For Judges Only

ASSOCIATION OF STUDENT INTERNATIONAL LAW SOCIETIES

PHILIP C. JESSUP INTERNATIONAL LAW MOOT COURT COMPETITION

1969 Competition Problem

And

Memorandum for Judges

[The memorandum on issues, which follows the statement of the problem, has been prepared for the use of judges in the regional, semifinal, and final competitions. The memorandum is intended to assist judges who may not be familiar with the law of the sea. The memorandum has not been circulated to the competing teams and they are not bound by it. The teams may identify other issues and formulate and organize their arguments in different ways.]

Philip C. Jessup International Law Moot Court Competition

1968-1969 Competition Problem

Oceania and Pacifica, two states with long coastlines on opposite sides of the Pacific Ocean, have both ratified the 1958 Geneva Conventions on the Law of the Sea.* Late in 1968, following the discovery of a sea-shallow in the high seas (approximately 25 metres under the surface, and one mile in circumference, at a distance of 45 miles from the coast of Oceania), Pacifica proceeds to construct an artificial island on top of the sea-shallow. After completion, the flag of Pacifica is hoisted and a small garrison left on the island, over which Pacifica proclaims sovereignty. The seabed surrounding the shallow gradually descends to a maximum depth of 180 metres between the sea-shallow and Oceania.

Following the proclamation of sovereignty over the island, the government of Pacifica, (a) constructs a dock adjacent to the island, (b) licenses a broadcasting company, registered in the Bahamas, in which the government of Pacifica holds 51% of the shares, and (c) issues a license for the exploration and exploitation of oil and other minerals to a British company, which has begun drilling operations at a distance of 15

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* Convention on the Territorial Sea and the Contiguous Zone, Convention on the High Seas, Convention on Fishing and Conservation of the Living Resources of the High Seas, Convention on the Continental Shelf, and Optional Protocol on Settlement of Disputes, done at Geneva, April 29, 1958, 52 A.J.I.L. 830 (1958).

miles from the island and a depth of 150 metres. The broadcasting company, in its daily political broadcasts, frequently attacks the government of Oceania.

In the spring of 1969, Oceania sends a naval task force which occupies the island, seizes the garrison (which is sent back to Pacifica), and destroys the dock, the drilling equipment, and the broadcasting installations.

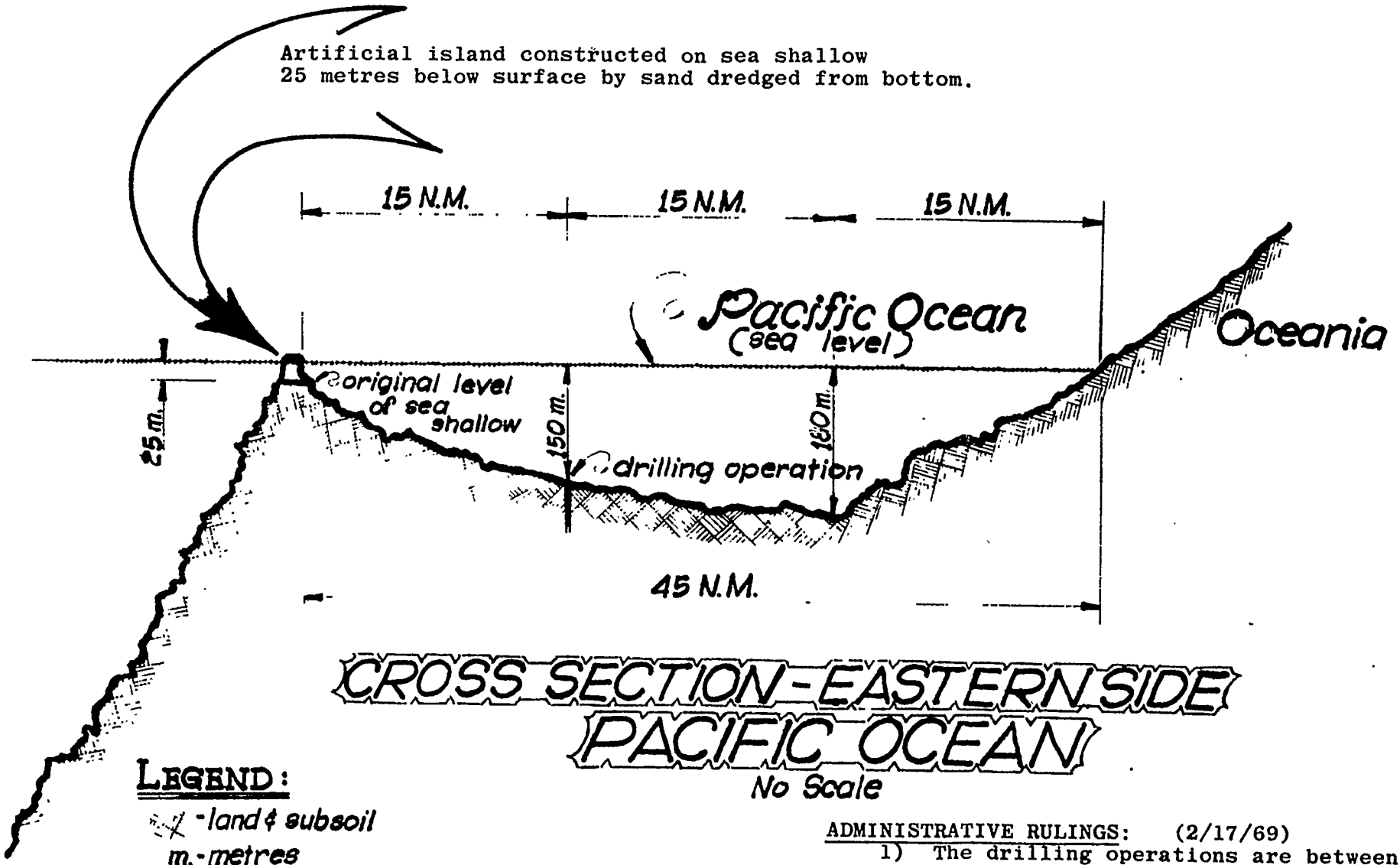
Pacifica, in a strong protest to Oceania, claims that the whole Oceanian operation is an illegal invasion of her sovereign rights. Pacifica asks for restoration of all the destroyed facilities (or, alternatively, full and prompt reparation) and compensation for the seizure and deportation of the garrison. Pacifica also demands recognition by Oceania of Pacifica's sovereignty over the island. Oceania contends that Pacifica's occupation of the island and subsequent actions are an illegal violation of the freedom of the seas, and that the broadcasting and drilling operations are piratical, entitling Oceania to act on behalf of the family of nations in vindication of international law.

After unsuccessful attempts to settle the matter by negotiation, the parties agree to submit the dispute to the International Court of Justice. Pacifica appears as applicant, Oceania as respondent. The parties have stipulated the above facts and waived preliminary objections.

Administrative Rulings:

(a) Oceania and Pacifica are members of the United Nations.

(b) See attached chart.



CROSS SECTION - EASTERN SIDE PACIFIC OCEAN

No Scale

LEGEND:

- land & subsoil
- m. - metres
- N.M. - Nautical Miles

ADMINISTRATIVE RULINGS: (2/17/69)

1) The drilling operations are between Oceania and the "artificial island."
2) The "artificial island" was constructed by dredging sand from the bottom.

NOTE: In response to several inquiries, the above rulings were made by the Assistant Director of THE AMERICAN SOCIETY OF INTERNATIONAL LAW who has been in close communication with the problem's author.

MEMORANDUM ON ISSUES

Prepared Solely for the Use of Judges*

I. IS THE CONSTRUCTION BY PACIFICA ON THE CONTINENTAL SHELF OF OCEANIA?

The 1958 Convention on the Continental Shelf states in Article 1:

> "For the purpose of these articles, the term "continental shelf" is used as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands."

Respondent (Oceania) can claim that the sea-shallow is part of its continental shelf. At no point between Oceania's coast and the shallow is the ocean deeper than 200 metres.

On the other hand, Applicant (Pacifica) might argue that the sea-shallow is not "adjacent" to the coast of Oceania and that the adjacency criterion applies to areas less than 200 metres in depth as well as those beyond. It could argue that the sea-shallow is not a natural prolongation of Oceania's land territory but rather an independent geological feature with a continental shelf of its own.[1] The decision of the

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*Prepared by William E. Butler, Harvard Law School.

[1]The use of the word "adjacent" does not appear to be discussed in any detail in the travaux préparatoires of the Convention on the Continental Shelf. The text of the article in the 1951 and 1953 drafts of the International Law Commission used the word "contiguous" rather than "adjacent." (International Law Commission, Yearbook, 1951, Vol. II, p. 141; Yearbook, 1953, Vol. II, p. 212.) The United Kingdom proposed

(Cont.)

International Court of Justice in the North Sea Continental Shelf Cases might be discussed in relation to the concept of the "continental shelf."[2] Inferences from geology, geomorphology, and topography can be brought into the discussion.

Oceania can draw support from the U.N. Secretariat memorandum on "Scientific Considerations Relating to the Continental Shelf":

> "[T]he existence should be noted of shallow seas between islands and/or continents. These areas incontestably form parts of the continental shelf. In some cases the islands form the raised margin of the continental shelf."[3]

While the parties can raise the issues, there is insufficient specification in the problem for them to argue in detail about the implications of geological characteristics. The problem does not, for example, describe the configuration and characteristics of the submarine areas along Oceania's coast on each side of the area in question.

II. IS THE SEA-SHALLOW (OR THE AREA ABOVE IT) PART OF THE HIGH SEAS; AND IF SO, DOES PACIFICA HAVE THE RIGHT TO OCCUPY AND APPROPRIATE IT?

Article 2 of the 1958 Convention on the High Seas provides: "The high seas being open to all nations, no state may validly purport to subject any part of them to its sovereignty." There was much discussion in the Conference on the Law of the Sea of the meaning of the word "sovereignty" and the various actions

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[1](Cont.) inserting "immediately" before "contiguous." Yearbook, 1956, Vol. II, p. 87.) At its 358th meeting in 1956, the I.L.C. decided to leave the text as it stood and refer to the U.K.'s point in the commentary. This was not done; the I.L.C. 1956 Report substituted the word "adjacent" for "contiguous" but no explanation of the change (apparently made by the drafting committee) appears in the Yearbook. (Yearbook, 1965, Vol. I, p. 141, and Vol. II, pp.264 and 296.

[2]Decision of February 20, 1969. The Registrar's summary of the decision has been circulated to the competing teams.

[3]U.N. Doc. A/Conf.13/2 and Add. 1; U.N. Conference on the Law of the Sea, 1958, Vol. I, pp. 39,40.

that states have the right to take on the high seas. The actions of Pacifica would appear to be a clear case of an attempt to subject the area to its sovereignty.

If Pacifica can establish that the territory it occupies is an island, its entire position would be strengthened. An island could have its own territorial sea and its own continental shelf. The parties can be expected to raise issues relating to acquisition of title to territory (especially islands) under customary international law. The Island of Palmas Case[4] might be cited in terms of modes of acquisition of title. Reference might also be made to Oppenheim who states that if islands arise by natural processes on the high seas, they belong to no state and may be acquired through occupation on the part of any state.[5] On the other hand, Oppenheim writes: "Since the open sea is free, no part of it can be the object of occupation, nor can rocks or banks in the open sea, although lighthouses may be built on them. Likewise, ... the bed of the sea cannot be an object of occupation."[6]

Oceania should assure that the argument of the parties centers on the application of Article 10 of the 1958 Convention on the Territorial Sea and Contiguous Zone. The draft of this article as it was reported by the International Law Commission defined an island: "An island is an area of land, surrounded by water, which in normal circumstances is permanently above high-water mark."

The United States proposed the following substitute definition which was accepted by the Conference, and is in Article 10 of the final Convention: "An island is a naturally-formed area of land, surrounded by water, which is above water at high tide." (Emphasis added.)[7] The United States in

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[4]Island of Palmas Case (United Kingdom and Netherlands), Permanent Court of Arbitration, 1928; Scott, Hague Court Reports, 2d Series, 83 (1932); 2 U.N. Rep. Intl. Arb. Awards 829.

[5]L. Oppenheim, International Law, edited by H. Lauterpacht, Vol. I, 8th ed. 1955, Sec. 234, p. 565.

[6]Id., Sec. 221, p. 556

[7]The U.S. proposal appears in U.N. Doc. A/Conf. 13 C.1/L.112; U.N. Conference on the Law of the Sea, 1958, Vol. III, p. 242.

commenting on its proposal said: "The International Law Commission's definition of 'island' includes artificially placed land. This permits an undesirable means of extension of the territorial sea and consequent encroachment on the freedom of the high seas."[8]

McDougal and Burke in Public Order of the Oceans state: "It is clear from this /Article 10/ that an artificially constructed area, however composed, cannot be considered as an island and that neither size nor capacity for use have any relevance to the conception of an island."[9] While this appears to be a proper interpretation, it is based on the plain meaning of the article and on U.S. statements. The summary records of the Conference disclose no discussion by other representatives of the U.S. proposed definition which was adopted by a vote of 37 to 6 with 14 abstentions.

Islands are further discussed under Issue IV.

III. MAY A STATE CONSTRUCT INSTALLATIONS FOR THE PURPOSE OF CREATING AN "ARTIFICIAL ISLAND" ON AN AREA OF THE SEA-BED COMPRISING PART OF THE CONTINENTAL SHELF OF ANOTHER STATE?

The 1958 Convention on the Continental Shelf does not expressly deal with the rights of a noncoastal state to construct installations on the shelf of another state. Construing the language of the Convention narrowly, applicant (Pacifica) may contend that the coastal state is granted only exclusive "sovereign rights" to explore the shelf and exploit its natural resources, that the definition of natural resources comprehends only "mineral and other nonliving resources of the seabed and subsoil" and certain specified living organisms, and that the Convention places no restriction upon the activities of noncoastal states on the shelfs of coastal states other than in general to observe the principle of freedom of the seas. The legislative history of the term "sovereign rights" at the Geneva Conference on the Law of the Sea suggests coastal states would be obliged to find grounds other than those of the Convention to prevent the use of their shelf by foreign submarines and to prohibit installations not designed for exploitation of resources.

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[8] Id., at p. 242.

[9] M. McDougal and W. Burke, Public Order of the Oceans, 1962, at p. 397.

Respondent (Oceania) may contest Pacifica's actions on at least three theories. First, it may be argued that any shelf construction is inconceivable without preliminary exploration and surveying, etc., which would be in derogation of the coastal state's exclusive "sovereign right" to explore the shelf.[10] (Who "discovered" the sea-shallow is not specified in the problem). However, it is doubtful the unlawful exploration would give rise to a right to destroy the installation unless it otherwise violated the rights of the coastal state.

Under a second approach, Oceania may claim exclusive competence to prescribe and apply regulations for all construction on its shelf. Such a claim would go well beyond the provisions of the Continental Shelf Convention, which allows the coastal state to construct, maintain, or operate installations and other devices on its shelf necessary for its exploration and the exploitation of its natural resources.[11] Oceania may contend: (1) that construction by Pacifica preempts exploration and exploitation of the shelf in violation of the coastal state's exclusive right to do so; or (2) that the sea-shallow is itself a natural resource of the seabed or subsoil of the continental shelf. By either line of analysis, respondent attempts to find rights implicit in the Convention to justify exclusive jurisdiction to safeguard rights expressly granted by the Convention. Treating the sea-shallow ipso facto as a natural resource of the shelf would seem to be an excessively liberal reading of the Convention, although a United States Court has included certain reefs in this category.[12] Respondent may be expected to compare the sea-shallow to a reef and cite "homesteading" and other potential commercial and recreational uses of the shelf by the coastal state.

A third theory is that applicant's construction unlawfully impinged upon the freedom of access to and use of the high seas

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[10]Article 2, Convention on the Continental Shelf.

[11]Id. at Article 5(2).

[12]United States v. Ray, 37 U.S.L.W. 2394 (U.S.D.C. S.Fla. Dec. 31, 1968). (American nationals and a foreign corporation prohibited from erecting structures on top of a string of coral reefs off the Florida coast beyond United States territorial waters, sustaining the Government's contention that the reefs were part of the seabed and a natural resource as defined by the Outer Continental Shelf Act).

areas enjoyed by respondent and other states. Since the problem contains no data supporting the fact of such interference, Oceania may rely on the policy arguably implicit in the Convention on the Continental Shelf that the coastal state, which itself is limited in the places where it may erect installations in the interests of freedom of the seas, must be deemed to have authority to regulate the installations of noncoastal states on the same shelf. If a legal vacuum exists in the Convention with respect to shelf activities of noncoastal states, it may be argued that it should be filled by coastal state regulation in the interest of uniformity of regime. Considerable weight may be given to the contention that a noncoastal state should enjoy no greater rights to erect installations on a coastal state's shelf than the coastal state enjoys.

IV. DO THE INSTALLATIONS ON THE SHELF SUPPORT APPLICANT'S CLAIMS OF A "SOVEREIGN CHARACTER"?

The Convention on the Continental Shelf authorizes the coastal state to emplace installations and devices on its shelf so long as certain limitations are observed. The Convention further provides in Article 5(4) that such installations and devices, though under the jurisdiction of the coastal state, do not possess the status of islands. They have no territorial sea of their own and their presence does not affect delimitation of the territorial sea of the coastal state. Article 1, however, stipulates that the term "continental shelf" may refer to the seabed and subsoil of submarine areas adjacent to the coasts of islands. Thus, an island may possess a continental shelf, but artificial installations and devices established by the coastal state to explore and exploit the natural resources of the shelf are not deemed to be islands.

The 1958 Convention on the Territorial Sea and Contiguous Zone, as noted above under Issue II, defined an island as a "naturally-formed area of land, surrounded by water, which is above water at high tide".[13] Areas of land submerged at high tide but surrounded by and above water at low tide, denominated "low-tide elevations", were distinguished from islands, but under certain circumstances may be used as the baseline

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[13]The United States Supreme Court has held that an island is a "naturally-formed area of land surrounded by water, which is above the level of mean high water". United States v. California, 382 U.S. 448 (1966).

for measuring the breadth of the territorial sea (Article 10). Although the Convention allows breakwaters to be taken into account in determining the territorial sea if they form an integral part of the harbor system, artificial constructions upon land that otherwise would not be taken into consideration for the purpose of measuring the territorial sea do not alter the legal situation.[14] The British Government has taken the view, in building a lighthouse upon a rock, that although they own the lighthouse, it is not an island for the purpose of having a belt of territorial waters.[15]

The Convention on the Continental Shelf does not define "island"; however, the four Geneva conventions on the law of the sea were originally drafted as a single document and were approved at the same diplomatic conference.

Assuming for international legal purposes that the "island" is an island, where does its continental shelf end, and how is the outward boundary of the shelf to be determined? Is the British firm which has commenced drilling operations at a distance of 15 miles from the island and at a depth of 150 metres actually exploiting the shelf of the island?

Article 6(1) of the Convention on the Continental Shelf provides that where the same continental shelf is adjacent to the territories of two or more states whose coasts are opposite each other, and in the absence of an agreement between them and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each state is measured. The territorial sea claimed by applicant and respondent is not specified in the problem. If they each claim an identical breadth of less than 22 1/2 miles, the median apportionment rule would safeguard drilling operations 15 miles from the island. If Pacifica claimed a territorial sea appreciably larger than Oceania, say 18 as opposed to 3 miles, the median rule would place the drilling operations outside the island's shelf. It may be questioned, however, whether the median rule should apply to delimitation of a continental shelf "carved out" from another.

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[14] D. Johnson, Artificial Islands, 4 Int'l L.Q. 203 (1951).
[15] T. Fulton, The Sovereignty of the Sea (1911), p. 642.

Applicant may base its claim to sovereignty on the theory of prescriptive title. Normally, prescription must satisfy: (1) an actual assertion of sovereignty; (2) exercise of sovereignty for a long period; (3) acquiescence in the claim by the other party.[16] Even assuming these criteria are met by applicant, the consequences of granting prescriptive title for artificial islands should be weighted against the principle of freedom of the seas. The majority of cases seem to require a much greater period for exercising sovereignty and determining acquiescence than the several months involved in the present case.[17] Absence of protest must be weighted against the knowledge of adversely affected states. A claim to sovereignty may not be clandestine. Jurisdiction must be exercised long enough to enable any Power having a claim to sovereignty to have, according to local conditions, a reasonable possibility for ascertaining the existence of a state of things contrary to its real or alleged rights.[18] A state which must have known what was happening and with an interest in the situation, but which did not protest, may be unable to excuse its failure to do so.[19]

Although applicant proclaimed sovereignty, hoisted its flag, and garrisoned the island, there is no indication of protest by respondent or previous knowledge of the construction by respondent. Licensing a British firm to explore and exploit the island's shelf clearly is an exercise of sovereign rights. Under United States practice, particularly of the Department of the Interior which issues all outer continental shelf leases, the exploration lease merely designates an area for which under certain conditions an exploitation lease may be granted in the future. This does not amount to an assertion of sovereign rights, although the exploitation lease would.

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[16]Diplomatic protest was sufficient to challenge a claim in the Chamizal Arbitration. See 5 A.J.I.L. 782 (1911).

[17]Fifty years adverse holding was adopted as the criterion in the British Guiana-Venezuela Boundary Dispute. 89 B.F.S.P. 57 (1896). This was then regarded as a comparatively brief period. See also Maryland v. West Virginia, 217 U.S. 1, 44 (1910); Arkansas v. Tennessee, 246 U.S. 158 (1918).

[18]Island of Palmas Case (United Kingdom and Netherlands), Permanent Court of Arbitration, 1928; Scott, Hague Court Reports, 2d Series, 83 (1932); 2 U.N. Rep. Intl. Arb. Awards 829.

[19]Anglo-Norwegian Fisheries Case, I.C.J. Reports, 1951, p. 116.

V. DO THE INSTALLATIONS POSSESS A "NATIONAL CHARACTER" SUFFICIENT FOR APPLICANT TO LICENSE A BROADCASTING COMPANY TO OPERATE THEREON?

Each state is considered to have the right to issue and enforce regulations regarding radio broadcasting within its own jurisdiction. This right also appertains to the flag state or state of registration of ships, aircraft, spacecraft, platforms in the ocean, etc. Limited international machinery in the form of an International Telecommunication Union has been established to coordinate and promote certain technical and administrative remedies against harmful interference, the search for new frequencies, and the use of existing frequencies more efficiently.

The problem does not specify that applicant or respondent are parties to the I.T.U.[20] It may be noted, though, that the Regulations appended to the I.T.U. Convention, while prohibiting the establishment and use of broadcasting stations on board ships, aircraft, and any other floating or airborne objects outside national boundaries, do not refer to stations resting on the seabed (Regulation 422). Parties to the I.T.U. have contracted to establish and operate all radio stations in such a manner as not to cause harmful interference to the radio services and communications of other members or associate members, recognized private operating agencies, or other duly authorized operating agencies which carry on radio service (Article 48).

There are at least two jurisdictional approaches to a structure erected on the seabed in international waters by a noncoastal state. First, the structure may be regarded as an artificial island; but this analogy has been rejected even by coastal states in considering how to deal with private unlicensed broadcasting operations.[21] An affirmative finding under Issue IV above would be dispositive here.

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[20] 18 U.S.T. 575; T.I.A.S. 6267

[21] H. van Panhuys & M. van Emde Boas, Legal Aspects of Pirate Broadcasting, 60 A.J.I.L. 303, 322 (1966). There have been a number of cases where European countries have prohibited broadcasting by individuals and companies from the high seas off their shores. See Lucky Star case, 2 International Legal Materials 343 (1963). See also the European Agreement for the Prevention of Broadcasts Transmitted from Stations Outside National (Cont.)

A second approach would be to base coastal state jurisdiction upon attachment to the seabed. This alternative requires a finding under Issue III above that either the sovereign rights granted to the coastal state by the Convention on the Continental Shelf embrace radio broadcasting installations, or that such installations unlawfully interfere with coastal state exploration and exploitation of the shelf, or that such installations unlawfully interfere with navigation, fishing, conservation, and scientific research. This approach was used by the Netherlands to justify asserting jurisdiction over a pirate station operating from a stationary non-floating structure off its coast. But in that situation, a legal vacuum allegedly existed because the station was unlicensed by any government; in this case, a government license has been issued.

It may also be argued that those community interests (submarine cables, navigation, fishing, conservation, and scientific research) stipulated in Article 4 and 5(1) of the Convention on the Continental Shelf as having a prior claim over coastal state exploitation of its shelf are an exhaustive listing of the rights contained in the concept of freedom of the seas. The history of the doctrine and Article 2 of the Convention on the High Seas tend to refute this view. Oceania's claim that the political content of the broadcasts provides a basis for its action entails a balancing of the interest in disposing of a nuisance with the interest in freedom of communication. The problem does not indicate that respondent has suffered economic impact from the broadcasting operations, which was a major concern in the pirate broadcasting cases. Respondent should be asked to distinguish, in principle or otherwise, applicant's station on the seabed from stations licensed by applicant on its own territory.

VI. DOES APPLICANT HAVE JUS STANDI TO MAKE A CLAIM ON BEHALF OF A BAHAMIAN BROADCASTING COMPANY IN WHICH APPLICANT OWNS 51% OF THE SHARES?

The question of standing has most recently been discussed in the I.C.J. judgment disposing of the preliminary objections in the Barcelona Traction Case (Belgium v. Spain). Belgium alleged injury to interests of Belgian nationals in a Canadian registered company resulting from treatment of that company in

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[21](Cont.) Territories, 4 International Legal Materials 115 (1965). Arguments from these sources may lack relevance because of Pacifica's position as a government.

Spain, thereby engaging the international responsibility of the Spanish Government. In contrast to the present situation, Belgium was not itself a shareholder.

The majority of the Court held that where a government is not merely purporting to exercise diplomatic protection, but to make a claim before an international tribunal, it invokes rights allegedly conferred on it with respect to its nationals by the rules of international law concerning treatment of foreigners. Hence the question in the Court's view was whether international law does or does not confer such rights. This, they believed, was a substantive question, and the preliminary objection was joined to the merits.[22] Since applicant's interest is direct in this case, it may be presumed that the Court majority would find the question of standing less difficult.

Applicant will find greater support in the dissenting opinion of Judge Wellington Koo, who concluded the evidence placed before the Court had not established the existence of any rule denying recognition of the existence of the interests of shareholders of shares in a foreign company or prohibiting their protection by their national state or states through recourse to international adjudication or resort to diplomatic intervention.[23]

VII. IS OCEANIA'S RESPONSE REASONABLE?

How far can a state go to vindicate its own rights or to defend the freedom of the seas? The International Court of Justice in the Corfu Channel Case[24] held that Albania (the coastal state) was responsible for damage to United Kingdom warships and personnel when mines in Albanian waters exploded at the time British ships were exercising a right of innocent passage through the North Corfu Strait. On the other hand, the Court held that the United Kingdom did not possess a right

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[22] Barcelona Traction Co. Case (Belgium v. Spain), I.C.J. Reports, 1964, pp. 44-45.

[23] Id. at 64. Some authorities place greater reliance upon control than ownership, which "is capable of easier and more precise application than that of ownership, the standards for which are even more difficult to arrive at." L. Sohn and R. Baxter, Convention on the International Responsibility of States for Injuries to Aliens (1961), p. 196.

[24] I.C.J. Reports, 1949, p. 4.

to unilaterally carry out a mine-sweeping operation in Albanian waters.

Under the United Nations Charter, member states are under obligation to settle their disputes by peaceful means. Pacifica's actions do not appear to represent an armed attack giving rise to a right of military self-defense under Article 51 of the Charter. Pacifica should seek to characterize Oceania's actions as exceeding Charter limits and as giving rise to international responsibility whether or not Pacifica's own actions were lawful.

Oceania, if it argues it possesses sovereign rights over the sea-shallow as part of its continental shelf (and is not merely concerned with freedom of the seas), might claim that there is no "dispute", that its rights are clear, and it is simply exercising its police authority. Whether Oceania's actions in that event exceed permissible treatment of foreign nationals is a further issue.

March 1969