

THE LAW OF THE SEA: U.S. INTERESTS AND ALTERNATIVES contains the edited proceedings of a February 1975 conference sponsored jointly by the American Enterprise Institute and the U.S. Treasury. The participants were chosen by the conference organizers to represent a broad spectrum of views on the negotiations on the law of the sea which were held in the late spring of 1975 in Geneva.

The volume is divided into three parts. Part I is addressed to U.S. interests in the law of the sea negotiations. Robert Osgood examines U.S. security interests in the context of the law of the sea. Next David B. Johnson and Dennis E. Logue examine U.S. economic interests in the law of the sea. Finally, Robert Tollison and Thomas Willett present a public choice perspective on law of the sea issues. Seyom Brown, Joseph Nye, Roland McKean, and Ross Eckert comment on the three papers.

In Part II, Ann L. Hollick reviews the Third UN Conference on the Law of the Sea and H. Gary Knight outlines alternatives to a law of the sea treaty. Their papers are discussed by Northcutt Ely, Kenneth Dam, Myres McDougal, and Arvid Pardo.

The Epilogue is James L. Johnston's report of the Geneva negotiations.

THE LAW OF THE SEA: U.S. INTERESTS AND ALTERNATIVES

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THE LAW OF THE SEA: U.S. INTERESTS AND ALTERNATIVES

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INTRODUCTION AND OVERVIEW OF THE CONFERENCE

Ryan C. Amacher and Richard James Sweeney

This volume presents the proceedings of a conference sponsored by the U.S. Treasury and the American Enterprise Institute to help focus attention on U.S. interests in the law of the sea negotiations and to discuss possible alternatives to a comprehensive treaty. This conference was held on 14 February 1975 and was attended by more than fifty private and government lawyers, economists, and political scientists. The participants were carefully chosen by the conference organizers to represent a broad spectrum of views of the law of the sea negotiations.

The morning session of the conference concentrated on U.S. interests. The session was chaired by Ronald Coase of the University of Chicago Law School.

The first paper, "U.S. Security Interests and the Law of the Sea," is written by Robert E. Osgood, dean of Johns Hopkins School of Advanced International Studies. Osgood, formerly of the National Security Council staff, points out that U.S. military security interests lie in the use of ocean space to achieve five goals: maintenance of a strategic nuclear capability, maintenance of adequate capacity to project American forces overseas, maintenance of access to vital resources, maintenance of adequate surveillance capabilities, and maintenance of peacetime naval functions. He then discusses the type of treaty or regime that would attain these objectives.

As far as the law of the sea is concerned, Osgood argues that U.S. strategic interests boil down to the problem of protecting only two straits, Gibraltar and the Indonesian straits. Most important from the standpoint of protecting American nuclear strategic interests in these two straits is simply to carry on the kinds of *modi vivendi* that we already have with Malaysia, Indonesia, and Spain. This does not require a universal law, but rather, favorable political relations with the few countries involved. The concessions that would have to be made in order to reach a compromise on straits for a law of the sea treaty are, by comparison, not worth making.

Osgood feels that the future environment within which we have to protect our military mobility, for various purposes concerning conventional force and the projection of conventional force to support far-flung commitments, is going to be rather inhospitable. It will be an environment in which coastal states will

be more assertive of their desire to control what goes on in waters a good way off their shores. Any ocean regime must, therefore, accommodate itself to the concerns and apprehensions of these states. Osgood's conclusion is that the United States is not so badly off in the present environment with a variety of ad hoc *modi vivendi*, however politically messy and difficult that may be. Osgood cites our relations with Iran as a case in point. U.S. ocean security interests, as they bear on our relations with Iran, are not defined by a law of the sea treaty, but rather by the overall estimate of what U.S. interests are in what is, in effect, Iran's assertion of a kind of hegemony in the Persian Gulf.

Osgood concludes by arguing that there are critical limits to the ability of the United States effectively and usefully to insist upon codifying into international law the protection of interests that appear to be the interests of a few great maritime states, without jeopardizing the working arrangements that can affect its security interests.

The second paper, "U.S. Economic Interests in Law of the Sea Issues," by David B. Johnson of Louisiana State University and Dennis E. Logue of Dartmouth College, is an attempt to reach some tentative conclusions concerning the value of resources on the outer continental shelf, in the deep seabed, in fisheries, in rights of transit, and in pollution control.

Johnson and Logue collect and analyze empirical evidence concerning the stakes involved in the law of the sea deliberations. They express the hope that the data will provide an adequate frame of reference for the formulation of negotiating priorities and will assist in the analysis of those trade-offs necessary to any successful negotiation. The authors also hope that these data and the implications drawn from them will stimulate the Departments of State and Defense to place some values on the strategic and political variables so that trade-offs can be examined. For example, how many divisions, tanks, or ships would Defense be willing to give up to obtain free transit? How many foreign service officers would State be willing to "sacrifice" to obtain various specific articles in the 1970 U.S. draft treaty?

Initially they examine the potential benefits to the United States of free access to the mineral resources of the deep sea. For example, by 1985 the deep sea could meet 85 percent of U.S. manganese needs, 6 percent of U.S. copper needs, 85 percent of U.S. nickel needs, and provide nearly four times the annual cobalt requirement. Their estimates show that in subsequent years even greater proportions of U.S. needs might be supplied by deep-sea resources. The U.S. acceptance of a rigid regulatory regime, which would hinder free access to the minerals and the free choice of timing of exploitation, could cost the United States, under very conservative assumptions, as much as \$310 million in 1985 and more in subsequent years. Considerably greater economic costs would be borne by the United States if hydrocarbon resources were discovered in the area controlled by such a

restrictive regime. They therefore conclude that it appears that the choice of regulatory regime is a critical aspect of the law of the sea negotiations.

Johnson and Logue then examine the costs of particular proposals for the delineation of the continental margins and for revenue sharing on the margins. Their estimates suggest that the cost to the United States of accepting a narrow margin or agreeing to very high revenue-sharing rates may range from \$2 to \$8 billion per year, depending on the specifics of the arrangements.

Next they turn to the issue of freedom of transit through straits. With respect to commercial navigation, achieving agreement on the U.S. position might be worth \$140 to \$180 million per year, but only if *all* straits are closed and the United States still insists on carrying out previously established trade with those trading partners who control and have closed the straits—an unlikely circumstance. Because the data supporting these estimates are, unfortunately, quite incomplete, a case study is performed measuring the cost of shipping oil from the Persian Gulf to the United States given the assumption that all states have 200-mile territorial seas that can not be transgressed, thus closing off many of the straits used by oil tankers en route to the United States. The increase in oil transport costs to the United States would be \$91 million per year at current import levels. Since these imports are likely to decline within a few years as a result of federal policy (Project Independence), this is a high estimate. It is also high because it would be unlikely that every coastal state would prohibit the passage of oil tankers within 200 miles of shore. On the basis of this analysis, it appears that free transit may not be worth as much to the United States as some analysts originally thought, although the analysis is admittedly incomplete—largely, they argue, because no one with knowledge of U.S. strategic military capabilities has addressed the issue, or released the results of their studies if they have, so that these important considerations might be included in an overall assessment of the worth of moving from the current regime of “innocent passage” to one of “free transit.”

Johnson and Logue also consider the question of international pollution standards. Once again, the analysis is incomplete, although this time because specific standards have yet to be proposed at the law of the sea negotiations. They do, however, present a case study based upon the kinds of international standards being discussed at the International Maritime Consultative Organization. The standard examined is the requirement for double-skin segregated-ballast oil tankers to prevent oil discharge in ballasting operations. The case study reveals that the cost-benefit ratio for such a requirement was approximately twenty to one, that is, the costs of the requirement exceed its benefits by a wide margin. They also argue that nations, for their own self-interest, will naturally move toward relatively compatible standards; hence there is no pressing need for this issue to be resolved

within the law of the sea deliberations. Moreover, the costs to the United States of accepting standards internationally agreed upon could be quite high.

Finally, they analyze the issue of fisheries and conclude that the type of fisheries regulation likely to emanate from an international treaty may be far worse than no regulation at all.

Johnson and Logue conclude their paper with a call for more analytical work on law of the sea issues. They feel that not enough analytical sophistication and empirical investigation have been brought to bear on the relevant issues and that this lack of sophistication will undermine the negotiating astuteness of the delegation.

The third paper, "Institutional Mechanisms for Dealing with International Externalities: A Public Choice Perspective," by Robert D. Tollison of Texas A&M University and Thomas D. Willett of the U.S. Treasury, attempts to provide some theoretical perspective on the law of the sea negotiations. The general theme of their remarks is that, given the difficulty of reaching international agreement, it would seem wise to concentrate efforts on those areas in which agreements can make the greatest contribution. It would be necessary, of course, to determine the degrees of prospective difficulty of achieving agreement in the various areas.

Tollison and Willett begin by looking at the relevant trade-offs involved in designing policies and institutions to internalize international externalities. One example of a prominent externality in the law of the sea negotiations is ocean pollution, where shippers and consumers of products dependent upon ocean shipping for transportation constitute an externality to the quality of the marine environment. They stress that not every international externality should be internalized at the highest level of government possible. In particular, merely to show that the market is failing to perform perfectly, or that there is some possible gain from coordination of national policies, is not sufficient reason to establish a clear case for international action. The need for caution in taking market or national government failure as a *prima facie* case for international intervention is reinforced by the recognition, derived essentially from contributions to the theory of public choice, that "perfect intervention" by governments or international organizations is as rare in the real world as the "perfect competition" of economists' models. Likewise, even where some degree of externality is imposed upon the whole community of nations, if the large majority of the externality is concentrated on a smaller subset of countries, then in an imperfect world, it may be more desirable to concentrate attempts at international action on this smaller number of countries. The issues here correspond closely to those of desirable patterns of fiscal federalism within a nation state.

Tollison and Willett then apply this approach to issues in the current negotiations on the law of the sea. Specifically, they examine the potential externalities from the exploitation of ocean resources and conclude that there is no economic

rationale for the international regulation of deep-ocean economic activity, except for the specific case of fish that reside, to an economically significant extent, in international waters. Second, they examine oil pollution control, and consider the externalities that can arise from the harmonization of pollution standards. Their basic conclusion in this discussion is that the costs of not having internationally agreed upon pollution standards have been generally overstated relative to the benefits.

Finally, they extend their discussion of the law of the sea negotiations to consider questions bearing on the process of the negotiations as such. They argue that the prospective gains from international action must be weighed against the costs of securing international agreement and the potential diversion of scarce collective decision-making resources from other more important areas. They specifically examine the effect that the number and the complexity of issues can have on negotiations.

In particular, they stress the importance of not bringing too many issues before the same negotiating forum and relate this general point to the slowness of progress in the law of the sea negotiations. They point out the possibility that in the current comprehensive law of the sea negotiations the number of issues may well have been pushed past the optimum number.

The discussants in this morning session generally supported the broad conclusions expressed in the papers. Seyom Brown of the Brookings Institution agreed that unimpeded passage through straits is not essential to U.S. strategic nuclear capabilities. However, his opinion was that bilateral interactions between states would be the least efficient and least effective way to handle the problem. Joseph S. Nye of Harvard University felt that the law of the sea conference is a worst case of a trend that has been evident for some time, a trend toward larger and more unwieldy conferences. Ross D. Eckert of the Hoover Institution at Stanford University agreed with Johnson and Logue in stressing the importance of relatively open access to the deep seabed.

The discussion that followed, with open participation from the floor, was lengthy and far-ranging. The consensus that seemed to emerge was that there are substantial economic interests for the United States in the law of the sea negotiations and that these issues had heretofore received too little consideration in U.S. policy. Further, it was felt that the conference is too large and that it would perhaps be best to split the negotiations—for example, to separate the issue of unimpeded transit through straits from that of negotiations on the deep seabed.

The purpose of the afternoon session was to examine alternative approaches to the negotiations. The session was chaired by Louis Sohn of Harvard University. The first paper, "The Third United Nations Conference on the Law of the

Sea: Caracas Review," was given by Ann Hollick of Johns Hopkins School of Advanced International Studies.

Hollick examines the law of the sea negotiations at the important 1974 sessions in Caracas. She argues that the task of the Caracas and other sessions, at least as officially defined, may be impossible. That is not to say that there will not be a treaty emanating from some later session. Indeed, the negotiators' interests in achieving some tangible results from the prolonged negotiations almost rule out the possibility that nothing will emerge. The treaty, however, will probably be either a widely accepted partial treaty or a comprehensive treaty accepted by a simple majority. The question posed by this outcome is whether the substance of the agreement will be desirable—from the U.S. or the global perspective. She argues, when she turns to examine the outlook for Geneva, that no treaty at all may be preferable to the treaty that seems likely to emerge there. But as she indicated earlier, there are significant pressures to produce some treaty. She feels that the political nature of the forum and the diversity of the interests that are accommodated in the negotiation determine that what does emerge will be the lowest common denominator—enormous extensions of national jurisdiction over ocean resources. With the exception of the landlocked and shelf-locked, which will be either placated or ignored, every state should get something from this extension. The principal beneficiaries will be certain developed countries, and South American and island states.

In the second paper, "Alternatives to a Law of the Sea Treaty," H. Gary Knight of Louisiana State University argues that there are many alternatives to a comprehensive treaty. Among these alternatives Knight lists: acquiescence in other nations' acts of agreements, use of force, negotiation-purchase, limited international agreement, domestic legislation, and combinations of all of the preceding. Knight argues that there appears to be a number of alternatives to a law of the sea treaty which, used in concert and where most appropriate on the basis of subject matter, could provide the framework for a reasonably stable regime in the oceans in the absence of a widely accepted and comprehensive law of the sea treaty. In fact, it would appear that U.S. interests could be most adequately protected through a combination of domestic legislation, limited treaties, purchase of rights, and the occasional application of force. This being the case, a strong argument can be made for the United States not to sign or ratify any law of the sea treaty which fails to satisfy all of its major policy interests.

The discussants of these papers, and the view from the floor, generally supported the arguments in the papers. It was felt that there is a wide range of alternatives to a comprehensive law of the sea treaty and that failure to reach agreement in Geneva will not result in chaos.

A late appearance was made by John Norton Moore, chairman of the United States Law of the Sea Task Force. He expressed his optimistic belief that Caracas was a transition session and that it is now possible to go forward toward

a treaty that will benefit all nations. He argued that the alternative to a treaty might be conflict and chaos in the ocean.

The conference ended with Moore's argument that we should not despair, because there is a good likelihood of a treaty, while much of the earlier argument had been concerned with the fear that a treaty might be reached.

Since publication lags are such that this volume is appearing after the Geneva session of the law of the sea negotiations, we asked James Johnston to prepare a review and progress report of that session, which appears as Part Three of this collection. We are grateful to Thomas F. Johnson of the American Enterprise Institute and Thomas D. Willett of the U.S. Treasury for cooperating in such a way as to make our task as organizers of the conference and editors of this volume proceed much more smoothly.

