

CONTENTS:

LOS-3 P. 1

LOUISIANA CZM P. 4

EDITORS: JOSEPH T. BOCKRATH & FRANK S. CRAIG III
SEA GRANT LEGAL PROGRAM • LSU LAW CENTER • [504]388-5931**LOUISIANA
COASTAL
LAW**

IMPACT OF THE FAILURE OF THE SEA CONFERENCE ON LOUISIANA

by H. Gary Knight*

How could the voting decision of the representative of Botswana (a landlocked state in southern Africa) on an obscure procedural point in a United Nations Conference have a direct impact on the political and economic life of Louisiana? The outcome of the Third United Nations Conference on the Law of the Sea (LOS-3) will -- whether successful or unsuccessful -- determine significant changes in the law of the sea which will have impacts on states, such as Louisiana, that have large investments in offshore resources and the use of the sea in general.

By way of background, LOS-3 officially got underway in 1973 amid high hopes of producing within a year or two an international agreement on over 100 issues relating to the use of the ocean. These issues were first brought up at the United Nations in 1967 and a special committee studied the problem from 1968-1973, thereby laying the groundwork for the most complex international negotiation in history.

Unfortunately the hopes of the negotiators were soon dimmed as it became apparent that the complexity of the issues, the number of states involved, and the differing political/economic objectives of the developed and the underdeveloped countries would simply not permit a quick solution to the outstanding problems. Thus, LOS-3 has dragged on for years while the delegates consider such issues as fisheries management, continental shelf jurisdiction, navigation and transportation on the high seas, oceanographic research,

*Campanile Professor of Marine Resources Law, LSU Law Center

protection of the marine environment, military use of the sea, and so on. The next session of the conference is scheduled to begin in Geneva in March, 1978, following sessions in Caracas (1974), Geneva (1975), and New York (twice in 1976 and once in 1977).

The major obstacle presently facing negotiators concerns the exploitation of deep seabed mineral resources beyond the continental shelf of any nation. The principal object of this debate concerns manganese nodules -- potato-shaped objects containing high concentrations of manganese, cobalt, nickel, and copper. The technology exists to raise these nodules from water depths of two to three miles and to extract minerals from them. Many industrialists have argued that the United States should make a major effort to commercialize the nodule mining industry as a way of alleviating its dependence on imports of strategically critical minerals such as manganese and cobalt from unreliable foreign sources.

The legal right to extract the nodules from the depths of the ocean is at issue. Most developed countries argue that these resources have the same legal status as the fish in the waters of the high seas -- they are property of no one but can be acquired by anyone who takes possession of them. This is the premise upon which American entrepreneurs would like to operate. However, the underdeveloped countries argue that a United Nations resolution passed in 1969 characterizes the manganese nodules as the "common heritage of mankind" and that their consent is therefore required before exploitation can take place. The effort in LOS-3 has been to develop some sort of international seabed mining agency which could issue licenses under this "common heritage" concept.

It now appears that the conference will founder over the manganese nodules question and therefore will not reach written accord on the many other issues before it. If this is the case, the question then becomes: If LOS-3 fails to produce an agreement, how will the law develop and what impact would it have on the United States (and Louisiana) maritime interests?

FISHERIES

In 1976 the United States adopted the Fishery Conservation and Management Act (FCMA) which, among other things, extended American jurisdiction with respect to the management and conservation of fisheries to a distance of 200 miles from the coast (see LCL No. 23). Although the United States had long opposed extensions of fishing zones to 200 miles, the need for conservation and management of fishery resources off our own coast finally dictated that this approach be taken. However, Congress acted over the objection of the Administration and the Act narrowly escaped a veto by President Ford in April, 1976. Adoption of the FCMA was a direct result of the failure of LOS-3 to produce a fisheries agreement.

In LOS-3, a substantial consensus has developed around the concept of a 200-mile exclusive economic zone (EEZ). In an EEZ a coastal state would be granted exclusive rights to all living and non-living resources. The United States was sympathetic to such an approach but feared that this control might extend to such issues as navigation within the 200-mile zones resulting in an unacceptable intrusion upon freedom of the high seas -- a particularly onerous burden to the United States Navy. Thus, the United States did not wish to see an international agreement approving the EEZ concept unless that treaty contained strong assurances that the surface waters would retain their characteristics as high seas.

However, if the conference fails completely, the EEZ concept will probably be implemented by the unilateral claims of coastal states regardless of United States protests. For example, both Mexico and Cuba have promulgated 200-mile EEZ's in which they claim broad authority over all

activities of an economic nature within the zone, although they do not attempt to regulate navigation. These two claims, together with the United States' FCMA, necessitated the negotiation of maritime boundary agreements. These agreements have now been concluded and have established a boundary line running from the Texas-Mexico border across the Gulf of Mexico and to the Straits of Florida separating the fishery and EEZ jurisdiction of the United States from that of Cuba and Mexico. These boundary agreements were reached through negotiation, but rest largely on the principle of equidistance (a median line). These agreements also result from the failure of LOS-3 to agree upon a uniform system for delimitation of offshore boundaries.

NAVIGATION

One of the United States' objectives in LOS-3 is to ensure that the establishment of EEZ's by coastal nations, or the assertion of more limited exclusive fisheries zones, does not affect free navigation within these 200-mile zones. It is clear that the breadth of the territorial sea can be extended from three to twelve miles under existing international legal standards. However, beyond the territorial sea most major maritime nations want to ensure that coastal states cannot interfere in any way with the free flow of commerce on the seas. Many underdeveloped countries do not share this view and have urged that the authority of coastal states within 200 miles of their coast should, in certain circumstances, extend to navigation. This poses the specter of ships having to maneuver outside the 200-mile limit of such states or having to subject themselves to possible harassment or detention for violation of the coastal state's navigation regulations.

A consequence of the failure of LOS-3 to reach agreement on this issue will be the assertion by many individual nations of whatever authority they wish to claim within 200 miles of their coasts. If that authority extends to navigation, a serious problem could be presented for maritime nations and for regions and industries dependent upon a free flow of ocean borne commerce. For example, the only route a ship could take to go from American ports on the Gulf of Mexico (such as New Orleans

and Baton Rouge) into the Atlantic Ocean without passing through the economic zones of Mexico, Cuba or the Bahamas, is one hugging the Florida coast to a point somewhat north of South Carolina. Obviously, if Mexican, Cuban and Bahamian 200-mile economic zones were so structured and regulated as to make high seas navigation too costly or dangerous to undertake, the routes available to ships utilizing the Gulf ports would be severely limited. Fortunately, to date neither Cuba nor Mexico has expressed any intent to claim rights in their economic zones beyond those necessary for the exploitation of natural resources. However, without an agreement, the potential always remains for claims which could result in serious limitations upon freedom of navigation.

CONTINENTAL SHELF OIL AND GAS

Insofar as the Gulf of Mexico is concerned, an LOS-3 failure on the major outstanding continental shelf issue -- namely, the seaward extent of a nation's right to extract oil and gas -- appears to have little potential impact. The most likely agreement would be that coastal states have oil and gas exploitation rights out to the seaward extent of the physical continental shelf structure. Because Cuba and Mexico are so closely adjacent to the United States in the Gulf region, these jurisdictions overlap and must be resolved by the negotiations of maritime boundaries, as noted above. Thus, in the Gulf of Mexico, the United States will have as extensive a continental shelf jurisdiction without an LOS-3 agreement as well as with one. Accordingly, the failure of the conference should not have an adverse impact on the further development of oil and gas deposits off coast to quite considerable distances out into the Gulf.

OCEANOGRAPHIC RESEARCH

Recent years have witnessed a large increase in oceanographic research activities. To the extent that these activities might require the gathering of scientific data within the 200-mile zones of foreign nations, the failure of LOS-3 to produce an agreement could result in serious restraints on oceanographic research. This situation is somewhat similar to that of navigation in that most underdeveloped

coastal nations assert the right to require advance consent and to impose conditions on oceanographic research expeditions wishing to operate within 200 miles of their coasts. Sometimes these conditions are so burdensome as effectively to prohibit the planned activity altogether. For example, Woods Hole Oceanographic Institution has on occasion been required to cancel marine research projects concerning the sea floor because of inability to procure the required permits from all of the coastal states along a particular coast. Thus, the failure of LOS-3 to agree on an open access system for such scientific research may result in unilateral claims which present serious obstacles to the conduct of scientific research in the ocean.

These are but a few of the consequences of the outcome of LOS-3. As one can tell, the outcome of the conference -- whether successful or unsuccessful -- could have significant impacts on Louisiana ocean interests. It is therefore not surprising that representatives of this state -- notably Senator Johnston and Representative Breaux -- have taken a very active interest in the law of the sea negotiations and in activities in Congress relating to the development of ocean resources. Senator Johnston has served as a Congressional delegate to the U.S. delegation at LOS-3. Representative Breaux, who has also served in the U.S. delegation, is chairman of the Oceanography Subcommittee of the House Merchant Marine and Fisheries Committee, and has been quite active in legislation affecting United States ocean interests.

Although eleven years have passed since the issues presently being debated by LOS-3 were first raised at the United Nations, no new international agreement has been achieved. To a large extent this failure results from the conflicting needs and desires of the participating nations, particularly with respect to developed and underdeveloped countries. The conference's failure prompted the United States to declare a 200-mile fishery management zone and to negotiate maritime boundary agreements with Cuba and Mexico. If an international accord is not reached, more unilateral assertions of increasingly greater authority can be expected.

4 LOUISIANA CZM

After Louisiana's coastal zone management plan (Act 705 of the 1977 legislature) failed to secure approval by the U.S. Department of Commerce, Governor Edwards pledged his full cooperation for obtaining an acceptable plan this year. One of his first actions was to replace the State Planning Office with the Department of Transportation and Development (DOTD) as the state agency responsible for coordinating the various aspects of a proposed management plan. Some conflict has thereby arisen between DOTD and the Louisiana Coastal Commission. The latter body's CZM authority derives from Act 705, but due to the Act's failure to obtain federal approval, it performs only advisory functions at this time. The respective responsibilities of the Commission and DOTD have not been clarified and some friction between the agencies has been an inevitable result.

The picture is further complicated by inconsistent provisions in two Acts passed in 1977. Act 705 created the Coastal Commission and placed it in the Office of the Governor, thereby making it somewhat more autonomous than most state agencies. However, the legislature also passed Act 83, the Executive Reorganization Act of

1977, which places the Commission in the Department of Natural Resources (DNR). Although some might argue that the more specific legislation, Act 705, should control in this situation, this position is undercut by the statement in Act 83 that it controls in case of any conflict with other laws. It has also been suggested that Act 83 refers to an older body of the same name, but a close reading of the Reorganization Act makes it clear that the present Commission was transferred to DNR. At present, this statutory conflict is more apparent than real because DNR has not asserted any control over the Commission. Moreover, future legislation on this subject can easily avoid such a conflict by a "housekeeping" amendment to Act 83.

A further wrinkle is added by DNR's preparation of an environmental reorganization plan for state government. Presently environmental responsibilities, even after reorganization of the executive branch, are divided among several departments, chiefly DNR, the Department of Wildlife and Fisheries and the Department of Health and Human Resources. Although the reorganization plan has not yet been presented, it is almost certain to provoke controversy and will be the subject of extensive treatment in a future LCL.

LCL is an advisory service of the LSU Sea Grant Program (NOAA, U.S. Dept. of Comm.). Materials may be reproduced if credit is given. Distributed freely upon written request. Editors: Joseph T. Bockrath and Frank S. Craig, III; Managing Editor: Linton Carney; Staff Assistant: Marianne Didier.



SEA GRANT LEGAL PROGRAM
56 LAW CENTER, L. S. U.
BATON ROUGE, LA. 70803

Non Profit Org.
U. S. Postage
PAID
Permit No. 733
Baton Rouge, La.