

7-1-1981

The Law of the Sea Conference and Development: Food and Energy Resources

Bernard H. Oxman

University of Miami School of Law, bhoxman@law.miami.edu

Follow this and additional works at: <http://repository.law.miami.edu/umialr>

 Part of the [Comparative and Foreign Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Bernard H. Oxman, *The Law of the Sea Conference and Development: Food and Energy Resources*, 13 U. Miami Inter-Am. L. Rev. 157 (1981)

Available at: <http://repository.law.miami.edu/umialr/vol13/iss2/3>

This Article is brought to you for free and open access by University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Inter-American Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

THE LAW OF THE SEA CONFERENCE AND DEVELOPMENT: FOOD AND ENERGY RESOURCES

BERNARD H. OXMAN

I would like to thank the sponsors of the International Development Conference for inviting me to speak to you today.

While I have served on the United States delegation to the Third United Nations Conference on the Law of the Sea for many years, and in the Ford, Carter and Reagan administrations as its vice chairman, I am here today in my capacity as a professor of law.¹ It is in that capacity that I claim the privilege both to lecture and to stray a bit from conventional wisdom. I do so at the outset.

The Third United Nations Conference on the Law of the Sea² was not called to promote development among developing countries. The rhetoric to the effect that this is the primary purpose of the Conference has served to confuse representatives and the public in both developing countries and industrialized countries. It has been the source of unreasonable expectations regarding the Conference and of unreasonable criticism of the Draft Convention.³

The origins of the international law of the sea are inextricably connected with the origins of modern international law itself. The function of the international law of the sea is constitutional: it creates the basic system of order in the oceans. It is primarily concerned with

1. *Professor of Law*, University of Miami School of Law; Vice Chairman, United States Delegation to the Third United Nations Conference on the Law of the Sea. The following is the text of an address given to the International Development Conference, Washington, D.C., May 13, 1981. The views expressed herein are those of the author and do not necessarily represent the views of the Department of State or the U.S. Government.

2. The Conference commenced in 1973 pursuant to UNGA Res. 3067 (XXVIII). The author's articles tracing the work of the Conference may be found in Stevenson and Oxman, *The Preparations for the Law of the Sea Conference*, 68 AM. J. INT'L L. 1 (1974); *The Third United Nations Conference on the Law of the Sea: The 1974 Caracas Session*, 69 AM. J. INT'L L. 1 (1975); *The 1975 Geneva Session* 69 AM. J. INT'L L. 763 (1975); and Oxman, *The Third United Nations Conference on the Law of the Sea: The 1976 New York Session*, 71 AM. J. INT'L L. 247 (1977); *The 1977 New York Sessions*, 72 AM. J. INT'L L. 57 (1978); *The Seventh Session (1978)*, 73 AM. J. INT'L L. 1 (1979); *The Eighth Session (1979)*, 74 AM. J. INT'L L. 1 (1980); *The Ninth Session (1980)*, 75 AM. J. INT'L L. 211 (1981).

3. Draft Convention on the Law of the Sea (Informal Text), U.N. Doc. A/Conf.62/WP.10/Rev. 3/Add.1 (1980). [hereinafter cited as Draft Convention] The text was subsequently reissued with primarily drafting changes as A-Conf.62/L.78 (1981).

allocating rights to use the oceans, and rights to insist that one's interests be taken duly into account in the exercise of rights by others.

The purpose of this allocation is to reduce the changes of conflict between states over ocean uses. This is done by narrowing the situations in which conflicting assertions of right may occur, and by channeling those conflicting assertions of right that do occur into more manageable legal and technical contexts.

The international law of the sea is therefore concerned with the maintenance of the prerequisites for all fruitful human activity, including economic activity: the promotion of peace, public order, and reasonable stability of expectations.

It is in this sense that I would be happy to contradict my opening assertion about the relationship between development and the law of the sea: the less the uncertainty about public order and the stability of expectations in the oceans, the less such uncertainty is a disincentive to investment or a source of demands for higher rates of return that can create both economic and political problems.

If the reasons for allocating rights are to promote peace, public order, and reasonable stability of expectations, then we must define what we mean by "rights" in light of those goals. It will not do to speak of God-given rights that may be contested by others, perhaps even violently. However divine the source for the assertion of rights, however eminent the authorities defending that assertion, however just or efficient the purported ends, if the assertion is not accepted by others, then there are no rights in the functional sense that we mean here: namely the acquiescence by others in the legitimacy of the activity in question.

The key words here are "others" and "acquiescence." Which "others" do we mean? Given the underlying purpose of achieving the acquiescence, by "others" we mean those states in a position to disrupt the desired stability of expectations by military, economic, or political means.

By "acquiescence" we mean a decision to accept the assertion of a right without military, economic, or political challenge, even though the acquiescent state might prefer that the underlying right in question not exist or that its specific exercise be avoided.

Like much of the rest of modern international law, the international law of the sea evolved largely in unwritten form.⁴ This is

4. The law of the sea was generally customary international law until it was codified and developed by the International Law Commission in a major undertak-

referred to by the term customary international law: a term used by international lawyers to distinguish it from international law in written form. The source of customary international law is the custom and practice of states.

In principle, there is nothing wrong with relying on unwritten rules. Most of the norms of behavior which guide us in our everyday lives—whether we call them law or not—are unwritten in form. Most of the promises that we make to each other in the course of our everyday lives are unwritten.

One difficulty, however, is that as the size of the community and the scope of the problems involved increase in variety and complexity, the demands for definitive and authoritative statements of the law increase. This “written” law can be in the form of international resolutions or judicial decisions interpreting what the customary law is, assuming those resolutions or judicial decisions are in fact accepted as having legislative effect. It can also be in the form of direct written statements of the law: in national terms “legislation,” in international terms so-called “law-making treaties.”

At the present stage, resort to the International Court of Justice for the settlement of disputes between states is rare. Moreover, judicial decisions are not accepted as authoritative statements of international law in the sense that decisions of American courts on common law issues are regarded as binding precedent.⁵ The extent to which resolutions are accepted as accurate statements of customary law depends on a case-by-case analysis that frequently turns itself on an analysis of custom and practice.

Thus, in the 20th century, the so-called law-making treaty has increasingly been resorted to as the way of bringing greater stability of expectations to the international law in an expanded and far more complex international community of states.

It is important to bear in mind that the historical function of the conference called to negotiate a law-making treaty is to increase the

ing culminating in the first United Nations Conference on the Law of the Sea in 1958. Four conventions emerged from that Conference: (1) Convention on the Continental Shelf, 15 U.S.T. 471, T.I.A.S. No. 5578, 499, U.N.T.S. 311; (2) Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205; (3) Convention on the High Seas, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82; (4) Convention on Fishing and Conservation of the Living Resources of the High Seas, 17 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 285.

5. See Statute of the International Court of Justice, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179 art. 59: “The decision of the Court has no binding force except between the parties and in respect of that particular case.”

efficiency and certainty of the law-making process. To put it into different terms, the conference brings together all of those "others" that I described in order to reach a common decision on what they will "acquiesce" in. Needless to say, the question of which states form the relevant group depends upon the issue.

If, for example, one is speaking of transit of straits, it would seem that the relevant group would consist primarily of the states bordering major straits and the major users of the straits (bearing in mind that most states are at least indirect users). Each of the states would, because of its underlying interest, presumably have the will, and because of its underlying position, presumably have the ability to upset the stability of expectations regarding transit of straits if it chose to do so. Similarly, if the written law embodied in a treaty is to create rights in the sense that we mean them here—that is promote peace, public order and stability of expectations—then these states must, by and large, also accept the resulting treaty if those goals are to be achieved by treaty (or at least accept the relevant written rules as a definitive statement of customary law).

A multilateral conference like the Third United Nations Conference on the Law of the Sea assembles all of the states of the world to discuss all of the major issues of allocation of rights regarding almost all ocean uses. This creates the temptation to regard the assembled participants as representatives of all mankind dispatched to enunciate global community policy on its behalf, rather than as instructed negotiating agents of states. The result is a rhetorical pressure to cast issues in terms of global community values, and especially in terms of the interests of the numerical majority, to a degree that far exceeds the actual weight accorded such considerations by almost all national governments in their individual formulation of policy.

The result can be good. For example, in controlling pollution or disease, the effect is to expose both the necessity for, and the possibility of, effective action on a global level. But the rhetorical pressure to submerge national interests in the face of asserted community objectives can also greatly magnify the influence of those who have little at stake in the resolution of a particular issue or would not be in a position to affect the underlying stability of expectations outside the context of a multilateral conference. Up to a point, this too can be a good thing, since it ensures that more voices are heard. But, if it diverts a conference from its primary function of serving as a forum for working out more efficiently the norms acceptable to those who are principally affected, then the resulting document will not define rights in the sense that we are using the term here.

It is against this background that one should examine the major development in the law of the sea since World War II. That development entails the removal of most of the living resources of the sea and most of known oil and gas resources of the seabed from the high seas regime—that is from the “commons” as it were—and their allocation to the adjacent coastal states.⁶ This process was begun in 1945 when the United States claimed exclusive control over the resources of the seabed of the continental shelf adjacent to the United States outside its three-mile territorial sea, and was rapidly emulated.⁷ It was continued as Latin American countries claimed various types of jurisdiction in 200-mile zones adjacent to their coast, a trend that gradually spread to other parts of the world.

The first United Nations Conference on the Law of the Sea, held in 1958 in Geneva, confirmed this trend with respect to seabed resources of the continental shelf, but was vague as to precisely how much of the seabed was involved in this allocation of resources to the coastal state, and took an exceedingly conservative approach to the question of extending coastal state rights over living resources. Thus, one thing that was lacking was sufficient precision with respect to the outer limit of coastal state control over seabed resources, a question which became increasingly relevant to stability of expectations as it became technologically possible to develop seabed resources in deeper and deeper areas further from shore.⁸ The second difficulty was that the approach to fisheries resources taken at that conference did not respond to the growing demands of coastal states for control over fisheries in vast areas adjacent to their coasts.⁹ This was one of the principal reasons why the 1958 conventions never achieved universal ratification.

6. At the end of 1972, some 400 drilling units were operating on the continental shelves of 70 countries, 26 of which were involved in commercial production. Berryhill, *The World Wide Search for Petroleum Offshore—A Status Report for the Quarter Century, 1947-1972*, U.S. Dept. of Interior (1974) 1-4, 20.

7. President Truman made this claim in what has come to be known as the Truman Proclamation. Pres. Proc. No. 2667, 3 C.F.R. 67 (1943-1948 Compilation), 13 DEP'T. STATE BULL. 485 (1945).

8. Convention on the Continental Shelf, *supra* note 4, art. 1, provides: For the purpose of these articles the term “continental shelf” is used as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 meters or beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.

9. The fisheries concept was left to state practice. The International Court of Justice noted:

Two concepts have crystallized as customary law in recent years arising out of the general consensus revealed at [the Second U.N. Confer-

By contrast, the Third United Nations Conference on the Law of the Sea—functioning by consensus—has developed texts that fully reflect, and refine with a degree of precision never before attained, the trend toward reallocating most fisheries and hydrocarbon resources to adjacent coastal states.¹⁰ While establishing a maximum permissible breadth of twelve nautical miles for the territorial sea,¹¹ the draft convention produced by the Third United Nations Conference on the Law of the Sea achieves this reallocation by the use of two regimes: the exclusive economic zone and the continental shelf.

Taking the latter first, the Conference confirmed the pre-existing continental shelf regime,¹² pursuant to which the coastal state exercises exclusive sovereign rights over the exploration and exploitation of the natural resources of the seabed and subsoil of the continental shelf.¹³ What the Draft Convention adds is a new precise outer limit which is set at the edge of the continental margin, with elaborate substantive and procedural provisions on how to locate the edge.¹⁴ The continental margin is a vast area extending seaward from the coast in many parts of the world—in some areas extending six, seven or eight hundred miles from the coast. In other places there is a very narrow continental margin. To deal with those situations, it is specified that at all events the continental shelf regime covers the seabed to a distance of 200 nautical miles from the coast if the continental shelf margin does not extend as far seaward as that 200-mile limit.¹⁵

Another thing added by the Draft Convention in this regard is the idea that there would be minimum internationally established environmental standards for the development of the resources of the continental shelf which coastal states would have to observe, assuming they did not wish to establish higher standards for such activities.¹⁶

ence on the Law of the Sea]. The first is the concept of the fishery zone, the area in which a State may claim exclusive fishery jurisdiction independently of its territorial sea; the extension of that fishery zone up to a 12-mile limit from the baselines, appears now to be generally accepted. Fisheries Jurisdiction Cases, [1974] I.C.J. 3, 23.

10. Draft Convention, arts. 2, 3, 47, 49, 56, 57, 61, 62, 66, 67, 76, 77, 121. *See also* art. 142.

11. Draft Convention, art. 3.

12. North Sea Continental Shelf Cases [1969] I.C.J. 3; Convention on the Continental Shelf, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311; Pres. Proc. No. 2667, 3 C.F.R. 67 (1943-1948 Compilation), 13 DEP'T. STATE BULL. 485 (1945).

13. Draft Convention, art. 77.

14. Draft Convention, art. 76, Annex II.

15. Draft Convention, art. 76 (1).

16. Draft Convention, arts. 208, 214; *see* arts. 192-206, 286, 297(1).

While the environmental reasons for taking such a step are clear, important economic reasons were also involved:

A. Pollution resulting from oil drilling off the coast of one country can be carried by winds and currents to other areas, thereby damaging the economic interests of another country in such uses as tourism, recreation, and fishing.

B. Publicity regarding pollution resulting from oil or gas drilling off the coast of one country can increase public resistance to the development of oil and gas resources of the continental shelf off other countries.

C. Offshore oil drilling is a global industry that can clearly achieve certain economies as a result of standardization of requirements regarding design and construction of equipment and even its on-site operation.

Some ninety percent of the world's fishing takes place within 200 miles of the coast of some country. Therefore, the effect of the establishment of a 200-mile economic zone is to replace the previous regime of freedom of fishing on the high seas by a regime of coastal state control.¹⁷ The Draft Convention introduces three new elements in this regime for fisheries:

A. It contains sophisticated provisions regarding the management of migrating fish stocks that pay no heed to the allocative boundaries drawn by man in the sea, in some cases differentiating between species of fish.¹⁸

B. It requires states to establish conservation measures for fish stocks, including the establishment of an allowable catch, with a view to maintaining an optimum yield from fish stocks over time.¹⁹

17. Note 10, *supra*. The drive to extend coastal state jurisdiction came initially from Latin American states. With respect to the seabeds, those with broad margins have been reasonably content with their rights under the Convention on the Continental Shelf, especially with interpretations that would give them the resources of the entire shelf, slope and rise out to the ocean abyss. Some states, having little continental margin, have asked "compensation" in the form of rights in the deep sea bed for many miles from their shores. Principally, however, these states have pressed for a monopoly over fisheries equivalent to that enjoyed over coastal minerals. Within the general campaign of the poorer states for change in the international economic system and its law, and the general re-examination of the law of the sea, mining and fishing states in Latin America joined to propose a "patrimonial sea" of 200 miles in which the coastal state would have exclusive rights of all resources. See Henkin, *Politics and the Changing Law of the Sea*, 89 POL. SCI. Q. 56-57. (1974).

18. Draft Convention, arts. 63-68.

19. Draft Convention, art. 61.

C. Coastal states are required to ensure the optimum utilization of fish stocks in their zone, so that if the fishermen of the coastal state are not for the time being able to take the full allowable catch of particular stocks, the coastal state must allow foreign fishermen access to those stocks under reasonable terms and conditions.²⁰

The duty of optimum utilization is a particularly interesting innovation from the perspective of food and resource policy. In effect, it is a prohibition on substantial under-utilization of a renewable resource, so long as there is a market for the resource.

The duty is a response to the recognition that there are frequently a variety of political pressures on states not to permit foreign exploitation of fisheries resources off their coasts despite the fact that they gain nothing by allowing those resources to go to waste. The duty of optimum utilization reduces this political restraint on the normal operation of economic forces; while the coastal state may establish reasonable conditions of access to the living resources surplus to its immediate needs (*e.g.* conservation restrictions and economic rent), and while those conditions may of course increase the cost of extraction of the living resources in question, it may not completely prohibit their extraction.

The duty of optimum utilization therefore responds at the same time to a global interest of ensuring the maximum feasible supply of animal protein from the sea consistent with sound conservation practices, as well as the more immediate interest of distant water fishing states in preserving some access to fisheries resources that fall under the jurisdiction of various coastal states.

I should interject here that the duty of optimum utilization does not apply to marine mammals.²¹ The convention would expressly permit the imposition of stricter limitations on hunting for marine mammals than are required by its conservation provisions, including total prohibitions, irrespective of whether those limitations are necessary for the maintenance of an optimum yield. I mention this in part because it is one of the rare instances in which ethical considerations have played such a prominent substantive part in a highly politicized global negotiation.

It is important to bear in mind that the pressure for extension of coastal state control over ocean resources was not confined to developing countries. With respect to seabed resources, it originated in the

20. Draft Convention, art. 62.

21. Draft Convention, art. 65.

United States. With respect to fisheries, it originated in South American countries that are not among the poorest of the developing countries. Among the advocates of broad coastal state control over seabed resources or fisheries resources, or both, at the Conference were such countries as Australia, Canada, Iceland, New Zealand, Norway, the United Kingdom, and the United States.

Nevertheless, the rhetorical technique used by the Latin American states to persuade their colleagues in Asia and Africa of the merits of broad coastal state jurisdiction was that such extensions of jurisdiction would prove of net benefit to developing countries generally. The argument was that under a high seas regime, the exploitation of resources would be dominated by the fishing fleets and mining companies of the developed world. Broad coastal state jurisdiction would permit developing coastal states to: (a) protect local fishermen from foreign competition; (b) prohibit or restrict development of resources until there can be greater participation by coastal state nationals in the extraction or downstream economic exploitation of those resources; and (c) collect economic rent for the privilege of exploiting such resources in the form of cash or training and technology transfer.

The effort therefore is to achieve a re-allocation of wealth to the coastal state that presumably would not otherwise result from the operation of market forces. Whether one believes that such forced re-allocation will in the end prove beneficial to the economies of developing countries as a whole depends to some degree on one's economic philosophy. One of the things which is so interesting about the current debate regarding the law of the sea is that those who assert that the primary criterion for measuring a regime for deep seabed manganese nodules is the avoidance of artificial restraint on the development of those resources and their distribution in response to market forces have paid little attention to the fact that a primary motive for the extension of coastal state jurisdiction over the much more valuable resources of the economic zone and the continental shelf is to impose such artificial restraints. I will do no more than note that a significant proportion of OPEC production comes from the offshore continental shelf of OPEC members.

Certainly from the perspective of a coastal state that has major fisheries or oil resources in the areas of its coast, it is difficult to refute the proposition that its assumption of control over those resources can make a significant contribution to its economic development that would not otherwise occur. And there are certainly those who would argue vigorously that the governments of various coastal states—even those where investment conditions are very unstable—can supply

greater incentives to economic investment than would otherwise be the case.

In assessing the impact of these regimes on developing countries one must consider the fact that there are significant numbers of developing countries that are land-locked or that will not acquire control over significant living resources or oil and gas resources off their coasts by virtue of broad extensions of coastal state jurisdiction in general. That problem of geography is of course not unique to developing countries. At the conference a group of Land-Locked and Geographically Disadvantaged States—numbering over fifty—was formed in an attempt to protect their interests in a situation in which there was dominant pressure for a massive re-allocation of control over resources to coastal states.

As one might expect, it was at this point that the rhetoric of community goals and promotion of developing countries' interests in general broke down. They gave way to assertions by both developing and developed coastal states that there were very stringent limits on the concessions they were prepared to make in a treaty to the Land-Locked and Geographically Disadvantaged States, since the coastal states could achieve many—although perhaps not all—of the advantages of the resource re-allocation without a treaty and without such concessions. Two concessions however were made:

A. Land-locked and geographically disadvantaged states enjoy a priority of access to surplus living resources of the economic zones of their coastal neighbors.²²

B. Coastal states must pay a certain percentage of the value of production of hydrocarbons from the continental margin in areas seaward of 200 miles into an international fund to be used for the benefit of developing states parties to the Law of the Sea Convention.²³

For those interested in finding new sources and approaches to fund international development efforts, and thereby to alleviate the heavy dependence on the United States, the idea of sharing revenues from development of mineral resources of the continental margin seaward of 200 miles could prove to be an interesting experiment. Moreover, giving developing countries generally some stake in the profits generated by development of hydrocarbon resources of the continental margin beyond 200 miles could help produce an atmo-

22. Draft Convention, arts. 69-72.

23. Draft Convention, art. 82.

sphere around the world more conducive to early efficient production of such resources.

I have deliberately avoided, until now, any discussion of the most controversial aspect of the law of the sea negotiations, namely the exploitation of the manganese nodules of the deep seabeds, that is the so-called International Seabed Area that is seaward of 200 miles of the outer edge of the continental margin.

The reason is that while the deep seabed mining negotiations have produced sharp philosophical differences of approach and principle between industrialized countries and developing countries, and the only militant and unified approaches by the Group of 77 at the Conference, the mining of the deep seabeds is, at least for the remainder of this century and the beginning of the next, of little if any importance to the overall question of development in the developing world.

Seen in context, the deep seabed manganese nodule negotiations are almost the obverse of the negotiations regarding the continental shelf and the exclusive economic zone. When ideological questions of sharing on a global basis for the overall benefit of the international community, and of installing strong regional or international organizational controls, were raised in connection with economic zone or continental shelf resources, the large number of developing coastal states seeking unfettered control over their slice of the pie resisted such appeals. With respect to deep seabed mining, however, the number of states that perceive a direct interest is quite small. Therefore the rhetorical appeal to community interest in general, and abstract developing country interest in particular has considerable effect.

This has produced distortions of perception that have continuously reduced, and continue to reduce, the possibility that a broadly acceptable treaty can be produced. These distortions are the source of many of the concerns being addressed in the current review of the Draft Convention by the U.S. Administration.

This leads me to a conclusion which may have some bearing on other approaches to issues of development. The achievement of near consensus on food and energy issues, and on a number of military, communications, and environmental issues of great significance as well, at a global conference of over 150 states functioning by consensus—while the same conference remains in danger of collapse over the issue of deep seabed manganese nodules—would seem to suggest that multilateral negotiations are more likely to succeed when the immediate stakes are high and are fairly widely distributed.

One could almost draw a certain analogy between the distorting effects of the multilateral negotiating process and the threshold buzz in a home radio receiver. The stronger the incoming signal—the stronger the underlying national interests being dealt with—the less troublesome or more tangible the buzz will be.

I do not make this analogy to the buzz in the radio receiver because I believe it is either desirable or appropriate to dismiss considerations of community interest in the development of international law. Nothing could be further from the truth. My concern with the effectiveness of the global multilateral process derives primarily from my belief that it is an important way to ensure that real community interests are recognized and reflected in the law. But I would suggest that multilateral decisions that result from careful consideration by, and dialogue between those who are principally affected—including by all means consideration of common interests—are more likely to become sound and acceptable norms of behavior than decisions that emerge largely from the rhetorical imperatives of multilateral bodies.