

## American Policy Options in the Development of Undersea Mineral Resources<sup>†</sup>

It is probable that the United States will soon face some fundamental choices in long-range policy with respect to undersea mineral resources.

One significant approaching date is October 1967, when one of the United Nations commissions will take up a pending Russian motion to create a working group to draft a convention to deal with exploration and exploitation of mineral resources beneath the high seas.<sup>1</sup> Another critical date is 1969, when consideration of revisions

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<sup>1</sup> Between the delivery date of this paper, August 8, 1967, and the date of publication, there have been some significant developments in the United Nations. The Russian proposal cited in the text (which had been submitted on April 3, 1967, to the International Oceanographic Commission) proposed that the Commission create a special working group to prepare a convention "on the international norms of exploration and exploitation of the mineral resources of the high seas." That Commission, on October 27, 1967, adopted a more limited resolution establishing a "working group on legal questions related to scientific investigations of the ocean." But on August 17, 1967, the Permanent Mission of Malta to the United Nations proposed inclusion in the agenda of the twenty-second session of the General Assembly an item captioned "Declaration and treaty concerning the reservation exclusively for

of the Geneva Convention on the Continental Shelf becomes in order, at the end of the first five years of that Convention's operation.<sup>2</sup>

With respect to minerals beneath the sea, as with respect to fishery resources and jurisdiction over the surface, dilemmas are presented to American policy-makers. Does self-interest propel us toward seaward expansion of the exclusive jurisdiction of the United States over the seabed, into deep waters at considerable distance from our shores, even if this stimulates reciprocal preemption by other coastal states of expanding margins of deep water seabeds off their own shores? With respect to petroleum exploration and fishery controls, American policy already seems to be on a course of expansion of coastal jurisdiction which is quite the opposite of the historic American policy with respect to the surface.<sup>3</sup> There, we have always insisted on a narrow limit on territorial waters.

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peaceful purposes of the sea-bed and the ocean floor, underlying the seas beyond the limits of present national jurisdiction, and the use of their resources in the interests of mankind." An explanatory memorandum proposed a treaty which would declare that "the sea-bed and the ocean floor, underlying the seas beyond the limits of present national jurisdiction, are not subject to national appropriation in any manner whatsoever"; that the exploration of such sea-bed shall be undertaken in a manner consistent with the Principles and Purposes of the Charter of the United Nations; "the net financial benefits derived from the use and exploitation of the sea-bed and of the ocean floor shall be used primarily to promote the development of poor countries"; the sea-bed shall be reserved exclusively for peaceful purposes in perpetuity; and the proposed treaty should envisage the creation of an international agency "to assume jurisdiction, as a trustee for all countries, over the sea-bed and the ocean floor, underlying the seas beyond the limits of present national jurisdiction," and "to regulate, supervise and control all activities thereon." This proposal was referred to the First Committee of the Assembly. It should be noted that in the twenty-first Session the General Assembly, on December 8, 1966, had adopted Resolution 2172 (XXI), "Resources of the Sea," directing the Secretary General to undertake "a comprehensive survey of activities in marine science and technology, including that relating to marine resources development," and to submit at the twenty-third session "an expanded programme of international cooperation to assist in a better understanding of the marine environment through science and in the exploitation and development of marine resources, with due regard to the preservation of fish stocks."

<sup>2</sup> Article 13 of the Convention on the Continental Shelf provides that request for revision may be made five years after the Convention comes into force. "The General Assembly of the United Nations shall decide upon the steps, if any, to be taken in respect of such request." The Convention became effective June 10, 1964, on ratification by the 22nd state.

<sup>3</sup> As to petroleum, the Interior Department has issued permits for the drilling of exploratory wells to explore the sediments underlying the ocean at a water depth of 5,000 feet, at locations as far as 300 miles from the American coast. However, the permit restricts penetration of the sediment to 1,000 feet (pre-

With respect to distant submarine mineral resources, which are not contiguous to any state, shall we favor the concept that they belong to no one, hence are open to competitive appropriation by all, or shall we favor the concept that they belong to everyone, hence shall be controlled and licensed out by some agency representing the community of nations?

If so, what community? One which is made up of the few competing nations which have the means to exploit deep and distant undersea resources? Or a community consisting of all the coastal nations, including some undeveloped ones which might find it profitable to issue flags of convenience to the expeditions of foreign licensees? Or a community made up of the land-locked nations as well as the coastal states, *i.e.*, the United Nations?<sup>4</sup> Or some other international agency created for this specific purpose?

Some of us believe that the American objective, for the next several years, should be to keep all options open, and avoid premature commitments.<sup>5</sup> Too little is known about these resources of the means of exploiting them, to justify great decisions. But the initiative may not be under our control.

By late 1967, in response to the Russian motion, or perhaps by 1969, in response to agitation for clarification of the Continental Shelf Convention, the United States will quite possibly have to make some policy commitments.<sup>6</sup> These may not be irrevocable, but, once made, they will be difficult to dissolve and recast.

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sumably to avoid the likelihood of striking oil, hence triggering the "exploitability" clause of Article 1 of the Convention on the Continental Shelf, although this is not stated). See Interior Department Press Release dated May 26, 1967. As to fishery jurisdiction, see Public Law 89-658, of October 14, 1966, establishing a 12-mile exclusive fishery zone, contiguous to the territorial sea.

<sup>4</sup> For excellent presentations of the case for exclusive United Nations jurisdiction over the bed of the high seas, see: Speech of Hon. Arvid Pardo, Ambassador of Malta to the United Nations, before the General Assembly November 1, 1967, in support of Malta's proposal for a treaty on this subject (see Note 1, *supra*). See also statements of Francis T. Christy, Jr., and Clark M. Eichelberger, before the American Bar Association's National Institute on Marine Resources, Long Beach, California, June 8-10, 1967 (on press).

<sup>5</sup> See statements of Professor William T. Burke and the present writer in "Exploiting the Ocean" (*Marine Technology Society*, 1966), and before the American Bar Association National Institute on Marine Resources, Long Beach, California, June 8-10, 1967 (on press).

<sup>6</sup> The proposal of Malta in the United Nations General Assembly, August 18, 1967 (Note 1, *supra*), has, of course, injected an entirely new factor into the time scale, since the date of presentation of this paper.

Moreover, it is conceivable that before the Convention comes up for amendment in 1969, an American exploratory well, drilled in depths of water several times 200 meters, and a long way from shore, will strike oil. If this happens, it is foreseeable that American policy will have to be crystallized very rapidly, and perhaps unilaterally, as it was by President Truman's continental shelf proclamation in 1945.

The main policy problems fall into two groups:

I. How shall the seaward limit of the coastal state's exclusive jurisdiction over the seabed be defined? This is the problem associated with the potential 1969 revision of the Continental Shelf Convention.

II. Beyond that limit, howsoever defined, what regime shall govern the exploration and exploitation of the minerals beneath the high seas? This is the problem which may be associated with the consideration of the Russian proposal in late 1967, although it is not clear just what the Russians intended by it.

### I.

As to the first of these, there has been considerable criticism of the third-dimensional definition in Article 1 of the Convention on the Continental Shelf, which reads "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." There are at least four troublesome things about this definition:

(1) Depths less than 200 meters exist off the coasts of California and Norway, for example, but separated from the shore by very deep trenches. Does jurisdiction swoon in the trench and revive farther at sea? If so, how far at sea?<sup>7</sup> On shoals such as Frigate Shoals, 400 miles from Hawaii?

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<sup>7</sup> Such trenches exist off Norway and off the coast of California. Norway's position "is that the Trough is only a depression in the shelf properly appertaining to Norway, and that Norway is entitled to the full expanse of shelf. . . ." Young, "Offshore Claims and Problems in the North Sea," 59 *Am. J. Intl. L.* 505, 511 (1965). An agreement between Great Britain and Norway recognized Norway's right beyond this trench. The legal question, as to Norway's rights under general principles of international law had Great Britain objected, thus remains unanswered. Norway has not acceded to the Convention on the Continental Shelf. As to the trench off California, the Interior Department's Solicitor has issued an opinion that his Department's jurisdiction under the Outer Continental Shelf Act supports its issuance of leases in areas some 50 miles from land, which are separated from the shore by depths which are several times 200 meters.

(2) The 200 meter isobath is criticized. Coastal nations have a legitimate and growing interest in the continental slope, beyond this depth. It is argued, also, that national security considerations work against the 200 meter negative-contour line. It gives only meager protection to exclusive American jurisdiction within a very narrow band of the seabed, off some of our coasts. The line which establishes the seaward limit of the coastal state's exclusive seabed jurisdiction, like any fence, fences out as well as fencing in. It may be a very good thing to move this fence outward.

(3) Exploration is now being carried on at depths much greater than 200 meters, and exploitation will surely follow.<sup>8</sup> The controlling portion of the definition is therefore really its second part, relating to exploitability "beyond that limit" of 200 meters. How far beyond? To a depth which marches the coastal state's flag to sea until it meets another, marching in the opposite direction? Rubber boundaries can be guaranteed to cause trouble.

(4) If exploitation by a single nation of the contiguous seabottom "beyond that limit" of 200 meters is proved feasible, it is arguable that the jurisdiction of all coastal nations all around the globe is identically extended or deepened, whether exploitation at that depth off their shores is physically feasible or not, and irrespective of the differences in the economic feasibility of exploiting wholly different minerals. This interpretation of the convention appears unconvincing, but it is earnestly argued by competent writers,<sup>9</sup> and there is some support for it in the legislative history of the Convention.

In short, a good case can be made for allegations that the negative-contour concept is a cumbersome and indirect way to set a meaningful lateral boundary, that the 200 meter isobath ignores the interests of coastal nations in their continental slopes, beyond the

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<sup>8</sup> See Note 3, *supra*.

<sup>9</sup> In addition, Professor Shigeru Oda in his June 9, 1967, speech at Long Beach, California, states: "Each coastal State is, of course, free to grant to any foreign country or foreign nationals the right to explore its continental shelf or to exploit the natural resources therein contained. . . . Thus understood, the concept of exploitability must be interpreted each time in terms of the most advanced standards of technology and economy in the world." See, also, Krueger, "The Convention on the Continental Shelf and the Need for its Revision," presented at Long Beach, California, June 9, 1967, at p. 9: ". . . the exploitability test of the Convention is an objective one, not a subjective one; if one country's technology is sufficient . . . every country's continental shelf is so extended."

continental shelf, and that the scheme of expansion by proof of exploitability is ambiguous.

Here we face a very old dilemma of another sort: It is easy to second-guess, but can anyone suggest any scheme that is better, and has as good a chance of world-wide acceptance? Whatever its defects, the Convention's definition of coastal seabed jurisdiction, and the accompanying boundary formulas, made possible a rapid crystallization of international law in a field which had been a vacuum twenty years earlier. It brought about almost at once an orderly allocation of jurisdiction in the North Sea,<sup>10</sup> and its principles are being widely observed, even by states which have not acceded to the Convention, for example in the Persian Gulf.<sup>11</sup>

But let us consider some alternatives. The Convention is obviously going to be revised at some time. We may need an inventory of alternatives, if not by 1969, then not long thereafter.<sup>12</sup>

For example, it can be argued that a more precise and useful concept would be that of a uniform lateral boundary of the coastal state's seabed jurisdiction, irrespective of depth. It should be wide enough to encompass all areas which are contiguous to the shore, and to meet the requirements of the coastal state's national security. Whether this uniform width should be 100, or 200, or more miles is a matter for negotiation. If the concept of a negative-contour is essential to nations which have very wide shelf areas, then let some realistic depth be substituted for 200 meters. Or, combine the two concepts, and let the coastal state's seabed jurisdiction extend to the

<sup>10</sup> See Devaux-Charbonnel, "Today's Trends in Offshore Oil and Gas Legislation," *World Petroleum*, April 1967: "There are areas where agreements have been concluded easily between certain coastal states, as in the North Sea." The only difficulties in this area concern the concave shoreline belonging to Federal Germany. Concerning this problem area, negotiations are being concluded between Germany and Denmark on the one hand, Germany and the Netherlands on the other. See, also, Young, "Offshore Claims and Problems in the North Sea," 59 *Am. J. Intl. L.* 505, 516 (1965).

<sup>11</sup> Most of the Persian Gulf coastal countries have stipulated the desirability of mutual agreement based on "equity" in delimiting the continental shelf boundaries. A joint committee of Iranians and Saudi Arabians was formed to study and consider such a settlement plan. Additionally, Saudi Arabia entered into an agreement in 1958 with Bahrain to split evenly the Abu Safoi offshore area.

<sup>12</sup> Francis T. Christy, Jr., in his June 8, 1967, speech at the American Bar Association National Institute on Marine Resources, at Long Beach, California, "Alternative Regimes for the Minerals of the Sea Floor," pointed out that the Convention's open-ended compromise simply postponed the day of decision. At some point before mid-ocean there must be demarcation of a clear-cut limit.

contour which marks that depth, "x," or to the line which marks the new distance, "y," whichever gives the greater width. But let us get rid of the exploitability concept, the rubber boundary notion, altogether. Of course, no matter how the new boundary is defined, the present distinction between exclusive jurisdiction of the coastal state with respect to the seabed, and the high-seas character of the overlying water column and water surface, must be retained. So also with the free status of the airspace above. Boundary problems would naturally be intensified by any seaward extension of coastal jurisdiction, but the mechanism for settling them is already stated in Article 6.<sup>13</sup>

## II.

The foregoing suggestions deal with one side of the coin, the redefinition of the line which limits the coastal nation's exclusive jurisdiction. The other side of the coin remains: What about submarine resources beyond the limit of the coastal state's exclusive jurisdiction, howsoever defined? This is the problem which may be confronted first—if the Russian proposal is seriously debated in late 1967. First, let us recognize the existence of a gray area. Exploratory drilling is now being planned in water depths exceeding 4,000 feet, several hundred miles offshore, and the United States Government has issued permits to U.S. nationals covering these operations.<sup>14</sup> It is almost as necessary to clarify the jurisdiction over these ventures in their exploration stage, as it will be later on if they strike oil. Shall such clarification come about by a redefinition of the coastal state's exclusive seabed jurisdiction, or by evolution of a regime governing exploitation of minerals beneath the high seas? Probably the latter.

Three general groups of opinion have been advanced with respect to the regimes, and the related substantive rights, which ought to govern the exploitation of marine resources which are located beyond the continental shelf:

### (1) Indefinite extension of the exclusive jurisdiction of coastal

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<sup>13</sup> Article 6 provides that the boundary between common continental shelves of two or more opposite or adjacent states shall be determined by agreement between them. In absence of agreement and special circumstances, the boundary is the "median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial seas of each State is measured."

<sup>14</sup> The Department of the Interior has published Outer Continental Shelf Leasing Maps which cover the ocean bottom to depths as great as 6,000 feet and extend as far as 100 miles off the Southern California coast. See also Note 3, *supra*.

nations, even to mid-ocean, or to the point of contact with similar expansion by overseas nations—in effect, dividing up the seabottom somewhat as Pope Alexander VI divided up the surface, except that his club had more limited membership. I will not spend further time on this, except to say that this notion constitutes one more reason for getting rid of the exploitability phase of the continental shelf boundary, because that is the premise of this proposal.

(2) Administration by the United Nations, or some other international authority, perhaps related thereto.<sup>15</sup> I will come back to that.

(3) Treatment of mineral resources which are beyond the limits of the coastal state's exclusive seabed jurisdiction (howsoever those limits are defined) as open to appropriation and exploitation under the laws of the flag of the discovering expedition.<sup>16</sup>

It seems to me that the last is the most sensible of these three proposals, and will be so for a long time to come. There is plenty of room on the world's deep seabeds. The maximum exploratory effort by all nations, the maximum interchange of information, should be encouraged. When a discovery is made, it will, as a matter of course, be exploited under the laws of the flag of the discovering nation, absent an agreement by that nation to the contrary. If expeditions from too many nations cluster too closely to the honey pot, the resulting disputes, initially at least, are going to be settled by accommodation among the competing states, or by the evolution of adversary case law. There already exists a respectable, if incomplete, body of international law relevant to such disputes. For example, our Government has always recognized the principle that uses of the high seas must be exercised with due regard for the similar rights of others, but we have also asserted the fundamental right and obligation of this nation, like all nations, to protect the lawful activities of its nationals abroad.<sup>17</sup>

<sup>15</sup> See Notes 1, 4, *supra*.

<sup>16</sup> Cf. the writer's papers, "The Laws Governing Exploitation of the Minerals Beneath the Sea," New York Section, American Institute of Mining, Metallurgical and Petroleum Engineers, New York, New York, January 13, 1966, and "The Administration of Mineral Resources Underlying the High Seas," American Bar Association National Institute on Marine Resources, Long Beach, California, June 8, 1967.

<sup>17</sup> President Truman, in his 1945 Continental Shelf Proclamation, stipulated that the freedom of the surface waters overlying the Continental Shelf of the United States beyond the territorial sea be maintained as high seas. President Johnson recently reaffirmed the United States position that freedom of both the high seas and the lands underlying them be maintained when he stated that "under no circumstances must we ever allow the prospects of rich harvest and mineral wealth to create a new form of colonial competition among the



This includes exclusive national jurisdiction over vessels flying the national flag, even in foreign territorial waters, and, a fortiori, on the high seas. To be specific, the same principle should apply to an American oil well located on a sea mount as to an American vessel loading oil from it. To turn to another example, our country recognized prescriptive rights in the seabed, acquired by exploration, long before the concept of the continental shelf jurisdiction was born. In short, there is in existence enough international law to provide the framework for solution of any conflicts likely to develop soon over the seabed beneath the high seas. It is quite possible that the discussions which the Russians have invited may prove constructive in bringing about general agreement on principles of the sort just discussed, and their amplification, so that each nation may proceed with its own explorations under its own laws, recognizing the correlative rights of other nations to do the same thing.

Beyond that, if a convention on this subject is negotiated, it should be limited to the working level, mutual accommodation, exchange of information type. It might perhaps encompass creation of arbitration or conciliation machinery to deal with such disputes as may arise.

But it is far too early to agree on the factors that are usually written into mining laws, such as the area and duration of mineral concessions. A fortiori, no international agency needs now to be created to administer deep sea mining laws that we cannot yet write.

Above all, we should not now cede to any international agency whatsoever the power to veto American exploration of areas of the deep sea which are presently open to American initiative.

We can give away later what we now keep, but the converse is sadly false.

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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."