

1976

The Position of the American Bar Association on the Law of the Sea

Luke W. Finlay

Follow this and additional works at: <https://scholarlycommons.law.case.edu/jil>



Part of the [International Law Commons](#)

Recommended Citation

Luke W. Finlay, *The Position of the American Bar Association on the Law of the Sea*, 8 Case W. Res. J. Int'l L. 84 (1976)
Available at: <https://scholarlycommons.law.case.edu/jil/vol8/iss1/7>

This Article is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Journal of International Law by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

SYMPOSIUM

The Position of the American Bar Association on the Law of The Sea

Luke W. Finlay*

Introduction

THE POSITION of the American Bar Association (ABA) on the law of the sea is set forth in a *Resolution re Natural Resources of the Sea* adopted by the ABA's House of Delegates on August 6, 1973.¹ Action by the House of Delegates was recommended in a report of the ABA's Section of Natural Resources Law for which the author of this paper acted as *rappporteur*.² Under ABA rules, however, the resolution alone represents official ABA policy.³ The forwarding report reflects only the views of the Section of Natural Resources Law and, by the same token, to the extent that this paper goes beyond the resolution and report, it reflects only the personal views of the author.⁴

Discussion of the resolution will be broken down into eight parts, corresponding to the eight headings under which the 12 paragraphs of the resolution are presented. Reference will also be

* Member of the Bar of the State of New York and the United States Supreme Court; Chairman, Marine Resources Committee, Section of Natural Resources Law, American Bar Association.

¹ *American Bar Association Resolution Re: Natural Resources of the Sea Adopted by The House of Delegates, August 6, 1973 and Report of The Section of Natural Resources Law Recommending Adoption of that Resolution*, 6 NATURAL RESOURCES LAW. 589 (1973) [hereinafter cited as 1973 A.B.A. Res.]. The entire text of the resolution is reproduced there; only the substantive paragraphs are quoted in this paper.

² *Id.* at 593.

³ *Id.*

⁴ For further views of the writer on various aspects of the law of the sea, see Finlay, *The Outer Limits of the Continental Shelf — A Rejoinder to Professor Louis Henkin*, 64 AM. J. INT'L. L. 42 (1970); Finlay, *The National Interest and the Limits of the Continental Shelf*, 4 MARINE TECHNOLOGY SOC'Y J. 71 (1970); Finlay, *Rights of Coastal Nations to the Continental Margins*, 4 NATURAL RESOURCES LAW. 668 (1971); Finlay, *Realism vs. Idealism as the Key to the Determination of the Limits of National Jurisdiction over the Continental Shelf*, in LIMITS TO NATIONAL JURISDICTION OVER THE SEA 75 (G. Yates III and J. Young, eds., 1974); Finlay & McKnight, *Law of the Sea: Its Impact on the International Energy Crisis*, 6 LAW AND POLICY IN INT'L BUS. 639 (1974) [hereinafter cited as Finlay and McKnight].

made to an earlier resolution on the same subject adopted by the ABA's House of Delegates in August 1968.⁵

In view of the obvious interest of participants in this conference with the extent to which the position of the ABA is in harmony with, or varies from, that enunciated in the *Revised Draft Treaty Governing the Exploration and Exploitation of the Ocean Bed (1971)*,⁶ prepared with accompanying comments by the United Nations (UN) Committee of the World Peace Through Law Center, a comparison of the two positions will be made on the major points involved. The draft treaty will hereinafter be referred to as the WPTLC draft treaty and the Committee comments as Pamphlet 14. Because of limitations of space, no comment will be made on points covered in the WPTLC draft treaty which are not within the purview of the ABA resolution, for example, military uses of the seabed.

As will soon be seen, there are significant differences in approach. As the author sees it, these differences stem largely from the fact that the Center's UN Committee felt little or no restraint in working toward what it regarded as the best solution in an ideal world; whereas the drafters of the ABA resolution concluded that the realities of the world as it is could not, and should not, be ignored, a view that finds support in Professor Moynihan's highly perceptive article, *The United States in Opposition*,⁷ to which further reference will be made at later points in this paper.

In the first place, one may not approach the law of the sea as if it were a *tabula rasa*. Rights in the sea have been in the process of development since the beginning of recorded history and rights recognized under existing norms of international law, be it conventional or customary, may not summarily be replaced by a new set of norms, however theoretically desirable the latter may be. We are not yet ready for a world legislature with the same power to make law for unwilling sovereign states that national legislatures have, within constitutional limitations, to override local minorities.

The Vienna Convention on the Law of Treaties⁸ makes it clear

⁵ 2 NATURAL RESOURCES LAW. 440 (1969) [hereinafter cited as 1968 A.B.A. Res.].

⁶ WORLD PEACE THROUGH LAW CENTER, REVISED TREATY GOVERNING THE EXPLORATION AND EXPLOITATION OF THE OCEAN BED (1971), Pamphlet Series No. 14 (1971) [hereinafter cited as WORLD PEACE].

⁷ D. Moynihan, *The United States in Opposition*, COMMENTARY, Vol. 59, March 1975, at 31.

⁸ Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, U.N. Doc. A/CONF. 39/27 (1969) in 8 INT'L LEGAL MATERIALS 679 (1969) [hereinafter cited as Vienna Convention on The Law of Treaties]. For the

that no state may be bound by a treaty to which it is not a party;⁹ also, that where two states are parties to an earlier treaty and only one of them is party to a later treaty on the same subject, the provisions of the earlier treaty continue to govern the relations of the two states *inter sese*.¹⁰ This means that to be viable any treaty that comes out of the on-going deliberations of the Third United Nations Conference on the Law of the Sea (LOS III) must gain the broad acceptance of the community of nations, and particularly of those states whose rights under existing norms of international law, whether conventional or customary, would be significantly impaired by the provisions of the new treaty. This will be touched upon further as individual points are discussed.

It must further be borne in mind in this regard that, though the possibility was envisioned of voluntary revision of the four 1958 conventions on the law of the sea after five years of experience following their entry into force,¹¹ no provision was made for termination of the conventions or for the withdrawal of a state party. This was explained at a plenary session of the 1958 Geneva Conference on the Law of the Sea (LOS I) on the ground that to a very large extent the task of LOS I was to codify customary law which, by its nature, could not be denounced and that, where new law had been made, it had been adopted by general consent with the result that there was no point in providing for its denunciation.¹²

As to Seabed Resources of the Continental Margin

Under this heading the ABA:

- (1) REITERATES its position "that within the area of exclusive sovereign rights adjacent to the United States, the inter-

Secretary of State's letter of submittal to the President and the President's letter of transmittal to the Senate of the United States requesting advice and consent to ratification, see 11 INT'L LEGAL MATERIALS 234 (1972).

⁹ Vienna Convention on The Law of Treaties, *supra* note 8, art. 34.

¹⁰ *Id.* art. 3, para. 4(b).

¹¹ Convention on the Territorial Sea and the Contiguous Zone, *done* at Geneva on April 29, 1958, art. 30, [1964] 2 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205; Convention on the High Seas, *done* at Geneva April 29, 1958, art. 35, [1962] 2 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82; Convention on Fishing and Conservation of the Living Resources of the High Seas, *done* at Geneva on April 29, 1958, art. 20, [1966] 1 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 285; Convention on the Continental Shelf, *done* at Geneva on April 29, 1958, art. 13, [1964] 1 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311.

¹² 2 U.N. CONF. ON THE LAW OF THE SEA, GENEVA 1958, OFFICIAL RECORDS, (Plenary Meetings) 56-57, U.N. Doc. A/CONF. 13/38 (1958). The discussion at the cited pages related specifically to the Convention on the Continental Shelf, but the rationale is equally applicable to all four conventions.

ests of the United States in the natural resources of the submarine areas be protected to the full extent permitted by the 1958 Convention on the Continental Shelf," and asserts that these areas encompass or with advancing technology will encompass the full extent of the continental margin¹³ adjacent to the United States. The environment must be adequately protected, and other uses of the ocean must be accommodated. Similar rights and obligations are to be recognized in all other coastal states. If an "economic resource zone" is agreed upon in which the coastal state shall have exclusive rights to seabed resources, the proposed width of 200 nautical miles is acceptable provided that the exclusive seabed jurisdiction of the United States should be protected to that distance or to the full width of the continental margin, whichever is greater at any given point on the coast. Any treaty commitment for contributions of governmental revenues from the American continental margin for international community purposes should be limited in amount, any larger contributions being reserved for appropriation by Congress in the light of the overall national interest from year to year.

(2) SUPPORTS the view that the portions of the U.S. Outer Continental Shelf in waters deeper than 200 meters, being now clearly within the exclusive resources jurisdiction of the United States, acting through the Congress, should remain so, and their subjection to any future international treaty should be limited to standards for the prevention of unreasonable interference with other uses of the ocean, for the protection of the ocean from pollution, for the protection of the integrity of investments, and for the compulsory settlement of disputes.¹⁴

The current position of the United States as enunciated at the

¹³ The term "continental margin" is used in the ABA resolution and report and also in this paper to refer to the entirety of the natural prolongation of the continental land mass into and under the sea, including the continental shelf, the continental slope and at least the landward portion of the continental rise overlying the continental crust. See 1973 ABA Res., *supra* note 1, at 597. This meaning, which conforms to the "natural prolongation" concept that is the foundation stone of the customary law of the Continental Shelf (see pp. 91-93 *infra*), avoids the debatable ground on which those who include in their definition the entirety of the rise, as well as the shelf and the slope, find themselves. There are situations in which portions of the continental rise lying seaward of the outer edge of the continental crust may reasonably be regarded as part of the natural prolongation of the continents, for example, the great river cones of the Indus and the Ganges Rivers. However, this cannot be said of the entirety of the rise everywhere that one exists. It may also be noted that when the term "Continental Shelf" is capitalized, the term is being used in its legal and not its scientific sense. As will be seen in the discussion to follow, there is a distinction between the two and it is a fundamental error to attempt to interpret the 1958 Convention on the Continental Shelf as if the term has been used in its strictly scientific sense.

¹⁴ 1973 A.B.A. Res., *supra* note 1, at 590.

Geneva session of LOS III in the spring of 1975 is in close harmony with the recommendations in paragraph (1). Subject to satisfactory resolution of several disputed points, the United States is prepared to accept the widely supported concept of a 200-mile economic zone within which coastal states would have exclusive jurisdiction over the natural resources of both the seabed and the water column.¹⁵ As a compromise between those wide-margin coastal states which insist upon coastal state seabed resource jurisdiction over the entire margin without any obligation of revenue sharing and those states which are opposed to any seabed resource jurisdiction beyond the 200-mile economic zone, the United States has proposed that recognition be given to coastal state seabed resource jurisdiction over the entire margin where it extends beyond the 200-mile limit but that this recognition be coupled with an obligation of modest revenue sharing for international community purposes with respect to production from that part of the margin lying beyond the 200-mile limit. There would be no revenue sharing during the first five years of production from a new field (to permit the recovery of initial exploration and drilling costs), but sharing would start at 1 percent of wellhead value during the sixth year of production and would increase 1 percent per year until the level of 5 percent was reached in the tenth year, remaining constant at 5 percent of wellhead value thereafter.¹⁶ Experts familiar with oil field performance and levels of production over the life of a field have estimated that with crude oil at \$11/bbl. a 700-million barrel oil field developed on the continental margin beyond the 200-mile limit would provide \$140 million of revenue sharing for international community purposes under this formula if depleted over a 20-year period.¹⁷

So much has been written on the law of the Continental Shelf that it will be covered here in only cursory fashion. As among the 54 states party to the 1958 Convention on the Continental Shelf,¹⁸ its provisions are controlling. For all other states and between these other states and the states party to the Convention, the norms of customary international law as enunciated by the Interna-

¹⁵ U.S. Delegation to LOS III, Press Release, May 9, 1975, at 3 [hereinafter cited as Press Release].

¹⁶ *Id.* at 4.

¹⁷ *Id.*

¹⁸ See U.S. DEP'T OF STATE, TREATIES IN FORCE 372 (1975) for the 45 States parties to the Convention.

tional Court of Justice in the *North Sea Continental Shelf Cases*¹⁹ are controlling.

The Convention on the Continental Shelf prescribes in Article 2 that:

1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.

2. The rights referred to in paragraph 1 of this article are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities, or make claim to the continental shelf, without the express consent of the coastal State.

3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.

4. The natural resources referred to in these articles consist of the mineral and other nonliving resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil.²⁰

The term "continental shelf" as used there and elsewhere in the Convention is defined in Article 1 as referring:

. . . (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.²¹

The International Law Commission (ILC), which drafted the language of Article 1,²² made it abundantly clear that by its use of the term "continental shelf" it did not intend to adhere strictly to the geological concept of the continental shelf. Thus, its 1956 report states that:

. . . exploitation of a submarine area at a depth exceeding 200 metres is not contrary to the present rules, merely because the area is not a continental shelf in the geological sense.²³

¹⁹ [1969] I.C.J. 3; 8 INT'L LEGAL MATERIALS 340 (1969).

²⁰ Convention on the Continental Shelf, *supra* note 11, art. 2.

²¹ *Id.* art. 1.

²² With the exception of an amendment to make specific reference to islands in Article 1(b), which was added at LOS I. See (1956) 2 Y.B. INT'L L. COMM'N 296, U.N. Doc. A/CN.4/SER.A/1956/Add. 1 for the ILC text, which is found in Article 67 of its draft of a comprehensive treaty on the law of the sea.

²³ *Id.* at 297, Commentary on art. 67, para. 7.

The ILC, in its earlier deliberations, had first agreed in 1951 upon exploitability alone²⁴ and had then shifted in 1953 to the 200-meter water depth alone²⁵ as the limit of coastal state jurisdiction over seabed resources in adjacent submarine areas beyond the territorial sea. It finally decided in 1956 to recommend the language later incorporated into the 1958 Convention embracing both the 200-meter water depth and the exploitability concept.

The moving force leading the ILC's 1956 decision was the action of a Specialized Conference of the Organization of American States a few weeks earlier, on March 28, 1956, in asserting the jurisdiction and control of the American States over the seabed and subsoil of the continental and insular terrace (which the Conference defined as including the continental shelf and the continental slope "from the edge of the shelf to the greatest depths"), or other submarine areas adjacent to their coasts but outside the territorial sea, to a depth of 200 meters or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of their natural resources.²⁶

Myres McDougal and William Burke say of this conference, in their highly regarded work, *The Public Order of the Oceans*, that it had a "decisive effect upon the discussions in the International Law Commission and its ultimate recommendation."²⁷ They go on to say that, though the ILC refused to incorporate the term "continental terrace" into its definition, the language actually adopted by it in its final draft had the same effect as the Ciudad Trujillo Resolution.²⁸ The Chairman of the 1956 session of the ILC, F. V. Garcia Amador, is in emphatic agreement with this view.²⁹ The U.S. Delegate to LOS-I, Arthur H. Dean, declared himself to the same effect in the course of the ratification hearings on the Geneva conventions before the Foreign Relations Committee of the United States Senate. His testimony was as follows:

The clause which protects the right to utilize advances in technology at greater depths [than 200 meters] beneath the

²⁴ *Id.* at 296, Commentary on art. 67, para. 1.

²⁵ *Id.* at 296, Commentary on art. 67, para. 3.

²⁶ *Final Act, Inter-American Specialized Conference on Conservation of Natural Resources: the Continental Shelf and Marine Waters*, 13, 34 (1956). It is to be noted that the affirmative vote of the U. S. Delegation in favor of the resolution had the express concurrence of the Department of State, 4 WHITEMAN, DIGEST OF INT'L LAW 837 (1965).

²⁷ M. McDUGAL & W. BURKE, *THE PUBLIC ORDER OF THE OCEANS* 680 (1962).

²⁸ *Id.* at 683.

²⁹ F. GARCIA AMADOR, *THE EXPLOITATION AND CONSERVATION OF THE RESOURCES OF THE SEA* 130 (2d ed. 1959).

oceans was supported by the United States and was in keeping with the inter-American conclusions at Ciudad Trujillo in 1956. It was included in the ILC 1956 draft.³⁰

It was in this sense that the United States Senate gave its advice and consent to ratification of the Convention by the United States.³¹

In the *North Sea Continental Shelf Cases*, the International Court of Justice embraced the submerged prolongation of the continental land mass into and under the sea as the juridical basis of continental shelf rights, saying:

[w]hat the Court entertains no doubt is the most fundamental of all the rules of law relating to the continental shelf, enshrined in Article 2 of the 1958 Geneva Convention, though quite independent of it, — namely the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short, there is here an inherent right. In order to exercise it, no special legal process has to be gone through, nor have any special legal acts to be performed. Its existence can be declared (and many States have done this) but does not need to be constituted. Furthermore, the right does not depend on its being exercised. To echo the language of the Geneva Convention, it is “exclusive” in the sense that if the coastal State does not choose to explore or exploit the areas of shelf appertaining to it, that is its own affair, but no one else may do so without its express consent.³²

The cases before the Court involved disputes between the Federal Republic of Germany and its North Sea neighbors to the north and the west, Denmark and the Netherlands, as to their respective Continental Shelf rights in the North Sea. Denmark and the Netherlands were parties to the 1958 Convention on the Continental Shelf, but the Federal Republic of Germany was not

³⁰ *Hearing on Conventions on the Law of the Sea Before the Senate Comm. on Foreign Relations*, 86th Cong., 2d Sess. 108 (1960); 42 DEP'T STATE BULL. 258 (1960). See also Whiteman, *Conference on the Law of the Sea: Convention on the Continental Shelf*, 52 AM. J. INT'L L. 629, 733 n.21 (1958). Miss Whiteman was U.S. representative on Committee IV at LOS I, which was responsible for the preparation of the Convention on the Continental Shelf.

³¹ B. Oxman, 3 J. MARITIME L. 245, 445, 683 (1972), argues for a somewhat different interpretation of the 1958 Convention on the Continental Shelf, but, in the view of this writer, the interpretation there given cannot stand against the clear authority to the contrary cited above.

³² [1969] I.C.J. 3, 22; 8 INT'L LEGAL MATERIALS 340, 357 (1969).

and the Court found that the latter had done nothing to bind it to the terms of the Convention. The cases, therefore, had to be decided on the basis of customary international law and it was on that basis that the pronouncement of the Court cited immediately above was made. After concluding that Article 6 of the Convention relating to boundaries between adjacent and opposite states was not itself a codification of customary law and hence not binding on the Federal Republic of Germany, and giving consideration to the physical configuration of the coastline in the light of customary law, the Court laid down guidelines³³ under which the three litigant States divided among themselves seabed resource rights extending some 156 nautical miles from the coast of Europe to the common boundary with the Continental Shelf of the United Kingdom.³⁴

It is an indisputable scientific fact that the continental shelf and the continental slope are surface manifestations, namely, the top and the front, respectively, of the same rocks. Also, it is these rocks in their entirety that constitute the natural prolongation of the land territory of the coastal state into and under the sea. As Menard and Smith put it, in explaining their combination of the continental shelf and the continental slope as a single province in their paper, *Hypsometry of Ocean Basin Provinces*:

. . . [s]helf and slope are grouped because they are merely the top and front of the margins of continental blocks.³⁵

It so happened that only the physical continental shelf was in dispute in the *North Sea Continental Shelf Cases*; but there would be no logic whatever in attempting to limit the natural prolongation concept to the physical continental shelf in its geomorphological sense in contradistinction to the continental slope and there has been no effort whatever to do so in the widespread practice of states. According to a recent count some 50 coastal states have

³³ [1969] I.C.J. 3, 53-54; 8 INT'L LEGAL MATERIALS 340, 384-85 (1969).

³⁴ The 156 nautical-mile figure is from OFFICE OF THE GEOGRAPHER, BUREAU OF INTELLIGENCE AND RESEARCH, U.S. DEP'T OF STATE, INTERNATIONAL BOUNDARY STUDY, SERIES A: LIMITS IN THE SEAS, No. 10, NORTH SEA CONTINENTAL SHELF BOUNDARIES 7, 9 (1970).

³⁵ Menard & Smith, *Hypsometry of Ocean Basin Provinces*, 71 J. GEOPHYSICAL RESEARCH 4308 (1966). See also the testimony of the late Dr. William T. Pecora to similar effect before the Subcommittee on Minerals, Materials and Fuels of the Committee on Interior and Insular Affairs, United States Senate, STAFF OF SENATE COMM. ON INTERIOR & INSULAR AFFAIRS, 91ST CONG., 1ST SESS., SELECTED MATERIALS ON THE OUTER CONTINENTAL SHELF 42 (Comm. Print 1969) (Memorandum by the Chairman to Members of the Comm. on Interior and Insular Affairs).

authorized offshore exploration for, and exploitation of, oil and natural gas in waters deeper than 200 meters, extending in some instances to depths as great as 12,000 feet.³⁶ This has led the eminent British authority, Professor R. Y. Jennings, to express the belief that, as a consequence of this widespread state practice, his *a priori* conclusion that the coastal states have exclusive jurisdiction over the continental slope and the subsoil of that part of the natural prolongation of their land mass was in the process of confirmation as a matter of customary international law.³⁷ This is a view with which the author is in full accord.

Pamphlet 14 does not undertake an analysis of the law of the Continental Shelf, but it does include the statement that the Moratorium Resolution adopted by the UN General Assembly on December 15, 1969³⁸ was adopted in the light of a then present limit to commercial exploitability of 200 meters and "froze" exploitation at that depth.³⁹ This statement was offered in support of the WPTLC draft treaty proposal that the resources of the ocean bed and the nonliving resources of the high seas beyond the first depth of 200 meters outside the territorial sea should appertain to the UN and be subject to its jurisdiction, subject only to a veto power of the littoral states over exploitation by nonnationals within 50 miles of their coasts and a right on their part to share in 50 percent of the net proceeds to the UN from exploitation within the 50-mile zone.⁴⁰

It seems clear that the suggestion that the Moratorium Resolution "froze" national jurisdiction under the exploitability clause of the Geneva Convention at the December 1969 state of the art of offshore development is expressly controverted by the record and that the proposal to internationalize the mineral resources of the high seas beyond the 200-meter isobath is nonnegotiable.

As to the first point, Mr. Garcia Robles, in speaking for Mexico in support of the Moratorium Resolution on the floor of the UN General Assembly immediately prior to the vote on its adoption, pointed out, without dissent, that the draft resolution does not

³⁶ H. Gould, *Offshore Petroleum Development and Potential*, in 2 MARITIME STUDIES MANAGEMENT 181, 187 (1975) [hereinafter cited as Gould], citing data supplied by the Foreign Scouting Service of Petroconsultants, S.A. as his source.

³⁷ R. Jennings, *The Limits of Continental Shelf Jurisdiction: Some Possible Implications of the North Sea Case Judgement*, 18 INT'L COMP. L. Q. 819, 830 (1969).

³⁸ G. A. Res. 2574-D (XXIV), 24 U. N. GAOR Supp. 30, at 11, U. N. Doc. A/7630 (1970).

³⁹ WORLD PEACE, *supra* note 6, at 10.

⁴⁰ *Id.* at 9, art. 1; at 16-17, art. 13; at 17-18, art. 13(A)(iii).

pronounce itself on the size of the area — or how far it extends — nor on the limits of national jurisdiction.⁴¹ Mr. Phillips, in speaking for the United States in opposition to the resolution, alluded to the same point, saying that not only was the resolution undesirable from the practical standpoint as tending to discourage the development of deep sea mining techniques that ought to be going forward but that the resolution was likely to encourage some states that wanted to engage in exploration or exploitation of seabed resources to move toward unjustifiably expansive claims of national jurisdiction as a means of circumventing the Moratorium.⁴² There was not the slightest suggestion from anyone in the course of the debate on the resolution that it was intended to apply to the entire seabed of the high seas beyond the 200-meter isobath, and the resolution would never have received the same degree of support that it did receive had it so provided.⁴³

The target of the Moratorium Resolution was manganese nodule mining from the deep seabed, not petroleum exploitation on the continental margins. Otherwise, it would be impossible to explain the total absence of diplomatic protest against the many leases and concessions that have been granted on the continental margins beyond the 200-meter isobath both before and after the adoption by the UN General Assembly of the Moratorium Resolution. The only opposition to such leases and concessions of which the author is aware is that which has arisen in a few instances in which more than one coastal state has laid claim to seabed resource jurisdiction over the same portion of the continental margin.⁴⁴

As to the second point, it is expected that at least 50 percent of new discoveries of oil and natural gas will come from beneath the floor of the sea.⁴⁵ The present heavy dependence of much of the

⁴¹ U.N. Doc. A/PV. 1833, at 3 (1969).

⁴² *Id.* at 6-11.

⁴³ At the date of adoption of the Moratorium Resolution, many of its adherents were pressing for agreement on a 200-nautical mile exclusive economic zone, which in most parts of the sea would extend several times farther to sea than the 200-meter isobath. Thus, for the 106 countries listed in J. ALBERS, M. CARTER, A. CLARK, A. COURTY & S. SCHWEINFURTH, SUMMARY: PETROLEUM AND SELECTED MINERAL STATISTICS FOR 120 COUNTRIES, INCLUDING OFFSHORE AREAS 125 (table 1) (U.S. Dep't of Interior Geological Professional Paper 817, 1973) [hereinafter cited as ALBERS], the total shelf area to the 200-meter isobath is 6,247,600 sq. n.m.; the total area to the 200 n.m. limit is 24,006,300 sq.n.m., or nearly four times as great!

⁴⁴ See, e.g., S. Harrison, *Oil Rush in East China Sea Becomes a Three-Nation Issue*, Washington Post, Oct. 14, 1970, at A12, Col. 1.

⁴⁵ Gould, *supra* note 36, at 183.

world on Middle East oil supplies,⁴⁶ the dramatic escalation that took place in oil prices following the October 1973 war in the Middle East,⁴⁷ and the drastic effect that this escalation has had on the economies of oil importing countries, large and small, developed and developing alike, all magnify the importance to the coastal states of the potential petroleum resources of their continental margins. As a consequence, it is highly unrealistic to expect that any coastal state will renounce rights to these resources to which it has a clear claim under existing norms of international law.

Despite the substantial amount of domestic production of oil and natural gas that the United States enjoys, it is already dependent upon imports for some 35 percent of its total requirements of petroleum.⁴⁸ Though the ABA resolution was adopted two months prior to the outbreak of the October 1973 war in the Middle East, the trend toward increasing dependence on imports was already apparent. Subsequent events have served only to accentuate the soundness of the ABA position in support of the retention by the United States, in common with other coastal states, of the full limit of Continental Shelf rights secured by existing norms of international law.

A two-thirds voting majority in favor of narrow coastal state seabed resource jurisdiction could be obtained in LOS III through the combined vote of 29 landlocked countries, 19 shelflocked countries and 47 countries facing the open sea with less than 40,000 square nautical miles of continental margin apiece;⁴⁹ but the result would be a nontreaty. These 95 countries among them have only some 955,000 square nautical miles of continental margin, or less than two-thirds that of the single country of Australia alone.⁵⁰ Australia and nine other countries — Canada, Indonesia, USA, USSR, New Zealand, Argentina, Norway, Japan, and Brazil

⁴⁶ Of the worldwide total production of 51.1 million b/d of crude oil in April, 1975, 18.7 million b/d, or 37%, came from the Middle East, OIL & GAS J., June 23, 1975, at 171.

⁴⁷ See Finlay and McKnight, *supra* note 4, at 639 & n.2.

⁴⁸ Gould, *supra* note 36, at 187.

⁴⁹ The number of landlocked and shelf-locked countries is from Hodgson and McIntyre, *National Seabed Boundary Options*, in LIMITS TO NATIONAL JURISDICTION OVER THE SEA 152, 166 (G. Yates III and J. Young, eds., 1974); the 47 countries with less than 40,000 sq. n.m. of continental margin apiece are drawn, in part, from Table 1, ALBERS, *supra* note 43, at 125 and, in part, from Hodgson and McIntyre, Table 4, at 160-64. It is to be noted that these tables give areas to the 3,000-meter isobath, which is a sufficiently accurate approximation of the area of the margin for the purposes of the point being made in the text.

⁵⁰ Table 1, ALBERS, *supra* note 43, at 125.

in the descending order of their continental margins — have some 7,909,200 square nautical miles of continental margin among them, or 59.3 percent of the continental margins of the entire group of 106 countries bordered by oceans or inland seas for which shelf and margin statistics are given in Summary Table 1 of Geological Survey Professional Paper 817, U.S. Dep't of the Interior (1973).⁵¹

There is substantial merit in the acceptance of a modest level of revenue sharing from the outer portions of the margin in exchange for international agreement on a precise limit for the legal Continental Shelf, and this is the rationale of the latest U.S. proposal previously mentioned. Yet, though this proposal was limited to the area of the continental margin beyond the 200-mile limit and was held to a maximum level of 5 percent of wellhead value that would not be reached until the 10th year of production,⁵² it is still far from acceptance by the coastal states with margins more than 200 nautical miles in width. A quick analysis of a map prepared by the Office of the Geographer, U.S. Department of State, entitled *Composite Theoretical Division of the Seabed*,⁵³ indicates that there are 22 countries some part of whose continental slopes extend more than 200 nautical miles from the coast and that there are another 27 countries some part of whose continental rises do so, including countries such as India and Pakistan with their legitimate claims to the seabed resources of the great cones of the Indus and Ganges Rivers. This suggests the clear need for agreement in LOS III on a broad definition of Continental Shelf rights along the line recommended by the ABA if a viable treaty is to be attained.

To conclude the discussion under this heading, it may be noted that paragraph (2) of the ABA resolution was addressed to a domestic United States problem which has since been resolved along the lines recommended by the ABA.

When a temporary informal suspension of leasing on the U.S. Outer Continental Shelf (OCS)⁵⁴ beyond the 200-meter isobath

⁵¹ *Id.*

⁵² See note 16 *supra*.

⁵³ Office of the Geographer, Bureau of Intelligence & Research, U.S. Dep't of State, *Composite Theoretical Division of the Seabed* (Map No. 562101, 1973).

⁵⁴ "Outer Continental Shelf" is used in the sense defined in Section 2(a) of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 (1953), to include all submerged lands lying seaward of the areas ceded to the jurisdiction of the coastal states of the United States under the Submerged Lands Act, 43 U.S.C. § 1301 (1953), "of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control." Since the entry into effect of the Convention on the Continental Shelf, this language has been construed in harmony with

was lifted in the spring of 1973 because of the need of finding new domestic sources of petroleum, the Executive Branch of the federal government prescribed that any new OCS leases in waters deeper than 200 meters would be subject to any new international regime to be agreed upon.⁵⁵ In view of the high degree of uncertainty as to the additional financial and other burdens that might be imposed upon OCS leases under an as yet undetermined treaty,⁵⁶ this requirement put prospective OCS lessees in an extremely difficult position and imperiled the highly lucrative bonus system of leasing under which the federal government had received billions of dollars of bonuses on OCS lease sales.⁵⁷ In addition, no other of the numerous countries that have opened up for development their continental margins beyond the 200-meter isobath had imposed a similar burden upon itself or its lessees or licensees. Accordingly, on further consideration, the policy was reversed in the fall of 1973 and standard OCS leasing procedures have applied to the entire OCS ever since.⁵⁸

*As to Seabed Resources Seaward of the Limits
of National Jurisdiction*

Under this heading of the resolution the ABA:

(3) RECOMMENDS that the United States insist that any international regime established with respect to the areas seaward of the limits of national jurisdiction incorporate the following principles:

(a) That the United States and other developed countries have representation in the governing council which gives adequate weight to the economic importance of the resource to their people;

(b) That any international authority created be administrative and regulatory only, with power to allocate areas, and that it have no control over volume or rates of production, distribution or pricing of seabed resources.

(4) RECOMMENDS that the United States implement its announced policy of encouraging exploration and exploitation

that of the Convention; Barry, *The Administration of the Outer Continental Shelf Lands Act*, NATURAL RESOURCES LAW. Vol. 1 No. 3, July 1968, at 38.

⁵⁵ 38 Fed. Reg. 9839, 17,743, 27,307 (1973).

⁵⁶ See Finlay and McKnight, *supra* note 4 at 673 & n.185.

⁵⁷ Bonus payments on 87 bids accepted by the United States Department of the Interior as a result of a single lease sale on December 20, 1973 totaled \$1,490,065,230, with the bonus payment on the most costly single lease running to \$36,805 per acre, OIL & GAS J., Jan. 21, 1974, at 39.

⁵⁸ 38 Fed. Reg. 30,457 (1973).

of seabed resources beyond the limits of national jurisdiction during the negotiation of a treaty and supports the companion policy of seeking the provisional entry into force of the seabed mining aspects of any treaty that is agreed upon.⁵⁹

Also pertinent to this topic is the recommendation in the 1968 resolution of the ABA that the arrangements to be agreed upon for the international seabed area should be such as to:

. . . assure, *inter alia*, freedom of exploration by all nations on a nondiscriminatory basis, security of tenure to those engaged in producing the resources in compliance with such rules, encouragement to discover and develop these resources, and optimum use to the benefit of all peoples.⁶⁰

The rationale of subparagraph (3)(a) is obvious. The developing countries not only have an overwhelming numerical superiority in the United Nations; they have also shown a strong determination to work closely together in the natural resources field to strengthen their economic power vis-a-vis the industrialized countries.⁶¹ If the industrialized countries and their nationals are to get a fair shake in the development of the mineral resources of the international seabed area in the light of such recent developing-country power plays as the *Charter of Economic Rights and Duties of States*, to which Professor Moynihan makes particular mention in the article of his mentioned above,⁶² it is essential that there be a weighted voting system for the governing council of the international regime so designed as to assure evenhanded treatment of developed and developing countries alike.

Subparagraph (3)(b) has a dual motivation. The first part of this subparagraph is based on the same reasoning that gave rise to the age-old objection to a single individual's serving in the triple role of prosecutor, judge and jury over his fellow men. It is against human nature to assume that an international regime which is both a licensing and regulatory body on the one hand and an operating agency on the other hand would not tend to favor itself over its licensees in innumerable ways. The result would be an irreversible trend toward state socialism at an international level. This is what the Group of 77 has insisted on from the beginning⁶³ — to the

⁵⁹ 1973 A.B.A. Res., *supra* note 1, at 590-91.

⁶⁰ 1968 A.B.A. Res., *supra* note 5, at 441.

⁶¹ Moynihan, *supra* note 7, at 35.

⁶² *Id.* at 38; Charter of Economic Rights and Duties of States, U. N. Doc. A/9946 (1974) [hereinafter cited as Charter of Economic Rights and Duties of States].

⁶³ See Press Release, *supra* note 15, at 45. The group of 77's view is reflected

point that it is likely to be the single most difficult obstacle to agreement on a viable treaty — but it most emphatically is not in the interest of the industrialized countries and there is good reason to doubt that it is in the real interest of the developing countries themselves. As Professor Moynihan puts it in his incisive article, *The United States in Opposition*, in speaking of the almost universal Fabian socialist policies of the developing countries:

And here is the nub of the bad news; for all the attractions of this variety of socialist politics, it has proved, in almost all its versions, almost the world over, to be a distinctly poor means of producing wealth. Sharing wealth — perhaps. But not producing wealth.⁶⁴

If the international regime is administrative and regulatory only, each state or group of states acting jointly can decide for itself whether to rely on private enterprise or state enterprise in the exploration and exploitation of the areas of the deep seabed licensed to it or its nationals. It might be a refreshing eye-opener for the world to let proponents of the two systems compete on equal terms under an international regime designed to assure absolute impartiality in the issuance and regulation of licenses.

As to the second aspect of subparagraph (3)(b), there is no valid reason why land-based production of minerals should have a preferential status over production from the international seabed area. Nor is there any reason whatever why land-based producer interests should be put ahead of consumer interests. Even the developing consumer countries seem to have awakened to this latter point despite the solidarity of the Group of 77 on most issues. If there is valid reason at any time for an international commodity agreement, it should be negotiated on a global basis in which individual countries with either land-based or sea-based production and consuming countries alike are adequately represented. Unilateral control of seabed production alone cannot serve the broad interests of the community of nations as a whole and the industrialized countries should not find themselves alone in opposing it.

The first part of paragraph (4) of the resolution relates to President Nixon's Statement on U.S. Oceans Policy of May 23, 1970, in which he included the statement, undoubtedly addressed

in Articles 21 and 22 of Part I of the Informal Single Negotiating Text prepared by the Chairman of the First Committee of LOS III at the close of the 1975 session in Geneva, U.N. Doc. A/CONF. 62/WP. 8/Part 1, at 9 (1975); 14 INT'L LEGAL MATERIALS 682, 688 (1975).

⁶⁴ Moynihan, *supra* note 7, at 39.

to the Moratorium Resolution of the previous December, that the negotiation of a law of the sea treaty might take some time and that he did not believe that it was either necessary or desirable to try to halt exploration and exploitation of the seabeds beyond a depth of 200 meters during the negotiating process.⁶⁵

The reference to the 200-meter water depth alluded to an earlier proposal of the President in the same statement that there be international agreement on the point where the high seas waters reach a depth of 200 meters as the outer limit of coastal state seabed resource jurisdiction, with only a coastal state trusteeship over the balance of the margin.⁶⁶ After the United States shifted to its present position in support of broad coastal state seabed resource jurisdiction,⁶⁷ it did open up for development the portion of the U.S. continental margin beyond the 200-meter isobath, as previously noted. Aside, however, from recommending provisional entry into force of the deep seabed mining provisions of any treaty coming out of LOS III,⁶⁸ it has done nothing affirmative to encourage manganese nodule mining from the deep seabeds beyond the continental margins.

Instead, until the failure of the Geneva session of LOS III to reach agreement on a treaty or even to recommend that the UN General Assembly call for a treaty to be concluded during the 1976 session(s) of LOS III, the Administration had consistently urged delay by Congress in acting on proposed legislation to assist American manganese nodule miners or to protect American fisheries stocks.⁶⁹ As of this writing, the Administration is in the process of reexamining its position on such legislation in the light of developments at Geneva and has requested Congress to

⁶⁵ 6 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 678 (1970).

⁶⁶ *Id.* For the U.S. draft treaty of August 3, 1970 implementing the statement of President Nixon, see Comm. on the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction, Report, 25 U.N. GAOR Supp. 21, U.N. Doc. A/8021 (1970), Annex V, Draft United Nations Convention on the International Sea-Bed Area (Working paper submitted by the United States of America) 130 at 132, 138-40.

⁶⁷ First announced in a statement by Hon. John R. Stevenson, U.S. Representative to the United Nations Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, in plenary session, August 10, 1972; U.S. Mission in Geneva, Press Release, Aug. 10, 1972 at 2-3. For the latest announcement, see Press Release, *supra* note 15, at 4.

⁶⁸ See U.S. Mission to the United Nations, New York, Press Release USUN-20 (73), March 19, 1973.

⁶⁹ See *Hearings Before the Subcomm. on Minerals, Materials and Fuels of the Senate Comm. on Interior and Insular Affairs*, 93d Cong., 2d Sess., Status Report on Law of the Sea Conference, Sept. 17, 1974, Pt. 2 at 825-30, 1087-89.

delay action until that reexamination is completed and can be discussed with the appropriate Congressional committees.⁷⁰

It is to be noted that the United States, by its affirmative vote in the UN General Assembly on the 1970 Declaration of Principles, has committed itself to the position that no interim actions taken by it or its citizens would give rise to any sovereign rights or claim of sovereign rights over any part of the international seabed area to be agreed upon or would create any rights with respect to the area or its resources incompatible with the international regime to be established.⁷¹

In the light of this commitment, there is no legitimate reason for concern that interim activity in the deep seabed would imperil a future treaty. To the contrary, there is a strong likelihood that it would provide a badly needed incentive to the Group of 77 to moderate their present extreme demands. There is reason to believe that they regard time as working on their side, with the possibility of increasing concessions from the United States and other developed countries the longer agreement on a treaty is delayed. Action to dispel such an attitude could have only a salutary effect. If it is the position of the Group of 77 that under no circumstances will an American mining company be allowed to operate in the international seabed area for its own account, the United States should throw down the gauntlet on that point without further delay.

The WPTLC draft treaty is in accord with the ABA position that the international regime should not itself engage in exploitation and that it should be governed on a weighted voting basis protecting all interests.⁷² On the other hand, it would authorize preferential treatment of developing countries in the allocation of licenses and would provide for a type of production control applicable only to deep seabed mining,⁷³ points with which the author is in obvious disagreement. It would also incorporate the international seabed regime as a United Nations corporation and give the United Nations civil and criminal jurisdiction over the area.⁷⁴

⁷⁰ See statement by Hon. John Norton Moore, Chairman of NSC Interagency Task Force on the Law of the Sea, before the Senate Commerce Comm., The National Oceans Policy Study, June 3, 1975.

⁷¹ U.N. Press Release GA/4355, Dec. 17, 1970; 10 INT'L LEGAL MATERIALS 220, 221 (1971).

⁷² WORLD PEACE, *supra* note 6, at 18-19, arts. 13(A)(iv) & 13(B)(ii).

⁷³ *Id.* at 17-18, art. 13(A)(iii).

⁷⁴ *Id.* at 16, art. 13 and at 18, art. 13(A)(vi).

There is, of course, no possibility that LOS III will move in that direction.

As to Fishery Interests

Under this heading of the resolution, the ABA:

(5) SUPPORTS the position on fisheries expressed by the United States delegation to the United Nations Seabed Committee, which seeks to assure the rational use and conservation of all fish stocks by adopting broad coastal State management of coastal species, host State management of anadromous species, and international management of highly migratory species, such as tuna.⁷⁵

It may be noted at this point that the WPTLC draft treaty and Pamphlet 14 are silent on the subject of fisheries. Though the issue is far from settled, broad support seems to be developing in LOS III for coastal state management of coastal species within the proposed 200-mile economic zone, subject to the requirement that fishermen of other states be given access to any part of the economic yield of a species that is not taken by local fishermen. Progress also appears to have been made on the subject of host state control of anadromous species beyond the economic zone.⁷⁶ In the light of the pronouncement of the International Court of Justice in the *Fisheries Jurisdiction Cases*⁷⁷ rejecting unilateral assertions of exclusive coastal state jurisdiction over broad expanses of the sea, one would have also expected some progress on the question of highly migratory species such as tuna, which has been such a bone of contention between the U.S. tuna fishermen and Ecuador, Peru and Chile; but apparently none has been forthcoming to date.⁷⁸

As to Protection of the Environment

Under this heading of the resolution, the ABA:

(6) RECOMMENDS that provision be made for establishment of internationally agreed standards for the prevention of marine pollution, to the ends

(a) That the marine environment be adequately protected;

(b) That, with respect to vessels engaged in international

⁷⁵ 1973 A.B.A. Res., *supra* note 1, at 591.

⁷⁶ Press Release, *supra* note 15, at 3.

⁷⁷ 13 INT'L LEGAL MATERIALS 1049, 1090 (1974).

⁷⁸ Press Release, *supra* note 15, at 3.

navigation, there be a single set of uniform standards, internationally determined;

(c) That, with respect to exploration and exploitation activities on the seabed, the community interest in the oceans be recognized by acceptance and enforcement of international standards everywhere beyond the territorial sea, but with the possibility of supplemental, more exacting, coastal State standards within the areas of special economic interest to such States;

(d) That liability for pollution by vessels and by seabed activities be strict but finite and insurable, with supplementation, if need be, by an international fund or funds.⁷⁹

The WPTLC draft treaty does not deal specifically with the question of vessel pollution, nor does it deal with the issue of national versus international standards for the protection of the environment. It does, however, include a provision imposing absolute liability for damage to the ocean environment.⁸⁰ The recommendation of the ABA for strict, but finite and insurable, liability, with supplementation, if need be, by an international fund or funds is predicated on the difficulty in evaluating and making adequate advance provision for the type of claims that could arise from activities in the international seabed area. The oceans are so vast, the coastlines bordering them so extensive, and the potential claimants of all nationalities so numerous that it seems much the wiser course, if the use of the seas and the exploitation of their resources are to be encouraged for the benefit of all mankind, to follow the pattern of the International Convention on Civil Liability for Oil Pollution Damage,⁸¹ as supplemented by the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage.⁸²

The argument in favor of a single set of international standards for the prevention of pollution by vessels engaged in international navigation is an intensely practical one and seems to be gaining support in LOS III.⁸³ There are well over 100 coastal states and to allow each and every one of them to impose its standards on the design, construction and operation of every vessel transiting

⁷⁹ 1973 A.B.A. Res., *supra* note 1, at 591-92.

⁸⁰ WORLD PEACE, *supra* note 6, at 13, art. 6.

⁸¹ International Convention on Civil Liability for Oil Pollution Damage, *done* Nov. 29, 1969; 9 INT'L LEGAL MATERIALS 45 (1970).

⁸² International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, *done* Dec. 18, 1971; 11 INT'L LEGAL MATERIALS 284 (1972).

⁸³ Press Release, *supra* note 15, at 5.

its economic zone or territorial sea even though not destined for its ports would create an intolerable situation that no country dependent upon international maritime commerce should be willing to accept.

As to Unimpeded Navigation and Transportation

Under this heading of the resolution, the ABA:

(7) SUPPORTS the principles that straits which have historically been open for international maritime traffic are international waters whose status should be protected against change as a result of any agreement of the breadth of the territorial sea, and that, as international waters, they should be subject to internationally agreed rules for the safety of navigation and prevention of pollution, with the proviso that any powers granted to coastal States in enforcement of international safety or anti-pollution regulations applicable to such waters be accompanied by adequate provisions for the prompt release under bond of any vessel of foreign registry detained under such regulations. Further SUPPORTS the acquiescence by the United States in the recognition of a 12-mile territorial sea, subject to adequate safeguards against such actions impairing the world community's existing rights of free movement through, and overflight of, straits which have historically been open for international maritime traffic. Further SUPPORTS the authority of the United States and other coastal States to provide for and regulate the peaceful use of the seabed of the adjoining continental margin in aid of navigation and transportation.

(8) RECOMMENDS comparable provisions to assure the right of unimpeded transit through archipelagic waters.

(9) SUPPORTS the view that coastal States have the right to establish deep water ports on the continental margins adjacent to their territorial sea and to operate them under their exclusive control, provided that they do so in such a manner as to avoid unreasonable interference with international navigation or other high seas freedom, and that any new international treaty dealing with the subject should so provide.⁸⁴

The salient points with respect to paragraph (7) are unimpeded transit and overflight and international versus national regulations for safety of navigation and the prevention of pollution. There are some 116 straits between 6 and 24 nautical miles in width, including such important ones as the Straits of Dover, Gibraltar, Hormuz and Malacca; and it is unrealistic to expect that the maritime countries would relinquish their high seas freedoms with respect to these straits by agreement on an unqualified 12-mile territorial sea, as a

⁸⁴ 1973 A.B.A. Res., *supra* note 1, at 591-92.

comparison of the relevant provisions of the Convention on the High Seas and the Convention on the Territorial Sea and the Contiguous Zone will readily demonstrate.⁸⁵ The same, of course, applies equally to archipelagic waters, which are covered in paragraph (8).

As to paragraph (9), the United States has already acted in reliance upon the principle enunciated in this paragraph by the enactment of the Deepwater Port Act of 1974.⁸⁶ It has also introduced in LOS III a draft article that would confirm the exclusive right of the coastal state in this regard.⁸⁷

The WPTLC draft treaty does not touch upon any of the topics covered under this heading of the ABA resolution.

As to Integrity of Investments

On this point, the ABA resolution:

(10) RECOMMENDS that the integrity of investments in seabed resources be fully assured.⁸⁸

This recommendation is based on the basic principle of international law that agreements made in good faith should be adhered to and that investments made in reliance on such agreements should be protected against expropriation except for an overriding public need and then only against prompt, adequate and effective compensation. This is a principle of which the developing countries have made a shambles in recent years, more and more of them having pressed for an unrestricted and unrestrained control over their natural resources to the point that the UN General Assembly on December 12, 1974 adopted a *Charter of Economic Rights and Duties of States* prescribing, *inter alia*, that each state has the right:

⁸⁵ The Convention on the High Seas specifically prescribes freedom of navigation and freedom to fly over the high seas as freedoms to coastal and non-coastal states alike, *supra* note 11, art. 2. By contrast, under the Convention on the Territorial Sea and the Contiguous Zone, the coastal state has absolute sovereignty over the airspace over, and seabed and subsoil under, the territorial sea and is required to open the waters of its territorial sea only to foreign ships that are in "innocent passage," which is defined as passage "not prejudicial to the peace, good order or security of the coastal State." This is a vague and often subjectively applied test, in addition to which the Convention expressly prescribes that submarines must navigate on the surface and show their flag, *supra* note 11, arts. 2 & 14, a requirement not now applicable to international straits more than 6 miles wide.

⁸⁶ Deepwater Port Act of 1974, 33 U.S.C.A. § 1501 (1975).

⁸⁷ THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, OFFICIAL RECORDS, Vol. 3 at 222, art. 3 (1975).

⁸⁸ 1973 A.B.A. Res., *supra* note 1, at 592.

(c) To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of sovereign equality of States and in accordance with the principle of free choice of means.⁸⁹

It is hard to imagine anything less calculated to encourage the foreign investment so urgently needed for the economic development of the developing countries in general, or seabed resources in particular, than this short-sighted policy and it is to be hoped that it will not be incorporated into whatever treaty comes out of LOS III, either expressly or by implication. The United States is in the forefront of the countries whose rapid economic development was enhanced in its early stages by massive investment of foreign capital and the developing countries would do well to profit by its example of the benefits to flow from providing a stable investment climate.

As to Determination of Disputes

On this point, the ABA resolution:

(11) RECOMMENDS that provision be made for compulsory determination by an international tribunal of disputes relating to marine resources between States, or between any international organization and a State, or between either of them and a foreign private party.⁹⁰

The ABA and the WPTLC draft treaty are agreed on the importance of this point, although the author cannot agree with the proposal in the latter that the election of judges to the international tribunal be made by the UN General Assembly.⁹¹ It is just as important that there be impartiality in the adjudication of developed/developing, democratic/socialist/communist differences in the interpretation and application of the treaty as there is that there be impartiality in the functioning of the governing council. The WPTLC draft treaty provides for the latter through a system of

⁸⁹ Charter of Economic Rights and Duties of States, *supra* note 62, at 6, art. 14.

⁹⁰ 1973 A.B.A. Res., *supra* note 1, at 592.

⁹¹ WORLD PEACE, *supra* note 6, at 22-23, art. 14.

weighted voting and it would have done well to propose that the selection of judges be a joint function of the governing council and the treaty assembly, paralleling the system of selection of judges for the International Court of Justice as a joint function of the UN General Assembly and the Security Council.⁹²

Progress seems to have been made at Geneva on alternative procedures for the compulsory settlement of disputes but much remains to be done.⁹³ If there is ever to be world peace through law, it is hard to think of a better place for a start than in the proposed new treaty on the law of the sea. There is no reason in logic or equity why all aspects of the treaty should not be subject to compulsory dispute settlement. Yet, some of the developing countries that categorically reject international adjudication of foreign investment disputes are tending to view activities of foreign contractors or licensees within that part of the sea subject to coastal state economic jurisdiction in the same light as foreign investments on their land territory.⁹⁴ It will be a blow to world peace through law and a disincentive to foreign investment should the final text of the treaty recognize such an exception to its compulsory dispute settlement provisions.

As to Scientific Research

On this point, the ABA resolution:

(12) SUPPORTS the general principle of freedom of scientific research, but recognizes the right of coastal States, within internationally agreed guidelines designed to provide maximum practicable application of this principle, to impose reasonable restrictions on their continental margins which will entail threats to their national security or hazards to the environment as by drilling into the seabed.⁹⁵

The entire world benefits from scientific research and this author has always given wholehearted support to the general principle of maximum freedom of scientific research. At the same time, coastal states have a measure of control at the present time under the provisions of the Convention on the Continental Shelf,⁹⁶ and it is not realistic to think that they will, or should, give it up in

⁹² I.C.J. STAT., art. 4.

⁹³ Press Release, *supra* note 15, at 5.

⁹⁴ THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, U.N. Doc. SD Gp/2nd-Sess./No. 1/Rev. 5 (1975) art. 17; 14 INT'L LEGAL MATERIALS 762, 768 (1975).

⁹⁵ 1973 A.B.A. Res., *supra* note 1, at 592.

⁹⁶ Convention on the Continental Shelf, *supra* note 11, art. 5.

its entirety. A scientific research vessel of the type of the *Glomar Challenger*, if it were indiscreet enough to drill in waters deeper than 200 meters just beyond the 12-mile limit off the coast of Santa Barbara, California, would have the capability of causing a blowout that would dwarf to minuscule proportions the highly publicized 1969 commercial oil spill in that vicinity. Just to mention this possibility is proof enough of the soundness of the ABA recommendation to work for meaningful relaxation — not total elimination — of present coastal state controls of scientific research beyond the territorial sea.

Conclusion

While Professor Moynihan's article, *The United States in Opposition*,⁹⁷ was addressed to the broad question of United States policy within the United Nations vis-a-vis the developing countries, the points he makes so vividly are no less applicable to the specific issues facing the United States in LOS III. In a nutshell, the developing countries as a body have embraced Fabian socialism in the British mold, with redistribution, not production, of wealth central to its ethos.⁹⁸

To paraphrase the words of Professor Moynihan, they have moved the UN from its original, essentially liberal vision as a regime of international law and practice which acknowledges all manner of claims, but claims that move in all directions, to one of advocacy, within the economic field, in only one direction, that of redistribution of wealth to the benefit of the developing countries.⁹⁹ The acme of this trend came, as Professor Moynihan notes, with the solemn adoption by the UN General Assembly at the close of its 1974 regular autumn session of the previously mentioned *Charter of Economic Rights and Duties of States*,¹⁰⁰ according each state the right to deal with foreign investments pretty much at will. After citing another example, a quotation from India's Prime Minister Indira Gandhi, he goes on to say:

Now there is nothing unfamiliar in this language: only the setting is new. It is the language of British socialism applied to the international scene.¹⁰¹

⁹⁷ Moynihan, note 7 *supra*.

⁹⁸ *Id.* at 32.

⁹⁹ *Id.* at 38.

¹⁰⁰ See note 62 *supra*.

¹⁰¹ Moynihan, *supra* note 7, at 38-39.

It seems to the writer that it is high time for the members of the World Peace Through Law Center and other participants in the October 1975 Washington World Law Conference to stand up and be counted. If they are genuinely in favor of world peace through law, they must lend their efforts to a solution of LOS III that will provide equal opportunities for all. If a two-thirds voting majority is to force through a treaty permeated with the stamp of Fabian Socialist philosophy on an international scale, not only would such action be a death blow to the viability of the treaty itself, it would, in association with other recent actions within the United Nations and its associated organizations, imperil the total effort to utilize that body as a principal highway to world peace through law.