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AN EQUITABLE REGIME FOR SEABED AND OCEAN SUBSOIL RESOURCES

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The purpose of this essay is to outline a strategy for implementing an equitable regime for the allocation of the seabed and the ocean subsoil. The importance and timeliness of the subject is based on the coinciding of three events of landmark historical importance: (1) the convening in June, 1974 of the Caracas Conference to write a new international treaty governing the seas and their resources; (2) the arrival of the long-awaited world resource-and-commodity crunch; and (3) the virtual termination of political support in the West, particularly in the United States, for bilateral aid programs to underdeveloped countries.

The Caracas meetings and other subsequent negotiations will concern themselves with a broad agenda on which the disposition of seabed and subsoil resources is but one item. Freedom of navigation, fisheries, investment guarantees, pollution control, and various other sea-related subjects will also share the agenda. These issues are inevitably related to the question of seabed and subsoil resources if only because the negotiators will be creating a total package in which the various items serve as trade-offs in the search for near-unanimity. The question of seabed and subsoil resources is, nevertheless, of such overriding importance as to warrant separate analysis.

Ocean mineral resources are the world's last great new frontier in an era of massive mineral consumption and predictable mineral shortages. The technological and legal challenge of the opening of this new frontier must be placed in the context of a greater ethical challenge to place the world economy on foundations which permit the

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narrowing, rather than the widening, of the gap between rich and poor nations.

I. THE RUSH TOWARD BROAD SEAWARD EXTENSIONS OF NATIONAL JURISDICTION

The U.N. Seabed Committee has begun work drafting a treaty establishing an international regime for the exploration and exploitation of the seabed beyond national jurisdiction, and on the international machinery to promote such exploration and exploitation for the benefit of mankind. This effort has been closely linked to the problem of defining the area subject to national jurisdiction.

As population expansion, rising standards of living, and the development of deep-sea mining technology have made inevitable man's exploitation of the resources beyond the traditional three-mile limit, different views emerged as to the manner in which this exploitation should proceed. Many coastal states favor more exclusive jurisdiction over their adjunct sea areas, while noncoastal and some coastal states support a sharing of jurisdiction over the off-shore seas by the coastal state and the international community.

While most coastal states have taken the position that their geography entitles them to almost exclusive rights over the resources of the sea area adjacent to their coasts, there are nuances of difference among them. Latin American states, such as Brazil and Uruguay, describe their exclusive claims in terms of "sovereignty" and the area claimed in terms of a "territorial sea" of about 200 miles width.[1] The majority of Latin American, African, and Asian states make a distinction between the territorial sea, which they wish to set at 12 miles, and an "economic zone" or "patrimonial sea" of 188 miles. According to the latter view, the coastal state, in its territorial sea, would exercise the traditional incidents of sovereignty, and, in the other 188-mile band, would enjoy exclusive or "sovereign" functional rights over the area's resources, both renewable and non-renewable, i.e., fishing and minerals.[2] Both the states demanding a 200-mile sovereign territorial sea and those merely demanding exclusive func-

1. *See* 28 U.N. GAOR Supp. 21, Vol. 3, at 23-29, U.N. Doc. A/9021 (1973).

2. *Cf.* the proposals of: Organization of African Unity, *id.* Vol. 2 at 4; Colombia, Mexico and Venezuela, *id.* Vol. 3 at 19; Ecuador, Panama and Peru, *id.* at 30; Argentina, *id.* at 78; Algeria, Cameroon, Ghana, Ivory Coast, Kenya, Liberia, Madagascar, Mauritius, Senegal, Sierra Leone, Somalia, Sudan, Tunisia and United Republic of Tanzania, *id.* at 87; Pakistan, *id.* at 106. *See also* the proposal of Iceland, *id.* at 23; China, *id.* at 71; Australia and Norway, *id.* at 77. Most of the proposals made a provision for landlocked and other disadvantaged states to share in the exploitation of the living resources of the neighboring coastal states. None of the proposals, however, was specific with regard to the exact implementation of such right and some of the proposals speak in terms of "privilege." *Cf.* Canada, India, Kenya and Sri Lanka, *id.* at 83.

tional jurisdiction but not territorial sovereignty over resources—thereby leaving open such matters as navigation—agree that the seabed and subsoil resources, to a distance of 200 miles, should become the exclusive preserve of those states endowed with coastlines. The resultant windfall, based on the length of the coast rather than on need or population, would be further augmented where the ocean off the coast happens to have the configuration of a particularly wide submerged shelf. Five coastal nations have shelves that extend beyond 200 miles at depths of less than 200 meters.[3] Australia, Argentina and Norway have insisted that the coastal state has the right to retain any jurisdiction—including the entire shelf—to which it was entitled under prior international law.

"Jurisdiction" or "functional sovereignty"—even if short of outright territorial sovereignty—is used by coastal states to include the following competences:

> 1. The exclusive national use of the resources of the area and the retention of the revenues derived therefrom;
> 2. The exclusive right to authorize and regulate all activities relating to the exploration and exploitation of the area, which includes the imposition of pollution control measures and supervision of scientific research;
> 3. The prerogative of settling according to national—rather than international—law any dispute arising from such activities.

From an international public-policy point of view, these assertions of wide functional jurisdiction leave much to be desired. Four of the

3. The five states are Argentina, Australia, Canada, the U.S.A., and the U.S.S.R. OFFICE OF THE GEOGRAPHER, BUREAU OF INTELLIGENCE AND RESEARCH, DEPARTMENT OF STATE, LIMITS IN THE SEAS, THEORETICAL AREA ALLOCATIONS OF SEABED TO COASTAL STATE, INTERNATIONAL BOUNDARY STUDY, Ser. A, No. 46 (August 12, 1972) [hereinafter cited as OFFICE OF THE GEOGRAPHER].

4. Australia and Norway, *supra* note 1, at 78 ". . . the Coastal State has the right to retain, where the natural prolongation of its land mass extends beyond the [economic zone- patrimonial sea], the sovereign rights with respect to that area of the sea-bed and the subsoil thereof which it had under international law before the entry into force of this Convention: such rights do not extend beyond the outer edge of the Continental margin."

It may be worth noting that the U.S., due to the open-ended jurisdictional definition contained within the Outer Continental Shelf (OCS) Lands Act, 43 U.S.C. §§ 1331-43 (1970), can be interpreted as now laying claim to jurisdiction over 2500 square nautical miles of seabed that is more than 200 miles from its coast. See OFFICE OF THE GEOGRAPHER, *supra* note 3. A treaty that included a seaward limitation of 200 miles of national jurisdiction could, therefore, be interpreted as amending the OCS Lands Act. Congressional action conforming the OCS Lands Act jurisdictional definition with the eventual treaty is a preferable alternative.

The total global area involved is only 35,800 square nautical miles, as compared to the 24,632,400 square nautical miles of sea-bed within the 200-mile delimitation. *Id.* The area under dispute is somewhat larger if states, such as Argentina, continue to claim jurisdiction to the edge of the continental margin, as opposed to the 200-meter isobath mark. Argentina, *supra* note 1, at 80. See also Columbia, Mexico, and Venezuela, *supra* note 1, at 21.

principal beneficiaries of such a policy, according to estimates made by the United States Government,[5] would be the United States, the Soviet Union, Australia, and Canada, while the landlocked states, who stand to gain nothing, include sixteen of the world's poorest nations (Bolivia, Paraguay, Afghanistan, Nepal, Bhutan, Laos, Uganda, Chad, Central African Republic, Lesotho, Botswana, Swaziland, Mali, Zambia, Rwanda, and Burundi). Yet the extension of national jurisdiction would not have gained so much favor had the rich coastal nations not been joined enthusiastically by the poor states with substantial coastlines. Their lack of technological knowhow makes particularly attractive the idea of claiming an extended and exclusive sea area which could be exploited on their own terms in the future. This approach is certainly more enticing than the acceptance of an international authority which, they suspect, would tend to serve the interests of the economically powerful and technologically advanced nations.[6]

Among both developed and underdeveloped coastal states, there is no complete agreement on the question of jurisdiction. Canada and the Soviet Union maintain that the coastal state should have exclusive jurisdiction over the minerals of the continental shelf. They argue that this position is merely a restatement of what was previously agreed upon in the 1958 Geneva Convention.[7] The Soviet proposal sets a 500-meter isobath or 100 nautical mile limit on the area of exclusive rights over continental shelf resources.[8] The Canadians have set no such limit. Others, such as the U.S. and the Netherlands, have proposed that the coastal states share with an international equitable regime the revenue derived from the exploitation of the resources in the area between the outer limit of the proposed

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5. *See* OFFICE OF THE GEOGRAPHER, *supra* note 3.

6. See *Economic Significance, in terms of Sea-Bed Mineral Resources, of Various Limits Proposed for National Jurisdiction*, REPORT OF THE SECRETARY-GENERAL TO THE COMMISSION OF THE PEACEFUL USES OF THE SEABED AND THE OCEAN FLOOR BEYOND THE LIMITS OF NATIONAL JURISDICTION, U.N. Doc. A/AC.138/87 (1973) [hereinafter cited as *Economic Significance*], in which he refers to the "limited and general nature of the existing information available on the extent and location of sea-bed minerals." *Id.* at 5. The disillusioning view of the developing countries *vis-a-vis* an international machinery seems to have developed as a result of the failure of the U.N. to solve their most immediate political and economic problems (decolonization and development).

7. 28 U.N. GAOR Supp. 21, Vol. 3, at 29. U.N. Doc. 4/9021 (1973). The Soviet Union proposal with regard to the limit of the continental shelf does not specify the rights of the coastal state over such area and seems to maintain the traditional concept adopted in the Geneva Convention of 1958 that the area beyond the territorial sea is essentially part of the high sea, excepting only the sovereign rights of the coastal states over the continental shelf for the purpose of exploring its natural resources. This is confirmed by the Soviet proposal on fishing which defines the sea area beyond the territorial sea as part of the high seas. See 27 U.N. GAOR Supp. 21, at 158, U.N. Doc. A/8721 (1972).

8. *See* 27 U.N. GAOR Supp. 21, at 158, U.N. Doc. A/8721 (1972).

economic zone and the 200 meter isobath.[9] In this way, at least some of the benefits derived from the further extension of national jurisdiction would be redistributed in accordance with an equitable principle. The U.S. proposes giving the coastal state exclusive rights over the continental shelf up to a 200-meter depth and favors establishment of a "trusteeship area" of preferential but limited rights for the coastal states up to the edge of the continental margin.[10] The Netherlands has proposed 40 nautical miles or a 200 meter isobath as the outer limit of exclusive jurisdiction and would devote a further 40-mile-wide "intermediate zone" to the exclusive exploitation of the coastal state, but subject to the rules and regulations established by the competent international authority. Under this approach, if the coastal state were classified by the international authority as an "advantaged" state—in terms of the proportion of the intermediate zone to its land area—it would share the exploitation of the intermediate zone with "disadvantaged" states in proportion to the rate of disadvantage.[11]

Similar to the position of the United States, though for different reasons, is that of states which are geographically disadvantaged, i.e., states which are landlocked, shelf-locked, semi-shelf-locked, or which, like Zaire, have trivial coastlines in relation to their population and land-mass. In their view, an equitable share of the benefits of the sea could only be attained through recognizing a limited jurisdiction for the coastal states over the adjacent sea area, while at the same time guaranteeing the geographically disadvantaged states a right to share in the revenue from the exploitation of the non-living resources. In the Kampala Declaration, the landlocked and geographically disadvantaged states have staked out a claim to equal participation in the benefits to be derived from the resources of the seabed and subsoil beyond the territorial waters of coastal states.[12]

II. THE SEARCH FOR AN EQUITABLE PRINCIPLE

An equitable principle applicable to the seabed and subsoil can be formulated as follows:

> No state should be permitted to extend its jurisdiction over seabed and subsoil resources beyond the limits permitted by existing international law without sharing the benefits of such an extension with the rest of the international community in accordance with each member's need.

9. Draft U.N. Convention on the International Seabed Area. 25 U.N. GAOR Supp. 21, at 130, U.N. Doc. A/8021 (1970); Netherlands proposal concerning an intermediate zone, 28 U.N. GAOR Supp. 21, Vol. 3, at 111, U.N. Doc. A/9021 (1973).

10. *Supra* note 9, at 138-40.

11. *Supra* note 9.

12. The Kampala Declaration, Kampala, Uganda, March 22, 1974, Art. VIII. See also the proposal to that effect of Afghanistan, Austria, Belgium, Bolivia, Nepal and Singapore, 28 U.N. GAOR Supp. 21, Vol. 3, at 85, U.N. Doc. A/9021 (1973).

The rationale for such an equitable principle is that the international legal order ought not to be amended in such a way as to transfer to some states resources previously held in common by all states if the effect of such transfer is unduly to enrich certain states at the expense of others, without rational regard for each nation's economic need. Development of large ocean tracts previously legally or technologically beyond the reach of states ought to be the occasion for greater equalization of benefits among states, not for the creation of new and greater discrepancies.

To gauge how much of the previous *res communis* will now be subject to national jurisdiction, one must begin by determining the present limits. This is not a simple task given the confused state of the law. The Geneva Convention defines the continental shelf, subject to the coastal state's sovereign rights, as "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 meters or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas."[13] Is the "submarine area" referred to in the definition limited to the shelf, or could it include the slope and the rise to the end of the margin? Could it even go further to the deep sea basin? The legislative history of the definition does not clarify the problem. The text of the International Law Commission draft, from which the Convention developed, was repeatedly altered. In 1951, the Commission adopted the "exploitability" test on the ground that though

> it seems likely that a limit fixed at a point where the sea covering the continental shelf reaches a depth of 200 meters would at present be sufficient for all practical needs; [nevertheless] technical developments in the near future might make it possible to exploit the resources of the seabed at a depth of over 200 meters. Moreover, the continental shelf might well include submarine areas lying at a depth of over 200 meters, but susceptible of exploitation by means of installations erected in neighboring areas where the depth does not exceed this limit.[14]

In 1953, nonetheless, the Commission abandoned the "exploitability" test on the ground that it "lacks the necessary precision and might give rise to dispute and uncertainty."[15] In its final draft of 1956, to compound the problem, the Commission retained the 200 meters criterion, but added to it the exploitability test. And although it recognized the latter criterion to be imprecise, the Commission's special rapporteur now felt, in contradistinction to the Commission's

13. Convention on the Continental Shelf, *done* April 29, 1958, Art. I, 15. U.S.T. 471; T.I.A.S. No. 5578.

14. *Report of the Int'l L. Comm'n*, [1956] Y.B. INT'L L. COMM'N 296, U.N. Doc. A/CN. 4/101 (1956).

15. *Id.*

1951 view, that "the time still seemed to be remote when technical development would allow the exploitation of the seabed at a depth over 200 meters"[16] and that, therefore, no practical difficulties will arise in the foreseeable future. It was this view which prevailed in the final text of 1958.

The Commission's guess of 1951 was better than that of 1956 or 1958. The time for technological advance beyond the 200-meter limit has proven not to be so remote. The industrial capacity to extract non-living resources from the seabed has advanced in sophistication and depthward reach far beyond the expectations of the draftsmen of the 1958 Convention on the Continental Shelf.[17] If that Convention must be read so that the only limit on national jurisdiction expansion is the limit of "exploitability," then the Convention may inadvertently have sanctioned exclusive national jurisdiction over natural resources beyond the flat shelf, past the slope and rise onto the very deep seabed itself. It may have sanctioned the extension of jurisdiction by a technologically advanced state across its own shelf, slope, rise, adjacent ocean bed, and onto the rise and slope near less advanced states. It may even be argued that by virtue of the "exploitability" criterion the whole seabed of the world has been inchoately apportioned among coastal states, to the median line between continents.[18] This, too, invokes a political absurdity, implying that the

16. 11 U.N. GAOR 6, 115th Comm., U.N. Doc. A/C.6/SR.500 (1956).

17. J. ANDRASSY, INTERNATIONAL LAW AND THE RESOURCES OF THE SEA 84-90 (1970). For an example of these expectations, see Mouton, Recent Developments in the Technology of Exploiting the Mineral Resources of the Continental Shelf, U.N. Doc. A/C.13/25 (1958); C. FRANKLIN, THE LAW OF THE SEA: SOME RECENT DEVELOPMENTS 29 (Naval War Coll., Int. L. Studies 1959-60, Vol. 53, 1961); M. MCDOUGAL & W. BURKE, THE PUBLIC ORDER OF THE OCEANS 687 (1962). As another author stated:

> "Some including advisors to the Marine Sciences Commission, have stated that it was the intent of the Conference that the definition cover only the geologic continental shelf which normally ends at 200 meters and that the purpose of the exploitability test was to permit the development of nearby adjacent areas." Krueger, *The Background of the Doctrine of the Continental-Shelf and the Outer Continental Shelf Lands Act*, 10 NAT. RES. J. 442, 473 (1970).

Krueger cited to the following as proponents of this theory: COMMISSION ON MARINE SCIENCE, ENGINEERING AND RESOURCES, OUR NATION AND THE SEA: A PLAN FOR NATIONAL ACTION 143-145 (1969); Henkin, *Changing Law for the Changing Seas*, in USES OF THE SEAS 69,79 (E. Gullion ed. 1968); Henkin, *The Outer Limit to the Continental Shelf: A Reply to Mr. Finlay*, 64 AM. J. INT'L. L. 62 (1970); B. OXMAN, THE PREPARATION OF ARTICLE 1 OF THE CONVENTION ON THE CONTINENTAL SHELF 74 (1968). *See also*, A Discussion of the Legislative History and Possible Construction of the Convention on the Continental Shelf, U.N. Doc. A/AC.135/19 (1968).

For additional material, see Henkin, *International Law and "The Interests": The Law of the Seabed*, 63 AM. J. INT'L. L. 504 (1970); *The United Nations and the Oceans—Current Issues of the Law of the Sea*, in TWENTY-THIRD REPORT OF THE COMMISSION TO STUDY THE ORGANIZATION OF PEACE 13 (1973).

18. S. ODA, INTERNATIONAL CONTROL OF SEA RESOURCES 167 (1963).

1958 Convention on the Continental Shelf meant to vitiate the Convention on the High Seas by eliminating the latter's subject matter. This is surely a political as well as ethical absurdity which could not have been intended by the inopportune legal phrase: "limits of exploitability."

Somewhat less easily dismissed is the argument that the Geneva Convention's exploitability test meant to open up to national jurisdiction the subsoil and seabed of the shelf's slope and rise, to the end of the continental margin.[19] A reading of the Convention, however, reveals no reason to depart from the literal meaning of its words: "shelf" means "shelf." In the view of one eminent authority, the intention behind the "limits of exploitability" criterion was not to expose vast additional seabed areas to conquest by national technology followed by national jurisdiction, but only "to admit of sovereign rights in marginal areas beyond the 200 meter isobath, in areas which are not strictly continental shelf but rather depressions, and in areas intersected by crevasses. . . ."[20] In other words, the "limits of exploitability" test was meant to take care of local variances, to allow for instances where the flat shelf was interrupted by incidental breaks, or where the sharp drop which is the "slope" occurs, exceptionally, at a depth slightly more than the usual 200 meters.

Accepting that "shelf" means "shelf," or, with a few exceptions, submerged areas to a depth no greater than 200 meters, it follows that most coastal states would acquire very substantial additional areas of jurisdiction if the international community were to permit the establishment of 200-mile economic zones.[21] Using the 200-meter depth criterion, the average width of the continental shelf is between 30 and 44 nautical miles,[22] although a few states, including the U.S. (off Maine) and Canada (off Newfoundland), have continental shelves extending, in places, even beyond 200 miles.[23] If such an agreement materializes, this additional area ought not to be parceled out without application of equitable economic principles of benefit distribution. Anything less would constitute an encroachment on the

19. Krueger, *supra* note 17, at 473, 475.

20. D. O'CONNELL, INTERNATIONAL LAW 410 (2d ed. 1970).

21. *See* OFFICE OF THE GEOGRAPHER, *supra* note 3. Also, an untitled, multi-colored map prepared by the Office of the Geographer, Dept. of State, illustrates this point. The map's index table is headed "Boundaries separate seabed areas of sharply contrasting topographic gradients." The ocean areas are divided into four differently colored areas designating: shoreline to 200 meter isobath, continental platform greater than 200 meters (with slopes steeper than 1:40), continental rise area beyond 200 nautical miles, territorial seas claims.

22. For a listing of sources, *see* ANDRASSY, *supra* note 17, at 9 n.15. *See also* A. SLOUKA, INTERNATIONAL CUSTOM AND THE CONTINENTAL SHELF 41-42 (1968).

23. *See* OFFICE OF THE GEOGRAPHER, *supra* note 3.

res communis[24] without adequate provision to compensate those whose share in the *res communis* is concommitantly reduced.[25]

The stakes in these negotiations are high. Beyond the 200-meter limit lie extensive deposits of petroleum.[26] The immensity of the seabed's hydrocarbon reserve, its relatively minor development at

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24. W. FRIEDMANN, THE FUTURE OF THE OCEANS 14-16 (1971); E. JONES, LAW OF THE SEA—OCEANIC RESOURCES 64 (1972). As Prof. Jones commented at 64:

> "Thus, the unilateral claims of certain nations extending the breadth of the territorial sea constitute a process of encroachment upon the internationally sanctioned doctrine of *res communis* which endangers the future status of the freedom of the seas."

25. This concept of compensation has been raised in discussions of the 200 mile economic zone. As Georges Wehry, of the Netherlands Mission to the U.N. stated:

> "If the zones grow and eventually become accepted as inevitable in the way they are put forward by a number of farthest reaching states, this would inevitably lead to demands, which one can hear clearer and clearer from day to day in these handicapped countries, for compensation—compensation, of course, not only in the international area, as this international area, if the 200-mile zone were accepted, would in fact yield no substantial benefits for many decades or even centuries; so this demand for compensation would mean a demand for compensation also regarding benefits derived from within the areas of national jurisdiction. And there will be no escaping from that demand." Wehry, *Concepts in Sharing of Common Heritage Wealth*, PROCEEDINGS OF THE SEVENTH ANNUAL LAW OF THE SEA INSTITUTE AT UNIVERSITY OF RHODE ISLAND 88 (L. Alexander ed. 1972).

26. Almost all of the petroleum lies on the landward side of the continental margin, but at least 32% is deposited seaward of the 200-meter line. The calculations given below may be proven too modest by the vigorous current explorations.

	Landward	Seaward
40 Nautical Mile Limit	59% of total ultimate reserves— 90% of proved reserves	41% of total ultimate reserves, including 20 billion barrels already discovered
200 Meter Isobath Limit	68% of total ultimate resources including 167.5 billion barrels proved (almost all reserves discovered to date)	32% of total ultimate resources, including some reserves discovered to date, near term prospects on outer shelf and upper slope
200 Nautical Mile Limit	87% of total ultimate resources including *all* of proved reserves and most immediate prospects	13% of total ultimate resource, long term prospect in continental rise
3000 Meter Isobath Limit	93% of total ultimate resource, including all proved reserves and immediate prospects	7% of total ultimate resources, some long-term prospects in continental rise and deeper parts of small ocean basins

present, and the potential shortages and high prices of petroleum from land-based sources have heightened interest in these ocean-based resources. The off-shore hydrocarbon resource is estimated at approximately 2272 billion barrels.[27] Current world production is approximately 50-60 million barrels/day, or 20 billion barrels/year.[28] Current exploration of both the continental margin and the deep seabed has also shown that many minerals, such as manganese, nickel, copper, and cobalt are found in concentrated degrees in nodules lying on the deep seabed at depths of 3,000 meters isobath or more, although there is little evidence of the existence of such nodules on the continental shelf, slope, or rise.[29]

These, then, are the very substantial stakes. Already in the past two decades, first unilaterally, through the Truman Proclamation on the Continental Shelf[30] and, subsequently, through the 1958 Convention, the international community has surrendered to national jurisdiction those areas between the traditional 3-mile limit and the 200-meter isobath boundary. In this area are contained the greatest known mineral and petroleum resources of the seabed and subsoil. Will the international community now agree to a further give-away of most of the earth's remaining non-renewable resources currently still in the *res communis*? Or will the opportunity for a general reordering be used to establish a more soundly equitable system in which coastal states are allowed to exercise the jurisdictional control made

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Source: *Economic Significance, in terms of Sea-Bed Mineral Resources, of Various Limits Proposed for National Jurisdiction*, REPORT OF THE SECRETARY-GENERAL TO THE COMMISSION ON THE PEACEFUL USES OF THE SEABED AND THE OCEAN FLOOR BEYOND THE LIMITS OF NATIONAL JURISDICTION, U.N. Doc. A/AC.138/87 (1973).

Hydrocarbons are generally thought to be most prevalent on the shelf and upper slope, with lesser quantities on the lower slope and continental rise. Almost no deposits are thought to occur on the abyssal plains, ranging in depth from 5,000 to 7,000 meters. The deep-sea trenches may contain deposits, although at such depths that recovery is almost an impossibility. Favorable geographic conditions, including the deposition of sediments and reservoir rocks and possible structural and stratigraphic traps, are also essential to the accumulation of hydrocarbon deposits. *Id.* at 12-13.

Whereas, the manganese nodules occur relatively widely on the sea-bed, most deposits occur below deep water and at substantial distances from the continents, where sedimentation rates are very low. *Id.* at 18.

See JONES, *supra* note 24, at 70-71 (1972).

27. *Economic Significance*, *supra* note 6, Table 1 at 14.

28. These are approximate figures based upon past production and predicted increases in production. *Id.* at 9; ROYAL DUTCH/SHELL GROUP OF COMPANIES, INFORMATION HANDBOOK 1973-74 60 (1973).

29. *Economic Significance*, *supra* note 6, at 18-20; JONES, *supra* note 24, at 70. Some nodules have been found in shallow water, although these deposits are not considered of mineable quality or quantity. *Economic Significance*, *supra* note 6, at 20.

30. Friedmann, *The Law of the Sea: Past, Present and Future*, in THE FATE OF THE OCEANS 101 (J. Logue ed. 1972). For a text of the Proclamation, see Proclamation No. 2667, 3 C.F.R. 67 (1945-1948 Comp.).

inevitable by geography, but as trustees for mankind rather than as windfall exploiters?

Proposals that seek to operationalize the equitable option all turn on a regional or international system of sharing, and envision an allocation either of actual operating rights or of revenues derived from operations. All proposals distinguish between application of equitable sharing in (1) a limited area seaward of the existing limits of national jurisdiction, and (2) the rest of the high seas. In the latter area, all jurisdiction would vest in an international authority and all revenues earned would be subject to redistribution in accordance with an equitable formula based on need. In the former, either jurisdiction and the right to mine would be shared between the coastal state and a regional or international authority, or else the revenues realized by the coastal states from operations in the area would be shared.

III. CALCULATING THE FISCAL BASIS FOR AN EQUITABLE REGIME

Revenue sharing, rather than a division of jurisdiction and multiplicity of operating authorities, has the advantage of simplicity and acceptability to coastal states. In practice, there are a number of bases for calculating the share of revenues derived from the area to be allocated to the regional or international authority:

(1) a quantum tax. In the case of oil, such a tax would be based on a percentage of value per barrel as set by international agreement.[31] Gas would be assessed at 6,000 cubic feet per barrel equivalent.

31. One problem would be to ascertain the "internationally agreed price" for the products. This could be accomplished by an agreed upon panel of economic experts setting a uniform price level for crude petroleum products on a world market, and then setting a percentage tax. However, due to the energy crisis and the revised price schedules of Canada and the OPEC countries, the price of crude oil and natural gas has rapidly increased since early 1973. As an example of this increase, note the following tables entered into the Congressional Record by Senator Chiles (D. Fla.):

Table 1—*Canadian Oil Prices in Chicago*—Alberta Crude (Pembina)

Date	Wellhead Price	Transport Cost	Export Tax	Total
1/1/73	2.96	0.45	0	3.41
9/1/73	3.81	0.45	.40	4.66
12/1/73	3.81	0.45	1.90	6.16
1/1/74	3.81	0.45	2.20	6.46
1/11/74	3.81	0.45	6.40	10.66

Table 2—*Venezuelan and Arab Oil Prices* [per barrel]

Date	Venezuelan crude, 35 gravity	Arab light crude, 34 gravity
8/31/70	2.34	1.80
1/1/73	4.63	3.07
12/1/73	8.00	11.65

Source: 120 CONG. REC. S592 (daily ed. Jan. 29, 1974).

(2) a percentage tax on the gross revenue derived from the mineral extracted. This would be more difficult to administer than the first method and would be subject to manipulable market variables reflecting time and place of extraction.[32]

(3) a percentage tax on all royalties, taxes, bonuses, leasing fees, etc., derived by the adjacent coastal state from the extracted minerals. This would be simple in theory, but would, in practice, prove the least equitable.[33] Developing nations depend on the taxation of hydrocarbon and other mineral production for a significant portion of their income and themselves consume relatively little of what is produced. Developed nations tend to have alternative sources of taxation and, being the principal consumers of their own primary products, tend to impose relatively lighter taxes on their production, with more allowances and exemptions.

(4) a percentage tax on realized net profits from extraction. The advantage of this approach is that it does not, like a fixed gross production tax, penalize the less-profitable but economically impor-

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It appears that the recent posted prices will decrease due to consumer-nation pressure and increased output. TIME, April 22, 1974, at 49.

If one set a 10% tax rate on petroleum products sold beyond 12 miles and one billion barrels was produced, approximately $1.1 billion of revenue at $11/barrel would be produced. OPEC countries currently sell their production on a posted price system with most of these countries exacting a 55 percent tax. See ROYAL DUTCH/SHELL GROUP OF COMPANIES, INFORMATION HANDBOOK 1973-74, at 52 (1973).

32. For instance, a country may want to differentiate hydrocarbons and minerals extracted in its economic zone and used domestically and those exported by price differentials. Such a system could lead to coastal nation rivalry in bidding for exploitive concerns by raising or lowering its price to suit the companies' interests.

33. Through 1968, 5.8 billion dollars in such revenue had been collected by the U.S. Government on offshore oil. Address by R.D. McCurdy, *Economics of Oil and Gas Operations Offshore, U.S.A.*, Offshore Technology Conference, May, 1969.

A recent book, speaking in terms of U.S. revenue policy, stated:

> "Based on a price of $3.45 per barrel, each one million barrels per day of production will contribute a royalty of 210 million dollars annually to the federal treasury (Recent and anticipated increases in the price of crude will substantially increase this revenue)."

D. KASH, ENERGY UNDER THE OCEANS 222 (1973). For further discussion of these revenues, *see id.* at 228.

In explaining the now-shelved trusteeship proposal of President Nixon, John R. Stevenson indicated that the regime would exact its revenue from royalties, etc. As he stated:

> The trusteeship zone would extend from the 200 meter depth line to beyond the base of the continental slope. The President contemplated that the regime for exploration and exploitation would provide for the collection of substantial mineral royalties to be used for international community purposes, particularly economic assistance to developing countries. Stevenson, *The United States Proposal for Legal Regulation of Seabed Mineral Exploitation Beyond National Jurisdiction*, 4 NAT. RES. LAW. 570, 576 (1971).

tant operations, those, for example, at greater sea depth where costs are much higher.[34] A profits tax would take these expenses into account in calculating the international levy. On the other hand, "profitability" is a notoriously flexible, manipulable term and difficult to enforce without armies of clerical examiners. Moreover, an international revenue-sharing system that does not tax "off the top" invites national governments to reduce the share available to the regional or international authority by increasing their own tax take.

It is safe to assume that, at least in the next decade, the bulk of revenues accruing to an international authority would derive from the area of shared revenue jurisdiction between the existing 200-meter isobath limit and the proposed new 200-mile (or continental margin) boundary, rather than from the further areas that would be wholly within the jurisdiction of the international authority. Nevertheless, it is important that any new international regime for the high seas establish itself both in the areas of mixed (inner) and of absolute (outer) international jurisdiction. Given the world's insatiable need for resources and the speed of technological innovation, this may well be the last opportunity to transfer to direct, effective international administration those outer areas of the seabed and subsoil beyond the 200-mile limit.

Equitable principles should apply not merely to the question of jurisdiction and to the collection of revenues from deep sea mining operations, but also to the income redistributive mechanism and the internal structure of the international authority to which these revenues accrue. An equitable revenue redistribution mechanism is one which recognizes that the poor should get a larger share than the rich. One functional basis would be the formula used by the U.N. in assessing members' dues. Such a "capacity to pay" evaluation would take into account the G.N.P. of each participating state, its population, per capita income, and any recent national disasters affecting economic viability.[35] An inversion of this formula, so that the capacity

34. As the U.N. Secretary General's *Economic Significance Report* stated:

> "The costs of exploitation increase at an exceedingly rapid rate with increasing water depth; for example at 330 metres the cost will be at least four times higher than at 33 metres, where the cost is already twice that of an on-shore field of similar characteristics. Operations under 300 metres or more of water may be so costly that only giant fields will perhaps be profitably exploited. In some off-shore areas today, a 2000 to 4000 barrels a day well might be considered an uneconomic discovery. Distance from shore also influences the economic possibilities of developing off-shore fields, particularly in the case of natural gas, as there are no viable alternatives for transporting to shore installations other than by pipeline (footnotes omitted)." *Supra* note 6, at 17. *See* KASH, *supra* note 33, at 81-90.

35. 28 U.N. GAOR, Report of the Comm. on Contributions, Supp. 11, U.N. Doc. A/9011 (1973).

to pay became the quantum of need, would provide an equitable sliding scale for determining the proportion of the international fund to be distributed to each participant.

Another equitable formula is that currently employed by the U.N. Development Program.[36] This formula would allocate the revenue shares by targeting amounts that each country should receive on the basis of need and a professional assessment of its program of development. Instead of using an automatic sliding scale, this approach substitutes country-by-country analysis of development problems and focuses on the specific needs of each economy.

A third approach would establish an organic process of decision-making by an assembly of participating states. Such an assembly, as well as an international secretariat, would be needed not only for purposes of budgeting revenues, but also in order to administer the areas of the high seas which are the outward zone beyond the proposed 200-mile limit. In this area the international authority would be "sovereign" for purposes of licensing mining, or operating its own mining enterprise, as well as for making all laws applicable to the seabed and subsoil. (This leaves aside, as beyond the scope of this essay, other roles pertaining to pollution control, freedom of navigation, etc., to which such an Authority might be assigned.)

In addition, as the revenues generated by the operations of the Authority increase, it might absorb the burden of supplying, administering and assisting in the technical implementation of international assistance programs which are currently operated on a bilateral basis.[37] If, as seems well within the realm of present contemplation, the international Authority could expect to realize an annual redistributive pool equivalent to 10 billion dollars at present value, the entire bilateral aid program could be subsumed. While this money would—and should—continue to come out of the purses of the well-to-do and go into the world's emptier pockets, the resultant redistributive scheme would have important advantages over the present bilateral aid arrangements. In particular, the system would be less vulnerable to the donor state's internal political vagaries, since no legislative appropriations would be involved. A multilateral system would be less marred by the external political pressures a donor brings to bear on recipients. Most important, once a steady source of income is established to finance development projects, middle and long-range development planning could, at last, become an international reality.

36. 17 U.N. D.P./26 (1973).

37. This would not be an AID program, but instead have no strings attached and be aimed simply at bringing out national expertise in certain skills and professions. *See* Pardo, *The Law of the Sea: The United Nations and Ocean Management*, PROCEEDINGS, *supra* note 25, at 26.

IV. ADVANTAGES AND POLITICS OF AN EQUITABLE SEA REGIME

There is much in this proposal to commend it to the government and people of the United States and, indeed, something akin to it remains an important ingredient in the U.S. proposals for the law of the sea.[38] Among the advantages are the following:

(1) it would avoid the potential conflict of a wide-open "race for ocean space";

(2) it would multilateralize the giving of aid, ensuring that other developed and rapidly developing states contributed their fair share alongside the United States, Canada and the Western Europeans;

(3) it would establish an international administration capable of forming the self-supporting, independent nucleus of an international regime to protect the freedom of the high seas beyond national jurisdiction.

Unfortunately, there are signs that the U.S. position in support of revenue sharing is being eroded by forces abroad, as well as in the executive branch, and in Congress.

Among the states that might be expected to benefit most from revenue sharing—the landlocked, other geographically disadvantaged, and even underdeveloped countries with substantial coastlines (all of which would expect to get back more than they contributed to an international authority) — there has been little inclination to embrace the American proposal. In part, this is precisely because it is the American proposal. However, this relucantce also reflects to a large extent, an understanding that the U.S. revenue-sharing proposal is linked with other less acceptable measures intended further to reduce the jurisdiction of coastal states in favor of international jurisdiction over pollution, navigation, and investment disputes. Divorced from these other considerations, the revenue-sharing proposal would probably enlist far wider support.

This is not to say that other U.S. proposals may not also be important and worth pursuing, from the American policy perspective. At least the proposal relating to free rights of passage through international waterways stands a relatively good chance of being supported by many other states on the basis of their own navigational self-interest. The revenue-sharing proposal, however, would benefit from being unencumbered by the freight of a "package deal." It

38. See Draft U.N. Convention, *supra* note 9. For additional material on the draft seabed treaty, see Knight, *The Draft United Nations Convention on the International Seabed Area: Background, Description and Some Preliminary Thoughts*, 8 SAN DIEGO L. REV. 259 (1971). For an account of events concerning U.S. policy since the proposal was submitted, see Hollick, *Seabeds Make Strange Politics*, 9 FOREIGN POLICY 148 (1972-73), and Hollick, *United States Oceans Politics*, 10 SAN DIEGO L. REV. 467 (1973).

stands on its own as beneficial, both in the narrower U.S. and broader international interest.

V. THE "UNILATERALIST" ALTERNATIVE

Although the President and the Departments of State and Defense continue to support an internationalist position, there is increasing evidence of a campaign by other federal executive departments—Treasury and Interior in particular—that favors a unilateral U.S. approach. A certain amount of support for this near-sighted effort is being engendered in the Congress. Even as the Caracas Conference gets underway, an equally significant battle appears to be shaping up within the U.S. Government between the "internationalists" and the "unilateralists."

This, of course, has been a battle of long duration. The United States began the modern era of international ocean's policy with a "unilateralist" quantum leap: the 1945 Truman Proclamation, which asserted exclusive U.S. sovereignty over the resources of the seabed of the contiguous continental shelf. In 1953, the U.S. incorporated this proclamation into domestic legislation. Neither the proclamation, nor the Submerged Lands Act[39] and the Outer Continental Shelf Lands Act,[40] specified the seaward limit of U.S. jurisdiction except to the extent that use of the term "continental shelf" implies a geographic limitation. Internally, as well as internationally, debate continues as to the exact location of those limits.[41] In any event, in 1958, the U.S. participated in the formulation of the Geneva Convention on the Continental Shelf and was an early signer.[42] Pleading the "limits of exploitability" provision of the 1958 Convention, the U.S. has continued to permit exploration in depths exceeding 200 meters.[43] Technological limitations, however, have until recently restricted actual mineral exploitation to well within the 200-meter isobath.

While the situation is rapidly changing, the U.S. is still committed to the maintenance of some international jurisdiction over the

39. 43 U.S.C. §§ 1301-15 (1970).

40. *Id.* §§ 1331-43.

41. *See* text accompanying notes 12-24, *supra*.

42. The 1958 Convention on the Continental Shelf, U.N. Doc.A/Conf. 13/L.55 was signed on April 29, 1958 by a majority of the states attending the conference, including the United States. *U.N. Conference on the Law of the Sea*, 2 OFFICIAL RECORDS 57, U.N. Doc. A/Conf. 13/38. *See* note 13, *supra*.

43. In 1961 the Department of the Interior issued a lease for the recovery of phosphate deposits off the coast of Southern California despite the knowledge that one deposit was 40 miles seaward and in waters as deep as 4000 feet. Krueger, *supra* note 17, at 478 n. 135.

In 1967, Interior interpreted Sec. 4F of the OCS Lands Act to apply to the erection of artificial islands 120 miles off the coast of California. Waters as deep as 6000 feet separated the proposed sites from the mainland. *Id.* at 478-79 n. 136.

seabed beyond the 200-meter depth.[44] This U.S. policy was first expressed by President Nixon in 1970.[45] In that statement, and in draft treaty articles subsequently submitted to the United Nations Committee on the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction, the U.S. proposed limiting national jurisdiction over resources to depths of no more than 200 meters.[46] Also certain areas beyond the 200 meter depth would be held by the coastal state as a trusteeship zone.[47] As noted, this proposal has disappointingly had little support. Although the appearance of international indifference is more tactical than real, and wide support for the proposal will undoubtedly surface in the hard bargaining at Caracas and beyond, the tactics of the developing states in seeming to prefer their own unilateralist solutions have strengthened the bargaining position of the unilateralists within the U.S. Government.

Thus, pressures for unilateral interim action are growing. The energy crisis has precipitated Project Independence, in which President Nixon has committed the U.S. to achieving domestically sufficient energy supplies by 1980.[48] In the U.S., those who wish to bring about a strong international regime may be forced to recognize the inevitability of some unilateral action. Efforts must, however, continue to make any such action consistent with the future international regime.

The U.S. Government is now considering several unilateral actions. The Deep Seabed Hard Mineral Resources Act (H.R. 9 and S. 1134)[49] would authorize the Secretary of the Interior to lease areas of the deep seabed (i.e., tracts of seabed admittedly in areas beyond the continental margin) to corporate developers. Those sponsoring this legislation hope to begin harvesting metal nuggets from the deep ocean floor. These nodules contain commercially exploitable manganese, copper, nickel, and cobalt. The United Nations Secretary General has estimated that a single nodule mining venture—and several are currently planned by U.S. and foreign companies[50]—could

44. Statement by Ambassador John R. Stevenson, chairman of the U.S. Delegation to the Committee on the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction, Plenary Sess., August 22, 1973, p. 3.

45. United States Oceans Policy, Statement by the President, 6 WKLY. COMP. PRES. DOCS. 677-78 (1970).

46. *See* note 9, *supra*.

47. *Id.* Art. 26-30.

48. "The Energy Emergency," Presidential Message to Congress, Nov. 8, 1973, 9 WKLY. COMP. PRES. DOCS. 1319, 1322 (1973).

49. *See generally Hearings on S. 1134 Before the Subcomm. on Minerals, Materials & Fuels of the Senate Comm. on Interior & Insular Affairs*, 93d Cong., 1st Sess. (1973) [hereinafter cited as *Hearings on S. 1134*].

50. Deepsea Ventures, Inc./Tenneco, Inc., Hughes Tool Co., Kennecott Copper

supply 7.9 percent of the cobalt, 2 percent of the manganese, 1.3 percent of the nickel and .13 percent of the copper needed for global industry by 1980.[51]

While the Department of the Interior has stated that no legislation is in any way necessary to allow U.S. companies to conduct exploitation on the deep seabed,[52] the industry is anxious to secure governmental guarantees on the integrity of its investment. Such a guaranty program would come close to committing the United States to facilitating actions by U.S. firms that are incompatible with the international law the U.S. wants to see established and, arguably, even with existing international laws.

While nominally subservient to a future regime that might emerge from present international negotiations, the bill imposes an obligation on the U.S. to negotiate with other states for recognition of the "grandfather" rights granted under the Act, something the State Department knows it could not succeed in obtaining.[53] Section 10 (a) does make licenses issued under the proposed Act subject to a future international regime, but only if "such regime fully recognizes and protects the exclusive rights of each licensee to develop" its licensed area. This would be quite difficult to accomplish. Failing that, the legislation mandates full restitution to the participating corporations for lost investment in areas not internationally recognized to be open to unilateral U.S. development.[54] Obviously, the legislation, if passed, would place the U.S. hopelessly at cross-purposes with any conceivable international regime. (Another, even worse, pending piece of legislation would unilaterally extend United States exclusive fishing jurisdiction from the present 9 nautical miles beyond our 3-mile territorial sea to a 200-mile zone.[55])

Corp., Ocean Resources, Inc., International Nickel Co. (Canada), Sumitomo Group/MITI (Japan), AMR: Metallgesellschaft/Preussag/Salzgitter (West German), CNEXO-Societe Le Nickel (France). A. Rothstein & R. Kaufman, *The Approaching Maturity of Deep Ocean Mining—The Pace Quickens*, in *Hearings on S. 1134, supra* note 49, at 214.

51. Report of the Comm. on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, 27 U.N. GAOR Supp. 21, at 125, U.N. Doc. A/8721 (1972) [hereinafter cited as *Report*].

52. Statement of Leigh Ratiner, Director, Office of Ocean Resources, Dept. of the Interior, *Hearing on Law of the Sea Before the Subcomm. on Oceans and Atmosphere of the Senate Comm. on Commerce*, 92d Cong., 2d Sess., at 24 (1972) [hereinafter cited as *Law of the Sea Hearing*].

53. Sec. 10, entitled "Investment Protection," subjects licenses issued thereunder to a future international seabed regime provided "that the United States fully reimburses the licensee for any loss of investment . . . ." The section further puts the U.S. government in the role of insuring (for an unspecified premium) the licensees against any loss due to (a) interference with the leased tract's development or (b) any unauthorized recovery of hard minerals.

54. *Hearings on S. Res. 82 Before the Senate Foreign Relations Comm.*, 93d Cong., 1st Sess., at 50 (1973).

55. S. 1988, 93d Cong., 1st Sess. (1973), referred to the Committee on Commerce.

Unilateral action by the U.S. will inevitably sink the prospects of a successful international regime's emerging from the international negotiations. Hearings on Senate Resolution 82,[56] which endorsed the objectives envisioned by President Nixon's ocean policy statement of May 23, 1970, were held on June 19, 1973.[57] The Department of State representative, referring specifically to H.R. 9 and S. 1988 stated that their passage "would have potentially disastrous effects on the possibility of achieving a success at the Law of the Sea Conference."[58] His reasoning was clear: "foreign countries that have been roundly criticized—and I feel justly so—by the United States for unilaterally extending their jurisdiction to the detriment, not only of the U.S. but of the international community generally, would believe and feel that the U.S. [in passing H.R. 9 or S. 1988] would be doing exactly that for which other countries have been criticized."[59]

Representative Donald Fraser, a Congressional participant in the United States delegation to the U.N., took part in floor debate over

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The Interim Fisheries Zone Extension and Management Act of 1973 (S. 1988) applies solely to anadromous species, e.g., salmon (Sec. 4(a)). It also strongly exhorts the Secretary of State to initiate and conclude international treaties to promote and conserve coastal fishing (Sec. 5). The Act shall "cease to be in effect on the date the Law of the Sea Treaty or Treaties now being developed regarding fisheries jurisdiction and conservation shall enter into force." (Sec. 10) The treaty language is, however, purely hortatory.

While 12 nations now claim 200-mile fishing zones (Argentina, Brazil, Chile, Costa Rica, Ecuador, El Salvador, Republic of Korea, Nicaragua, Panama, Peru, Sierra Leone, and Uruguay: International Boundary Study, *Limits in the Seas, National Claims to Maritime Jurisdiction*, Ser. A, Pub. No. 36 (1972) (with corrections to March, 1972) issued by the Geographer, U.S. Department of State, reprinted in *Law of the Sea Hearing, supra* note 52, at 71-72), the vast majority of coastal states do adhere to a 12-mile limit. *Id.* The present United States fisheries policy utilizes a species approach with preferential rights for the coastal states (see United States of America: Revised Draft Fisheries Article, U.N. Doc. A/AC.138/SC.11/L.9, reprinted in *Report, supra* note 51, at 175). S. 1988, in contrast, establishes an exclusive coastal state jurisdictional belt for anadromous species. It is hardly sound policy for the U.S. to espouse contradictory solutions to the fisheries problem. The distinction between preferential and exclusive coastal rights is significant. Under the latter, the U.S. long-distance fishing fleets (comprising 20 percent of the U.S. fishing industry) would be hampered by the almost certain retaliation by virtually every other coastal nation. In 1972 the fish and shellfish landed by U.S. fishing craft in international waters off foreign shores were valued at $155,723,000. The total U.S. catch was valued at $765,500,000. *Hearing on S. Res. 82 Before the Subcomm. on Oceans and Int'l. Environment of the Senate Foreign Relations Comm.*, 93d Cong., 1st Sess., at 29 (1973); [hereinafter *Hearings on S. Res. 82*].

56. S. Res. 82, 93d Cong., 1st Sess., adopted unanimously July 9, 1973, 119 CONG. REC. S 12810 (daily ed. July 9, 1973).

57. *Hearings on S. Res. 82, supra* note 55.

58. *Id.* at 23-24.

59. *Id.* at 24.

H.Res. 330,[60] the House counterpart of S. 82. On April 2, 1973, he asked:

> Well, the United States could unilaterally assert jurisdiction to 200 miles or to a 200-meter depth or to 1,000 or to 10,000 miles, but do we want to? We could make the assertion, but if we did it unilaterally, this would provide a source of conflict with other nations which would take the position that this is not an accepted international standard. We have criticized other nations for making unilateral claims to vast areas of the international ocean, and we have steadfastly refused to recognize such unilateral claims, believing such matters are properly a subject for international agreement in precisely the kind of forum which we have in the forthcoming law of the sea conference.[61]

The Administration continues to resist unilateral congressional action and, instead, has asked Congress to give U.S. negotiators until 1975 to work out an acceptable international ocean regime.[62] Nevertheless, congressional hearings have already been held on H.R. 9,[63] and the Administration is preparing its own version of a seabed mining act should treaty talks stall.[64]

More ominously, the Administration has begun its own program of unilateral encroachment on the seabed despite its opposition to H.R. 9 and S. 1988. On July 3, 1973, the Department of the Interior began issuing oil and gas leases for portions of the outer continental shelf up to a 600-meter depth, pursuant to the procedures and open-ended authority contained in the Outer Continental Shelf Lands Act. Accompanying the July 3rd announcement was a caveat which stated: "Nothing contained in this call for nominations or in the issuance of new leasing maps should be interpreted as being inconsistent with the President's Oceans Policy Statement of May 23, 1970, relating to offshore development beyond the 200 meter depth contour. Leases ultimately issued beyond 200 meters will be subject to the international regime to be agreed upon."[65] That caveat has been superseded by the Interior Department's recent unexplained—and unwarranted—conclusion that "it will not be necessary to insert any additional provisions in leases to be issued beyond the 200 meter isobath to comply with the President's Oceans Policy and to accomodate the international negotiations now in progress regard-

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60. H.R. Res. 330, 93d Cong., 1st Sess., adopted by a vote of 303 yeas, 52 nays, 78 not voting, April 2, 1973, 119 CONG. REC. H 2310 (daily ed. April 2, 1973).

61. 119 CONG. REC. H 2312 (daily ed. April 2, 1973).

62. Letter from Charles N. Brower, Acting Legal Adviser and Acting Chairman, Inter-Agency Task Force on the Law of the Sea to Sen. Henry M. Jackson, Ch., Insular Affairs Subcomm. of the Senate Comm. on the Interior, March 1, 1973, in *Hearings on S. 1134, supra* note 49, at 15 [hereinafter cited as Letter from Brower to Jackson].

63. *Hearings on S. 1134, supra* note 49.

64. Letter from Brower to Jackson, *supra* note 62.

65. 38 FED. REG. 9839 (1973); 38 FED. REG. 17743 (1973); similar caveat in 38 FED. REG. 27307 (1973).

ing the law of the sea."[66] The Council on Environmental Quality has recently given qualified approval to deep-sea oil drilling on the outer continental shelf,[67] indirectly endorsing operations further out than 50 miles by stressing the relatively lower environmental risk of such far-out drilling to the shorelands.[68] Although estimates of the reserves of petroleum to be found on the U.S. outer shelf have fluctuated widely, even within the past year, there is little doubt that whatever there is will not much longer go untapped.

The analysis means that if the international community is to benefit from petroleum resources lying even as much as 300 miles off the U.S. Atlantic coast, on the outer continental shelf or slope, it will only be because Caracas or its successor meetings will have produced a generally acceptable package of agreements establishing an international regime and operationalizing a system of revenue sharing.

VI. HOLDING THE LINE AGAINST THE UNILATERALIST OPTION

As yet, the United States remains committed to a multilateral revenue-sharing plan for the windfall of scarce resources that lie beyond the present reach of national jurisdiction. Revenue sharing is the fourth of the five principles pertaining to coastal areas promulgated by the U.S. delegation at the Seabed Committee.[70] On August 10, 1972, the U.S. representative to this committee, noting his "conclusion from previous exploitation patterns that a significant portion of the total international revenues will come from the continental margin off the United States in early years,"[71] nevertheless stated that

> [w]e continue to believe that the equitable distribution of benefits from the seabeds can best be assured if treaty standards provide for sharing some of the revenues from continental margin minerals with the international community, particularly for the benefit of developing countries.[72]

The Draft Articles on the Coastal Seabed Economic Area submitted by the U.S. on July 18, 1973, provided in Article 2, sec. (3): "the coastal state shall make available in accordance with the provisions of Article ___, such share of revenues in respect of mineral resources exploitation from such part of the Coastal Seabed Eco-

66. 38 FED. REG. 30457 (1973).

67. N.Y. Times, March 23, 1974, at 1, col. 6.

68. *Id.* at col. 7.

69. Almost 50 billion barrels were reported in the autumn of 1973, but a revised estimate of less than half that amount was issued by the U.S. Geological Survey in the spring of 1974. *Id.*

70. The U.S. delegation to the Seabed Committee has repeatedly restated its position. See for example, Statement by Hon. John R. Stevenson to the U.N. Seabed Committee, Aug. 10, 1972, reprinted in *Law of the Sea Hearing*, *supra* note 52, at 53.

71. *Id.*

72. *Id.*

nomic Area as is specified in that Article."[73] The statement accompanying the Draft Articles noted that "[r]evenue sharing is, in our view, an important element in an overall comprehensive settlement of the law of the sea issues which . . . could have specific application to resolving the issue of the outer limit of coastal state resource jurisdiction."[74] Remarking that few nations had spoken in favor of revenue sharing, the U.S. delegation concluded that perhaps no real discussion of revenue sharing was possible until other nations "have some better idea of the role which revenue sharing will play in an overall political settlement,"[75] *i.e.*, until other countries recognize that revenue sharing by the U.S. is a *quid pro quo* for their accepting certain positions advocated by the United States. In addition to the suggested standards for coastal areas,[76] the U.S. seeks the protection of scientific research,[77] the conservation and protection of fish stocks,[78] and the freedom of transit through straits.[79] It is these additional caveats to the revenue-sharing proposal which have caused other states to fail to "rise to the bait."

Yet it is handsome bait. While the U.S. is on record as favoring the sharing of a substantial portion of the revenues it receives from exploitation in depths greater than 200 meters,[80] there may even be more to sweeten the pot. Washington has deliberately left open the possibility of sharing revenues from exploitation in the closer-in area between the outer limit of national sovereignty (probably now to be set at 12 miles) and the end of the 200-meter isobath.[81] The State Department's proposal seems to hint that even in this area, which the Continental Shelf Convention has already placed firmly in national

73. United States of America: Draft Articles for a Chapter on the Rights and Duties of States in the Coastal Seabed Economic Area, U.N. Doc. A/AC.138/SC.II/L.35 (1973).

74. Statement by Hon. John R. Stevenson to Subcomm. II of the U.N. Seabed Committee, July 18, 1973.

75. *Id.*

76. *See* note 73 *supra.*

77. See the Draft Articles for a Chapter on Marine Scientific Research and the accompanying Statement by Ambassador McKernan, Alternative U.S. Rep. to the U.N. Seabed Comm., submitted to Subcomm. III on July 20, 1973.

78. *See* note 55 *supra.*

79. U.S. Draft Articles on the Breadth of the Territorial Sea, Straits and Fisheries, submitted to Subcomm. II of the U.N. Seabed Comm., U.N. Doc. A/AC.138/S.C.II/1.40 reprinted in Report of the Seabed Comm., 26 U.N. GAOR Supp. 21, U.N. Doc. A/8421 (1971).

80. Articles 5 and 29, U.S. Draft Convention, *supra* note 9.

81. Statement by Ambassador Stevenson, *supra* note 74, at 4. "[W]e recognize that allowance may have to be made for the fact that the Geneva Convention on the Continental Shelf already provides coastal States with the sovereign right to explore and exploit the resources of the shelf to the depth of 200 meters with a somewhat different, and in our view, less satisfactory, provision for the protection of other interests in, and uses of, the area than is provided in our draft articles. . . . Hence, there

hands for purposes of resource exploitation, at least some types of international jurisdiction and revenue sharing might be acceptable in the context of a comprehensive new agreement.

But such agreements are some time off, and are only likely to result from some loosening up of the U.S. "package." If revenue sharing, the application of equitable principles to the new territories beneath the sea being opened up by technology, is worth doing at all, then it is intrinsically valuable whether or not the final sea law agreement includes other objectives of U.S. policy. If the effect of revenue sharing is, at last, to place international development assistance on a sounder basis than the present system of "give-what-you-can" hat-passing, then that objective ought not to be lost by being encumbered with other, quite unrelated objectives that make it unacceptable to the very countries that are the potential beneficiaries of a sound system of sharing.

Meanwhile, however, the U.S. may soon lose the capability to negotiate for any system of equitable distribution of ocean exploitation because of the momentum of the unilateralists within the country and abroad. The best way to counter the unilateralists' thrust towards a "grab-what-you-can" system may be for the U.S. to take the initiative by instituting, unilaterally, an interim system of equitable benefit-sharing. The operation of this system should, of course, be limited to those areas which, by existing international law, are clearly within the jurisdiction of the United States or which are within the 200-mile economic "trusteeship" zone which has a preponderant measure of state support. Acting alone, the U.S. could establish the concept of revenue sharing by unilaterally creating a trust fund into which would be placed twenty percent of the assessed value of minerals generated by exploitation off the U.S. shores beyond the territorial sea. In other words, for each barrel of oil or cubic foot of gas extracted from the seabed beyond 12 miles from shore, a certain percentage of the value could be set aside in a government trust fund. To encourage exploration, the government could permit selective, temporary price differentials or tax credits.

The statute under which oil and gas leases are now issued for seabed beyond our territorial sea is the Outer Continental Shelf Lands Act of 1953.[82] This act can be amended to:

(1) create a trust fund to expire at the enactment of a suitable international regime or at the end of a specified renewal term, *e.g.*, 5 years.

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may be some states which will not wish to subject the area between 12 miles and 200 meters to a new legal regime, or they may object to the application, in that area of one or more of the international standards we propose—for example, revenue sharing. . . . We welcome active consultation with other delegations on this question."

82. *See* note 40 *supra*.

> (2) direct the Secretary of the Interior to collect and place into such fund a specified portion of the gross revenues generated by exploitation of the seabed beyond 12 miles from shore.[83]
> (3) direct the Secretary of the Treasury to allow the affected companies tax credit for those monies paid to the Secretary of the Interior under (2).

A proposed amendment to that effect is included below.[84]

It is perhaps instructive to compare our proposal with the sug-

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83. The four methods for determining the amount of tax due have been discussed previously, see text accompanying notes 31-34, *supra*. Although the U.S. could adopt any of the alternatives, the course best suited for eventual adoption by the international community is a percentage tax of a posted price per barrel.

84. Proposed Amendments:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. These amendments to the Outer Continental Shelf Lands Act may be cited as the International Equitable Sharing of Revenues Act.

Section 2. When used in this Act —

> (a) The term 'Commercially extracting party' means any person licensed by the Secretary of the Interior to engage in the recovery of minerals on the outer continental shelf at a substantial rate of production (without regard to profit or loss) for the purpose of marketing or commercial use and does not include recovery for any other purpose such as sampling, experimenting in recovery methods, or testing equipment or plant for recovery or treatment of minerals.
> (b) The term 'gross revenue' means all revenues actually received by a commercially extracting party in a fair market sale of the unimproved minerals recovered from the outer continental shelf or, if no such fair market sale occurs, the fair market value as determined by the Secretary of the Interior, of the unimproved minerals recovered from the outer continental shelf by the commercially extracting party.
> (c) The term 'person' means any government or unit thereof and any juridical or natural person.

Section 3. There is hereby established in the U.S. Treasury an International Revenue Sharing Fund. The Secretary of the Interior shall collect from each commercially extracting party and deposit into this fund each year an amount equal to 20 per centum of the gross revenues of each commercially extracting party attributable to the recovery of minerals located on a portion of the outer continental shelf whose water depth does not exceed 200 meters. The Secretary of the Interior shall also collect from each commercially extracting party and deposit into this fund each year an amount equal to 35 per centum of the gross revenues of each commercially extracting party attributable to the recovery of minerals located on a portion of the continental shelf whose water depth does exceed 200 meters.

(b) These amendments shall apply to any lease heretofore issued under the Outer Continental Shelf Lands Act. The Secretary of the Interior shall ascertain the depth position of each lease issued heretofore under that Act and so notify each leaseholder. The Secretary of the Interior shall include notification of depth position in each lease issued hence-

gested escrow fund contained within H.R. 9.[85] This rather vague escrow fund, into which the U.S. Government would deposit an unstated percentage of the licensing and taxing revenues it receives

forth under the Outer Continental Shelf Lands Act.

(c) From time to time the Secretary of the Treasury shall report in the Federal Register on the amount contained in the fund.

Section 4. The fund shall continue until the President of the United States affirms to the Secretary of the Treasury that the international community has reached general agreement on a regime for the oceans or until five years from the date of this enactment, whichever occurs earlier, provided, however, that this act may be extended by appropriate Congressional Act.

(b) If this fund terminates upon affirmation by the President of the United States that the international community has reached general agreement on a regime for the oceans, the monies in the fund shall be paid over by the Secretary of the Treasury to the international body charged with administering the international ocean regime or, if the President of the United States shall find that no such body exists, directly to those developing nations that Congress shall hereafter designate.

(c) If this fund terminates in the absence of an appropriate international regime after the passage of five years from the date of this enactment, the monies therein shall be treated by the Secretary of the Treasury as general revenues.

Section 5. The Secretary of the Treasury shall allow to each commercially extracting party an income tax credit in an amount equal to any monies collected by the Secretary of the Interior pursuant to Section 3 of this Act.

Section 6. Nothing contained in this Act shall be interpreted as an extension by the United States of jurisdiction over the continental shelf or the high seas."

For a useful precedent to this proposal, see the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1624. An Alaskan Natives Fund is created, §1605, and, *inter alia*, a specific percentage of the gross value of the minerals thereafter produced or removed from certain lands is placed therein, §1608(b) and (c). The provisions for this Fund are not applicable to the Outer Continental Shelf (§1608 (i)).

85. H.R. 9, 93rd Cong., 1st Sess. §9 (1973) which provides:

ESCROW FUND

SEC. 9. A fund shall be established for assistance, as Congress may hereafter direct, to develop reciprocating States. The United States shall deposit in this fund each year an amount equivalent to-*per centum of all license fees collected during that year by the United States pursuant to section 5(a) and an amount equivalent to-*per centum of all income tax revenues derived by the United States which are directly attributable to recovery of hard minerals from the deep seabed pursuant to licenses issued under this Act: Provided, That the amount deposited by the United States per license issued and per unrelinquished square kilometer under license shall not exceed the amount contributed for assistance to developing reciprocating States by other licensing reciprocating States (except developing States) per license issued by them and per unrelinquished square kilometer licensed by them. For the purposes of this section, "developing reciprocating State" means a reciprocating State designated by the President, taking into consideration per capita gross national product and other appropriate criteria.

*An appropriate amount to be determined by the Congress.

from deep seabed exploitation, is meant to aid developing reciprocating states. This bow toward revenue sharing has been dismissed as "lip service."[86] A percentage of the licensing fee (a mere $5,000 for a block of 40,000 square surface kilometers[87]) would have to be quite large to be at all significant. There is provision for sharing with an international fund an unstated percentage of a tax on revenue "directly attributable to recovery of hard minerals from the deep seabed . . . under this Act."[88] But the escrow fund contributions cannot exceed the rate of contributions of other reciprocating developed states,[89] a "reciprocation" not currently contemplated by any nation in the world. Most importantly, this fund is mere window-dressing for what has already, above, been analyzed as an essentially undesirable unilateralist legislative scheme.[90]

Our proposal carries no such additional baggage. An amendment to the OCS Lands Act would affect operations on the continental shelf where the vast bulk of mineral wealth lies—not, as does H.R. 9, on the deep seabed. Furthermore, the suggested amendments are in no sense an assertion of additional jurisdiction by the U.S.

In sum: the United States' effort to preserve an equitable international co-jurisdiction over coastal waters beyond the 12-mile territorial sea is a laudable one. Actions aimed at preventing unilateral extensions of U.S. jurisdiction that will frustrate that policy must be continued. However, current energy demands ensure that the U.S. will continue to conduct oil and gas exploitation at greater and greater depths. The likelihood of the international community's viewing such exploitation as consistent with a future international regime is significantly greater if measures are taken now to allocate a portion of the revenues generated to a trust fund whose monies will eventually go to such a regime.

86. Knight, *The Deep Seabed Hard Mineral Resources Act—A Negative View*, 10 SAN DIEGO L. REV. 446 (1973).

87. *Supra* note 85, at Sec. 5 (a).

88. *Id.* at Sec. 9.

89. Sec. 2(i) of the Act provides: " 'reciprocating state' means any foreign state designated by the President as a state having legislation or state practice or agreements with the United States which establish an interim policy and practice comparable to that of the United States under this Act." *Id.*

90. *See* text accompanying notes 52-55, *supra*.