One of the basic issues is the right of a coastal State to an exclusive fishery zone or, in broader terms, a zone of exclusive "economic jurisdiction" in the waters adjacent to its territorial sea. In that connection, several questions arise, e. g. (1) what would be the width of such a zone ? (2) should the right be granted absolutely, or only subject to such conditions as proof of economic dependence, substantial investment in fisheries etc ? (3) What would be the precise nature of the rights of the coastal State in the zone ?

Exclusive fishery zone or zones of exclusive jurisdiction

In recent years when the fishing activities of the major fishing powers have been intensified, some developing countries have claimed the right to establish exclusive fishery zones adjacent to their territorial sea to ensure that the fish from those areas is reserved to their own fishermen and that the available stocks of fish are utilised for the benefit of their own populations. Such countries have canvassed the view that coastal States must be recognised as being entitled to claim as exclusive fishery zone (or, in more general terms, a zone of exclusive economic jurisdiction) adjacent to its territorial sea. The width of this zone is not specified and would have to be the subject of intensive negotiation at forthcoming meetings. This approach is not advocated as ideal in every situation, but merely as being appropriate, under certain cirumstances, for application to particular countries on a regional basis.

It has been urged that the establishment and maintenance of an exclusive fishery zone of, say 200 miles, could have a salutory effect on a country's fishing industry and hence on its economy as a whole. Acknowledgement of the right of all developing countries to such a zone would strengthen their position against, and possibly eliminate, the constant threat of exploitation of their traditional fishing area, by powerful foreign fishing fleets. Governments would wish to give careful consideration to these views.

Against this it has been suggested that where a developing country claims an exclusive fishery zone but lacks the capacity to exploit it efficiently, it runs the risk of underutilization of this valuable resource, and that this profits no one. All States, it has been said, have an interest in maximum utilization of the living resources of the sea, and this can be achieved only by permitting fishing in as wide as possible an area of the sea by fishermen of all countries, without discrimination.

The exclusive fishery zone concept may need careful study in the light of several factors. One of these is a country's plans for investment in and expansion of its own fishing industry. As a country's fishing capability grows it may find it irksome to be unable to fish within two hundred miles of another's coast. Again, major fishing nations might not continue to find fishing the lucrative occupation that it was. With attractive alternative opportunities available at home in land-based activities, it has become more and more difficult to obtain crews willing to spend months at sea except by paying substantially higher wages. Such a country, it is suggested, might consider it more profitable to invest in the infant fishing industries of developing countries and purchase the catch from them. If this is a true assessment of the trend, and if the major fishing nations may soon find it worthwhile to adopt such a policy, attractive possibilities might open up for developing countries in fishing—and then a 200-mile limit, which would preclude entry into some of the world's best fishing grounds, may not be uniformly welcome.

Other proposals

A recent proposal regarding preferential fishery rights may be summarised as follows : Fisheries (and other living resources) are to be subject to management (including conservation and equitable allocation of fisheries) by an international or regional organisation. Where the States concerned do not regard an organisation as necessary,

problems are to be resolved under bilateral or multilateral agreements. Such international or regional organisations and agreements, are to be based on specified principles including :

(1) determination of an "allowable catch" for the area, based on scientific evidence ;

(2) allocation of a part of the allowable catch to (a) coastal States economically dependent on fishing in a particular area by means of small boats operating out of coastal State ports, in an amount necessary to "sustain this fishery" ;

(b) States making investments in necessary hatcheries, in an amount "attributable to such investments" ;

(3) freedom for all to fish for the unallocated portion of the allowable catch ;

(4) non-discrimination in the application of conservation measures and catch limitations imposed in order to enable fishing of allocated stock.

This kind of regime may be implemented unilaterally (in the absence of an organisation or agreement) by a coastal State in an adjacent area of high seas, if negotiations with States of the area have failed to result in agreement on measures to be taken, and if the coastal State has submitted its proposals for a regional fisheries organisation to "all affected States" together with supporting material. Disputes between parties to the foregoing arrangement are to be submitted to a special commission constituted on an *ad hoc* basis having compulsory jurisdiction and the power to render binding awards.

Some countries, while not rejecting for the time being the exclusive fishery or economic jurisdiction zone concept, believe that a better approach to problems connected with protecting the interests of coastal States in the living resources of adjacent seas might be on a regional or ocean basis, the

States of the region or ocean being encouraged to enter into one or more agreements among themselves regulating their rights and obligations in relation to fishing, free from outside interference. In relation to this suggestion it has been argued that it ignores the interests of countries outside the region or ocean concerned, in fishing and conservation measures within the region.

Extracts from 1971 Report of the AALCC Sub-Committee on the Law of the Sea

"*The extent of the territorial sea, including rights of coastal States in respect of fisheries and zones of economic jurisdiction beyond the territorial sea.*

In the course of the discussion some Delegations urged that a functional approach be taken to the question of establishing jurisdictional limits. Thus, it was suggested that different limits might be established for different purposes. However, the endeavour should be to arrive at uniform limits for each type of jurisdiction. One Delegation was of the view that a coastal State should not have exclusive fishery jurisdiction beyond its territorial sea.

The Sub-Committee with the exception of a very few Delegations considered that at the present time any State would be entitled under international law, to claim a territorial sea of twelve miles from the appropriate baseline. The majority of Delegations indicated that a State had the right to claim certain exclusive rights to economic exploitation of the resources in the waters adjacent to the territorial sea in a zone the maximum breadth of which should be subject to negotiation. Most Delegations felt able to accept twelve miles as the breadth of the territorial sea, while supporting, in principle, the right of a coastal State to claim exclusive jurisdiction over an adjacent zone for economic purposes.

A few Delegations emphasised that in their view the maximum breadth of the territorial sea could be twelve miles subject to certain conditions, and that it would not be to the

interests of all countries in maximum utilization of the living resources of the sea to establish an exclusive jurisdictional zone for economic purposes beyond the twelve mile territorial sea. One of those delegates further indicated that it would have no objection to conferring on developing countries which are coastal States a special status in relation to exploitation of the living resources of their adjacent seas.

One Delegation urged that problems of fisheries and fish conservation be approached on a regional or ocean basis, the States in the region or ocean being encouraged to enter into agreements among themselves regulating the rights and obligations of each other in relation to fishing, free from outside interference."

IV. INTERNATIONAL STRAITS

Definition of the category of straits dealt with

The Geneva Convention of 1958 on the Territorial Sea and the Contiguous Zone states in Article 16 (4) :

> "There shall be no suspension of the innocent passage of foreign ships through *straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State*" (Emphasis added)

This provision may be regarded as an attempt to define a particular category of narrow sea area, or "international strait" which may need, and is susceptible of, regulation, in the interests of the international community. The definition, if it may be regarded as such, is not accepted by many States.

The problem of defining an "international strait" is one of a number of issues connected with this subject. Is *any* strait that is used for international navigation an "international strait" in that sense ? Are not the number of foreign ships using the strait relevant to determine this ? Some States would reject the idea that a strait used, say for occasional

traffic exclusively by two or three littoral States could be regarded as used for "international navigation" and therefore subject to a special regime safeguarding the rights of the community. For them "international navigation" implies the idea of many ships of many nations. Other States have rejected another aspect of the "definition" in the Convention: "straits used for international navigation between one part of the high seas and the territorial sea of a foreign State".

Prior to the *Corfu Channel* case (Merits) I.C.J. Reports (1949), p. 4, many held the view that a strait was "international", or of significance to the community of nations as a whole, if it was *essential* to passage between two parts of the high seas and was used by considerable numbers of foreign ships. The decision in the *Corfu Channel* case (Merits), I.C.J. Reports (1949), p. 4, did not support the view that the test was related to the "essential to passage" idea. Regarding the North Corfu Channel between Greek and Albanian territory, the Court said :

> "....the decisive criterion is rather its geographical situation as connecting two parts of the high seas and the fact of its being used for international navigation. Nor can it be decisive that this strait is not a necessary route between two parts of the high seas, but only an alternative passage between the Aegean and the Adriatic Seas. It has nevertheless been a useful route for international maritime traffic". (pp. 28-29).

The rights of littoral States

In general, the Geneva Convention appears to give littoral States somewhat less control over passage through an international strait than in the case of innocent passage through the territorial sea. (See Article 16). Thus, while a littoral State may suspend passage through its territorial sea that does not form part of such a strait, if "essential for its security", it may not suspend passage through an adjacent strait. It may, however, take precautions to safeguard its

security and make rules concerning safe navigation, lighting and buoys. The problems involved become further complicated when the entire strait falls within the territorial sea of one or more littoral States-as is likely to occur with regard to a number of straits when the right to extend the breadth of the territorial sea, say to 12 miles, is generally recognised and acted upon. What should be the rights of littoral States in those circumstances ? The views expressed by members of AALCC are set out below and need not be repeated here. In general, States seemed to be unwilling to concede any more than a right of "innocent passage", subject to compliance with the littoral States' rules and regulations, and thus to tend toward the "territorial sea" concept, rather than a special regime for such straits providing for free transit as though on the high seas.

The status of warships in such straits will need to be carefully considered, e. g. would they need prior authorisation before passing through such straits ? Will the authorisation of one littoral State with a navigable channel entirely within its territoral sea be sufficient, or should the concurrence of both or all littoral States be required. Such questions were not discussed in detail by the 1971 Sub-Committee. In elaborating its conclusions the Sub-Committee confined itself to "merchant ships" in times of peace".

New proposal

A new proposal for a regime for international straits is set out together with a summary of the views of the Sub-Committee in the following paragraphs.

Extracts from 1971 Report of the AALCC Sub-Committee on the Law of the Sea

"*International Straits*

It was acknowledged by all Delegations that if it were generally accepted that each State had the right to establish a territorial sea 12 miles wide, several if not all States were

likely to exercise that right without delay. As a result, several straits 24 miles or less in width would fall under the exclusive jurisdiction of the riparian States concerned.

Several Delegations referred to recent suggestions for safeguarding the right of passage through and over straits used for international navigation which might thus fall within the territorial sea of the riparian States. According to those suggestions, in order to safeguard freedom of passage through "straits used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State", the riparian States would be required so to delimit their territorial sea as "always to provide a corridor of high seas suitable for transit by all ships and aircraft."

Several Delegations took the view that where a strait or part thereof consisted of the territorial sea of the riparian States, the latter must retain under all circumstances a special authority to control navigation through or above that strait for economic or security purposes or for purposes connected with preservation of the marine environment. For those reasons they would be unable to accept the "corridor of high seas" concept. They were also unable to accept the definition of the term "international strait" implied in those suggestions. They were likewise unable to accept a more recent suggestion whereby "all ships and aircraft in transit shall enjoy the same freedom of navigation and overflight, for the purpose of transit through and over such straits, as they have on the high seas".

While all Delegations were in agreement that a strait used for international navigation should in times of peace remain free for the innocent passage of merchant ships of all countries, subject to rules and regulations of the riparian States, many Delegations rejected both the "corridor of high seas" and "free transit" concepts. A few Delegations expressed themselves in favour of the "free transit" concept.

V. ARCHIPELAGOS

In a purely geographical sense an "archipelago" is a formation of two or more islands (islets or rocks) which geographically may be considered as a whole. As a legal and political concept, other unifying factors may need to enter into a definition, such as ethnic origins of a people, language, economic viability, and security considerations. Archipelagos have been classified as (1) coastal archipelagos and (2) outlying or mid-ocean archipelagos. *Coastal archipelagos* are those situated close to a mainland and may reasonably be considered part and parcel thereof, forming an outer coastline from which it is natural to measure the territorial sea. *Outlying archipelagos* are groups of islands situated out in the ocean at such a distance from the coast of a mainland as to be considered as an independent whole. In this latter category may be included such important archipelagos as the Philippines and Indonesia.

The 1958 Geneva Conventions on the Law of the Sea do not contain explicit provisions on the legal aspects of archipelagos that are political entities. Some provisions that are relevant are Article 4 of the Convention on the Territorial Sea which permits application of a straight baseline method for measuring the territorial sea "if there is a fringe of islands along the coast in its immediate vicinity" ; Article 10 of that Convention which implies that islands may have their own territorial sea ; and Article 1(b) of the Convention on the Continental Shelf which expressly attributes to islands an area of the adjacent sea-bed and sub-soil.

The issues that arise in respect of archipelagos would appear to result from efforts to reconcile (a) the interests of an archipelagic political entity in the preservation of its unity and integrity, usually assured by regulating in some measure the use of its interstitial waters and sea-bed areas, and (b) the interests of the rest of the international community in using those waters or exploiting those submarine areas free

from unnecessary interference. Consequently, controversy has tended to centre around such questions as : from what baseline should an archipelagic State measure its territorial sea ? If it is accepted that the coastlines of the outermost islands may be used, should that method be permitted when the outermost Islands are more than a specified distance apart, e.g. twice any internationally agreed maximum limit for the breadth of the territorial sea ? What are the rights of the archipelagic State in respect of navigation by foreign ships between islands separated by a distance greater than twice any internationally agreed maximum limit for the breadth of the territorial sea ? What are the rights of the archipelagic State in respect of exploitation of an island's sea-bed area lying beyond any specified depth or distance applied for the purpose of delimiting national jurisdiction ? If any general rules governing measurement of the territorial sea, navigation, sea-bed exploitation etc. are not to be applied in relation to archipelagos that are political entities, on what bases should this exception be made ? Should the applicable rules vary depending on whether (a) a coastal archipelago or (b) an outlying archipelago is being considered ? What rules should apply in respect of over-flight of archipelagos ? Governments may wish to consider the implications of these questions in relation to the "archipelago concept" urged in the course of the discussions of the AALCC Sub-Committee on the Law of the Sea at the Twelfth Session. (See also on the whole question of archipelagos : Jens Evensen, "Certain legal aspects concerning the delimitation of the territorial waters of archipelagos" UN Conference on the Law of the Sea, Summary Records, Vol. I (Preparatory Documents), p. 289).

Extracts from 1971 Report of the AALCC Sub-Committee on the Law of the Sea

"*The archipelago concept*

The Delegations of Indonesia and the Philippines requested the Committee to consider the problems of

archipelagic countries. They urged that archipelagic countries like Indonesia and the Philippines, which consist of thousands of islands, had a special interest in, and relation to, the waters between and around those islands for historical, geographical, ethnological, political and economical reasons, as well as for reasons of national defence and security. In their view, an archipelagic country of this kind was entitled to measure the breadth of its territorial sea from baselines connecting the outermost points of the outermost islands of the archipelago. The right of innocent passage from one part of the high seas to another through the waters of an archipelagic country would be guaranteed by that country subject to any rules and regulations it might enact in that regard.

Several Delegations expressed their appreciation to the Delegations of Indonesia and the Philippines for their elaboration of the archipelago concept. They agreed that sympathetic consideration should be given to the archipelago concept as outlined by the members from Indonesia and the Philippines.

Some Delegations expressed support for the concept.

One Delegation indicated that it was not in a position to accept the archipelago concept.

VI. HISTORIC WATERS

Issues relating to "historic waters"

The conditions under which a State may validly claim rights in an area of the sea on the ground that such rights have been exercised by it over a long period with the acquiescence of the international community, i.e. that a State has "historic title" to those rights have not yet been fully agreed at a general international conference. The Conventions of 1958 contain references to historic situations generally with a view to exempting them from a rule of the particular Convention that would otherwise apply. Thus, for example, Article 7(6) of the Convention on the Territorial Sea states

inter alia that the provisions of that Article are not to apply to "so-called 'historic' bays". Article 12 of the same Convention exempts from application of the "median line" principle cases

> "where it is necessary by reason of historic title or other special, circumstances to delimit the territorial seas of the two States in a way which is at variance with this provision."

(It may be noted that a similar provision in Article 6 of the Continental Shelf Convention, while providing for an exception on the ground of "special circumstances" makes no specific reference to historic title).

From the foregoing it will be seen that historic title to sea areas has been considered to be of importance in relation to "historic" bays and claims to a special breadth of the territorial sea. It is also of importance in relation to a special regime for the international waters and sea-bed areas of an archipelagic country. A study of the principles applicable to determine historic title has been suggested. On the subject of historic bays, see a very detailed Memorandum by the UN Secretariat, UN Conference on the Law of the Sea, Official Records Vol. I (Preparatory Documents), pp 1-38. The scope of the Memorandum is not limited to historic bays, and has a bearing on straits, the waters within archipelagos and other marine areas.

Governments may wish to give careful consideration to the various circumstances which, existing singly or in combination, are roots of historic title. Among such elements may be considered :

(1) propinquity of the sea area and the traditional and consistent exercise of sovereignty over it. (What acts constitute the exercise of sovereignty ?)

(2) acquiescence of other States in the claim. (Must acquiescence be universal ? Must it be express, or can it be inferred from absence of opposition ?

When a State has publicly proclaimed its right to sea area e.g. through legislation, may the claim be recognised as against those who have abstained from lodging objections ? Should mere formal protest be considered enough to undermine an otherwise strong record of usage.)

(3) existence of the claim over an appreciable period of time. (Must the period be a "long" one ? Must it spread over decades, centuries ? Would it be possible to formulate a rule which stipulated a period of time that would be "reasonable" when all the surrounding circumstances are taken into account ?)

(4) Consistency in, or continuity of the claim and exercise of sovereignty.

(5) Dependence on the sea area for economic, security or other purposes considered by the claimant to be of a vital nature.

Governments may also wish to consider the general proposition that the onus of proving that maritime areas close to its coast possess the character of internal waters that they would not normally possess, lies on the claimant State.

At the Committee's plenary meeting on 27 January 1971 one delegate indicated his concern at the Sub-Committee's having failed to discuss the matter of historic waters for lack of time. He recalled that the 1958 Conference on the Law of the Sea had adopted a resolution requesting the General Assembly to make appropriate arrangements for the study of the juridical regime of historic waters including historic bays, and to send the results of those studies to all its member States. (UN Conference on the Law of the Sea. Summary Records, Vol. II, p. 145). This matter had been referred subsequently to the International Law Commission.

VII. PREVENTION AND CONTROL OF POLLUTION OF THE MARINE ENVIRONMENT

Prevention and control of pollution of the marine environment has until now been approached on a piecemeal basis. Thus Article 24 of the Geneva Convention on the High Seas requires Contracting States to draw up regulations to prevent pollution of the seas by oil; Article 25 of that Convention requires Contracting States to take measures to prevent pollution of the seas from the dumping of radioactive waste, or resulting from any activities with radioactive or other harmful agents; Article 5 (7) of the Continental Shelf Convention requires a coastal State to undertake, in safety zones surrounding installations established by it on its continental shelf, all appropriate measures for the protection of the living resources of the sea from harmful agents; and several articles of the Fishing Convention deal generally with the measures necessary for the conservation of the living resources of the high seas.

From the London Conference on Pollution of the Sea Oil (1954) emerged an International Convention on Pollution of the Sea by Oil. The Conference adopted a Final Act embodying eight resolutions, one of which invites the United Nations to "undertake the collection, analysis and dissemination of information about oil pollution in various countries, and in particular technical information about port facilities for the reception of oily residues and the results of research into the problem of oil pollution generally and to keep the whole problem under review. In 1969 a Convention relating to Intervention on the High Seas in cases of Oil Pollution Casualties and a Convention on Civil Liability for Oil Pollution Damage were formulated under the auspices of the Inter-Governmental Maritime Consultative Organization.

With acceptance of the need for a comprehensive legal framework for the prevention of pollution of the environ-

ment as a whole (including the marine environment) it has been decided to convene a Conference on the Human Environment in 1972. Governments may wish to consider carefully the results of that Conference in their preparation for initiatives regarding pollution of the marine environment at the Conference on the Law of the Sea scheduled for 1973.

One of the problems involved in the prevention and control of pollution is that of defining pollution. The 1969 Group of Experts on the Scientific Aspects of Marine Pollution jointly sponsored by IMCO/FAO/UNESCO/WMO has defined marine pollution as :

> "Introduction by man, directly or indirectly, of substances or energy into the marine environment (including estuaries) resulting in such deleterious effects as harm to living resources, hazard to human health, hindrance to marine activities including fishing, impairment of quality for use of sea water and reduction of amenities".

While this definition might have served the purpose for which it was intended, it does not offer guidance as to at what point the "harm", the "hazard", the "hindrance" or the "impairment" in fact occurs. What is the threshold level of pollution ? Among the principal sources of pollution caused by man are (1) disposal of domestic sewage and industrial waste, mainly from coastal outlets within national jurisdiction; (2) the escape or dumping of harmful materials such as toxic or radioactive substances that have served their purpose or are no longer usable; (3) the introduction of waste material from ships or the accidental escape of harmful cargoes such as oil and (4) escape or introduction of harmful substances in the course of exploitation of the sea-bed. Consideration may have to be given to establishing not one, but several threshold levels of pollution with respect to these sources, levels which would vary with, among other factors, the form and quality of the material introduced, its rate of introduction, the nature of the

protective packaging used, if any, and the characteristics of the area of the marine environment into which it is introduced. It is even possible that there might be even more than one threshold level for each pollutant.

Three other issues may be noted in this connection : (1) the principles applicable to determine liability in the case of pollution damage ; should an offender's State be responsible directly for pollution damage ? should such responsibility be "absolute" or "strict" or dependent on some notion of fault ? (2) the right of a coastal State in the region of an activity causing or likely to cause pollution damage, to be consulted, and in certain circumstances to take preventive measures (see on this point paragraphs 12 and 13 (b) of the Declaration of 17 December 1970 and Article I of the Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (1969) ; (3) measures to centralise and control marine pollution surveillance or monitoring through impartial international machinery.

It has been suggested that, while problems of marine pollution are serious and would seem to require urgent attention, the questions of regulation and control of pollution and of liability, could have somewhat more significance for developed than for developing countries. Developing countries engaged in striving with the limited resources at their command toward greater industrialization may be reluctant to assume obligations of control and liability with respect to pollution if it involves further demands on infant industries. On the other hand, the developed countries which have for several years added steadily, and with what in retrospect may appear to be less than adequate forethought, to the level of pollution in human environment as a whole, may be expected to bear a greater share of the responsibility.

Note : The question of preservation of the marine environment was not discussed at the Twelfth Session of AALCC for lack of time.

VIII. SCIENTIFIC RESEARCH

The promotion of scientific research in the marine environment, and the means of effective publication and dissemination of the effective results of such research so as to benefit mankind as a whole, and the developing countries in particular, is regarded as a topic of the first importance. Many believe that as more data in the marine environment becomes known—the extent and location of mineral resources of the sea-bed, exploration and recovery techniques, information on living marine resources etc—it should receive the widest possible circulation.

Some have emphasized the need for new means of co-operation in measures to strengthen the research capacities of developing countries, including participation of their nationals in research programmes of the developed countries or of international organizations active in this field. The exchange and training of personnel in all branches of marine science and technology including fishing and fish conservation should, it is felt, be promoted and encouraged at the international level. To what extent would it help to institutionalise this process ? It has been suggested that the new International Authority contemplated for the area of the sea-bed beyond national jurisdiction might play a useful role in this connection. Clearly States would wish to take as much advantage as possible of the facilities and services offered by the Inter-governmental Oceanographic Commission of UNESCO, of FAO and its Committee on Fisheries, the other specialised agencies of the United Nations, and such regional institutions as the ECAFE Committee for Co-ordination of Joint Prospecting for Mineral Resources in Asian Off-shore Areas (CCOP). Would it be feasible or desirable to attempt to centralise functions of collection, publication and dissemination of information on the marine environment, and of exchange and training of personnel, in some new institution created for the purpose ?

Could the principles relating to international co-operation and scientific research with regard to the international sea-bed area set out in paragraph 10 of the Declaration of 17 December 1970 serve as a basis for formulating principles applicable to such activity in the marine environment as a whole ? Should such principles be embodied in a separate treaty ? Governments may wish to consider the extent to which protection ought to be afforded to new discoveries in marine science, the development of new technological processes and other knowledge in the nature of industrial secrets.

On the broader question of transfer of technology in general, it may be useful to recall the Policy Measures set out in Part C. 7 (Science and Technology) paragraphs 60-64 of the International Development Strategy for the Second United Nations Development Decade, embodied in General Assembly resolution 2626 (XXV) of 24 October 1970.

Note : Questions relating to scientific research were not discussed at the Twelfth Session of AALCC.

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