THE NEPAL PROPOSAL FOR A COMMON HERITAGE FUND: PANACEA OR PIPEDREAM?

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In an article entitled *The Nepal Proposal for a Common Heritage Fund*,[1] Professor John L. Logue discusses and urges the adoption of the proposal for a common heritage fund advanced by Nepal at the Seventh Session of the Third United Nations Conference on the Law of the Sea (UNCLOS III).[2] Under the Common Heritage Fund (Nepal) Proposal, each coastal state would contribute a portion of the revenue realized from exploitation of its offshore seabed minerals to an international fund, which would be used to aid developing nations.[3]

Professor Logue believes that adoption of the Nepal Proposal would serve two purposes: it would break the current deadlock over the deep seabed mining issue at UNCLOS III, and it would restore meaning and vitality to the concept that the resources of the deep seabed are the "common heritage of mankind."[4]

The Nepal Proposal and Professor Logue's advocacy are appealingly idealistic. In an international community where the disparate possession and consumption of the world's riches increasingly separates the have and have-not nations, any proposal

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The invaluable assistance of Michael Morin in the preparation of this article is gratefully acknowledged.

1. Logue, *The Nepal Proposal for a Common Heritage Fund*, 9 CALIF. W. INT'L L.J. 598 (1979).

2. The proposal was introduced at the seventh session of UNCLOS III at Geneva, Switzerland, on May 19, 1978. UNCLOS III, a comprehensive international conference, was authorized by the United Nations General Assembly in December 1970. G.A. Res. 2750C, 25 U.N. GAOR, Supp. (No. 28) 26, U.N. Doc. A/8028 (1970). The Conference received a mandate to conduct a wide-ranging review of the law of the sea, with a view toward a new treaty or treaties that would modernize and synthesize the international rules governing use of the oceans. Since its initial meeting in Caracas, Venezuela, in the summer of 1974, the Conference has continued to meet in Geneva and New York.

3. Memorandum by the Leader of the Delegation of Nepal Relating to the Establishment of a Common Heritage Fund in the Interest of Mankind as a Whole but Particularly in the Interest of Developing Nations, U.N. Doc. A/CONF. 62/65 (1978).

4. Logue, *supra* note 1, at 599-600, 606.

to ease that inequality must be seriously considered. However, because it overlooks major political and legal developments in the law of the sea over the last three decades, the Nepal Proposal has merit only in its idealism. Moreover, Professor Logue's advocacy of the proposal, like other high-minded but unrealistic ideas, may even have a negative effect by raising false hopes for what UNCLOS III may produce.

Three postulates appear to underlie Professor Logue's article. First, the conferees at UNCLOS III, by means of the Informal Composite Negotiating Text (ICNT),[5] have created a new regime of law in the exclusive economic zone (EEZ) to regulate the extraction of hydrocarbons from the seabed.[6] Second, the developed world, particularly the United States, has either fostered the creation of the EEZ or has failed by inaction to prevent its creation.[7] Third, the Nepal Proposal is consistent with the sovereign rights a coastal state enjoys over its offshore resources.[8] This article contends that all three postulates are in error, and, that without their supporting logic, Professor Logue's thesis in favor of the Nepal Proposal fails.

I. THE FIRST POSTULATE

The ICNT is the current version of the draft law of the sea treaty articles produced by the conferees at UNCLOS III. Part V, Articles 55 through 75, of the ICNT provides for exclusive coastal state control of the resources of the seabed within the EEZ, which extends 200 miles seaward from the baseline from which the territorial sea is measured.[9] Professor Logue argues that the ICNT has awarded the lion's share of total seabed resources to coastal states, because the seabed area seaward of the EEZ contains virtually no hydrocarbons — the richest potential source of development capital for the disadvantaged, poorer nations of the world.[10] Because the

5. 8 OFFICIAL RECORDS OF THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA 1, U.N. Doc. A/CONF. 62/WP. 10 (1977).

6. *See* Logue, *supra* note 1, at 601, 606-07, 612, 614, 619.

7. *Id.* at 601.

8. *Id.* at 610.

9. Informal Composite Negotiating Text/Revision 1, U.N. Doc. A/CONF. 62/WP. 10/Rev. 1 (1979), *reprinted in* 18 INT'L LEGAL MATS. 686 (1979) [hereinafter cited as ICNT/Rev. 1]. Articles 3 and 4 of the Convention on the Territorial Sea and the Contiguous Zone, *done* April 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205, define the baseline of the territorial sea and describe the methods by which the baseline may be constructed.

10. *See* Logue, *supra* note 1, at 606-08.

Nepal Proposal would apply to revenue realized from mineral exploitation within the 200-mile EEZ, where most of the world's offshore hydrocarbon deposits are located, Professor Logue reasons that adoption of the proposal would very quickly create a large international fund for the developing world.[11]

However, this reasoning process contains a flaw — the idea that the ICNT, by awarding coastal states exclusive control over all the resources of the EEZ, has created a new regime of law still open to renegotiation by the conferees at UNCLOS III. Such an idea ignores a body of state practice concerning offshore claims that has steadily grown since World War II.[12] In fact, the increase in the number and extent of these offshore claims was one of the factors that prompted the convening of UNCLOS III.[13] Until the post-World War II period, the law of the sea had been a relatively stable branch of international law.[14] With the postwar breakup of the colonial empires and the creation of many new nations, unusual claims to ocean space began to be heard,[15] and the law of the sea became increasingly less stable. The international community attempted to codify and stabilize the law of the sea at UNCLOS I (1958) and UNCLOS II (1960).[16] The failure of these two Conferences to draw a definitive limit to the territorial sea and to define fishery zones provided encouragement to those countries seeking expansion of coastal state jurisdiction and created an atmosphere which led, ultimately, to UNCLOS III.[17]

It is suggested here that the provisions of the ICNT recogniz-

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11. *Id.* at 607-10.

12. *See* text accompanying notes 20-80 *infra*.

13. *See* Stevenson & Oxman, *The Preparations for the Law of the Sea Conference*, 68 AM. J. INT'L L. 1, 2 (1974); Friedmann, *Selden Redivivus — Towards a Partition of the Sea?*, 65 AM. J. INT'L L. 757, 758 (1971).

14. *See generally* Dean, *The Geneva Conference on the Law of the Sea: What Was Accomplished*, 52 AM. J. INT'L L. 607 (1958).

15. *Id.* at 610; *see generally* Garcia-Amador, *The Latin American Contribution to the Development of the Law of the Sea*, 68 AM. J. INT'L L. 33 (1974).

16. After extensive preparatory work by the International Law Commission (ILC), 86 states met in Geneva from February 24 to April 28, 1958, and adopted four treaties on the law of the sea, which articulated principles of international law governing the territorial sea and contiguous zone, the high seas, the continental shelf, and fisheries. For an authoritative report on the 1958 Conference, *see* Dean, *supra* note 14. Because the 1958 Conference was unsuccessful in reaching agreement on the breadth of the territorial sea and on limits to fishery zones, a second conference met to deal with these two issues from March 17 to April 27, 1960. This Conference similarly failed to reach agreement. The political events that dominated the second conference are described in Dean, *The Second Geneva Conference on the Law of the Sea: The Fight for Freedom of the Seas*, 54 AM. J. INT'L L. 751 (1960).

17. Smith & Hodgson, *Unilateralism: The Wave of the Future?*, in LAW OF THE SEA 137

ing coastal state authority in a 200-mile zone has created nothing new in principle. The detailed provisions of Part V of the ICNT reflect the decisions of the conferees at UNCLOS III;[18] however, the principle of coastal state control over resources within a 200-mile zone was established in state practice even before the first session of UNCLOS III at Caracas in 1974.[19]

A. State Claims

During the period between the end of World War II and the convening of UNCLOS III, extended coastal state claims to ocean space generally took two forms — those related to the mineral or nonliving resources of the continental shelf, and those related to the living resources of the offshore waters of the coastal state. The prototype seabed claim was the well-known Truman Proclamation of 1945,[20] which asserted the United States' exclusive right to explore and exploit the mineral resources of the continental shelf. Thirteen years later, these seabed claims received international confirmation and recognition in the Geneva Convention on the Continental Shelf.[21] As the language of that treaty suggests, seabed claims were made not in terms of seaward distances, but were based instead upon water depth or the seaward extension of the continental shelf.[22]

The true forerunners of the 200-mile EEZ were the claims to offshore living resources. Not coincidentally, many of these early living-resource claims asserted exclusive rights of conservation over fisheries of the continental shelf, with no seaward mileage limitations.[23] It should be remembered that in the years immediately fol-

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(E. Miles & J. Gamble eds. 1976); G.A. Res. 2750C, U.N. Doc. A/C.1/L.562 (1970); 64 DEP'T STATE BULL. 152-53 (1971).

18. ICNT/Rev. 1, *supra* note 9.

19. In fact, members of the Sea-Beds Committee (forerunner of UNCLOS) had already proposed the 200-mile limit. Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, 27 U.N. GAOR, Supp. (No. 21) 72, U.N. Doc. A/AC. 138/79 (1972); 28 U.N. GAOR, Supp. (No. 21) 30, U.N. Doc. 9021 (1973).

20. Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, Pres. Proc. No. 2667, 3 C.F.R. 67 (1943-1948 Compilation), *reprinted in* 59 Stat. 884 (1945), and 13 DEP'T STATE BULL. 485 (1945).

21. Convention on the Continental Shelf, *done* Apr. 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311.

22. *Id.* art. 1. The effect of the development of continental shelf law on the Nepal Proposal and Professor Logue's article is discussed in the text accompanying notes 135-59 *infra*.

23. Garcia-Amador, *supra* note 15, at 33-36.

lowing World War II, a claim to ocean space in excess of twelve miles from shore was, if not an absurdity, at least an international curiosity.[24] In 1952, Chile, Ecuador, and Peru signed the tripartite Declaration of Santiago.[25] The Declaration, in terms of international precedent, did for 200-mile zone claims what the Truman Proclamation had done for the continental shelf claims — it legitimized them. Although individual Latin American nations — Chile, Peru, Costa Rica, El Salvador, and Honduras — had made 200-mile claims prior to 1952,[26] the Declaration of Santiago became the paradigm for the conservation and fishery zone claims that ensued. After 1952, claims in excess of twelve miles, not all of which extended to 200 miles, owed much of their respectability to the Declaration of Santiago.

A brief historical review of claims in excess of twelve miles, with particular emphasis on claims of 200 miles, is revealing. By 1960, the year of UNCLOS II, the original five "200-mile" Latin American nations had been joined by Ecuador[27] and Panama.[28] Ceylon[29] and India[30] claimed 100-mile fishery conservation zones. Vietnam,[31] the Dominican Republic,[32] Iceland,[33] and Korea[34] had fishing claims ranging from twenty kilometers (about twelve miles) to a limit that coincided with the outer limit of the continental shelf. A total of thirteen countries had asserted claims beyond twelve miles; seven of them had asserted claims to 200 miles.

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24. Gutteridge, *Beyond the Three Mile Limit: Recent Developments Affecting the Law of the Sea*, 14 VA. J. INT'L L. 195, 198 (1974).

25. Laws and Regulations on the Regime of the Territorial Sea, U.N. Doc. ST/LEG/SER. B/6, at 723 (1956).

26. *See* Declaration on the Maritime Zone, U.N. Doc. A/AC. 135/10/Rev. 1, at 11-12 (1968), *reprinted in* I NEW DIRECTIONS IN THE LAW OF THE SEA 231 (S. Lay, R. Churchill & M. Nordquist eds. 1973) [hereinafter cited as I NEW DIRECTIONS]; *see also* U.S. DEP'T OF STATE, NATIONAL CLAIMS TO MARITIME JURISDICTIONS, PUB. NO. 36, at 17, 91, 21, 30, 47 (2d rev. ed. 1974) [hereinafter cited as PUB. NO. 36].

27. *See* Decree Law 003 of Feb. 22, 1951, *cited in* PUB. NO. 36, *supra* note 26, at 28, *reprinted in* U.N. Doc. ST/LEG/SER. B/18, at 15 (1976).

28. *See* U.N. Doc. ST/LEG/SER. B/1, at 15-16 (1951).

29. *See* Proclamation of Governor-General, Dec. 20, 1957, *cited in* PUB. NO. 36, *supra* note 26, at 109, *reprinted in* U.N. Doc. ST/LEG/SER. B/16, at 318 (1974).

30. *See* President's Proclamation of Nov. 29, 1956, *cited in* PUB. NO. 36, *supra* note 26, at 51, *reprinted in* U.N. Doc. ST/LEG/SER. B/16, at 303-04.

31. *See* Decree of Sept. 22, 1936, *cited in* PUB. NO. 36, *supra* note 26, at 136.

32. *See* Law No. 3342 of July 13, 1952, *cited in* PUB. NO. 36, *supra* note 26, at 27.

33. *See* Law No. 44 of Apr. 5, 1948, *cited in* PUB. NO. 36, *supra* note 26, at 49, *reprinted in* U.N. Doc. ST/LEG/SER. B/18, at 331 (1976).

34. Presidential Proclamation of Sovereignty over Adjacent Seas of Jan. 18, 1952, *cited in* PUB. NO. 36, *supra* note 26, at 66.

In 1967, the year of Ambassador Pardo's "common heritage" speech to the United Nations General Assembly,[35] the list of countries with claims of more than twelve miles had grown to sixteen. Of that number, eight claimed 200-mile zones; Argentina[36] and Nicaragua[37] had joined the 200-mile group. Ghana[38] and Pakistan[39] claimed 100-mile fishery zones; Guinea[40] claimed a 130-mile territorial sea; and Cameroon[41] claimed an eighteen-mile territorial sea. Changes in the laws of Costa Rica, the Dominican Republic, and Honduras temporarily removed them from the list.[42]

In 1973, the year before UNCLOS III began, thirty-two countries made claims of greater than twelve miles.[43] Twelve claimed 200-mile zones; Brazil,[44] Sierra Leone,[45] Somalia,[46] and Uruguay[47] had joined the 200-mile group. Other newcomers were the

35. U.N. Doc. A/6695 (1967); U.N. Doc. A/C.1/p.v. 1515-16 (1967).

36. *See* Law No. 17.094 of Dec. 29, 1966, *cited in* PUB. NO. 36, *supra* note 26, at 3, *reprinted in* U.N. Doc. ST/LEG/SER. B/15, at 45 (1970).

37. *See* Decree No. II of Apr. 5, 1965, Delimiting the National Fishing Zone to 200 Nautical Miles, arts. 1-2, *reprinted in* U.N. Doc. ST/LEG/SER. B/15, at 656 (1970).

38. *See* Article 175, *cited in* PUB. NO. 36, *supra* note 26, at 40, *reprinted in* U.N. Doc. ST/LEG/SER. B/16, at 10 (1974), and 4 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 34 (1963).

39. *See* President's Proclamation of Feb. 19, 1966, *cited in* PUB. NO. 36, *supra* note 26, at 89, *reprinted in* U.N. Doc. ST/LEG/SER. B/18, at 344 (1976). Pakistan claimed 100 miles from the outer limit of the territorial sea, whereas Ghana claimed 100 miles from the baseline.

40. *See* Decree No. 224 of June 3, 1964, *cited in* PUB. NO. 36, *supra* note 26, at 44, *reprinted in* U.N. Doc. ST/LEG/SER. B/15, at 87 (1970).

41. *See* Ordinance GP JFT/25, Nov. 13, 1967, *cited in* PUB. NO. 36, *supra* note 26, at 14, *reprinted in* U.N. Doc. ST/LEG/SER. B/15, at 51 (1970).

42. Honduras shortened its territorial sea to 12 n.m. (nautical miles) in 1957, HOND. CONST. art. 5. The Dominican Republic went from a 15 n.m. fishing zone to a 12 n.m. fishing zone in 1967. While Costa Rica had adhered to the Declaration on the Maritime Zone of 1952 on October 3, 1955, in 1966 the President declared that this violated the Costa Rican Constitution. *See* PUB. NO. 36, *supra* note 26, at 27, 47.

43. Argentina, Brazil, Cameroon, Chile, Congo, Ecuador, El Salvador, Gabon, Gambia, Ghana, Guinea, Haiti, Iceland, India, Korea, Madagascar, Maldives, Mauritania, Morocco, Nicaragua, Nigeria, Oman, Pakistan, Panama, Peru, Senegal, Sierra Leone, Somalia, Sri Lanka, Tanzania, Uruguay, and Vietnam.

44. *See* Decree-Law 553 of Apr. 25, 1969, *cited in* PUB. NO. 36, *supra* note 26, at 10. *See* Decree-Law of March 25, 1970 (revoking Decree-Law No. 553 of Apr. 25, 1969), *reprinted in* 10 INT'L LEGAL MATS. 1224 (1976).

45. *See* The Interpretation Act of Apr. 19, 1971, *cited in* PUB. NO. 36, *supra* note 26, at 101.

46. *See* Law No. 37, *cited in* PUB. NO. 36, *supra* note 26, at 103.

47. *See* Law No. 13.833 of Dec. 29, 1969, *cited in* PUB. NO. 36, *supra* note 26, at 132.

Congo,[48] Gabon,[49] Haiti,[50] Iceland,[51] Madagascar,[52] Maldives,[53] Mauritania,[54] Morocco,[55] Nigeria,[56] Oman,[57] Senegal,[58] and Tanzania.[59] It is worth noting that several of the new claims in excess of twelve miles involved assertions of territorial sovereignty rather than assertions of exclusive conservation zones. What had begun as an arguable state conservation practice had become, in part at least, a movement toward appropriation of ocean space under total coastal state jurisdiction.[60]

In addition to individual state claims, two significant regions of the developing world — Latin America and Africa — issued declarations regarding the EEZ in the years immediately preceding the convening of UNCLOS III at Caracas in 1974. Nine Latin American nations issued the Montevideo Declaration on May 8, 1970.[61] This Declaration provided in pertinent part:

> Recognizing . . . that any norms governing the limits of national sovereignty and jurisdiction over the sea, its soil and subsoil, and the conditions for the exploitation of their resources, must take account of the geographical realities of the coastal States and the

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48. *See* PUB. NO. 36, *supra* note 26, at 20.

49. *See* Decree of July 21, 1972, *cited in* PUB. NO. 36, *supra* note 26, at 37, *reprinted in* U.N. Doc. ST/LEG/SER. B/16, at 10 (1974).

50. *See* Decree of Apr. 6, 1972, *cited in* PUB. NO. 36, *supra* note 26, at 46.

51. *See* Resolution of Feb. 17, 1972, *cited in* PUB. NO. 36, *supra* note 26, at 49, *reprinted in* U.N. Doc. ST/LEG/SER. B/18, at 331 (1976).

52. *See* Ordinance No. 73-060 of Sept. 28, 1973, *cited in* PUB. NO. 36, *supra* note 26, at 71, *reprinted in* U.N. Doc. ST/LEG/SER. B/18, at 27 (1976).

53. *See* Act No. 52/70 of Dec. 30, 1970, *cited in* PUB. NO. 36, *supra* note 26, at 73, *reprinted in* U.N. Doc. ST/LEG/SER. B/18, at 28 (1976).

54. *See* Law of July 31, 1972, *cited in* PUB. NO. 36, *supra* note 26, at 75, *reprinted in* U.N. Doc. ST/LEG/SER. B/16, at 17 (1974).

55. *See* Dahir of March 9, 1973, *cited in* PUB. NO. 36, *supra* note 26, at 79, *reprinted in* U.N. Doc. ST/LEG/SER. B/18, at 29 (1976).

56. *See* Decree No. 38 of Aug. 26, 1971, *cited in* PUB. NO. 36, *supra* note 26, at 85, *reprinted in* U.N. Doc. ST/LEG/SER. B/16, at 20 (1974).

57. *See* Decree of July 17, 1972, *cited in* PUB. NO. 36, *supra* note 26, at 88.

58. *See* Law No. 20 of Apr. 10, 1972, *cited in* PUB. NO. 36, *supra* note 26, at 100.

59. *See* Proclamation of Aug. 24, 1973, *cited in* PUB. NO. 36, *supra* note 26, at 113, *reprinted in* U.N. Doc. ST/LEG/SER. B/18, at 31 (1976).

60. Franck, El Baradei, & Aron, *The New Poor: Land Locked, Shelf Locked and Other Geographically Disadvantaged States*, 7 N.Y.U.J. INT'L L. & POL. 33 (1974). In the introduction of their article, the authors suggest a strong parallel between the claims to ocean space by coastal states at the commencement of UNCLOS III and the "era of Land colonization between the fifteenth and nineteenth centuries, and the nineteenth century land rush in the American West." *Id.*

61. Montevideo Declaration on Law of the Sea, May 8, 1970, U.N. Doc. A/AC. 138/34 (1970), *reprinted in* 9 INT'L LEGAL MATS. 1081 (1970), and I NEW DIRECTIONS, *supra* note 26, at 106.

special needs and economic and social responsibilities of developing States,

Considering: . . .

That, . . . the signatory States have, by reason of conditions peculiar to them, extended their sovereignty or exclusive rights of jurisdiction over the maritime area adjacent to their coasts, its soil and its subsoil to a distance of 200 nautical miles from the baseline of the territorial sea, . . .

Declare the following to be Basic Principles of the law of the sea:

. . . .

2. The right to establish the limits of their maritime sovereignty and jurisdiction in accordance with the geographical and geological characteristics and with the factors governing the existence of marine resources and the need for their rational utilization . . . .[62]

The Montevideo Declaration was reinforced by a similar declaration at Lima from fourteen Latin American nations on August 8, 1970.[63]

From June 5 to June 9, 1972, the Specialized Conference of Caribbean Countries Concerning Problems of the Sea, met at Santo Domingo.[64] Once again they affirmed the right of coastal states to assert jurisdiction over both living and nonliving resources of the sea and seabed seaward to 200 miles.[65]

Representatives of seventeen African nations met at Yaounde, Cameroon, in June 1972, in a regional seminar on law of the sea.[66] They recommended adoption of a series of principles which, *inter alia*, approved the establishment of an economic zone beyond the limit of the territorial sea and the right of each coastal state to determine the seaward limits of such a zone.[67]

In May 1973, before the beginning of UNCLOS III at Caracas, the Council of Ministers of the Organization of African Unity

62. *Reprinted in* 9 INT'L LEGAL MATS. 1081, n.50 (1970), and I NEW DIRECTIONS, *supra* note 26, at 235-36.

63. Declaration of the Latin American States on the Law of the Sea, U.N. Doc. A/AC. 138/28 (1970), *reprinted in* 10 INT'L LEGAL MATS. 107 (1971).

64. Declaration of Santo Domingo, June 7, 1972, 27 U.N. GAOR, Supp. (No. 21) 70, U.N. Doc. A/AC. 138/80 (1972), *reprinted in* 11 INT'L LEGAL MATS. 892 (1972).

65. *Id.*

66. Yaounde Conclusions of the Regional Seminar on the Law of the Sea, June 20-30, 1972, 27 U.N. GAOR, Supp. (No. 21) 74, U.N. Doc. A/AC. 138/79 (1972), *reprinted in* 12 INT'L LEGAL MATS. 210 (1973).

67. *Id.*

issued a series of declarations on the law of the sea.[68] Among these declarations was the explicit recognition of "the right of each coastal State to establish an exclusive economic zone beyond their territorial seas whose limits shall not exceed 200 nautical miles, measured from the baseline establishing their territorial seas [*sic*]."[69]

Thus, before UNCLOS III began, not only did twelve nations claim 200-mile zones but thirty-two nations claimed zones of more than twelve miles, and Latin America and Africa strongly supported the principle of coastal state exclusive control over all resources, living and nonliving, within a 200-mile zone. A total of fifty-nine countries supported the Latin American and Yaounde declarations.[70] Although only twelve of those countries had actually made 200-mile claims, the support of the principle of coastal state control over 200 miles of ocean by all fifty-nine countries demonstrates that the idea was not that of an unrepresentative minority.

In 1976, the number of claims greater than twelve miles had increased to sixty,[71] and of that number, thirty-one countries claimed 200-mile zones.[72] Significantly, this was the first year in which developed countries had joined the 200-mile group. Among

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68. Organization of African Unity, Council of Ministers, Addis Ababa Declaration of Issues of the Law of the Sea, May 24, 1973, U.N. Doc. A/AC. 138/89 (1973), *reprinted in* 12 INT'L LEGAL MATS. 1200 (1973).

69. 12 INT'L LEGAL MATS. 1204 (1973).

70. The following are countries supporting the Declaration of Montevideo: Argentina, Brazil, Chile, Ecuador, El Salvador, Nicaragua, Panama, Peru, and Uruguay.

The countries supporting the Santo Domingo Declaration were: Colombia, Costa Rica, the Dominican Republic, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Trinidad and Tobago, and Venezuela.

The countries supporting the Organization of African Unity Declaration were: Algeria, Botswana, Burundi, Cameroon, Central African Republic, Chad, Congo, Dahomey, Egypt, Equatorial Guinea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Ivory Coast, Kenya, Lesotho, Liberia, Libya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Morocco, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, Somalia, Sudan, Swaziland, Tanzania, Togo, Tunisia, Uganda, Upper Volta, Zaire, and Zambia. *See generally*, Montevideo Declaration on Law of the Sea, *supra* note 61.

71. *See* PUB. NO. 36, *supra* note 26, and CENTRAL INTELLIGENCE AGENCY, NATIONAL BASIC INTELLIGENCE FACT BOOK 3-4 (1979).

72. Angola, Argentina, Bangladesh, Brazil, Canada, Chile, Comoro Islands, Costa Rica, Denmark, Ecuador, El Salvador, France, West Germany, Guatemala, Iceland, India, Mexico, Morocco, Mozambique, Nicaragua, Norway, Panama, Peru, Senegal, Sierra Leone, Somalia, Sri Lanka, the Soviet Union, the United Kingdom, Uruguay, and the United States. *Id.*

these developed countries were Canada,[73] the United States,[74] the United Kingdom,[75] France,[76] the Soviet Union,[77] and Norway.[78] By January 1, 1979, sixty-three countries had claimed 200-mile zones,[79] and eighteen others claimed zones ranging from fifteen to 150 miles.[80]

The statistics reviewed above clearly demonstrate that there has been a steady and irreversible trend over the past nineteen years toward widespread acceptance of a 200-mile zone. This process was well under way and had begun to accelerate even before the UNCLOS III meeting in Caracas. When Professor Logue describes the nations of the world as retreating from the principle of the common heritage at Caracas, he is, therefore, misleading. In fact, the conferees were not retreating from the principle. It had been abandoned before UNCLOS III began. Those countries which adopted the 200-mile zone after the convening of UNCLOS III were merely conforming their national law to what had become an established international pattern.

II. THE SECOND POSTULATE

Professor Logue contends that the United States and the Soviet Union, if not the leaders in the retreat from the common heritage principle, were at least the creators of a "band-wagon" effect through their desertion of the principle at Caracas.[81] He implies that the developed countries, and particularly the United States, could have forestalled the incorporation of the 200-mile EEZ in the ICNT by standing fast at Caracas.[82] The evidence to the contrary is overwhelming.

73. Fishing Zones of Canada (Zones 4 & 5) Order, S.O.R./77-62, *reprinted in* V NEW DIRECTIONS IN THE LAW OF THE SEA 55 (S. Lay, R. Churchill, & M. Nordquist eds. 1977) [hereinafter cited as V NEW DIRECTIONS].

74. Fishery Conservation and Management Act of 1976, 16 U.S.C. §§ 1801-82 (1976), *reprinted in* 15 INT'L LEGAL MATS. 635 (1976).

75. Fishery Limits Act, 1976, c.16, art. 1.

76. Law No. 76-655 of July 16, 1976, *reprinted in* V NEW DIRECTIONS, *supra* note 73, at 301.

77. Union of Soviet Socialists Republic: Edict on Provisional Measures for the Preservation of Living Resources and the Regulation of Fishing in Marine Areas, Edict of the Presidium of the U.S.S.R. Supreme Soviet, December 10, 1976, *reprinted in* 15 INT'L LEGAL MATS. 1381 (1976).

78. Law No. 91 of Dec. 17, 1976, *reprinted in* V NEW DIRECTIONS, *supra* note 73, at 337.

79. CENTRAL INTELLIGENCE AGENCY, *supra* note 71, at 1-4.

80. *See id.* at 5.

81. Logue, *supra* note 1, at 606.

82. *Id.* at 601, 606.

At Caracas, UNCLOS III conducted its business in three Committees (I, II, and III).[83] Committee II was charged with responsibility for the discussion and preparation of draft articles on coastal zones, including the territorial sea, the contiguous zone, and the EEZ,[84] which was then known under a variety of labels ranging from conservation zones[85] to patrimonial sea.[86]

During July and August 1974 at Caracas, Committee II held meetings at which the representatives of the attending countries expressed the views of their governments on the 200-mile zone.[87] The records of those meetings disclose that the overwhelming majority spoke in favor of the 200-mile zone. A few nations opposed it, while a few others were essentially noncommittal.[88]

To state that the 200-mile zone was supported by an overwhelming majority does not adequately characterize the depth of that support, even at that early stage of UNCLOS III. The fervor and solidarity of the EEZ support can better be ascertained from excerpts of the delegates' speeches on the subject.

A. Statements by the Developing Countries' Representatives

As summarized in the Summary Record,

> [The representative of Honduras] said that his country claimed inherent rights over the resources in its adjacent zones and had established control over hunting, fishing and other exploitation in those waters. Foreign States had no competence in those zones except on the basis of agreement with the coastal State. His country maintained the principle that the outer limit of the territorial sea had never constituted a limit on the inherent right of States over their resources. Free and unimpeded activities in

83. The organization of UNCLOS III is patterned closely after the United Nations Sea-Beds Committee, which was both the forerunner of and preparatory conference for UNCLOS III. Committee I dealt with the seabed beyond the limits of national jurisdiction; Committee II dealt with coastal state jurisdiction over the coastal areas of the ocean, the continental shelf, fisheries, and high seas; Committee III dealt with pollution and scientific research. These organizational arrangements are discussed in Stevenson & Oxman, *supra* note 13, at 4, 8, 23, and in Stevenson & Oxman, *The Third United Nations Conference on the Law of the Sea: The 1974 Caracas Session*, 69 AM. J. INT'L L. 1, 3-4 (1975).

84. Stevenson & Oxman, *supra* note 83, at 3; U.N. Doc. A/CONF. 62 (1975).

85. *See* note 39 *supra*.

86. *See* the draft articles submitted by Haiti and Jamaica to Committee II at Caracas, U.N. Doc. A/CONF. 62/C.2/L.35 (1974).

87. *See* text accompanying notes 89-117 *infra*.

88. Owing to the nature of some of the speeches and the complex geopolitical, economic, and social issues involved, it is not possible to list the exact positions of each country. However, a sound estimate of 73% in favor of the 200-mile zone can be found in Alexander & Hodgson, *The Impact of the 200-Mile Economic Zone on the Law of the Sea*, 12 SAN DIEGO L. REV. 569, 570 (1975).

> the adjacent zones were a conventional rather than a customary freedom, which was binding only on States parties to a treaty relating to those zones.[89]

Nigeria maintained "that . . . the 200-nautical-mile limit to the exclusive economic zone stipulated in article 1, paragraph 1, [of the draft treaty articles] reflected the *consensus formula* on that issue."[90]

Mexico, a sponsor of the draft articles which proposed a 200-mile zone, maintained that the twelve-mile territorial sea limit "presupposed acceptance of an economic zone of 200 miles," and that the various elements in the arrangements of ocean zones were "indissolubly interrelated."[91]

The German Democratic Republic, which, because of geographical constraints, could not hope to benefit from a 200-mile zone, supported the concept because of its sympathy for "the proposals of *the developing countries* favouring the establishment of an economic zone."[92]

Upper Volta, a landlocked developing country with no apparent benefit to be derived from a zone that would simply remove it 200 miles farther from ocean resources, nevertheless supported the zone, calling it an "economic necessity" and asserting that the government of Upper Volta "fully understood the motives of those who support the concept."[93]

Paraguay, apparently concerned lest developing country brethren misconstrue its prior opposition toward the 200-mile zone at the 1970 Lima meeting on the law of the sea, spoke in favor of the 200-mile zone.[94] Paraguay, a landlocked country, perceived its interests as being promoted by maximization of the international areas of the oceans, and threatened by vastly increased coastal state jurisdiction. To the outside observer, therefore, Paraguay might have appeared to have been aligned with the developed countries which, before UNCLOS III and at its initial stages, were attempting to

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89. U.N. Doc. A/CONF. 62/C.2/SR. 22, at 171 (1974). The inference here is that even the high seas freedoms of navigation and overflight are not free from coastal state control.

90. *Id.* at 172 (emphasis added).

91. *Id.* at 173.

92. *Id.* at 173 (emphasis added).

93. *Id.* at 174.

94. As to the limit and the regime to be applied in the economic zone, his delegation maintained its position that the zone should not extend beyond 200 miles — a distance that should be coextensive with the continental shelf, namely, the sea-bed and the subsoil, together with the water column and the surface of the sea. Such uniformity would offer decisive practical and legal advantages.

Id. at 175.

stem the flood of 200-mile claims,[95] or at least restrict their impact. Evidently concerned over this alignment, the representative of Paraguay expressly "rejected any allegations of collusion with the highly developed countries: the fact that their position was in certain cases similar to those of his own country was a mere coincidence."[96]

Congo, in a ringing declaration of support for the 200-mile zone, characterized the zone as a significant tool in the developing country's efforts to make its way in the modern world: "The developing coastal State should have permanent sovereignty over its natural resources, in particular, living and non-living marine resources. No State should be subjected to economic, political or other pressure to prevent the full and free exercise of its inalienable right of sovereignty."[97]

Tanzania addressed the very aspect of the 200-mile zone that has troubled Professor Logue and the adherents of the Nepal Proposal — the exclusion of hydrocarbon resources, which otherwise would be shared by the developing nations under the concept of the common heritage of mankind. As summarized in the Summary Record,

> [I]t had been argued that the exclusive economic zone would drain the resources that comprised the common heritage. But the 200 miles of economic zone was intended to replace the legal continental shelf and the concept of fishery zones. No opponents of the concept could honestly accuse its proponents of draining the common heritage with regard to living resources, for they themselves had refused to include them in that heritage. Scientists had said that the best and most extensive mineral resources lay far from the coasts and, with regard to oil and gas, the economic zone would leave at least some of the continental shelf in the international area.[98]

Although the scientific assurances that the Tanzanian government offered appear to be less than clear, the desire of Tanzania to secure for itself alone the mineral resources of the zone suffers from no such lack of clarity. Later, the Tanzanian representative described the EEZ as "particularly important to developing countries, especially in Africa, and that the EEZ would be a key point in determining his delegation's judgment on the outcome of the

95. *See* text accompanying notes 108-18 *infra*.
96. U.N. Doc. A/CONF. 62/C.2/SR. 22, at 175 (1974).
97. *Id.*
98. U.N. Doc. A/CONF. 62/C.2/SR. 23, at 182 (1974).

negotiations in progress."[99] Evidently he was prepared to overlook the disadvantages of the 200-mile zone to the landlocked and other geographically disadvantaged developing states.

The Kenyan representatives, apprehensive that the 200-mile EEZ might be "unduly diluted"[100] by its opponents, stated that if the zone were not adopted they would "have to resort to claiming *a broad territorial sea limit* of 200 nautical miles in order to assert their justified concern over their resources."[101]

India and Chile summed up what at that point in the discussions had become obvious. The EEZ was a fact of international life; it could not be talked or negotiated away. India's representative stated that "[t]he concept of an exclusive economic zone had received more support than any other issue or item before the Conference.[102]

According to the Summary Record,

> [Chili's representative] said that the economic zone could be defined legally as a jurisdictional zone over which the coastal State exercised sovereign rights of a primarily economic nature, without prejudice to the freedoms of navigation and overflight, up to a distance of 200 miles. *That definition was no longer an abstract concept; it had been supported in the general debate by more than 100 States.*[103]

B. Statements by Developed Countries' Representatives

At several points in his article, Professor Logue suggests that the developing countries were slow to realize the implications of granting coastal state exclusive jurisdiction over resources within the zone,[104] and that the zone was "shrewdly packaged,"[105] although by whom he does not indicate. As a result, he concludes that support for the concept is not deeply based.[106] The sometimes strident rhetoric of the developing countries in support of the zone, quoted above, points to a contrary conclusion. Moreover, warnings from Poland and Byelorussia and the ambivalent positions of the developed countries underscore this contrary conclusion.

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99. *Id.*
100. *Id.* at 183.
101. *Id.* at 210-11 (emphasis added).
102. U.N. Doc. A/CONF. 62/C.2/SR. 24, at 191 (1974).
103. U.N. Doc. A/CONF. 62/C.2/SR. 25, at 203 (1974) (emphasis added).
104. Logue, *supra* note 1, at 601, 607, 621.
105. *Id.* at 618-19.
106. *Id.* at 601, 615.

During these 1974 summer meetings, as delegation after delegation from developing countries made speeches in favor of the 200-mile zone, Poland warned the developing countries that the recognition of the zone in international law would not benefit the many, but the few.[107] Although Poland was discussing the question of fisheries in the zone, its observations applied with equal force to seabed resources, because the demands of the developing world were for inclusion of *all* resources within the jurisdiction of the coastal state.

> Although it had been argued that the unilateral appropriation of fish resources in a wide coastal zone would serve the interests of all developing States, [the Polish representative] pointed out that *more than 50 developing coastal States could be regarded as geographically disadvantaged, while 19 developing States were land-locked. Granting unconditional rights in major fishing grounds to coastal States would mean giving geographically privileged States additional privileges under international law.*[108]

The Summary Record reports Byelorussia's position, which constituted an even more pointed and dramatic warning:

> Extending the rights of coastal States beyond the territorial sea would seriously interfere with the interests of geographically disadvantaged States. Some representatives of land-locked countries had already said that the concept of an exclusive economic zone was similar to the concept of the annexation or nationalization of the seas. [The Byelorussian representative] *agreed with those who had claimed that developing coastal States which had unilaterally extended their national jurisdiction to wide zones had themselves undermined the principle of the common heritage of mankind adopted in General Assembly resolution 2749 (XXV), as their action reduced the size of the international area.*[109]

France's representative, by contrast, outlined several of the difficulties inherent in the concept of the 200-mile zone.[110] Recognizing power in the coastal state over the resources in a 200-mile zone would pose a threat to freedom of navigation, freedom of communication, and freedom of scientific research.[111] While France's views were not directly opposed to the 200-mile concept, they reflected France's "desire to prevent vast areas of the oceans from being made subject to the sovereignty of coastal States because . . .

107. U.N. Doc. A/CONF. 62/C.2/SR. 26, at 202 (1974).
108. *Id.* (emphasis added).
109. *Id.* at 205 (emphasis added).
110. U.N. Doc. A/CONF. 62/C.2/SR. 23, at 184-86 (1974).
111. *Id.* at 185.

such an extension of sovereignty would run counter to history and, moreover, would benefit primarily those States which already exercised sovereignty over the largest land areas."[112]

The United Kingdom found the 200-mile concept "not attractive,"[113] because it would "markedly affect existing and established rights in international law."[114] Although the concept covered only the resources of the seabed and the water column, the United Kingdom representative noted "a growing tendency to take for granted those rights to the resources, and to make demands for further competences, not directly related to resources, within the zone."[115] Accordingly, the United Kingdom viewed the concept coolly and with a clear eye toward the dangers it presented to internationalism in the oceans.

Similarly, the United States spoke cautiously about the 200-mile zone, supporting it only "as part of an overall acceptable convention" and asserting that such a convention would have "to reconcile the primary interests of the coastal State in resources with the primary interests of all States in navigation and other uses."[116] The United States representative stated that "[a]chieving a balance of that kind was a delicate task that could be accomplished only by a series of carefully drafted articles."[117] These are hardly the comments of a country whose strategy was to seize ocean resources at the expense of the common heritage of mankind principle and, ultimately, of the developing world. Indeed, had the United States simply voted for its own economic interests as the nation with the largest potential EEZ,[118] a position such as that quoted above would have been nonsensical.

A fair interpretation of the positions taken at Caracas strongly suggests that the 200-mile zone is a creation of the developing world. The concept has been consistently and assiduously cultivated and promoted by developing nations. Even developing nations that would be directly and palpably disadvantaged by adoption of the 200-mile zone felt compelled to speak in favor of it for fear of incurring the disapproval of their developing world

112. *Id.* at 186.
113. U.N. Doc. A/CONF. 62/C.2/SR. 25, at 200 (1974).
114. *Id.*
115. *Id.*
116. U.N. Doc. A/CONF. 62/C.2/SR. 24, at 190 (1974).
117. *Id.*
118. *See* OFF. OF THE GEOGRAPHER, BUREAU OF INTELLIGENCE AND RESEARCH, U.S. DEP'T OF STATE, LIMITS IN THE SEA NO. 46, THEORETICAL (Series A 1972).

brethren. Developed countries' positions at Caracas, on the other hand, were less than enthusiastic. They perceived dangers to deeply cherished high seas freedoms if the zone were adopted. Their support was conditioned upon agreement to an acceptable solution to all law of the sea issues.

The above conclusion is shared by other writers. Elizabeth Mann Borghese, recognized as an ardent advocate for the developing world in law of the sea and economic issues, noted that the rapid acceptance of the 200-mile zone would benefit principally the developed world, and that developing nations had embraced a concept that was not in their best interests.[119]

It may be politic to conclude that the developing world was misled or uninformed, but a simpler, though less edifying, conclusion suggest itself. The developing coastal states, inspired by the success of the Latin Americans in defying the developed countries (particularly the United States) with the 200-mile zone, and mindful of the direct and exclusive benefits to be derived by each of them in a 200-mile zone, found it easy to overlook both the imperatives of the common heritage of mankind and the claims of their landlocked and shelf-locked developing brethren. In short, self-interest prevailed over the interests of the international community — a community comprised largely of other nations whose economic, social, and political problems paralleled their own. This conclusion is not meant to be an indictment of the developing coastal states. It is offered solely to refute Professor Logue's implications of uninformed choice by, or manipulation of, the developing countries. In choosing what they perceived to be their own interests, the developing nations were perhaps merely repeating the attitudes and decisions of most nations during the development of modern international law.

III. The Third Postulate

A. Political Constraints: The New International Economic Order

Anticipating the argument that the 200-mile zone is a *fait accompli*, Professor Logue asserts that the Nepal Proposal is not inconsistent with the EEZ concept and the exclusive resource rights

119. Borghese, *Boom, Doom and Gloom over the Ocean: The Economic Zone, the Developing Nations, and the Conference on the Law of the Sea*, 11 San Diego L. Rev. 541, 547-48 (1974).

enjoyed by the coastal state within the zone.[120] Rather, by making an analogy to the homeowner and property taxes, he claims that the proposal would respect the sovereignty of the coastal state: "In the same way that a homeowner is required to pay a tax on his exclusively owned property, the coastal state would be taxed on the revenues from mineral exploitation in its exclusively owned EEZ."[121]

As beguiling and attractive as the homeowner analogy may be, it fails to take into account the highly significant legal and political differences between the status of the domestic homeowner and that of the sovereign nation. A sovereign nation cannot, without its consent, be compelled to pay a "tax" to anyone, no matter how laudable the goal or deserving the recipients. The homeowner pays a tax as part of a complicated socioeconomic and political structure. As a subordinate unit in society, the homeowner pays his tax, among other things, in return for the services and protection that society provides him. In international society, there is no supranational legislative or executive body to enact tax laws and enforce them, nor are there equivalent services or protection to be obtained from supranational organizations. The United Nations, despite its many considerable achievements, cannot be regarded, even by its most passionate adherents, as a world government.

It appears to this writer that the "common heritage tax" on the mineral resources of the EEZ is a sophistical attempt to reconcile two irreconcilable concepts: the exclusive sovereign right of coastal states over mineral rights within the EEZ and the right of the developing world to a share in those resources. Such a sophism ignores the clear expression of the will of the nations gathered at UNCLOS III.[122]

There is, however, a stronger argument against the validity or feasibility of such a tax — the adverse sentiments of the developing world with regard to control over national resources. Professor Logue is correct in his analysis of the deep seabed mining impasse.[123] It represents the crystallization of the conflict between the developing nations, who desire a New International Economic Order (NIEO),[124] and the developed nations, who may acknowledge the morality of the developing world's claims but resist satisfaction

120. Logue, *supra* note 1, at 610.
121. *Id.*
122. *See* text accompanying notes 89-103 *supra*.
123. Logue, *supra* note 1, at 621-23.
124. *See* note 129 *infra*, and accompanying text.

of those claims.[125]

Nowhere have the claims for a NIEO been pressed more strenuously than at the United Nations Conference on Trade and Development (UNCTAD).[126] UNCTAD has generally been regarded as a forum for developing world views on redistribution of the world's wealth,[127] and its resolutions are regarded with considerable caution by the developed world.[128] The UNCTAD resolution most pertinent to the conflict between the "common heritage" principle and the EEZ is the Declaration of the Establishment of a New International Economic Order:

> 4. The new international economic order should be founded on full respect for the following principles:
>
> (a) Sovereign equality of States, self-determination of all peoples, inadmissibility of the acquisition of territories by force, territorial integrity and non-interference in the internal affairs of other states;
>
> . . . .
>
> (e) Full permanent sovereignty of every State over its natural resources and all economic activities. In order to safeguard these resources, each State is entitled to exercise effective control over them and their exploitation with means suitable to its own situation, including the right to nationalization or transfer of ownership to its nationals, this right being an expression of the full permanent sovereignty of the State. No State may be subjected to economic or any other type of coercion to prevent the free and full exercise of this inalienable right . . . .[129]

The position of the developing nations with respect to the EEZ combines with the nationalistic principles of the NIEO to present bedrock opposition to the notion of a tax on national resources. At UNCLOS III, the developing nations unanimously agreed that the hydrocarbons within the EEZ fall under the sovereignty of the coastal state.[130] Similarly, there was unanimity among the developing nations at UNCTAD that no nation can be required to submit

125. For an excellent essay on the confrontational nature of the issues involving the NIEO, *see* Ferguson, *The Politics of the New International Economic Order*, in THE CHANGING UNITED NATIONS 142-58 (D. Kay ed. 1977).

126. G.A. Res. 2085, 20 U.N. GAOR, Supp. (No. 14) 25 (1965).

127. Gregg, *The Apportioning of Political Power*, in THE CHANGING UNITED NATIONS 69, 72-73 (D. Kay ed. 1977).

128. *Id.*

129. Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201, S-VI U.N. GAOR, Supp. (No. 1) 3, U.N. Doc. A/9559 (1974).

130. *See* text accompanying notes 152-55 *infra*.

to external interference with national resources.[131] It is therefore clear that the developing coastal states consider their offshore resources to be national wealth, not to be interfered with. Thus, if it were suggested that the developing coastal states submit to a tax on what they consider to be their own resources — even a tax for the benefit of developing countries — it seems certain the tax would be rejected.

If by some means, the developing coastal states were persuaded to accept a nominal tax on offshore resources with the expectation that the developed countries would provide the bulk of the tax revenues, their acceptance of the tax would not compel acceptance by the developed countries.[132] The same principles of national sovereignty that would enable the developing coastal states to refuse to submit to a tax would authorize a similar refusal by the developed coastal states. Principles of national sovereignty and freedom from external taxation are enjoyed by all nations of the world, not merely the less fortunate.

To place the Nepal-proposed tax in a better perspective, consider a more graphic proposal. If, in the interest of creating an international development fund, the United Nations General Assembly proposed that each nation pay an international tax on its livestock or cereal grains, such a proposal would undoubtedly be rejected with indignant outcries of "interventionism" and "violation of national sovereignty," and quite properly so. In the present state of international affairs, no structure or mechanism exists whereby the individual wealth of one country can be either taxed or transferred against its will. To say that the Nepal Proposal would effect such a transfer amicably, in the context of UNCLOS III, begs the question. Indeed, the UNCLOS III conferees have shown little interest in the proposal,[133] chiefly because the proposal in effect violates the deeply held convictions of all nations of the world with regard to their natural resources.[134] Characterization of the Nepal

131. *See* note 28 *supra*.

132. It is of course a basic postulate of international law that a sovereign state can be required to submit to the imposition of other states' will only where it has agreed to do so or where the will of other states represents the force of international law. I L. OPPENHEIM, INTERNATIONAL LAW 15-23 (8th ed. H. Lauterpacht 1955). A decision of the developing nations, even if they represent a majority of the nations of the world, cannot purport to bind the developed world in the absence of the widespread consensus and recognition required for customary international law.

133. Logue, *supra* note 1, at 613-14 n.135. In fact, as of the April 1979 meetings of UNCLOS III, the Common Heritage Fund Proposal had not been officially discussed.

134. *See* text accompanying notes 123-31 *supra*.

Proposal as a mere "tax" on the resources of the EEZ should thus be seen for what it is — a sincere but ineffective attempt to persuade the nations of the world to undo what they have already done.

As Professor Logue noted in his article, the United States, in a farsighted and altruistic effort to accomplish what the Nepal Proposal is attempting today, suggested, in 1970, the yielding of sovereign rights over the seabed seaward of the 200-meter depth curve and the establishment of an international regime.[135] Although this proposal was made well before the convening of UNCLOS III and the drafting of the ICNT, it received no significant support in the international community. Although other factors may have been involved, the primary reason for lack of support was that the proposal derogated from the existing sovereign rights of coastal states. Nationalistic feeling is perhaps the preeminent standard in international relations today. Such feeling cannot tolerate either a "tax" or the imposition of any kind of international regime on natural resources. To argue otherwise is to ignore political reality.

B. Legal Constraints: Continental Shelf Law

In focusing on UNCLOS III, the ICNT, and the EEZ, Professor Logue has ignored what is probably the most formidable obstacle to the Nepal Proposal, the constraints of continental shelf law. Quite apart from the political events which preceded UNCLOS III and which have dominated its proceedings, there is a body of international law governing the extraction of mineral resources from the continental shelf.[136] If this law regulates the entire area of the seabed from the outer limit of the territorial sea to the abyssal ocean depths, then the Nepal Proposal would purport to tax resources which are already subject to the exclusive sovereignty of the coastal state, and could not, by hypothesis, be considered to be the common heritage of mankind.

It may well be that, irrespective of UNCLOS III and the ICNT, continental shelf law will dictate whether the developing na-

135. Logue, *supra* note 1, at 603.

136. Convention on the Continental Shelf, *done* April 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 312 [hereinafter cited as Continental Shelf Convention]. While the Convention sets forth the basic concepts of continental shelf law, the International Court of Justice has interpreted it, North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), [1969] I.C.J. 3, and virtually all coastal states have taken positions regarding the meaning of the Convention. Each of these sources is discussed below.

tions have a right to share in the mineral resources of the coastal state's continental shelf. A brief review of the history of continental shelf law and an analysis of its current status suggest that coastal states have a legal right to refuse to share continental shelf resources as contemplated by the Nepal Proposal.

Following its origin in the Truman Proclamation in 1945, continental shelf law made rapid progress. The international community, at the first UNCLOS at Geneva in 1958, produced a legal definition of the continental shelf and defined the rights enjoyed by the coastal state therein:

> Article 1
>
> 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 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.
>
> Article 2
>
> 1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.
>
> 2. The rights referred to in paragraph 1 of this article are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities, or make a claim to the continental shelf, without the express consent of the coastal State.
>
> 3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.[137]

Unfortunately this definition has probably raised more questions than it has answered. A consensus agrees that the coastal state exercises sovereign rights over seabed resources out to a line drawn at the 200-meter depth curve. Where the line should be drawn beyond 200 meters has, since the Geneva Convention was adopted, been sharply contested.[138] Because the outer limit of coastal state

137. Continental Shelf Convention, *supra* note 136.

138. *See* B. OXMAN, THE PREPARATION OF ARTICLE 1 OF THE CONVENTION ON THE CONTINENTAL SHELF 5-7, 150-60 (Clearing House for Federal Scientific and Technical Information, Monograph No. PB-182-100, 1969); Goldie, *A Lexicographical Controversy — the Word "Adjacent" in Article 1 of the Continental Shelf Convention*, 68 AM. J. INT'L L. 829 (1972) [hereinafter cited as *A Lexicographical Controversy*]; Friedmann, *The North Sea Con-*

sovereignty marks the dividing line between the resources available to the "common heritage of mankind" and those reserved to the coastal state, its location is critical to the prospects of success for the Nepal Proposal.

The language of the Convention appears to provide a dual test for the drawing of the line — exploitability and adjacency.[139] Because today's technology acknowledges no apparent engineering limitations (although economic considerations may exercise restraint),[140] the open-ended exploitability test provides no limit. From the language of the Convention, the two concepts that therefore serve to define the outer limit of national jurisdiction are "adjacent" and "continental shelf."

As mentioned previously, there is no single, fixed meaning to "continental shelf." Geologically, the continental shelf has been described to mean that portion of the seabed extending seaward from the coast to about the 200-meter depth curve.[141] Because the exploitability language of the Convention extends coastal states' rights beyond 200 meters, the continental shelf must encompass more seabed area legally than it does geologically. Because the exploitability test provides no seaward limit to coastal state jurisdic-

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tinental Shelf Cases — a Critique, 64 AM. J. INT'L L. 229 (1970); Goldie, *Delimiting Continental Shelf Boundaries and Finlay, Realism v. Idealism as the Key to the Determination of the Limits of National Jurisdiction over the Continental Shelf*, in LIMITS TO NATIONAL JURISDICTION OVER THE SEA 3 (G. Yates & J. Young eds. 1974).

139. Continental Shelf Convention, *supra* note 136.

140. J. MERO, THE MINERAL RESOURCES OF THE SEA 2, 280 (1965); Burke, *Law and the New Technologies*, in LAW OF THE SEA 205 (1967).

141. Perhaps the chief source of the confusion and acrimony, that characterizes the debate concerning the seaward extent of coastal state jurisdiction over the continental shelf, is the blending of two separate disciplines, law and geology, in the same definition. Geologically, the seabed area that extends the landmass has three parts: the continental shelf, the relatively level or gently sloping area immediately contiguous to the coast; the continental slope, the more steeply declining area seaward of the shelf; and the continental rise, the declining area between the slope and the deep seabed or abyssal plain. All three areas are often referred to as the continental margin. The latter phrase is used to denote the three areas in this article. Although the depth of the superjacent water where the shelf becomes the slope varies in different parts of the ocean, in general the 200-meter depth curve has been used to describe the point where the shelf becomes slope. Therefore, the dispute occasioned by the Continental Shelf Convention definition in reality is concerned, not with the seaward extent of coastal state jurisdiction over the geological shelf, but with the remainder of the continental margin — the slope and the rise. By describing the area seaward of the 200-meter depth curve as continental shelf, the Convention inevitably confuses physical-geological concepts with legal-political ones. For an excellent geological analysis of the continental margin, *see* Hedberg, *Relation of Political Boundaries on the Ocean Floor to the Continental Margin*, 17 VA. J. INT'L L. 57 (1976-1977). The Appendix to that article lists a variety of continental margin definitions from scientific rather than legal literature. *Id.* at 73.

tion, one must turn to an analysis of the meaning of the word "adjacent" to ascertain whether it implies a limitation.

Without attempting to summarize the varying points of view on the meaning of this word, it is probably safe to say that those who favor a relatively narrow area of coastal state jurisdiction over the continental shelf argue that "adjacent" has the general meaning of "near" or "close." In their view, attempts to stretch the meaning to encompass distances of 100 or 200 miles from shore destroy the meaning of the word. The opposing view is that adjacent connotes "appurtenant to" or "an extension of" the land mass of the coastal state. These two points of view are well exemplified in the exchange between Professor Louis Henkin and Mr. Luke Finlay in the *American Journal of International Law*.[142] Professor Henkin argues that if "adjacent" is to have any meaning at all, that meaning must restrict coastal state jurisdiction to an area less than the entire continental margin.[143] Mr. Finlay contends that the phrase restricts coastal state jurisdiction over seabed resources merely to the continental margin, which ends at the abyssal ocean depths.[144]

Both schools of thought found some comfort in the 1969 International Court of Justice (ICJ) decision on the *North Sea Continental Shelf Cases*.[145] Unhappily for the resolution of the dispute, the cases before the ICJ did not require a decision regarding the seaward extent of coastal state sovereign rights. The court's description of the shelf as the "natural prolongation of [the coastal state's] land territory into and under the sea,"[146] however, tends to provide support to the school of thought that emphasizes the geological aspects of an extended continental shelf definition, at the expense of those who emphasize the narrowing effect of adjacency.

On the other hand, the ICJ's comment that "by no stretch of imagination can a point on the continental shelf situated say a hundred miles, or even much less, from a given coast, be regarded as 'adjacent' to it"[147] encouraged those who argue for the limiting notion in the word adjacent. Neither of these comments of the ICJ is

142. Henkin, *International Law and "the Interests": The Law of the Seabed*, 63 AM. J. INT'L L. 504 (1969) [hereinafter cited as *Law of the Seabed*]; Finlay, *The Outer Limits of the Continental Shelf*, 64 AM. J. INT'L L. 42 (1970); Henkin, *A Reply to Mr. Finlay*, 64 AM. J. INT'L L. 62 (1970).

143. *Law of the Seabed*, *supra* note 142, at 507-08.

144. Finlay, *supra* note 142, at 52-57.

145. North Sea Continental Shelf Cases, [1969] I.C.J. 3.

146. *Id.* at 22.

147. *Id.* at 31.

of definitive assistance, however, because the court was using adjacency as it related to the problem of delimitation of the continental shelf between neighboring states, and not as it related to the seaward extension of coastal state sovereign rights.[148] Indeed, since the entire seabed area of the North Sea was conceded to be continental shelf, the limiting effect of adjacency, if any, could not have been discussed. The participants in this definitional dispute have repeatedly appealed to the work of the drafters of the 1958 Convention — the International Law Commission. Here again, both points of view appear to find support in the work and the deliberations of the Commission,[149] with inconclusive results.

It would appear that, as a matter of semantics, legal theory, and geology, the issue of where to draw the line has not been definitively settled. At the same time, it seems clear that there is no state practice supporting the view that the line of national jurisdiction should be drawn landward of the edge of the continental margin. On the contrary, most continental shelf claims, excluding shelf-locked or other geographically disadvantaged coastal states, appear to rely on the open-ended exploitability criterion.[150]

Probably the best evidence of state practice regarding the continental shelf can be found in the expression of national views on this topic at UNCLOS III. From July 26 to July 31, 1974, at Caracas, Committee II debated the subject of the continental shelf at five meetings where representatives of fifty-five nations spoke.[151]

148. *A Lexicographical Controversy*, *supra* note 138, at 831-33.

149. One of the subsidiary disputes within the major controversy has been the extent of the influence of the Inter-American Specialized Conference on Conservation of Natural Resources: The Continental Shelf and Marine Waters on the deliberations and formulation of the International Law Commission (ILC). The Inter-American Conference met in Cuidad Trujillo in March 1976 and adopted a position favoring coastal state jurisdiction over the shelf and slope. Mr. Finlay and the proponents of the broad coastal state jurisdiction maintain that the action at Cuidad Trujillo so influenced the ILC that the language chosen by the ILC to present to the conferees at the 1958 Law of the Sea Convention reflects this broadened area of jurisdiction. *See* Finlay, *supra* note 142, at 43-46. Professor Henkin argues that the ILC's consideration of the Cuidad Trujillo Conference's action demonstrates clearly that no member of the commission intended to give such broadened extent to coastal state jurisdiction. *See* Henkin, *supra* note 142, at 65-66. For a somewhat more dispassionate treatment of the *travaux preparatoires* of the ILC, *see* Gutteridge, *The 1958 Geneva Convention on the Continental Shelf*, 35 BRIT. Y.B. INT'L. 102, 106-10 (1959).

150. This negative type of conclusion is awkward to document without listing the continental shelf claims country by country and demonstrating that each claim either is not or, because of geographical constraints, cannot be restricted to less than the entire continental margin. A review of the continental shelf claims in PUB. No. 36, *supra* note 26, strongly supports the validity of the conclusion.

151. U.N. Doc. A/CONF. 62/C.21/SR. 16-22 (1974).

Of these, only one, Switzerland, attacked coastal state jurisdiction over the entire continental margin. The basis for the attack was that such an idea was contrary to the provisions of the 1958 Geneva Convention.[152] By contrast, almost all the other states were preoccupied, not with the issue of limiting coastal states' rights short of 200 miles, but with the issue of whether coastal state rights should go *beyond* 200 miles where the continental margin extended that far seaward. All but a handful of delegates[153] conceded coastal state rights over the continental margin. Even those who questioned the open-ended definition of the Geneva Continental Shelf Convention did so only to suggest that it was obsolete and had been subsumed in the concept of the 200-mile EEZ.[154]

Those delegates who did address continental shelf law, apart from its relationship to the EEZ, concluded that widespread state practice and the ICJ's pronouncements regarding the "natural prolongation of [the] land territory" confirmed sovereign rights in the coastal state over the entire continental margin as a matter of international law. As a result, these views quite naturally are expressed in Part VI, Articles 1 and 3, of the ICNT, which defines both the continental shelf and the rights of the coastal state therein:

> 1. The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.
>
> . . . .
>
> 3. The continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the sea-bed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor or the subsoil thereof.[155]

Whether one considers Part VI of the ICNT as a synthesis of the development of continental shelf law or separately examines state practice under the Geneva Convention definition, one is compelled to conclude that the international community regards the entire continental margin as appertaining to the coastal state. Under

152. *Id.* at 157-58.

153. *Id.* (Switzerland), 160 (Soviet Union), 164 (Lesotho and the Federal Republic of Germany).

154. For representative views, *see id.* at 145 (Libya), 146 (Zaire), 154 (Egypt).

155. ICNT/Rev. 1, *supra* note 9, arts. 1 & 3.

this conclusion, coastal state rights in the continental margin exist independently of any decisions taken at UNCLOS III. If these rights are established as a matter of international law, the coastal state is entitled to treat offshore hydrocarbons as "appertaining to it."[156] It may choose to exploit them or not; "that is its own affair, but no one else may do so without its express consent."[157]

Thus, even without the EEZ there would still be virtually no basis under which the international community could claim the right to share in the resources of the continental margin. In order for the common heritage concept to apply to the resources of the continental margin, coastal states would have to renounce sovereign rights which have inured to them under international law — an action, as noted above, they are most unlikely to take.[158]

IV. CONCLUSION

If the Nepal Proposal appears unlikely to be accepted by the international community, may not one nevertheless urge, as Professor Logue does, its adoption as the hope of a very tired law of the sea conference?[159] Like the basic idealism underlying the Nepal Proposal, this argument is appealing. However, its appeal carries with it the same lack of realism, and this may be harmful to the hope of a successful conclusion to UNCLOS III. It is ironic that a proposal based on hope and idealism should be harmful to both. However, the complex nature of the interests and events at UNCLOS III almost guarantees this result.

From the establishment of the Seabed Committee in 1967 to the present impasse at UNCLOS III, the law of the sea has provided an unhappy spectacle: nations maneuvering for narrow individual advantage; the developing world in bitter contention with the developed world; extraneous international political developments intruding upon the Conference; the disillusionment of politicians, lawyers, and diplomats; confounded expectations; and, perhaps most disturbing, an uneasy sense that the Conference may, after all, fail. It may be that a conference of the magnitude and difficulty of UNCLOS III is destined to bring in its train all these problems. It cannot be doubted, however, that the hopes and dreams for a new era of sharing and true internationalism in the

156. North Sea Continental Shelf Cases, [1969] I.C.J. 4, 22.
157. *Id.*
158. *See* text accompanying notes 121-35 *supra*.
159. Logue, *supra* note 1, at 625-26.

oceans — which existed at the outset of UNCLOS III — have been unrealized. In this environment, it seems almost cruel to suggest that a single proposal will at once revive lost hopes and solve the persistent problems of UNCLOS III. Such thinking is not only deceptive, it ignores the overriding note of nationalism that has been the pervasive theme of the Conference.

Rather, a more sober approach to UNCLOS III is required. Quick solutions and nostrums should be put aside and every effort directed at solving the problems of the Conference through the traditional, tedious, and painstaking process of negotiation. In that process, regrettably, the Nepal Proposal can play no role.