be stated in various ways, depending very much on differing interests and perspectives. Louis Henkin⁶ rightly points out that uncertainties are not necessarily undesirable to those in a position to take advantage of them. Some are due to the law's uncertainties, others to old or newly-realised inadequacies in the law⁷. There has been uncertainty whether the right of innocent passage in the territorial sea applies to military vessels. It has not been clear what special security measures a coastal State may take either in its contiguous zone, or on the continental shelf, or beyond. The territorial sea, its width, its uncertainty – all these have important military consequences since a widening of the territorial sea would effectively bar for military purposes an increased area of the sea, and might completely bar important international straits to military vessels⁸.

Difficulties facing the Developing Countries

The first and most fundamental difficulty facing the developing countries is the fact that they are poorly endowed with natural resources in adjacent under-sea areas⁹. By some strange quirk of nature, the poorest is often also the most deprived in this respect. The largest number of land-locked countries are found among the developing nations. In Africa alone there are fourteen of them, Asia has five and Latin-America has two. The gross national product of the landlocked countries is the lowest in the world. Their handicap is considerable. They have been seeking by legal means to obtain relief and access to the sea through equitable accommodation. Countries like Iraq, Jordan, Zaire and Singapore which have narrow continental shelves, and usually referred to as "shelf-locked", have little territorial sea or fishing zone to claim because of the close proximity to their neighbouring States. In the new régime of the sea-bed declared to be the "common heritage of mankind"¹⁰, they search for equitable solutions to compensate for their physical inadequacy¹¹.

For the developing nations, an acute lack of technology and equipment and the financial means to participate in the activities of ocean exploration and exploitation is a further and substantial problem. The technological gap has been correctly taken note of by the Strategy for the Second Development Decade. Europe, the United States of America and Japan effec-

⁴ Edmund A. Gullion, *op. cit.*, page 3.

⁵ Edmund A. Gullion, *op. cit.*, page 4.

⁶ Louis Henkin, "Changing Law of the Changing Seas", in *Uses of the Seas*, The American Assembly, 1968, page 77.

⁷ There is, of course, the uncertainty as to the status of all the laws of war that applied at sea before the UN Charter, but hopefully that question will remain largely academic. There is still debate as to the lawfulness of nuclear tests at sea, but most nations have forsaken such tests, and any nation that decides to test at sea will no doubt invoke the precedent of earlier tests and the legal justifications then offered.

⁸ Louis Henkin, *op. cit.*, page 76.

⁹ Pinto, Legal Adviser, Foreign Affairs – Sri Lanka, 7th Annual Law of the Sea Conference, 1972, in Rhode Island.

¹⁰ See the Declaration of Principles governing the Sea-Bed and the Ocean Floor and the sub-soil thereof, beyond the limits of National Jurisdiction, contained in Resolution 2749 (XXV) of the UN General Assembly adopted on 17 December 1970. Especially Resolutions 2340 (XXII) of 18 December 1967, 2467 (XXIII) of 21 December 1968, and 2574 (XXIV) of 15 December 1969.

¹¹ This subject is explored further later in this study.

tively dominate marine technology – whether related to fishing or ship-building. The newly independent nations cannot easily compete because of their continued dependence on primary products. Unfruitful attempts have been made to establish stable, renumerative and equitable prices for these products; but all to no avail.

The lack of understanding among the developing States has been described as an unfortunate misunderstanding. This is particularly noticeable among the delegations of the developing coastal States and the developing shelf-locked and land-locked States. It appears that each nation as a matter of course is attempting to advance its national self-interests. There have been suggestions that the interests of developing land-locked and shelf-locked States could, and should, best be accommodated on the regional level¹².

To the developing world the sea-bed offers a unique opportunity to augment their meagre natural resources from a new area owned in common with none of the unpleasant implications of economic aid.

The most fascinating aspect of the Conferences on the Law of the Sea is that the developing world believes that, through their tireless struggle within the United Nations and elsewhere, they have won a significant victory for themselves; namely the right to review the whole international law of the sea at a comprehensive conference to analyse, question and remould, destroy if need be, and create a new equitable and rational régime for the world's oceans and the deep ocean floor.

The 1958 Geneva Conventions on the Law of the Sea¹³

The conference was thoroughly prepared, expertly organized and staffed, and abundantly attended by some 700 delegates from 86 countries plus observers from seven specialized agencies of the United Nations and nine inter-governmental organizations¹⁴. It produced four conventions, nine resolutions, and an optional protocol¹⁵. From the start of the conference no attempt was made to conceal the planning which had preceded the conference on regional and bloc bases, as when the representative of Ecuador, „speaking on behalf of the delegations of the Latin-American States“, nominated Prince Van Waithayakon (Thailand) to be president of the conference¹⁶. In the same manner, during the debate on the adoption of the rules of procedure, the Mexican representative proposed an amendment “on behalf of all the Latin-American delegations . . .”¹⁷.

Many developing nations expressed, nonetheless, profound dissatisfaction about the outcome of the whole conference. They regarded the rules of international law propounded as those which could only increase tension and harden the differences of opinion between the western and non-western countries. Some of them went so far as to say that they were merely designed to protect the interests of the industrialized, economically developed western world. The representative of Guinea remarked that – “with regard to historical rights

12 Chao Hick Tin, Legal Adviser, Singapore. Rhode Island Conference 1972.

13 The Conventions adopted by the United Nations Conference on the Law of the Seas, 29 April 1958, were:

I The Territorial Sea and Contiguous Zone

II The High Seas

III Fishing and Conservation of the Living resources of the High Seas

IV The Continental Shelf.

14 P. C. Jessup, The UN Conference on the Law of the Sea; Essays on International Law from the Columbia Law Review, New York, 1965, page 197.

15 See the extensive preparatory documentation available in preliminary bound mimeographed form as UN Document Nos A/CONF 13/1-3 (1958) which are printed in the official records of the Conference.

16 See UN Document – Official Records 3.

17 Ibid.

... the concept was nothing other than a manifestation of the right of the strongest and a vestige of colonialism, which (Guinea) would oppose in all its forms. to perpetuate those rights would be a grave injustice to the young States which were struggling not only for political but also for economic independence”¹⁸.

The representative of Vietnam referred to those rules as “a mass of unilateral practices anarchically applied”¹⁹. The Iranian delegate felt that “a great many delegations would not accept servitude to the large maritime powers which wished to fish in the waters of the other States”²⁰. The representative from Burma said that “in the past international law had been a body of rules and usages adopted by powerful States”²¹. The Peruvian delegate maintained that²² the – “Rules of international law had sometimes been unilaterally created in the interests of great powers; it was therefore reasonable for certain rules of law to be initiated by small States in their legitimate interests . . . it was inadmissible that a sort of colonialism of the high seas should be allowed in the same freedom of the seas”.

The delegate from Chile said²³ that – “The rise and development of the law of the sea had been prompted by one single factor: interest. Political or economic interest had always prevailed in defining the law of the sea through the centuries. Grotius had not argued for the freedom of the seas simply as an intellectual concept, but to defend the interests of the Dutch East India Company. Selden’s sole aim in refuting Grotius had been to defend England’s interests. Things had changed very greatly since that time. The rule of law had been extended, but it was impossible to overlook the fact that the reason for the existence of the law was interest”.

In support of the strong view expressed by the Chilean delegate, the representative from Peru²⁴ added that Hugo Grotius, the very – “father of international law”²⁵ . . . did not write a work on international law but a treatise to vindicate the claims of the Dutch East India Company, by whom he had been retained, to obtain freedom of navigation and trade”²⁶.

The Law of the Sea and the International Sea-Bed Question

The sudden focus of attention and interest on the question of the sea-bed and the ocean floor²⁷ took many of the developing nations completely by surprise. Preoccupied as they were with the exploitation of their land resources, and being comparatively newcomers to the international community, they felt initially that such issues could be left in abeyance until some convenient future date. Consequently the interest manifested and contributions made towards the exploratory work of the Sea-Bed Committee was minimal. This was especially true of the African countries. But as a result of their membership of the Sea-Bed Committee,

18 See Official Records, Vol III, First Committee, A/CONF 19/8, 18th meeting, para 6.

19 A/CONF 19/8, 3rd meeting, para 6.

20 A/CONF 13/38, 20th plenary meeting, para 70.

21 A/CONF 13/39, 4th meeting, para 6.

22 A/CONF 13/39, 4th meeting, para 13.

23 A/CONF 19/8, 14th meeting, paras 13, 14.

24 A/CONF 13/41, 23rd meeting, para 11.

25 The so-called “father of international law” was Hugo Grotius (1583–1645), whose reputation and influence have been world-wide, and whose principal works have been translated and commented upon. Born in Holland, Grotius was a child prodigy, entering the University of Leyden at 11, and being admitted to the practice of law at 16. He was also a theologian, poet and historian. In 1623 and 1624, he wrote his great book, the Law of War and Peace (*De Jure Belli ac Pacis*), in which he deals with the problems of “just” war and in 1609 he proclaimed the freedom of the seas in an elaborate argument in *Mare Liberum* (Open Sea), defending the right of the Dutch to navigate the Indian Ocean which Portugal claimed as its exclusive territorial waters. He was answered in 1635 by a distinguished Englishman, John Selden, in *Mare Clausum* (Closed Sea). It was Grotius who introduced into international law the theory of extraterritoriality.

26 A/CONF 13/41, 23rd meeting, para 11.

27 See UN General Assembly Resolution 2340 (XXII), 18 December 1967; Also Resolution 2467 A (XXIII), 21 December 1968.

and due to the widespread publicity and prominence given to the whole question, African and Asian States gradually began to grasp the vital importance of the sea-bed to the developing world.

During the debates at the First Committee meetings of the 24th session of the United Nations General Assembly, it became clear that the African countries had developed an interest and taken a firm stand in favour of the concept of the “common heritage”. A statement of the Ghanaian delegate illustrates this²⁸: “Our colonial past and its attendant evils and sufferings compel us to ensure that we shall not have emerged from the colonial tutelage which resulted from the mad scramble in the 16th century for territory, only to plunge ourselves into the greater economic disaster that might well come about as a result of an uncontrolled scramble for the riches of the ocean.”

In order to create a balance between the economic situation of developed and the underdeveloped countries through the exploitation of the sea-bed resources, many newly independent States supported the idea of establishing an international régime and machinery for that purpose. Around the same period President Lyndon B. Johnson of the United States of America warned²⁹ that – “Under no circumstances must we ever allow the prospect of rich harvest and mineral wealth to create a new form of colonial competition among maritime nations. We must be careful to avoid a race to grab and to hold the lands under the high seas. We must ensure that the deep seas and the ocean bottoms are, and remain, the legacy of all human beings.”

The equitable content of the President’s declaration particularly satisfied many developing countries which were quite incapable of competing with the industrialized world.

Common Heritage of Mankind

Ambassador Arvid Pardo of Malta, in a memorandum to the United Nations Secretary-General on 17 August 1967, suggested that the old law relating to the sea needed drastic modifications. He firmly declared that the time had come to regard the sea-bed and the ocean-floor as “a common heritage of mankind”. In addition, Ambassador Pardo proposed that immediate steps be taken to safeguard the interests of mankind³⁰.

In Resolutions 2340 (XXII) of 18 December 1967 and 2467 A (XXIII) of 21 December 1968 the General Assembly again voiced its conviction that the exploration and exploitation of the sea-bed – “should be carried out for the benefit of mankind as a whole irrespective of geographical location of States; taking into account the special interests and needs of the developing countries”.

Reiterating its conviction that the exploitation of the resources of the sea-bed should be carried out under an international régime including appropriate international machinery, and emphasizing the importance of preserving the sea-bed and the ocean-floor from actions and uses which might be detrimental to the common interests of mankind, the General Assembly went a step further in 1969 and imposed a moratorium on the sea-bed régime.

Pending the establishment of that régime, the General Assembly resolved³¹: (a) States and persons, physical or judicial, are bound to refrain from all activities of exploitation of the re-

28 UN Document A/C 1/PV 1681, 7 November 1969.

29 Quoted in Henkin’s *Our Nation and the Sea* (Report of the US Commission on Marine Science, Engineering and Resources), Washington D. C., 1969, page 14.

30 A/6695, 18 August 1971, pages 1–2.

31 See UN Resolution 2514 D (XXIV).

sources of the area of the sea-bed and oceanfloor, and the subsoil thereof, beyond the limits of national jurisdiction; (b) no claim to any part of that area or its resources shall be recognized.

Mr. Sen of India³² advanced the view that the concept of the common heritage of mankind would provide benefits which could dissipate the harsh inequalities between the developed and the developing countries. Ambassador Amerasinghe of Ceylon added that “. . . in the future, international law is designed to serve the interests of all mankind especially the economically weaker sections of mankind”³³. Ballah of Trinidad and Tobago called the concept a “useful rallying cry, for it symbolized the interests, needs, hopes, desires and objectives of all peoples”³⁴.

The problems of the developing countries compound one another and will affect issues of the law of the sea in greater or lesser degree by themselves, or in combination. At this point a review of some of the main issues of the law of the sea is necessary.

Elements of the Law of the Sea

There is no single law of the sea but a body of codes, international agreements, unilateral declarations, precedents and traditional practices that affect activities on or under the surface of the high seas. Some of these have been rendered obsolete by new technological capabilities; most importantly, many major technological operations which are already feasible, or soon will be, contain the seeds of dispute or may result in a misallocation of resources³⁵. Henkin explains that in the law governing the extraction of minerals from the deep sea-bed, the only certainty is that the law is uncertain. Many of its elements are unclear³⁶.

a) The Limits of the Area of National Jurisdiction

The international conferences of 1958 and 1960 in Geneva failed to reach agreement on the maximum breadth of the territorial sea. The tendency among the under-developed countries is to treat the issue of territorial limits separately from the resource jurisdiction which, for them, is of primordial significance. Although 12 miles is the generally accepted maximum breadth of the territorial sea, yet States retain the right to make substantially larger claims. The developing nations may well be prepared to accept the outer limits of 12 miles, if the separate question of adequate exclusive resource jurisdiction is satisfactorily determined but the developing nations may be unwilling to consent formally to a definite breadth of the territorial sea until the limits of resource jurisdiction have been universally accepted. At a meeting of the Group of Experts at Yaounde, Cameroon, in June 1972, approval was given to the principle of establishing a territorial sea enclosing a zone of 12 nautical miles. But this approval, which may be regarded as a statement of the position of the African States, was expressed to be subject to the acceptance of a “substantial” zone of national jurisdiction beyond the 12-mile limit in which the coastal States would enjoy exclusive economic rights. These proposals subsequently were embodied in the OAU Declaration on the Issues of the Law of the Sea³⁷, although the exact extent of the territorial sea was not specified in the Declaration.

32 Mr Sen (India), First Committee, 24th Session, A/C 1/PV 1673, 31 October 1969, page 28.

33 Ambassador Amerasinghe, First Committee, 24th Session A/C 1/PV 1673, 31 October 1969, pages 18–20.

34 Legal Sub-Committee of the Sea-Bed Committee, A/AC 138/SC, 1/SR, 12–29, 6 November 1969, page 47.

35 Edmund A. Gullion, *op. cit.*, page 5.

36 Louis Henkin, *op. cit.*, page 81.

37 See A/CONF 62/C 2/L 82 of 26 August 1974.

b) The Recognition of Zones of Exclusive Resource Jurisdiction

Beyond the territorial sea of a coastal State lie the high seas. Article 2 of 1958 Geneva Convention on the High Seas declares that they are “open to all nations” and no country may purport to subject any part of them to its sovereignty. Further, article 2 provides that the “freedom” of the high seas consists of, *inter alia*, (1) freedom of navigation; (2) freedom of fishing; (3) freedom to lay submarine cables and pipelines; and (4) freedom to fly over the high seas. The work of the commission on this article indicated that other freedoms were contemplated but were not specified. It was generally understood by the new States that “freedom” as referred to in article 2 conferred an undue advantage on nations which technological know-how and the financial means to exploit that area. Therefore the developing States, not being in the same enviable position, decided to draw a corollary to this by asserting the right of coastal States to declare a zone of exclusive jurisdiction beyond their territorial sea. In other words, they claimed a right to reserve the zone together with all its resources exclusively to themselves. Additionally they would be empowered to prohibit, or restrict, access to that zone by others. What it amounted to was, apart from the normal claim of 12 miles, a claim to the exclusive right to exploit the resources, living or non-living (minerals), up to a distance of 200 miles exactly as the Latin-American countries had previously claimed. The developing State could, if it so wished, employ foreign contractors, or enter into joint ventures with other countries or corporations or make adequate bilateral arrangements for their exploitation. All the necessary powers of regulation and conservation would be assumed. Two principal spheres of interest were directly in mind: a) the adjacent waters (fisheries); and b) adjacent under-sea areas (offshore mineral resources).

The developing countries supported the rights of coastal States to claim exclusive jurisdiction over areas beyond their territorial sea for fishing and for marine conservation. The measurement of the outer limits could be measured from the baseline from which the territorial sea is determined. From early days a distance of 200 miles was envisaged as its maximum breadth. The basis of this claim was the traditional right of the coastal State to fish in this area; a right which should be jealously safeguarded. Such right was founded in the immemorial economic dependence of a substantial part of the population of the coastal State upon fishing in such a zone.

The Third world also supported the right of coastal States to claim exclusive jurisdiction over an appropriate area of the sea-bed and sub-soil adjacent to their territories beyond the limit of the territorial sea for the object of exploration and exploitation of the resources. The OAU Declaration on the Issues of the Law of the Sea, which was the basis of the approach of the African States during the Second Session of the Conference on the Law of the Sea at Caracas, provided (article II):³⁸

- “1. In the Exclusive Economic Zone a coastal State shall have sovereignly over living and non-living resources. It shall have sovereign rights for the purpose of regulation, control, exploration, exploitation, protection and preservation of all living and non-living resources therein.
2. The resources referred to in (1) of this article shall encompass the living and non-living resources of the water column, the sea-bed and the sub-soil.
3. . . . no other State has the right to explore and exploit the resources therein without the consent or agreement of the coastal State.”

³⁸ See A/CONF 62/L.2.

During the working sessions of the Third Conference on the Law of the Sea the establishment of a 200-mile economic zone seems to have received de facto recognition on a wide front. In the course of the conference³⁹ the United States took unilateral action to proclaim a 200-mile fisheries zone and the Soviet Union has also adopted a temporary measure⁴⁰ in which it claims "sovereign rights" over fish and other living resources for the purposes of "detecting, processing and preserving them" in a 200-mile zone.

Whilst the concept of the exclusive economic zone is likely to supersede the earlier concept of jurisdiction over the continental shelf some adjustments may be required where the shelf itself extends beyond the 200-mile limit. Further, the conference did not reach a consensus of opinion on the possible failure of a coastal State to exploit the resources placed within its jurisdiction nor the reconciliation of the concept of an exclusive economic zone with the competing rights of nations which have traditionally fished in waters which are now to be included within the exclusive economic zone of another State.

Two other important areas beyond national jurisdiction are to be dealt with, namely: (1) deep-sea fishing; and (2) the resources of the sea-bed and the ocean-floor.

c) Areas beyond National Jurisdiction

Concerning the management of fisheries beyond national jurisdiction, the developing nations would favour regional arrangements providing for institutions empowered to allocate the catch and establish conservation rules based on scientific criteria. A number of States support the idea that membership of such organizations might be limited to States within that region. It seems however that if, for any reason, membership were open to States other than those which traditionally fish in the particular area, care would have to be taken to ensure that such organizations were not dominated by the major fishing powers. In areas beyond national jurisdiction it is urged that coastal States that are underdeveloped and are not in a position to pursue deep-sea fishing due to lack of fishing fleets should be given special privileges.

The less developed nations approached the recent sessions of the Law of the Sea Conference with every intention to press for an international agreement which would give effect to the terms of the resolution⁴¹ dealing with the régime relating to the sea-bed. It was generally considered that the international agreement should be open to all States, and should also be subscribed to by a substantial number of States before it entered into force. The agreement should establish international machinery⁴², with jurisdiction sufficient to give effect to the convention. The machinery, according to the developing nations, should have strong powers, namely:

- (I) to explore and exploit the international sea-bed on its own, or in partnership or joint ventures with consortia or countries or corporations;
- (II) to license exploitation by others;
- (III) to promote the rapid transfer of technology to developing countries;
- (IV) to minimize the adverse economic effects caused by the fluctuation in prices of raw materials resulting from exploitation and marketing of minerals extracted from the international area of the sea-bed and the ocean-floor;

³⁹ See the U.S. Fischer Conservation and Management Act. This became effective on 1 March 1977.

⁴⁰ See Izvestia, 10 December 1976.

⁴¹ See UN General Assembly Resolutions 2340 (XXII), 18 December 1967; 2467 (XXIII), 21 December 1968 and 2574 (XXIV) 15 December 1969.

⁴² See also the resolution of the representative from Tanzania on International Sea-Bed Authority.

(V) to promote scientific and technical training of personnel from developing countries;
(VI) to ensure the equitable sharing of all benefits derived from the sea-bed among countries on the basis of economic need.

The structure of the machinery⁴³ might consist of (some or all of): (a) a plenary organ of the entire membership; (b) an executive council of limited composition based on equitable geographical representation and perhaps political alignments and degree of technological advancement; (c) a tribunal with jurisdiction over legal disputes arising out of the agreement; and (d) a secretariat.

The principle of one-State-one-vote is proposed for all decisions. There should be no system of weighted voting or veto.

Many developing countries preferred an administration with strong powers to carry out its responsibilities effectively without fear or favour. But the developed world with the technical knowledge and financial capabilities held a different opinion. In particular, the United States wanted to ensure that US corporations would be given access to the resource of the ocean, albeit under strict supervision. In the meetings of the Third Conference on the Law of the Sea in April 1976 both the United States and the Soviet Union came under attack for their military activities in the international area of the sea-bed. From those meetings, however, a measure of agreement was reached on the establishment of an International Sea-Bed Authority which would license exploration and exploitation of the international sea-bed. Moreover, it would have its own operative arm, Enterprise, which would be empowered to undertake exploration on its own.

Following this, the session of the conference in New York in May 1977 sought to develop the concept of the “parallel system” of development; in the reservation of an area for exploitation by Enterprise equivalent to each area licensed to a national or corporate entity.

Whilst the developing countries would undoubtedly have been happier if the whole of the exploration and exploitation of the international sea-bed had been delegated to Enterprise with a mandate that the wealth of the sea-bed should be made available equitably to all nations, they may be prepared to accept the parallel system of development. Their disappointment would be more likely to be offset if a system were devised for stabilizing the prices of raw materials following the exploitation of the sea-bed. In this regard the slow progress towards the funding of commodity agreements (relatind, eg, to sugar and grain)at the Conference on International Economic Co-operation in Paris in May and June 1977 will not have encouraged their hopes.

Scientific Research in the Oceans

The developing Countries which held strong views on scientific research in the oceans and on the sea-bed at the 1971 Preparatory Conference on the Law of the Sea usually were those where the head of the delegation was personally interested in the subject, as, for example, Ceylon, Malta, Trinidad and Tobago. At that time, freedom of scientific research on the high seas did not seem to many developing countries to be of over-riding, immediate importance. Their main interest lay in establishing extensive resource zones. Most coastal States accepted the principle of freedom of scientific research, but only subject to controls. Some of the

⁴³ The machinery should, as far as possible in its day-to-day operations, be guided only by essential scientific, technological, economic and financial criteria adopted in advance by the plenary organ. Considerations of efficiency and sound business aimed at the greatest financial return (for distribution among developing nations) ought to be decisive in operational matters.

newly independent nations feared that uncontrolled freedom of research would be subject to abuse. They therefore urged that (1) research would be subject to definite rules, for example, rules that would safeguard the security of coastal States and would prevent pollution; (2) whilst it was difficult to distinguish between "scientific research" and "industrial research", certain restrictions had to be imposed on "industrial" research or "prospecting"; and finally, (3) where research was undertaken within the vicinity of a developing State, its nationals should be invited to participate⁴⁴.

Agreement was reached at the Third Conference on the Law of the Sea that there should be freedom of scientific research in areas of the high seas but that such research could not be used to substantiate any claim to the resources in the area⁴⁵. This would seem to satisfy the requirement that restrictions must be imposed on industrial research or prospecting. The requirement that the nationals of a developing State in the vicinity of the research should be invited to participate seems to have been met, in part at least, by agreement on the promotion of international co-operation for research and the exchange and publication of marine research findings⁴⁶.

The nature of the scientific research which should be permitted was not however defined. Clearly, research for military purposes, especially in areas within exclusive economic zones, is not acceptable to all nations, particularly to those which cannot be classified as super-powers. There is the practical problem also of whether there should be freedom of scientific research within those zones or whether such research can be prohibited by the coastal States concerned. The Group of Seventy-Seven favours, in effect, giving the International Sea-Bed Authority control over all research in the international zone⁴⁷ whilst reserving all research rights within the exclusive economic zone to the relevant coastal States⁴⁸.

Whilst the proposals of the Group of Seventy-Seven have an attractive logic⁴⁹, it may prove difficult to persuade the developed nations that they should restrict their marine research activities to their own zones of exclusive economic rights. Such restriction might be more palatable if the developing countries were to seek actively to co-operate in research in their zones with the industrialized countries, particularly in instances where the developing countries do not possess the finance or technology to undertake research in those areas on their own.

The Transfer of Marine Technology to Developing Nations

The developing countries have pointed out, frequently, that full and free access to marine technology must be available to them if they are to derive substantial benefits from rights of exploration and exploitation of the ocean and the sea-bed. It seems to be likely that the newly independent States will make a stronger plea for the rapid transfer of all types of marine technology and scientific data from the developed countries; but it is not hard to understand the reluctance of any developed nation to give away freely its scientific knowledge, even in the name of equity.

⁴⁴ A single item of information about the activities of an individual is significant in illustrating the changing attitudes in these matters. Dr. Emery of Woods Hole Institute of Oceanograph, Woods Hole, Massachusetts, in anticipation of commencing ocean research on the coasts of West Africa early in 1973, invited experts from, inter alia, Nigeria and Ghana to participate and stated that the scientific information collected would be given to the governments of the coastal States.

⁴⁵ See A/CONF 62/C 3/L 17, Part. I, A 3.

⁴⁶ See A/CONF 62/C 3/L 17, Part. I, B.

⁴⁷ See A/CONF 62/C 3/L 12/Rev. 1, 25 April 1975

⁴⁸ See A/CONF 62/C 3/L 12/Rev. 2, 25 April 1975.

⁴⁹ It is for example, easy to understand that the boundaries between "exploration" (which is the acknowledged interest of the International Sea-Bed Authority) and "scientific research" may on occasions be very difficult to define.

The developing countries may nevertheless feel encouraged that the climate of opinion in the industrialized world may be changing in their favour on this issue. In the first Lomé Convention⁵⁰ concluded between the European Economic Community and the African, Caribbean and Pacific States on 28 February 1975, article 31 provided:

“with a view to helping the ACP States to overcome obstacles encountered by them in matters of access to and adaptation of technology, the Community is prepared in particular to:

- a) keep the ACP States better informed on technological matters and assist them in selecting the technology best adapted to their needs;
- b) facilitate their contacts and relations with firms and institutions in possession of the appropriate technological know-how;
- c) facilitate the acquisition, on favourable terms and conditions, of patents and other industrial property, in particular through financing and/or through other suitable arrangements with firms and institutions within the Community;
- d) contribute to the establishment and expansion of industrial research facilities in the ACP States with particular reference to adaptation of available technology to the conditions and needs of those States”.

The proposals of the Group of Seventy-Seven for the control of marine research by the Independent Sea-Bed Authority in April 1975 also called for the training of personnel and transfer of technology to enable the developing nations to undertake marine scientific research.

The Marine Environment

The whole human environment, including the marine environment, must be preserved. Attempts to put the problem of preservation and conservation into a reasonably clear focus were commenced in June 1972. However, the developing States argue that the problem has been inflicted on the international society by the industrialized world, through commercial expediency and industrial neglect. The developed countries are entirely responsible. The views of the developing nations and those of the industrialized countries on this problem are diametrically opposed. While the developed countries are striving to secure international acceptance of rules and standards⁵¹ to combat the menace of pollution, the developing countries are more concerned to prevent any increase in their own industrial investment by reason of attempts to combat existing pollution in one form or another which may impede their programmes of industrialization.

It could fairly be said that the developing nations won a major victory in 1970 through the adoption of the Declaration of Principles Governing the Sea-Bed and the Ocean Floor and the Sub-soil thereof Beyond The Limits of National Jurisdiction⁵², which declared that area and its resources to be the “common heritage of mankind”.

It is difficult to over-emphasize the importance of this historic Resolution in the eyes of the developing countries.

The developing nations have to face the fact, however unpalatable it may be, that they lack one, or both, of two essential ingredients necessary to achieve a high standard and good quality of life for their peoples, namely natural resources and technology. In the nineteen-seventy-

⁵⁰ The first Lomé Convention was annexed to Council Regulation (E.E.C.) No 199/76 of 30 January 1976 (O. J. L 25, 30 1 76, page 1). For an exposition and analysis of the special relationship between the A.C.P. and E.E.C. in the sphere of the transfer of technology under the convention, see Ernest F. T. Doku, The A.C.P./E.E.C. Convention and Transfer of Technology.

⁵¹ See Preparatory Work for the 1972 Stockholm Conference on Human Environment A/CONF 48/9, page 27, Chapter IV.

⁵² UN General Assembly Resolution 2749 (XXV).

ties not only did the gap in economic development widen, but so also did the gap in technological competence. Hence, there should be little surprise at the apparent rigidity of the approach by the newly independent States to the whole problem of the Law of the sea; nor at the impression that they are attempting to gain as much as possible and to reserve to themselves what they do not immediately need, or cannot effectively use. They prefer to retain rights to what they cannot exploit immediately until such time as they will have the necessary capabilities. Their attitude towards the establishment of an economic zone exemplifies this; and their attitude may not be other than entirely fair. It is very important to do equity in all the régimes of the sea.

Conclusion

The movement towards the codification of the law of the sea has provided the developing countries with a rare and perhaps unexpected opportunity to play a full participatory role in shaping the rules of international law, albeit in a restricted area of law. They have been able to propose changes either by reference to the concept of international equity or in a spirit of self-interest. Moreover, they have succeeded in influencing the development of those rules; not only the form in which the rules have been promulgated but also in relation to the speed with which changes have been made.

They have realised, too, that such matters cannot be considered in isolation from other problems. The formulation of the rules of the law of the sea has drawn the attention of the developing nations (by way of example) to the need for the transfer of technology from the developed nations of the world and to the disadvantageous position of the land-locked countries. Whilst the former issue tends to unite the developing nations, the enthusiasm to support the case of the land-locked countries tends to depend on questions of self-interest and hence to disunite the third world. This is a matter where the developing countries should consider carefully whether it would not be more in their interests to call with a united voice for a solution to the problems of the land-locked countries in the name of international equity. And to match their words with appropriate deeds. Let them, in this way, show their unity of purpose, their faith in the concept of international equity and let them be an example in this to the rest of the world. "He who seeks equity, must do equity⁵³".

⁵³ See per Lord Eldon L.C., in *Davis v. Duke of Marlborough* (1819) 2 Swan 108, 157.

International Equity and the Law of the Sea:

By EMMANUEL G. BELLO

Quite often, questions have been asked in the light of the unusually protracted Third UN Conference on the Law of the Sea (UNCLOS III), whether it will in the end serve any meaningful purpose in the interest of the world community, and in particular the Less Developed Countries (LDCs), also known as the Group of 77, comprising the developing and the non-aligned nations. Such a pessimistic note is not entirely unjustified. Notwithstanding the past number of years of active negotiations, and the preceding years of discussions and deliberations, a conservative estimate shows that more than ninety percent of the people of the Third World, know little or nothing about the on-going law of the sea conference. Yet, under the umbrella of all the wrangling, the shape of the seas, the new form of legal norms and the modalities for the distribution of the great wealth under the ocean floor, of two-thirds of the earth's surface is being developed.

Inadequate transmission of knowledge of what has been going on to the people in the Third World is inconsequential. What is important and directly relevant is that in spite of the shortage of trained and experienced international lawyers and diplomats from the less privileged parts of the world, they are fervently committed, for the first time, to playing a role in the establishment of the most political, economic and prestigious legal document of this century. Before 1967, when Ambassador Pardo of Malta, propounded his famous theory on the „common heritage of mankind“, the conclusions of the Geneva Conventions on the law of the sea in 1958 and 1960, had almost placed the industrialised maritime powers in a state of complacency. Among themselves, with no difficulty whatsoever, they had produced a corpus of International Law of the sea, regulating the relations among all the members of the international community. Various zones and régimes were carved out on the basis of their own need, and defined in a language that eminently suited their merchant marines and their endeavours as naval powers. There was the preposterous three-mile limit, grounded on the „cannon shot rule“ even though it has been said that the range of the cannon shot was not than one mile. We also had the complex and discriminating definition of the Continental Shelf, which included, *inter alia*, the phrase „. . . to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas;“ (Article 1 (a) of the Convention on the Continental Shelf 1958). Such legal formulation provided the technically advanced nations the leeway to deploy their fishing fleet, and deplete the living resources off the coast of many developing countries, while calling at the same time for the need for conservation.

The Third UN Conference on the Law of the Sea, since 1973, not only made those provisions obsolete, they also gave the Third World nations, the opportunity, albeit dubious and improperly co-ordinated at the beginning, to take part, in the fullest sense of the word, in restructuring the law of the sea, and injecting some degree of dynamism in the development of international law. The whole process has projected a „grand design“ in quest of international equity in many areas of international law and economic relations with the perspectives of the developing nations in view.