National Sovereignty, Common Property and Ocean Governance

By

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I Introduction

Nature has provided resources for the basic sustenance and growth of billions of human beings. Until recently, society has concentrated its efforts on resources on land, less than 25% of the natural resources on earth. Land resources are distributed unequally among nations, with some places one while other places ten thousand human beings per square mile of land.

Late in the 20th century, society is rediscovering oceans and their vast potential. Society has progressed scientifically and technologically, making possible a more effective use of the oceanic resources which represent more than 75% of all natural resources on Earth. Since the oceans were not owned by any single state, conflicting claims to sovereignty over the natural resources have created many obstacles for the sound use of them. There was an urgent need to establish international cooperations and regulations to efficiently exploit the oceans.

This paper focuses on the issues related to sovereignty, property, and the international law of the sea. These three concepts are critical to the establishment and legitimization of a new international regime in ocean governance. The efficient exploitation of the oceanic resources in the areas beyond national jurisdiction of nation-states cannot legally start without a set of

preestablished rules concerning property and property rights[1]. Although the Law of the Sea was signed by most nation-states to assume the responsibility of regulating oceanic exploitation, its ambiguous goals, illy defined concept of the oceans, and lack of enforcement procedures have prohibited it from effectively doing so. The question is what consists a preferred model of the future, an international regime of the oceans which would best serve the preferred goals of mankind as a whole. This question is certainly the greatest in our time and is what this paper tries to explore.

II. Ocean Uses

During the last few decades, considerable interest has been developed in the mineral wealth of the ocean. The ocean-floor geomorphology shows a variety of forms, similar to land geography including seamounts, mountain ridges, submarine canyons, abyssal plains, etc. By analogy, we can conclude that all the minerals found under land masses are likely to be found under water. In view of the ocean's enormous size, the amounts of marine minerals appear staggering. Many are of immense strategic and economic importance because land-based reserves are being depleted, so that marine mineral development is rapidly becoming one of the most valuable ocean activities. Even though exploitation started but a few decades ago, tremendous progress has been made in the development of recovery techniques, indicating that the exploitation of even the most remote deposits is only a matter of time and economics.

[1] The exception of this is fishing, where such rules exist.

In regard to fisheries, there is a lot of food that can be obtained from the sea, though the harvest of traditional species is probably limited to a doubling, at best, of the present catch. The surplus is made up of unconventional species such as krill, lanternfish, squid, and perhaps through the development of sea farming. Until recently, the management of fisheries was based on their designation as a common-pool resource, accessible to all. This was fine as long as there was a relatively small number of fishermen but led to overfishing once their number, and the catching power of their boats, increase. Management practices are moving away from that notion. Coastal states indeed are claiming jurisdiction over the fisheries up to 300 miles from their shores, thus "nationalizing " perhaps as much as 90 percent of all ocean fisheries. This move toward national control is not necessarily a guarantee of optimal use of the ocean's food resources but currently it may well be the only means for preventing further waste and misuse with the absence of effective international regulations.

Contrary to popular opinion, waste disposal is a legitimate ocean use. Natural waters indeed have the ability for purification and there is no doubt that the oceans, as a consequence, can assimilate a share of society's wastes. Not to use this capacity would be a waste of a very valuable resource. It appears, however, that the use of the ocean as a common-pool resource has led not only to overfishing but in some instances to waste disposal beyond its capacity.

In addition, Marine transportation provides an economic way of transporting goods. Oceans can also be a significant source of renewable energy, for example, scholars from all over the world are giving increased priority to one of the aspects of solar energy: ocean thermal energy

conversion (Cuyvers, 1984). Artificial islands have been suggested as advantageous for oil drilling, oil-refining, electric power generation, petrochemicals manufacturing, and nuclear fuel reprocessing etc.

All marine activities, traditional and new, are now characterized by a rapid growth in magnitude. As the use of the oceans intensifies, effective coordinations and regulations of ocean exploitation are needed. Since ocean exploitation is international in nature, its regulation is largely a matter of international politics. In response to various problems, a substantial body of international marine law has been implemented, but its record is not always impressive. Most of the treaties are not all that stringent and the enforcement procedures leave a lot to be desired. In addition, international marine regulations remain to be implemented nationally, and the interpretation of these standards by different governments often vary considerably. This inconsistency is related to the two fundamental concepts involved in international law-making: sovereignty and property rights.

III. Sovereignty and Common Property

1. Some basic concepts

According to Lauterpacht, the concept of national sovereignty may stand as a legal expression of the nation-state's power, including its supreme authority, jurisdiction, and sovereign rights.

Internally, a nation-state has the power to make decisions according to its own constitution. Even subnational units can retain sovereignty to a certain extent, as in the cases of federations. Externally, it is a nation-state as a whole which is sovereign and equal to all other nation-states, irrespective of its internal structure.

In its broadest sense, national jurisdiction is the power of a nation-state over persons within its territory. In these terms, national jurisdiction may equal to national sovereignty. In a narrower sense, jurisdiction may mean judicial jurisdiction only, i.e., the authority of national courts within territory. In that sense, jurisdiction is a necessary element of sovereignty (Coplin, 1974).

Both sovereignty and jurisdiction extend over a particular territory. The sea is a potential part of a state's territory, just as is land or air. According to international law, state territory includes internal waters and the territorial sea. The state's complete sovereignty ends at the outer limit of the territorial sea. The 1982 Law of the Sea also states that coastal countries have sovereignty rights over the exclusive economic zone, the ares of the oceans next to the territory sea, for designated economic uses. The rest of the seas, the high seas, have been considered as open to all nations, and no territorial claims over that area have been recognized.

Many conflicting claims have occurred in regard to the area of the oceans over which a country has jurisdiction. The territorial sea claims now range from 3 to 300 miles, while existing international law does not recognize more than 12 miles. Another important question giving rise to conflicting claims is: where to start counting the 12 miles, from a line parallel to the coast

or from a straight baseline? All these claims are necessarily directed towards the high seas. The classical freedoms of the high seas do not provide for free annexation of any part of the high seas by coastal states. A one-mile extension of national territory may mean that hundreds or thousands of square miles of the seas change their status from an international to a nation regime.

Since the high seas are beyond jurisdiction of any particular country and these areas are surely the existence of the earth with great exploitable potential, mankind as whole could be said as a sovereign over the high seas. In the words of Carlos Andres Perez, "Today sovereignty is a much more complex concept than in the past. National values and interests must not be given more weight than the mutual duties and obligations to bring well-being to all peoples and thus ensure the political balance of the world." If the traditional sovereignty reflects full independence of states, the new sovereignty should reflect their interdependence, as well as global concerns of mankind as a whole. This do not have to be mutually exclusive, especially not in the areas of the high seas.

2. National and International Sovereignty

To be more specific, national and international sovereignty can be defined in terms of the three basic elements: the subjects, the rights, and the objects. The subject of national sovereignty is the people of one country. At the global level, by analogy, all human beings collectively, or all human beings of all generations - past, present, and future, is the subject, representing the

interests of the whole, and probably be represented by an international organization. The rights of sovereignty is property right and cannot be all listed or enumerated. Most rights making up sovereignty in classical terms are directly or indirectly related to world natural resources. The main right of a nation-state is the right to exclude the citizens of other nations from the use of resources which are in the national territory. The right of international sovereignty, whether it is exercised by treaties by nation-states, or by existing or newly created international organizations, is to regulate and coordinate each individual state's rights. International sovereignty's right should dominate a nation-state's right. The objects of sovereignty are resources, natural resources or national territory as such.

3. Sovereignty as related to property

Sovereignty and property are both legal forms of the same social process which results in distribution of wealth and they are in fact inseparable. According to U.S. supreme court proceedings[2], "Property is the sum of all rights and powers incident to ownership." These rights and powers are absolute and must be exclusive. In the common law, "property" is related to physical objects only, and more especially, to land. In court decisions, the term "property" tended at times to merge with the more indefinite rights of "liberty." Similar principles can also be found in continental law systems. These principles apply to both private and public property. In the case of public property, the owners are more difficult to define, and the rights may be more loosely regulated.

[2] Nashville C. & St. L. R. Co. v. Wallance, 288 U.S. 249.

In regard to sovereignty-property link, Jessup argued that increased sovereignty, in quality and quantity, increases the property rights of states or of their nationals. On the other hand, no property rights can be exercised without sovereignty. The international property, or the common property, can not be created as a new form of property mainly because there is no single subject of sovereignty behind the institutions involved.

It is understandable that states may have a relative lack of interest in defining the common property and proposing international regulations on it. The nation-states tend to maximize those values directly related to national sovereignty and property, perceiving their immediate interests as more important than those of mankind as a whole and its common property. The discrepancy between national interests and international, common interests, as perceived by states are not necessarily mutually exclusive, though the national ones seem to be more easily perceived, and given precedence over international ones by an ever-increasing number of states. In fact, so much has been done for the national good, which seems to be so obvious, and so little for the good of mankind as a whole, which appears to be so abstract. The results of this discrepancy has appeared, which can partly be represented by overfishing, overdumping, and regional warfare caused by conflicts over using the oceans. With technology development, it is perceivable that the exploitation of the oceans will be extended in both intensity and range. Without effective coordinations and regulations of nation-states' activities, the extended use of the oceans presents a main danger to the future of the common property.

IV International Law of the Sea and Its Implications

International law of the sea is the traditional way of regulating nation-states' marine activities. International law can be broadly defined as a body of rules which sovereign nations have agreed to observe in their relationship with each other. Its main purpose is to establish an order based on justice and peaceful relations among states. There is, however, no legislature to lay down these rules. Even organizations such as the United Nations are not designed to adopt rules binding on those states which do not choose to accept them. This the a consequence of the principle that sates, no matter how great or small, are equal and sovereign, and that no state can legally impose its will on others.

There are two ways in which rules of international law can be developed. States may be bound by rules of customary international law. When the practice of states on a particular matter achieves a certain degree of consistency, the international community may come to feel bound to observe this practice, and it is then considered to have crystallized into a rule of customary international law. States may also enter into legal obligations by treaty. These obligations are binding on all the states which become party to the treaty, but not on the states that do not ratify it.

1. Law of the Sea

The law of the sea is one of the oldest components of international law. From the moment we

started using the oceans, a number of practices and principles developed, some of which gradually became accepted as the customary international law. Many of these principles were codified by the four 1958 Geneva Conventions on the Law of the Sea, which form the basis of contemporary ocean law.

1). The 1958 Geneva Conference on the Law of the Sea

The 1958 Geneva Conventions divided the oceans into different zones. Coastal states could exercise various degrees of jurisdiction over the internal waters, the territorial sea, the contiguous zone and continental shelf; the rest was the high seas, which remained a common property where the principles of freedom to common property apply (Figure 1.1).

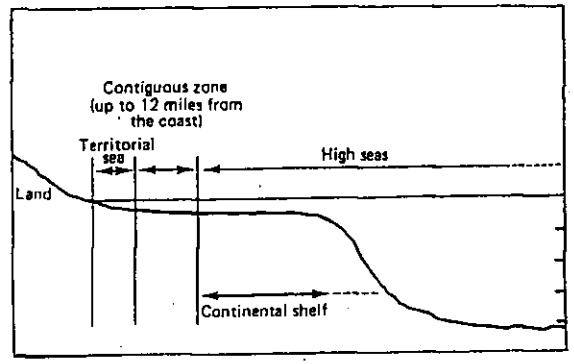

Figure 1 The legal division of the oceans following 1958 Law of the Sea (source: Larson, Major issues of the Law of the Sea)

The conference failed, however, to resolve some of the most difficult and basic controversies, including the establishment of a uniform rule on the breadth of the territorial sea. In addition, the Conventions included a number of ambiguous definitions and procedures, some of which might have been acceptable at the time but required clarification soon thereafter.

2). Preparing for a new ocean order

New economic and political conditions after 1960 gave rise to changes in the concepts of national sovereignty and economic rights, and to increasing demands for a revision of the existing ocean regime. Many of the new states, which became independent during the 1960s, were wary of an international legal order created before their independence which, in their view, served the interests of the industrialized nations. Pressure was increasing to develop ocean resources on a larger scale. The demand for more food coupled with new technologies resulted in an enormous increase in the harvest of fish, and the expanding search for oil at growing distances from shore created problems which demanded attention.

The evolution of the law of the sea received a great stimulus in 1967 when Arvid Pardo, the Permanent Representative of Malta to the United Nations, in a speech before the General Assembly warned against the possible appropriation of vast ocean areas by countries with the technical competence to exploit them. He proposed that the seabed and the ocean floor beyond the limits of national jurisdiction be declared the "common heritage of mankind" and that an international agency be created to assume control over this area as a trustee for all countries.

In 1970, the General Assembly of the United Nations announced Declaration of Principles Governing the Sea-Bed, which began by stating that international area of the seabed and its resources were the "common heritage of mankind," as had been called for by Ambassador Pardo a few years earlier. This declaration spelled out clearly that it was impossible to consider one part of the ocean without referring to the others and became the first internationally agreed set of principles covering the vast area of ocean space.

3). The Third Law of the Sea

The third United Nations Conference on the law of the Sea opened in December 1973 and did not reach a formal treaty until April 1982. The concepts involved in this Conference were developed in response to the advance of technology, to the demand, especially by the developing countries, for greater international equity, and to the new uses of the sea and its resources. It should be of no surprise that the third Law of the Sea Conference took much longer than originally anticipated to arrive at a generally accepted treaty. In comparison with 1958, the situation had changed thoroughly: in 1958 there were 73 draft articles for consideration by 86 participating states, whereas the 1973 conference was working its way through well over 400 draft articles - later dropped to about 300 - and was attended by nearly twice as many countries. As a result of the increase in number and complexity of oceans uses and political and economic importance, participants to the third Conference organized themselves in a much wider range of groups. Furthermore, the General Assembly at the outset adopted an agreement that there would be no voting on any substantive matters until there was consensus on all.

The general outline of the third Law of the Sea related to this paper can be summarized as: a 12-mile territorial sea and contiguous zone, and a new 200-mile exclusive economic zone. The breadth of the territorial sea, which was one of the major unsolved questions at the first and second conferences on the law of the sea, was established at a maximum of 12 nautical miles, measured from the low-line water along the coast. The territorial sea is part of the sovereign territory of the coastal state. The breadth of the contiguous zone can not extend more than 24 miles from the appropriate baseline. It remains a zone where a state may prevent and punish violations of customs, fiscal, immigration, or sanitary regulations within its territory or territorial sea.

The regime of the exclusive economic zone is certainly one of the most important aspects of the third Law of the Sea Conference. Extending 200 miles from the coast, the exclusive economic zone covers about 36 percent of the total ocean surface, subtracting more than one third of what was previously considered high seas. Within this zone, the coastal states will have sweeping powers, including "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living[3] or non-living, of the seabed and the subsoil and the superjacent waters, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds,"

[3] Since the conservation of living resources in the exclusive economic zone is left solely to the coastal state, 85 to 95 percent of the world's current fish catch will fall largely under the control of coastal states. This enclosure may not guarantee optimal utilization, but it may save certain stocks from total depletion. As a result of the demands of the distant-water fishing nations, the coastal sate's control over fisheries in the economic zone is moderated somewhat by an obligation "to promote the objective of optimum utilization of the living resources," which means that coastal states should determine how much fish they can take and allow other states to harvest the surplus.

as well as jurisdiction with regard to the establishment and use of artificial islands, installations, and structures and marine scientific research and the protection of the marine environment.

The portion of the world ocean remaining after the exclusive economic zones have been subtracted is still considered high seas. The traditional freedoms of the high seas - navigation, overflight, fishing, and laying submarine pipelines or cables - are retained and the freedom of scientific research as well as the freedom to construct artificial islands are added.

In the treaty the deep seabed is simply called "the Area." Officially it is defined as the "seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction," the area designated as the common heritage of mankind. The new treaty established an international agency which will manage the mineral resources of about half of the earth's surface for the benefit of all the peoples of the world. The exploitation of deep sea minerals will fall under the jurisdiction of the agency, the International Sea-Bed Authority, which will be empowered to conduct its own mining operations and to authorize state ventures or private companies to obtain mining rights in the Area. Under the adopted parallel system of exploitation, an area of commercially equal value will be reserved for the developing countries for every seabed area allotted to a state.

The treaty also includes a substantial section on the protection and preservation of the marine environment, unlike the 1958 Convention, which hardly mentioned it. However, the Conference indeed appeared more concerned with dividing up the oceans than with taking a global approach,

and the pollution provisions remain very general, serving only as guidelines for what states should do rather than specific criteria. In the 1980s, nevertheless, other international treaties incorporated some specific environmental protection regulations, for example, the 1989 International Convention on Salvage takes environmentally responsible emergency action one step further by extending to salvors incentives for taking efforts that avoid or reduce damage to the marine environment.

Ten years of intensive negotiations at the Law of Sea Convention still did not produce regulations that would meet the requirements of all the participating nations. A decades has passed after the third Law of Sea (LOS) came into existence, and various issues and problems have arisen. First of all, the goals have not been clarified, except in rather general terms, such as common heritage of mankind (CHM), which, is not determined either. For example, freedom of private corporations to exploit the Area, is not consistent with the CHM as a goal, due to the fact that such a freedom does exclude large portions of mankind from the seabed and its resources. If we consider the technological progress and industrial development of the oceans as benefiting mankind as a whole, however, then the freedom of the companies may be understood as serving as a tool for the CHM goal.

The oceans under the current Law of the Sea is illy defined. Mankind as a whole has common sovereignty over the planet Earth. Due to historical circumstances, this sovereignty, which has existed since the time immemorial, has been broken into at least 160 parts on land, remaining undivided in the oceans. In fact, all those parts of the Earth that are not effectively controlled

by nation-states should be reclaimed as common heritage of mankind and used for common goals. Therefore, coastal zones should not be under sovereignty of states.

Secondly, although the International Seabed Authority (ISA) has the power to authorize state ventures and private companies to obtain mining rights in "the Area", the ISA does not have the necessary powers to sanction violators and there is no mention in the law for settling dispute.

Many other criticisms of the LOS have been expressed on economic, political and legal grounds.[4] It is not the paper's purpose to review these criticisms here. The purpose of this paper is to relate the LOS to both concepts of sovereignty and property right and to find out what solutions these relationships may suggest.

2. Implication of the Law of the Sea

Future developments of the law of the sea depend on the national, international goals perceived by the actors involved in the decision-making process. For most nation-states, the interests at stake are primarily economic and political. The main goal in using the oceans for most nation-state can then be defined as economic well-being, a result of economic development or growth based on the resources of the sea. Nation-states' goals also involve power, along with all the values accompanying power. Free navigation and free access to the sea for the landlocked nations, and unimpeded traffic and communication among nations, are related to both economic

[4] Sreenivasa P. Rao, *The Public Order of the Oceans: A Critique of the Contemporary Law of the Sea*.

well-being and power.

Although the economic development and power strength are the goals for all nations, they may take different forms in different countries. In terms of economic development, for the developed countries, it means expansion and new possibilities of growth, while for the developing nations, it means to catch up with the developed, including by means of their aid. In the third Law of Sea Conference, the developing countries had originally supported the 200-mile exclusive economic zone (EEZ) proposal with the understanding that the new zones are to serve their economic development. This is possible, but data show that these zones favored developed countries and their further economic growth. According to Richard Bridgman, among the top 25 countries who together got 76% of the total EEZs worldwide, 12 are developing countries, and their share represent only 28% of the total. The twelve least developed countries[5] do not get anything due to the fact that they are landlocked. These least developed countries, along with other geographically disadvantaged countries, are all giving up their original rights over the high seas without any compensation.

The interests which may be understood as world public concerns are sharing of wealth of the seas, and, to some extent, navigation. World unity, interdependence, active cooperation, etc., as goals, are served by fair and active sharing of resources, and by free and unimpeded traffic and communication. The sharing of resources potentially means the realization of the CHM, and represents a new contribution to the united world of the future. According to Lynn Miller,

[5] Out of the 33 nation-states with per capita income of less $200, in 1974, 12 were landlocked.

if world society is to prevent its own destruction, it must forge itself into a world community. "The task is gargantuan and is the goal of men's best instincts throughout his long journey on earth." International organization, which "can help formulate and implement the common values of the world's people," has two basic categories of goals: conflict management and welfare.

These and similar goals can be defined and expressed in various ways. They are proposed by scholars, philosophers, politicians, etc., but it is up to mankind to decide what its values and goals are.

The Third LOS has failed to address itself to this kind of issues. It has failed to develop the CHM and the institutions genuinely able to manage and improve the CHM, in accordance with such collective goals as world peace and unity, the well-being of mankind, social justice on a global level, etc. For example, by sharing the wealth of the exclusive economic zones of the few countries, the mankind as a whole would have profited. Once again, the interest of mankind should have been considered as more important than individual interests of nation-states.

If mankind as a whole is granted the subject of international sovereignty, it must be followed that mankind as a whole has its own interests and that it should be able to maximize those values which best serve its own goals. To become a real and effective subject, mankind also needs power of its own.

It is clear that the absence of sovereignty and property rights are the main obstacles to the

recovery of the vast oceanic resources by technological means now available. Therefore, the modern law of the sea should establish the common property of mankind as a new institution, possibly in the form of world federalism. The world federalism is not supranational, but it is equal to other sovereignties in existence. It has a functional character: to manage the oceans. It governs the oceanic territory and inter-state actions on that territory. The world federalism would perform the classical functions of a state: legislative, executive, and judicial. It should also have enforcement power, international in character. As part of the start of the new ocean regime, the coastal zones should be redefined. The territorial sea zones to which a nation-state has the right should be limited, for example, 3 nautical miles seaward from the straight baseline, contingent on further research. A state that wishes to keep the current coastal zones must compensate other human beings for their loss of the high seas. Further, part of the high sea areas should be reserved for the future generations.

The details of the operation of the whole new regime have to be specified by the Treaty, and some of the existing human experience could be used for that purpose. Common property as a new institution can be derived from the national legal systems, both traditional and modern, which incorporate a number of general principles of Law as recognized by nation-states.

Apparently, it will be very difficult to design such a new institution and even more difficult to make it operational. However, this is the only way to satisfy the goal of all human beings in the long run. Since the need is clear, the political will exists. Further research and discussion is needed, and this is a direction worth trying.

There will be at least another four or five years before the next United Nation Law of the Sea Conference begins. At the time before this conference, there is a need of intensive research by the concerned scientists, including political and social scientists, economists, international lawyers, oceanographers, geologists, psychologists, philosophers, etc., directed toward design and further development of the new world institution, or alternative models. In addition, international nongovernmental organizations (NGO) have reflected the high standards of knowledge, skill, and awareness brought by highly educated elites outside government to their self-appointed tasks of public education and policy modification. They may play a very important role in helping to expose the inadequacies of nationalism as engines for securing and distributing ocean resources. These NGOs may also be very important in quickly transferring information, stimulating the cross-fertilization of ideas and experience that inspires concept development and creative applications, and mobilizing pressure for change. Further, the nation-states are more and more closely related to each other. Global environmental concerns, multi-national corporations, various international organizations, and regional coalitions of several countries may all help to advance the establishment of a new world institution to govern the oceans that will effectively manage and improve the common heritage of mankind in accordance with the goals of mankind as a whole.

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